SOFIA LEIVA: Thanks, everyone, for joining the webinar entitled, "How to Mitigate the Risk of an Accessibility Lawsuit." I'm Sofia Leiva from 3Play Media, and I'll be moderating today. And today, I'm joined by Kristina Launey, labor and employment litigation and counseling partner at Seyfarth Shaw. And with that, I'll hand it off to Kristina, who has a wonderful presentation prepared for you all.

KRISTINA LAUNEY: So hi, everyone. Now, for real, we are going to be talking about website accessibility. Obviously, if you all know 3Play Media, you probably are familiar with the subject and you probably know quite a bit about it. Some of what we'll talk about today will be a bit of a refresher, a bit of a state of the law. Again, just to set the stage for our conversation about actions that companies can take to mitigate the risk of being hit by a website accessibility lawsuit. I hope that you all do submit any questions you have. And as Sofia said, I'll try to address them as I go through the presentation today.

So that's me, in case you want to know who's talking to you, since we're via the virtual world here. I have to put the legal disclaimer up just-- basically, if you take away the legal use that says that this is purely educational, informational, and there is no attorney-client relationship here, nor are we providing legal advice.

So level setting first. What might require a business to have an accessible website in the first place that could result in being the basis for a website accessibility lawsuit? Well, there are various statutes, laws, that could apply that may require accessible technology.

The first and the one that we talk about is Title III of the Americans with Disabilities Act. That applies to public accommodations, which is essentially-- it's one of numerous categories of businesses, but we essentially refer to as any business that opens its doors to the general public, virtually or physically. Although, there's little debate about whether both have to be there for it to apply.

There's also Title II of the ADA, which applies to state and local governments; Section 504 of the real Rehabilitation Act, which applies to recipients of federal funding. The Rehab Act applies to the federal government, contractors, and recipients of federal funding.

Under Section 508 of the Rehabilitation Act, not only might technology sold to federal agencies need to be compliant with 508 requirements, but also recipients of federal funding and federal contractors, in addition to the federal government, have to comply with the Section 508

requirements. And as of earlier this year and last year, the WCAG guidelines.

State nondiscrimination laws, generally, like Title III of the ADA, will apply to public accommodations, business establishments. Again, businesses that open their doors to the general public. And some of them, like in California, make any violation of the ADA a violation of the state law. Others, you know, are just their standalone own states, or sometimes municipal laws as well.

We've also seen more laws, both on the state and city levels, requiring state entities in their contracting, or city entities in their contracting, to require that the vendors that contract them provide accessible technologies. So it's becoming-- outside of the lawsuit area, becoming an area of focus through those sorts of contracts as well.

And then the Air Carrier Access Act requires primary websites of airline carriers to conform to WCAG 2.0 AA. And then the WCAG 2.0 AA guidelines are also incorporated into the Air Carrier Access Act. Regulations and implicated in that, as well as in the Medicare regulations. And, you know, other various laws internationally as well.

But those are the primary ones in the US. And again, we're going to principally be talking about Title III of the ADA because that is the statute upon which all of-- virtually all the lawsuits that we've been seeing, certainly the huge numbers of lawsuits that we've been seeing, have been filed.

If you get sued for violation of Title III of the ADA, what might you have to do or pay to resolve the lawsuit? Or if you're found liable, what would the remedies be that the plaintiff could get? Well, if it's a private plaintiff that sues a business, the plaintiff could be entitled to injunctive relief, which means fixing the website, resolving the accessibility barriers on the website; attorneys' fees to the plaintiff's counsel for prosecuting the action; and costs, which are usually expert costs, court filing fees, et cetera.

If the DOJ were to want to pursue an enforcement action against the business, the DOJ is also entitled to get injunctive relief. Again, fixes to the website. And it can also recover civil penalties in the amount of $75,000 for an initial violation and $150,000 for each violation thereafter, and potentially damages for folks who actually were injured as a result of the inaccessible condition.

We did see the DOJ pursuing quite a few enforcement actions under the Obama

administration, but as we'll talk about in a minute, the DOJ has been pretty quiet when it comes to website accessibility, and really everything on the regulatory front under the Trump administration.

Section 504 of the Rehabilitation Act-- again, recipients of federal financial assistance, federal contractors, injunctive relief attorneys' fees, costs, and damages are available remedies there as well. And then the state nondiscrimination laws are especially important to mention because in New York and in California mostly, we've seen a proliferation of lawsuits alleging violation of those laws in addition to Title III of the ADA because those state laws make damages available to plaintiffs in addition to the injunctive relief and attorneys' fees that are available under Title III of the ADA. In California, a plaintiff can get either minimum statutory damages of $4,000 per violation or actual damages.

