

# Do My Websites and Mobile Apps Have to Be Accessible to People with Disabilities?

Presented by Seyfarth Shaw LLP  
and SSB BART Group

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# Presenters



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# Agenda

- Introduction
- What is Digital Accessibility?
- Assistive Technologies
- Legal Requirements
- Accessibility Guidelines
- Litigation & Settlements
- Roadmap for Digital Accessibility





# Introduction:

## Role of Lawyer & Consultant

- **Attorney**
  - Provides advice on legal obligations under federal and state statutes
  - Oversees privileged review of websites done by consultants
  - Represents clients in actual or threatened lawsuits and government investigations
- **Consultant**
  - Provides technical expertise to help businesses assess their websites and solutions for accessibility
  - Provides software & training
  - Develops strategies for minimizing risk & maximizing opportunity



# Introduction:

## What Types of Entities Need to be Concerned?

- **Public Accommodations:** ADA Title III
- **Recipients of Federal Funding:** Section 504 of Rehabilitation Act
- **Federal Government Contractors & Subcontractors:** Section 503 of Rehabilitation Act
- **Employers that use online systems as part of the application process or job duties:** ADA Title I
- **State and Local Governments:** ADA Title II




# **What is Digital Accessibility?**



# What is Digital Accessibility?

- The practice of making websites, mobile applications, and other online systems usable to people with disabilities.
- When sites are correctly designed and developed to be accessible, all users can have equal access to information and functionality.
- A measure of *comparative utility*.



# What Types of Electronic Information Technology are Implicated?

## IT Systems

- Websites, Web Applications and Mobile Web Assets
- Software Applications
- Mobile Apps for IOS & Android
- Both public and employee facing systems pose risk for an organization

## Electronic Documents

- Adobe Acrobat (PDF) Documents
- Microsoft Office Documents
- ebooks





# Example Types of Disabilities Impacted by Inaccessible Digital Technology

- **Sensory** – Impairment of one of the five senses
  - Blind, Low Vision
  - Deaf, Hard of Hearing
- **Cognitive** – Impairment of the cognitive process
  - AD/HD, Dyslexia, Dyscalculia, Developmental Delay
- **Mobility** – Impairment of an axis of motion
  - Quadriplegia, paraplegia, strength issues, lack of fine motor control, rotational issues, grasp issues, missing limbs
- **Speech** – Difficulty or inability to produce speech



# Assistive Technologies

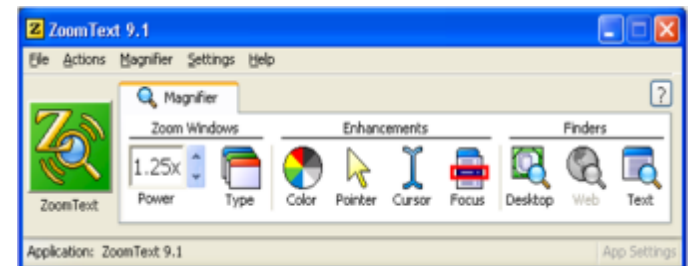
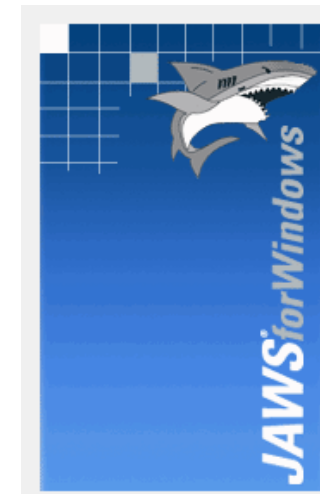
# What Are Assistive Technologies?

Devices, software, or techniques used to assist individuals with disabilities in using or accessing information.



# Assistive Technologies

- Screen Readers
- Refreshable Braille Displays
- Screen Magnifiers
- Onscreen or Other Special Keyboards
- Text-to-speech Software
- Word Prediction Software





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# Legal Requirements



# Current Legal Requirements

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- Statutes, Regulations, Court Decisions
- Accessibility Guidelines
- Settlements and Consent Decrees



# Statutes, Regulations, Court Decisions

## ADA Title III

- Applies to public accommodations
  - Must provide auxiliary aids and services (including accessible electronic and information technology) necessary to ensure equal access to their goods and services and to ensure effective communication.
  - DOJ 2010 ANPRM Statement: Websites that provide goods and services must be accessible to people with disabilities unless the goods and services are available in some other equivalent manner.
  - Increased first time penalties to \$75,000



# Statutes, Regulations, Court Decisions

## ADA Title III

- DOJ has not issued a regulation adopting the legal standard for what constitutes an “accessible” website.
- Proposed regulation expected in 2015, but DOJ has moved forward with enforcement based on WCAG 2.0 Level AA as the technical standard for accessibility.
- Proposed rule in January 2014 modifying definition of “disability” to be consistent with ADAAA





# Statutes, Regulations, Court Decisions

## ADA Title III

- Courts have held that the website of a business with a brick & mortar presence is covered under the ADA.
- First Circuit & DOJ position: No brick & mortar presence required for coverage.
- Ninth Circuit position: Website must have a nexus to brick and mortar location to be covered under the ADA.
- No court decision on whether WCAG 2.0 AA is the appropriate standard for accessibility because the cases settle as soon as the courts determine that the website is covered under the ADA.
- No decision on ADA coverage of mobile applications.



