# Rough Transcript for May 13 Webinar, ADA Website Accessibility Lawsuits during Coronavirus

## Introduction

Bethany: Thank you for joining today's webinar titled ADA Website accessibility lawsuits during Coronavirus. My name is Bethany Sirven and I'm the marketing director at UsableNet. Today I am pleased to be joined by our special guest presenters, Peter Shapiro of Lewis Brisbois partner in New York and New Jersey office vice chair of the labor and employment practice, and Melissa Daugherty, vice chair of the labor and employment practice, chair of the ADA compliance and defense practice and our own Jason Taylor. The chief innovation strategist and advisor to the UsableNet CEO. Before we begin, I wanted to start us off with a few housekeeping items. We are recording today's session. A link will be emailed out next week so you can watch it again or share it. The slides from today will be made available also after the webinar by email.

And for questions we'll have a Q&A at the end of the hour. If you have questions before that, please feel free to send them in via the side chat. All attendees are muted so we'll take your questions via that side panel and get to as many as we can. If we don't get to your question, someone will reach out to you after today. With that, I'll hand the session over to our first speaker, Jason Taylor.

Jason: Thank you, Bethany. I'm really pleased that we have got Peter and Melissa here today. And as you can see, they are representing two of the hotter areas of ADA lawsuits, one in New York and one in California so they will bring a unique perspective on some of the data points that we are going to start with.

## Agenda

Jason: I wanted to start with a slide that gives a context of what we are going to cover in the agenda so you understand what we are going to cover. We've done introductions. I've put together some actual data points so we've tracked lawsuits over the last two, three months and I want to give you data points on what's happening in lawsuits. We are going to talk about broad trends that we've seen in 2020, what's the same and what's new in those lawsuits. And then we are going to have Peter and Melissa take us through how cases are handled. I think from a very practical perspective, if you're a company that is in the middle of a legal action or concerned about getting in a legal action, what would that look like and how to handle those and what you should be thinking about, what sort of strategies you have ahead of you.

And then we want to close with really talking about practically how could you reduce and mitigate your legal risk ahead of potential and legal actions.

## Impact of Coronavirus

Jason: We'll start first with just a slide that tries to give us context. What has happened over the last two or three months is very important in the area of digital accessibility. I think it's created more empathy and urgency to act. In reality, lots of people are being put in a position where many people with disabilities have found themselves over the last five or 10 years where they are primarily house bound and many of the things that they want to do are available on websites and apps.

And I think that the working from home, the lockdown has really made everybody aware that the importance of websites and apps for you to do all the things that you want to do in your life, whether that's work, educate yourself, educate your children, manage your health, your wellness, manage your money, it's all there online and digital. And really I think the whole purpose of what we want to communicate today is how urgent you would feel if you couldn't do those things online today, if you were having issues accessing and maintaining your ability to work, educate, and manage your money, manage your health, how frustrated you would feel. And that is at its core where most of the desire to make sure that digital experiences and inclusive comes from.

I think we are going to talk about lawsuits as coming out of a different place. We can talk about lawsuits not always being the way that we would want to advocate that people make change, but I think it's important to understand that the advocacy of making sure that things are inclusive has been going on for 20 years. The Department of Justice has joined over the years around 250 settlements with all types of different companies, whether H & R Block, Chase Bank, Bank of America, different retail stores, grocery stores, education, the need for making sure websites are accessible is a fundamental right for everybody. It's doable. That's the other thing we want to make sure is clear. But the legal landscape has accelerated urgency. And I think it's important that we generate our own empathy and urgency out of the experience we've had over the last couple of months.

Let's look at some data points. Really there's not really surprising information across these lawsuits on a weekly basis. Early March lawsuits at a federal ADA level around digital, so web and app lawsuits. And I want to be clear here. The data that we provide and we promote, we get by looking at every single ADA lawsuit that's filed at the federal level. We look at that case and separate the ones which are aimed at digital, so websites and apps, from ones that are focused physical, for example, like disabled ramps at restaurants. We narrow that down to cases that are aimed at digital accessibility. In the first weeks of March, they were at one an hour, 40 to 50 a week primarily in New York and Florida. And there's been a reasonable tail off through April. I don't think that's going to be a surprise. Primarily lots of things were locked down. People were not actively working so much. But those numbers now have come back up again in the last couple of weeks. And the places are again New York, Florida, and a few in California. I wanted to bring Peter in here to talk about what he's seen in New York over the last two or three months and whether he feels that we're back at where we were before in terms of the types and number of cases.

