# Introduction

Bethany: My name is Bethany Sirven, and I am the marketing director here at UsableNet.

 Our webinar today is on the state of ADA in 2020, a guide to online accessibility lawsuits amid the pandemic.

 Our presenters are Jennifer Rusie and Jason Taylor.

 Before we begin, a few housekeeping items. All attendees are muted, but if you have a question during the presentation, we encourage you to please send them in via the chat box. If we don't get to your question today, we will reach out to you directly.

 I want to confirm that we are recording today's session, and you will receive an email likely early next week when it is available to watch on demand. We'll also make the slides available this week.

 Now, it's my great pleasure to introduce our speakers. We have Jennifer Rusie and Jason Taylor.

 I'll go ahead and hand it over to you, Jason.

# Agenda

 >> JASON: Thank you, Bethany. I thank everybody for taking some time out of their day to be with us.

 I'm really pleased to have Jennifer here with us to give the legal color to the data and statistics that we gather.

 I have an agenda we're going to go through, just to give you an idea what we'll try to cover in the next 45 minutes before we do Q&A.

 We're just going to give you some sort of high-level numbers around number of cases over the period of what we might call the lockdown or the COVID period. Where do those numbers stand today?

 In general, I think we want to give you some bullet points of trends we've been seeing in both ADA lawsuits and state lawsuits.

 We're going to talk, and Jennifer will primarily talk about the connection of the ADA websites, apps, DOJ.

 She's going to give us some hands-on and real-world examples of types of enforcement that you potentially may have.

 Also, how you might first approach those and -- those types of enforcements or legal actions.

 We typically try to give you a quick roadmap of what we feel you could do right now to minimize your risk of legal actions and put yourself in a better place from an accessibility point of view, but also to lower your potential risk with regard to receiving a legal action.

 Just to give you -- if we can start to the first slide. It would help me, Bethany, give some details.

 I'm going to talk through this slide for the people that have visual -- quite a tight slide.

 Essentially, this slide gives you numbers, weekly, with regard to filings of the federal ADA lawsuits that are related to web and apps.

# Research Methodology – ADA Federal Lawsuits

 Let me give you a clarification of what we do when we're tracking those lawsuits in federal and state level.

 All the data you're going to hear, in terms of numbers, is based on the fact we actually track every ADA lawsuit, but not every ADA lawsuit is related to web, app, or something to do with digital, so we actually look at every single lawsuit, and we actually filter out the ones which are essentially more traditional ADA lawsuits, which are around physical spaces, and we identify the ones which are related to basically digital, so essentially, web, app, and video content.

 We then track those, and then we look to see trends within those cases. Everything we talk about is focused on the digital space and not broadly across ADA lawsuits.

 You're also seeing data we talk about that comes from federal ADA cases, state cases, particularly in California under the Unruh, and also you're going to hear Jennifer talk about more regional state stuff like the fair housing law in Florida and other legal actions taking place now.

# The pandemic effect on ADA digital lawsuits

 If I can describe the pandemic effect, essentially. We were at around 40 to 50 filings at federal ADA level around web and app before March. There was a significant drop-off during the first month or two. Then it sort of rebounded back to 50 or 60. What we see in the last couple of months is that number is now up more around 80. At the federal level. And around 20 at the state level, particularly California and Unruh.

 Extrapolate now that number, probably around 3,000 federal for web and app cases. Maybe I can bring Jennifer in here to talk about her own personal experience during that period of where there's cases started to drop off, what was the practical effect of the pandemic for you, Jennifer, and what you saw.

 >> JENNIFER: I think I must have gotten all of the cases that were filed during this period. (Laughter). I stayed very busy.

 For those that don't know, my name is Jennifer Rusie, and I'm a shareholder at Ogletree Deakins. I've been handling website accessibility and other accessibility cases all over the country, primarily the eastern half of the country, for the last five or six years.

 I've been deeply in this. When the pandemic hit, I had many, many cases going on. Dozens.

 I did still see cases getting filed, definitely fewer than what we had in the past, but the biggest thing I saw was that the attorneys were very desperate to get some money. On the other side, I think they were worried their cash cow was drying up, and I was able to negotiate some very favorable settlements during this time period. We did stay busy, not quite as busy.

 As Jason said, it's ramped back up. We are seeing many, many filings on a daily basis.

 >> JASON: Great. We'll get into more detail around different types of actions and the volume that Jennifer has been seeing around different industries as well.

 I want to stay high-level and take you through what we see so far in 2020 from trends. Bethany, you can move to the next slide.

# Trends in Website Accessibility Legal Actions

 Where we are today, lawsuits around 100 a week. When I'm talking about lawsuits, I'm combining federally filed ADA cases. The increasing number of California-based Unruh cases, which Jennifer will talk about, why we're seeing maybe an increase there, in a little while.

