



Accessibility:

The law demands it. We deliver it.

ADA Demand Letters and Settlements – Lessons Learned

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Executive Summary

Over the last 20 years, Level Access has seen digital accessibility litigation under the Americans with Disabilities Act (ADA) increase drastically. In 2017 alone, over 800 cases were filed in federal court alleging inaccessible websites, and an untold number of organizations settled potential litigation after receiving demand letters from plaintiffs' counsel. In addition, the U.S. Department of Justice (DOJ) and state attorneys general have stepped up active enforcement of the ADA and state accessibility laws. This has created an environment where many organizations are seeking counsel on how to address issues relating to digital accessibility and using that guidance to develop agreements that can be committed to with confidence.



Level Access has a long history of experience working with counsel as a technical expert in settlements, as well as working directly with design, development, quality assurance, and product management teams to implement the requirements of settlements—as well as the pitfalls to avoid. We have realized that there were technical requirements based on settlement language that couldn't be readily implemented by development teams. Further, there were clear expectations that could have been set during the settlement process and negotiations that would have put all parties—plaintiffs and defense—in a better position for success.

“ Remember, there are no specific published technical requirements that define how the ADA is applied to the Internet.

This whitepaper provides those lessons learned and can serve as a guide for organizations trying to understand how to address the requirements in web accessibility settlements. This can be used to help guide the practicality of requests on both sides during negotiations as well as avoiding pitfalls other organizations have succumbed to in these agreements. In short, we hope it serves as a guide of what can reasonably be done to address accessibility and the core areas we see as needing to be addressed in a holistic settlement.

ADA Legal Status for Digital Accessibility

In addressing issues related to digital accessibility, a key thing to consider is the current state of the law and rulemaking status of the ADA. Remember, there are no specific published technical requirements that define how the ADA is applied to the Internet. Although the DOJ was working on formal rules about website accessibility, it abandoned them in December 2017, and is unlikely to take the matter up again in the near future. In the absence of clear regulations, courts

have taken on a more prominent role in determining what the ADA requires of websites and mobile apps.

Until recently, virtually all cases we are engaged with have revolved around the effective communication requirements of the ADA. These requirements state that firms must provide auxiliary aids and services necessary to ensure equal access to goods and services and effective communication. Given the proliferation of digital apps and websites for customer interactions, this “effective communication” clause now reasonably includes accessible electronic and information technology.

More recently, cases have focused on the question of whether websites themselves qualify as places of public accommodation that must comply with the ADA. This question is far more complicated, with federal courts and the DOJ having reached inconsistent positions. Some courts have held that the website of a business with a brick & mortar presence is covered under the ADA only to the extent that it has a nexus with the physical store. Other courts have held that no such nexus is required.

Last year, in the first website accessibility case to go to trial, a federal judge in Miami ruled that grocery chain Winn-Dixie’s website was covered under the ADA, because it served as a nexus to the chain’s physical stores. The court then ordered Winn-Dixie to bring its website into compliance with WCAG 2.0—the first court to do so—but did not distinguish between Level A or AA success criteria. The case is currently under appeal to the Eleventh Circuit Court of Appeals. Aside from the *Winn Dixie* case, however, courts have not addressed the question of whether WCAG 2.0 AA is the appropriate standard for accessibility, leaving the state of digital accessibility law very much in doubt.



This brings us to the first lesson learned in our 20 years in the business: get a good attorney. As this is a developing legal area, knowledgeable counsel is critical, as are issues of attorney-client privilege, and they need to be thought through first. Once that is in place, organizations then typically engage with a firm like Level Access under a formal technical expert structure. As the situations evolve, the engagement model evolves accordingly.

ADA Enforcement Status for Digital Accessibility

The first thing to consider is the likely enforcement scenario that will be encountered.

