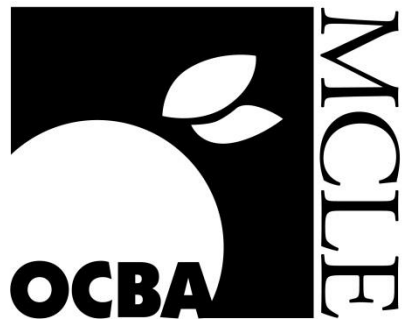

ORANGE COUNTY BAR ASSOCIATION

BUSINESS & CORPORATE LAW

SECTION WEBINAR

Website Accessibility Discrimination Claims: Navigating
Compliance and Defending Claims



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Website Accessibility Under ADA and California Disabled Persons Act: Navigating compliance and defending claims.

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Overview of ADA

- ▶ The “ADA” is the federal law known as the “Americans with Disabilities Act”
- ▶ Enacted July 26, 1990
- ▶ Codified into law at 42 U.S.C. §§12101 *et seq.*

Note: California imposed accessibility requirements prior to enactment of ADA found in Title 24 Cal. Code Regs

Overview of ADA

▶ Stated Purposes of ADA:

- ▶ “To provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities.”
- ▶ “To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”
- ▶ “To ensure the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities.”
- ▶ “To invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”

(42 U.S.C. § 12101(b).)

Overview of ADA

▶ ADA (Substantive) Subtitles

▶ Title I: "Employment"

- ▶ 42 U.S.C. §§ 12111-12117
- ▶ Applies to Public and Private Employers

▶ Title II: "Public Services & Programs" Offered by Public Agencies

- ▶ 42 U.S.C. §§ 12131-12165
- ▶ Applies to All Public Entities (Except Federal Agencies)

▶ **Title III: "Public Accommodations and Services Operated by Private Entities"**

- ▶ **42 U.S.C. §§ 12181-12189**
- ▶ **Only Applies to Private Entities**

Overview of ADA

- ▶ “No individual shall be discriminated against on the basis of disability ***in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations*** of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” (42 U.S.C. § 12182(a).)
- ▶ ***In other words: if you make it available to the general public, you have to make it available to the disabled***



Overview of California Disabled Persons Act

- ▶ Civil Code §§ 54 et seq.
- ▶ *Prohibits discrimination on the basis of disability to “accommodations, advantages, facilities, medical facilities, including hospital clinics, and physicians’ offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), telephone facilities, adoption agencies, privates schools, hotels, lodging places, places of public accommodation, amusement, or resort, and any other places to which the general public is invited, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.” (Civ. Code § 54.1(a)(1).)*

What is a public accommodation?

- ▶ Just about any business establishment which provides goods or services to the general public is a public accommodation.
- ▶ Definition found in 42 U.S.C. § 12181(7):
 - ▶ Inns, hotels, motels or other places of lodging
 - ▶ Restaurants, bars, or other establishments serving food or drinks
 - ▶ Movie theaters, concert halls, stadiums or other places of exhibition or entertainment
 - ▶ Auditoriums, convention centers, lecture halls, or other places of public gathering
 - ▶ Bakeries, grocery stores, clothing stores, hardware stores, shopping centers, or other sales or rental establishments



What is a public accommodation? (Cont'd)



▶ Definition Cont'd:

- ▶ Laundromats, dry-cleaners, barber shops, beauty shops, travel service, shoe repair, funeral parlors, gas stations, accountant or lawyer offices, pharmacies, insurance office, medical offices, hospitals, or “other service establishments”
- ▶ Terminal, depot, or other station used for public transportation
- ▶ Museums, libraries, art galleries, or other places of “public display or collection”
- ▶ Parks, zoos, amusement parks, or other “places of recreation”
- ▶ Private schools of all education levels
- ▶ Day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, or other social service center
- ▶ Gyms, health spas, bowling alleys, golf courses, or other places of exercise or recreation



What is a public accommodation?

