UNEDITED TRANSCRIPT

“The Intersection of Voting Rights and Website Accessibility lessons Learned from Eason v. New York State Board of Elections”

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>>Claudia Center: I'm Claudia Center. I volunteered to be the moderator. These 2 are the brains of the case. I said I would moderate. They will be the presenters. We have with us today Jessie Weber who is a partner at Brown, Goldstein & Levy and Christina Brandt‑Young who is the managing attorney at Disability Rights Advocates. I'm with the national ACLU Disabilities Right programs that played a role in the starting or the beginning of this case.

And what happened was that Susan, who I work with, had been tracking the moderation of voter registration.

The increasing reliance on online voter registration for voters to register for the first time in a jurisdiction or to update an address. So we wanted to make sure that all states implemented a system that would be fully accessible to people with disabilities.

So the ACLU asked the Center for Assistive Technology ‑‑ Center for Accessible Technology to work with the ACLU to put together a review of the states who were then doing online voter registration and to see which states looked good, which states looked problematic, and which were the most common barriers on the website for people who use screen readers or other assistive technology to access websites.

And the shocker, the shocking result was that only one state was accessible for people who use screen readers or other assistive technology to access the website. That was California. That was because it was launched the year before and had started off inaccessible and the advocates had raised an uproar about the inaccessibility. No other states passed the most basic of tests to be able to fill out the voter registration form using a screen reader.

It was pretty pathetic. This report and its findings was mailed to all of the states. Susan made presentations to the U.S. Election Commissioner and Secretary of State.

This was a big part of the beginning of the case. The Center for Accessible Technology has deep, deep roots with the disability community and are experts even though that is true, we had to go through many, many drafts of this report.

I'm using we, it was Susan. To make it fully accessible to people who had never thought about this issue before. So that was a lesson that came up later in the Easton case. Now I will turn it over to my colleagues.

>> Christina Brandt‑Young: I just want to note that Claudia is utterly selling herself very, very short here. If you want someone to draft a Complaint and Motion for Summary Judgment and Response to someone else's Motion for Summary Judgment, she is an extremely nice lady to know. She is an extremely nice lady to know by any standard.

If you were going to litigate against the State of New York, Claudia is your best friend.

I will be talking about some of the legal issues that were posed to us in this case. The defendants ‑‑ as you can tell, it was traumatic. The defendants filed 2 motions to dismiss and a motion to exclude our expert report and a motion for summary judgment and many of their arguments related to how websites can and probably should change every day.

Our nucleus of facts was constantly changing because the websites were changing and many of their arguments sought to take advantage of that.

So this presents legal issues to think through. It presents factual and proof issues. I will tackle the legal stuff. Jessie will tackle the proof.

The first is the Pleading Rule, standing muteness and the basic legal standard for website accessibility.

I want to note that we will be spitting out this citations here. If anyone would like to have those citations E‑mailed to them, we are very, very happy to do that. Please come and see me afterwards I will put your name and e‑mail address on the list so you do not have to copy these things down right now.

Starting with problem number 1, the pleading and scope of relief, our court called us ships passing in the night because of the parties approaches to the rule and what should be out of our complaints.

The defendant's argued we identified certain problems on the websites and that as a matter of notice pleading under number 8 it should be limited to those problems those web pages and functions that we identified in the complaint or they wouldn't know what we sued about.

The plaintiffs argued it was too narrow. They were badly run and that was the real problem that our lawsuit wanted to correct. We alleged that their websites were constantly repeating the same kind of problems that kept showing up over an over lack of ALT text, inaccessible PDF, poor ink tests. The list went on and on the problems showed up all the time over the place.

And we argued that because of that, only injunctive relief of proper policies and procedures would solve the problem. Furthermore, you don't have to point out every single URL to give defendants notice what it is that we allege broke the law and why.

The Court agreed with us they said that our complaint alleged that there was a broader case here and that inability to run the website was a problem and there was no pleading issue under rule 8.