- **The Department of Justice:** Until 2017, the DOJ was moving forward with enforcement based on WCAG 2.0 Level AA as the technical standard for accessibility, for both brick and mortar businesses that have websites as well as web-only businesses. Under Attorney General Jeff Sessions, however, the DOJ has stepped back from intervening in

digital accessibility cases on the same scale. Currently, the DOJ's role in digital accessibility litigation is very uncertain and up in the air.

- **State and Local agencies:** These organizations have exerted pressure on businesses to make websites accessible under state non-discrimination statutes. The Attorneys General of New York and Massachusetts have been especially active in this area in the past. State agencies pay attention to federal ADA mandates and will seek to enforce them through their own state mechanisms. In some western states, however, Attorneys General have begun to intervene on behalf of businesses subjected to lawsuits under the ADA and state accessibility laws.
- **Advocacy groups:** Various advocacy groups continue to pursue litigation to accomplish access. For example: The National Association of the Deaf recently came to a settlement with the airline industry to provide captions on in-flight entertainment. In September 2016, two lawsuits were filed in Texas against rideshare companies Get Me and Fare for not having their apps accessible to the blind. In November 2017, the American Council of the Blind sued streaming video provider Hulu over its inaccessible website and lack of video description for users who were blind or limited vision.
- **Plaintiffs Counsel:** ADA-focused plaintiff's attorneys are now actively pursuing web-related claims. We've seen a dramatic rise in ADA demand letters in recent months, many from Carlson Lynch Sweet & Kilpela LLP of Pittsburgh. We expect that more firms will join the fray as word spreads. In 2017, at least 814 cases were filed in federal court alleging inaccessible websites.

Enforcement of the ADA as it relates to digital accessibility has drastically expanded in recent years and will continue to grow looking forward.

ADA Regulatory Status for Digital Accessibility

In 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking (ANPRM) relating to Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. The ANPRM indicated that DOJ believed the WCAG 2.0 A and AA requirements as the logical implementation requirements for the web-based portion of services for organizations covered under the ADA, and announced an intention to draft regulations codifying WCAG 2.0 AA success criteria.

After years of delays, however, the DOJ official abandoned the ANPRM. In July 2017, the DOJ included the proposed website accessibility rules under a list of "inactive actions," leading many in the industry to assume that no action was likely in the near future. On December 26, the DOJ made it official, officially withdrawing the ANPRM. Although the DOJ could return to the subject again in the future, it would need to start the process over from the beginning with a new ANPRM.

But while the DOJ has stepped away from enacting rules to codify WCAG 2.0 AA success criteria, other governmental agencies remain active. The U.S. Access Board's Section 508 Refresh provided a blanket mandate for the use of WCAG 2.0 A and AA requirements as the baseline for the updated Section 508 requirements, which go into effect on January 18, 2018. In addition, nearly all of the recently settled web accessibility cases relating to the ADA have been settled by requiring the defendant organization to conform to either A or AA requirements or a mix of both.

So, while Level Access stresses that no specific technical standards for the ADA compliance of websites exist, we are reasonably confident in selecting the WCAG 2.0 A and AA requirements as the likely ADA technical standards. These standards have been used as the basis of developing this whitepaper and are what the vast majority of settlements use as a baseline. Level Access would, however, counsel firms not to view the WCAG as sacrosanct and would actively counsel organizations to request carve outs from the WCAG that make sense in the context of the needs of the organization.

Dealing with Demand Letters and Litigation

A variety of our clients have received demand letters from ADA plaintiff's attorneys over the past several years. As there seems to be a great bit of confusion behind these letters, we'd like to share a few notes to clear things up.

“ The first thing to do when you receive one of these letters is not to call Level Access, or any other technical expert in the digital accessibility space.

The first thing to do when you receive one of these letters is *not* to call Level Access, or any other technical expert in the digital accessibility space. First, contact your in-house legal team or external counsel and decide on an approach for handling the legal matter. Counsel is critical in this, as are issues of attorney-client privilege, and they need to be thought through before engaging with technical experts. Once counsel has been secured, Level Access typically engages with legal teams first. As the situation evolves, the engagement model evolves accordingly. Given that digital accessibility litigation is a new and specialized legal space, the need to have good legal counsel cannot be understated.

