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How to Write a Web Accessibility Statement & Why You Should Be Proactive

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WEBSITE ACCESSIBILITY - MINIMIZING THE RISK OF LITIGATION -

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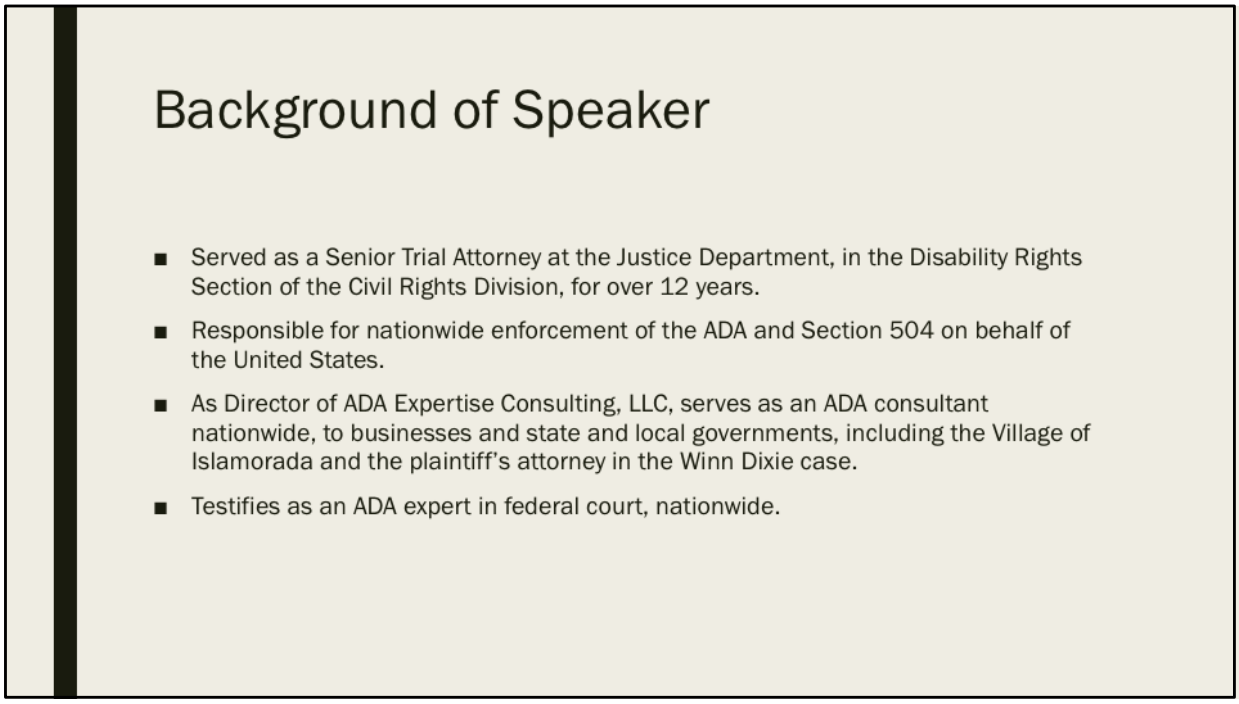

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Legal theories behind ADA website litigation - continued

- 1) Approach one: Internet activities covered if activities fall within one of 12 categories of public accommodation – 1st and 7th Cir. – Broadest Interpretation. See NAD vs. Neftlix, H869 F.Supp.2nd 196 (D. Mass. 2012) – (Lack of closed captioning Blind vs. Scribd, inc., 97F.Supp.3D 565 (D. VT. 2015) – (Online digital library).
- 2) Approach two: Requires a connection or nexus between the challenged Internet-based activity and an actual, physical place of public accommodation.
- This approach is taken by the Third, Sixth, Ninth, and Eleventh[th] Circuits.
  - *Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000)*
  - *Parker v. Metro Life Ins. Co., 121 F.3d. 1006 (6th Cir. 1997)*
  - *Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998)*

This was followed in 2002 in the 11th Circuit by Rendon v. Valleycrest Productions, Ltd., 294 F.3d 1279 (11th Cir. 2002). In the Rendon case, an individual with a hearing disability challenged the telephone screening process used by the TV show "Who wants to be a millionaire" because he tended to screen out people with disabilities. The court held that the game show itself was a place of public accommodation and that the telephone hotline was closely tied to admission to that place of public accommodation. Thus a nexus was established, and the plaintiff could proceed.