So again, what's the statutory and regulatory basis for these lawsuits? There is no standard in the ADA, in Title III of the ADA, that states a website must meet X to be considered compliant with the ADA. We do have, under Title III of the ADA, a very, very large set of regulations, which are standards for buildings. How you have to construct every little aspect of your building for it to be accessible in compliance with the ADA. There are no such standards for website accessibility or mobile application accessibility under the ADA.

So in the absence of that, what the plaintiffs in lawsuits are claiming is that a website that is not accessible violates the ADA's general principles at its very foundation a law that public accommodation must provide equal access to its goods, benefits, and services to individuals with disabilities, and that it must provide auxiliary aids and services at no extra charge to individuals with disabilities to ensure effective communication.

Some defenses to that or undue burden and fundamental alteration, but those are very difficult and fact based exceptions to establish. In the regulations, auxiliary aids and services has exemplars that are provided with it, and one of those exemplars is accessible electronic information technology, which is, in turn, widely believed to include accessible websites.

An important thing to note is that the ADA, unlike other anti-discrimination statutes, requires affirmative steps to ensure access by persons with disabilities. So for example, you can't just wait for someone to come along and say, I can't get into your building because there is no ramp, there is only stairs. You have a proactive obligation to make sure that there is a ramp or there is an accessible means of entry to the building.

Other anti-discrimination statutes wouldn't require such proactive action. And so, again, that is another basis upon which plaintiffs in lawsuits are claiming you can't just wait to make the website content accessible for a plaintiff or an individual with a disability to come along and say, hey, I tried to use your website and I couldn't because of these barriers to accessibility. Can you please fix it? They're arguing, no, you have a proactive obligation under the ADA to make the website accessible.

There is no statute or regulation-- again, I'll probably say this a million times in this presentation today-- that specifically mentions websites or sets a standard for accessible websites in Title III of the ADA, and that is part of what has led to this wild west of lawsuits that we're in and part of what has led to you being on this webinar to figure out how to mitigate the risk of being hit by one of those, or if you are hit by one of them, what to do to mitigate loss that could be suffered through cost of defense or otherwise.

Why don't we have regulations? I probably shouldn't belabor this because you've probably heard it a million times, but it is always informative to go back through the history of how we got to where we are right now. I mean, as you know probably, the ADA Title III went into effect in 1992, 1993, was signed into law by George Bush. And the internet was not on anybody's minds at that time, so clearly, for that reason, they didn't contemplate putting websites into the text of Title III of the ADA.

Technologies have advanced. The administrative agency that is charged with enforcing Title III of the ADA, the Department of Justice, started in 2010 to move toward putting in place regulations that would have set a standard for website accessibility and put other measures in place that would have provided businesses with some certainty around what they needed to do and compliance deadlines, et cetera.

So in 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking, which is the first step in the process towards enacting regulations. Interestingly, at that time, the DOJ said that an equivalent alternative means of accessing goods and services on a website, such as 24 hour telephone service, could be an acceptable means of effective communication. Especially if the website isn't accessible, then potentially the telephone service is an equivalent alternative means.

The DOJ has since backpedaled on that statement and courts have called into question-- some have gone on one side of things and thought that that was persuasive as potentially an

alternative means of communication. Others have not been so friendly to that idea, but there has not been a real definitive judicial opinion on that yet.

In the Advance Notice of Proposed Rulemaking, the DOJ requested public comment about well over 100 different specific questions. The couple that are listed here are some of the key ones. Also what to do with third party content, and the impact of captioning videos, and how much time businesses should have to comply with the requirement that they make their websites accessible and in accordance with a certain standard if a certain standard were to be set by regulation that would have given businesses some sort of relief from all these gotcha lawsuits that are coming at them before they can even put in the work to make their websites accessible, let alone knowing what standard to conform the website to to make it accessible.

In the meantime, while the Department of Justice's regulatory arm was sitting on the Advanced Notice of Proposed Rulemaking, the enforcement arm was not waiting along-- was not waiting around, rather. It was pursuing enforcement actions against various entities, such as those listed here, and as part of settlements with those, was requiring the parties to the settlement agreements to make their websites and/or mobile applications conform to the Web Content Accessibility Guidelines 2.0 AA.

Under the Obama administration, the DOJ was also pretty active in intervening in lawsuits and filing statements of interest, such as those two here. Intervening and filing a statement of interest in the *NAD versus Harvard and MIT* lawsuits about video captioning online videos. And in those statements of interest, the DOJ said that an accessible website is something that's already required under the law; that the schools have an obligation to the public at large, not just to their students, to provide accessible content; and that the online programming must be made accessible.