The vast majority of demand letters we have seen are boilerplate letters that are based principally on automatic testing results and are little informed by expert testing. Further, they often cite standards—Section 508 and WCAG 2.0, for example—which don't have regulatory application to the sites being tested. As such, we recommend organizations proceed with a healthy skepticism about the nature and structure of the technical issues that are noted in these letters. These are matters for an expert like Level Access to sort out in conjunction with your technical teams and legal counsel.

Most organizations start the process with an audit of the relevant asset to determine its compliance with a key accessibility standard such as WCAG 2.0 AA. As noted above, the WCAG does not have direct regulatory relevance, but it does serve as a well-known and widely agreed upon benchmark for accessibility. Based on the results of the audit, organizations then work with a firm like Level Access to build a multi-year accessibility compliance roadmap and program.

Compliance Timeline

When reviewing digital accessibility settlements or consent decrees, most of the timelines we see are one- to two-year periods to have the site and related mobile applications brought into compliance. Generally, these are more aggressive timelines than what we have seen put in place by similar regulations. The most recent reference regulation was part of the Air Carrier Access Act (ACAA). In these regulations, the Department of Transportation gave airlines two years to make key functions of the site accessible and three years to make the full site accessible¹. Below are the general timelines that we see outlined in these settlements:

- General web sites – 2 years or less
- Mobile assets (sites, apps) – 2 years or less
- Plug-in content—Time frames vary

In our experience, trying to get a system into a high level of compliance with WCAG 2.0 AA standards, and maintain it there, in anything less than two years is exceptionally difficult. A lot of this difficulty is cultural in nature; this is due to the fact that developing a functioning accessibility approach requires changes to the core processes of the organization. A remediation timeframe of three to five years is challenging, but manageable, as it allows all parties, both internal and external, to work together to grow the system's compliance over time.

Our general recommendation would be a five-year remediation period as that allows for the best cost efficiency and quality while still delivering within a reasonable timeframe. While we have seen the remediation timeframes range from two to three years, another viable alternative is for the client to agree to make some key areas accessible sooner and negotiate a longer remediation period (e.g., three-year term for full conformance across all properties). This approach shows some milestones for progress without adding material cost. It can also be justified as mapping to the approach taken in U.S. Federal rulemaking—notably the ACAA implementing regulations discussed above.

¹ 14 CFR 382.43, DoT Rulemaking [DOT-OST-2011-0177-0111](https://www.federalregister.gov/documents/2011/01/17/2011-0117-air-carrier-access-act)

One counterintuitive observation we have made is that mobile systems often can be brought into compliance *faster* than web systems. Often, they have simpler user interfaces and less legacy code, and they are often under active, agile development. So one lower risk commitment is to do the mobile apps first on a more aggressive timeframe and then circle back and remediate the desktop sites on a longer timeframe.

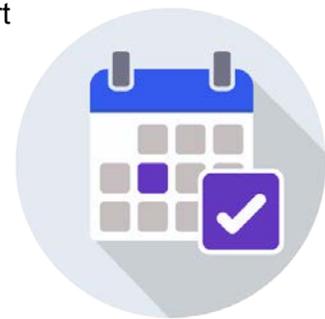
We do occasionally see plug-in content (e.g., PDF, Flash, etc.) having different remediation timelines than primary content. This, however, is legacy language in the agreements and doesn't make too much sense in the modern development environment. That noted, the primary area where we see plug-in content become an issue is with systems that have legacy electronic document production that does not support accessibility. For example, an electronic bank account statement available online in PDF doesn't provide an accessible PDF document because it is built on a system that doesn't support the creation of accessible PDF documents. Thus, if there are significant concerns around legacy plug-in content, they are worth carving out in your timeline or as part of the [Third Party Solutions](#).