Peter: Hello, everybody. I think in general fewer of these cases are being filed in 2020 than in 2019 and I think that's in large part because so many companies out there have gotten the message that compliance is important and plaintiffs have had a harder time finding companies to sue, but there are still a number of law firms in this space and they're still actively searching for companies to sue. They seem to be hitting some low hanging fruit. Last week or so, I've noticed in New York a lot of cases have been filed against what seem to be mom and pop type liquor store businesses which are websites. And it's not what it once was where major companies were being sued and there was some perhaps greater merit to the idea that a major corporation should have the wherewithal to comply with the ADA. We'll see what happens in the future, but there was a lull, as Jason mentioned, due to Coronavirus. But the cases are being filed again more or less at the same rate, it seems, that they were before. Obviously it's easy to file as a federal complainant. You don't have to go into court. You click a button and file it. You can do that while social distancing.

Jason: One thing that comes on this chart is we hear a lot about California being in a hotbed of companies being sued for inaccessible digital websites and apps. The numbers here are quite low. Maybe, Melissa, you could explain to actually in California, the legal actions are not covered at the federal ADA level. Maybe you could give us some background on other types of legal action that companies should be aware is happening outside of federal ADA court.

Melissa: Sure. There are two significant things that we're seeing that are not represented here. The first is the vast majority of claims we're seeing in California are pre litigation demand letters. The figures that we're seeing here is a vast under representation of what businesses are receiving. They're almost all pre litigation demand letters. And then the second thing that we're seeing are California state filings. And of course, that's not being represented here either. But the claims are plentiful. And I would say perhaps more so than ever before.

Jason: I just want to make people aware, the reason we don't add into the figures state and demand letters, it's very hard to track those. There's a reasonably simple way, although we look at every single ADA lawsuit, there's a reasonably simple way for us to look at the country and report that from a trend perspective. I think Melissa's point is we're tracking even in LA County this week there's four lawsuits a day being filed. The numbers in California are actually higher than probably any other state right now because there's multiple ways that people are coming in at this.

And what we saw in COVID 19 impact on this slide, just to recap is we did see cases still being filed, as Peter said. You file them electronically so there's no reason why you couldn't file. There was a slowing down because you need to coordinate staff, you need to coordinate the documentation that you are going to present, so that obviously lowered it down. And there's probably also a reasonable likelihood that certain aspects of trials or cases will slow down whether that's availability of juries and basically the overall process of going through a lawsuit will probably be slowed down during this process. I just want to also cover, and I feel like I'm going to get Peter and Melissa also to come in on the next slide which is talking about what we've seen so far in 2020 as the overall trend. So what's the same and what's new. Bethany, if you could bring that slide up. I'm just waiting for Bethany to see if she can find the slide. Bethany, can you let me know if you have the slide. If you don't, we can just move to the next one. Some of the nice internet problems.

Bethany: Sorry. I'm having a little bit of technical difficulties here. Yeah, I can't find that slide. Let's go ahead and move on and I'll get us back on the right slide. Sorry about that.

## ADA Lawsuit Trends 2019 compared to 2020

Jason: If we can go back to the data points, I can take people through some of the things which are the same and some of the things which are different. If we go back to the other slide that shows the cases. One thing I think is really important for people to realize about these cases, we talk about 46 cases this week. What does that look like in terms of the profile of these cases?

So federal cases in particular, probably, and I'll get Melissa to talk about state and also demand letters, is these aren't individual people who have struggled using a website for months and months and they personally go find a lawyer to then say they want to sue a company. It's not 46 set proactive. The vast majority of these cases are represented by a small number of plaintiff law firms that specialize in finding sites to sue based on being inaccessible. So some of the things which are the same in 2020 is most cases are brought by people who have a vision disability, low vision or blind.