Problem number 2 was standing. The defendants argue that had we should only be allowed to complain about specific URLs and functions that our witnesses had personally encountered. So if we could demonstrate that our expert had found a problem on the site but we couldn't produce a blind witness who had also encounter that had specific problem that we could not include that in the suit.

We responded that there are 58 different transactions and services offered via the department of motor vehicle's website in New York. They have 6,530 distinct HTLM pages, 898 PDF documents, 468 other file types, and that was just one of the defendants.

We argued under the defendant's argument if we wanted it to address each website in its entirety we would have had to attempt to visit each of those documents and experienced a barrier and that the proof would go on forever. It was not an efficient way to run a case.

And we argued that that was inconsistent with precedent in certain circuits. All of that precedent to architectural barriers.

And some of those cases include Kreisler v. Second Ave. Dinner Corp., 731 F.3d 184, 189 (2d Cir. 2013). In that case plaintiff had tried to enter a diner had been unable to enter the diner and sued although he had not experienced them.

The next was Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 950‑52 (9th Cir. 2011). It was a similar situation. The plaintiff who had encountered barriers trying to shop in a store had standing to challenge all of the barriers in that store.

And Steger v. Franco, Inc., 228 F.3d 889, 894 (8th Cir. 2000) that was a blind plaintiff who challenge all of the barriers despite going on to the first floor.

Under Kreisler, it would burden businesses and other places of accommodation with more ADA litigation, encourage piecemeal with the ADA and thwart the goals of eliminating widespread discrimination.

We said we can file a separate lawsuit for every URL as we encounter it, Judge, but you will not have fun with that. The Court agreed. The Court agreed that would be wildly inefficient.

What was really nice, the Court applied all of the architectural standing cases to websites.

Kreisler makes clear that lack of access may fairly put other areas that a plaintiff could not and did not access in play.

Issue number 3 was muteness. To a certain extent muteness was the name of the game. No sooner would we identify the barrier and the defendants would try to fix it and claim that our case didn't exist anymore.

But the way the argument ran is we identified certain problems on their website and they fixed those so our case was mute and said if we wanted to complain about something we should file a new lawsuit.

We disagreed with that analysis in several ways. Number 1, there were still barriers on their websites. Secondly, we argued even if they had fixed all of those barriers, they managed to introduce so many new ones over the course of the lawsuit that this demonstrate that had they could not run a website unsupervised by the Plaintiffs and court and that the defendants lacked the policies and procedures that would be likely to prevent reoccurrence on the website.

They didn't know what they were doing and continued to not know what they were doing. As long as discovery record they would fix those but that would not solve the problem in the end.

>>Claudia Center: They were rolling out the real ID. They were rolling out with real ID and it was filled with access barriers even though it was brand new in the middle of some sort of motion, summary judgment.

>>Christina Brant‑Young: They fixed it in time for our reply. They meant to fix it all along. They had to get it out and their intention was to make it accessible a week later always. Always.

>>Then we made the usual arguments about how your intention to eliminate barriers is not eliminating them and the plan is not eliminating barriers. There are some website‑specific laws about your intent to fix your website, how that doesn't render someone's lawsuit mute. Haynes v. Interbond Corp. of Am., No. 17‑CIV‑61074, 2017 WL 4863085, at \*2‑3 (S.D. Fla Oct 16, 2017).

And Markett v. Five Guys Enters, LLC, No. 17‑CV‑788 (KBF), 2017 WL 5054568. at \*3 (S.D.N.Y. July 21, 2017).

>> So I am happy to say that the Court denied motion for summary judgment on these claims of muteness. That was a constant fight, constant battle.

So problem number 4 the last problem that I am going to talk about. That was simply understanding Title 3 and the Section 504 standards for website accessibility. This fell into 2 categories, one easy one not so easy to argue.

First of all, there was the broader question whether Title 3 requires a website to be accessible at all. We pointed out that title 2 replies to. Martin v. Metro. Atlanta Rapid Transit Auth., 225 F. Supp. 2d 1362, 1377 (N.D. Ga. 2002).