“ To avoid having the audit and cure period coincide with the busy season or code freeze, it's best to schedule the audit in Q1.

With all that noted, the compliance timelines are all, ultimately, specific to the business reality and process of the settling party. Further, the timelines don't account for the full complaint or litigation lifecycle, which can mean that work is underway a few years in advance of the actual agreement. While a reasonable timeline is key, we also recommend getting solutions rolling as soon as possible.

Compliance Calendar

The first thing to consider when creating a compliance calendar as part of a settlement is ensuring it is in sync with the existing development calendar. For example, most development teams are quite busy in early Q4, leading up to a code freeze on or around November 1 through the end of the year. Most settlements require an annual audit, followed by a cure period to fix the issues found in that audit. To avoid having the audit and cure period coincide with the busy season or code freeze, it's best to schedule the audit in Q1, when any issues that remain can be found, addressed, or clearly scheduled in the new development cycle.



The same concept would apply for the reporting and training cycles; we would want to be doing them early in the year, before the crunch period, and not late in the year when we are trying to get systems into production.

The best way to avoid this issue is to pull in some product managers or owners from each asset covered under an agreement and get a high-level sense of the development calendar. We don't need specific weekly dates—more on the order of “Don't commit us to anything between September to November.” That way, we make sure nothing in the agreement conflicts with the ebb and flow of their year. Ideally, the timing in the agreement should complement their work.

Third Party Solutions

- Third party content will be periodically tested throughout the Terms of the Agreement
- If a Third Party advises that they will not bring their content into conformance with the Access Standard, another third party provider will be evaluated in good faith
- All newly created requests for proposal after the effective date of the Access Standard will include compliance with the Access Standard as a requirement

Third party services and content are often carved out in agreements to allow for time to evaluate new and alternative solutions. We have also seen ads and non-functional components of websites be carved out for similar reasons. A reasonable commitment for most parties is that when evaluating, purchasing, or renewing third party solutions, accessibility will be evaluated as part of the process.

A subtle point related to third party solutions in modern development is that many modern websites are built on user interface (UI) libraries. jQueryUI, as an example, is a common library that helps build web-based user interfaces. On average, we see *significant* variance in the level of accessibility of the core UI libraries, which in turn impacts the final accessibility of the site. Further, switching libraries or upgrading to a more recent version of the library is often a significant undertaking. Thus, it is often worth contemplating user interface library changes and a *reasonable* timeline for making those decisions.

Another way to ensure delivery of accessible solutions by third party providers is to revise your new contract language reflecting your organization's policy on accessibility and what accessibility requirements your organization has adopted (e.g., WCAG 2.0 AA). Additionally, all current contracts should be refreshed with this language at the renewal stage to ensure conformance across an organization.

Technical Standards

The default technical standards for settlement are the WCAG 2.0 AA requirements. Conformance claims should occur in line with the process outlined in the WCAG documents. These are the de-facto standards and we recommend them as the base for most settlements.

That noted, the use of the WCAG 2.0 AA requirements as a technical standard is a matter of settlement choice, **not** regulation or law, as noted above. As such, we recommend asking for flexibility in a few areas as it relates to the technical standards:



Future Proofing – While regulations from the DOJ are unlikely in the near future—and are regardless likely to be significantly weaker than the terms of a specific agreement—we would have the option to use those regulations on publication.

Mobile Exceptions – There are a variety of situations where certain aspects of the mobile experience can't be made fully accessible because the device doesn't support some of the accessibility features. iOS and Android both have examples of this. Thus, there needs to be an understanding that things will be accessible to the extent supported by the underlying deployment platform.