In the *Winn-Dixie* case, which we'll talk about a little bit more in a bit, that case dealt with whether a website that doesn't have a relation to a physical location can be covered under Title III of the ADA. And even though it wasn't really germane to the outcome in that case, that is an issue that has been debated and litigated a lot. But ultimately, the point here is just to show that these were two cases where the DOJ thought that this was an important issue and wanted to weigh in on it.

And then comes around the Donald Trump administration. And it first had suspended the rulemaking effort the Obama administration had begun in 2010, and then in 2017, officially

withdrew the Advance Notice of Proposed Rulemaking, leaving all of us without any more wondering, when are these regulations going to come? We now know they're not coming anytime soon. Also, in contrast to the Obama DOJ, the Trump DOJ was invited to weigh in on a motion to dismiss in a relatively recent website accessibility case and didn't respond, so implicitly declined to weigh in.

And then this summer, there were separate letters that members of the House of Representatives and senators in Congress sent to then Attorney General Jeff Sessions at the Department of Justice, clarifying, saying, hey, DOJ, we need you to clarify whether the ADA applies to websites in the first place. And can you please help set a standard so businesses know what they need to do to be in compliance with the ADA with respect to their websites?

The DOJ replied to one of those letters in September 2018, and in the letter it said that it is evaluating whether specific website accessibility regulations are necessary and appropriate to ensure ADA compliance. In other words, maybe it doesn't think that regs are necessary to ensure ADA compliance. Maybe it's just hanging out and watching what the courts do and seeing if through litigation a body of case law would develop. Who knows.

The DOJ also said that the ADA does apply to public accommodations websites. That it has, you know, said that in the past. It's Been its position. And it said that the absence of a specific regulation is not reason to fail to comply with the ADA. And that somewhat goes to some arguments that defendants have made in lawsuits that it's not fair. It's a denial of our due process rights to require us to have an accessible website when the ADA doesn't expressly require that and doesn't set a standard that we have to meet.

And many courts thus far have rejected that argument saying, courts decide issues of law all the time that are exactly that. It's a point that is not specified or not clear in the statutes, and it's our job to interpret the statutes. And the DOJ seems to be adopting that position here.

And then the final thing that the DOJ said that was pretty significant in this letter that's not on the side here is that it thought that Congress was better suited to deal with this issue and said specifically, "Given Congress' ability to provide greater clarity through the legislative process, we look forward to working with Congress to continue these efforts." In other words, it's your job Congress, not ours, to do this.

So this really leaves us in a place of, there is no legally required standard under Title III of the ADA or its implementing regulations, and there isn't going to be one anytime soon. Although

we do know a lot of our clients, a lot of industry groups, a lot of businesses are still working very hard to speak to their congresspeople and others in positions of power in Washington to try to convince them otherwise, to take some sort of action to provide some certainty here.

And no matter what side of the coin you're on, whether you are an advocate, whether you're an individual with disability, whether you are a business, you know, everyone wants regulations. They all want some certainty here to know what exactly needs to be done to be considered in compliance with the ADA, and to further be able to mitigate risk of these lawsuits.

The only people who probably don't want those regulations are some of these plaintiffs who have filed tons and tons of these lawsuits that really are able to be successful in these lawsuits because of the great uncertainty that there is in the law right now.

So in the absence of a legally required standard under Title III of the ADA, what is a business to do? Well, there is a set of guidelines that were adopted or were developed and then published by an international consortium of web accessibility experts called the World Wide Web Consortium, the W3C. The W3 stands for the world wide web. Three W's. And then Consortium.

And it is a set of criteria that, essentially, in very layman's terms, provide guidance for how to design and code, construct a website so that it is accessible to individuals with different sorts of disabilities. And the guidelines are put together so that they address not only one type of disability, but the various types of disabilities that people might have who would use a website, and whose disabilities could interfere with their ability to use a website.

We had one question that came in that said, can you explain a few examples of the lack of accessibility for a website? For those of you who've been to these presentations before, I know that this may seem somewhat basic, but it's always good for a refresher, and it's a really, really great question.

So I don't have any sides in this presentation on that. Apologies for that. But I can tell you some examples for this. So for individuals who are blind, for example, they would use assistive technologies most often to be able to use the website.

And if the website is not coded properly-- and, again, the WCAG guidelines provide the guidance on how the website should be defined and coded-- then the assistive technology--

we're talking screen readers like JAWS or NVBA, screen readers like that, then the assistive technology cannot, essentially, read aloud what is on the website.

And some examples could be that a website needs to be able to be used by keyboard only entries rather than use of a mouse. Somebody who's blind can't see where the mouse is pointing on the keyboard. Excuse me. On the screen.

And when somebody is using the keyboard only functionality and tabbing through the web page, if the page is not designed in a manner that is in sensical order, that has heading structure, that has text embedded behind pictures, then first of all, the screen reader is not going to read the content of the website off in a manner that makes any sense at all to a person who's listening to it.