 I wanted to get Jennifer, maybe we can combine that, and you can talk about Unruh, but also the Fair Housing Act and just generally where you see most actions coming from this. Could you give us your feeling on on-the-ground activity around different areas?

 >> JENNIFER: Yeah. We've seen -- for those that don't know, the California Unruh act is basically a public accommodation ability in California. Unlike the ADA, which only provides for attorney’s fees and injunctive relief, which is typically for mediating the website, it also provides for compensatory damages, $4,000 per violation. Typically, the court finds two violations, one being the encountering a barrier, and one being deterred from returning. That's $8,000 a pop. It is very, very attractive for these California attorneys to file a lawsuit claiming both Unruh and ADA violations because there's a pretty low minimum threshold -- or high threshold they think they can get. We've seen lots of those coming out of California.

 I actually, this past week, we got demand letters from someone in New York about a violation of the Unruh act, but I don't think is viable, but everybody is getting in on the Unruh act.

 Unruh the FHA, I have not personally handled any FHA cases, but I've seen a trend of a lot of them getting filed mostly out of Florida. Florida does not have a state accommodation act, so compensatory damages are not available.

 I think the FHA is a way some of these attorneys are trying to see if they can get additional damages there.

 >> JASON: Great. Talking about what we're seeing, actually, the subject of legal claims. We're seeing around 20% of the filings at the federal level around mobile apps. Also, an increase where the focus is on the mobile website.

 Now, there's some practical reasons for this. You know, mobile is as important to disability community as it is for anybody else, so it makes sense. Probably the connection around apps being referenced in the Domino's case three or four months back, or late last year, sorry, sort of helped bring attention to basically apps being a potential place.

 I want to combine actually another trend, which actually explains this a little bit.

 We're also seeing lots of companies sued multiple times. I don't mean a repeat lawsuit, meaning the same plaintiff on the same website. Typically, we might see a company be sued for different websites or one is a website, one is an app. Maybe you can talk about that, Jennifer, in terms of what you're seeing, and also if you see much on the video front. We're seeing more on the video front as well.

 >> JENNIFER: Yes. There is an attorney in Miami who has a plaintiff that he works with.

 They file almost exclusively cases regarding apps. Typically, it's a way that they can go after people who have already been hit with website accessibility cases because typically in the last several years of cases we've seen, the lawsuits have been focused pretty much only on the website. So, remediation activity focused on the website. The app has not been a focus of many people's IT groups, but now they're getting hit with these lawsuits. We are seeing those.

 I've seen a lot of people, a lot of defendants, companies, who have already been sued because of their website.

 Gets sued because of their app. Also, a lot of companies get sued multiple times. You know, I've had a case in Miami, and I have another case in New York. Pittsburgh.

 The same defendant. A lot of those defendants ask me because they've seen my name out there. I think it's just bad luck. I think if you haven't remediated your website, you're a target. At the end, we'll talk about ways to help lessen your risk of being a target, but that's one of the frustrating aspects of these lawsuits. It's difficult to preclude getting hit from another plaintiff after you may have resolved one of these cases.

 >> JASON: Yeah. We're going to talk more in detail about that. I think it's really important, and a couple of these other trends I'll quickly pass through because we're going to maybe cover them in a little more detail.

 Lots of companies have taken up and installed things like what we see in the market, things called accessibility widgets and overlays. Typically, cheap, promoted to help you instantly help people with disabilities and make sure you're not going to get sued.

 The reality is there's plenty of companies that have these widgets and overlays on the site, and they get legal actions, whether it's lawsuits --

 It's not showing that a plaintiff firm that's using blind people to find issues -- still finding issues on sites with widgets and overlays. They don't particularly protect very well.

 I think it's important, the last couple of trends, which are ongoing trends over the last two or three years.

 This is an industry nugget. Jennifer will talk about this. I said there were going to be 3,000 cases this year. It's not 3,000 different plaintiffs or 3,000 individuals who felt they haven't received support and feedback from companies around using their website and app and gone down to a lawyer and then sued. This is a reasonably focused business.

 For example, 70% of all the cases are actually filed in New York. 5 law firms with responsible for 80% of those.

 This year's companies that file, 10 lawsuits at a time on a biweekly basis. They have a process. How they go about the process and go about documenting and generating content for the claim. It's probably going to help inform you as a company on what you should focus on first because that's actually sort of how the claims are generally put together and what happens in a claim.

 Jennifer, if you could talk about what you typically think the process is that a plaintiff firm goes about to generate its filing of volume.