▶ Case Example:

- ▶ *PGA Tour, Inc. v. Casey Martin* (2001) 532 U.S. 661
- ▶ Disabled golfer sought entrance to PGA tour by using a golf cart (in lieu of walking the course as required by PGA rules)
- ▶ First issue was whether PGA offered a “public accommodation” within meaning of ADA
- ▶ **Holding:** *although not specifically enumerated, PGA tour fell within broad definition of “public accommodation” which is to be construed “liberally” under ADA*
- ▶ **Note:** *this case also addressed issue in favor of plaintiff as to whether allowing a “golf cart” exception would “fundamentally alter” the nature of the program. United States Supreme Court held it would not result in fundamental alteration.*



How is discrimination determined?

- ▶ Discrimination on its Face (Intentional Discrimination)
 - ▶ “We do not serve people in wheelchairs”
 - ▶ Not the typical type of ADA claim
- ▶ Architectural Barrier Discrimination (The Most Common ADA Claim)



Websites under federal law

- ▶ ADA only prohibits discrimination on the basis of disability with respect to public accommodations.
- ▶ The text of the ADA does not expressly apply to websites.
- ▶ But are they public accommodations?
- ▶ Split in Circuits—U.S. Supreme Court has yet to resolve.
- ▶ Congress has yet to extend ADA to websites.
- ▶ Access Board (promulgates and vets new regulations) has not adopted regulations or standards for websites.

9th Circuit's take on websites

- ▶ *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019)
 - The plaintiff was visually impaired and qualified as a “disabled person” under the ADA
 - He used software that vocalized visual information contained on websites
 - The defendant—Domino's—operated a website and app that allowed customers to order pizza's and other at-home delivery (or in-store pickup)
 - Domino's website and app was not designed in a way that allowed the plaintiff to utilize its software
 - The issue addressed in the case was whether Domino's website and app constituted a “public accommodation” under the ADA

9th Circuit's take on websites—cont'd

- ▶ Holding: Domino's website and app constituted a public accommodation within the meaning of ADA.
- ▶ Limitation on holding: only websites and apps that assist in the procurement of goods and services from a brick and mortar location constitute "public accommodations."
- ▶ Rationale: the ADA applies to places "of" public accommodation and are not limited to the sale of goods and services "at" a place of public accommodation.
- ▶ Nevertheless, websites that simply sell goods and services not tied to a brick and mortar location would not constitute public accommodations.

Federal district courts outside 9th Circuit

- ▶ The limitation in *Robles* that the website or app be tied to a brick and mortar place of public accommodation is not present in district courts in other circuits
- ▶ *Andrews v. Blick Art Materials, LLC*, 286 F.Supp.3d 365 (E.D.N.Y. 2017)
- ▶ *Suchenko v. ECCO USA, Inc.*, 2018 WL3933514 (W.D. Pa. Aug. 16, 2018)
- ▶ In these circuits, the plaintiff need not demonstrate that the website or app is tied to a brick and mortar location in order to constitute a public accommodation.
 - Amazon, e.g.

California law re websites

- ▶ Recall that in California, in addition to complying with federal law, the entity selling goods or services must also comply with the California Disabled Persons Act, which is defined more broadly than federal law.
- ▶ California Courts of Appeal and Supreme Court have not addressed whether websites are included within the scope of California's disabled persons act.
- ▶ HOWEVER, the California Supreme Court has held that websites constitute “public accommodations” in a different context.
 - ▶ *White v. Square, Inc.*, 7 Cal.5th 1019 (2019)

Distinction between “public accommodations” and “commercial facilities”

- ▶ Commercial facilities are treated identically to public accommodations if they qualify as “new construction” or “alterations”
 - ▶ Must comply with accessibility standards
- ▶ Unlike public accommodations, there is no “readily achievable” barrier removal obligation for commercial facilities that are not public accommodations

Accessibility standards

- ▶ Federal standards for accessibility are set forth in Americans with Disabilities Act Access Guidelines (“ADAAG”)
- ▶ California standards are set forth in Chapter 11 of the California Building Code
- ▶ No adopted regulations or standards for website accessibility.
- ▶ The Big Issue: How can a public accommodation be found liable for failing to implement accessibility standards in websites when the applicable government agencies have not adopted any standards?
 - *Robles* says the lack of government-mandated standards does not excuse websites from compliance. May look to guidance from private trade association standards (WCAG-Web Content Accessibility Guidelines)

