

### 3Play Webinars | wbn-02-28-2019-marc

JACLYN LEDUC: Hello, everyone. Thanks for joining this webinar entitled Title III of the ADA-- How does it Apply to Hotels, Restaurants, and Businesses? My name is Jaclyn Leduc. I'm from 3Play Media, and I'll be moderating today.

I'm joined today by Marc Dubin, who currently serves nationwide as an ADA consultant and as an ADA expert in the federal court. He also provides businesses and state and local governments with guidance about the ADA. He formerly served as a senior trial attorney at the Justice Department. And with that, I will hand it off to Marc, who has a wonderful presentation prepared for you today.

#### MARC DUBIN:

Thank you very much. I'm going to be trying to go through this fairly quickly. I will take questions at the end. Please feel free to contact me at your convenience. You have both my cell phone and my email address within the presentation, and I'm happy to talk with anybody at your convenience.

There's also going to be a quiz that there is a link to concerning service animals. I'm urging you to click on the link, take a look at the quiz, and email back your answers to the quiz. I will then review them and send you a response and talk with you about whether you want some additional information about service animals and the ADA.

I'm going to just start off by sharing with you how important it is to market to customers with disabilities. There are over 21 million adults with disabilities who traveled at least once in the preceding two years, according to a 2005 study. More than 50% of adults with disabilities stayed in hotels while traveling within this two-year period. And they spent approximately \$13.6 billion-- just travelers with disabilities. 42% of adults 65 or older have disabilities.

As we're going through it-- according to that 2005 study-- 4 million business travelers and 20 million leisure travelers with disabilities travel regularly. That translates into 70% of persons with disabilities in the United States traveling more. And more than 50% of those persons with disabilities regularly stay in hotels, motels, and places of lodging. And they bring along family members and friends. And that's an extraordinary amount of money that they are able to spend on your properties. And just scroll through it.

According to those studies-- what I simply want to share with you is how large a population it is that you are marketing to and how much money they actually have to spend. So it's a very important group to make sure that you accommodate in your services at your properties. If you go to the next slide, please.

I wanted to point out to you that there were studies done of the number of lawsuits brought across the United States. California had over 4,000 lawsuits. New York had over 2,000. Florida had close to 2,000. And all the other states had about 1,400. So that's close to 10,000 lawsuits just on the ADA itself-- just targeting places of lodging. But that does not include other federal agency enforcement or the Department of Justice enforcement-- the Civil Rights Division at Justice enforces Title III of the ADA, opens investigations on the basis of complaints. Those numbers that I've just shown you here do not include those federal government investigations. You can go to the next slide.

What we're going to talk about today are four areas. New reservation requirements for places of lodging-- what you need to know when taking reservations from guests with disabilities, and what you need to post about the accessible features of your place of lodging. Information about the ADA and its application to guests with disabilities who want to be accompanied by a service animal. Websites at the ADA-- a very, very large new topic of litigation, what you and your web developer need to know and what is often overlooked resulting in litigation. And then a discussion, briefly, about architects and the ADA and what you need to be thinking about when you bring an architect on board either to address existing barriers or when you're doing new construction or alterations, especially rebuilding after a disaster.

You have some very important issues that need to be understood by your architect. There are other issues that the ADA addresses, like effective communication issues, that would primarily address persons with hearing loss. I'm not going to go into great detail on that today, but I don't want to minimize the importance of it, and I did want to bring it to your attention.

The highlights of that for places of lodging would be the need for TTYs, alarms, sign language interpreters and when they would be required, the kits that you have to have at your properties, assisted listening systems and devices-- all of which are part of Title III of the ADA's obligations, and all of which you need to be thinking about in terms of compliance. Next slide, please.

With respect to reservations and guests with disabilities, what the litigation and the enforcement is really highlighting is guests not having enough information about the accessible features of the property to be able to independently make a knowledgeable determination of whether the property meets their accessibility needs.

Second problem is that when an accessible room is reserved, it has to be held and not given

to another guest. Third is that the accessible room has to be taken out of rotation. And then, finally, inadequate training of staff about the accessible features of the property. And we're going to be talking about that in more detail. The links here are some cases that the Justice Department brought in enforcement. And these particular cases addressed this issue very well. I'd urge you at your convenience to take a look at it. Next slide, please.

The Department of Justice generated new regulations about this as of March 15, 2012-- which was a very important date because they brought in to play a lot of new features in the new regulations. One of the issues that the Department of Justice was trying to address was decades of complaints by guests with disabilities who would go to a property after making a reservation and, having arrived at the property, finding that the room that they had reserved was not meeting their accessibility needs.

They were either misled about whether it had a roll-in shower or a bathtub with a seat, whether it was accessible features that were problematic for them. And so the Department of Justice changed the regulations as of March 15, 2012, and essentially sought to make properties-- places of lodging-- provide enough information about the accessibility of the property for the guests with a disability to make an informed decision about whether the property meets their needs.

