



THOMAS J. TRASK, B.C.S.\*  
JAY P. DAIGNEAULT  
RANDY D. MORA, B.C.S.\*  
ERICA F. AUGELLO  
DAVID E. PLATTE  
PATRICK E. PEREZ

*\* Board Certified by the Florida Bar in  
City, County and Local Government Law*

## MEMORANDUM

---

DATE: August 19, 2019

TO: Mayor John Holic  
Vice Mayor Richard Cautero  
Council Member Bob Daniels  
Council Member Mitzie Fiedler  
Council Member Jeanette Gates  
Council Member Helen Moore  
Council Member Chick Newsom

CC: Edward F. Lavallee, City Manager

FROM: Randy Mora, Litigation Counsel

RE: ADA Website and Document Accessibility | Litigation and Proposed Settlement

---

This memorandum is intended to provide a summary concerning the legal issues governing the accessibility of the City of Venice (the “City”) website and the content it hosts, pursuant to the Americans with Disabilities Act (the “ADA”). Further this memo addresses the proposed settlement of an ADA claim against the City.

### I. EXECUTIVE SUMMARY

Given the degree of uncertainty and exposure to attorneys’ fees and costs, litigation counsel is seeking the authority of the City Council to settle an ADA claim against the City for the sum of **\$10,000**, to be paid by the City’s insurer, and a commitment to compliance efforts the City has already largely implemented.

### II. LEGAL BACKGROUND

#### A. LEGAL REQUIREMENTS AND TRENDS

Local governments have legal responsibilities and exposure pursuant to Title II of the ADA.

The ADA covers three main types of discrimination, each of which is addressed in of the statute’s three main subchapters: Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities (state or local governments); and Title III prohibits discrimination by a ‘place of public accommodation,’ which is a private entity that offers commercial

services to the public.<sup>1</sup> Title II provides that no person with a qualified disability shall “be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by an such entity.”<sup>2</sup>

To state a claim under Title II, a plaintiff must establish: “that he is a ‘qualified individual with a disability;’ (2) that he was ‘excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity’ or otherwise ‘discriminated [against] by such entity;’ (3) ‘by reason of such disability.’”<sup>3</sup> Section 504 of the Rehabilitation Act has the same requirements as applied to programs or activities receiving federal financial assistance.<sup>4</sup>

More recently, there has been a flurry of awareness and litigation concerning the accessibility of public entities’ websites and hosted content. By way of example, in 2017, there were at least 814 ADA Title III website accessibility lawsuits in federal court.<sup>5</sup> By 2018, that number ballooned to at least 2,258.<sup>6</sup> A private litigant who brings suit can recover injunctive relief, attorneys’ fees and costs.

In Florida, private litigants have brought suit over the accessibility and hosted content of websites for counties, municipalities, special districts, and other divisions of government.

## **B. FEDERAL GUIDANCE, OR LACK THEREOF**

There is a lack of definitive guidance on Title II claims in the website context. There is no statute, regulation or administrative order setting out in specific detail a uniform method for achieving accessibility compliance.

Even so, the Department of Justice has provided some insights, stating:

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title II covers Internet Web site access. Public entities that choose to provide services through web-based applications (e.g., renewing library books or driver’s licenses) or that communicate with their constituents or provide information through the Internet must ensure that individuals with disabilities have equal access to such services or information, unless doing so would result in an undue financial and administrative burden or a fundamental alteration in the nature of the programs, services, or activities being offered. . . . [A]n agency with an inaccessible Web site may also meets its obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line.<sup>7</sup>

---

<sup>1</sup> *A.L. by & through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir 2018)

<sup>2</sup> 42 U.S.C. § 12132

<sup>3</sup> *Shots v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001)

<sup>4</sup> 29 U.S.C. § 794; *see also J.S., III by & through J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017)

<sup>5</sup> *See Seyfarth Shaw LLP*, ADA Title III Website Accessibility Lawsuits in Federal Court (2019)

<sup>6</sup> *Id.*

<sup>7</sup> 28 C.F.R. § Pt. 35, App. A.

Public entities must also “make reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.”<sup>8</sup> They must also “take appropriate steps to ensure that communication with applicable, participants, members of the public and companions with disabilities are as effective as communications with others.”<sup>9</sup> As a result, entities are required to “furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities. . . . an equal opportunity to participate in, and enjoy the benefit of, a service, program, or activity of a public entity.”<sup>10</sup>

Though public entities have a general responsibility to make their data accessible, there are no legislative or administrative guidelines with the force of law that govern these responsibilities. In this vacuum, the courts and private sector have turned to the World Wide Web Consortium (“W3C”), an international community that develops open standards with the aim of “lead[ing] the Web to its full potential.”<sup>11</sup> The W3C has developed Web Content Accessibility Guidelines (the “WCAG”). The WCAG documents explain how to make web content more accessible to people with disabilities.<sup>12</sup> WCAG offers three compliance levels (A, AA, and AAA) in ascending order of comprehensiveness.