Accessibility Supported – One particularly challenging concept of the WCAG 2.0 conformance requirements is that all means must be “Accessibility Supported” (i.e., work in assistive technology). Unfortunately, that means even if we implement something perfectly per the specification, if there is a bug in the browser or AT, the solution is deemed non-compliant. If we can avoid the concept of “Accessibility Supported” as part of settlement language, it will make the testing and implementation process much easier. In that case, as long as we can show the proper technical implementation, we would have a safe harbor. Given the wide variances in screen reader support and structure for technologies like ARIA, “Accessibility Supported” can become a big issue in certain development scenarios.

Video – Current support for video accessibility pursuant to WCAG 2.0 requirements is limited in the market. Notably, while captioning support is relatively robust, video description support is more or less non-existent. The current best practice is to post a full alternative video with video description mixed into the (sole) audio track for the video. To that extent, we have started recommending that the CVAA IP video regulations (47 CFR 79.4) govern for web and mobile systems. This has the effect of aligning coverage to regulations many of our clients are already subject to in some fashion and provides a far more judicious framework for the implementation of accessibility.

WCAG Carve Outs

In our experience, certain portions of the WCAG can reasonably be carved out from settlements without materially impacting the accessibility of a final system on a practical basis. These requirements fit one of a few profiles:

1. They have no material impact on the user experience but are highly likely to be violated in a modern development environment—and in a systemic, costly-to-fix fashion.
2. They aren't technically feasible in the current development environment.

“ While we wholly support the idea of providing audio description in video, most content distribution networks or video players do not support multiple audio streams.

We recommend clients ask that a few of the items that don't actually impact the user experience be removed from the WCAG requirements. This can be immensely helpful in focusing development activities. The scope of these carve outs, however, is relatively limited. Specifically, we generally focus on three requirements for carve outs:

- **1.2.3 Audio Description or Media Alternative (Prerecorded)** – While we wholly support the idea of providing audio description in video, most content distribution networks or video players do not support multiple audio streams and video on television has limited requirements for audio description (previously discussed).
- **1.2.4 Captions (Live)** – The ability to conform to this requirement is a matter of the technical systems used for the creation and distribution of live video. If, after checking with your content distribution network, you find live captions are supported, we would include them. If not, we would recommend removing this requirement.
- **3.1.2 Language of Parts** – This has to do with marking up changes to in-line language in a document. Conceptually, we agree with this, but given the way content is widely published for most sites, we have found this to be very difficult to enforce. Further, the vast majority of sites and applications tend to be single language affairs that provide the ability to switch between languages on a global basis. In these cases, we take the view that as long as the language switching ability is accessible, the specific content markups can be flexible.
- **4.1.1 Parsing** – Parsing is a detailed technical requirement that is specific to ensuring the well-formed nature of the underlying coding structure of the page. All modern browsers are well equipped to handle the occasional typo or legacy code on a website, and functional testing ensures they can be used in spite of the code-level errors. In practice, we have never seen this create a material accessibility problem. We do, however, see violations of this requirement on virtually every site we test.

For all of the above items, we do recommend organizations commit to making their best effort to address them and support their validity and importance. We do not, however, view them as requirements for ensuring accessibility.

Organizational Structural Requirements

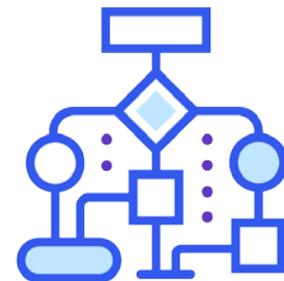
- Requirement to appoint a web accessibility coordinator that reports to the CIO
- Requirement to evaluate all employees and contractors based on web accessibility implementation
- Requirement to evaluate web accessibility coordinator based on accessibility

Our general experience with overly prescriptive structures is that they don't actually result in better outcomes. In fact, they often cause the organization to get stuck with an ineffective structure. The focus should be on reporting and evaluating data flowing back and forth. This can be accomplished within any efficient internal organizational structure.

