

Could My Company's Website Violate the Americans with Disabilities Act?

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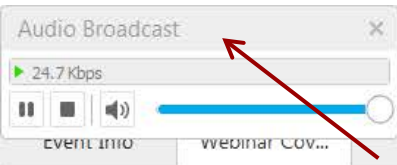
June 14, 2016 | Webinar



Could My Company's Website Violate the Americans with Disabilities Act?

Thank you for joining us. We will begin at 12:00 PM (EDT). At this time, you will not hear any sound.

Audio



Audio should stream automatically on entry through your computer speakers

Pepper Hamilton Webinar



A screenshot of the webinar interface. The top right shows icons for Participants, Chat, and Q&A. The main area displays a list of participants: 'Speaking: Panelists: 1 Brian Dolan (Host)' and 'Attendees: Webinar Guest (me)'. Below this is a Q&A section with a dropdown menu set to 'All (0)'. At the bottom, there is a text input field for asking questions, a dropdown menu set to 'All Panelists', and a 'Send' button. A 'Connected' status indicator is visible in the bottom right corner.

Audio

The screenshot displays the Cisco WebEx Event Center interface. At the top, the title bar reads "Cisco WebEx Event Center" with a menu bar containing "File", "Edit", "View", "Communicate", "Participant", "Event", and "Help". Below the menu bar, there are tabs for "Event Info" and "Webinar Cov...". The main content area is split into two panes. The left pane shows a slide with the text "Pepper Hamilton Web" and a logo for "Pepper Hamilton LLP Attorneys at Law" celebrating 125 years (1890-2015). The right pane shows the "Participants" list with "Brian Dolan (Host)" and "Webinar Guest (me)". Below the participants list is a "Q&A" section with a "Send" button. An "Audio Connection" dialog box is open in the center, showing two options: "I Will Call In" and "Call Using Computer" with a link to "Test computer audio". A red arrow points from the text "If you cannot stream audio, click phone icon and a phone number will be sent to you" to the phone icon in the "Call Using Computer" option.

If you cannot stream audio, click phone icon and a phone number will be sent to you

Pepper Hamilton Web

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125
1890 2015
Years
Pepper Hamilton LLP
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Participants: Brian Dolan (Host), Webinar Guest (me)

Q&A: All (0)

Ask: All Panelists

Select a panelist in the Ask menu first and then type your question here. There is a 256-character limit.

4 Connected

Q&A

Cisco WebEx Event Center

File Edit View Communicate Participant Event Help

Event Info Webinar Cov... x

Participants Chat Q&A

Participants

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

All (0)

Ask: All Panelists

Type question here... Send

Connected

01

Send us questions

Pepper Hamilton Webinar

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1890 125 Years 2015
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Download PPT Slides

The screenshot displays the Cisco WebEx Event Center interface. At the top, a menu bar includes 'File', 'Edit', 'View', 'Communicate', 'Participant', 'Event', and 'Help'. Below the menu, there are tabs for 'Event Info' and 'Webinar Cov...'. A red arrow points to the 'File' menu item with the text 'Click 'File''. The main content area shows a slide titled 'Pepper Hamilton Webinar' with a large '125 Years' logo celebrating the firm's 125th anniversary from 1890 to 2015. The logo includes the text 'CELEBRATING 125 Years 1890 2015' and 'Pepper Hamilton LLP Attorneys at Law'. On the right side, there is a 'Participants' panel showing 'Brian Dolan (Host)' and 'Webinar Guest (me)'. Below this is a 'Q&A' section with a dropdown menu set to 'All (0)' and a 'Send' button. At the bottom right, there is a 'Connected' status indicator.

Cisco WebEx Event Center

File Edit View Communicate Participant Event Help

Event Info Webinar Cov... x

01

Click 'File'

Pepper Hamilton Webinar

CELEBRATING
125 Years
1890 2015
Pepper Hamilton LLP
Attorneys at Law

Participants

Speaking:

Panelists: 1

Brian Dolan (Host)

Attendees:

Webinar Guest (me)