 >> JENNIFER: I'm not sure. A lot of times, I see one of those bullet points. Retail, hospitality, banking receive the most lawsuits. That's absolutely true. It seems to come in waves with types of industries. I'll see a whole lot of insurance companies get suend in the same week, or a bunch of banks. I'll tell you, in the last couple of months, I've gotten 10 or 12 higher education lawsuits. I think they sometimes focus on an industry, then they run scans of the websites.

 As Jason mentioned, this is not many different plaintiffs not able to access your site and they're having difficulty.

 Typically, each attorney has a plaintiff or two they work with, and that person is what we call a tester, and we'll talk about that a little bit more.

 That person or their expert runs a scan on the website, typically using some free online software that's not terribly accurate, then they will file a lawsuit, and you know, it's a cookie cutter claim. They're the same. They just fill in the blank.

 I saw a Q&A pop up. I know some use "power mapper." I don't think anybody is using a real screen-reader. They might be, but from when I understand, this is a very quick process and typically the people are not genuinely trying to get any products or services from the websites that they are viewing.

 >> JASON: I agree. The team looks at every single docket. What we have seen over the last two years is a change away from a very cookie cutter, hey, you got this in ALT text, you got missing form labels, missing this, missing that... to a combo. Essentially, what we're seeing now is there's a specific user journey that has been identified by the plaintiff who is typically blind who will say I could not achieve A, B, and C on this particular task, so they might pick a checkout parser of a retail site or an online ordering path of a restaurant.

 We're seeing more. There's some that have got a lot of detail, some that don't have a lot of detail, but it is sort of now a double agent, which is the plaintiff themselves are typically talked about and referenced in terms of what they couldn't achieve on the website, plus a set of what I would class as documented issues that have been identified by what Jennifer talks about, scanning software.

 There's typically a reference to stay, but the website doesn't have an accessibility policy, or the company doesn't have an accessibility statement or policy in place.

 I think it's important to understand the ADA is a discrimination act. It's a civil rights act. What they're trying to establish is you're discriminated.

# ADA and the DOJ

I think what's important is to understand how we got here. There are thousands of thousands of lawsuits and demand letters every year for the last two or three years, but it is not a new subject. This is not something that's just come up in the last three years from a business perspective.

 I think it's important to look at where this comes from, Jennifer can talk about the history. We've got a slide up and I'll explain what the slide is.

 It's really tracking the involvement of the DOJ over the last 20 years in establishing what I would class as a benchmark of yes, the ADA applies to websites and apps, yes, you should make sure your websites and apps are fully accessibility, yes, we think it's a good standard to follow.

 You know, in the first 15 or 16 years from 2000 to 2017, the DOJ entered in on the plaintiff side with around 200+ lawsuits over that time. Most brought by what I class as classic advocacy, the federal for the blind. The DOJ would come in on the plaintiff side and get companies such as H & R block and other types of big companies to agree in a settlement to do things which now you'll see, the template of the lawsuits that are being filed after 2017.

 I'm going to get Jennifer to talk about the important of 2017 and how the DOJ has had a big effect on opening up the market for the private plaintiff. 2017.

 >> JENNIFER: The priorities changed and the DOJ said they were not going to go forward with these ADA investigations anymore, but they already created a blueprint for many private law firms to pick up the mantel, basically, and pick up where they left off.

 As you can see, the numbers here, they exploded after that point.

 It was originally the law firms that started doing this, Carlson Lynch in Pittsburgh started doing a lot of these, and Newport law firm, also a lot in California. Prior to 2018. I would say around late 2017, 2018, we saw the firms in New York start aggressively taking up these cases. New York and then Miami. That's when I saw a huge uptick in those -- taking over these cases.

 The DOJ wasn't doing it. Why should they go out and collect their attorney’s fees?

 >> JASON: Yeah. We'll go in and talk about how the DOJ but also how the ADA has sort of become this applied legal standard that people are using to attach to websites and apps.

 I think it's really important to understand that web accessibility has been around for 20 years. Things like 508, the law that requires the state and the federal government.

 DOJ has been joining in on settlements across industries for 20 years. There is an argument that a lot of companies have made it possible for plaintiffs to sue them because they haven't implemented things they knew were coming along.

 There is a double edge to this, which is websites haven't done a great job of following accessibility guidelines. They haven't really taken seriously about the DOJ's effort for 20 years, and now they're finding plaintiff firms are taking advantage of that, that combination of situation.

 Maybe Jennifer, you can take us through what I class as the nuts and bolts of how the ADA is being applied in the digital space, when of course there wasn't such thing as an digital space when the ADA was first passed 30 years ago.