But I want to highlight that this is a very risky proposition, because what you're balancing here are the Title III obligations to address barriers-- either new construction alterations or existing barriers in existing facilities-- and engage in barrier removal, contrasting that with the obligation to let the public know what those barriers are.

So the risk is if you tell the guest too much about all the barriers, and you have not removed the barriers that you should have removed, you risk litigation for not having engaged in barrier removal. So it's a careful balance that we try to provide as to what information is available and what information you keep confidential, but that you work on in terms of your efforts to come into compliance with the barrier removal obligations of Title III. Next slide, please.

So this is an example from 2010, which was in advance of the new regulations taking effect. And the Department of Justice had had this as a priority for many, many years. And when they were considering the new regulations, they already used their concern in this consent decree with the Hilton properties. And what it says about accessibility in reservations is that the property will ensure that the Hilton reservation system-- both by telephone and internet-- will

provide information about the availability of accessible rooms, as well as details about the configuration of the rooms, the amenities available in the rooms, and the views available in each accessible room, so that individuals with disabilities are able to reserve the accessible rooms with specific features and amenities.

This is a good example of an early effort by the Department of Justice to alert places of lodging that these features are crucial to guests with disabilities. A guest is going to want to know both when they call about a reservation and when they go on the internet to make a reservation what the room is really like. What are the configurations? Is it a queen bed, two king beds? Does it have a roll-in shower? What are the features of the room that make it accessible?

And where they're not accessible, the individuals under the new regulations are going to be entitled to know what some of those failures are so they can make a determination whether it meets their needs or not. Next slide, please.

These are the requirements that the regulation sets out-- ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms, identify and describe accessible features in the hotels, and guest rooms offered through its reservation service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets their accessibility needs, ensure that the accessible guest room is held for use by individuals with disabilities until all of the guest rooms of that type of rented, and the accessible room requested is the only remaining none of that type. And we're going to talk about these in more detail in a few minutes.

And reserve upon request the accessible guest room or a specific type of guest room and block that room off and remove it from the reservation system so no other guests can get that room. That way when the guest arrives, they know specifically which room they have been promised with exactly the features that they were provided information about.

And they have to guarantee that, upon request, the specific accessible guestroom reserved through the reservation service is held for that reserving customer. Whether or not you do that for other guests or not, for guests with a disability, you have to say this is the room that's specifically assigned to this guest. And when they get there, that's the one they're entitled to. Next slide, please.

So there are a number of steps that I recommend you consider. First, modify your policy, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms.

Now, this can sometimes be a challenge because not all properties have front desk staff available 24/7. If not, you have to think about what have you done to allow a guest with a disability an equal opportunity to make the reservation having gotten the information they need. In those circumstances, you're likely going to want to put more information about the accessible features online. Because once they are seeking to make the reservation, the room may go very quickly.

And the reason that the same hours and same manner obligation is there is so that you don't have a run around of a guest with a disability who, by the time they get around to the right person giving them the information about the accessible features, the room is gone already. Next slide, please.

Then you want to identify the accessible features in the hotels and the guest rooms and describe them through the reservation service in enough detail, again, to reasonably permit individuals with disabilities the ability to access independently whether that hotel or guest room meets their accessibility needs. The reservation agents must be trained to identify the accessible features-- the key accessible features.

Does it have a roll-in shower? Is there parking that's accessible? Is it designated? What's the path of travel from the parking space to the front desk? Are the common area and common use bathrooms accessible? Because if they're not, a guest in a wheelchair is going to have a problem, and they're going to want to know about that in making their decision about whether they want to make the reservations

The next issue is do customers get the same answers from their front desk staff as they get from the reservation staff? And the answer to that is usually no, which means you really have to make an extra effort here to make sure that the reservation staff doesn't simply say, I really don't know the property, let me transfer you to the front desk. They both need to have that information.

Because otherwise, you end up really making the guest with a disability go through a number of hoops that guests without disabilities don't have to go through in order to make a decision

about renting the room. And by the time they go through those hoops and get transferred back and forth, that room may no longer be available. So that's a risk you take if you don't adequately train your reservation staff to know the property's accessible features.

And that's going to take some additional work and some additional training that currently doesn't happen all over the United States. I called one property yesterday to ask about accessible features and I found that I was transferred to the reservation staff. Then when I spoke to the reservation staff, they had no idea about the actual accessible features of the room. And I was transferred back to the front desk.

By the time I got through getting the information I needed, the room was gone. So, as a practical matter, you have to train both your reservation staff. And for large chains, that's going to be a challenge because many of them are independent of the property and urge customers to make the reservation only through the main reservation system.

If that's the system you use and that system does not know the accessible features of the property, it's going to create problems and potential risk of either a complaint to the Justice Department resulting in a potential investigation or litigation.

Do customers get the same answers from the front desk staff as they get from the reservation staff, can be answered by putting together a cheat sheet that basically allows the reservation system to know what the accessible features are that each property wants to identify-- and put that both online and in what I call a cheat sheet for the staff to be able to answer the questions.