Legal theories behind ADA website litigation – continued – More on Nexus Cases

- In a recent, and significant, nexus theory ADA website case, that went to trial, – – involving the grocery chain Winn-Dixie - (a case in which I served as the ADA consultant for the plaintiff), the Court was persuaded that Winn Dixie's website had a sufficient nexus to the stores to hold Winn Dixie liable for failing to make its website accessible,, and ordered the chain to come into compliance with WCAG 2.0.

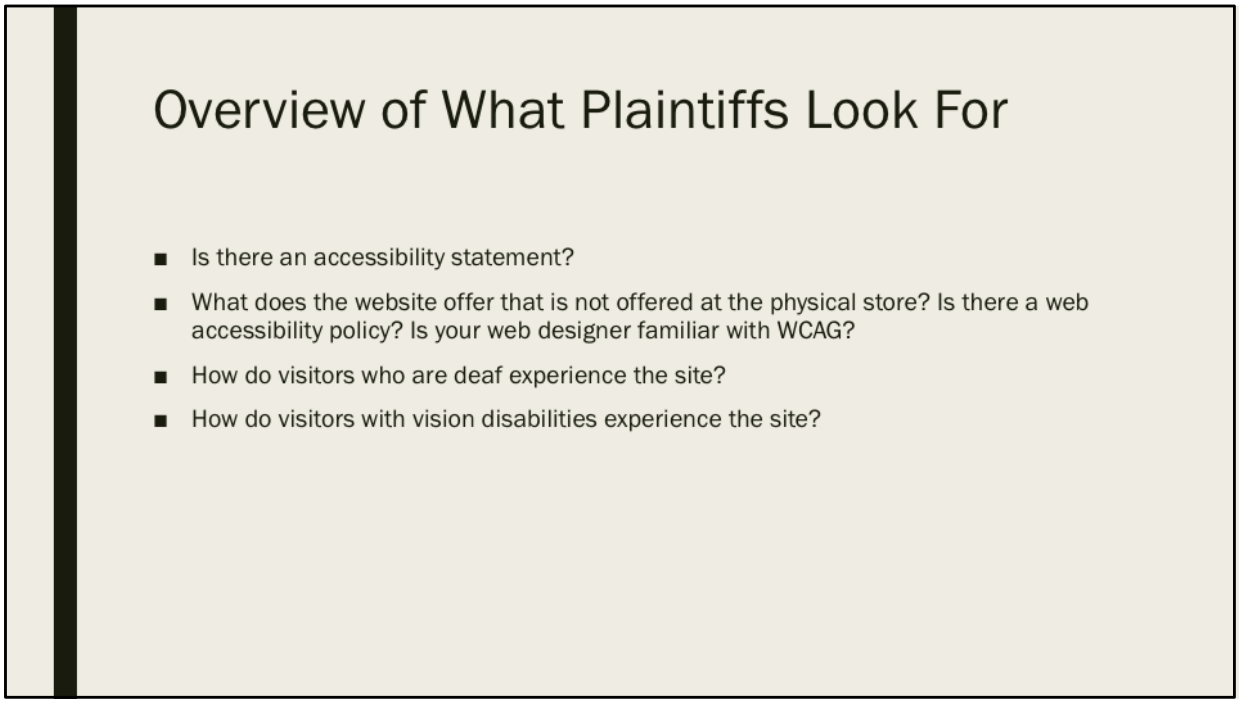
The plaintiff showed that the website had services available that put the customer at a disadvantage when the information was inaccessible. This included such valuable information as a store locator feature, and notice of sales and coupons. In light of the importance of the case, Ken Nakata and I brought the case to the attention of our former colleagues at the Justice Department, and they then participated in the case as Amicus Curiae. See Gil v. Winn Dixie, 257 F.Supp. 3d 1340 (S.D. Fla 2017).

Legal theories behind ADA website litigation – continued – "Of" vs. "At"

- Approach Number 3: (Second Circuit): This approach focuses on specific language in title III – the use of the word "of" rather the use of the word "at".
- The Second Circuit notes that title III applies to the goods and services **of** a place of public accommodation and not **at** a place of public accommodation.
- See Pallozi v. Allstate Ins. Co., 198 F.3d 28 (2d Cir. 1999)
- Also see (applied to internet cases): Andrews v. Blick Art Materials, 268 F.Supp 3d 381 (E.D.N.Y. 2017 and Markett v. Five Guys Enterprises, LLC, 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. Jul. 21, 2017).