And the Court had no problem with that. I don't think even defendants really felt they had a good argument about that.

>> I will add we did get a decision where the Court rejected both summary judgment decisions. That was from December 2018 and is really nice on this point. Of course websites are covered.

>> So very much of our daily life is spent on the internet. We are constantly referred to someone's website as a more convenient less expensive or better way of accessing services. If the disabled are denied access to a website, a door, an array of information is closed. If they are denied meaningful access they are getting less than that to which the law entitles them.

That was nice to read.

A trickier question was the defendants argued 2.0 was irrelevant to the law. What was that? The web content accessibility guidelines are the industry standard for determining whether a website is accessible or not. There are different levels of compliance.

I believe we are now on version 2.1 if I am not mistaken. Indeed, we are good. So what that meant for this lawsuit was a real question for the judge. We argued that it is a road map it is not a law. On the other hand the law requires accessibility. It is how you comply with the law.

In our briefing we included footnotes listing 12 different Title 2 DOJ and 6 DOJ settlements which incorporated 2.0AA as the standard groups had to meet in order to basically get the DOJ off their back.

The Court was okay with this in principle. The Court wanted to understand the functional impact of violations and connect those to the question whether there was meaningful access. She held, "equal access does not sufficiently inform the Court where we are on the spectrum of functional or meaningful access. To make such a factual determination the Court needs to understand whether the issue identifies causes the user to lack access to the service and spend twice the time to access the service and the like."

In another way this was the case in the nutshell. The judge was comfortable with as a solution and less comfortable as a measuring stick for whether that inaccessible existed.

So the next question in the case became how do you demonstrate how bad it really is? That's where I am going to hand it over to Jessie who has thoughts on that topic.

>>Jessica Weber: The best way is to have an amazing co‑counsel. I should ask Dan Goldstein was among those until he abandoned us for retirement in 2018.

>>Christina Brandt‑Young: We made him argue summary judgment as punishment.

>>Jessica Weber: She said something like, you have really gone out with a bang, Mr. Goldstein. Exactly.

So this case we learned a lot of lessons. That was part of the meet vision of putting together this discussion.

One of those really because it was such a long‑standing case with 2 complicated websites and really opposing counsel and Defendants they really put us through the ringer. So we learned a lot of lessons how to demonstrate proof in this type of case and how to overcome Defendants that were really dead set root us out without changing business and have an accessible website.

Some of those lessons. As Plaintiffs, we are always trying to push the case to move quickly. That really needs to be true in website accessibility. Websites are constantly changing the moment you submit an interrogatory barrier they can be changed quickly it is not that hard.

So the faster you move the more difficult obviously it is for defendants to then quickly very quickly fix all of the barriers. To be clear, I will talk about this, again, if those fixes were really resolving the case then fine we would have an accessible website and we would be okay.

They were ad hoc fixes. So I will talk about what we did to try to prove that as well.

In addition, this is the intersection with website and voting cases when you are bringing a case that has voting election deadlines, really think about those deadlines. Think about how much time you need realistically what your expert will say in terms of how long it will take to fix it before the election whether it is voter registration, absentee voting et cetera. Think ahead of time. Something that will help as Defendants true to mute you out is gathering as much data as you can beforehand.

I think having the ACLU access the report was helpful. In fact, they sent it to every state. Defendants had advance notice. We had other proof of that. One of our organizational Plaintiffs, the Center for Independence of New York had notified New York about inaccessible voter registration forms 2011. We ended up ending in discovery that the defendant had talked about it and maybe made a quick fix and the next time they uploaded a form it was inaccessible again.

So the other thing that I learned from this case that I will now do going forward is documenting, documenting, documenting the barriers and how it affects your clients and how it affects individuals with disabilities as early and often as possible. Not affidavits. That's what we are used to do. Video evidence. Record your client trying to use the website.

You can do ‑‑ you can have someone hold a camera up trying to access it. The best thing is to have that plus sort of a screen shot type of video recording so you can very clearly someone can see what the screen says and compare that to what the person is experiencing.