They are brought with a sort of production type environment. So a plaintiff firm and as Peter indicated might say let's look at liquor stores this week and they will send us a group of websites of liquor stores and they will have a blind user try to do the same thing on each liquor store website and report their issues. So essentially they would come back with a similar list of issues. So we talk about boiler plates, we talk about you'll see from my list of what's the same in 2020 now which is up on the screen. Again, people with visual disabilities have a list of things that are easy to find but are wrong with the website. They claim the harm is the inequality of the use of the website or the app by the person with the disability. They typically reference ADA and the standard guidelines, WCAG, in those. They focus on industries which are consumer facing. This is important. People ask me, well, how vulnerable is my B2B site?

How vulnerable is my internal site?

So these types of lawsuits, less vulnerable, just because there needs to be an easy way for me, as a plaintiff, to say to my user, go to this site and tell me if you have problems. So consumer facing sites are easier to go after. There are, and maybe I can get Peter and Melissa to talk about this. There's typically a focus where there is a brick and mortar location and a website. Maybe, Peter, you could explain the relevance of that, why that's the case. Why are not pure play websites as vulnerable as ones which have physical locations and a website?

Peter: Sure. The answer to that last point is that it depends where you are. One of the joys of the American legal system is you can have different rules in different states. And Federal Court you can have different rules in different circuits. New York is in the Second Circuit. And while the Second Circuit Court of Appeals itself has not addressed the issue, the lower courts here have all held you do not need to have a physical presence to support an ADA website lawsuit. By contrast, some other jurisdictions, circuits have held you do need to have a physical store within the district or the circuit. So that's one of the reasons that New York Federal Court has been a particular hotbed for lawsuits. There's a lot of aggressive lawyers here who are doing it and they have been looking to businesses all around the country that may not have any physical presence at all, just totally internet businesses, or ones that have physical presence elsewhere. And New York generally has been willing to take those cases. We have been doing more motions and threatening more motions to dismiss based on lack of jurisdiction, saying this company out in Montana or wherever it may be has no salient connection to New York and sometimes the plaintiff will go away on that basis, sometimes courts will dismiss it on that basis, but so far they are not too daunting and those cases continue to be filed only because New York Federal Court is so receptive to these cases in every possible way.

Jason: And I think the most important thing that I'm trying to communicate with what's the same is what's driven lawsuits, demand letters, and state cases in the past is still driving it today. It's primarily well organized plaintiff firms which have got well educated users that are seeing this as a slash advocacy slash way of making some money, but essentially it's a production. It's not individual cases. I think it's important though that those companies now in 2020 have actually added some other things to their standard templates or standard operating procedure. One is they're going after mobile native apps and websites a lot more, at least 20% of the cases today we see are going after mobile sites and apps. That makes some sense. People with disabilities rely on apps on their phone. It's easy to take screenshots on your mobile device and send those in as evidence that you have got problems accessing certain features and it helps document in suits. And actually that's what we're seeing as well. These lawsuits are now becoming more detailed. They are not just a list of missing alt tags or labels. They're including screenshots of true functionality but the user says they cannot process through. Things like adding things to car purchasing, making more dynamic user tasks which they can't complete. They're now using the new WCAG 2.0 .1, so the latest version is part of their playing and referencing 2.1 and asking that a site be remedying to 2.1. There are cases in companies already invested in accessibility widgets and overlays. There's a lot of movement last year with smaller new technology companies providing easy to add widgets to websites to make things more accessible. Unfortunately they don't do the job as much as they claim and they don't seem to have helped companies avoid getting lawsuits. And then cases that we've seen in the last couple of weeks are actually arriving in COVID 19 as acute harm reference and using that as an urgency for pushing a remedy and for pushing the case.

I wanted to move now and pass over to Peter and Melissa to take us through a feel of how recent the legal cases are handled, what should a company expect if they get a demand letter or state or federal, how they should prepare themselves. I know, Peter, you have put together a good amount of content on this so maybe you can take the lead from there.

Melissa: Jason, if I can make one note on the prior slide before we move on, because some of what we're seeing is on the pre litigation demand letters, before it actually gets to the filed complaint, are really, really generic letters. So while I wholly agree that once they get filed we're seeing a lot of details, these pre lit demand letters often don't identify a plaintiff, they don't identify any specific violation, they sometimes don't identify any particular jurisdiction. What they do identify is a website. Sometimes it doesn't identify anything beyond that other than some canned language about some recent case law. That's it. It's becoming increasingly easier for these to be just blast letters sent out to businesses in just mass filings, which is why we're seeing so many of them. Sometimes they're coming from Florida plaintiffs' attorneys out to California businesses and vice versa. And then we're seeing copycat demand letters coming across the country. So with that, we could move on to how it is that we're dealing with these cases and I'll let Peter start from there.