Do they know if there's a roll-in shower? Do they know the locations and features of the rooms designated as accessible? Do they know whether they're available in a dispersed number of locations? What information is on your website, is the first step to try to figure that out. Next slide, please.

Step three is really through your control of your rooms. Ensure that the accessible guest rooms are held for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining one of that type. This is often overlooked, but it is a major concern for the disability community seeking rooms at properties.

Because when you rent out an accessible room to a non-disabled individual, it obviously

deprives the guest who needs those accessible features from the features of that room. So what the Justice Department regulations are saying is if you have a room type and within that room type you have an accessible room, you need to not rent out that accessible room until all the other rooms in that room type have been rented out-- and only then can you free it up. Next slide, please.

Step four is block off and remove the accessible rooms. Accessible guest rooms or specific types of guest rooms must be reserved and ensure that those are blocked off and removed from the reservation system once they've been reserved. Next slide.

You must guarantee the specific, accessible guestroom reserved to your reservation service is held for that customer regardless of whether that's your policy of holding other guest rooms. Many hotels have a policy that we give you a room type that we guarantee, but we don't give you a specific room. So we will guarantee a two queen bed room with a view of the pool. And there'll be maybe multiple rooms within that room type and you don't guarantee a specific room number.

But because of the scarcity of accessible rooms, you have to guarantee that specific guest room is taken out of the reservation system after it's reserved, and that guest is entitled to have that room held for them until arrival. Next slide, please.

I'm anxious to take questions about that at the end, but I did want to let you know that there's a lot of information about reservations issues-- it's a big, big area of new litigation. I live in the Keys and there have been at least nine lawsuits against properties in the Keys already-- just on that one issue about reservations.

And the reason it's so easy to file and get between \$10,000 and \$15,000 in attorney's fees is because you don't even have to leave and leave your room to do it. You simply go to the website and make a phone call, you find that the reservation information is inadequate, and you file the same lawsuit 10 or 20 or 30 times. And that is, I think, a very disturbing reality for properties-- we're trying to get properties to understand what they can do to minimize or maybe even avoid that kind of litigation risk.

Next subject I want to talk about would be service animals. And the service animal issue, to my surprise, remains a very common problem. You call a property and you ask-- whether it's property or a restaurant-- you say, do you allow me to bring my service animal with me? 99% of them will say, yes. I rarely find somebody say, no, we won't accept a service animal.

But the violations are very frequent right after that, because then what happens is the staff is not aware of what the ADA says about service animals. Does your staff know what the ADA allows when a guest with a disability seeks to check in with a service animal? You should have a written policy about service animals, and your staff should be trained about it. Your staff should know how to distinguish a service dog from an emotional support animal.

And I'll give you some links here to some cases from the Justice Department, one of which was a restaurant in which the customer was allowed in, but he was segregated. And they ended up paying \$5,000-- \$2,500 in damages and \$2,500 in civil penalties. The Justice Department can seek civil penalties up to \$75,000 for the first offense and up to \$150,000 for subsequent offenses. They cannot get attorneys' fees, but they can seek damages.

What I want to say about the service animals is this-- service animal regulations are very easy to understand, but it's really important that you understand it. Because the violations can result in either Justice Department litigation-- and they're very frequently looking at service animal violations, both in restaurants and in hotels-- or it can just result in bad reputation and loss of business as well. So next slide, please.

So what you want to look at is that beginning in March of 2011, the law changed. It used to be that any animal that was individually trained to assist a person with a disability or perform a task for a person with a disability was a service animal. That became a problem for businesses, and they lobbied the Justice Department and the Justice Department changed the law in 2011. So now it's only a dog of any breed and any size or miniature horses.

And as long as it is individually trained to do work or perform tasks for a person with a disability, then it's a service dog protected by the Justice Department's litigation and by private litigation. The link there is a technical assistance document that is very helpful published by the Department of Justice. Next slide, please.

There's a link to a quiz that I've created which I think has been very helpful to businesses in understanding how difficult this can be if you don't think through what you're doing when a service dog is accompanying a person with a disability. This provides your staff with an opportunity to test themselves about the ADA's requirements, including give a guest response.

And I just urge you, please-- take the quiz, email me your answers. I'm happy to walk you through grading it and talking to you about whether you think the training would be of value to



you. And we can also assist in writing a policy that can assist you.

Common problems that result in litigation or Justice Department investigations is asking the wrong questions, demanding documentation, demanding that the dog wear a vest, imposing a cleaning fee, segregating the animal in a different section of the restaurant, and failing to educate the guests about what your rights are in terms of service dogs, and what their obligations are as owners of or handlers of service dogs and failing to tell them what the rules are up front and failing to demand corrective action.

And I think it's important to point out that a lot of the litigation that occurs because the staff really haven't thought through what the law requires. It's not, again, complex, but it's really important to have a written policy and training so that they don't result in asking questions they're not allowed to ask. You're only allowed to ask two questions with a service dog-- one is, is that dog needed because of a disability if it's not obvious that it's a dog needed for a disability.