 >> JENNIFER: Right. When the ADA was enacted, the internet didn't exist. There's not any -- the DOJ didn't enact any types of standards regarding website accessibility. They enacted some very, very specific guidelines. The standards for accessible design in 1991. How wide a doorway must be, the slope of a ramp, where exactly handrails must be. It's very detailed and specific and provides a very nice blueprint for a place of public accommodation to follow along and know they are compliant or not.

 The DOJ updated these in 2010. Even though the internet was very big at that point, there still was no move to do anything with standards for websites.

 We can go to the next slide please.

 They actually did -- you can go to the next slide.

 They went to the rule-making process actually and tried to start working on implementing some accessibility standards under the Obama administration, but then we had the change in administration, all of that just faded away.

 What's really been going on, since we don't have any official governmental action on this, is that the law has been developed in the courts. The way that has happened is courts have decided to say that the ADA says that no individual should be discriminated against on the basis of disability, and the full and equal enjoyment of the goods, services, of a place of public accommodation.

 The way they first decided that websites could be held accountable for being accessible under the ADA was to say the website was a good or service of a physical place of public accommodation. They called this the Nexis theory. There's 12 categories of what a public accommodation is, which is generally somewhere where the public goes in and spends money or gets a service. Perhaps a library, museum, retail establishment, hospital, hair salon, restaurant.

 If any of these types of operations had a website, some courts, not all, decided that could be held accountable under the ADA under the Nexus theory. Next slide.

 Bethany, can we go one more please?

 Uh oh. I lost somebody.

 >> JASON: I think we'll have to wait for Bethany to come back.

 >> JENNIFER: Okay. I'll just tell you. It was different in different jurisdictions, and it still is. The 11th and Ninth Circuit subscribed to the nexus theory. The seventh circuit and others said it doesn't matter if there's a nexus to a physical place and an online-only operation, Netflix, something like that, could be held liable under the ADA.

 The law is different in different places. Unfortunately, the internet is everywhere, so it doesn't matter if your company is based in one of the jurisdictions that has a stricter standard. What matters is where the plaintiff is. That's one reason we see a lot of these cases in New York because they can sue online-only.

 >> JASON: Bethany, are you back? Can you go back one more slide?

 >> JENNIFER: All right. We got a couple of different -- like I said, no actual official guidelines, however, courts have landed basically on these industry standards, the web content accessibility guidelines from the worldwide web contortion. The latest version is 2.1. It was 2.0 for a long time. You'll still see a lot of cases and settlement agreements that go with 2.1. Or 2.0. But 2.1 is the latest and greatest version. There's three what we call the priority levels. A, AA, and AAA.

 AA is the most standard. A is pretty basically. I have never ever seen anyone request that something be compliant with AAA. I've never seen someone complain AAA. This is the Jason comment because I'm not a tech person, but AAA to me seems like it may not exist because I've never seen anyone meeting that standard or demanding that they don't meet that standard.

 Like I said, this isn't an official governmental standard, but it's fairly widely recognized that if you meet the tag 2.0 or 2.1 AA standards, you're compliant with the ADA. The DOJ a couple years ago actually said in a letter that just because you don't meet this standard, that doesn't mean that you weren't compliant with Title III of the ADA.

 This letter that the DOJ had written was meant to clear things up, but it muddied the water a little bit because we still don't know what the standard is, but you're probably pretty safe if your website meets the WCAG 2.1 AA standard.

# Proposed Online Accessibility Act

 We also have the pending -- introduced legislation called the online accessibility act. Just introduced about three weeks ago.

 I don't think it's going to go a whole lot of places. (Laughter). Congress as a lot of other stuff going on right now.

 But as you can see, it's applicable to consumer-facing websites and apps, which would be comparable to public accommodation. There would be a whole separate title to the ADA to apply to digital spaces. The standards they would apply have been proposed WCAG 2.0 A and AA. We know one, we have a standard. A company can know for certain if they meet or don't meet the standard. A really big thing here is before a company could be sued under the ADA, there needs to be a notice and cure period, which we don't have right now. We think actually this is the element of it that's probably going to make it very difficult to pass in congress because the disability advocacy community really does not like this part of legislation that's been introduced in the past.

 >> JASON: Yeah. Jennifer, I think you're bringing up the -- what I would class as the cases out there and the different types of standards that people have tried to establish.

 There's a real practical understanding here, but most people aren't going anywhere near a court when they get a demand letter or a lawsuit. Most companies in a practical sense probably get a lawsuit that -- from a company which really -- this is what these plaintiffs do. They really know how to generate a feeling of well, is this worth going to court?

 >> JENNIFER: Absolutely.

 >> JASON: They will generate a whole list of issues on the website based on WCAG because most websites haven't done a good job.