## Legal Update

Peter: Great. One point I would make that's important to understand at the outset is the reason that Melissa is so inundated with demand letters whereas I'm inundated with lawsuits is that there's a California provision, which she'll explain, that enables plaintiffs to recover damages quite readily. And the California plaintiffs' attorneys are not worried about their cases being mootd. And the cases can be mooted theoretically if the defendant were to get wind that the claim would be filed, if they're already substantially compliant, make sure that they get more compliant. Or if they are not compliant at all, hire UsableNet or someone, get compliant in a hurry. And when the lawsuit strikes, they can say go away, this case is moot because we're compliant. Because under the ADA there's no ability to recover damages, only attorneys' fees, the attorneys who have to rely on the ADA don't want to signal necessarily that they have a claim before they file suit. They want to go ahead and file those lawsuits. So virtually all the cases we have in New York start with a lawsuit and you then basically have a much more difficult task facing you if you want to argue that the case is moot, because after you got sued you went ahead and fixed everything. Most of the courts here are not receptive to that and they still will say that, under the ADA, the fact that the plaintiff was the force that initiated the steps as to comply with the ADA is enough to entitle them to the recovery of attorneys' fees.

As I said before, where your suit really matters, New York unfortunately got off on the wrong foot from the point of view of the companies when one of the early of these cases was assigned to a very famous judge named jack Weinstein who is well into his 90s and has announced he's finally retiring. And he's issued many landmark rulings and issued a ruling in this area in a case involving Dick's sporting goods. It held that it doesn't matter that there are no regulations adopted by the U.S. Department of Justice, this was supposed to be the case, and that the judges or juries could figure out what's required under the ADA. And virtually all the judges here adhere to that and they have been very, very receptive to these lawsuits and as a result, thousands of them have been filed here.

The Department of Justice had not done anything to adopt regulations at the time judge Weinstein ruled a few years ago and they made clear more recently under the Trump administration that they are not planning to do that. They basically punted and said they're looking for Legislative solutions and needless to say that legislative solution is not going to be forthcoming pre COVID and now post COVID it's far far down on the priority list.

So we're left with a chaotic situation under which nobody can say for sure what exactly is required to make a website compliant with the ADA and you could have a website that really is terrific, kind of state of the art, but there might be a few bugs in there, a few alt tags that don't work and so forth as inevitably seems to happen as websites are fluid beings, and maybe that's enough. Under any test, maybe the website is 98% compliant. There is no law saying 98 is good enough, even though that should be clear that it is. And a company that has such an exemplary level of compliance shouldn't be sued, but the fact is nobody can say for sure what the standard is going to be. As a result virtually all of the cases, at least in New York, that are not resolved early wind up getting resolved somewhere down the road. Some of the cases resolve early because they're dismissed or voluntarily withdrawn because there may be other technical reasons like jurisdiction that may apply, or in the very rare case the argument that the lawsuit is moot because the website is compliant works. But most plaintiffs' attorneys are pretty savvy and they're able to overcome that argument. The plaintiffs' attorneys all have experts, they are armed with expert reports. In New York, most of the complaints actually, contrasting with what Jason said, are completely boilerplate, often there are mistakes that reflect that they haven't really tailored it to comply with the particular type of business or particular website. They are not in most cases referencing apps. But if you then challenge the plaintiff and say, hey, this is not sufficient and our website is compliant, they will say take a look at our report or they will posture that they have a report and say we have got a report that lists 17 different violations on your website so we feel very strongly or we have good factual basis to stand on to say that you are not compliant.

And based on that, most companies wind up doing the smart thing, which is to settle rather than continue fighting. And they do so because the longer you fight, the more plaintiffs' attorneys you're exposed to. And if you don't have a clearly dispositive defense there's a good chance you may lose the case at the end of the day and be liable for attorneys fees which will be high if the case goes to dispositive motions or trial. I should mention that in New York there is theoretically some ability to recover damages under state law and city law, but unlike California, there's no set amount of damages provided for and there's really no authority out there that indicates what the measure of damages is. That's not really a big part of the case. These cases are all about attorneys fees in New York and that's what's driving the bus.