Q&A

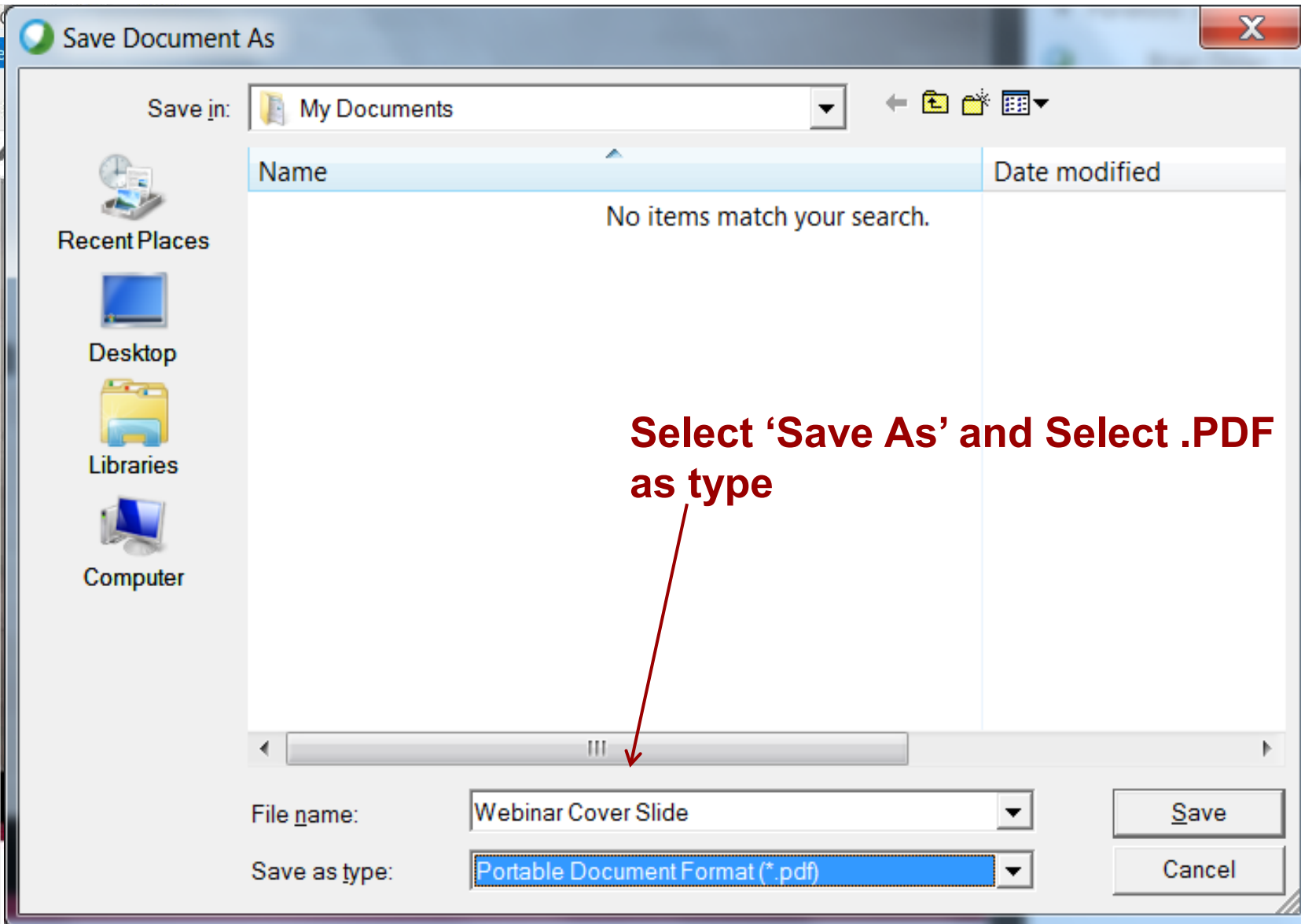
All (0)

Ask: All Panelists

Type question here... Send

Connected

Download PPT Slides



Select 'Save As' and Select .PDF as type

**CLE credit available in CA, NY, PA.
NJ CLE credit is available through reciprocity and
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**Contact Kristen McCalla at
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- ▶ Provides guidance on national and local charitable activities
- ▶ Prior to joining Dunkin' Brands in 2012, she was senior corporate counsel at Ocean Spray and trademark counsel at Polaroid



Agenda

- ▶ Explore whether the Americans with Disabilities Act applies to businesses' and institutions' websites.
- ▶ Discuss what companies and institutions are doing, can do and should be doing to limit their liability and exposure for these types of claims.
- ▶ Review what we are seeing in terms of claims, enforcement actions and litigation in this area, in PA, CA, and elsewhere in the U.S.