If there is not alt text behind a picture, the screen reader is not going to be able to tell the individual with a disability what the picture shows. And so you can see that-- say it's a website that is a retailer and has pictures of clothing and none of them have alt text, they're not going to be able to have any clue what is on the website and what they're shopping for. Those are some of the common issues that come up for somebody who is blind.

For someone who has a mobility disability and may not have the use of their hands, then, again, they also would need to be able to have functionality of a website with something other than a mouse. For people who have hearing disabilities, closed captioning is something that is a very important feature for any sort of audio content in videos.

For folks who have cognitive disabilities, things like time outs that are delayed and don't happen too quickly are important. For people who have epilepsy, not having flashing content. And for people who might be color blind or have low vision, things like resizing of text and appropriate color contrast are features that the website must have to be considered accessible.

So those are just some. Examples hopefully that answers your question as to that. And again, you asked for examples of the lack of accessibility of a website. If it's lacking the alternative text behind the photos, if it can't be used with keyboard only, if it's not coded so that it can interact with screen readers, heading structure is not proper, those are all barriers to accessibility that might exist on a website.

And as I mentioned before, I went on that slightly long explanation of those barriers that could

exist and how they could manifest on websites. We were talking about the Web Content Accessibility Guidelines, which provide criteria that, if followed, would help make the website accessible.

Even though they are not the legally required standard under Title III of the ADA, the WCAG guidelines, as we mentioned earlier, have been adopted as legal standard under some other laws, such as Section 508 of the Rehab Act, the Air Carrier Access Act. It is the standard that has been used in Department of Justice and advocacy group settlements, and almost all private settlements as well.

But it's still important to remember that it's not a legally required standard under Title III of the ADA by statute or regulation. That's why whenever people say, you know, does my website comply with the WCAG guidelines, I say, well, it's not a legal standard, so it's not going to comply with the WCAG-- we like to say substantially conform with or to the WCAG guidelines.

And also, does my website comply with the ADA? That's a very tough question because the ADA does not require your website to comply with any certain standard. Arguably-- again, this is debated in some of the courts-- the most the ADA by its terms requires is that a website be accessible, as some courts have held, and more close to the language of the ADA that you provide effective communication with individuals with disabilities.

The WCAG has three levels-- A, AA, AAA. I just throw this in because even though many of you know that, it's important to remember. AA is considered the standard that affords maximum accessibility, while still being attainable. AAA has many criteria-- well, not many. It has criteria that are not applicable to all websites or all features that might appear on websites. So it was never intended to be the level of general applicability.

And so it's WCAG 2.0 AA that is considered the de facto standard for accessibility, as we refer to it. But it's also important to keep in sight 2.1, which was-- the recommendation was adopted in June of this year for that updated version of 2.0. 2.1 has all the same criteria 2.0 does, but just adds additional criteria that generally address mobile applications, low vision, and cognitive disabilities. So it's good to keep that on your radar.

Challenges that we've seen come up with website accessibility. What to do about third party content. And this was something that was in the questions asked in the Advance Notice of Proposed Rulemaking comment period and which entities an individual submitted comments on.

And it's still somewhat of an open question. One court shed some light on its view on the topic and Winn-Dixie, which we'll talk about in a minute. But ultimately, it is a very tough question as to what to do and who is liable potentially with either links to other third party websites from your website, third party content that you incorporate into your website. And then what about when you're dealing with third party vendors who design your website or create your website and they don't know or understand web accessibility or the WCAG guidelines? How do you deal with that?

Contracts. If you're an entity that enters into contracts to provide a good or service, typically a service, software service, to other entities and the contract requires you to provide your service in an accessible fashion but doesn't define what that means, what do you do?

Then when you're entering into a contract that has an indemnity and hold harmless provisions, you really want to look very carefully at that and the other provisions regarding what they're requiring you to do with respect to compliance with the laws and accessibility. Those are all some common issues that we see arise, and we'll talk about a couple of mitigation measures to mitigate risk of any of these issues coming up later as well.

So everybody talks about the data that we crunch and publish on our blog, www.adatitleiii.com. It's the blog that we attorneys and our fabulous librarian put out who are part of Seyfarth's Title III disability access team. And we'll talk just about some of the key numbers that show some trends in the website litigation area over the past two years, I think is what we're mainly focusing on.

But we'll go over a little bit of history because, again, it does inform what we've been seeing in the way of lawsuits in this area and, thus, what recommendations for best practices are to mitigate risk of lawsuits and mitigate risk of loss in lawsuits.

We have this slide up here that seems to be somewhat appropriate when we're talking about the litigation trends and the big numbers you're going to see in a minute. "The internet is the first thing that humanity has built that humanity doesn't understand, and the largest experiment in anarchy we've ever had." And that does seem to be rolling over into the state of lawsuits alleging inaccessible websites.