This is really a variation of approach number one. In both instances, the role of place is minimized.

It should be noted that the Andrews case does an excellent job of providing a very careful analysis of the development of caselaw in different circuits.

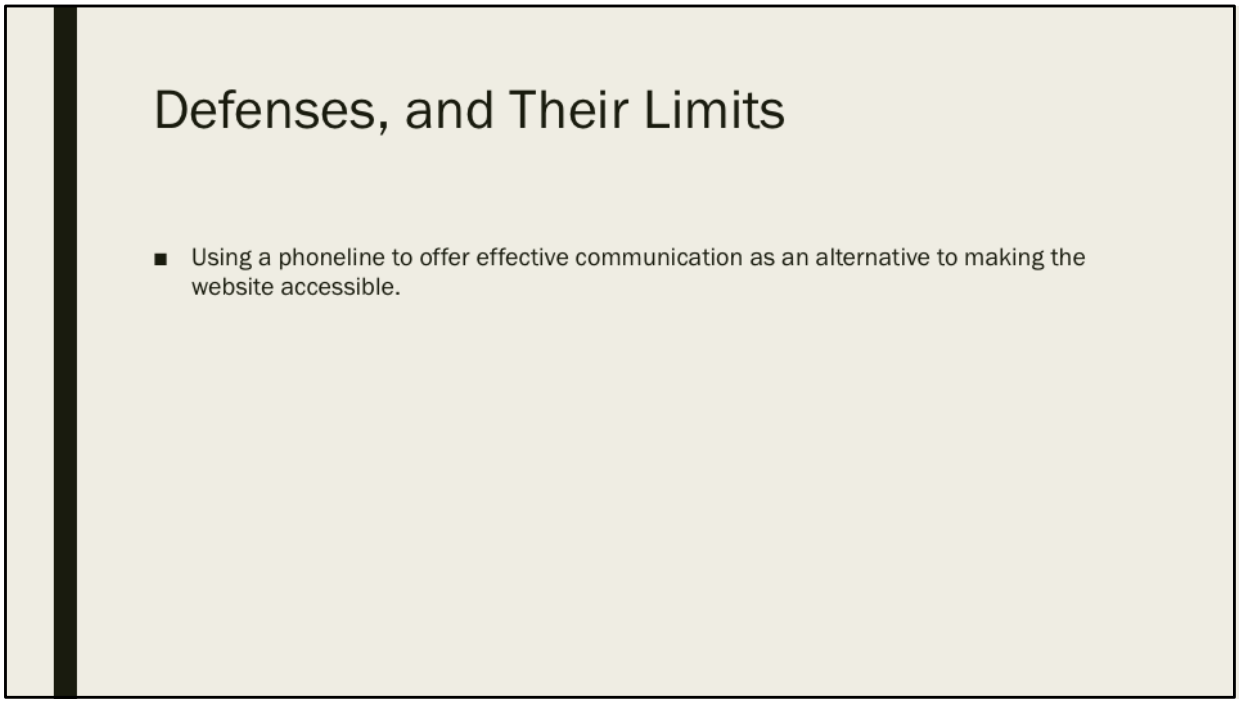


If so, what does it say? Are there ongoing efforts to improve the site? Are new items accessible?

E.g., coupons, time sensitive sales (such as ticket sales or the availability of accessible rooms, information about the accessible features of a hotel. the ability to develop a shopping list that can be conveyed to the store, to speed up access to the goods sold? The ability to submit questions and comments?

- Are there photos or videos on the site that are not captioned, or are captioned inaccurately?

- Does the coding on the website prevent access through screen readers to charts, photos,, graphs, tables, or the ability to skip pages? Is there a lack of alt tabs on photos? Has the site been tested for accessibility?