The Americans with Disabilities Act

Overview

- ▶ When ADA enacted 26 years ago, no widespread use of Internet – and no e-commerce as we know it today.
- ▶ Law provides that places of public accommodation must ensure equal access to the goods and services they offer to disabled individuals.
- ▶ Statute defines public accommodations as hotels, retail stores, movie theaters, restaurants, etc.
- ▶ Act does not mention websites or provide any guidance or standards for making websites accessible.

The ADA and Websites

- ▶ Approximately 10 years ago, we began seeing claims that websites offering goods and services are public accommodations and that visually impaired, hearing impaired or other disabled individuals were unable to access all info contained on certain businesses'/institutions' websites.
- ▶ In 2010, Department of Justice began soliciting comments on proposed regulations governing website access.
 - Comment period recently extended until 2018.
- ▶ DOJ has, however, in investigations, enforcement actions and amicus briefs, taken position that ADA does apply to websites.

The ADA and Websites

- ▶ Majority of claims/lawsuits are settled at a fairly early stage.
- ▶ Limited number of courts that have made rulings have reached different conclusions on whether, when ADA applies.
- ▶ We have seen in litigation to date that:
 - Difficult to get claims dismissed at early stage
 - Judges unwilling to wait for DOJ to issue its rules
- ▶ Trend toward requiring websites to comply with ADA and make sites accessible to all.
- ▶ Best practices therefore dictate that companies should take steps they can to make their sites compliant.

Web Content Accessibility Guidelines 2.0 AA

- ▶ The Web Content Accessibility Guidelines (“WCAG”) 2.0 AA, published by Web Accessibility Initiative of the World Wide Web Consortium, have become de facto standards for website accessibility – accepted, applied by DOJ, various courts.
 - Three levels of conformance with standards, A, AA and AAA
- ▶ Defines how to make web content more accessible to people with disabilities with a focus on four main categories:
 - Is the content perceivable?
 - Is the content operable?
 - Is the content understandable?
 - Is the content robust?

Other Sets of Standards

- ▶ Section 508 Standards
- ▶ British Broadcasting Corp.'s Mobile Accessibility Standards and Guidelines version 1.0 (BBC Standard)

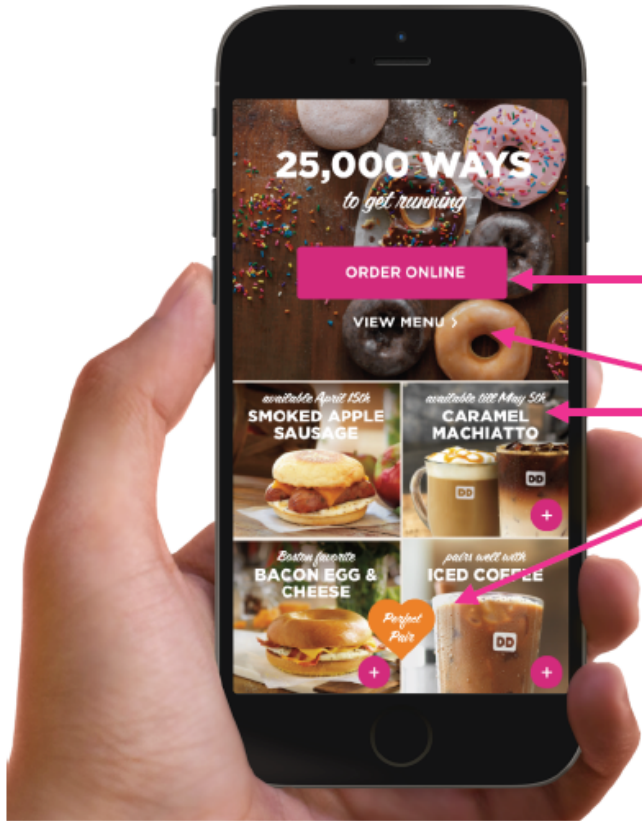
DOJ's Supplemental ANPRM

- ▶ Suggestion that WCAG 2.0 AA conformity be required for governmental websites within at least a two year (or longer) grace period.
- ▶ Possible expansion of ADA requirements to web content provided by third parties.
 - Ramifications if expanded to private commercial websites
- ▶ Educational Institutions
- ▶ Possible exemptions being considered:
 - Small Public Entities
 - Third-party's website via link
 - Undue Burden
 - Fundamental alternation
- ▶ How to measure compliance?
- ▶ Whether to include/cover mobile applications?