And two-- what services is it trained to do or what task is trained to perform? That's it. You can't ask about the nature of the disability. You really can't ask anything else. If they say to you, it's a service dog, and this is what it's trained to do, you have to let it in. It's illegal to ask for documentation. It's illegal to ask for a vest. And it's easy to get vests and documentation online without ever having the dog trained, without ever having the issuer of the desk or the documentation even see the dog.

So there's no reason to ask for or trust any of the documentation. And, many times, people will put a vest on legitimately trying to avoid having to be interrogated. But if you welcome service animals as you're required to do, it's easy enough to ensure that you are protected from its misbehaving. It has to be behaving well, has to be on a leash, and it has to be trained not to poop and pee on the grounds.

You have to know what your rights are and you have to know what their rights are. And that's something I just wanted to convey to you. Next slide, please.

Now I want to talk about websites. Websites is really a crucial thing to be thinking about today, because the number of website lawsuits is just astronomically growing. In 2018, there have been 2,258 lawsuits. Compare that to 2015, when there were only 57. And you're talking about an even larger number in 2019-2020-- it's obviously going through the roof.

And, again, this is a situation where there's a lot of confusion. Web developers often don't know that they are required to make accessible features of websites. Owners of websites don't know what they're supposed to be asking or getting from their web developers, and so these lawsuits are just exponentially increasing. Next slide, please.

*Forbes* magazine did a very interesting article about this, and it was "Is Your Hotel Website ADA Compliant? Here's Why it Matters." And what they are recommending is an experienced audit firm-- while maybe costing you more money-- is well worth the peace of mind, because they need to know what they are required to do.

And they're saying as well that for the majority of developers-- while they are excellent at getting visitors to your website and excellent at putting together a website that sends the message you want to send-- the vast majority of them do not understand what they are required to do or have very much experience with website accessibility requirements.

So I just want to point out that I agree with what *Forbes* is saying there. It's important to have an experienced expert with website accessibility on your side. And we're going to talk about what you have to do for your websites in just a minute. Next slide, please.

The Justice Department has always been interested in websites. As soon as websites were created, the Justice Department began thinking about how does the ADA apply to websites. Now, as you know, Congress enacted the law in 1990, the Justice Department issued regulations in 1992. So it's been around for decades now, but the web has not been around for decades.

So it became an issue of, how do we apply the regulations of Title III of the ADA-- and for state and local governments, the regulations of Title II of the ADA-- to websites. The Justice Department has said that this is a crucial concern of the department. One example here is the head of the Civil Rights Division in 2015 started to look at the issue of job applications and the high number of job applications that have to be completed online. And they made a determination that websites need to be designed to work with technologies that are used by the deaf and the blind communities and persons with mobility disabilities in order to be able to access job applications. Next slide, please.

The Obama administration proposed regulations under the ADA to apply to websites. But that regulatory process took a lot of time. It never got completed. And they indicated in 2012 that the fact that the regulatory process is not yet complete does not indicate that web services are

not already covered by Title III.

They took the position that what you put on your website is communication. They're communicating to the public how you provide services, what services you provide. And so, therefore, whatever you're communicating has to be done in compliance with the ADA's requirements that you provide the appropriate auxiliary aids and services necessary for effective communication.

And so they took the position that that's how they would initially apply the ADA to websites and said that even though the regulatory process is still in flux, the Title III entities are still covered in terms of their website work. The new administration took a very different position completely withdrawing proposed regulations and, apparently, have no intention really of having new regulations about website accessibility.

But while that created some doubt about what a business is required to do with a website to be accessible, there are some who believe that the approach to take is to ensure that as long as you are able to access public accommodations, goods, services, and benefits through the website or some alternative fashion, then you're in compliance.

Now I would urge businesses and state and local governments to adopt what I would refer to as a safer approach. The safer approach would be to seek to ensure that your website is compliant with the Website Content Accessibility guidelines-- WCAG-- which is an international standard that's been developed over years that the Justice Department, in its litigation under Section 508-- which is addressing websites of the federal government or websites of places that contract with the federal government-- that in their settlements the years, they required that the WCAG 2.0 is the standard that they are requiring in their settlements. Next slide, please.

So while there is a split in the circuits about whether the websites are covered by Title III and Title II of the ADA-- and depending on where you are, some are requiring more context in terms of whether your business has a relationship to the website in terms of the services it provides-- like, for example, if you can get coupons or fill prescriptions online-- like in the Winn-Dixie case, they are saying that that is much closer to what should be covered.

And so you have some litigation out there that is still unclear. There's a split in the circuits. But the vast majority are coming to the conclusion that you should be attempting to do what you can to make the websites accessible. And I want to point out two cases-- well at least one

case.

There was a Title II case-- which is a state and local government case-- in which two attorneys teamed up with a client and they sued Flagler County, Florida alleging that the county's website was not accessible to an individual with a vision disability who had asked to have compatibility between the website coding and the screen reader used by the plaintiff.