# Statutes, Regulations, Court Decisions

## ADA Title II

- Applies to state and local governments
- Equal access to programs, services, or activities required unless doing so would fundamentally alter the nature of the programs, services, or activities or would impose an undue burden.
- 2003 DOJ technical guidance says websites should be accessible or there must be an alternative means of access that provides an “equal degree of access.”
- DOJ proposed rule for state and local government websites was due in August



# Statutes, Regulations, Court Decisions

## Section 504 of the Rehabilitation Act

- Applies to recipients of federal funding.
- DOJ 2010 ANPRM Statement: “[t]here seems to be little debate that the websites of recipients of federal financial assistance are covered by Section 504 of the Rehabilitation Act.”



# Statutes, Regulations, Court Decisions

## Section 503 of the Rehabilitation Act

- Applies to federal contractors and subcontractors.
- Contractors “encouraged” to make information and communications technologies accessible, even absent a specific request for accommodation.
- If technology not accessible, contractor must provide “alternate means” for accessing job information and applying that is “timely.”



# Statutes, Regulations, Court Decisions

## ADA Title I

- Applies to all employers with more than 15 employees
- No formal position taken by EEOC about whether online application websites must be accessible. In an 2/17/03 informal letter, the EEOC said that accessibility of online application systems was an “emerging issue” but stressed that employers must make reasonable accommodations upon request.

# Statutes, Regulations, Court Decisions

## Air Carrier Access Act (ACAA)

- 2013 Final DOT Rule: Airlines that operate at least one aircraft having a seating capacity of more than 60 passengers must make the core functions of their website accessible by **12/12/15**; remainder by **12/12/16**.
- 25% of kiosks must be accessible by **12/22/22**.
- Mobile applications not covered by rule.





# Statutes, Regulations, Court Decisions

## 21st Century Communications and Video Accessibility Act of 2010 (CVAA)

- Requires that most communications and video programming previously broadcast that is rebroadcast over the Internet be provided in an accessible manner to individuals with disabilities.
- Enforcement by FCC only – no private cause of action.



# Statutes, Regulations, Court Decisions

## Accessibility for Ontarians with Disabilities Act (AODA)

- Generally applies to “large organizations” (employers of 50 or more employees in Ontario)
- After 1/1/12: Web-content posted to existing websites must conform with the WCAG 2.0, Level A.
- By 1/1/14, “New internet websites” must conform to WCAG 2.0, Level A
- By 1/1/21: Internet websites and web content must conform with WCAG 2.0, Level AA, other than Captions (Live) and Audio Descriptions (Pre-Recorded)





# Statutes, Regulations, Court Decisions

## European Directive on Accessibility of Public Sector Bodies' Websites

- Would require all public sector websites to be accessible to users with disabilities.
- Intended to benefit individuals with disabilities across the EU, *and* increase the potential of the internal market for web accessibility products and services.
- WCAG 2.0 AA proposed standard
- Voted to be strengthened in Feb. 2014; final agreement unlikely before 2015.



# Statutes, Regulations, Court Decisions

## States

- State agencies and Attorney General Offices have exerted pressure on businesses to make websites accessible under state non-discrimination statutes.
- New York and Massachusetts AG's offices have been active in this area in the past.
- State agencies pay attention to federal ADA mandates and will seek to enforce them through their own state mechanisms.



# CLE Code



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# **Web Accessibility Guidelines**



# Accessibility Guidelines

## Web Content Accessibility Guidelines (WCAG)

- Level A
- Level AA
- Level AAA
- Level AA is the standard expected to be adopted by the DOJ in its public and private DOJ regulations,
  - Required standard by DOJ in recent enforcement actions.
  - Standard incorporated into private settlement agreements.
  - Adopted by the DOJ under ACA.
- The majority of companies that build for accessibility strive to conform to Level A and Level AA.



# Accessibility Guidelines:

## WCAG 2.0 Level AA Concepts

- Ensure that a page is designed so it can be read in assistive technology
- Provide alternative text for images
- Ensure the page can be used with the keyboard
- Provide sufficient color contrast for text
- Provide captions for any video and presentations containing audio



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# Litigation and Settlements



# Recent Settlements: Retail

2013: Large grocery chain entered into a settlement agreement after being approached by advocates for the blind about its grocery delivery website. Key provisions:

- 2 years to comply with WCAG 2.0 Level AA
- Make PDFs accessible on ecommerce & mobile web pages
- Retain a 3rd party for accessibility consulting and do usability testing
- Train technical support staff and web and mobile development team





# Recent Settlements: Professional Services

2014: Department of Justice, NFB, and leading online tax preparation company entered into a consent decree after DOJ filed an enforcement suit. Key provisions:

- 10 months for website and online tax preparation tool to comply with WCAG 2.0 AA
- 20 months for mobile apps to comply with WCAG 2.0 AA
- Develop, adopt, distribute web accessibility policy
- Accessibility feedback method for consumers
- Train employees with website/mobile app responsibilities
- Retain third party website accessibility consultant
- Civil penalty and damages



