Website Accessibility:
Top Ten Questions (and Answers) for 2020

Presentation to the National Apartment Association

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The purpose of this update is to identify select developments that may be of interest to readers. The information contained herein is abridged and summarized from various sources, the accuracy and completeness of which cannot be assured. This update is not and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.
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The Blank Rome Team

• Blank Rome has a nationally-recognized ADA Website and Mobile App Defense and Compliance Team
• We employ a multi-disciplinary approach to assist clients with compliance, litigation, and remediation
• Our lawyers have represented clients across the country facing these types of suits, and are recognized as thought leaders in this space
• We act quickly to stem the damage and limit attorneys fees, and we help counsel our clients about methods of quick website remediation (including helping with vendor selection) if that is requested
Agenda

1. What are the Laws?
2. What is Website Accessibility?
3. Are there Regulations?
4. How is Compliance Measured?
5. What is Happening in Current Cases?
6. Does this Apply to Apps?
7. What is Happening in the Apartment Industry?
8. How do These Cases Typically go?
9. How can I Prevent/Defend a Lawsuit?
10. Q&A from the Audience
1. What are the Laws?

• The Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations by any private entity that owns, leases (or leases to), or operates any place of "public accommodation."

• The Fair Housing Act protects people from discrimination when they are renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities. (Additional protections apply to federally-assisted housing.)

• Note that Federal Agency websites are governed by the Rehabilitation Act and airline carrier websites are governed by the Air Carrier Access Act.
The Americans with Disabilities Act

What is a disability?

• The term “disability” means, with respect to an individual—
  • (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
  • (B) a record of such an impairment; or
  • (C) being regarded as having such an impairment.

• An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
The Americans with Disabilities Act

• The ADA lists several types of public accommodations, but because the statute predates the internet, websites are not specifically included.

• As virtually every business entity now has web presence, the US DOJ has pursued enforcement actions against companies with allegedly inaccessible websites and mobile applications.

• In the last several years scores of private ADA enforcement actions have been filed accusing websites of being inaccessible to the blind and visually impaired.
The Americans with Disabilities Act

• In 2010, the DOJ issued Advanced Notice of Proposed Rulemaking, and then began pursuing enforcement and settlements, including several settlements in 2014-15.

• Given the importance of e-commerce, we began seeing spike in private lawsuits claiming that businesses’ commercial websites violated ADA Title III because they could not be accessed by visually impaired individuals using screen readers.

• DOJ supported various private lawsuits by filing “statements of interest” and pursued enforcement actions in this area. DOJ activity has slowed since 2017.

• In the last several years, hundreds of private ADA enforcement actions have been filed accusing websites of being inaccessible to visually impaired and other disabled individuals.
The Fair Housing Act

• The Fair Housing Act ("FHA") covers most housing.

• Exceptions include owner-occupied buildings with no more than four units, single-family houses sold or rented by the owner without the use of an agent, and housing operated by religious organizations and private clubs that limit occupancy to members.
The Fair Housing Act

• The FHA prohibits discrimination in housing because of many characteristics, including disabilities.
• How does the FHA translate to website accessibility?
  • The FHA prohibits making housing unavailable based on disabilities.
  • The FHA prohibits discriminating in the services offered to tenants or prospective tenants.
  • The FHA prohibits making privileges unavailable to the disabled.
The ADA vs. the FHA

• Private vs. Public
• Disability vs. Many Classifications
• Enforcement
• Reactive vs. Proactive
• Is it a distinction without a difference?
2. What is Website Accessibility?

- An accessible website is one that can be used by sighted people, as well as those with visual (and other disabilities).
- Accessibility includes more than blindness.
- Examples:
  - Auditory Conditions – captions for web audio content.
  - Motor Disorders – full keyboard site navigation, modify “time outs.”
  - Color Blindness – contrast or black and white.
  - Seizure Disorders – eliminate flash effects.
2. What is Website Accessibility?

Visual disability claims: visually impaired individuals use JAWS or other screen reading software/devices to access and “read” content on websites, but software does not work with defendant’s website, or only certain portions of site.