And, ultimately, they settled the case. I highlight this one for two reasons. One, that is a very common piece of litigation now. In fact, those same attorneys have sued multiple counties across Florida with exactly the same argument-- one on behalf of blind plaintiffs who say that the coding on the website is not accessible or compatible with screen readers, and the other for deaf clients who were saying that videos on the website are not properly accessible to them for the lack of proper captioning.

Now, we worked with the village of Islamorada last year when these same attorneys threatened a lawsuit against them. And we worked out a much-improved website, which ended up winning an award for the best small government website in America. This is opportunities that we should be seeking, not seeing this necessarily as problems.

In this case, the Flagler County Commission ended up spending \$15,700. And what I find disappointing and somewhat shocking is the alleged victim of the discrimination-- the plaintiff-- he got \$1,200 from it. The attorneys got \$14,500 in attorney's fees.

Now had the county, had other counties, had other businesses anticipated, we're vulnerable and we need to know how to make our website compatible with screen readers-- how do we make sure our website is compatible with the use of persons who are deaf or persons with mobility disabilities-- they would have saved a ton of money.

We can help you with that. And I want to just point out to you how important it is to work with your web developer and with experts in web accessibility. And we work with excellent web accessibility experts. Next slide, please.

In its settlements, DOJ has been saying, use WCAG 2.0. I recommend you comply with WCAG 2.0. Most of the internet cases with the exception of Winn-Dixie are really addressing motions to dismiss. Winn-Dixie went to trial. Winn-Dixie was found liable for having an inaccessible website and ordered to fix it and pay damages.

So, as a practical matter-- again, for all websites, I think they need to be tested, I think they need to be analyzed, and they need to be made compatible with the requirements of WCAG 2.0. Next slide, please.

These are some cases in which WCAG 2.0-- A/AA-- has been accepted by federal courts as the appropriate standard for measuring web accessibility. And there's a couple of links at the bottom for lawsuits by the Department of Justice against the Hilton Hotels. And it required them to comply with WCAG 2.0 as a condition of compliance with the settlement agreement. Next slide, please.

So what I recommend is relatively straightforward. First, talk to your web developer. Don't assume that your web developer knows WCAG, knows the ADA, or knows anything about what accessibility means. You need to have a conversation with them. Some have knowledge of it, many just don't.

And so when you're negotiating with your web developer, you really should address the ADA in your conversation and have it as part of your contract. And I can help you with that as well, but you should be addressing the ADA and WCAG 2.0 compliance in the contract with your web developer.

Create an accessibility statement-- and, again, we can help you with this if you want-- create an accessibility statement on your site. Let visitors know that if they're having difficulty getting the information from your website-- because for some reason some area the website is not accessible to them-- let them know who they need to contact by phone. Let them know where they can get the information that's available on the website through some alternative needs.

Accessibility statements are often missing from websites, but they're crucial. They're very straightforward, they're important, and I think you need to have one on your website. And then test your website for WCAG 2.0 violations.

Now, there are a number of free website testing services out there. ADAScan.com is an excellent website testing tool, but it tests through an automated system. There's no charge for it. I use it to kind of take a look at websites. Here's the problem-- one-third of all of the violations of WCAG 2.0 are not detectable by automated testing.

So even if you score a perfect score with an accessibility testing service that's automated-- and most won't, but even if you do, you're still not getting any guarantee that you're really

identifying the accessibility problems for visitors with disabilities. So we offer an assessment. We offer some testing. And then we work with you, we work with your web developer, ultimately, to help them understand what they need to do to come into compliance with WCAG 2.0.

To the degree that you use automated testing, be aware that so are plaintiffs. Their attorneys are using that same automated testing to identify violations. And that's when they see you. So my recommendation has always been-- before you get the lawsuit, before you get the demand letter, test your website using manual testing as well as automated testing and have those test results discussed with your web developer to get the web developer to fix the problems before a plaintiff runs into problems, or a plaintiff's attorney uses you as a test case. Next slide, please.

This I'm going to just skip through. These are a group of links that I urge you to take a look at that I think are helpful to the discussion about website accessibility. Some are about all New York wineries that were sued over website accessibility, some against J Crew, Build-a-Bear, and some other articles about hotels and ADA compliance. Let's go to the next slide, please.

Now I briefly want to talk about ADA and architecture. I want to go through this very quickly because I want to leave some time for questions. I want to highlight some important things for you to be aware of as we're going through this. First, the ADA standards for accessible design are federal standards in Title III of the ADA. They are not state building codes. They're different from your state building codes.

You have to comply with the federal ADA standards for accessible design to avoid violating the ADA federal civil rights law. Your state building codes may be very similar to, or even in some areas better than, federal ADA standards, but you really need to have somebody with expertise in the ADA standards on your side.

You should know that, generally speaking, new construction has to strictly comply with the federal ADA standards. Altered properties-- those areas that are altered have to be in compliance with the ADA standards and trigger other requirements for the altered area, including a path of travel to the altered area that many architects or building code inspectors miss. So I want to highlight for you that if you've altered your property, you need to speak to somebody about how the ADA applies.

