Hotel Websites and Reservation Systems
Is your website accessible to the blind and vision impaired?
by Martin H. Orlick, Chair, JMBM’s ADA Compliance & Defense Group

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JMBM’s ADA Defense & Compliance team takes the ADA seriously, and we recommend that our clients take a proactive approach in identifying and solving potential problems before they become lawsuits. For many years now, we have called attention to the importance of making website ADA-compliant, but hotels, resorts, restaurants, banks, retailers and other owners and operators of commercial real estate continue to be vulnerable to one of the more recent and serious waves of ADA complaints. See Charles Schwab settles web site accessibility claim and New ADA standards for website accessibility.

Today, my partner Marty Orlick talks about a recent wave of website accessibility claims plaguing owners of commercial real estate. Be smart. Understand the problem and fix it now. This issue is not going to go away.

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A version of this article was published by the California Bankers Association.

How would you react if you received a letter from a law firm alleging that your hotel’s website is in violation of the Americans with Disabilities Act (ADA) because it discriminates against persons who are visually disabled?

If your reaction is to take it seriously, you would be correct.

How would you react if you discovered a near-identical letter was sent to hundreds of other hotels, restaurants and other businesses – by the same law firm?

If your reaction is that you received a cookie-cutter letter by a plaintiff firm that is using a dragnet to identify possible defendants for lawsuits, you would also be correct.

How would you respond to the demand that you bring your website into compliance with international standards for web accessibility?
If you respond by picking up the phone to call experienced ADA legal counsel, you will be saving time and money.

What it’s all about

In January 2016, the law firm Carlson Lynch Sweet & Kilpela (CLSK) sent hundreds of near-identical form letters to national hotels, restaurants, financial institutions and other businesses, contending that the Department of Justice (DOJ) – the federal agency responsible for adopting ADA Standards – requires businesses to make their websites compliant with the ADA. (Note here that the DOJ has not formally adopted any specific website accessibility guidelines.)

Then later this year, at least two new rounds of letters were sent by the same firm – again with demands regarding website compliance under the ADA. These letters seek structured settlements and threaten litigation against those who do not respond promptly, typically within 21 days of the letter.

What is included in the “settlement”?

The remedial measures sought under the structured settlement, are that the hotels or other businesses do the following:

- Bring their websites into conformity with the WACG 2.0 A and AA success criteria within a specified time frame;
- Designate one or more persons to manage the hotel’s website and other digital assets;
- Designate one or more website content development personnel for WCAG 2.0 programming, design and functionality;
- Create and adopt a policy to develop and maintain website accessibility;
- Train IT staff; and
- Contractually require third-party software providers to represent and warrant that their products meet WCAG 2.0 A and AA Success Criteria (good luck on that one), conduct independent third-party periodic testing and to implement policies for programming, designing and maintaining accessible websites.

Settlements and fees

Attached to the letter is a “Confidential Settlement Agreement” which sets out the above terms and demands, as well as damages, and investigative and attorneys’ fees. Actual settlements differ widely as do the monetary terms. Click here to see a template of the Confidential Settlement Agreement and General Release.

Take it seriously

CLSK claims to have utilized a website testing tool which supposedly assesses whether a given website meets the WCAG 2.0 criteria. If a website test shows discrepancies with WCAG 2.0, a demand letter is generated. The letters we have seen are identical except for certain references to alleged WCAG 2.0 shortcomings.

These letters should be taken seriously. A number of lawsuits have been filed in various federal courts against companies which either ignored the letters or refused to negotiate settlements. These cases eventually settled. Recently, several of these lawsuits were filed in the Northern District of California. A number of demand letters have been withdrawn for a variety of reasons.
What you need to know about Website accessibility for blind and low vision customers

Millions of visually impaired consumers rely on the Internet for reserving hotel rooms, banking, shopping, and conducting personal business. For years, the Internet all but eluded them. The DOJ has determined that website accessibility falls within Title III of the ADA and has been working to implement standardized website accessibility standards for over a decade. The DOJ projected these standards would be adopted by April 2016. But website standards have not yet been adopted and the speculation is that the DOJ will implement comprehensive website regulations in the first quarter of 2018. These criteria focus on screen reader software technology, keyboard versatility, accessibility for touch screens, point-of-sale technologies, and streaming video services. Whether the DOJ’s proposed regulations will clarify ADA requirements for websites or create more confusion, remains to be seen. Either way, an increase in website accessibility lawsuits is sure to follow.