So what are we seeing? Well, first of all, ADA Title III lawsuits in federal court. These numbers are for all lawsuits. So physical accessibility, service animals, website accessibility. Any lawsuit

that was alleging a violation of Title III of the ADA that was filed in a federal court, we tracked. We don't think this captures all of them because there is no perfect way to search all of them, but we know that there is at least this many.

And you can see how this litigation has really risen exponentially over the years. And we last crunched the numbers here in June of this year. And as of that time, at the rate that things were going, we were projecting a 30% increase of the number of lawsuits over 2017.

The top 10 states for the beginning of this year for six months in which 88 Title III lawsuits were filed in federal courts. California still led the pack, mostly because of physical accessibility lawsuits, but also some website accessibility lawsuits. New York and Florida. Florida's got a lot of physical accessibility, but also a lot of website accessibility. And the New York numbers are almost entirely driven by website accessibility lawsuits.

And here, these slides are specific to website accessibility lawsuits. You can see the growth year over year and see that that huge jump from 2016 to 2017 in the number of website accessibility suits filed year over year. And again, this does not count those filed in state courts and it does not count demand letters that resolved prior to filing of a lawsuit, which is significant also.

And then in the first six months of 2018, we saw more ADA Title III website accessibility lawsuits filed than all of 2017. So stay tuned for our numbers at the end of this year because it's likely to be quite big if it continues on this trend.

The estates. As I mentioned before, website accessibility lawsuits in New York is just through the roof, as you can see here in the first six months of 2018. And they have not showed signs of slowing down. Almost every case I see pop up these days seems to be filed in New York.

Here are the last two charts or graphs I'll show you. We haven't crunched these yet late this year, but we had analyzed the statistics by industry. And last year, it was, obviously, retail and restaurants who were being hit the hardest by website accessibility lawsuits. And as we can see from the other colors in this chart, no industry was immune.

And then at the beginning of this year, we again crunched the numbers because we saw a big number filed at the beginning, and retail was still leading the pack. Restaurants were closely behind, but nudging restaurants out for the number two were financial industry companies there, and we'd seen a ton of credit union cases, as you may have known, in addition to other

players in that industry as well.

What other trends did we see in 2018? Well, like I said a minute ago, banking and financial were a big area for lawsuits. Credit unions have very publicly been fighting back and have actually been doing a really great job of fighting back. But so many of these lawsuits, when they are litigated, the outcome comes down to what court you are in and what judge you draw.

And the credit unions recently got an unfavorable decision from one of those judges, which was a setback for those credit unions that are small and trying to fight lawsuits filed on behalf of plaintiffs that they sometimes say could never have even been a member of the credit union.

Last year, we saw a lot of US Office of Civil Rights in the Department of Education enforcement actions and investigations, and then there were a lot of private plan of actions against colleges and universities last year. In 2018, we've seen quite a few more lawsuits alleging that the ADA was violated vis a vis individuals with hearing disabilities because of video content not being captioned. Prior to that, the lawsuits were largely by blind people.

And then we also saw a new phenomenon. We're talking a whole lot about Title III of the ADA today, which applies to businesses that provide goods and services to the public, but we had also seen some lawsuits and a bunch of demand letters sent to companies alleging that an applicant for employment was denied access, but really it would have been that the business did not reasonably accommodate the individual's disability because he or she wanted to apply for a job using the online job application, and that was not accessible.

And they tried to argue that that needed to be made proactively accessible. Many of those actions either settled or are still ongoing. Totally different set of laws apply there. Title I of the ADA, which applies to employment, and state nondiscrimination laws would apply there as opposed to Title III of the ADA.

So we have seen defendants fighting back more and more and more rather than going through every single case. Here are the big themes in terms of the arguments they're making. We talked about this a little bit earlier. That the WCAG is not a legal standard under Title III of the ADA and the DOJ has not issued regulations on website accessibility. Therefore, your honor, it is a violation of my due process rights to hold me to a requirement that my website must be accessible and that it must meet any certain standard when there is no statute of regulation that says it must be.

And courts, largely, have not been buying the due process argument. Most of them are saying, like we talked about earlier, we don't need a regulation or a statute to specifically state what a website has to look like for us to decide whether a website is accessible or not. There's experts who can help opine on that.

This rationale was relied upon in one court in granting a motion to dismiss in favor of a defendant. That case is on appeal, so we're waiting to see how the Ninth Circuit will ultimately come down on that.

Another argument is that effective communication was provided through alternate equivalent means through telephone access. Those arguments, again, have been met both ways by courts, and there's not really any definitive opinion on it yet. There's no nexus between a website and a physical location. Those arguments have, again, been successful in some courts, not in others.