While this approach is consistent with the assertion that an effort is being made to ensure effective communication, and further asserts that a well staffed telephone line could mitigate liability that provides the same services as those available through the website, such an approach has considerable risks. At the motion to dismiss stage it is unlikely to succeed because it relies on such a fact-based determination. In Robles v. Dominos Pizza, LLC, 2017U.S. Dist. LEXiS 53133 (C.D. Cal. Mar. 20, 2017 (https://tinyurl.com/y8dhldet), the approach succeeded, but in Access Now v. Blue Apron, 2017 U.S. Dist. LEXiS 185112 (D.N.H. Nov. 8, 2017) and Gorecki v. Dave and Busters Inc., 2017 U.S. Dist. LEXIS 187208 (C.D. Cal. Oct. 10, 2017) this approach was rejected.

It should be noted however, that about a month ago, a California Superior Court expressly rejected the "telephone access" argument, finding that providing phone access as an alternative to and access the website "imposes a burden on the visually impaired to wait for a response via email or call during business hours rather than have access via defendant's website as other cited customers. Thus the email and telephone options do not provide effective communication "in a timely manner" or do they protect the independence of the visually impaired." Thurston v. Midvale Corp. (Cal. Super. Ct. May 21, 2018) (http://tinyurl.com/ycmcpczar).

On May 21, 2018, a California state court in Los Angeles held a summary judgment that the whisper lounge restaurant violated California's Unruh Act by having a website that could not be used by blind person with a screen reader. The court ordered the restaurant to make its website comply the Web content accessibility guidelines (WCAG) Level 2.0 AA. The court also ordered the restaurant to pay $4000 in statutory damages.

The court specifically rejected the restaurant's argument that the website was not a place of public accommodation under the ADA. The court found that the restaurant's website "falls within the category of "services"… privileges, advantages, or accommodations of the restaurant, which is a place of public accommodation under the ADA." The court also rejected the defendant's assertion that he provided access to the information by having a telephone number and email.

The court found that the provision of a phone number and email does not provide" equal enjoyment of the website", as the ADA requires, But instead imposes a burden on the visually impaired to wait for a response via email or call during business hours rather than have immediate access like sighted customers the court did not say whether a toll-free number that is staffed 24 hours a day would have yielded a different outcome.

The court also rejected the defendant's argument that the website filing to process and that the court should wait until the Department of Justice issued regulations addressing website accessibility.

Defenses, and their limits (continued)

- Due Process Claim As a Result of the Lack of Specific Regulations Concerning Websites
- When a plaintiff alleges that a website fails to comply with WCAG 2.0 A/AA, defense counsel often argue that in the absence of specific regulations mandating compliance with WCAG, there is no legal basis for liability.

At least one court in the Ninth Circuit has accepted that position granting the defendant's motion to dismiss without prejudice, and calling upon Congress and the Department of Justice to develop more specific regulations for website liability. The case is currently on appeal to the Ninth Circuit. The case is unusual in that it specifically alleges a violation of WCAG - likely and unsustainable position as WCAG has never been specifically required under the ADA's regulations. It should be noted however, that this may turn out to be a viable political argument rather than a viable legal argument. There is now a bipartisan effort in Congress to urge the Justice Department to assert that web accessibility lawsuits should be prohibited is a violation of due process without greater clarification in the statute and regulations. See https://tinyurl.com/y7rlhqxh.

Defenses, and their limits (continued)

- Standing To Sue:
- There have recently large number of accessibility lawsuits filed against banks. The National Association of Federally Insured Credit Unions (NAFCU)has been vigorously defending these cases, asserting that the plaintiff lacks standing.
- In the Caroll case, decided on June 11, 2018, the plaintiff could not demonstrate an injury in fact because they lived at least 200 miles from the nearest branch and did not allege that they were even entitled to the services of the bank or had any intentions of becoming a member. Almost the exact same reasoning was used recently in the Mitchell case decided on June 25, 2018.

Good examples of this defense are Caroll v..Roanoke Valley Community Credit Union, 2018 U.S Dist. LEXIS 98284 (W.D. Va. June 11, 2018 and Mitchell v. Dover – Phila Federal Credit Union, 2018 U.S. Dist. LEXIS 105798 (N.D. Ohio June 25, 2018).

Defenses, and their limits (continued)

- Mootness
- Commonly, a defendant will assert that their efforts to revise their website in an effort to make it accessible will moot the claim against them.
- This position has generally been rejected courts have found that in light of the constant updating of websites there is no guarantee that the site will in fact provide effective communication.