Federal accessibility standards for building facilities

- ▶ Federal – ADA
 - ▶ 1991 Standards = Americans with Disabilities Act Accessibility Guidelines (ADAAG)
 - ▶ Effective date for barrier removal: July 1992
 - ▶ Some additions in 1994
 - ▶ 2010 Standards = ADA Standards for Accessible Design (ADAS)
 - ▶ Effective date: March 15, 2012 for new construction, alterations and barrier removal
 - ▶ Updated from the original ADA Accessibility Guidelines (ADAAG) in an effort to harmonize with model building codes (ICC, IBC, ANSI)
 - ▶ There is no inspector for ADA compliance. The building owner & those responsible for the design & construction are responsible for complying with the ADA
 - ▶ No “Grandfather Clause”
 - ▶ The ADA requires “Readily Achievable Barrier Removal” (easily accomplishable and able to be carried out without much difficulty of expense)
 - ▶ Is an ongoing responsibility until full compliance is achieved

Access litigation re websites

- ▶ ADA & California Law Authorize “Private Right of Action”
- ▶ Typical “Access Lawsuit”
 - ▶ Disabled patron goes to fast food restaurant and discovers “barriers” to access
 - ▶ No insulation around pipes under sink in restroom
 - ▶ No outside seating available for wheelchairs
 - ▶ Service counter is too high
 - ▶ Lawsuit may be filed in either United States District Court or California state court
 - ▶ Cause of Action Number One—violation of ADA; seeks injunctive relief only (fix the violations)—no “monetary damages” available under ADA unless proof of “intentional discrimination”
 - ▶ Cause of Action Number Two—California Unruh Act--\$4,000 “per offense”
 - ▶ Cause of Action Number Three (in the alternative)—California Disabled Persons Act--\$1,000 “per offense”

Access litigation re websites

- ▶ Attorney's fees
 - ▶ Plaintiff is entitled to recover attorney's fees and expert fees if successful.
 - ▶ Defendant **is not** entitled to recover attorney's fees if successful, unless defendant demonstrates action is wholly lacking in merit (a very difficult standard to meet).

Access litigation abuses

- ▶ Most of access litigation in the United States occurs in California
 - ▶ Populous state
 - ▶ California allows for “statutory penalties”—(federal law only allows for injunctive relief)
- ▶ Serial plaintiffs
 - ▶ A large number of disabled individuals whose sole occupation is to drive around looking for access violations
 - ▶ The good news about serial plaintiffs is that they are looking for a quick monetary settlement at nominal value—typically less than what it will cost to simply file an answer to the complaint
 - ▶ The bad news is that you will likely have to pay a ransom—even if the claim is frivolous

California accessibility standards

- ▶ State – California Building Code (CBC)
 - ▶ Title 24, Chapter 11B
 - ▶ Accessibility standards for public accommodations and commercial facilities
 - ▶ Specific access standards have been a part of the California Building Code since 1982 (and prior to that in model building codes)
 - ▶ Building code access requirements are enforced by Building Department
 - ▶ Building code access compliance required at times of remodel and new construction (no readily achievable barrier removal included in the CBC)

Litigation risk minimization

- ▶ There is no enforcement agency under the ADA
 - ▶ Other than the Department of Justice for matters of major importance
 - ▶ As such, the regulations are being enforced by civil litigation
- ▶ Prior to the passage of the ADA, California developed the Unruh Civil Rights Act, which is part of the California Civil Code
 - ▶ Unlike the ADA, the CA Civil Code allows for punitive & compensatory damages in accessibility lawsuits.
 - ▶ As such, entities that are not in compliance could be faced with not only the cost to remove the accessibility barriers, but could be required to pay damages & attorney's fees as well.
 - ▶ Although many legitimate accessibility claims are made, the number of frivolous lawsuits is increasing as a result.
- ▶ Public accommodations can lower their risk of lawsuits by removing accessibility barriers
 - ▶ One way to identify barriers and provide your properties with additional legal protection is with a CASp inspection