Dunkin' Brands

- ▶ Potential Accessibility Issues
 - Audio content
 - Compatibility with screen reading devices or software used by blind or low-vision individuals
 - Navigation on website
 - Videos/moving parts
 - Color and size of text or links
 - Privacy policy

Text Color and Size



Does Not Pass:

White on pink only passes at large font sizes (used for primary CTAs)

Text on certain imagery (used throughout the design)

Orange on white (used for call outs and subheads)

Other callouts:

- Pink on white (used for links)
- The light brown color in the palette (used as accents)
- Orange on pink
- Pink on brown
- Brown on brown

Sample Readout from WebAIM*:

Contrast Ratio: 2.59:1

Normal Text

WCAG AA: **Fail**

WCAG AAA: **Fail**

Sample: **I am normal text**

Large Text

WCAG AA: **Fail**

WCAG AAA: **Fail**

Sample: **I am large text**

Contrast Ratio: 4.32:1

Normal Text

WCAG AA: **Fail**

WCAG AAA: **Fail**

Sample: **I am normal text**

Large Text

WCAG AA: **Pass**

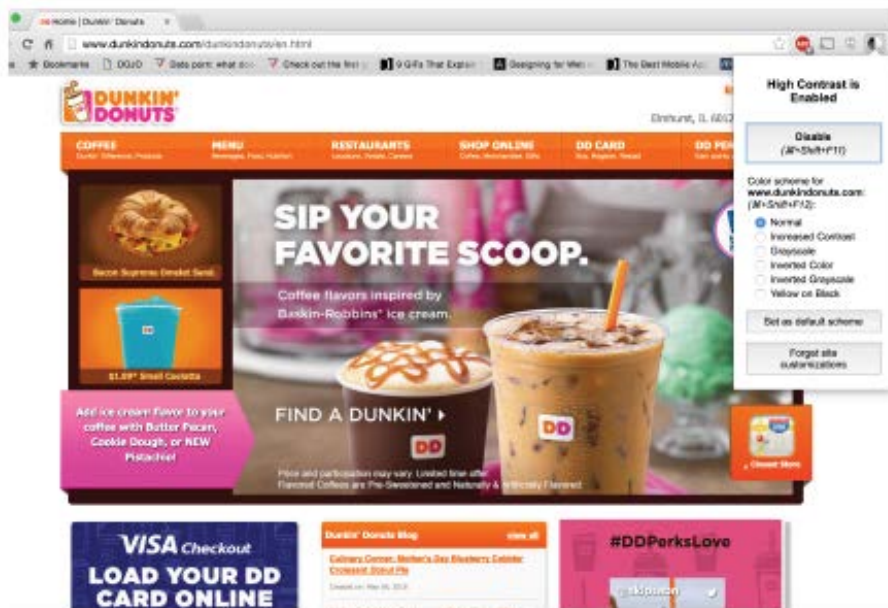
WCAG AAA: **Fail**

Sample: **I am large text**

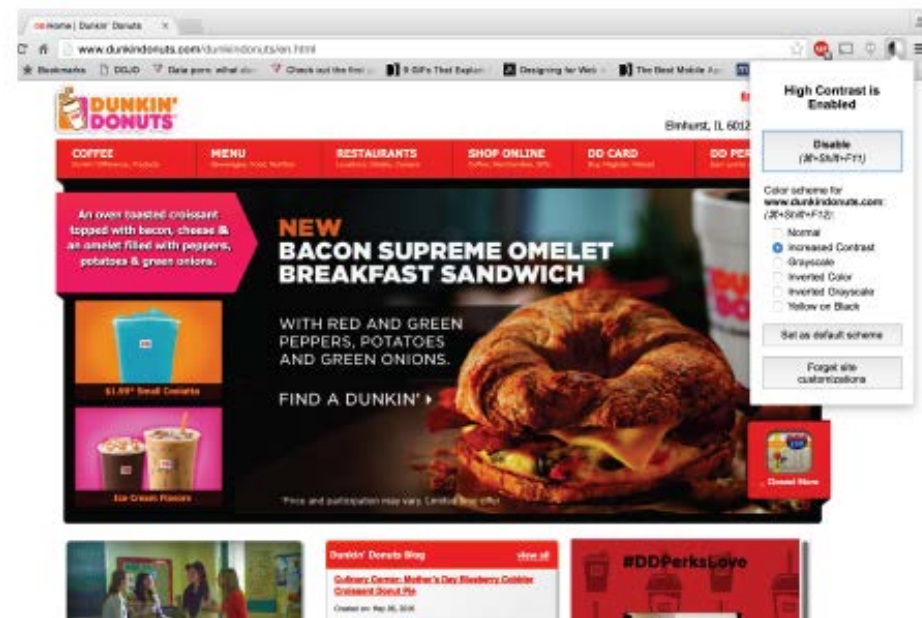
*Source <http://webaim.org/resources/contrastchecker/>

