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January 21, 2011

Mr. Thomas E. Perez, Assistant Attorney General
U.S. Department of Justice, Civil Rights Division
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RE: RIN 1190-AA61: Comments on Nondiscrimination on the Basis of
Disability; Accessibility of Web Information and Services of State and
Local Government Entities and Public Accommodations

Dear Assistant Attorney General Perez:

On behalf of the American Bar Association (ABA), with nearly 400,000 members across the country, I am pleased to present our enclosed comments in response to the Department of Justice's Advance Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations (RIN 1190-AA61; 75 Fed. Reg. 43460 (July 26, 2010)). ABA President Stephen Zack has approved the filing of these comments, which were prepared by the ABA Commission on Mental and Physical Disability Law on behalf of the Association.

Consistent with the ABA policy on website accessibility, our comments are made in the context of urging the legal community to provide universal website accessibility. We therefore do not address whether our responses are equally applicable to other segments of the population. Additionally, while our comments apply in the context of an ANPR, we propose that the first step in the process of migration to fully accessible websites should be the creation of standards and encouragement of their adoption short of a fully enforceable rule. ABA policy does not at this time support mandatory rules with the force of law on this subject even as to the legal community.

Sincerely,



Katherine H. O'Neil, Chair
ABA Commission on Mental and Physical Disability Law

/enclosure



**Comments from the American Bar Association on Nondiscrimination
on the Basis of Disability; Accessibility of Web Information and
Services of State and Local Government Entities and Public
Accommodations**

The American Bar Association (ABA) has a substantial history of working for the inclusion of individuals with disabilities, particularly lawyers and law students with disabilities. Goal III, one of the ABA's central tenets, is to "[e]liminate bias and enhance diversity," including for individuals with disabilities. The mission of the ABA's Commission on Mental and Physical Disability Law (Commission), which the ABA originally created in 1973 to safeguard the rights of the "mentally disabled," is "to promote the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and their full and equal participation in the legal profession."

In February 1991, the ABA's House of Delegates resolved to make member benefits accessible to members with disabilities "to the maximum extent feasible." Thereafter, the ABA's House of Delegates adopted a resolution urging that all courthouses and court proceedings be accessible to people with disabilities, including the court websites and the websites of lawyers who practice in those courts. Some years later, in August 2007, the ABA House of Delegates passed a resolution specifically on website accessibility. It reads:

That the American Bar Association urges that websites provided by lawyers, judges, law students, and other individuals or entities associated with the legal profession, including law firms, the courts, other legal employers, law schools, and legal publishers be created and maintained in an accessible manner which is compatible with reasonable technologies (known as assistive technology) that permit individuals with visual, hearing, manual, and other disabilities to gain meaningful access to these websites.

Therefore, it is the official policy of the ABA that all legal websites should be made accessible, whether they are publicly or privately owned or supported. The internet is a vital tool in today's society as a source of information, a marketplace for goods and services, and a way to network and interact with others. Moreover, there is an obvious link between the accessibility of legal websites and the ability of people with disabilities to find employment as lawyers and paralegals, to access legal information and services, and to obtain competent legal representation.

In order to help promote universal website accessibility within the legal community—which includes, as the above-quoted policy states—law firms, the courts, legal employers, law schools, and legal publishers-- the ABA urges the Department of Justice (DOJ) to consider, as a prelude to revising the regulations implementing the Americans with Disabilities Act (ADA) Title II, 42 U.S.C. §§12131-165, and Title III, 42 U.S.C. §§12181-189, the creation of standards and the encouragement of their adoption short of a fully enforceable rule. Thus, while the ABA, through this Commission, respectfully offers the following comments in answer to the questions that DOJ posed in the context of its July 25, 2010 Advance Proposed Rulemaking Notice (RIN 1190-AA61; 75 Fed. Reg. 43460), we reiterate that we are not advocating that the standards and limitations addressed be adopted as enforceable rules in the first instance, but only as guidance. We nonetheless offer these as technical comments that we believe you will find relevant to this proceeding.

