FINAL TRANSCRIPT

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**ACC - The ADA the Internet and Technology: Accessibility In Cyberspace for Disabled Employees and Consumers

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PRESENTATION

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Good afternoon, everyone. My name is Jonathan Spencer, and I'm Chair of the Information Technology Law & E-commerce & Committee of the Association of Corporate Counsel. I'd like to welcome you to our webcast, The ADA the Internet and Technology - Accessibility In Cyberspace for Disabled Employees and Consumers.

Our speakers today are myself and Darren Mungerson. Darren is an Associate with Jenner & Block. He is a member of the firm's Labor & Employment and Litigation & Dispute Resolution Practices.

Mr. Mungerson counsels and represents clients in virtually all areas of labor and employment law including affirmative actions plans, American's with Disabilities Act compliance, collective bargaining, corporate reorganizations, reduction [ph] enforced in drug and alcohol issues.

Mr. Mungerson is a member of the Illinois State Bar Association and the Chicago Bar Association. I, Jonathan Spencer, am General Counsel of Shenandoa Telecommunications, and I am a member of the District of Columbia Bar and a Corporate Counsel Member of the Virginia Bar.

I'm going to turn the presentation over to Dan in a second, to start, but I would like to remind people that if they have any questions they should email Jonathan Spencer, and the email is jonathan.spencer@emp.shentel.com. There is also a link on the webcast page that you can click on to use to send an email and ask a question. So we will now get started with the actual presentation and I'll ask Darren to start.

Darren Mungerson - *Jenner & Block - Associate*

Thank you, Jonathan. First of all, I would like to apologize to anybody that was entering this in the hopes of listening to Carla Rozycki. Carla was originally scheduled to present this and had asked me to fill in.

So with that out of the way, I'd like to start giving an introduction. If you will turn to what is the second page of the slide, or the second slide, which has "Introduction" listed at the top.

The American's with Disabilities Act was enacted in 1990 to establish a clear and comprehensive prohibition of discrimination on the basis of disability. Prior to that, there had been a number of commentaries and concern with the government that individuals who either had impairments or were perceived as having impairments were being denied opportunities within both the employment context as well as in public accommodation.

Now since the introduction of the ADA in 1990 the United States has, and the world, as we all know, has experienced a rapid change in technology including a huge growth in the use of the Internet. Now with this new technology that's in place employees and consumers both experience new and emerging technologies in the work place and market place.

I'd like to turn now to the next slide. Individuals who suffer from disabilities, particularly those who suffer from vision impairment, are often unable to access these new technologies without some type of assistance. As we all know, these types of technologies are very dependent upon certain standardized -- are dependent upon certain equipment such as keyboards, a mouse, other types of touch pads and particularly people with vision impairments have often had difficulty in using these types of equipment.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

I'd like to make a comment here that it's not just visual impairment when concerned about the use of technology. One must also consider individuals who have handicaps involving motor skills and the ability to handle a mouse and the sensitivity on that, as well as people who have trouble with a keyboard, in general, or other things that you need to be concerned about in dealing with technology.

And also, we will be touching on not just the Internet, but also the use of self-serve kiosks and there are other people with other handicaps there is a question about acceptability to reaching the self-serve kiosk such as if someone was in a wheelchair, can they reach the screen or have access to the keyboards.

Darren Mungerson - *Jenner & Block - Associate*

Absolutely, Jonathan, that's right. This is not just limited to people with visual impairments, it's anybody that has any type of restraint in using these types of normal equipment.

Today, we'd like to explore what sort of obligations the ADA imposes on employers under Title I of the ADA and on public accommodations under Title III of the ADA. First, I would like to turn to the ADA obligations for employers, and this would be the next slide on the list which would be the fourth slide.

Title I of the ADA prohibits employment discrimination against the qualified individual with the disabilities because of the disability of such an individual with regard to job applications, hiring, advancement, discharge compensation, job training and other terms, conditions and privileges of employment.

