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One Minute Memo®

DOJ Shifts Position on Web Access: Stating In Court Filings That Public Accommodations Have a "Pre-Existing" Obligation to Make Websites Accessible

By Minh N. Vu

What a difference five years makes. In September 2010, the Justice Department (DOJ) announced in an Advanced Notice of Proposed Rulemaking (ANPRM) that it would issue new regulations under Title III of the ADA to address the accessibility of public accommodations websites. At that time, it made a number of statements that reasonably led public accommodations to conclude that their websites did not necessarily have to be accessible as long as the public accommodation offered an equivalent alternative way to access the goods and services that were provided on the website. The DOJ's statements also led public accommodations to believe that once DOJ issues a final regulation, they would have time to make their websites comply with the technical accessibility standard DOJ adopts in that regulation.

DOJ has now shifted positions, presenting its revised viewpoint in Statements of Interest it filed in two lawsuits originally brought by the National Association of the Deaf (NAD) against two universities about the alleged inaccessibility of videos on their websites.

What DOJ said in 2010.

In the 2010 ANPRM, DOJ stated that "covered entities with inaccessible websites may comply with the ADA's requirement for access by providing an accessible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their website. In order for an entity to meet its legal obligation under the ADA, an entity's alternative must provide an equal degree of access in terms of hours of operations and range of information, options, and services available. For example, a department store that has an inaccessible website that allows customers to access their credit accounts 24 hours a day, 7 days a week in order to review their statements and make payments would need to provide access to the same information and provide the same payment options in its accessible alternative."

DOJ also asked the public to comment on the following questions: (1) "Are the proposed effective dates for the regulations reasonable or should the Department adopt shorter or longer periods for compliance?" (2) "Should the Department adopt a safe harbor for such [web] content so long as it is not updated or modified? (3) "Should the Department´s regulation initially apply to entities of a certain size (*e.g.*, entities with 15 or more employees or earning a certain amount of revenue) or certain categories of entities (*e.g.*, retail websites)?" Particularly relevant to the NAD lawsuits, DOJ specifically asked the public to comment on whether requiring videos on websites to have captioning would reduce the number of videos that

public accommodations would make available, to the detriment of the public. ("[W]ould the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their websites?").

What the DOJ is saying now.

On June 25, 2015, the DOJ filed Statements of Interest in two lawsuits brought by the NAD against two major private universities. The NAD brought suit against these two universities under Title III of the ADA and Section 504 of the Rehabilitation Act alleging that they had failed to caption the many thousands of videos that are posted to their various websites. *To be clear, at issue are not videos that students enrolled in paid or free courses may be required to view. Instead, at issue are videos of general interest (e.g., a lecture posted by a professor, a speech given at the university, or even a campus organization's event).*

Both schools asked the federal court to stay their respective cases until the DOJ issues final regulations specifying what the law requires of public accommodations websites or to dismiss the cases in their entirety on other grounds. Though not a party to either case, the DOJ filed a brief in both in support of the NAD. Although there is much to digest in the DOJ's briefs, here are some highlights:

- "[T]he scope and timing of any final rule on web accessibility is speculative and far from imminent; although the title III proposed rule. . . is currently scheduled for a Spring 2016 publication, there is no scheduled date for publication of a final rule." In other words, it could be years before we see any final regulations on website accessibility. Meanwhile, DOJ continues to pressure businesses into making their websites accessible by filing these types of briefs and threatening enforcement actions, as we have reported.

- The obligation to make websites accessible exists *right now*, even in the absence of any new regulations. DOJ made this point indirectly by stating that when it issued the ANPRM in 2010, it was seeking "to explore whether rulemaking would be helpful in providing guidance as to how covered entities could meet their *pre-existing obligations* to make their websites accessible." This position departs significantly from DOJ's statement in the 2010 ANPRM that public accommodations with inaccessible websites can still comply with the ADA by providing an equal degree of access through alternative means (e.g. the telephone).

- Every video that is on a public accommodation's website has to be accessible to people with disabilities, even if it is not closely related to the public accommodation's core business. DOJ said the universities have an obligation to make their "online programming" accessible. DOJ defined "online programming" to include free online videos and audio files that are not only courses or educational lectures but also "topics of general interest." DOJ did say that the universities could try to prove that providing accessible videos is an "undue burden" or would fundamentally alter the nature of the goods and services they provide, but this would be a fact-intensive issue which would have to be resolved much later in the case.

- A public accommodation has an obligation to ensure that the content of its videos is accessible to every person with a disability *in the public at large*, not just individuals who are customers or potential customers. For the universities, this means that the obligation goes beyond providing access for people who have some connection to them (e.g., students, potential students, etc.).

We should point out that DOJ did not specifically state that access to online videos must be provided through closed captioning. Thus, it is at least conceivable that the videos could be made accessible in some other manner. However, as a practical matter, there are few other options for providing the deaf and hard of hearing access to audio content that is on a video and the NAD is demanding captioning in the lawsuits. In addition, DOJ did not say whether it expected all videos to be captioned before they are posted, or whether captioning (or some other means of access) can be provided after a deaf person makes a request.

The Far Reaching Implications.

Although DOJ articulated the above positions in the context of website videos, the principles underlying DOJ's positions can be applied to everything on a website—not just videos. DOJ's statements confirm what we always knew based on our ongoing work with the agency on website-related matters: DOJ expects public accommodations to make their websites accessible, even in the absence of even a *proposed* regulation that would provide public accommodations guidance, through the proper regulatory process, as to what the DOJ considers a legally-compliant "accessible website".

If you have any questions, please contact your Seyfarth attorney, or Minh Vu at *mvu@seyfarth.com*.

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