Question 1. Should the Department adopt the WCAG 2.0's "Level AA Success Criteria" as its standard for website accessibility for entities covered by titles II and III of the ADA? Is there any reason why the Department should consider adopting another success criteria level of the WCAG 2.0? Please explain your answer.

Level AA of the WCAG 2.0 standards is adequate in order to make nearly all types of web pages accessible, is less cumbersome to implement, and generally has been embraced by the disability community. Level AAA, while comprehensive and thorough in its requirements, would impose additional burdens on webpage owners as far as time and resources needed for compliance, which would slow progress. Also, Level AAA's more stringent requirements have the potential to compromise proper viewing of a webpage by users who may not have disabilities.

Should DOJ decide to adopt Level A, which would be less than optimal, we suggest that Level A only be allowed in instances in which Level AA compliance would be an undue burden on the owner or fundamentally alters the purpose of the website. Barring one of these two defenses, all websites should be required to comply with WCAG 2.0.

Question 2. Should the Department adopt the section 508 standards instead of the WCAG guidelines as its standard for website accessibility under titles II and III of the ADA? Is there a difference in compliance burdens and costs between the two standards? Please explain your answer.

WCAG—specifically version 2.0—should be adopted by DOJ over section 508. The technical standards of section 508, even though they are currently undergoing revision, are not as comprehensive and helpful as WCAG 2.0—which not only contain standards/guidelines, but also success criteria to help determine compliance and support documentation. WCAG, with its concept of a perceivable, operable, understandable, and robust website provides a more holistic web design model that will assist web developers more than just a list of standards. Moreover, section 508 in its current form is out of date.

Question 3. How should the Department address the ongoing changes to WCAG and section 508 standards? Should covered entities be given the option to comply with the latest requirements?

Covered legal entities should be given the option to comply with the latest WCAG requirements, but DOJ should not use 508 standards unless they are equivalent to or exceed WCAG 2.0 requirements. The internet is a constantly-evolving medium; therefore, as new types of webpage features are developed, new standards have to be created or current standards need to be updated in order to cover the new developments. Additionally—as is typically the case with technology in general—it is quite possible that the newer generations of standards will be easier to comply with due to advancements in technology.

Question 5. The Department seeks specific feedback on the limitations for coverage that it is considering. Should the Department adopt any specific parameters regarding its proposed coverage limitations? How should the Department distinguish, in the context of an online marketplace, between informal or occasional trading, selling, or bartering of goods or services by private individuals and activities that are formal and more than occasional? Are there other areas or matters regarding which the Department should consider adopting additional coverage limitations? Please provide as much detail as possible in your response.

To ensure that individuals with disabilities who use the internet are offered the protections of the ADA—as was intended by Congress—although the policy of the ABA applies only to the legal community, we understand the argument that coverage should be extended broadly to all goods and services “offered to the public.” See *Morgan v. Joint Admin. Bd., Retirement Plan of the Pillsbury Co. & Am. Fed. Of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). To the extent that the first step in the process is precatory rather than mandatory, it would make sense for guidance and standards to address all websites.

Question 6. What resources and services are available to public accommodations and public entities to make their websites accessible? What is the ability of covered entities to make their websites accessible with in-house staff? What technical assistance should the Department make available to public entities and public accommodations to assist them with complying with this rule?

The World Wide Web Consortium (<http://www.w3.org>) offers free support and resources for the WCAG. Web Accessibility in Mind (<http://webaim.org/>) also offers free resources and support. The ABA Legal Technology Resource Center (<http://www.abanet.org/tech/ltrc/>) and the ABA Commission on Mental and Physical Disability Law (<http://www.abanet.org/disability>) are available for consultation in making websites, particularly those related to the legal profession, accessible.