If you'll turn to the next slide, we've got the definition of both disability and qualified individual. Now, a disability is one of three things, it's a physical or mental impairment that substantially limits one or more of the major life activities of such individual.

Second, it can be a record of having such an impairment or C, it can be the individual being regarded as having such an impairment. Now something to keep in mind with regard to disability is that someone does not actually have to have an impairment to be considered, or to be protected, under the ADA they just have to be regarded as having such an impairment.

Now a qualified individual is someone with a disability who with or without reasonable accommodation, and that's one of the key parts there is the reasonable accommodation, can perform the essential functions of the job without imposing an undue hardship on the employer.

I think one of the ways to look at how the courts view an employer's obligations under Title 1 of the ADA is a quick review of a number of the employment cases that have arisen under this section. And if you'll turn to the next slide, we've got the case of EEOC versus EchoStar Communications which just came out earlier this year. Now, under this case, a blind plaintiff applied for a customer service rep job, and this was after the employee had completed training for such a job.

Now, therefore, the technology available at this time allows for a person to use a computer program which is called 'job access with speech' which is often referred to as just by the acronym JAWS. Now the JAWS program, which is available through the marketplace, will translate text into speech. A blind customer service rep, in this case the plaintiff, would use a split headset. He

would hear the JAWS program translating the text into speech in one ear, and the customer would be communicating with the customer service rep in the other ear.

Now EchoStar, if you turn to the next slide, EchoStar rejected this plaintiff arguing that the JAWS program could not work in their complex software environment. Now the EEOC got involved and made the argument that numerous employers throughout the United States had installed this type of program for their customer service reps and other employees, and along those employers that had installed JAWS and had it work in their software program were Norwest Bank, American Express and MCI.

Now because the EEOC was able to convince the jury that the type of technology was available to EchoStar, that it could have been implemented as a reasonable accommodation, the jury returned a verdict for the plaintiff. Now they awarded $2,000 in back pay, $5,000 in compensatory for damages and, here's the kicker, $8 million in punitive damages. Therefore, the jury found, that EchoStar's treatment of the plaintiff was so egregious that even though the plaintiff suffered actual compensatory damages of around $7,000, they tacked on $8 million in punitive damages.

Now, obviously, this amount would be reduced in accordance with statutory cap, but that just goes to show what sort of obligations both the courts and juries expect from employers.

As we turn to the next slide, Nagel vs. Sykes Enterprises, which is also a recent case from this year where a visually impaired plaintiff sued claiming the employer failed to reasonably accommodate her disability, again, because the employer failed to provide JAWS software or a reader for the plaintiff.

The employer moved for summary judgement alledging that these accommodations were not reasonable, that it wasn't reasonable to provide the employee with a reader or with the JAWS software program to read the text for the plaintiff.

The employer also alledged that the employee failed to engage in the interactive process. Now if you turn to the next slide, the Court granted summary judgement to the employer that providing a reader was not a reasonable accommodation. However, the Court denied the employer's motion for summary judgement on the computer software and hardware issues, stating again that it wasn't clear from the evidence that this type of software was not a reasonable accommodation for the employee, that it could have been feasible for the employer, without suffering an undue hardship, could have implemented this type of software program to allow the plaintiff to perform her job.

The next case I'd like to turn to is Robinson vs. U.S. Bancorp which is a District of Oregon case from 2000, and it starts on the next slide. In that case, a visually impaired plaintiff who used adaptive software to read the computer was fired after the employer changed computer systems.

Now, the plaintiff and the employer disagreed on whether technology enhancements existed to allow her to perform her job. Now there was a dispute over this and so the case settled before the decision was reached.