One of the notes on the slide is about this idea of constitutional due process. Some defendants had argued that they would be deprived their right to due process by being asked to comply with the ADA without having any standards adopted by the government to comply with. And a number of courts had rejected that and most recently the Ninth Circuit, which covers California and some other states, rejected it. And as a result I think that argument has died in most jurisdictions and companies will have to realize they have to comply even if it's not clear what they need to do to comply.

Melissa: And I'll weigh in on that too. Specifically that was the Robles versus Domino’s case. What the Ninth Circuit said was in the absence of Department of Justice regulation, Domino’s due process rights were not violated. It's not that businesses don't have due process rights, but the court reason, while it understood why Dominoes wants the DOJ to issue specific the Constitution only requires that the businesses receive fair notice of legal duties, not a complete blueprint for compliance with statutory obligations. So basically we know the title three applies to websites, the standards are not entirely clear. And we have to go with it. And so what we're looking at generally is the WCAG 2.0 .088 standards. What that means, is it 98% compliance?

Is it 90% compliance?

We don't know exactly. But I will say it's not that we are completely without defenses in these cases regardless of what our jurisdiction is. We are still looking at whether or not the plaintiff has an actual interest in using the services of the business. We're looking at whether or not there are actual compliance issues that impacted the plaintiff or if we're just looking at technical minor issues that didn't actually impact the usability. So I would say not all is lost once we receive a demand letter or we receive a case. It's not always a big settlement. There are potential defenses to these cases.

Peter: And since Melissa mentioned settlement, that's a good point to hit. The cost of settling these cases varies widely, depending where you are. It also varies depending on what defenses may be available if we have a case in New York where jurisdiction is equitable, plaintiff’s attorney recognizes that, they may take less to go away. If there's a case where the defendant is a small business and really can't afford to A, pay a lot to settle, and B, incur the cost of remediating their website, some attorneys will be sympathetic to that and will settle for less. The price range in New York in a lawsuit can probably vary from five thousand dollars to $7,500 range to over $20,000. It depends. Other places it's different. I think Florida, generally the numbers are lower and Pennsylvania, which has seen some of these cases, also lower. And I would expect that, given how many businesses are troubled these days as a result of the collapse of their businesses due to COVID, that we'll see plaintiffs' attorneys recognizing in reality if they want some money, they better be flexible.

Melissa: We are. We are seeing that. We're seeing fire sales in California.

Peter: One other thing I thought may be worth mentioning before we move on to the insurance topic on the slide that's currently up is the fact that at least in New York, virtually every case is filed as a class action. That means that the plaintiff is trying to act on behalf of all visually disabled people who have been excluded from the enjoyment and use of the website. We've never seen anybody actually move for class certification in these cases. I don't personally believe that a class can be certified but it's done in part for what's called interim reasons. A company not familiar with this type of litigation, gets a lawsuit, sees it's a class action, has immediate visions of a lawsuit that's going to involve hundreds of thousands of plaintiffs and now it's going to cost them hundreds of thousands of dollars, if not millions to resolve, and they run scared and want to settle. Hopefully people are getting educated at this point and realizing that doesn't really add very much to the potency of many of these cases.

Melissa: Correct. And you're not going to get a plaintiff is not going to get class wide damages. So even those these are being filed sometimes as putative class actions in California where there are a rights act damages, they are not entitled to class wide damages. They are not going to be able to establish that.

The courts have been pretty clear on that.

Peter: We have got to jump on to the other point from the back. So Melissa, maybe if you could explain what those automatic damages are so that everyone understands why it's hard to evade at least that part of the liability.

Melissa: Sure. But I'll be clear that it's not automatic. The damages aren't automatic. Peter allude to this before. Under the ADA there are no damages available. It's injunctive relief and attorneys in California, there are statutory damages, but there is a particular standard that needs to be met for a plaintiff to be able to establish those statutory damages. It is a minimum of $4,000 per offense up to treble, which is three times the actual damages, and we really don't see that standard being met for website accessibility cases. You may see the statutory damages of $4,000 if the plaintiff is able to establish difficulty, discomfort, embarrassment, distress, but it is not an automatic penalty as we typically think in these cases. But Peter's right. It really is he is right that it is difficult to evade but not impossible. There still needs to be some threshold of difficulty, discomfort, embarrassment, distress. If the violation of the website content is this minor technical issue does not actually affect the usability for the plaintiff, then the statutory damages might not be triggered.