Browser Plug In

Normal Contrast Mode



High Contrast Mode



Contrast



Original



High Contrast

Steps Taken/Issues Confronted by Dunkin', Others

- ▶ Hiring outside consultant
- ▶ Website pages operated by a third-party vendor
 - Update agreements
 - Seek indemnity for any claims relating to pages/sites operated by third parties
- ▶ Mobile applications

Litigation, Claims and Enforcement Actions

ADA Web-Access Cases Filed in Last 5 Years

| State | ADA-Website Access Cases |
|----------------|--------------------------|
| California | 17 |
| Delaware | 1 |
| Florida | 11 |
| Massachusetts | 5 |
| Maryland | 1 |
| North Carolina | 1 |
| New York | 24 |
| Ohio | 3 |
| Oklahoma | 1 |
| Pennsylvania | 21 |
| Texas | 1 |
| Vermont | 1 |
| Washington | 2 |

Litigation, Claims and Enforcement Actions

Split Among Circuits

- ▶ 9th, 3rd, 6th Circuits – pure e-commerce websites not connected to a physical location not “places of public accommodation.”
- ▶ 1st, 7th Circuits – no connection between a website and a physical structure/necessary for website to be required to comply with ADA.
- ▶ 9th, 2nd, 11th Circuits – ADA applies if a “**sufficient nexus**” between the site and a physical location/space.

Litigation, Claims and Enforcement Actions

Pennsylvania

- ▶ Numerous cases filed, consolidated.
- ▶ Claim for injunctive relief, declaratory judgment and attorney fee award under ADA.
- ▶ Nearly all have been settled and dismissed.
- ▶ Motion to dismiss based on declaratory judgment action filed in CA unsuccessful (*Harbor Freight*).

Litigation, Claims and Enforcement Actions

New York

- ▶ Various cases filed, not consolidated.
- ▶ Several have been settled and dismissed.
- ▶ Many filed within last 2-3 months and still pending.
- ▶ In addition to ADA claim, claims for violation of certain state, municipal statutes relating to discrimination in places of public accommodation.

Florida

- ▶ Similar to PA, NY
- ▶ More specific allegations, prayers for relief regarding how websites in question should be modified

Litigation, Claims and Enforcement Actions

California/Ninth Circuit

- ▶ In general, California federal courts hold that websites are not subject to ADA unless a sufficient nexus between the website and a physical place of business.
- ▶ Reliance on *Weyer v. Twentieth Century Fox Film Corp.* for principle that websites without sufficient nexus to physical space not subject to ADA.
 - *Earll v. eBay, Inc.*
 - *Cullen v. Netflix, Inc.*
 - *Jancik v. Redbox Automated Retail*
 - *Young v. Facebook, Inc.*
 - *National Federation of the Blind v. Target Corp.*

Litigation, Claims and Enforcement Actions

California/Ninth Circuit

- ▶ Big Question: What is degree of connection and entanglement between website and brick-and-mortar store that will trigger application of ADA to website?
 - Websites that have no involvement in brick-and-mortar store owned by website operator.
 - Websites that offer services in conjunction with brick-and-mortar operations, but are not necessary to fully enjoy brick and mortar location.
 - NOT okay if the website is so integrated with brick and mortar that disabled users would be deprived of certain abilities in brick-and-mortar store if website were inaccessible.
- ▶ *Davis v. BMI/BND Travelware* decision (March 2016)

Litigation, Claims and Enforcement Actions

California/Ninth Circuit

- ▶ Unruh Act: Provides that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civ. Code § 51(b).
- ▶ *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*
- ▶ *Koebke v. Bernardo Heights Country Club*

Litigation, Claims and Enforcement Actions

California/Ninth Circuit

- ▶ Disabled Persons Act: “The California Disabled Persons Act, Cal. Civ. Code §§ 54 et seq. (“DPA”) provides that “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities . . . and privileges of . . . places of public accommodation . . . and other places to which the general public is invited.” *Id.* § 54.1(a)(1).