With proper training, individuals already designated as webmasters should have the ability to make their covered web pages accessible. Aside from training they may receive from appropriate vendors, there are many free tools (both information and products) on the internet already—some of which are mentioned immediately above and below under Question 16— that can enable a webmaster or technology specialist to develop accessible web pages.

DOJ should expand the staff and resources it already has for ADA compliance in order to assist covered entities. Staff on the ADA Information Line should be trained on website accessibility. Also, DOJ should publish and distribute guides, FAQs, and support documentation related to website accessibility.

Question 7. Are there distinct or specialized features used on websites that render compliance with accessibility requirements difficult or impossible?

One of the more frequently encountered inaccessible web features is CAPTCHA (Completely Automated Public Turing test to tell Computers and Humans Apart), a challenge-response test where the user needs to type in text displayed on a randomly-generated image in order to complete a task such as submitting a form. Users with screen readers are not able to read the required text because it is an image file with no alternative text. reCAPTCHA, a similar feature, is accessible, however, because it has the option where the text in the image is read aloud.

Question 8. Given that most websites today provide significant amounts of services and information in a dynamic, evolving setting that would be difficult, if not impossible, to replicate

through alternative, accessible means, to what extent can accessible alternatives still be provided? Might viable accessible alternatives still exist for simple, non-dynamic websites?

Many websites provide information in real time or on a dynamic/continuing basis. Yet just because information on a web page is consistently changing does not mean that the information can not be displayed in an accessible format. When controls and features are placed on a website that display dynamic information, they have to be developed so that the information is displayed in an accessible manner no matter how it is inserted or uploaded by a web developer or user. Therefore, when feasible, a covered website should implement technology that allows dynamic information to be published in an accessible format at the time of publication rather than at a later time.

Question 9. The Department seeks comment on the proposed time frames for compliance. Are the proposed effective dates for the regulations reasonable or should the Department adopt shorter or longer periods for compliance? Please provide as much detail as possible in support of your view.

Question 10. The Department seeks comment regarding whether such a requirement would cause some businesses to remove older material rather than change the content into an accessible format. Should the Department adopt a safe harbor for such content so long as it is not updated or modified?

Question 11. Should the Department take an incremental approach in adopting accessibility regulations applicable to websites and adopt a different effective date for covered entities based on certain criteria? For instance, 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)? Please provide as much detail and information as possible in support of your view.

Question 18. Are there alternatives that the Department can adopt, which were not previously discussed in response to Questions 11 or 16, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.

Regarding these four questions, the ABA over 3 years ago urged the legal community to begin the process of developing and maintaining accessible websites, but we are aware that the downturn in the economy has contributed to a slow pace of response. As stated above, the ABA policy does not support mandating accessibility, but seeks to encourage voluntary compliance with accessibility standards. We are aware that the Department's inquiry contemplates mandatory compliance, and we have not examined the questions posed that relate to a government-imposed compliance requirement.

As a general observation, however, we suggest that the DOJ should be mindful of the more limited resources that ordinarily characterize smaller public entities in the legal profession. These entities may require additional time to comply with any new regulations. Even if an entity is small in its physical presence (e.g., staff, office space), that does not mean that its presence on the internet is small as well; therefore, entities with fewer resources may need additional time in order to bring numerous web pages into compliance with new regulations.

Question 13. What are the annual costs generally associated with creating, maintaining, operating, and updating a website? What additional costs are associated with creating and maintaining an accessible website? Please include estimates of specific compliance and maintenance costs (software, hardware, contracting, employee time, etc.). What, if any, unquantifiable costs can be anticipated from amendments to the ADA regulations regarding website access?

Currently, the ABA is creating a new website involving thousands of older web pages and new software and hardware. Therefore, figures on the costs associated with making this new website accessible and annual accessibility maintenance costs cannot be calculated at this time. In general, however, such costs can range from a couple hundred dollars to tens to millions of dollars per year depending on several factors, including the entity's operating budget, staff size, services offered over the internet, and number of web pages.