Examples:

• images cannot be “read” because of lack of alt text
• drop down menus do not work
• color-coded maps cannot be comprehended
• video not closed-captioned (hearing impaired)
Example: Lack of Alternative Text

The image below does not contain alternative text, so a screen reader would simply state to the user: “Image” because there is no text coded to tell the reader what to recite to the user. Consequently, persons with disabilities will not be able to easily understand what this box is for or if they would be interested in its content.
Example: Lack of Alternative Text

The language selection drop-down is missing alternative text, and as a result a screen reader would only read aloud “javascript:;void(0)”. Additionally, access to the language selection drop-down is not accessible via commonly accepted industry-accessible standards.
Global Accessibility Awareness Day occurs every May. It is designed to help raise awareness about barriers people with disabilities have to accessing the Internet. It encourages people to take one hour today to experience what people with disabilities encounter when accessing the Internet.

Ex. Go mouseless for an hour - use keyboard to interact with websites (tab/shift, etc.)

Ex. Try out a screen reader for an hour:

- Windows: NonVisual Desktop Access (free download)
- Mac: Built-in program called “VoiceOver”
3. Are There Regulations?

There is a great deal of uncertainty in this area about: (1) what to do if you are sued or receive a demand letter, or (2) if you have not been sued, how to reduce the risk that you will be and limit exposure.

Reasons for this uncertainty:

• The ADA was enacted before Internet being used and says nothing about websites.

• There is a split among the courts and Circuits regarding whether/when ADA applies to a website and when a claim can be stated arising from problems a disabled person has accessing a website.

• No government rules or guidelines exist.
State of Uncertainty

• The ADA only talks of physical spaces and accommodations in 12 categories.
• Split among courts involves whether a “nexus” is required between a website and a physical space/location.
• The DOJ had announced it would be issuing rules in this area but in December 2017 withdrew them entirely.

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State of Uncertainty

• This lack of government action is seen as the main reason behind the explosion of these cases, because it is unclear as to what it takes for a website to be “accessible” for ADA purposes.

• Most legal and industry experts were expecting the DOJ rulemaking process to result in the issuance of rules adopting guidelines promoted by the World Wide Web Consortium (W3C) as the minimal standard needed to make a website ADA complaint.

• WCAG 2.0
Legislative and Regulatory Vacuum

- A proposed ADA Education and Reform Act of 2017 did not make it to a final vote in Congress.
- In late 2017, the DOJ officially abandoned its stagnant plan to issue website accessibility regulations.
- Industry and government pressure on the DOJ led to a September 2018 letter confirming that the ADA applies to websites as “places of public accommodation.”
- The DOJ failed to endorse WCAG 2.0 – or any other set of guidelines, as the standard.
- No further action is anticipated in the short term.
Some Preliminary Initiatives

• U.S. House passed bill requiring notice and cure period, but regarding “drive-by,” not “surf-by” ADA lawsuits.

• Some states are trying to step in where the federal government has failed to act.

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Geographical Differences

Different states and circuits treat these claims differently

- California
- New York
- Pennsylvania
- Florida
- Arizona
- Elsewhere
Companion State Law Claims

• Generally, state law disability claims mirror federal ADA claims.

• Several key differences, primarily in what relief/damages (if any) are available.

• Each state is different, but the NY Human Rights Law permits recovery of money damages and civil penalties.

• California – Unruh Act (also permits statutory damages)
New York’s Human Rights Law (State and City)

- New York State Human Rights Law (“NYSHRL”) and New York City Human Rights Law (“NYCHRL”)

- NYSHRL - Statutory penalties, attorney fees, costs, and injunctive relief ($100-$500) “for each and every violation”
  - Plaintiffs sue for $500 per instance

- NYCHRL - damages, including punitive damages, and for injunctive relief

- Have not yet seen damages awarded for website accessibility under either statute
  - But plaintiffs include tag along claims under these statutes

- A violation of the ADA is a violation of NYSHRL and NYCHRL

- NYCHRL is broader than ADA or NYSHRL
  - Extends to “provider of public accommodation” not just places of public accommodation
  - Courts must analyze NYCHRL claims separately and independently from any federal and state law claims -- even if challenged conduct not actionable under federal and state law, federal courts must consider separately whether actionable under the broader New York City standards
California’s Unruh Civil Rights Act

• A violation of the ADA is a violation of the Unruh Act
• Extends to “business establishments,” not just places of public accommodation
• Backward-looking
• Intentional discrimination required for Unruh Act claim independent of any ADA violation
• Statutory penalties, attorney fees, costs, and injunctive relief
4. How is Compliance Measured?