Litigation, Claims and Enforcement Actions

Vermont

- ▶ *NFB, et al. v. Scribd* (2015) – Court denied motion to dismiss, found web-only business's site is public accommodation and needs to comply with ADA

Massachusetts

- ▶ Actions by *Nat'l Assoc. of Deaf v. Harvard, MIT*
 - Claimed online videos, programming not closed captioned.
 - Universities moved to dismiss or stay while DOJ works on its regulations.
 - DOJ filed statements of interest opposing motions, argued courts are well-equipped to resolve website accessibility claims.
 - Magistrate judge recommended motions be denied.

Settlement Demands, Terms, Issues

- ▶ Bringing site into compliance within certain standards.
- ▶ Future audits, monitoring.
- ▶ Adoption by defendant of website accessibility policy.
- ▶ Training of IT personnel, other staff.
- ▶ Payment (of damages, counsel's fees, etc.).
- ▶ How to avoid additional claims going forward.

Conclusions

- ▶ Businesses and institutions should proactively utilize internal personnel or outside consultants to assess their websites' accessibility and make necessary/recommended changes to bring site into compliance.
- ▶ Should also consider how to address and improve accessibility of mobile apps.
- ▶ Should insist third party vendors, contractors make their sites/pages compliant.
- ▶ If do receive demand or are sued, assess from cost, risk/exposure and publicity standpoint whether it makes sense to litigate/defend claim or try to settle it.
- ▶ If do settle, work with outside counsel to get certain protections, representations and take certain steps, to help minimize risks of future actions and liability/exposure.

Questions & Answers

Capabilities

Best Lawyers

More than 60 lawyers listed, including 5 as Lawyer of the Year

100+

lawyers highly rated by Super Lawyers and Rising Stars

SERVICES

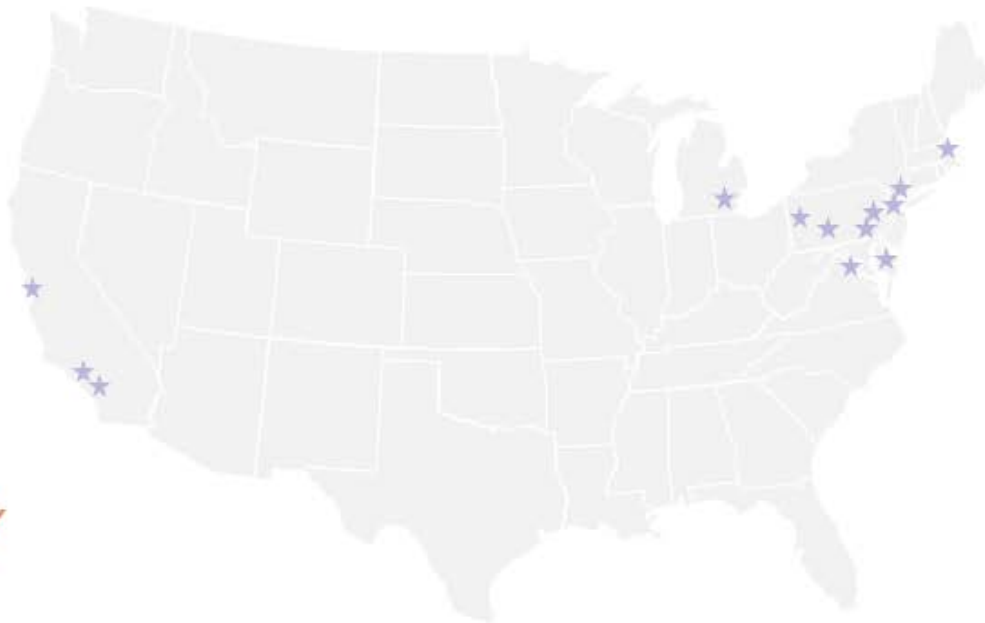
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