But that is really one of the west ways to show and explain the practical effects what might seem super technical violations.

Another thing that was helpful particularly in a case like this where defendants kept trying to fix things and weren't going about it the right way, when you finally get into depositions we were trying to elicit the testimony about why barriers occurred, how they were fixed and how they came back out. Trying to establish sort of what they are doing now isn't working.

So more than just saying there is a bad thing on your website, getting the evidence you need that will not go away by saying fix your website. The Court will need to order fix the way you do business and fix your organization. Trying to elicit that kind of testimony and evidence early is important.

And just as an example, we had in our case one of the IT people, I think it was Board of Elections, she wasn't the enemy. She actually had tried to advocate in her organization for years the E‑mails we showed trying to keep things accessible.

We had E‑mails from her saying you really want me to post this? This is inaccessible. Someone high up saying, we will fix it later. When did later happen? Maybe a couple of weeks or months later. Five months later you are posting something else inaccessible it was not to make her look like a bad guy there was a breakdown trying to keep their website accessible that it kept happening again.

Obviously expert evidence is critical. You need to work carefully with your expert to make sure they are using terminology that the Court can understand. People who don't know this world. Do you have your hand up, Dan?

>>Dan Goldstein: I wanted to add, I think we should have drafted the complaint ‑‑ I think we should have drafted the complaint differently. Instead of saying this was a barrier and this was a barrier, we should have said because they don't have any training there are 530 pictures wall ALT tags. Because there is no internal testing the following paths aren't there.

Because they don't have ‑‑ in other words, part of the problem was we framed this as there are these barriers and therefore there is a violation of the ADA they are not allowed their muteness strategy. When we did a preliminary injunction motion the other side said we will fix all of those things in your motion. That kind of left us hanging because then there were fusses what was and wasn't in the preliminary injunction.

So I think we need to draft ‑‑ you need to draft complaints in the web area that are more based in the kind of remedies you are ultimately going to be seeking in terms of infrastructure changes and less in terms of individual barriers.

>> How do you know that at the pleading stage to be able to plead that?

>>Dan Goldstein: With a public website you may be able to get that information because policies are supposed to be public information.

>>Christina Brandt‑Young: The proof is in the pudding. They don't have messy websites therefore we know whatever you have is inadequate.

>> I wanted to comment.

>>Claudia Center: I will run microphones.

>> I wanted to comment because I litigate actively in this area. I think what you were saying is good. But you didn't mention the Domino opinion that recently came out in California that I think for the first time gave us some hope of getting rid of the confusion between Waysag and ADA by telling us that Waysag are not the norms but the methodology that the is willing to test the order of its injunction.

I think everything that you spoke about, those methodologies and those things are already part of what is generally becoming accepted as the norm which I don't think existed. This case paved the way for all of this which has been monumental. It is an incredible impact. And Hooters, that is a muteness case. We got to share those cases. They are excellent.

>>Dan Goldstein: The one thing I would say about that is I think the white tag issue is a somewhat separate is separate in that what you need to get the judge to understand this isn't about putting a ramp in place of the staircase, about individual fixes. So you have to frame it from the beginning as to making clear the nature of the systemic problem. I will shut up and go back to my sheet.

>>Jessica Weber: It comes in as a remedy, but it is not the only part of it. Actually something that is really helpful is the World Wide Web Consortium has ‑‑ there is information ‑‑ web accessibility initiative. There is information on the website about all of the policies and procedures you want to see in an organization to get to the place of having an accessible website.

And our expert used that as a road map. But it is there. It is public. I think that's really helpful. You want to incorporate into the relief as much as possible and this is not just about the end what you see at the end, but the policies that lead to it.

So talking about experts, experts I think are often used to talk about web issues in terms of violations which is helpful. It is an objective standard everyone knows about. Translating that into functionally how it affects users is super important. To that end something that we started exploring at the end is usability testing whether it is your expert or somebody else doing it.