• There is no comprehensive standard
• As a result, many businesses – and courts – look to the Web Content Accessibility Guidelines
Web Content Accessibility Guidelines

• The World Wide Web Consortium (W3C) develops international standards for the web.
• The W3C Web Accessibility Initiative (WAI) develops standards and support materials to help people and businesses understand and implement accessibility.
• W3C provides resources to make websites, applications, and other digital content more accessible.
• In addition to resources, the W3C drafts and maintains suggested guidelines for website accessibility.
Web Content Accessibility Guidelines

• The guidelines provide instructions and specifications for web developers to design/modify websites for people with visual disabilities.

• They are *recommended* international web standards.

• But they have been widely accepted and followed, including by various courts.

• The guidelines have no independent legal significance but are often used by litigants as a means to measure website remediation.
Web Content Accessibility Guidelines

Web accessibility relies on several components:

- **Web content** - refers to any part of a website, including text, images, forms, and multimedia.

- **User agents** - software that people use to access web content (browsers, smartphone browsers, multimedia players, plug-ins, and some assistive technologies).

- **Authoring tools** - software or services that people use to produce web content.
Web Content Accessibility Guidelines

The components work in concert:

• Web content needs to include accessible alternatives for visual components, such as text.
• This material must then be processed by a user agent like a browser, and then conveyed to an assistive technology like a screen reader.
• This process can only be accomplished with the help of authoring tools designed to foster accessibility.
5. What is Happening in Current Cases?

- There has been a tremendous increase in the number of cases being filed accusing companies that operate business websites of violating the ADA.
Recent Explosion in ADA Litigation

• High increase of cases particularly in New York City, California, and the Southern District of Florida.
• No industry is safe – any entity with a website is at risk.
• Websites promoting luxury apartments sales and rentals have not been spared.
A Recent Explosion in ADA Litigation

• Over the last 4 years, there has been an explosion in the number of cases being filed accusing companies operating consumer-facing websites of violating the ADA.
  • 2016: 262 cases
  • 2017: 814 cases
  • 2018: 2314 cases
  • 2019: 2235 cases
• High increase of cases particularly in New York and Florida.
• A fair number of cases in Pennsylvania and Massachusetts.
• In California, many state court actions filed as well.
• Consumer-facing websites in many different industries are being targeted, including retail, hospitality, quick service restaurant, and banking.
A Recent Explosion in ADA Litigation

- Leveling off is good news
- But leveling off at this level is bad news
- Companies are being hit multiple times
- A recent study from Usablenet showed that 21% of defendants sued in 2019 were sued multiple times that year
- And a recent snapshot showed that nearly 50% of recent cases are against defendants who had been sued previously
6. Does this Apply to Apps?

• Yes. Apps also need to be accessible.

• iPhones and Android devices have built-in screen reader functionality and other accessibility plug-ins.

• If you have a mobile app, it needs to work with that software (Voiceover – iPhone, Talkback – Android)

• WCAG standards have been applied to apps as well, but there is no magic bullet.
Mobile Apps Are Being Targeted

- **Robles v. Domino’s Pizza, LLC, 913 F.3d 898 (9th Cir. 2019)**
  - Dominos petitioned the Supreme Court of the United States for review, but the Court declined to hear the case
- **Reed v. 1-800 Flowers.com, (E.D.N.Y. 2018)**
- Most mobile app lawsuits have settled early, before the courts have issued decisions
Mobile Apps Are Being Targeted

- New WCAG 2.1 Accessibility Standards add app-specific guidelines:
  - Display Orientation
  - Pointer Gestures
  - Motion Actuation

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7. What is Happening in the Apartment Industry?

• The Apartment Industry has not been immune.
• According to Usablenet:
  • Real estate agencies and properties are the sixth most commonly targeted businesses in website disability discrimination cases.
  • The hospitality industry is fourth.
• Considering these two together, only the retail industry is sued more.
7. Why Target Apartments/Hospitality?

- Proliferation of customer-facing websites
- Sites are complex and thus difficult to keep accessible
- Many businesses have multiple websites, which adds to settlement value
- Plaintiff’s lawyers are used to suing these entities for physical accommodation cases
  - They know the players
  - They think these businesses will settle easily
7. What is Happening in the Apartment Industry?