 The first conversation that typically happens in a practical world is the web teams are asked, are we following WCAG 2.0? Are we sure we're conforming to that standard? The web team probably says probably not, we haven't really given it that much attention, we know we've got issues.

 Well, you know, in-house counsel doesn't give them a lot of negotiations.

 Essentially, the practical sense, and Jennifer can talk about this. The conversation is how quickly can we get this to go away? The only fees are going to be legal fees, so the shorter the time, smaller the settlement and the fee.

 That's why we see 95% of claims sell and sell quickly because most companies haven't done the work.

# Options for Defenses

 Jennifer, I wanted you to clarify that for us. I also think you'll talk later about what if you're a company that has done lots around accessibility and you feel like it is a force claim, meaning it's a claim that doesn't really have a lot of validity. What are the options? I think we'll talk a little bit about that. What are your options when you get a demand letter? What are your options with regard to if you get a lawsuit? If you feel you're actually in a good place, how do you set yourself up to be -- to defend yourself?

 >> JENNIFER: All right. Let's see what the next slide is and we'll talk about that.

 I guess it's not that one.

 Unfortunately, even if your website is you think perfect, as Jason said, most of these cases are settled because what's at stake in this matter are attorney’s fees. This whole thing is say shake down for attorney’s fees far the most part. There's genuine groups suing, but most of the cases I see, I would say 99% of the ones I've had have been filed by seasoned plaintiff attorney who is looking for a cash pay-out. That's the problem. Even if you have a great website, you have the options of a quick settlement. You have a good website, I think that is really good leverage to get a lower settlement amount.

 I think that if you want to litigate, the problem if your website is 100%, you're going to have potentially an issue of fact as to whether or not the website is in fact compliant, and you might have a hurdle in getting past some re-judgment, then you're faced with a trial, which is why so many people settle because it's so much cheaper to pay a small amount upfront than be faced with the prospect of a $250,000 trial.

 Experts will be involved and everything, but I do think there have been cases where we can get expert testimony and upfront at the beginning, and some of your -- I have seen a case where the judge granted a motion to dismiss, even though there was testimony outside the pleadings at that stage. (Laughter). Looks like it's fixed, so this claim is moved.

 We don't need this website lawsuit to get these people to get their website in shape because it already is.

 You know, you can try to do that. It's just the risk most times is just a little bit too great for most companies to –

 >> JASON: Yeah. To that point, Jennifer, this slide sort of gives people an understanding of what's a characteristic that make a company a great target. What Jennifer is talking about is a plaintiff firm wants to do the least amount of work to find a firm that probably is not in great shape, has the money to sell, don't particularly want to busy themselves defending an essentially tick the box of a great target.

 That's why this slide explains that. As you said, Jennifer talked about easy to visit 20 sites which are the same, have your user do the same user journey on the 20 sites, document the issues they've got, scan the 20 sites, produce the documentation.

 We see it focused mainly on what I class as computated (phonetic) sites. These are items that make them attractive.

 I think Jennifer's point is correct, which is the best thing you can do is try not to actually get legal action.

 That's actually where we start to look at, how do you -- we'll talk about that. How do you do the things which are going to be actually, if a plaintiff comes, tries to use your site, actually they can achieve using your site, try to do a scan. What that scan produces is a reasonably good scan. You've got a great accessibility statement.

 These are things which will allow you to go down on the list of potential risk because there's other sites they can go and generate more activity on and easier settlements for.

 I think the next section is to talk about those actions. How do they come? Maybe just Jennifer, what you think the best first action you can do, for example, for a demand letter and legal? What your generally advice to a company is, or general questions to a company is to think about when they get those legal actions.

 >> JENNIFER: I feel we already covered this slide about what's available Title III.

 Let's see the next one. We can show who is suing.

 As we noted, this is where we see the cases. Again, it doesn't matter if you're not in one of these places or you don't have a physical place. What matters is where the plaintiff lives. Typically, no jurisdiction argument. Let's go to the next and we can see what the defenses are. Sorry.

 We get a lot of demand letters. That is something that -- specific trial attorneys and Carlson Lynch. Typically files a demand letter before a lawsuit. These two firms are good about following-up with the demand letters they've sent out and then filing a lawsuit if they do not hear a response back.

 Not always. Sometimes things slip through the cracks, but these guys are better than most.

 There's some firms that send out lots and lots of demand letters and I have never seen them file a single lawsuit.

 You know, it's sort of up to you whether or not you want to raise your hand and respond to them because obviously, it's possible if you don't respond, you'll never hear from them again.

 There's this one guy, Jay Brodsky and he filed lots and lots -- sends lots of demand letters. He's prose. He doesn't want to deal with filing fee or the inform of filing an actual lawsuit. He will demand a very, very low settlement. He's very prolific. (Laughter). He likes to go after hotels, and particularly restaurants and hotels.