As an example, one requirement we have seen is "appoint a web accessibility coordinator that reports to the Chief Information Officer (CIO)." On the surface, this makes sense. It assigns the accessibility compliance to a specific person who reports to a key management sponsor. The challenge is that this language doesn't provide flexibility. Perhaps Governance, Risk, and Compliance (GRC) is a better place for that person? A different location would require a different reporting structure which wouldn't conform to the agreement, even if it better served its execution. When faced with this requirement in a settlement, we generally see organizations appointing someone who already reports to the CIO as the web accessibility coordinator to avoid having to add another direct report to the CIO.

We have also seen a settlement require a cross-functional committee charged with monitoring and maintaining conformance across all sites and applications. While this is a good idea, in practice not many organizations have an active committee of this nature. Given that, if you opt to create a committee, we recommend developing it during year four or five, after your accessibility program has gotten its legs under it.

Stay away from structural prescriptions whenever possible and focus on outcomes. Additionally, ensure that the web accessibility coordinator role is one that lasts beyond the tenure of the initially-appointed individual to ensure long term success and accountability.



Web Accessibility Policy

- Create, distribute and implement a web accessibility policy.

Most private settlements—as well as some DOJ settlements—have a requirement for a web accessibility policy. Generally, we would agree that requiring a defined, written, and widely distributed digital accessibility policy is a best practice.

One item we would recommend to include is the ability to update the policy upon written notice to the other party. If they choose not to object, the new policy would go in place. If they choose to object, you get together and sort it out. That gives you a way to update the policy without having to change the initial agreement.

“ If a web form is built, you need to ensure the form is accessible and that the path for routing requests within an organization is clearly defined.

It is equally important to document your organizations exceptions, or limitations, to which the Accessibility Policy is applied. If there are areas that cannot be brought into conformance at the time the Web Accessibility Policy is implemented, it is important to document those within the Policy to ensure scope is clear.

Public Accessibility Statement and Feedback

- Publicly available, conspicuously linked, accessibility page
- Overview of accessibility approach
- How to report accessibility issues—E-mail and telephone generally required, Web form nice to have
- If relevant, how to request alternatives

Making a public-facing statement about your organization’s focus on accessibility is a best practice as well as a documented requirement in most settlement agreements. This statement provides high-level information about the accessibility work of the organization and methods to contact the organization about accessibility issues.

We recommend having an accessibility statement regardless of whether there is a settlement in place. It helps communicate accessibility issues to the organization. When under a timeline to

bring a site into compliance, this is also crucial to make sure items in need of repair are being tracked properly.

If a web form is built, you need to ensure the form is accessible and that the path for routing requests within an organization is clearly defined. There should also be a process document outlining the review of such forms:

- who reads them
- what they look for (keywords, etc.)
- where they are routed
- escalation paths, etc.

- Provide a notice, prominently and directly linked from the homepage, soliciting feedback from visitors on how the accessibility of the website and mobile applications can be improved
- The link shall provide several methods to provide feedback, including an accessible form to submit feedback or an email address, and a toll-free phone number (with TTY) to contact representatives knowledgeable about the Web Accessibility Policy

As with the [Web Accessibility Policy and Statement](#), this is a best practice... but with one proviso: **your organization should control the form and the routing of the data**. Further, the form data would be private to your organization for use in operational improvement.

A critical component tied to the establishment of a [Web Accessibility Policy and Statement](#) is ensuring your organization has processes built out to address any feedback or complaints received through this channel. Being able to illustrate the issue resolution process is key.

Reporting Requirements

- Annual third party audits
- Automatic reports
- Quarterly meetings

Most reporting requirements are fairly stock and are a mixture of (i) formal annual audits by a mutually agreeable third party and (ii) some ongoing cadence—quarterly, most often—of automatic reports on the systems. These are all standard and we wouldn't see an issue with them.

One thing we would recommend is having quarterly or twice a year *face-to-face* meetings to talk about progress and engage the users involved in the process. We see a lot of success in flexibility if we can show actual, user level progress on systems in these meetings.