All buildings are covered, regardless how old they are. Historic properties are covered, all

existing properties are covered-- there's no grandfather clause in the ADA. And for barrier removal in existing properties, you have a standard called Readily Achievable Barrier Removal, which the Justice Department has defined as that which is easily accessible with minimal difficulty and expense. And that's an important concept.

So you're looking at potential litigation even if you have a property that was built in the 1950s. You still have potential barriers there that could have been removed, should have been removed, have not been removed, and they subject you to either a Justice Department investigation or a federal lawsuit.

Relying on state building inspectors, county building inspectors has its limits, because many of them work off of state building codes and are not familiar with federal ADA standards. The same problem exists with some architects who are not particularly experienced with federal ADA standards. That can be a problem.

Some properties that are brand new-- I know of one property that was brand new-- brought in another architect and guess what? The new architect said, you've got violations here. So you have to have conversations with your architects about their expertise and experience in the ADA standards.

And one of the things that I try to offer with ADA expertise consulting is we work with architects across the country who have experience and expertise in the ADA-- if we can be of help, we'd like to talk with you. Next slide, please.

I wanted to point out that the Hilton Hotels in 2010 settled an investigation with the Justice Department, and they highlighted the following. They didn't design and construct the hotels in compliance with federal ADA standards. They failed to provide reliable, accurate information about the accessible features to its reservation system. It failed to disperse the accessible rooms among the various classes of rooms. It failed to provide the required number of accessible sleeping rooms and roll-in showers. It failed to provide services and accessible rooms to individuals who were deaf and hard of hearing.

It failed to provide accessible signage and failed to comply with the ADA standards for protruding objects. Now why do I highlight this? Because that should have never happened. You'd think the architect who helped them design this would have known enough about the ADA standards to know about all of these requirements and not create all of these violations that came to the attention of the Justice Department. That's what we want to help you avoid.

We don't want you investigated by the Justice Department. Next slide, please.

The new standards for architecture came into effect on March 15, 2012. Here's some information about it of where you can both find the standards and find some guidance about the standards. Next slide, please.

I wanted to highlight for you something you may not have heard of, which is the Department of Justice's certification program. The Justice Department in 1992 when the ADA took effect began the process of offering a certification program to the states. Because they recognized state building codes are the building blocks for making buildings accessible.

So they went through very, very carefully every state's building code that was requested to be reviewed. And they made them change the building codes state by state to be in compliance with what the ADA standards required or have enhanced requirements for accessibility. And then they certified that those local codes were, in fact, certified by the Justice Department as being as good as or better than federal ADA standards.

The value of this is it allows building code officials, when the code is certified, to be in a better position to ensure that you're also compliant with the ADA. But be aware-- the enforcement mechanism for the ADA is not in the control of state or local building code officials. They have no jurisdiction over the ADA. If a lawsuit is filed, compliance with a certified code may be offered as rebuttable evidence of compliance with the ADA. So it is valuable.

But you want to be very careful here in talking with your architect about how they are relying on the ADA standards-- which, again, just changed. So you want to be sure they're familiar with them. And you can't always rely on the representations of your state building code officials, because they also are not really working with the federal ADA standards, just the state building code. Next slide, please.

Design and construction under state and local building codes complies with the ADA, again, only when they provide accessibility that is the same as the ADA standards or exceeds the ADA requirements. And, again, state codes are the responsibility of state and local officials, but they don't have the authority to enforce the ADA. Next slide, please.

I want to highlight that the ADA is a federal civil rights law, it's not a building code. It's investigated by the Justice Department by the Civil Rights Division where I used to work. It's also enforced by private litigation, and they can-- as I earlier mentioned-- issue civil penalties



of \$75,000 for the first offense and up to \$150,000 for each subsequent offense. There's an information line in a website from the Department of Justice that I urge you to take a look at. Next slide, please.

This is, again, just emphasizing the importance of your architect being familiar with the ADA standards. I just want to quickly go to some common architectural violations-- Pool lifts-- pool lifts are required if readily achievable to do so. It's also required in new construction.

So if you have a hotel, a resort, a swim club, you have to remove the existing barriers in the existing pools to the extent it's readily achievable to do so, and that includes putting in a pool lift. Next slide, please.

So on the pool lifts-- I just want to point out I put a link on that previous slide that gives you a great deal of detail from the Justice Department about pool lift requirements. And I urge you to take a look at it. Parking lot issues is also a common area of both investigation by the Justice Department and litigation by private litigants. If you're re-striping your parking lot, it's going to trigger ADA requirements. You have to be accessible parking space on the shortest accessible route to the accessible entrance.

There are requirements that you need to be aware of for parking. They're all highlighted in the ADA standards for accessible design, and they're highlighted in the technical assistance from the Department of Justice. I've given you links to those. I urge you to take a look at them. And, as you are budgeting for your parking lot, make plans for how you're going to ensure compliance with the ADA. Next slide, please.

You want to look at the path of travel from the parking lot. You want to point out alterations-- again, they require you to address the path of travel requirement and you have to spend up to 20% of the cost of the operation on the path of travel. So that's an additional budget you need to think about. You have to look at whether your front desk is accessible to a guest in a wheelchair.