See Haynes v. Hooters of America LLC, 2018 U.S. App. LEXIS 16464 (11th Cir. June 19, 2018) and Markett v. Five Guys Enterprises, LLC., 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. July 21, 2017).

In these cases, sometime after the lawsuit began, the defendant agreed to make substantial changes to their website often agreeing to fully conform to what WCAG 2.0 AA. Before the changes were made however they were seated by a second plaintiff defendants then asserted that because they were in the process of improving their website, second case should be considered moot. In the Marquette case this argument was rejected, with the court finding that it was "not yet absolutely clear that the allegedly want behavior could not reasonably be expected to recur." In the Haynes versus Hooters of America case, the 11th circuit reversed the motion to dismiss granted by a lower court. In this case the restaurant was sued by two plaintiffs and settled with one of. The settlement agreement required compliance with WCAG 2.0 A/AA and the monitoring of compliance. This was the same remedy that the second plaintiff requested in their complaint. However the 11 circuit allowed the second plaintiff to proceed, reasoning that only the first plaintiff could enforce the settlement agreement and the defendant could not show that was already in compliance. This reveals an important message to businesses – – website accessibility

improvements is an ongoing obligation. Even getting sued and settling the case does not resolve any subsequent website accessibility concerns. Until all the necessary changes are in place, the risk oflitigation is a reality. This is really no different from the brick-and-mortar business that fails to engage in ongoing compliance with the ADA standards – – one lawsuit does not result in immunity from future lawsuits for other violations.

Defenses, and their limits (continued)

- The Defense of Lack of Personal Jurisdiction
- Even where the plaintiff does not have significant contacts with a given business, if it deliberately targets marketing efforts to a specific customer base in a specific geographic market, such as marketing to local universities across the country, this may be sufficient to establish personal jurisdiction over the defendant.

In Access Now v. Sportswear, Inc., 298 F.Supp.3d 296 (D.Mass.Mar.22, 2018), A Seattle-based company made collegiate branded clothing and operated a website. The court specifically blocked to allegations that the defendant made product specific to universities local to the plaintiff (in Seattle) and determined that this was enough to establish personal jurisdiction.

Title II Websites (State and local governments)

- Title II of the ADA is framed around the concept of program access. This means that when viewed in its entirety, the program, service, or activity of the state or local government (including websites) must be usable by and accessible to persons with disabilities.
- Title II further provides that "no qualified individual with a disability shall by reason of such disability, be excluded from participation in be denied the benefits of services, programs, or activities of the public and, will be subjected to discrimination by any such act." 42 U.S.C. 12132
- When a state or local governments website is inaccessible, visitors with vision or hearing disabilities are thereby denied the benefits of that website, and therefore subject to discrimination.

See Martin v. Metro Atlanta Rapid Transit Authority, 225 F. Supp. 2d 1362 (N.D. Ga. 2002). In this case, Because they were unable to get information about the transit schedule in a format that was accessible to them. The defendant argued that they provided this information to their website, in braille format upon request, and through their telephone operators. The plaintiff showed that the website could not be accessed with a screen reader, and that they rail schedules that were set were always out of date. He also showed that they contained incorrect information, that the telephone operators rarely answered the phone, or were unable to provide useful information when they did respond. While not directly stating that the defendants website needed to be made accessible, the court did emphasize that the program as a whole had to be accessible.