As we all know, there are websites that comply that are not usable for whatever reason. Or sometimes it doesn't seem like a violation but it seems minor but it is leading to major usability issues. You can't find something. The description is not good.

And just to note, there is a list of web site consultants. Keep in mind websites and screen leaders are totally a new concept for your judge and even for your opponent's lawyers. You will have to think about that at every step. This is something we did in a case in Ohio and didn't do here until late.

That is another reason having video evidence is so important so a judge can see how the user is using the website, a good website that is working properly and your defendant's website.

And kind of introducing ‑‑ giving the judge the baseline familiarity.

And when you are doing those demonstrations or videos for the Court, just do it slowly. Most real screen reader users are having the audio read back super quickly. You need to slow it down. Make it as accessible as possible for someone who has no knowledge in this area.

The other thing is when you talk about fixes that are needed, you want to talk about not just the technical aspects of the fix, when your expert is talking about it, again usability that it will open up for your clients.

Just so everyone is clear on how the technical stuff interacts with usability stuff. What does this matter? Is it just a hyper technical violation or does it result in better access for people?

So those are the practical proof points. I am going to move a little bit to how we got from having a really difficult relationship with our opposing council to achieving a really great settlement just before trial.

So I will move on to that. The first hidden weapon is Susan who is I negotiation champion.

We had 2 really big challenges. We had a difficult relationship with the other side.

It wasn't just limited to kind of getting into fights about discovery. It even settlement negotiations the letters we were sending back and forth just the tone of some of the loans we got back when we weren't that far apart would make you think we had said terrible things. The tone was really off.

That was difficult to deal with not to throw their letter in the trash but to say we are agreeing on some things, maybe this is worth pursuing. And I'm a New Yorker so I was deeply offended.

The other big obstacle is the bureaucracy of dealing with a massive government entity. I have dealt with other states. New York ‑‑ I have dealt with federal government agencies. New York was in a league of its own not just dealing with bureaucratic clients but even internally in the AG's office every attorney had to sign off on every word in a sentence before it could be sent to us for settlement. That made things slow and frustrating.

So as I mentioned, as we got closer to trial, really close to trial we were working on our pretrial we realized we weren't that far apart onset element concepts. We were fighting ‑‑ reading their letters back to us you would think that. So we realized we were getting quite close we made a decision to really see if we could pull this off.

So that required a major turning of the other cheek and taking the higher road. That's where I think Susan was really helpful in this and setting a new tone of our conversations saying, listen, we think we can do this. It looks like we have the same goals in mind. So let's talk practically. How can we make this program. That was helpful. Appealing to our higher selves and appealing to her higher selves.

The other thing was inviting them to be part of the solution and problem solving.

So any time we proposed any compromise, anything, their MO was shooting it down. It is a bad idea for this reason.

So we started then switching to really asking more open-ended questions to achieve this common goal we have in this area, what do you think would work best for your clients? This is an obvious negotiation point. How do you think, given your processes what you know about these agencies how should we do it?

Then sometimes what they said wasn't that different from what we were proposing. They owned it. That's a great idea we will do it that way. Suddenly they bought into the process. That was a really helpful mind game we played that Susan led us in. I don't want to be too flippant about it. They had a process we were not aware of. Sometimes it was helpful to tell us this is how we get to where you want to be and this is how we do it.

Sometimes we had silly differences. We had policy and procedures. We just can't do that. That is impossible. Nobody tells us what to do. It turned out we couldn't use the word "policy." They had a New York IT policy. That is our policy. When we talk about policy this is it. Fine. So we called it practices. It sounds ridiculous but once we started calling it practices, oh, that's okay we can have these practices in place just as long as you don't call it a policy.

>>Claudia Center: When they were like we can't have changes in policies well that's the whole case we will not settle it. We can't do it without policies.

>>Jessica Weber: These are also examples when you exchange formal settlement they get lost. Pick up the phone just talk to us what is the issue here. What is your problem? We were able to move. I think sometimes the urgency we were so close to trial. Now or never. Tell us, help us help you we can get this going.