For example, in the Ninth Circuit, where California and other Western states are, there must be a tie between the website and a physical location for Title III of the ADA to apply. Other courts have held the opposite. They've held that web only businesses can be subject to Title III of the ADA.

That the business has already hired a vendor to make its website more accessible. We're already working on it, they want to say. They can't come after us, can they? It takes time. We can't be made accessible overnight. What do we do? Can't we just tell them that and make them go away? Sadly, no. That's not good enough. The only thing that is good enough on that front is hiring the vendor, getting them to help you make the website accessible, and do it right.

Because quite often, I've seen companies try to just read the WCAG guidelines and do it themselves, and they just don't understand how to evaluate the website and then how to remediate the website properly. So hiring the vendor who can help you make sure you do know how to do it properly and then following through with the work is really what needs to be done for that argument to really hold weight.

Plaintiff lacks standing to sue. For example, someone with a hearing disability is saying that the website is not accessible because of missing alt text, for example. You have to sue for barriers that are related to your disability. The plaintiff didn't suffer an injury. Those usually

don't go anywhere. And the plaintiff is just a tester.

He didn't really mean or intend to use the defendant's business. Again, most courts will allow lawsuits by people who are just testing the limits of the law, rather than forcing them to be a plaintiff that actually is attempting to access the goods and services of the particular business.

This slide just listed some of the other cases. Give you a little bit of history. There has been litigation for a while, but it really has just been firing up more over the past couple years. The bottom case-- other than Harvard and MIT, which we talked about earlier.

But the bottom case is probably the most significant because it was one of the first in which we got, if not be first in which we got, a dispositive opinion from a court on, does a website that is not accessible violate a state law or the ADA? And in that case, the state court said yes, an inaccessible website does discriminate against the blind customer and violates California law.

Here, key decisions that came out in '17, '18. One court did, like I said, grant a motion to dismiss on those due process grounds. That's in the Domino case, but it was heard on appeal before the Ninth Circuit last month. We're waiting for a decision on that. I mentioned the credit union case. And again, working to make the website accessible where there was already a settlement agreement entered into between the defendant and a different plaintiff.

There was a group of cases that the trial court said, yeah, that's a good argument. You've already agreed to do the injunctive relief, so what else is there for a court to order? But then the Court of Appeals said, no. Until the website actually is accessible, you can't hide behind a prior settlement agreement with a different party.

The Winn-Dixie decision bears mentioning because not only was it the first website accessibility case to go to trial and resulted in a bench trial verdict for the plaintiff, but it is a case where we can look to, OK, here is potentially what could be ordered if you were to litigate this all the way through and lose, and, therefore, inform some of our lawsuit risk mitigation recommendations.

Here, the judge ordered that the website be made accessible following the WCAG 2.0 AA guidelines, that employees receive annual training on website accessibility, that third party content be accessible. Like I mentioned earlier, before, we thought we could say, that's third party. That's not ours. We don't control it. We can't control it.

The judge in Winn-Dixie said, no, you're incorporating into your website, it's part of the way

that you are providing your good or service, and you should have enough leverage through your contracting to require that third party to make that content accessible. Businesses know that's not always how reality works. Sometimes third party vendors have more leverage than we do, but that's what the court held.

And then it required the grocer to adopt a website accessibility policy and to pay fees and costs to the plaintiff in the amount of over $100,000, which is actually on the low end for going through trial. And that, of course, does not include the defense fees and costs as well.

Two other key decisions, both out of New York. The reason why we mention these is because, we mentioned before, the huge proliferation of lawsuits in New York. And these two decisions, mainly the Blick Art decision, which was very long and very detailed, were really the impetus for folks in New York to realize, wow, the courts are really going in our favor, why don't we file more of these lawsuits there?

Fairly recent summary judgment ruling out of California is also significant because it is a second one where a court ordered the defendant to make the website accessible in accordance with the WCAG 2.0 AA standard. In the Winn-Dixie appeal, which was also heard in early October, the defendant there said that it's not fair.

The court improperly-- and it's not fair for it to have ordered us to bring the website into conformance with WCAG 2.0 AA because that's not a legally required standard. So that is one of the issues on appeal before that court-- whether the trial court went too far in ordering conformance to the WCAG 2.0 AA standard.

The fact of the matter is, though, that all the experts you're going to hire, any expert in the field is going to say that that is the standard that they would look to in testing your website. So ultimately, we would not recommend that a business do anything other than look to that standard as the measure of accessibility. And then, of course, you know, 2.1 now, as well.

All right. Risk mitigation. What can or should a business do to mitigate the risk of being the subject of one of those lawsuits that would put you as yet another number pushing those charts I showed you higher, or being in the position of Winn-Dixie or some of the others having to fight these lawsuits?

