



Website Accessibility: What you need to know

Presented by

Matthew S. Kenefick

April 28, 2022

Matthew S. Kenefick is a partner at Jeffer Mangels Butler & Mitchell, LLP. Matt's practice areas include litigation, real estate and operational compliance. Matt has handled hundreds of accessibility litigations and website remediations

Program Outline

1

1. The ADA and Correlating State Laws
2. Visual Accessibility on Websites
3. Communicative Accessibility on Websites
4. Reservation System Accessibility on Websites
5. Emerging Trends

JMBM

Jeffer Mangels
Butler & Mitchell LLP

jmbm.com

1. The ADA and Correlating State Laws

Introduction and History of the ADA

- *The Americans with Disabilities Act of 1990* (the "ADA") affords civil rights protection to individuals with disabilities similar to that provided to individuals on the basis of race, color, sex, national origin, age and religion
- The ADA guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services and telecommunications
- The scope of the ADA is broadly construed, and extends to just about any facility that a member of the public can access
- Intended to provide guidelines to enable the provision of full and equal access



Title III of the ADA

Title III of the ADA requires “**public accommodations**” (*i.e.*, any place doing business with the public) to provide **full and equal access** to goods, services, privileges and facilities

Shopping centers, retail stores, restaurants, banks, hotels, law firm offices, office buildings, movie theaters, museums, golf courses and most websites



Policies Procedures and Practices

Public Accommodations must make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities (28 CFR § 36.302)

- guest must make request and then public accommodation must consider and accept/reject it
- DOJ catchall

Auxiliary Aids And Services

A public accommodation must provide, at no cost, auxiliary aids and services reasonable necessarily to achieve effective communication

- *examples*: Braille statements; qualified interpreters; notetakers; videotext displays; accessible electronic and information technology; screen reader software; magnification software; optical readers *etc.*
- Public accommodation decides which auxiliary aids and services to provide (*c.f.* Title II – “primary consideration”)

California Accessibility Laws

- **Unruh Civil Rights Act** – Civ. Code §§ 51 et seq.
Violation of ADA is a violation of Unruh Act
\$4k min. per incident statutory damages
 - difficulty, discomfort or embarrassment
 - deterred visit
- **Disabled Persons Action** – Civ. Code §§ 54 et seq.
\$1k per incident statutory damages
- Section 11B of Title 24 of the California Building Code *vs.* ADAAG
Distinctions (*e.g.*, Westernized Braille, counter height, ATM scoping)
- Broader definition of “disability” – **substantial** limitation on daily life activity

JMBM

Jeffer Mangels
Butler & Mitchell LLP

jmbm.com

2. Visual Accessibility on Websites

Web Accessibility

- **World Wide Web Consortium (W3C)**
 - The main international standards organization for the World Wide Web Consortium (“WAC”)
 - Use of screen reader software to highlight text and alternative text for images
 - Use of voice recognition software
- W3C generated the **Web Content Accessibility Guidelines 2.1 A and AA Success Criteria (WCAG)**
 - The leading set of web accessibility guidelines used by government agencies and authoritative entities

Web Accessibility

Uncertainty in Standards

- 12/26/17 – withdrawal of ANPRM re WCAG
- Consent decrees and enforcement proceedings
- Amicus briefs
- *Robles v. Dominos* (9th Cir.) – WCAG non-conformity can be a manifestation of non-compliance and an equitable remedy
- *C.f.* March 18, 2022 guidance (discussed *infra*) “(T)he Department has consistently taken the position that the ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.”



Website Accessibility Policies

Policies Which Promote Accessibility

- Have adequate consistent policies across all business channels to receive and respond to disabled access complaints
- Have channels for customers to make accommodation requests
- Have policies in place advising employees to accommodate disabled customers and guests
- Provide training to employees to know how to recognize and accommodate disabilities
- Have policies which, if viewed from an outside agency or court, demonstrate a business' commitment to accommodating its customers with disabilities



Web Accessibility

- **Anatomy of an ADA website claim**
 - Easy to test/file
 - Automated testing/vs. usability
 - Often target entire enterprise (common development team)
 - Offshore development/contractors
 - Most development teams lack capacity to achieve conformity
 - Claims often have bootstrapped damage claims
 - Holiday code lock
 - Third-party content procurement
 - Public facing web access policies
 - Remedial access vendors



3. Communicative Accessibility on Websites

Communicative Access

1.2.2 Captions (Prerecorded): Captioning for prerecorded audio content in synchronized media, except when the media is a media alternative for text and is clearly labeled as such. (Level A)

- Captions are not needed when the synchronized media is, itself, an alternate presentation of information that is also presented via text on the Web page
- WCAG not standard -- achieving “Effective Communication” through auxiliary aids and services of public accommodation the standard per 28 CFR § 36.303
- Best practice: “No sound is used in this clip” – note 1.2.3 (Level A) requires audio for prerecorded video content
- *C.f.* 1.2.4 for live audio content (Level AA)

JMBM

Jeffer Mangels
Butler & Mitchell LLP

jmbm.com

4. Reservation System Accessibility on Websites

Reservation Systems

28 C.F.R. § 36.302(e)

- Accessible guest rooms need to be able to be reserved during the same hours as standard rooms.
- Accessible guest rooms need to be able to be reserved in the same manner as standard rooms.
- The website needs to identify and describe the accessible features in the hotel and the guest rooms.
- The hotel should to have a policy that accessible guestrooms are held for use by persons with disabilities and only rented last.