Peter: So in other words we should go back and edit the transcript so I said more or less automatic rather than automatic.

[Laughter]

Melissa: It is often thought to be automatic, but those of us who are pursuing these and defending them in California will never stipulate that they are actually automatic. We will challenge that every single time.

Peter: Just to touch briefly on the topic of insurance, most often we see coverage for the claims under employment practices liability insurance. Not all companies carry that insurance but it's a good idea to have. A, because there's so many employment lawsuits where people are alleging that they have been discriminated against or harassed or otherwise treated improperly these days, but also because there may be coverage for other types of discrimination claims such as an ADA claim. There's some policies that specifically exclude those. There's some that may not cover it because there may not be a damages claim. And insurance companies can be creative in finding ways to find no coverage, but it's a good thing to have generally and certainly any company that gets sued should notify whatever insurance carriers may be on the hook and general liability policies which generally cover accidents and things of that type. And directors and officers liability insurance, errors and omissions insurance. You never know where you might get some help from an insurance company to resolve the case. As the slide says, you won't get help paying for remediation of the website, but even paying some of the defense costs or cost of settlement is helpful. Many of these policies, I will note officially liability policies have large deductibles and since the cases typically will settle pretty quickly and for relatively modest amounts it's often the case that insurance doesn't really kick in and the client insured company is paying itself for the defense and the settlement, but you never know; different policies have different levels of deductible depending on underwriting issues. One point that I wanted to I know we're getting pretty far along. There's just one point that I wanted to make before we miss it rather the New York litigations. We typically will settle cases via consent decrees and that is basically a consented to injunction that the company agrees to. We do so because it gives notice to the world that this company was sued, that it's taken the claim seriously, that it's endeavored to comply with the ADA and it's subject to consent decree that requires it to comply with the ADA. We believe that that is the most effective way to avoid copycat cases, because we think some people see that and think okay, I'm not going to go after that company because they are not likely to be too vulnerable. Or if copycat cases are filed, to posture with the copycat to say you're going to have to go away, because you're not going to be able to recover attorneys fees because the only way you can do that is if you're the change agent that previously recalcitrant defendants to live up to the they won't be able to prove that if somebody else beat them to the punch. That doesn't always work. But hopefully in most cases in other places, it's a basis to get a settlement for less of that copycat case. One of the reasons we do it that way is the Eleventh Circuit court that covers Florida issued a decision called Haynes versus Hooters, basically refusing to bar a copycat case on the basis of a settlement agreement, saying that's not good enough, there could be issues out there, it's not like there's a court order. We have been using this consent to decree device and it's worked well, most judges agree to them. It hasn't been fully tested. We'll see what happens if that's tested someday, but for right now, it's a helpful device to hopefully stem the tide a little bit for the copycat cases which are endemic.

Jason: Peter and Melissa, the change agent is very interesting and I wanted to get your opinion about how that documented in non legal cases. So one of the things I'll pick out three or four things I've come across in your detail, which I think is really important to recap to the group. Pretty much all of these legal actions where we talk about the federal, state, or demand letters, typically come from a place where someone's done minimal testing on a website, if they've done any, but they say they've done minimal testing, which means they've probably run automatic testing tools, they may have had a user with a screen reader or blind user or someone with low vision actually try to use the site and document there's some things wrong. Then they typically will reference WCAG, they reference a lot that companies don't have policies in place and they don't have the requirements in place to make sure that the sites are built accessible and are maintained accessible. So to that terminology, as we sort of wrap up here, is low hanging fruit for me is always about if you want to avoid getting a legal action, do the things that plaintiff attorneys are doing to find you. Make sure that you've scanned your website for the easy stuff and you've fixed that easy stuff. Make sure that you've actually had some people who use screen readers test your site to tell you whether there are big problems or no problems. Establish an accessibility policy or statement that tells the world that you're already doing this. And that's the question that I actually wanted to ask you about. Is it enough that a company's already the agent of action themselves with the policy and can they use that as their, hey, actually we've already got an agent of action already internally developed and already communicated internally and externally and that means that you, Mr. Plaintiff lawyer is not the agent of action here. We've already got an agent of action. Is that a term that can be used in that sort of early negotiation or is that only if you have gone through a legal process and an attorney's already claimed that agent of action?