 I'll have clients who get three a day from him. He's a repeat player. Like I said, he's just one of the people out there you have to look out for.

 We'll go to the next slide.

 Typically, what I would say is when you get a demand letter, you want to evaluate whether or not you want to respond to it. Which is a little different than an actual lawsuit. When you get a lawsuit --

 >> JASON: To that point, Jennifer, sorry, what we tend to have an experience of is if you get a demand letter, it's probably important right there to consult outside counsel that knows this place, like Jennifer, who can tell you if that demand letter came from this firm, it's probably better to respond to it.

 >> JENNIFER: 100%. (Laughter).

 >> JASON: Actually, if it came from this firm, it's better not to respond to it. That's the value of external counsel at that stage, this landscape is not complicated. It's 10, 20 firms and understanding how those firms work. The plaintiff firms. It's very beneficial, I think, in terms of what to do next in a particular situation. I just wanted to make that point.

 >> JENNIFER: I'm so glad you did because that's absolutely true. A lot of these cases are about the relationship that I have with these plaintiff’s counsel. I deal with them multiple times every day.

 You know, I know I have a really good idea of what they're going to do with the matter.

 If you can reach out to outside counsel who works in this space, they can probably help you decide whether or not to respond. If you are going to respond, how to respond. If you have a great defense, whether or not you should just reach out to them and say hey, this is a mistake because perhaps look at this. The website is not even owned by us. You've sued the wrong company. You know, this is operated through this other platform that we contract out to. Like, you're barking up the wrong tree. That's a defense you could have.

 Again, like if you happen to have an online-only business and you're in a nexus jurisdiction, such as Florida, that could be failure state of claim. That's a great defense. I guess in California, strangely, the Ninth Circuit is the -- specific trial attorneys as we mentioned before, they are really, really actively trying to change the law.

 So, you know, they may keep trying to fight. They are one of the few firms out there that really can litigate one of these cases.

 As we know, before, most of these settle. I think there's only been two trials in the whole country on website accessibility. One of them was in California, specific trial attorneys handled it, and another in Miami. That's Gil v. Winn-Dixie. Currently on appeal to the 11th circuit.

 Other defenses. Like we said, if you have your website in great shape, you can I think leverage that for a good settlement. Sometimes you're going to run into the issue of oh well, that's a question of fact, and you're going to need to get into expert battles and whatnot.

 Vagueness and lack of specificity for failure state to claim. Few motions to dismiss on that a year or so ago. Courts granted them. People have gotten more specific. There's still some filers out there that are still wildly vague, and people who receive these don't have any idea what's wrong with their website.

 The problem with this defense is all the plaintiff has to do is amend the complaint.

 Standing is a good defense sometimes because the plaintiff hasn't alleged any specific harm or specific intent to return to the website or the actual business. If you have a plaintiff that's filed 30 cases in a week, you can throw out a standing argument. Again, they can just amend. As we've mentioned a couple times, there are testers that are allowed, and they don't have to necessarily even have a real intent to use your products to have standing to state a claim.

 >> JASON: Yeah. Jennifer, maybe I'll go back to that also.

 Especially when we talk to a company that's in a good state -- let's say a company has done great work around accessibility.

 Are those questions going to be do you have documentation of that?

 >> JENNIFER: Yeah.

 >> JASON: If we support a client and they get on a call with an ADA defense lawyer, the first thing that defense lawyer is going to say is well, where do you stand with regard to web accessibility? You may say good shape. They'll say well, can you prove it? Documentation is key.

 If you are doing a good job and you're testing and using people from the disability community, which is also a counter evidence of saying hey, we've got blind people that can use our site, you say you got a blind person who can't use your site. It's important. If you're doing this work, make sure that there's well documented and as soon as legal counsel wants access to those documents, it's in a really powerful format that gives them the documents that are going to make someone think twice about going from demand letter to lawsuit, or makes someone think actually yeah, we are still in the wrong company here.

 There are law firms and advocates, but potentially, they want -- they are advocates. They want the company to be doing the right things. If you've documented it, make sure it's there for legal counsel to have use it.

 >> JENNIFER: Absolutely. I mentioned Jay Brodsky. I had him walk away from a case the other day. He wrote back and said you know what, you're right. Withdraw the complaint. It is possible.

 Sometimes they make mistakes and male admit it. It's very helpful if you've got good documentation to show the other side.

 Let's see what we've got next.

 Here we are. This is the question I get the most. How can we make sure this doesn't happen again?

 We really just cannot guarantee that it won't, which is the most frustrating element of these cases.