Another thing was we were really insistent because we had some trust issues with defendant of some third party monitor that would issue reports and seeing if they were compliant. They we called it a consultant and monitor. At the end of the day they had a web accessibility expert for lit gas that organization, we said you can't use the person who had been an expert in the case because we had issues with him. But because they had already procured that group as an expert, they didn't have to deal with a whole new procurement process to retain that organization as what we would call a monitor in the settlement agreement.

Instead of using any name for what that organization was we just named the organization and said this group is going to be issuing reports. They were be advising them. We got around that issue.

So in terms of the bureaucracy and timing issue, something that we realized was a problem the reason opposing counsel was so slow in getting back to us is any time they sent us a letter or any draft settlement language it had to go through so many layers in our office.

So we were getting really close to trial they were telling us, listen, we recognize we have momentum. We don't have time to do this we have to go ahead and maybe we will talk to you in trial. We just can't keep this process going.

So we decided to float the idea of just a term sheet that wouldn't have all of the settlement language we needed but would be enforceable list of terms that would be included in a settlement agreement and a time line for turning it into a settlement and have protective language about fees. That worked.

It is funny, a term sheet. It ended up being quite complex. We were 4/5 of the way to the settlement agreement. From their agreement it was easier to move a term sheet through their process and get that approved and back to us in a timely way.

And in order to make this term sheet happen, we ended up ‑‑ we moved a pretrial order deadline by 3 days which might seem inconsequential, given the way it was working. Opposing council told us if we don't have that 3 day extension we just can't engage in settlement negotiations at all.

I think it was 3 days made the whole difference. We got enough accomplished that we were able to say this is happening.

Again, part of this is taking the time to understand what their approval processes looked like. Phone calls. They were cagey. It was who approved what and where is it at. How many more people? What is going on?

So I think those are the main lessons we had from settlement.

>>Claudia Center: Divorced the fees.

>>Jessica Weber: We would agree on fees or do a fee petition. Once we agreed on the substantive terms we had a long negotiation over attorney fees. We had a magistrate judge mediate that and settled it. It took much longer. But I am glad we divorced it out. We got agreement on substantive terms. While we were negotiating fees some of the deadline for the substantive agreements had passed but they had already started doing it. They were in compliance because they knew these were terms we had agreed to and were enforceable. So that was helpful. Anything to add?

>>Claudia Center: Anyone have questions or comments similar tales?

>>Dan Goldstein: The one thing I would add, as I recall the attorneys fee agreement was they wouldn't contest whether you were entitled but only how much so that took care of the catalyst issue.

>>Jessica Weber: Another interesting thing this caused late night problems over mothers day weekend. They are insistent that we were not be a prevail party. That is the only way we have a trigger for a fee petition. What we ended up doing. We had to say everyone agrees we are entitled to fees under the standards, but not including Section 504. That's how we kept the entitlement without saying we were the prevailing party. It was a creative way of dealing with a bizarre concern but we got to the result.

>> So I definitely agree with you on the documentation because if you get into discovery on this stuff the evidence is gone by the time you get it. Or it is difficult to obtain because websites are so dynamic and it is more of a systemic problem. One of the things that we have been doing that I think is a slight compromise to what with you are saying for documentation having the clients document how they are using it, video. We actually have the experts take a look at the website and do a video documentation and sort of a quick capture of the underlying data so that we can illustrate sort of the key show stopper barriers.

They are illustrative not exhaustive it is nice and concise and it has the expertise. They can do a video that narrates through what is going on with the technology.

And if you do have to litigate it down the road, they can then use that and rely on that later if you have to pay for the whole full on expert report.

It is cheap to have them just capture the data and do the video illustrations at the front end. I have really been happy with doing that. Plus you can show it at a settlement conference and it is really effective.

>>Jessica Weber: When you say capture the underlying data, do you mean coding or what the website is doing for users?