There's another couple of cases here that I've gotten listed, and I'm not going to necessarily get into each one of them, but they show that there is certainly a question of whether or not the way that, the technology exists as of today, that an employer has to take a very strong look at what types or reasonable accommodations are being, not only requested by an employee, but also reasonable to implement that would allow an employee to do his or her job.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

I think it's important to note here that you also have to consider about employees, when you talk about the web and you have to consider that Intranet, and if a company puts programs or various things on an Intranet that an employee needs to do their job, that they may find themselves in a position of having to provide a reader or these accommodations to employees whose jobs don't normally wouldn't think about needing the same things as a customer service rep that they're sitting at the computer

all the day. But if there are essential items that they need for their job that they have to take off of a company Intranet, they may very well need to have these accommodations made.

Darren Mungerson - *Jenner & Block - Associate*

Right, and, for example, under one of the cases in here that we'll find where an employer had implemented email, and it was found that they were required to basically provide the employee the ability to particularly perform her job using this email and to provide reasonable accommodations for that employee. So this is an instance of where it's an internal matter.

Although email is not the Intranet, it's certainly is close enough that you have to be careful of even changing internal systems to make sure that when those changes are being made that you engage in reasonable accommodations for those employees that may need it in order to perform their jobs under the new systems.

I'd like to turn now to what will be the 18th slide where we talk about tips for employers in complying with Title I of the ADA. Now, employers will--and this is at the top, there's a pile of tips for employers -- now employers with visually impaired employees should anticipate that they may be required to provide technical assistance as a reasonable accommodation, and this could include such things as the JAWS program. There are alternatives to this, I believe, Zoom Tech is one that is mentioned in the slides. Or, as technology progresses, there may be other types of items here.

There may also be other types of technical assistance that may be required for persons with other types of disabilities. There are special keyboards, a special mouse, some type of voice recognition software that people can use to basically speak and the words will come on the screen rather than having to type them out. These may all be found to be reasonable accommodation under the circumstances presented.

Employers, as I mentioned, should be particularly mindful of their obligations under the ADA when engaging in a technology upgrade that may result in a change of networks or computer systems for employees.

I'm turning to the next slide, employers of visually impaired employees should be familiar with assistive options available for reading on a computer, and there are organizations and associations that will provide assistance to employers if they desire. Employers should absolutely never ignore a request for accommodation from an employee.

Turning to the next slide, employers should engage in the interactive process with an employee with a disability, this is one of the things that's very important in dealing with ADA cases, that the employer and the employee engage in this interactive process, keeping in mind that an employer never has to give everything that an employee asks if it's unreasonable, but if what the employee asks is reasonable, then they are obligated to provide that accommodation.

Employers should also have detailed job descriptions that specify the essential functions of a job so that it's the employer and not a court that determines which functions are essential. And this really boils down to the defense of whether somebody is a qualified individual with a disability, because if they can't perform an essential function, they couldn't be qualified for that position. And if it's up in the air as to what those essential functions are, employers are basically leaving it up to the court to decide.

In addition to the court cases, and I'm turning now to the next slide, which is entitled "Other Authority on Employer Obligations" which as the title suggests indicates that there are other documents, credences (ph), regulations that have an impact on what sort of obligations an employer has.

Now just this last month, on October 24th, the Equal Employment Opportunity Commission issued guidelines on blindness and vision impairment for the workplace and the ADA. As a general matter, these guidelines address such questions as who would

be considered visually impaired, when that impairment constitutes a disability, and how an employer can legally obtain information about the disability from the employee.

Turning to the next slide, the EEOC guidelines also discuss what types of accommodations would be available to individuals with visual disabilities, and among those types of accommodations are listed assistive technologies. Now if you look to the next slide, I've listed a couple of types of assistive technologies that the EEOC says could be reasonable accommodations.

One of those is a closed-circuit television system for reading printed materials, an external computer screen magnifier, cassette or digital recorders, software that will read information on the computer screen, and an optical scanner that can create documents in an electronic form from printed ones. So if an employee is asking for an accommodation that involves any of these types of assistive technology, an employer will really have to take a look and there's, I guess you would call it a presumption, that these types of assistive technology would be reasonable. Now -- I'm sorry, Jonathan?

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Yes, I was going to ask, while these are reasonable, it's still a question of if a less expensive solution exists that will meet the needs and provide the accommodation. The employer is not obligated to go with the more expensive one even if it's on this list.