Some examples of WCAG recommendations to enhance compliance include optimizing Websites and PDFs for screen reader compatibility, improving color contrast and text resizing for those with low vision, including captions for audio content to assist the deaf and hard of hearing, and not using color alone to indicate content so as not to exclude the color blind.

### **III. LITIGATION AGAINST CITY OF VENICE**

For several months, City personnel have diligently been working to maximize the City’s compliance efforts without incurring an undue burden or fundamentally altering the City’s operations. Even so, the City is a defendant in ongoing litigation concerning the operation and content on its hosted website.

#### **A. ADA Litigation in Florida Generally**

Across the State of Florida, a small group of Plaintiffs have filed hundreds of suits against corporate and governmental entities alleging violations of the ADA and Rehabilitation Act. Owing to the lack of regulatory guidance concerning accessibility standards and the exposure to attorneys’ fees, the majority of governmental entities have settled these claims. The settlement range for such claims varies by region and the specific facts underlying the claim. In general terms, the settlement of Title II claims has ranged from \$7,000 to an estimated \$25,000, with additional non-monetary terms wherein the entity commits to future compliance.

---

<sup>8</sup> 28 C.F.R. § 35.130(b)(7)

<sup>9</sup> 28 C.F.R. § 35.160(a)(1)

<sup>10</sup> 28 C.F.R. § 35.160(b)(1)

<sup>11</sup> <http://www.w3.org/Consortium>

<sup>12</sup> <http://www.w3.org/WAI/standards-guidelines/wcag#intro>

In some instances, municipal entities have moved to dismiss these claims with some success. Most recently, in May 2019, the Middle District entered an Order dismissing the lawsuit against the Town of Longboat Key (M.D. Fla. Case No. 8:19-cv-00591-T-02AAS). In that case the facts were very specific, where the Town promptly responded to the claimant's pre-suit letter by sending a USB drive with properly formatted versions of the referenced documents and set forth in detailed terms the ways the Town was working to accommodate other individuals with disability. Further, the Court opined that the plaintiff failed to establish sufficient future injury to establish standing (a legally justifiable reason to be in court). The Middle District's ruling in the Longboat Key case was substantially similar to an April 22 decision in a suit filed against the City of Ocala (M.D. Fla. Case No. 5:19-cv-39-Oc-30PRL).

In response to these decisions, ADA claimants have modified the claims in their complaints to allege they *might* be moving to the jurisdiction in question. In doing so, the claimants have adjusted their pleading to overcome the Middle District's finding that Plaintiffs were not susceptible to future injury. Further, such allegations create factual issues that make it very difficult to prevail at the motion to dismiss stage where factual allegations must be construed in favor of the Plaintiff. This creates an evidentiary issue that increases the temporal and financial costs associated with litigation.

More recently, on July 30, 2019, the Southern District of Florida denied a Motion to Dismiss a complaint against the Town of Juno Beach (M.D. Fla. Case No. 9:19-cv-80518-Rosenberg/Reinhart). The complaint against Juno Beach included allegations the Plaintiff might move to the jurisdiction. The court explained: "[u]nlike in [the Ocala case], Mr. Gomez alleged that he has concrete plans to move from Miami and that he visited Defendant in the past. This creates a connection between Mr. Gomez and Defendant."

## **B. Pending Litigation Against the City**

On April 15, 2019, Andres Gomez and Open Access For All, Inc., filed suit against the City of Venice in the United States District Court for the Middle District of Florida. Andres Gomez is the Plaintiff in scores of ADA suits in California and Florida.

The Plaintiffs here have sued the City in two counts. The first count claims a violation of the Title II of the ADA. The second count claims the City committed intentional discrimination or deliberate indifference to Plaintiff's claims pursuant to Section 504 of the Rehabilitation Act. Substantively, the Complaint alleges that Plaintiff Gomez visited the City's Website in January 2019, and again in February 15, 2019, but was unable to access the City's electronic documents. According to City staff, beginning in February 2019, the City commenced significant efforts to overhaul its website to address the trend concerning such claims. Plaintiff has made detailed claims about the City's services and could readily amend the complaint to include similar allegations to those the Court found sufficient in the Juno Beach case.

Based on the broader litigation landscape, the fact that the City was not in compliance at the time of Plaintiff Gomez's visit to the City's site, and the temporal and financial costs associated with litigation, litigation counsel has explored settlement of this case. The parties have reached an agreement in principal. The City would pay the sum of \$10,000. The settlement agreement specifies that \$9,500 is for attorneys' fees and \$500 for Plaintiff's general release of claims. Further the City commits to WCAG 1.0 compliance by December 31, 2021. The Agreement also specifies that the City shall not be liable or responsible to publish Electronic Documents that are technically impossible to make understandable, including scanned historical publications.

It is the opinion of litigation counsel that this is a reasonable settlement allowing the City to minimize costs and exposure while bringing finality to Plaintiff's claims and limit potential exposure to future claims.

I am happy to address any questions or concerns you may have.

TRASK DAIGNEAULT, LLP

/s/ Randy D. Mora, Esq.

Randy D. Mora

Encl.

/RDM