>> Both. The narrative and they capture the code. If their expert report they need to go back and say, let me explain to you in technical terms why the illustration of the video is doing what it is doing. They now have captured a copy or a snapshot of the actual underlying code just to preserve their opportunity to explain it later on in the litigation.

>>Thanks. One thing that I wondered about and I'm curious how you handled it in your case is the proliferation of platforms on which people interact with websites, browsers, mobile devices and also multiple screen readers. We are not where everyone uses Jaws anymore. Is that something you have dealt with in expert reports and having people who were testing the website for purposes of these videos who were using ‑‑ who were interacting in different ways to show it was inaccessible on multiple browsers? How do you handle that?

>>Jessica Weber: So yes, it was an issue. One of the things defendants claimed our folks weren't using the most up to date screen software. We had MBDA we might have had a voice over user. Jaws. We had folks with low vision using screen imagination. What is helpful, those standards, they are the lowest denominator. So if something is compliant it should work across a variety of devices and access technology.

And it was part of showing especially because it was a Title 2 entity they shouldn't be coding their website for people with the newest most expensive version of Jaws. They need to be following general best practice to make sure everyone can access.

One thing to note and your expert will be aware of this, the newer versions of Jaws are great they sometimes cover barriers. Jaws is getting better at guessing labeling when form fields are not labeled properly.

It might be pain for someone with a new version of Jaws. It is not fool proof. It may work when you try to document it on a video. MVDA does not do that. Sometimes it is better to test and document with that.

>>Christina Brandt‑Young: One of the things that ended up happening in our expert report is that our expert was ‑‑ we asked our experts to go ahead and document when a problem was found. Our expert tested everything in JAWS and MBDA and noted which program had the problem or if both did that raises another problem which is that your expert may work in a team with different people who specialize in different screen readers. You have to ask yourself are all of those people going to have to be deposed? Hopefully not. Hopefully there is one spokesperson that is familiar with the work and can describe it all.

>>Jessica Weber: One thing to mention I have also learned that there is software that will capture ‑‑ so one thing we were doing is going into a machine and trying to find some of the old barriers.

>>Christina Brandt‑Young: God bless it.

>>Jessica Weber: Which is hit or Miami. The way back machine preserves the barriers sometimes it doesn't. I have since learned there are companies that will basically be a way back machine for you that you can set to record the website every day or every week supposedly will capture a real time experience so you can go back and demonstrate the barriers on the website which would have been quite helpful in our case. So much of it was like we gave them this interrogatory answer showing it on Tuesday and on Thursday they fixed it. On Saturday it was bad again. We didn't always have that precision. We had to guess and rely on our expert who wasn't the best at tracking every moment she went to check things which was understandable. Think about using technology like that.

>> So this is a totally different kind of question. You started out, this is about voting and registering to vote. Did it matter at all that a fundamental right such as voting was involved? Or was this just a straight up any public service kind of case?

>>Jessica Weber: We did it as a straight ADA case not any constitutional claims. The reason is, the inaccessible website wasn't preventing people from voting. The constitutional requirement is really access in any way is okay. Well not always. There is not as clear a requirement for private and independent access as there is through the ADA and 504. Those are the tools we used.

I don't know if we mentioned it because the case started about voting, but we were focused on the voter registration and websites. The initial complaint was just about those portions of the website. We ended up expanding the case to both websites because we realized it is so difficult to cordon off segments of the website when you need to go to their home page to find it or the change of address form is using a database that is actually a totally different part of the website.

So one of the lessons learned was to do all of it.

>>Claudia Center: We thought we fixed the address update function as a settlement of a preliminary injunction it is the other part of the website that does the address changing. So we ended up having to go toward the entire websites.

>>Christina Brandt‑Young: I want to add very briefly on to that comment I totally agree with Claudia at one point we were told there was a change that would solve all of our problems. When it didn't they never said it would solve all of the problems. Not true.

Part of the problem is laws are technical. Websites are technical. Lawyers and people who work on websites don't always understand each other.