Peter: Well, we certainly use it, but we get a lot of push back saying that's very nice that you purported to comply with the ADA, but here's our report which shows 17 ways that you don't comply and you wouldn't become compliant without our pushing you so we're entitled to our attorneys fees. How that would sort out when these cases get tried and whether some of the plaintiffs might be thrown out of court simply because all they did was suggest minor tweaks as opposed to inducing a policy of practice and compliance remains to be seen.

Melissa: But we use it as leverage. There's no question that we would recommend to our clients that you should be proactive. Because there are two issues that we are dealing with here. One is that you want to be compliant. You want to make sure that everybody who is going to access your website is going to be able to utilize it, right?

There is a public interest in wanting to have your website be accessible, right?

There's that reason for doing so. And then the other reason, of course, is to avoid litigation to the extent you're able. But can we say that that is going to be a fool proof way of avoiding lawsuits?

Absolutely not. There always is going to be the plaintiffs' attorneys and the plaintiffs that are going to be trolling around and are going to find technical issues regardless of what each of these businesses have done to make their website compliant. We see it repeatedly. But I think Jason, what you are suggesting is the right thing to do and it will certainly help us in negotiations and sometimes it will ward off the claims all together. And sometimes we are successful in getting them either dismissed or making them go away entirely.

Jason: Yeah, I just, I mean, one of the things which we find very interesting and you guys have talked about it, right, this sort of cookie cutter template. And what you find in there is a lot of talk about the company doesn't have an accessibility policy in place. And these are actually things which you really need, as a company, you should be thinking about getting in order, because without a policy and without an actual plan to become accessible, you'll never become accessible. And without a policy you probably won't get the funding that you need to really take accessibility seriously and you'll never achieve that end goal of making sure people are fully inclusive on the site. So we look at those templates of what people demand and say, well, there's your blueprint company, there's your blueprint of what you should be focusing on first because they're the ones, if you do get sued, that's what your lawyer's going to ask. Do you have a policy in place? Have you done any testing? Have you done user testing? What is your status?

Obviously, I'm assuming that's a question that you guys asked when you're engaged at a company level. I'm assuming you have a list of questions you might ask a client where are you on these items. And that helps drive the blueprint. And again, looking at this final slide, that's what we talk about, that the reducing legal risk is to do the work that is really in those templates and you achieve the two things that Melissa said, you're going to make your sites and your digital experiences more accessible and reduce risk. And there's no reason you should not start doing it right away.

Peter: On that note, somewhat remarkably to me, many of the clients that come to me who have been sued say we're really compliant, we've done this and that, but they don't have an accessibility link on their website that explains they have this policy and are compliant and provides an avenue to contact the company if any obstacles to accessibility are encountered. And that's something clearly the ADA calls for and that should be part of something everybody does, even if you're not quite compliant yet. You should put up a message saying we're striving to get compliant, if you need help, contact us. A policy is good, but announcing the policy to the world is also important.

## Q and A

Bethany: We have some questions that have come in around this topic, actually. And I think now is a good time to transition to those. Someone has asked: Does publishing a known accessibility barriers within an accessibility statement reduce legal risk if there is an attention to address those issues?

Melissa: Publishing known barriers?

Bethany: Yeah. I'll read it again. Publishing the known accessibility barriers within an accessibility statement reduce legal risk. So I wonder if what he's asking is just saying like we know about this and we're working on fixing it, but we need more time, if that will help, or if that impacts legal risk.

Peter: I think it's a good idea to do it. But I don't think it's necessarily going to reduce your risk. Arguably it's an acknowledgment that you are not compliant and I don't think that's a fatal acknowledgment because if you're not compliant you're not compliant and you're not going to pretend that you are. I think the more that you show that you are aware of the requirements and take them seriously, that will potentially be helpful down the road. But you have to back it up by acting with alacrity and going ahead and doing what you have to do to get compliant.

Melissa: I want to add you would want to craft that carefully and with some legal guidance. You would want to be very careful in the way that you craft that statement, I would say.