Additionally, documentation outlining your internal reporting processes (e.g., governance and reporting processes) will also go a long way in highlighting your organization's commitment to accessibility.

Web Accessibility Training

- Provide web accessibility training to development and content team members
- Mobile apps covered in most cases
- Training occurs on an annual refresh, as reasonably necessary or on relevant job transition

Make sure that the date for the training matches a reasonable internal date (same concept as noted in the [Compliance Calendar](#) section of this document). Clearly, we don't want people to be taking time out of their end-of-year development push to learn about accessibility. Load it up in a quarter that makes sense.

For both cost and training efficacy, the key is to be able to implement this in some efficient, scalable fashion rather than have to do **any** kind of classroom-based trainings. We recommend a three-tier approach:

- A 30-minute, all-hands accessibility awareness training (like your standard privacy and security training items)
- Role-specific trainings (management, marketing, development)
- Opt-in advanced technical training (web developers, iOS developers, etc.)

Be sure that the settlement language is not overly specific about the type or approach of the training, but instead defines the desired outcome of the training. If both parties can agree to the outcome, there should be much latitude afforded in how to achieve that goal.

Automated Web Accessibility Testing

- Purchase an automated web and mobile accessibility testing tool
- Run automatic tests on a recurring basis – almost always quarterly

Tool Purchase – Purchasing and deploying an automated web accessibility testing tool is a key part of any web accessibility program. As part of the settlement, most clients will need to secure and use an automated testing tool that covers web, mobile and other electronic documents.

Automated Testing – This is another basic requirement we see in most agreements. While this can be done internally, most clients outsource this and have Level Access run automated tests. There is no material cost associated with this approach as we can allocate a few hours per report under a structured service agreement.

User Testing

- Engage a user group of people with disabilities to test the system during the development process.

Engaging a user group of people with disabilities throughout the testing process is a good idea, however, the problem is getting the timing right in modern development environments. Fast moving scrum teams, for example, aren't going to have a lot of value for user feedback that occurs six months later. Thus, the goal is to get users actively involved in the development process at points where they can have a positive impact on it.

“Fast moving scrum teams, for example, aren't going to have a lot of value for user feedback that occurs six months later.”

One compelling reason for user testing: often a site is not 100% technically compliant but is effectively usable by people with disabilities. Being able to demonstrate usability can be profoundly helpful in bridging the gaps where the code may still need work but the website or app is functional for people with disabilities.

Strategically, having a user group involved that is actively engaged on the plaintiff side can be very helpful for all parties if properly managed. Basically, it gives the plaintiff (or the class) a voice in the process and the ability to say, “This works for me now.”

Finally, as noted in the [Technical Standards](#) section, a lack of clear regulations often means that user issues drive the day.

Scoring

Defining—or at least contemplating—a method for scoring compliance during settlements can be a helpful activity. There should be a reasonable method for gauging the compliance level of the system, taking into account the number of total *potential* issues, not just total issues.

For example, if we found one image missing alternative text out of 10,000, there are two ways to score that website.

Claim one: One image is missing alternative text of 10,000, that's pretty good. Compliance is around 99.9%.

Claim two: We found an image missing alternative text, therefore, the site is not compliant. Compliance is 0%.



While the latter claim is clearly absurd, we have heard it in meetings before. Thus, we want to set some expectations and discuss scoring early in the settlement process.

General v. Perfect Compliance

In line with the discussion on [Scoring](#), we want to set some expectations around general or material compliance versus perfect compliance. In line with the example above, let's say testing finds a single image on the site.

Claim one: One image is missing alternative text out of 10,000, thus, we would deem that to be materially compliant with that portion of the WCAG.

Claim two: We found a single image missing alternative text, the site is not compliant with the WCAG as a whole.

As with the Scoring discussion, clearly the latter is absurd, and clearly we have had that discussion before as well.

