

A pineapple with its green crown sits in a field of vibrant green grass. The background is a clear blue sky with soft, white clouds. A white rectangular box with a dark teal border is centered over the image, containing the conference title.

THE HOSPITALITY LAW CONFERENCE: SERIES 2.0

October 3, 2018



Washington, D.C.

Website Accessibility & the ADA

2018 HOSPITALITY
LAW CONFERENCE:
WASHINGTON D.C.

OCTOBER 3



Jordan B. Schwartz

Partner, Labor · Employment Group

- Defends employers against claims of discrimination and harassment, misappropriation of trade secrets, and wage and hour violations, and counsels employers on all aspects of the employer-employee relationship.
- Represents property owners and managers against claims brought by patrons alleging lack of accessibility under Title III of the ADA.
- Routinely conducts on-site inspections of properties and modifies their policies and practices to ensure compliance with the ADA.



**THE H^{HL}OSPITALITY LAW
C^{HL}ONFERENCE SERIES 2.0**

Website Accessibility



Hotel Culture

- Set a culture that emphasizes the accessibility of your products and services, including making online reservations, and integration of best practices into your products and services.
- Strong business case that making your websites accessible will increase profitability and improve your brand and consumer pool by being a preferred hotel for individuals with disabilities.



What is the Americans with Disabilities Act (ADA)?

- Federal **civil rights law** that requires all public accommodations be accessible to individuals with disabilities.
- Since January 16, 1992, all places of public accommodations are required to comply with the ADA.
- Applies to owners/operators, landlord/tenants, franchisors/franchisees.



Title III Obligations

- Must modify policies, practices, and procedures – unless doing so fundamentally alters goods and services
- Requires auxiliary aids and services for effective communications
- Removal of barriers to access



ADA and Website Accessibility

- 2 Completely Separate Issues
 - Issue # 1 - Does your website need to be accessible for users with visual, hearing and physical impairments? (WGAC issue)
 - “It’s complicated”
 - Issue # 2 - Does your website need to provide information regarding various accessibility features at your resort?
 - Yes



Issue #1 – ADA and Website Accessibility

- Does the ADA require my resort’s website to be “accessible?”
 - Maybe! Title III of the ADA does not explicitly define whether a place of public accommodation (e.g., a resort) must be a physical place or facility
 - Tension exists in courts and DOJ whether Title III applies to websites
 - Courts have ruled on both sides of the issue
 - No universally recognized standards for achieving website accessibility
 - Trend is for courts to find that websites are places of public accommodation
 - This, even in the absence of guidelines for private companies’ websites, the trend is to comply with WCAG 2.0.



Common Website Accessibility Issues

- Users with visual impairments
 - Pictures, symbols, maps, diagrams, etc. with no written descriptions
 - “Click here” links
 - Text as an image file (as opposed to html)
- Users with hearing impairments:
 - Video and audio files with no captioning
- Users with physical impairments:
 - Navigating website without a mouse or a keyboard



ADA and Website Accessibility

- Assuming your website is a place of public accommodation, your website must be accessible to people with disabilities
- Exception – If a proposed accessibility feature would be an undue burden or a fundamental alteration of the program, service or activity
 - The burden is on the company to prove this



Common Threads in Accessibility Guidelines

- Provide text alternatives for non-text content (e.g., pictures, maps)
- Provide text captions for audio content
- Avoid using color as the only means of conveying information (e.g., green means go)
- Make all functionality available from a keyboard interface (as opposed to requiring mouse “clicks” to activate links)
- Provide a way to pause or slow down “time out” features



Nat'l Federation of the Blind v. Target

- Addressed whether Title III covers only physical “brick and mortar” structures or the internet too
- The Court held that Title III covers websites in situations where a nexus exists b/n the website and physical place of public accommodation
 - “The statute applies to the services of a place of public accommodation, not services in a place of public accommodation.”
 - Many of the benefits and privileges of the website – such as online information about store’s locations and hours and printable coupons that are redeemed in the store – were heavily integrated with the stores.