2016 brought a dramatic rise in the number of ADA website lawsuits and threats of litigation. While the hotbed of ADA website litigation has been the Western District of Pennsylvania, where several dozen lawsuits were filed against some of the nation’s top retailers, website litigation is occurring nationwide. In a March 29, 2016, California state court decision, Davis vs. BMI/BND Travelware, the Court granted plaintiff’s summary judgment motion holding that Title III of the ADA applies to the plaintiff’s use of the defendant’s website which was inaccessible to blind customers. The Court held that the plaintiff’s use of the website to purchase goods and services was closely related to the defendant’s retail store operations, a critical issue in California. The 9th Circuit requires the webhost to have brick and mortar retail stores in order for the ADA website accessibility requirements to apply. Other Circuits do not require a brick and mortar nexus with a website sales channel. The Court ordered the defendant to pay the plaintiff $4,000 minimum statutory damages under state law.

While the amount of damages for this customer was relatively inconsequential, the implications for hotels are significant. Had the plaintiff been a hotel guest who regularly makes hotel reservations on the Internet, the damages could have been exponentially higher – $4,000 for each visit to the website or deterred visit.

Web Content Accessibility Guidelines 2.0.

The World Wide Web Consortium (“W3C”) published its Web Content Accessibility Guidelines (“WCAG 2.0 A and AA Success Criteria) which the DOJ and others use as a baseline for assessing website accessibility. Although W3C is not a government agency without regulatory powers, it has been in the forefront of website accessibility. The DOJ adopted the WCAG 2.0 AA Success Criteria for federal agencies under Section 508 of the Rehabilitation Act. The DOJ has not officially adopted any formal standards for website accessibility in the private sector, but existing requirements of the ADA already apply. It is widely expected that the DOJ will require businesses to conform to standards mirroring the Web Content Accessibility Guidelines 2.0 A and AA Success Criteria. Many websites do not currently meet these standards, but hotels have seen the “coding on the wall” and are proactively performing analyses of their websites in anticipation of the new standards.

Addressing the complexities of website accessibility regulations before becoming a target for ADA litigation is prudent. Hotels, restaurants, banks and other businesses should consider hiring a web accessibility consultant through legal counsel to maintain privileges and confidentiality protections. Once a complaint letter is received from a potential plaintiff, measures should be taken to protect electronically stored information (ESI) in anticipation of litigation.
If you would like to discuss any ADA issues, please contact us:

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**Martin H. Orlick** is one of the top ADA defense lawyers in the country. He has helped hotel, restaurant, retail and other commercial property owners defend more than 600 ADA cases. In addition to defending lawsuits and governmental investigations, Marty’s team of ADA specialists focuses on enterprise-wide ADA compliance and litigation prevention, including facilities, website and operational compliance. He is also a senior member of the law firm’s Global Hospitality Group®, a partner in the real estate department, and a member of the American College of Real Estate Lawyers (ACREL). For more information about ADA compliance and defense, contact Marty Orlick at 415.984.9667 or morlick@jmbm.com.

**Jim Butler** is a founding partner of JMBM, and the founder and chairman of JMBM’s Global Hospitality Group® and Chinese Investment Group™. He is recognized as one of the top hotel lawyers in the world and has authored or co-authored The HMA & Franchise Agreement Handbook, How to Buy a Hotel Handbook, The ADA Compliance and Defense Guide, and The Lenders Handbook. Jim has led the Global Hospitality Group® in more than $71 billion of hotel transactional experience, involving more than 3,800 hotel properties located around the globe. Jim’s team has also closed more than $1 billion of EB-5 financings for developer clients over the past two years. 310.201-3526 or jbutler@jmbm.com

Other ADA defense and compliance resources

You can access the full library of ADA materials on Hotel Law Blog by going to the home page, selecting the tab at the top that says “HOTEL LAW TOPICS”, and then clicking on “ADA Defense & Compliance” in the drop down menu . . . or by clicking here.

Below is a partial listing of articles by JMBM’s ADA Defense Lawyer team:

- ADA web site accessibility lawsuits escalate
- The ADA Compliance and Defense Guide — Free Download
New ADA standards for website accessibility

FAQs on “service animal” requirements of the ADA. What every hotelier needs to know. Why Uber was sued over service animals.

Starwood Hotels and The Phoenician get an expensive (and unnecessary) lesson in ADA compliance.

DOJ sues 3 of NYC’s top Zagat-rated restaurants for ADA violations

Charles Schwab settles claim over website accessibility

A blast against frivolous, serial ADA lawsuits in striking the right balance

New ADA compliance standards for golf courses. What do they mean to you?

How to handle an ADA lawsuit . . . and How not to do it

How a recent ADA case affects all hotels but particularly conference centers and meeting hotels

ADA Defense Lawyer Alert: Hilton’s ADA Settlement with the Department of Justice: Precedent-setting agreement delivers more than removing architectural barriers

When disabled hotel guests’ needs go beyond the norm for typical guests, what do hotel owners and managers have to do?

ADA Sweeps by U.S. Department of Justice — Coming to a theater district or Hotel near you soon? How to get ready before it’s too late.