Modification of Bug Fix Priority Policies

- Requires accessibility bugs to be handled with the same priority as other bugs

Many settlements have standard language that requires accessibility bugs to be handled with the same priority as other bugs. This is a best practice for ensuring accessibility gets mapped into the organization's specific bug control approach.

Support and Assistance

- Provide a method for users with disabilities to access customer service.

Settlements will also include a requirement that you require a method for users with disabilities to access customer service as well as providing training for your customer service

representatives so they understand how to properly handle and escalate issues related to accessibility. As with a few points above this is a key best practice.

“ When someone contacts customer service and says “I have an issue using the site in JAWS,” we don’t want the response to be “What is JAWS?”

- Training for customer service representatives to properly handle and escalate issues related to accessibility

Front line customer service representatives should be trained on responding to issues relating to accessibility. For example, when someone contacts customer service and says “I have an issue using the site in JAWS,” we don’t want the response to be “What is JAWS?” Representatives should also know to ask “Are you using an assistive technology?” for certain classes of questions, and know when and how to escalate such issues. As with a few other points above, notably the [Public Accessibility Statement](#), we see this as a key for risk management.

- Provide alternative telephone service for visually impaired customers

Some agreements provide for alternative service to visually impaired customers via a telephone number. Our advice is to proceed with caution. We only recommend this on a limited, gap basis and it should not be mistaken for meaningful alternative access.

Additionally, documenting your “catalog” of available accommodations is a helpful practice to ensure employees in your organization are well-versed in accommodations that are routinely supported.

Alternative Format Request

- Provide alternatives format documents on request

Providing alternative format documents (e.g., Braille or large print) on request is a standard part of most accessibility settlements. This is a well-known and broadly settled tenant of access, we are just recently seeing its movement online.

One interesting thing we have seen is the request to add a flag to an account so that alternative formats don't have to be requested more than once. (i.e. once you request to have documents in large print you always get them in large print). We have been seeing more and more of our enterprise accounts do this as a matter of good customer service. Thus, if it can be technically supported, this is a good practice to implement. The catch is "if it can be technically supported" which can be complicated given the legacy systems in place.

Key Points to Remember

- Over the last 20 years, Level Access has seen litigation in the area of the Americans with Disabilities Act (ADA) as applied to the Internet drastically increased.
- There are no specific published technical requirements that define how the ADA is applied to the Internet.
- The DOJ has abandoned its proposal to implement specific regulations for websites, and is unlikely to take the issue back up in the near future.
- Nearly all of the recently settled web accessibility cases relating to the ADA have been settled by requiring the defendant organization to conform to either WCAG 2.0 A or AA requirements or a mix of both.
- In the only web accessibility case to go to trial, *Gil v. Winn Dixie Stores, Inc.*, the court ordered the defendant to conform to WCAG 2.0, without distinguishing between Level A, AA, or AAA success criteria.
- The first thing to do when you receive one of these letters is not to call Level Access, or any other technical expert in the digital accessibility space. First, contact your in-house legal team or external counsel and decide on an approach for handling the legal matter. Counsel is critical.
- Trying to get a system into a high level of compliance with WCAG 2.0 AA standards, and maintain it there, in anything less than two years is exceptionally difficult. Be sure that your settlement includes a realistic timeline for your organization.
- Third party solutions—such as UI libraries—can be tricky to bring into compliance. Ask for a carve out or extra time to research and implement new solutions.
- When it comes to organizational structure and accessibility training for employees, stay away from specific prescriptions whenever possible and focus on outcomes.
- User testing (early in the process) can be invaluable: often a site is not 100% technically compliant but is effectively usable by people with disabilities. Being able to demonstrate usability can be helpful in bridging the gaps where the code may still need work but the website or app is functional.
- Beyond your website, it is important for your customer service team to have training about accessibility so they can help customers that may be having difficulties.