When you're looking at accessible rooms, you want to look at the positioning of your grab bars, mirrors, doorknobs, and dispersal of accessible rooms-- roll-in showers or tubs. What I want to highlight for you here is that the ADA guidelines talk very clearly about where grab bars have to be, how they are set up within the bathroom, what issues you need to be aware of as you are altering your property, building your property new, or removing barriers.

And I'm giving you some links here that I think is good, helpful starts for you to look at common violations that ADA litigants look at. Next slide, please. Dispersal requirements-- many hotels violate this without even thinking about it-- to provide persons with disabilities a range of options equivalent to the options available to other persons served by the hotel. The standards obligate hotels to disperse their accessible rooms among the various classes of sleeping accommodations available.

Factors to be considered include room size, cost, amenities provided, and the number of beds provided. Can't tell you how many times hotels have gotten into trouble with the Justice Department and with private litigation because they put all of a certain room type. They did not disperse the accessible features among all room types. So they'll say, yeah, we have an accessible room, it's in our suite. Yes, we have an accessible room, it's in this room type.

Well the standard set out depending upon the number of rooms you have available at the hotel, it tells you exactly how many accessible rooms and what the features of those accessible rooms have to be. And you have to disperse them among the different types of rooms that you are providing-- again, room size, cost, amenities provided, the view, number of beds.

You can't just say, we have accessible rooms in this price. It has to be dispersed through a range of options. Many hotels, even brand new hotels, violate this provision of the ADA. And this is a very easily targeted area for ADA litigation or Justice Department complaints. So I urge you to talk any further about this. This is a really crucial thing to understand. Next slide, please.

OK, basically, you can reach me at this contact information. I urge you to do so. Next slide. And then feel free to use it. Next slide. And we also have a listserve and a newsletter that we urge you to think about subscribing to. I have it as 3 o'clock. I don't think I've left you very much time for questions, but that's all I have on my PowerPoint. I tried to go to it as quickly as I can. Could you please begin asking questions?

**JACLYN LEDUC:** Yeah, thank you so much Marc. We're getting ready to begin the Q&A. We have a few questions. So we'll take a few minutes to answer those. The first question is, what if the guest is lying about the service animal? How do we identify?

**MARC DUBIN:** It's an excellent question and a very important question. So let me answer it this way-- I would not start with assuming they're lying. Be aware that your staff should be trained to know that

any dog, any breed, any size, any weight can be trained to individually assist a person with a disability.

Individuals may have disabilities that are not readily apparent-- post-traumatic stress disorder, autism, diabetes-- all of those disabilities have had dogs trained to assist them with their disability. Epilepsy, seizure alert dogs-- if the dog is trained to individually assist the individual to perform a task related to their disability or provide a service related to their disability, they are covered and protected under the ADA.

If you are not sure whether it's a service dog or it is not a service dog, you have to do what you have to do on all situations with service dogs. You only get asked two questions-- as frustrating as it may be, you can ask them is that dog needed because of a disability? You are not entitled to ask what the disability is. If they say, yes, you are then allowed to say, OK, what is your dog trained to do? What task is it trained to perform, what service is it trained to provide. That's it.

And then they have the answer. And they may say, it's trained to lick my face when I get upset. It may be trained to pick things up when I drop them. It may be trained to alert me to a seizure. It will pull on the leash. The answer you get there, you have to accept. You're kind of, I'm sure, frustrated when you get that response, but that's the reality of the Justice Department's position on it.

Now how do you protect yourself? One, it has to be under control at all times. So it has to be on a leash unless the disability itself prevents them from holding a leash. So first thing to do is make sure that when that guest comes in, that the dog is on a leash and make sure they know it has to stay on a leash.

Let them know it has to be with them 24 hours a day. They can't just check into your hotel, leave the dog in the room, and go to the pool-- or go down to the beach. They have to take the dog with them. They cannot leave it alone. Same within a restaurant-- [INAUDIBLE] have to have it under control and behaved. [INAUDIBLE] you have the right to tell them that it's [INAUDIBLE] the one-bite rule. You get to ask them to fix the problem.

If they cannot get the dog under control, then you are allowed to ask them to remove the dog from the premises. You have to invite them back in without the dog, but you can say, that dog is out of control, you're not going to be able to get it under control, the dog has to leave the premises.

It also has to be trained. Should the dog poop or pee on anything, you cannot charge a fee for cleaning up after the dog. You can charge them if they damage the property as long as you have a damage fee policy for other guests as well. Does that help?

**JACLYN LEDUC:** Yes, thank you, Marc.

**MARC DUBIN:** Take a look at the questionnaire, the quiz. It will help you understand this, and I can help you further. Go ahead, next question, please.

**JACLYN LEDUC:** Yes, so the next question is-- WCAG 2.0 is the current standard as of June 2018. Are you seeing any lawsuits that are insisting upon that as a standard for evaluation?