 You've got one plaintiff and you're really just resolving a case with that one plaintiff.

 Generally, the plaintiff's firm will not sue you again, but that's more of an unwritten rule.

 Potentially, you could certify a class under Title III.

 Typically, doing that is going to cost a lot more money in terms of settlement. You still have to get the court to approve the settlement. You still could be open to getting hit with a claim in another state. For example, if you certified a class under Title III.

 I've never had a client opt to go the class certification route. It's typically -- most of them -- it's better to get a good quick settlement, agree to remediate, really start working on that website and documenting what you're doing, and then if you have already been down this path, that is a deterrent for some. If your company has already been sued and they've got a stipulation on the record that they are going to remediate the website, they will leave you alone.

 Also, some people say that if they see a website accessibility statement on your website, they will not sue you. I believe that might be our next slide.

 It's not.

 >> JASON: I mean, I think --

 >> JENNIFER: Accessibility statements you can put on there. Go ahead, Jason.

# How to reduce risk of accessibility legal action and let the disability community know you are working on your site

>> JASON: This is going to found like I'm repeating myself. Jennifer's point is you can't really avoid a second lawsuit, but you can actually really lower your risk of getting the first one and the second one. I'll go back to it.

 >> JENNIFER: Also, even if you haven't been sued yet, do these things. That's the best thing. I love getting calls from people that are proactive.

 >> JASON: It's practical how these lawsuits are put together. They are literally put together in a certain way.

 If you follow the same way that they try to put together a lawsuit, you will end up with a better, more accessible website, and significantly reduced risk, meaning -- first thing you need to do, how many websites do we have? How many apps do we have? What's all of our exposure? How many public-facing things do we have that are exposing us? That's the first thing you want to list.

 The second thing, you go -- this is something we do for clients, but you can find people who are blind. You can hire them. You can go to advocacy groups like the Miami lighthouse for the blind. There's many organizations like mobility in Austin. There's the American federation for the blind. You can get your own blind user.

 Get them to test your site. Can they do the things you expect them to do? They will tell you whether they can or cannot. You document that. That gives you your expert witness, if you're ever sued. Hey, we've actually got blind testing, and we have documentation for it.

 The bad news and the good news about scanning your top pages, it's very easy to scan pages. That's the bad news because plaintiff firms can scan your pages and find lots of issues. The good news is, it's easy for you to do, and most of the things they find with easy to fix. High visibility issues based on whenever you see. The ability of these tools to scan and find these issues.

 The final item, which is what Jennifer will talk about, accessibility statement. Even if you're in the process, there is no penalty for knowing that you're actively remediating. There's no damages. It's not about -- it's about communicating. We're already on the path. We understand. We believe in accessibility. We're not discriminating. Here is our statement of what we're trying to do and how we're trying to do it.

 Maybe you can just finish that, Jennifer, with your accessibility statement.

 >> JENNIFER: Next page. Here are sample statements. Typically, we recommend they're placed down in the footer of the page.

 I've seen samples that say hey, we know we're not accessible yet, but we're trying. I don't recommend saying you're not accessible. Just say we're working on it. I wouldn't put it on there if you're working on it. Definitely, give somebody an opportunity, a way to respond to you, if they can't access some page. This is a win-win. This is going to actually help some people who might not be able to access your website. It will also inform you of some areas you can potentially improve. I think these are great things to do.

 I would recommend you have -- if you have a hotline, that it is operated as close to 24/7 as possible. If you have an email, I would recommend that you check that very regularly and respond to people.

 One thing I wanted to just touch on, we've been really focusing on blind issues, but I wanted to make sure everybody was checking their videos. If you have video content, you want to make sure it's captioned as well.

 You're checking to make sure people with all kinds of different disabilities can access your content and then you have these statements on there so that if they can't, they can let you know.

 One other thing, I have one attorney I'm opposite quite a bit. He always demands that the defendant put an invisible link in the header to the website accessibility statement so that a screen-reader comes across it very quickly, so they know how to get in touch if they're having problems.

 That is just another thought. Doesn't mess with the presentation of the page because it's invisible and only visible to the screen-reader. If you're going to do that, I would certainly have the one that is down in the footer because, like we said, not all of the disabilities are related to screen-reading. Might have captioning issues as well.

 >> JASON: I think we're very close to one hour.

 >> JENNIFER: Yeah. (Laughter).

# Q and A

 >> JASON: I do apologize. I want to make sure one thing is clear.

 Every question we get, we do respond to. Even if we don't get to much Q&A right now, we do respond to every question because we can pull them from Zoom and we'll respond back individually to any questions.

 I do encourage you to ask questions because we will respond to them.