Accessibility Standards in other laws

- ▶ The California Consumer Privacy Act of 2018
 - ▶ Specific notices required for covered businesses
 - ▶ Notice at Collection, Privacy Policies, Do Not Sell My Personal Information
- ▶ CA Attorney General Regulations Impose Accessibility Requirements for Notices
 - ▶ Notices must be “reasonably accessible to consumers with disabilities
 - ▶ Businesses required to follow generally recognized industry standards
 - ▶ Specifically mentions the WCAG 2.1 Standards
- ▶ Notices are mostly written statements, but accessibility to link buttons also required

Web Content Accessibility Guidelines

- ▶ De Facto Standards for website compliance is WCAG 2.0 AA Conformance
- ▶ Four Principles of Accessible Design
 - ▶ **Perceivable**: Users must be able to perceive information presented
 - ▶ **Operable**: Users must be able to operate the UI
 - ▶ **Understandable**: User must be able to understand information and the UI
 - ▶ **Robust**: Users must be able to access content as technology changes

WCAG Conformance

- ▶ Five Requirements to meet to conform to WCAG 2.0
 - ▶ Must meet the AA level of Conformance
 - ▶ Web pages must be *fully* conforming—no parts of web pages may be excluded
 - ▶ If a process is presented to accomplish a task, every step must conform
 - ▶ All information and functionality (e.g. HTML, JavaScript) must be accessibility supported.
 - ▶ Non-Accessibility supported technologies can only be used if
 - ▶ All the same information is also available using supported technologies;
 - ▶ Such material does not block users' ability to access the rest of the page.

Level AA Conformance

- ▶ Website Must Meet Requirements for Level A Conformance, AND
- ▶ Websites must meet additional requirements for Level AA Conformance
- ▶ Level AA Requirements include:
 - ▶ Providing Captions for Live Audio.
 - ▶ Providing Users the Ability to Resize Text Up to 200%.
 - ▶ Using headings and labels to describe topics and purposes of webpage components.
 - ▶ Ensuring navigations and menus are consistent throughout the website.

WCAG 2.1 Standards

- ▶ Provides updates to 2.0 Standards and Adds Additional Areas
- ▶ Criteria for mobile devices
- ▶ Addresses impairments like colorblindness and cognitive function
- ▶ 2.1 adds to, does not superseded, 2.0
- ▶ 2.1 becoming the de facto standard

Achieving Conformance

- ▶ Web Development
 - ▶ Contracts with website developers/maintenance to achieve Level 2.1
 - ▶ Additional costs and/or ongoing maintenance especially for regularly updated websites
- ▶ Service Providers
 - ▶ Automated A.I. Solutions: (Accessibe; AudioEye;)
 - ▶ Offer very limited warranties regarding accessibility compliance
- ▶ Website Builders and Platforms
 - ▶ Offer features and solutions to assist with compliance
 - ▶ Responsibility remains with website owner.

Certifications, Reports, Logos

- ▶ W3C offers a methodology and tool to support WCAG Evaluations
 - ▶ Reports are prepared by the content creator using methodology
- ▶ W3C Offers Conformance Logos to indicate a claim of conformance
 - ▶ Do not represent any review or validation of conformance by W3C
 - ▶ Content providers are solely responsible for use.
- ▶ There are no standard/approved certifications.
 - ▶ Certifications are static in time—website constantly evolve
 - ▶ Conformance with a standard is a constant process

Avoiding Claims

- ▶ Low Hanging Fruit
 - ▶ Many claims are based on drive-by automated scans
 - ▶ Fix violations likely to trigger nonconformance by automated scans.
- ▶ Certification Logos and Statements
 - ▶ Statements and logos demonstrate good faith compliance and may prevent drive-by claims
 - ▶ Be wary of making definitive ongoing compliance statements
- ▶ Shifting responsibility to vendors
 - ▶ Use web developers with expertise in WCAG compliance

Questions?