Reservation Systems

- **Sept. 15, 2010 DOJ Guidance regarding hotel reservation systems**
- For hotels built in compliance with the 1991 ADAAG:
 - Specify the hotel is accessible
 - For each accessible room, describe:
 - The room type (e.g., deluxe executive suite)
 - The size and number of beds (e.g. two queen beds)
 - The type of accessible bathing facility (e.g. roll in shower)
 - Communications features available in the room (e.g. alarms and visual notification features)

Reservation Systems

Guest Room Mobility Accessible Features:

- Accessible doors and doorways (at least 32-inches of clear width passage)
- Accessible bathrooms and features, including shower/tub
- Accessible room controls (e.g. HVAC and lighting)

More Amenities —

Public Space ADA Accessible Features:

- Accessible parking spaces and signage (car and van)
- Accessible parking space that is 96-inches wide with an appropriate access aisle
- An accessible route that allows for approaching and entering the hotel
- An accessible lobby entrance door
- Accessible table in eating area

- Approved in in *Garcia v. Best W. Norwalk Inn*, 2021 U.S. Dist. LEXIS 180465 (CD Cal. June 14, 2021)
- See also *Lammey v. JNZ Hospitality, LLC*, 2021 U.S. Dist. LEXIS 183606 (ED CA 9/23/2021) (Judge Shubb summarized at Footnote 2 the 70+ cases in which District Courts have granted motions to dismiss based on the DOJ guidance)
- On appeal in 9th Cir. *Garcia v. Gateway Hotel L.P.*, No 21-55227; *Garcia v. E.L. Heritage Inn of Sacramento, LLC*, No. 21-15674

JMBM

Jeffer Mangels
Butler & Mitchell LLP

jmbm.com

5. Emerging Trends

Emerging Trends

- **On March 18, 2022, DOJ Issued Web Accessibility Guidance Under the ADA**
 - Best practices and common issues
 - “(T)he ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.”
 - “(t)he ADA’s requirements apply to all the services, programs, or activities of state and local governments, including those offered on the web.”
 - Refers to WCAG
 - *Available at:* <https://beta.ada.gov/web-guidance/>

Emerging Trends

- **Federal Circuits disagree on whether and to what extent websites are covered public accommodations under the ADA**
 - Third Circuit and (as of 2021) the Eleventh Circuit, have held that the ADA does not apply to websites because it applies only to physical spaces; *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998); *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021).
 - First, Second, and Seventh Circuits (minority view) have held that websites are places of public accommodation under the ADA. *Carparts Distri. Ctr. v. Automotive Wholesaler's*, 37 F.3d 12, 19-20 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.* 179 F.3d 557, 559 (7th Cir. 1999).
 - The Ninth as well as the Sixth Circuits have taken an intermediate position and held that websites are covered by the ADA where there is a “nexus” between the website and a physical place of public accommodation. *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905-906 (9th Cir. 2019).

Emerging Trends

- **California State Courts –**
 - *Thurston v. Midvale Corp.*, 39 Cal.App.5th 634 (2019) - first CA appellate decision on the ADA website-accessibility issue
 - Affirmed Summary Judgment against restaurant on grounds that its inaccessible website discriminated against blind customers under Unruh Act
 - Ordered restaurant to pay \$4,000 in statutory damages and conform website with the WCAG level 2.0 AA (not overbroad or uncertain)
 - Websites with physical nexus are subject to ADA Title III
 - *Martinez v. San Diego County Credit Union*, 50 Cal. App. 5th 1048 (2020) held that the trial court erred in dismissing plaintiff's action at the pleadings stage based on the ADA's public-accommodation element. Websites with a nexus to a physical place of business are covered by Title III.

Emerging Trends

- **New Administration**
 - Statements of Interest (SOI) in several ADA Title III cases
 - Renewed effort to pressure businesses to make websites accessible to users with disabilities through threats of enforcement action
- **Law Firms' Websites**
 - Increasing number of claims brought against law firms for ADA violations (revisit of TRS)

Emerging Trends

- **Potential Solutions:**
 - Use of Accessibility Remediation Companies
 - Use of Accessibility Monitoring Software
 - Use of Overlay or Widgets
 - Insurance Coverage

Matthew S. Kenefick

Jeffer Mangels Butler
& Mitchell, LLP

(415) 398-8080

msk@jmbm.com

www.jmbm.com