 Bethany, do you want to take over and just put out any that you feel like have come up multiple times?

 >> BETHANY: Yeah. Let me take a look here. I do apologize about -- I had some technical issues during the presentation.

 We have a question -- a few questions actually on widgets and overlays.

 Are plaintiffs accepting the use of these tools for purposes of requiring WCAG compliance with a settlement? Does that make sense?

 >> JASON: Yeah. I think the question I'm going to paraphrase for you Jennifer. Typically, you have a settlement and maybe you sell with a plaintiff firm and they outline what is expected of them.

 Have any of them accepted that a widget and overlay is an acceptable remediation in a settlement letter?

 >> JENNIFER: I've never included that in a settlement agreement. Typically, the language we have in settlement agreements is we will use good faith efforts to make the parts of the website to Title III accessible to individuals with disabilities and individuals without disabilities. The language is fairly vague that we use. It's still a question as to whether or not that would satisfy that plaintiff, I guess. A lot of times, that still would not make it as accessible. Maybe not as a practical matter.

 Most of these plaintiffs do not ever go back to check the website again. I've not seen that happen. I've never had a case where someone has said hey, you agreed to remediate, and you haven't. But I think you absolutely should want to comply with your obligations under the settlement agreement. Number two, to keep you from getting sued again. But I've never actually specifically seen hey, is it work if my client installs this overlay or widget to comply with Title III. I would not -- just up in the air.

 >> JASON: Yeah. I'll go back to the original list of what you can do to stop getting lawsuits and not get a second one. Jennifer is right.

 The most powerful reason you should make your stuff accessible is to make sure people can use your website who have got disabilities. Second, to potentially make sure you can get these legal actions to go away in the future, or you don't get legal actions in the future.

 If I scan a website before a put a widget on it and I scan it after, the number of the issues comes up reduced by a small number. I still have lots of issues I can sue you for.

 Primarily, we actually now see lawsuits which really specific call out how the widget is actually added more accessibility issues than it solved. There is actually cases even this week where it's two or three pages of focus on the website, actually on the widget itself and how the widget is actually making the website less accessible than without it.

 Not only do widgets not stop you getting a lawsuit, but they're being listed as components of the claim of inaccessibility inside of lawsuits today.

 >> BETHANY: Some of the questions around widgets and overlays we can answer with a blog post. In the follow-up email with the recording and the slides, I'll send a couple of blog posts that we've written about that, more detailed.

 Do you guys want to do one more question? We're two minutes over.

 >> JASON: Let's do one more.

 >> JENNIFER: Sure.

 >> JASON: Of course, we'll answer directly the ones we didn't get to.

 >> BETHANY: Okay. We have a few questions. I think it's worth revisiting about third-party links or content on your site that you don't control and liability issues around that.

 >> JENNIFER: Typically, that's one thing I always include in a settlement agreement. We're not responsible for third-party content linked to or from the website. We can't control it. We are not liable for it.

 However, that's not going to prevent someone from suing you, and then you have to sometimes go in and tell the other side hey, we don't control this. Another server has it.

 A lot of times, I've seen a website might have a general web address, but then if you start to go into shop, that is owned and operated by someone they've contracted it out to.

 The defendant, the main party, doesn't have control over it. However, they can still be sued, and then you have to go the route of trying to get -- from the third-party, which is a difficult issue. It's something we see sometimes.

 I've had cases where I have said look, this isn't my client, you need to -- this isn't owned or operated by us, we can't in fact do the injunctive relief you want us to because we don't have any access to it.

 Unfortunately, you can still be sued for it and you still go after the other party to make sure they make the website compliant.

 >> JASON: Yeah. Our experience is that the plaintiff firms don't care. Meaning, they'll sue you.

 You then spend money defending yourself and defending the fact it's not you, and they still don't care.

 Your absolutely best path right now is to know exactly every third-party application and feature you have on your site, and make sure you have the supplies and make sure they're responsible for making sure their responsible and add it to the clauses and contract.

 >> BETHANY: Great. We are a little past. I want to thank everyone who stayed with us and joined today.

 I have up to the screen my contact information. Jennifer and Jason. If you have questions you think of later, send those in, and I will forward them to our presenters. I'll also be sending some follow-up materials, the slides in the next couple of days, and then the recording next week. I did have a technical hiccup, so I hope we have a good recording from this webinar. I think we can go ahead and -- Jason, Jennifer, do you have any final thoughts before we jump off?

 >> JASON: No. Just thank you everyone for being -- spending time with us. Obviously, Jennifer for your legal color today.

 >> JENNIFER: Yes. Absolutely. Thank you all so much.

 >> BETHANY: Great. Okay. Thank you everyone for joining. With that, we're going to end the webinar.