**MARC DUBIN:** Could you repeat that one more time, please?

**JACLYN LEDUC:** The question is-- WCAG 2.1 is the current standard as of June 2018, are you seeing any lawsuits that are insisting upon that as the standard for evaluation?

**MARC DUBIN:** No, I haven't, but I know that one of the participants in this call who was scheduled to be on the call Ken. If Ken Nakata is on the call, maybe he can assist with that question. No, I haven't, but I think you're safe harbor continues to be 2.0.

**JACLYN LEDUC:** OK, great.

**MARC DUBIN:** Go ahead.

**JACLYN LEDUC:** So we have a couple more questions. The next one is-- what should be included in a good web accessibility statement?

**MARC DUBIN:** You should include, first of all, recognition that you are trying to ensure compliance with WCAG 2.0-- that that is your goal and that is your effort. Two-- that you make sure they understand that some guests are going to have problems with their website and that if they experience a problem, you should give the name and contact information of somebody on staff who they can call directly and have a conversation with. Give that contact information on that web accessibility statement.

Three-- you should make sure the web accessibility statement is prominently displayed-- not hidden somewhere where they can't find it. There's a lot of website accessibility statements that are very brief and cover the minimal aspects of what you should have. What I would urge

you to do is give me a call. I can talk with you about it. It doesn't take a great deal of time or effort for me to write one for you, and I would try to make it as complete as possible based upon your needs.

But the three things you absolutely should have is a recognition that you're trying to do a WCAG compliance, who they need to reach and how to reach them. Part of the reality is that stuff on the web is accessible 24 hours a day.

If you're having trouble getting that information from the web because of inaccessibility, you need to be able to give them an alternative that works for them-- whether it's a front desk staff person-- if you have a front desk that's staffed 24 hours a day. But you want to make sure that what you're really trying to do here is provide the information in an alternative way than the website if you don't believe your website is really accessible.

I've done a lot of automated testing of hotels around the country, and I haven't found one, frankly, that has not had violations. The concern I have then is what are those conversations with web developers that resulted in those websites being identified as a violation of WCAG 2.0 simply by using ADAScan.com-- a free website scan device.

It seems to me that the issue is going to get worse and worse as more and more litigation occurs. Just the numbers that I showed you earlier highlight how important it is to do the right kind of testing of the website and discussion with web side developers and putting information in your contracts about website accessibility.

At the end of the day, I see it this way-- if you have an architect who designs and constructs your building, they have to design and construct it not just in compliance with state building code, but design and construct it in compliance with federal ADA standards. I see websites, frankly, quite the same way.

If they're going to design and construct your website, they need to design and construct it in compliance with WCAG 2.0. Now even if there is a dispute among the circuits about the applicability of that, it's a safe harbor. If you have made a good faith effort to comply with WCAG 2.0 and you've got an accessibility statement that allows guests to have an alternative way of getting the information, then even if you are sued, you're in a much better position to turn back to the architect, turn back to the website developer and say, in my contract, you agreed you would build this in compliance with the ADA and WCAG 2.0 or with the ADA standards for accessible design for architects.

I'm now being sued because it doesn't appear you did that. So we need to talk. And that's why I suggest this needs to be one of the priorities in the discussions with both architects and website developers.

**JACLYN LEDUC:** Great, thank you, Marc. We have time for one more question. So the question is-- does the readily achievable standard also apply to websites?

**MARC DUBIN:** Yes. Essentially, it does. But what you really need to look at there is that the expense of fixing a website-- just like with buildings, it's an ongoing obligation. Let's assume you've built a website and the website is now updated as they should be constantly.

Is the new update accessible? Does the code that's behind the website that is supposed to be accessible to somebody using a screen reader-- is the new information accessible? So on an ongoing basis-- just like barrier removal on an ongoing basis is required-- you really need to be testing your website on an ongoing basis as you update information.

In most cases, once the website developer has the test results from the manual testing and the automated testing and the testing using adaptive equipment-- which is what we try to do for clients-- once you have that in hand, have the discussion with your website developer. As they put new content onto the website-- like a new photograph or new video-- they're going to know from the previous testing results and the previous remediation discussions that they should not make the mistake that they made the first time again.

They should use the remediation that they used to fix the problems the testing results provided to them that we discussed with them to ensure on an ongoing basis that that website is accessible. Now, at some point, the readily achievable barrier removal argument is really a basis for saying, I can't afford more than this.

But, at the end of the day, once you've got the website designed in such a way that it works for the message that you're trying to provide, then you're really talking about having your website developer trained and educated about WCAG 2.0 and how to build a website accessibly. And that's what really has to happen here to make any significant difference.

**JACLYN LEDUC:** Great. Thank you, Marc. That's all the time we have for today. Thanks, everyone, for joining. And thank you to Marc for a wonderful presentation.

**MARC DUBIN:** Thank you for offering me the opportunity to be of assistance here. If anybody has any

questions, feel free to call me or email-- happy to get back to you.

**JACLYN LEDUC:** Great, thanks, Marc.

**MARC DUBIN:** My pleasure, thank you. Bye bye.

**JACLYN LEDUC:** Bye bye.