Well, first of all, for the websites themselves and your mobile apps themselves, inventory them. Figure out what you have. A lot of times, I get into it with clients and they don't even

know what all their web properties. And sometimes, they frankly can't even figure it out because they have so many out there. But inventory it. Figure out what you have that's public facing.

Prioritize your review of those websites. And if you hire a digital accessibility consultant, those consultants can help you do this somewhat as well. Some of them have analytics. If you don't have your own website analytics, they can help you figure out which pages are highest visibility, which receive the highest hits, highest traffic, figure out which pages are essential to the core functionality of the purpose that the website provides and the services that you all provide. And for pages where there is no accessible alternative, then those should obviously be high priority as well.

Engage a digital accessibility consultant. A reputable one. Because of the proliferation of lawsuits and litigation, there have been a lot of new consultants entering the scene. And, you know, there are those who have been doing this for a very, very long time and those who you'll see at CSUN and the other big conferences that are networking with each other and sharing best practices with each other.

And then there are some that are new on the scene that are-- some might be fine. Some [INAUDIBLE] experience are not so much. Some are kind of potentially selling companies things that they don't need and selling them some false security in those things. And then they get hit with another lawsuit and the company says, wait a sec. This vendor said that I'd be fine if I installed their software.

So you need to be careful and do your due diligence, and retain a reputable digital accessibility consultant, and engage that consultant to perform an audit of your website. After you get the audit report, remediate the website. After remediation, retest the website to make sure that it was done properly.

Then from there, you need to train your IT department. Really, anyone who is responsible for developing your website and uploading or maintaining content on the website. It also often involves the marketing folks as well. They sometimes either control the website or control branding or other things that go on the website. And you don't want to run into a bunch of clashes with them if they just don't understand why you're pushing back and saying, you can't do this branding because it's not accessible. Training them so they understand the principles is often very, very effective.

Maintaining the accessibility of the website is very, very important because even though it's accessible today, if your content folks are not uploading it and maintaining the content in an accessible fashion, you could be subject to liability again tomorrow for another website.

And I know it causes people a lot of heartburn in this context because they think, well, this is so unique to websites and they're so dynamic and it's just so onerous. The same thing really does apply, though, in the physical accessibility context.

In doing this line of work for so long, I'll go into restaurants-- especially in the restrooms in restaurants all the time, they'll have the trashcan moved right by the side of the door or have put a fancy table right in the space that would be required for the wheelchair to pull in. So the same principles somewhat do apply there as well, though we recognize that the websites quite often move even faster. And there are often a lot of hands on websites.

Adopting policies and procedures is an absolutely essential step as well. The policies and procedures would be, number one, just a general effective communication and digital accessibility policy that would-- these are internal policies-- that would state that you're committed to providing access to individuals with disabilities; your commitment to making your website and mobile applications, if you have them, accessible-- maintaining them in accessible fashion; what standard you're going to strive to meet-- the WCAG 2.0 AA, 2.1 AA; and how you're going to go about maintaining the websites in an accessible fashion. And quite often, it also includes what you do with respect to vendors and third party content.

The procedures usually go to your IT team, your content team, perhaps your marketing team. They say these are the procedures we follow in uploading, maintaining, designing our content in our website to make sure that it's done in an accessible fashion all the time.

And the reason why those documents are so important is because we know that bugs occur on websites. Bugs occur that affect individuals with disabilities and individuals without disabilities. It's unavoidable. But if you make your website accessible and then you have these policies and procedures in place, if you get sued, you'll be able to better argue that was a temporary bug.

We are not discriminating against individuals with disabilities. We do everything we possibly can to design and maintain an accessible website. Here are our policies and procedures that prove that. This bug was just a temporary aberration. We fixed it. It's done. Move on. Don't

sue us. So that's why those are important.

They're also important just so everybody in the company knows about the company's commitment to accessibility and that it's something that is not optional. That they must do-- not only because it provides you with an accessible website that increases the folks who can use your website, because there is a large consumer base with individual with disabilities, but also because it will minimize the risk of you getting hit by a lawsuit.

I covered most of this on the last slide. The point about engaging the reputable digital accessibility consultant-- we always advise you do it through counsel so that the audit you get is privileged. So if you're later sued, you don't have to produce it in litigation. We talked about all of this.

Putting in place a procedure going forward as part of our procedures and policies that we talked about for periodic retesting of the website, whether on an annual basis, whether it's more frequent than that, is a good practice.

We talked about the training as to the folks who touch the website, but it's also absolutely crucial that you train employees who will interact with customers and members of the public. They are your first line of defense and can either make things go fabulously with folks who might think about suing you or can make it a disaster and make them jump to sue you even more quickly.