Target Settlement

- The case resolved in a court-approved class settlement agreement in which Target agreed to:
 - Establish a \$6 million fund from which members could make claims;
 - Take steps to make its website accessible to the blind and obtain “certification” from NFB;
 - Pay NFB to train all of its employees who work on its website; and
 - Pay attorneys’ fees and costs



Post-Target Landscape

- Significant number of settlements and “cooperative agreements” between advocacy groups and/or DOJ regarding website accessibility
- Increased attention from DOJ and regulators
- Heavy reliance on the WWC / Web Content Accessibility Guidelines (WCAG)



Threats of Litigation

- Law firm of Carlson Lynch Sweet & Kilpela has led the charge in filing cases seeking injunctive relief on accessibility claims:
 - Hundreds of suits and demand letters since 2016
 - Sends a settlement demand letter with alleged access barriers on the company's website
 - Suggests a “proposal” for resolution and remedial measures
 - Includes designating individuals to test website, conduct third party testing and monitoring, and payment of attorneys' fees



Settlement with Carlson Lynch

- Cases are joined together before a single judge
- Requires mandatory ADR with the General Counsel of the company to attend in person
- Most cases then settle after the ADR
- Companies sued include: NCAA; Hard Rock Café; Red Roof Inns; NBA; Estee Lauder Companies



Proposed DOJ Rule on Accessibility

- On July 26, 2010, the DOJ release proposed advanced of a proposed rule to amend Title III to adopt standard covering websites
- Proposed staggered compliance deadlines
- NPRM was expected to be published in 2015, but has been postponed until 2019, at the earliest



Key Settlement Agreements

- Carnival Cruise Line (2015)
 - Settlement agreement addressed the accessibility of Carnival's website, mobile application, and reservation system
 - Carnival agreed to make its website and mobile application conform with WCAG 2.0, and pay a \$55,000 civil penalty to the federal government and \$350,000 to eligible complainants
- Red Roof Inn (2015)
 - Claims Red Roof's website is out of compliance with Title III of the ADA
 - Requests the court to require Red Roof to hire a consultant to perform automated website accessibility audits to oversee compliance
 - Consolidated with other Carlson Lynch cases



Key Settlement Agreements

- H&R Block (2013)
 - DOJ intervened in suit brought by NFB
 - Agreed to a consent decree under which it would make its website, tax preparation tool, and mobile applications conform to WCAG 2.0
- Hilton WorldWide, Inc. (2010)
 - Settlement with DOJ to comply with ADA Standards
 - Agreed to make its Internet reservation system more accessible for individuals with mobility and hearing disabilities
 - Required to update its inventory in the reservations system to identify room and lists its accessibility features



Recent California Decision

- In March 2016, a blind customer filed suit against a luggage retailer because he was not able to use the retailer's website.
- Court found that the plaintiff had presented sufficient evidence that he was denied full and equal enjoyment of the goods and services
- First time a court has ruled for a plaintiff on this issue.
- Awarded \$4,000 and must make its website accessible or terminate the website
- Price tag will be much higher because of attorneys' fees and costs (over \$100k)



Point of Sale Devices

- Increase in litigation over accessibility of touch screen devices:
 - Point of Sale devices at check out / check in
 - Rental kiosks
 - Parking garages



Policy and Remediation Plans

- Proactively test your website's accessibility, and implement changes, if necessary.
- Remediation plans should include:
 - 1) A project and timeline for remediating accessibility issues
 - 2) Executive and senior management participation
 - 3) Identify an accessibility project leader
 - 4) Make third party providers aware of accessibility requirements and expectations



Policy and Remediation

- You likely want to create a web accessibility policy consistent with the requirements set forth in the WCAG 2.0
- Ensure training and compliance with policies
- In the meantime, consider adding a banner to your website providing a telephone number that users with disabilities can call if they are having trouble navigating the site.
- If you do not implement certain accessibility features because they are unduly burdensome or would fundamentally alter your website, make sure to have plenty of documentation to back up that claim.