# Recent Settlements: Healthcare

2013-14: A weight loss company, healthcare insurance provider, and a national drug store chain each entered into settlement agreements after being approached by advocates for the blind. Each agreed to:

- Make its website and mobile apps WCAG 2.0 AA compliant
- Provide print materials in alternative formats, including braille, large print, audio, and electronic format
- The pharmacy also agreed to an electronic method of providing information on prescription bottles audibly



# Roadmap for Digital Accessibility



# What does success look like?

- Best measure is a maturity model
  - Defines the level of maturity of an organization in addressing a business problem
  - Originally developed in line with the Capability Maturity Model defined by Carnegie Mellon
  - CMM is often used to look at the maturity of software development processes
- Model SSB uses is the Digital Accessibility Maturity Model (DAMM)
- Judges process mastery in core domains for digital accessibility
- Looks at nine plus two dimensions of maturity



# What are the levels of a maturity model?

- **Level 1 – Informal**
- **Level 2 – Defined**
- **Level 3 – Repeatable**
- **Level 4 – Managed**
- **Level 5 - Optimized**



# Digital Accessibility Maturity Model

- Ownership and Governance
  - Communications
  - Policy and Standards
  - Fiscal and Risk Management
  - Development Lifecycle
  - Testing and Validation
  - Support and Documentation
  - Procurement
  - Training
- HR Dimensions
- Accommodations
  - Hiring



# Roadmap for Digital Accessibility

## Organizations generally rollout accessibility using a six stage process

- **Policy Development** - Develop the core accessibility policy, target standards and timeline
  - Accessibility Policy
  - Accessibility Issue Resolution Policy
  - Accessibility Quality Control Plan
  - Accessibility Monitoring Plan
  - Procurement and Contracting Policy
- **Standards Development** – Define the technical standards and supporting documentation for implementing the standards.
- **Implementation Plan Development** – Develop the implementation plan for rolling out the policy and standards across the organization.
  - System Survey and Analysis
  - Accessibility Project Management Plan
- **Training Development** – Develop the training plan, eLearning modules and training courses used to train the various different roles.
- **Pilot Implementation** – Implement the accessibility standards in key, high risk systems.
- **Full Deployment** – Deploy the standards and policy across the organization

# System Audit

## Requirements for Compliance Auditing

### Technical Requirements

- Requires a system to have a conformant technical implementation
- Testing requirements are split between those that can be tested Automatically (**24.8%**), Manually (**48.3%**) and Globally (**26.9%**)
- Automatic testing is the cheapest and most common testing but covers only a small fraction of legal requirements

### Functional Requirements

- Requires a system to be usable to people with disabilities using current assistive technologies
- Functional testing coverage for sensory and mobility impairments is generally required

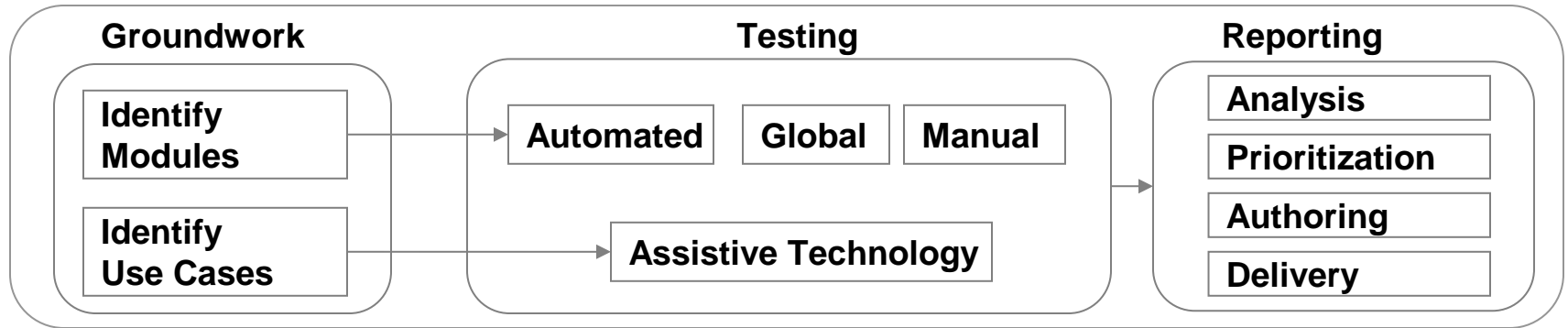
### Support Requirements

- Requires a system to be accessible in deployment





# System Audit Methodology



A single audit methodology to create and deploy audits across technology types

- Testing coverage for full compliance requirements
- Repeatable and scalable testing methodology
- Code level remediation guidance
- Independent validation and verification of compliance



# Next Steps

## Accessibility Initiative

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- Be Proactive!
- Contact your legal counsel to discuss your risks
- Secure third party technical expertise to help guide you through the process
- Develop an enterprise accessibility roadmap and policy framework
- Audit and test your website to determine the baseline level of compliance
- Start building in accessibility proactively