Jason: I would add to that, around accessibility statements, and I'm assuming that Melissa and Peter have experience, the way most accessibility statements should be worded is around what you can control and not what you can't control. We would always recommend that you avoid things like we are WCAG2.0 compliant, which is very hard to achieve and almost impossible to prove. So you would more likely put in we regularly test against the WCAG standards. We use the test on a regular basis. We have a third party company helping us achieve and maintain accessibility. These are broader statements about activities that you are doing rather than definitive statements that you might make in an accessibility statement. I don't know if that gels with what your experience is, Peter and Melissa.

Peter: I think so.

Melissa: Right. Sorry, I was muted. Yes, agreed. Entirely agree.

Bethany: So we have a question. What should companies look for while selecting vendors for accessibility widgets and overlays and they're referencing one of the trends from 2020 that we're seeing more cases against companies that have already invested somewhat in accessibility via widgets and overlays.

Jason: Peter or Melissa, what would you typically say when someone comes to you and says we need to engage a vendor, what sort of criteria do you typically say to a client they should look for in a vendor that's going to help them on accessibility?

Peter: Well, I think I'm not a technical expert so I don't try to dictate criteria. But I would say for example, use companies that our clients have worked with that have seemed to achieve good success, you should work with a vendor who is able to do this and has done it successfully in the past. Some clients have asked about these kinds of cheap, quick and dirty overlay type techniques. I had one client that, without my consultation went ahead and adopted one and was insisting to me they were now fully compliant, and the case should be dismissed. And of course, plaintiffs' counsel said I looked at your website and it's not even one inch towards compliance so you're going to have to pay me to get out of this case. So look for a solution that's going to work in the long term as opposed to something that's cheap would be my recommendation.

Melissa: Agreed. I was just going to say the vendors who we've recommended have been based on our clients' experience and who we know has, for quite some time, showed good success.

Bethany: So we have another question about working around making your website accessible. Does having a call center where users could call in to accomplish the same function reduce liability? Like how does that work legally?

Melissa: Go ahead, Peter.

Peter: Why don't you talk about that.

Melissa: It depends upon what the business is. It depends upon what the business is and whether or not the services are equal. Right?

It is not going to be sufficient for all businesses.

Peter: It's a good thing to have another arrow in your quiver in terms of defense but there's going to be few plaintiffs' attorneys that will accept the notion that just having a robust call center program is sufficient and whether any courts will ultimately accept that as a substitute for WCAG compliance really remains to be seen.

Jason: As you might ask yourself, would you be happy with that equivalent and that might answer your question. If you're not going to be happy with that, someone with a disability is not going to be happy with that.

Melissa: And we know for a fact that for some businesses it is not going to be sufficient. The courts have found it is not okay. There may be limited circumstances where it will, but it depends upon jurisdiction and what the business is.

Bethany: So, we've run a few minutes over and I want to be considerate of everyone's time. I want to thank everyone who attended today and has sent in questions. I know that we have a lot of questions that we haven't gotten to. What I'm able to do is pull a report from this Q&A session and actually send it to our panelists today so that they can reach out to you directly. And I'll also include in a follow up email contact details so you're able to reach out with us if you have more questions after today or we didn't get to a question that you asked. And we have a lot of really good questions that I'm seeing come in here. But again, I want to be considerate of everyone's time.

 Peter: Hopefully we have some good answers, too.

Bethany: Thank you so much to our panelists today. And before we sign off, I would love to get any closing thoughts that you might want to leave the folks that are still on. Maybe we'll start with Peter and then Melissa and then Jason.

Peter: Well, my closing thought would be to thank everybody and say if you're attending this webinar, you're doing the right thing already, so you should be on track to doing your level best to avoid lawsuits or minimize the risk from those lawsuits. So congratulations.

Melissa: Agreed. Yeah, I want to thank everybody for attending. I know that now in particular is not an easy time for any business. And when thinking about spending additional money in any regard, it sometimes feels very onerous. So with much appreciation, we understand what it is that we're asking everybody to do.

Jason: Yeah, I would just close, just extending Melissa's point there. Accessibility is a journey. You have got to start. It's possible to start in a small way, which doesn't cost so much money, but I think it's important to start. That's really what I would say is the most important aspect of accessibility is.

Bethany: Okay. Great. Well, thank you again to our presenters and our attendees and with that, our webinar has now ended.