Policy and Remediation

- Free resources are available to provide info on accessibility requirements applicable to your webpage:
 - ❖ WAVE (WebAIM.org) – provides visual feedback containing errors preventing or interfering with content accessibility and areas that can be improved
 - ❖ Other examples – Functional Accessibility Evaluator and Ainspector Sidebar



Policy and Remediation

- Retain an Accessibility Consultant
 - They can help you build safeguards into your contracts to protect against client liability for inaccessible deliverables



Issue #2 – Hotel Accessibility

Information on Website

- ADA regulations - 28 CFR 36.302(e)(1)
- Hotel websites are subject to the regulation requirements because it provides information about their goods and services to the public
- A public accommodation that owns, leases, or operates a place of lodging shall:
 - i. Modify its policies, 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;



Accessibility Information on Website

- ii. Ensure that 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 room of that type;



Accessibility Information on Website

- III. Reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the guest room requested are blocked and removed from all reservations systems;
- iv. Guarantee that the specific accessible guest room reserved through its reservations service is held for the reserving customer, regardless of whether a specific room is held in response to reservations made by others;



Accessibility Information on Website

- v. Identify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.



Accessibility Information on Website

- This final prong of the regulation is crucial and has been the subject of hundreds of lawsuits.
- Plaintiffs are now claiming they “wanted” to visit the hotel, but were deterred due to lack of information about the hotel’s accessibility features on its website.
- Florida, Arizona and California have been the main targets so far.
- Much easier logistically (and from a standing perspective) to bring this type of claim as opposed to more “traditional” brick and mortar claims.



Accessibility Information on Website

So, what is enough information?

1. At a minimum, provide information regarding whether common areas of your hotel are accessible
2. Where should that information be provided?
 - Popular common areas: parking, main entrance, public restrooms, pool/pool lift, restaurants and bars, fitness centers, business centers, lever handles on doors, etc.
3. Are there accessible routes to get to these areas?
4. If so, describe those as well.
 - ❖ Do not provide inaccurate information!



Accessibility Information on Website

So, what is enough information?

5. You also need to provide sufficient information regarding the accessibility of your rooms.
6. What does that mean?
 - Bed type, number of beds, type of bathroom (roll-in shower, tub with accessible seats), non-slip grab bars, etc.
7. How should this information be provided?



Accessibility Information on Website

- Due to the lack of case law, there is no bright line rule as to the amount of information that is deemed to be “sufficient.”
- The more information you can provide, the more likely you are to be ADA compliant and avoid these types of lawsuits in the future.



Service Animals



Service Animals (Dogs)

- ❖ Definition -- Dogs trained to perform work for the benefit of a person with disability
- ❖ Cannot impose surcharge or cleaning fee for use of service animals
- ❖ Only two permissible inquiries can be made:
 - Is the animal required because of a disability?
 - What work or task has the animal been trained to perform?
 - * No other inquiries about an individual's disability or the dog are permitted



THE ^{HL}HOSPITALITY LAW
^{HL}CONFERENCE SERIES 2.0

Service Animals (Dogs)

- ❖ Cannot require proof of certification or medical documentation as condition of entry
- ❖ May require the dog to be harnessed, leashed or tethered
- ❖ May only exclude service animals if:
 - The dog is out of control and the owner cannot gain control
 - The dog is not housebroken
- ❖ “Comfort,” or “emotional support” animals do not meet the ADA’s definition of service animal



Visit Our Blog

the **EMPLOYER DEFENSE** Report



CONN
MACIEL
CAREY

<https://employerdefensereport.com>



THE **H**OSPITALITY LAW
CONFERENCE SERIES 2.0

Questions?



Jordan B. Schwartz

Partner, Labor • Employment

Conn Maciel Carey LLP

jschwartz@connmaciel.com

202.909.2731