Additional costs for creating an accessible website come with the creation, production, and post-production of certain types of content, typically audio and video formats. To be accessible audio content usually requires a transcript and video content usually requires either captioning or a transcript. Transcript and captioning services for a single video or audio recording can cost as much as several hundreds of dollars.

Training of a covered entity's staff would probably be the most expensive unquantifiable cost. Learning how to make a website accessible is a process that requires initial training as well as continuing education (due to the ever-evolving nature of technology). For an entity such as the ABA, an appropriate approximation would be that seventy-five entities would need to contribute to the website. If each entity trained one staff member on accessibility and that training lasted roughly six hours, that would equate to around 450 hours of training.

Question 15. What, if any, are the likely or potential unintended consequences (positive or negative) of website accessibility requirements? For example, would the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their websites?

Positive consequences include an increase in website traffic by users with disabilities. This result would be of particular value to entities who want increased traffic on their website, including companies selling a good or service and government entities offering information and services. More important from the ABA's perspective, there is a direct link between the accessibility of legal websites and the ability of people with disabilities to find employment with legal employers, work as lawyers and paralegals, access legal information and services, and obtain competent legal representation. If the legal community does not have accessible websites, individuals with disabilities could be excluded from the profession and from obtaining legal services.

For the legal-business community, new regulations would create a large "cottage industry" in the technology sector that will offer services and products to make accessible web development both possible and easier. While there are already companies that offer such services and products—e.g., development training and guides, accessibility analytical software tools—the more that entities' websites are accessible, the greater will be the demand for these items, and thus supply.

The development of standards and goals for internet accessibility would be blazing a new trail internationally, and can serve as an inspiration and model for other nations to do the same.

Question 16. Are there any other effective and reasonably feasible alternatives to making the websites of public accommodations accessible that the Department should consider? If so, please provide as much detail about these alternatives, including information regarding their costs and effectiveness in your answer.

Google has a feature that automatically adds captioning to videos uploaded through YouTube. It uses speech-recognition software to turn the audio from a video into captions. This technology is free for YouTube users, but it should be expanded to other video platforms. (<http://googleblog.blogspot.com/2009/11/automatic-captions-in-youtube.html>).

Internet browsers have add-ons and extensions that can allow a user or web developer to analyze the accessibility of a website (see: <https://addons.mozilla.org/en-US/firefox/addon/5809/>) and even help to make an inaccessible website accessible (see: <https://chrome.google.com/extensions/featured/accessibility>).

As mentioned above, it is feasible in theory for website software and feature developers to build in accessible controls so that when information is later inputted by a website developer or user, it can be automatically displayed in an accessible manner. Some website content management systems, such as Microsoft SharePoint for example, have built in features that enhance accessibility before materials are even published to the web. Such features also allow web site managers with little or no accessibility training to produce accessible content. (see: <http://office.microsoft.com/en-us/windows-sharepoint-services-help/accessibility-features-HA010173723.aspx>)

Question 19. The Department is interested in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA. Are there additional issues or information not addressed by the Department's questions that are important for the Department to consider? Please provide as much detail as possible in your response.

DOJ should encourage additional technology providers to develop consumer products that make websites accessible. We believe that the setting of guidelines and standards and the encouragement of compliance should be a first step. The federal government should also lead the way in use and support for development of relevant technology.

As discussed above, some products have already been developed by Google, Microsoft and Mozilla. As also mentioned above, there is great potential to have the free market create a sizable "cottage industry" related to making websites accessible. As the ADA evolves, we are confident that it will eventually cover websites of public accommodations and public entities, so it would also be helpful to ensure that there are enough resources and products available in the market (both free and at cost) to assist with the great number of web pages that will need to be covered. The development of these resources will benefit not only the owners and operators of websites—by allowing them to reach a new population of internet users with disabilities—but also the companies that produce and sell such products and services.