• In July of 2018, Aimco Properties, L.P. ("Aimco"), a real estate investment trust that owns apartment properties in multiple states and the District of Columbia, was sued in the Southern District of New York in connection the Aimco website that promotes its luxury rental units in New York City.

• The same serial plaintiff (and lawyer) filed identical complaints against apartment building owners in the popular neighborhoods of Long Island City, New York and Bushwick, Brooklyn.

• Each such complaint includes similar allegations describing the defendants’ connection to the websites.
Examples of Allegations in Apartment Housing Industry Cases:

A. Defendants own and manage buildings throughout the United States, including [the Building], located at [Address]. They rent within these buildings, studio apartments, and apartments with one or more bedrooms.

B. Defendants’ Website is heavily integrated with their building, serving as its gateway. Through the Website, Defendants’ tenants and prospective tenants are, inter alia, able to: learn information about [the Building], including its location, apartment features and building amenities; view images and floorplans of the apartments; learn about the neighborhood; and search availabilities through a third party website.

C. It is, upon information and belief, Defendants’ policy and practice to deny Plaintiff and other blind or visually-impaired users access to their Website, thereby denying the facilities and services that are offered and integrated with their apartment building. Due to their failure and refusal to remove access barriers to their Website, Plaintiff and visually-impaired persons have been and are still being denied equal access to Defendants’ apartment building and the numerous facilities, goods, services, and benefits offered to the public through their Website.
8. How do These Cases Typically go?

• Pick an area of focus (by industry, geography, etc.)
• Compile a list of participants in the category
• Compile a list of websites for those participants
• Run a software accessibility-checking tool on the website(s)
• (Maybe) follow up with a manual review
• Send a demand letter/draft complaint
• Await responses
• Settle or sue
• Repeat
• Vast majority of cases settle in early stages.

• Only one case has gone to trial (Winn-Dixie, Florida), resulting in an order of WCAG 2.0 compliance.

• A few cases have been dismissed in certain jurisdictions (although most have been reversed/reinstated on appeal).

• Initially, most brought as individual actions, but recently many more as class actions.

• Most of these cases settle in the early stages.

• Most settlements are confidential

• However, some believe memorializing settlement through a consent decree will help deter subsequent lawsuits asserting same claim(s)
Unintended Consequences

Lawsuits can actually impede accessibility:

• In Florida, due to lawsuits against cities and counties, local governments are removing content from their sites because they cannot easily get them into compliance.

• Businesses have considered reducing their web offerings – or even taking down websites altogether.

- Assess whether websites are accessible to screen reading software/devices, etc.
- Take necessary steps to make websites accessible.
- Determine whether to conduct remediation in-house, or through an outside consultant.
- Develop and post on website an Accessibility Policy.
- A compliant website is good business, access to a business website for the largest number of people is a good thing.
Key Takeaways – Best Practices

• Consider a “hotline” (and email address) for people to call (or email) if they experience accessibility issues.
• Don’t overlook mobile apps you may offer.
• Make sure any third parties who run or contribute content to portions of website make their content accessible.
• Obtain indemnification, warranties, other helpful clauses in contracts with website developers, managers, other vendors.
• Keep on-line job application
A few Words About Vendors

• Various price points
• Scalable solutions
• Automated evaluations
• Manual testing
• Certifications of compliance
• Indemnification
• Third party liability
• Ongoing maintenance
A few Words About Insurance

- Policies do exist to cover web accessibility lawsuits
- Coverage may be available under existing general liability or umbrella policies as well
- Blank Rome’s Policyholder Practice is a valuable resource in this area
- If you get sued, do not forget to check for coverage
• Generally recommended that companies take what steps are necessary to make their websites accessible.

• Good business—want everyone to access site.

• Will reduce if not eliminate exposure for future claims, lawsuits.

• If sued and settle and as part of settlement agree to update site and bring it into compliance, will have a mootness argument if sued again.

• Consider strategies for giving plaintiff’s counsel “gatekeeper” role to combat copycats.
Final Points

• Remediation is Paramount
• Defenses Exist
• Pursue an Effective Settlement
• Inaction Can be Costly
10. Audience Questions
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