So make sure that you have an appropriate training program for them and that you are training all customer service reps or people-- whoever's on your front lines who would be answering emails, chat, phone calls so that they can identify the issues.

An individual with a disability might say the website isn't working with JAWS, and you don't want your customer service rep to make some joke about sharks. That is one way to make someone very upset. You want them to know how to identify the issues and be able to address issues that individuals with disabilities might raise with respect to the website empathetically and appropriately, and to know when to escalate it to a higher level. That's absolutely essential also. And to get back to them in a timely manner.

Company wide cultural adoption and support of accessibility initiative is something that if you go to presentations of companies that have really effectively implemented and socialized accessibility throughout the company, those are the companies where you can see this has

stuck. Companies that haven't done that, that haven't gotten the buy in, that don't have a C-suite sponsor, it seems like they're doing it to resolve a lawsuit or they might think it's a good thing to do for their customers with disabilities, but then it almost always falls by the wayside.

So companies that have really made it a company wide initiative and had a higher up sponsor and put it as part of their diversity initiatives or something else like that seems to be the ones where it really sticks and they don't get hit with lawsuits hardly ever after that. It's those who don't do things like that that it seems to fall by the wayside and are at greater risk.

Creating and appointing and accessibility team with a lead that helps lead up these efforts and keep them going is also something that is absolutely a best practice. We talked about the accessibility policy. That would be internal. It is absolutely a best practice to also have an accessibility statement that you will post on your website. It usually comes in a header or footer.

Usually just says Accessibility that somebody can click on and that carries throughout the site. That's why it's in the header or footer. When they click on it, it tells the person who is visiting that page about your commitment to accessibility. It might be more detailed, it might not. That's up to the company.

But it always needs to provide contact information for how to contact the company to get help with using the site if there are any difficulties that the person is encountering, or just to provide comments and feedback.

And then, again, making sure that employees who are monitoring that website chat forum, or email, or phone number, whatever it may be, are trained to monitor it and promptly respond. I have had a lot of clients where they had the email set up, but nobody was monitoring it and ended up with a lawsuit that way.

So that was the end of my summary of risk mitigation measures you can take. I do want to-- in the last couple of minutes we have, I'll answer a couple of the questions that had come in. Let's see.

One asks, you're referencing numbers on your slides without telling us what the numbers are. This is inaccessible for blind viewers. I do appreciate for that-- I'm sorry. I appreciate your feedback, and I apologize for that in my rush to go through the slides.

In our blog, we have the charts listed with text accompanying the charts, so you can see. I did

tell you what the highlights of those charts were, and we certainly will be providing, I believe, a copy of the PowerPoint-- Sofia will speak to that-- that does have the actual numbers that go along with each of those charts. And if you'd like to offline, I'd be happy to tell you the exact numbers. They really were just year over year numbers showing the increase in website accessibility lawsuits in federal courts.

Is there an accessibility standard for mobile phones? No, there is not. And that was one of the questions that was asked in the Advanced Notice of Proposed Rulemaking as well. Should mobile phones or mobile applications be addressed in the rulemaking efforts in addition to websites? And since that process never went through, it was never addressed.

And at the time, the WCAG didn't really address mobile applications either. 2.1 now does. So while there are various standards or guidelines that talk about the accessibility of mobile apps, and this is probably a question for somebody technically within 3Play Media or one of the other digital experts, but I think that folks are looking more and more now to the WCAG guidelines now that it has the additional criteria applicable to mobile applications in 2.1.

Application to online courses, learning management system web pages. The WCAG guidelines would and could certainly apply there. And in settlement agreements that we've seen between the Office for Civil Rights and universities, making the learning management systems accessible absolutely has been a component of those. And if you want any more information about that, I'm more than happy to talk to you offline about that. But that has-- learning management systems has been a focus of the Department of Education in prior years.

If you hire a third party to fix your website and they don't make it accessible, WCAG compliant, 508 compliant, who is responsible? That would be a matter of contract between you and your vendor there. But under Title III of the ADA, only the public accommodation is responsible for the accessibility of the website.

Let's see. In the last minute. Where do higher education institutions fit under Title II of the ADA if you are a public university? And potentially, you could be subject to the Rehabilitation Act as well as a recipient of federal funding. Title III of the ADA and, potentially, again, Section 508 would apply to private universities. And as you likely saw from the mention of lawsuits against Harvard and MIT, they definitely are not immune from these lawsuits alleging that they need to make their content and their websites accessible.

Let's see. There were a couple of others here. And I think we're out of time, though. I guess I'll turn it back to you, Sofia. And I guess I will say that if-- it looks like a lot of these are having to do with learning management systems, so I got some of them. But I'm happy to follow up with any of you after if you have further questions. But I will say, since we're at the hour, thank you so much for tuning in, and I hope this was helpful.