I honestly believe that when we were promised certain things the lawyers believed it was possible. And that they didn't really understand the underlying issues. It took a long time for the other side's lawyers to get up to speed in this case. That's my opinion.

>> So exactly what you are saying. I think we are seeing the same types of obstacles only more evolved today. For example one thing that I wanted to comment there are companies that are selling accessibility to companies as compliant. I have one example that I see coming up a lot. It is called E Central Accessibility. So it is like some websites will have certain programs that to the visual eye I guess for purposes of pitching it to a Court and judge that doesn't have any real understanding of the technicalities that you are speaking to may have the appearance of compliance. In reality there are guises to give that appearance as opposed to truly achieve that compliance.

I wonder if you have seen any litigation E central accessibility which is one of the bigger ones that I see popping up as a measure of compliance websites.

>>Jessica Weber: I think they e‑mailed every member of the DOBA. I think you have the wrong audience. No, I haven't seen litigation targeted towards an organization like that. But I think anything that's a quick fix we find that unless you have this a systemic. Unless you have baked in accessibility you have usability testing, you have folks high up who care about accessibility and towing the line and making sure everybody is caring about it and that it is factored into their job performance even.

You are going to have some mistakes that keep popping up. So I would be doubtful that such a quick fix would work.

>> I want to go back to the question about actual voting rights. I am thinking about the voter suppression efforts going on now. If you do something like you don't change your address and you show up at your polling place to vote and you are told you can't vote because you couldn't access the site then you have a voting right issues. I am wondering how that plays in.

>>Dan Goldstein: The first 4 cases that were at the intersection of disability and voting rights were brought under the ‑‑ had to do with accessible voting machines. And we went 0‑4 I think in those cases being able to vote in private is not actually a part of the constitutional guarantee. Being able to vote independently is not part of the constitutional guarantee with respect to voting.

And that's when we sort of wised up and realized equal access is a much easier standard to prove. And that was really the reason for moving away from it because then that allowed us to say, okay, if everybody is going to have to raise their hand at a New Hampshire town meeting for the presidential election that's fine. But if people are getting to go into voting booths and vote independently, then the equal access guarantee applies.

At least for people like me, it is an easier, less complicated argument to make.

>>Claudia Center: There was a little piece of the constitutional analysis in our case in that we sued under the ADA and Rehabilitation Act. We went against the state agencies without naming state officials with the thinking. The original case was tightly focused on voting. That should be in the realm of a constitutional right under the ADA. We thought New York is a blue state are they really going to say that you don't follow under Lane v. Tennessee they complained that we didn't name the right Defendants.

In the meantime we realized we had to seek remedies against both entire websites they were too intertwined. We just named the officials. So that was one little way it came up the constitutional right aspect of it.

>>Jessica Weber: I will say despite our war stories we don't want to dis sway anyone from doing these cases. There have been other ‑‑ not every state fights this hard. They are critically important as more states as they should whether it is hosting voter registration forms online or online voter registration. We need to really be making sure that that's being done accessibly.

And you have New York ‑‑ the settlement is a model. We have a Court decision from Ohio governing the accessibility of that website. They fought us on the relief. They thought they were going to fix things on their own time. Once we said your website is inaccessible they didn't dispute that so much.

>>Dan Goldberg: Fourth Circuit.

>>Jessica Weber: Not on the website on absentee voting.

>> I think because you are suing a state agency. You run into that. I did a lot of employment litigation. I learned unfortunately the same way you are describing here that it is not a good path generally speak to go follow that generally speaking government agencies are going to put up a fight that is in most common sense of the word don't make economic sense to do this kind of thing.

So I think when you get into the private sector you are looking at that cost of litigation approach as opposed to scorch earth litigation like you faced here because you had a state actor I think that may have been a very ‑‑ at least in my experience I don't want to sue the state actors in anything.

>>Jessica Weber: Then you get good case law.

>> You do. But it is part of it.

>>Claudia Center: We have one minute. I thought we were going to end early but it is only one minute. Thank you, guys.

[Applause]