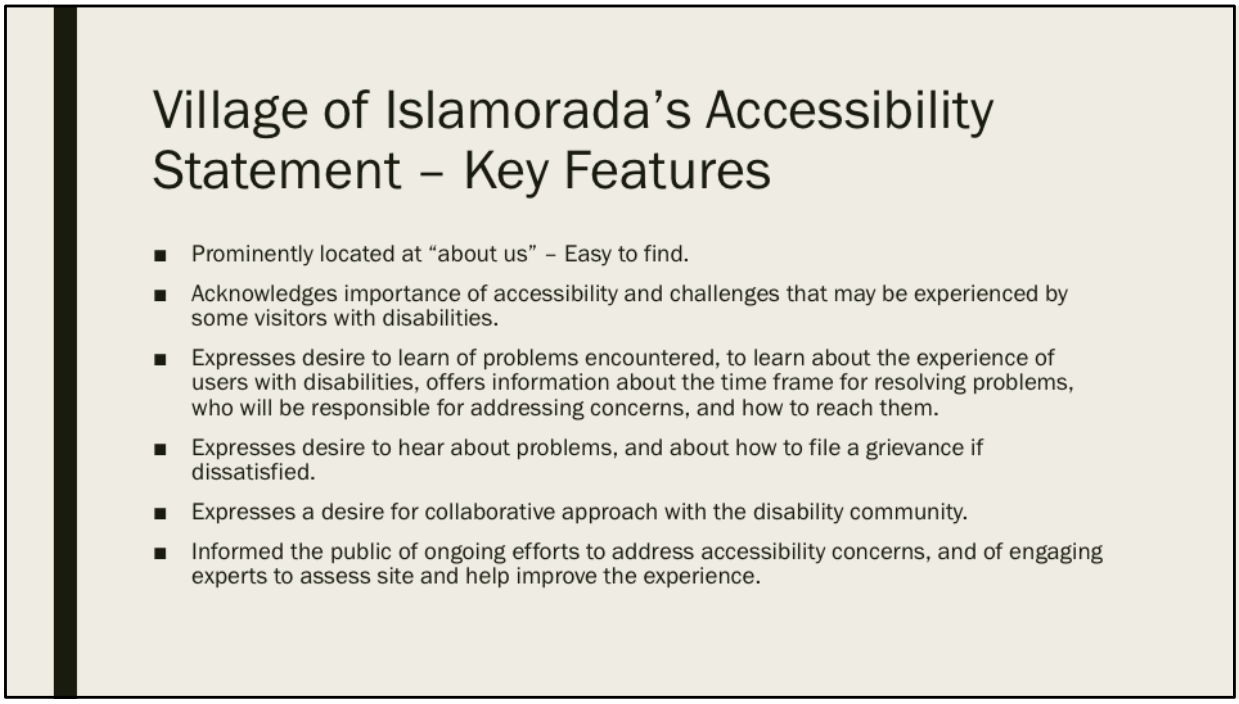
More recently ,in Hindel v. Husted, 2017 U.S. Dist. LEXIS 13820 (S.D.Ohio Feb.1, 2017), the District Court issued a permanent injunction requiring the Ohio voter services website be made accessible, and mandated that the state bring the website into compliance with WCAG 2.0 level AA, because the website was essential to the state's program of enabling voting.

Writing An Accessibility Statement - the Importance of Being Proactive

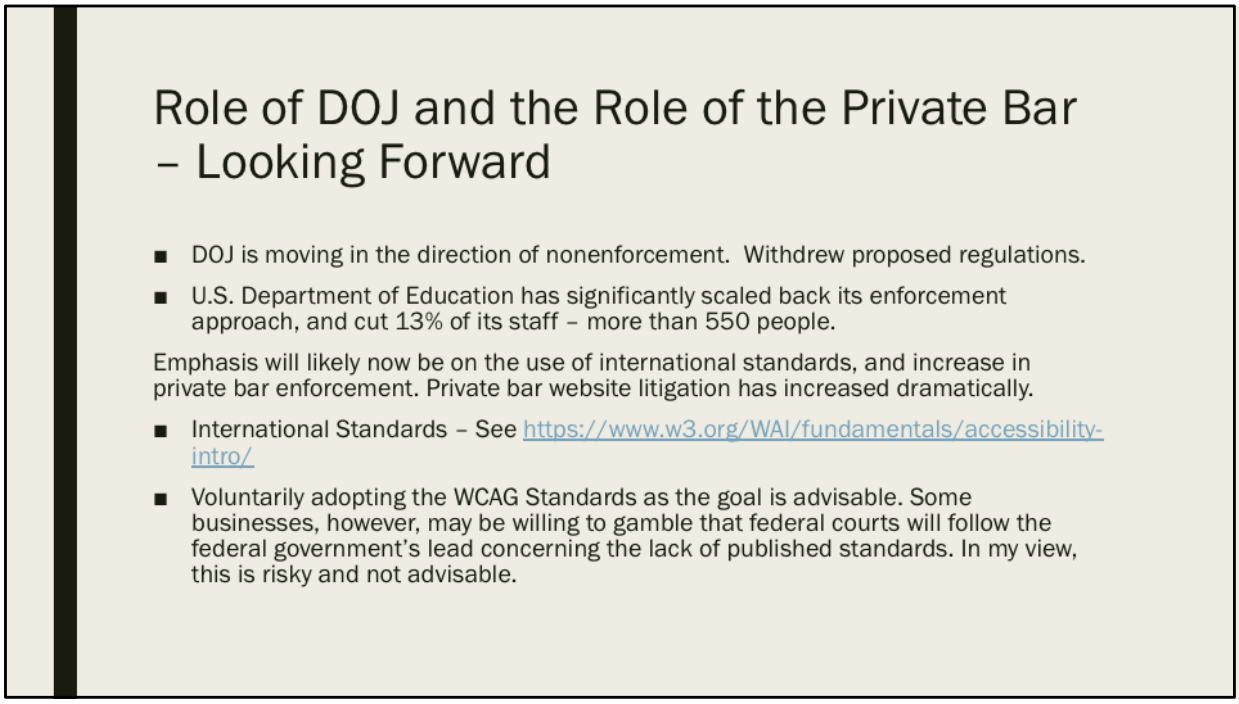
- Simple, but essential. Often missing from websites. Lack of accessibility statement is often the first thing plaintiff's lawyers look for when deciding who to sue.
- Expresses desire to be accessible, steps taken, and ways to alert website of issues.
- Need to identify alternative ways to get the same information, but should be equally available.
- Needs follow through. Saying you are doing it needs commitment to reviewing website and making necessary changes.
- See website accessibility statement of the Village of Islamorada, in the Florida Keys:

http://www.islamorada.fl.us/about_us/ada_accessibility_statement/index.php

I serve as their ADA Consultant, and assisted in writing this. 3Play found their website among the most accessible in the nation.



– "Islamorada, Village of Islands is committed to ensuring that all visitors and residents, including visitors and residents with disabilities, are able to access and use all of our programs, services, and activities…."
"(W)e want to provide users of our website with information about what we offer, ways to inform us of any difficulties encountered, alternative ways we can offer the services, the time frame for doing so, who to contact, and information about our ADA Grievance Procedure, as discussed below."
Our website offers a wide range of information and services, and we recognize that for users with disabilities, some material on our site may pose challenges. We are interested in hearing from users with disabilities, we want to know about your experiences, and want to address the challenges you identify.
We strive to ensure that our website will comply with WCAG 2.0 AA, but recognize that alternatives to using the website should be available in the event that a user with a disability encounters a problem using our website. Should you encounter such a problem, we urge you to contact our ADA Coordinator, who will provide an alternative way to quickly obtain the information you are seeking to obtain through the website. In addition, should you wish to file an ADA Grievance to alert us to any problems you may be experiencing, you may also file an ADA Grievance with us.



Under Secretary DeVos, US Department of Education, the biggest losses have been within the office of Federal Student Aid, which oversees all federal support for college students, and, alarmingly the Department's Office for Civil Rights (OCR). OCR has lost nearly 70 staffers overall, or about 11% of its workforce since last year. In the Trump administration's most recent budget proposal for fiscal year 2019, they projected that civil rights staff would carry 38 cases per person in the 2017 fiscal year, civil rights staff managed 34 cases per person, compared to 40 the previous year.

The former head of OCR under the Obama administration who now chairs the US Civil Rights Commission, said that "when civil rights staff have unmanageable caseloads, that creates a powerful incentive to not open and not investigate those cases." (Source: inside higher Ed.com. June 13,2018. Article by Andrew Kreighbaum.

in addition, "the Trump administration has taken steps in recent months to change how it processes civil rights complaints. Many cases have been dismissed outright if they don't meet standards issued for civil rights investigators. They have stopped automatically conducting systemic reviews of institutional practices when civil rights

complaints are filed."

. A new case processing manual issued in March directs the complaints be dismissed under some circumstances, including when they are similar to complaints filed against other institutions, resulting in the dismissal of hundreds of complaints filed by one disability rights advocate believes many institutions websites are not accessible to those with impaired vision or hearing.

in the absence of Justice Department enforcement, and withdrawal by the Justice Department of its regulatory efforts concerning accessibility websites, businesses may be tempted to assume that they need not address the concerns of persons with disabilities visiting their websites. In my view, they would be mistaken in this assumption.

As I indicated earlier, there is no shortage of private litigants pressing issue of website accessibility across the United States.

- Time synchronized text gif
- Relevant sound effects
- Broadcast
- Terminology
- Caption formats