Darren Mungerson - *Jenner & Block - Associate*

Absolutely not. It goes along with what I had mentioned earlier about, you know, an employer doesn't have to give the exact accommodation requested by an employee. If a lesser accommodation will enable the employee to perform his or her, or the essential functions of the job, the employer can do that.

If there's, for example, Option A and Option B, and they both will allow the employee to perform the essential functions of the job, the employer has requested Option A which costs $10,000, Option B costs $1,000, the employer will meet its obligation under Title I of the ADA even if it goes with Option B the cheaper of the two options available to it.

Now, this list that the EEOC has given out should not be considered an exclusive list as the EEOC has listed these as real examples, and other employees may need different changes or adjustments. Again, within these things, you can't assume that one accommodation will work for everybody; it's very much a case-by-case basis, and what may work for one employee won't necessarily work for another.

So the employer must tailor the accommodation to the individual, and this ties into the interactive process. Now, if anybody would like more information on these Q&As, these guidelines can be viewed online at www.eeoc.gov/facts/blindnesshtml, and that address is listed in the slides.

I'd like to turn away from an employer's obligations now and move on to the ADA's obligations for public accommodations, if you'll turn to the next slide which is entitled "ADA Obligations for Public Accommodations."

Title III of the ADA prohibits discrimination against persons on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases or leases to, or operates a place of public accommodation.

Now, the ADA defines a place of public a accommodation as a facility operated by a private entity whose operations affect commerce and fall within at least one of the 12 categories, and I won't read all the 12 categories to you, but they're listed on the next four slides. And you'll see in here, just as an example, we've got inns, hotels, restaurants, bars, motion picture houses,

auditoriums, convention centers. So you can see that it's a fairly large list of what would be considered to be a public accommodation for the ADA.

If you'll turn to what will be the- it's the 30th slide here. It's the first one after the listing of the 12 categories. A facility is defined as all or any portion of building structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots or other real or personal property, including the site where the building, property structure or equipment is located; and this definition actually comes from the Federal Regulations, not from the Statute itself.

With regard to the Internet, if you'll turn to the next slide, the Internet is not specifically listed as a place of public accommodation or facility in the ADA or its implemented regulations. In addition, case law has yet to definitively decide whether Internet sites are places of public accommodations. There are a number of cases that have touched on this either peripherally or, in one case, directly, although its preferential value may be in question. If you'll turn to the next slide, the America Online case, in 1999-- I'm sorry, Jonathan?

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

I just wanted to let the people know that this is the slide that has at the top, "Public Accommodation Cases." We've jumped a number of slides, so I wanted to make sure people caught up.

Darren Mungerson - *Jenner & Block - Associate*

Okay, thank you, Jonathan. The America Online case, which is a 1999 case from the District of Massachusetts, in that case, the National Federation of The Blind sued American Online alleging that the AOL's web browser interfered with the ability of visually impaired persons to use screen reader software, along the lines of JAWS or some of the other types of programs that I had mentioned before.

The NFB also alleged that a number of other features of the site were inaccessible for visually impaired persons. Now this case never reached a decision whether the website itself or the Internet itself constituted a place of public accommodation because it ended in a settlement. What happened was that AOL then released a new software version with screen-reading software in it.

Now since that case in '99, a number of companies have made their websites accessible for visually impaired persons. If you'll turn to, it will be two slides after that, it starts with Access Now at the top, this will be the 34th slide. Access Now vs. Southwest Airlines is a very unique case, because in that case a disability advocacy group and a blind individual sued Southwest Airlines claiming that Southwest's Internet website and virtual ticket counters were inaccessible to blind persons, in violation of Title III of the ADA, and their complaint was very much along the lines of the America Online case in which they said that the website was not compatible with screen reading programs.

If you'll turn to the next slide, what happened was that on the District Court level, the case was dismissed. The District Court ruled that a place of public accommodating had to be a physical, concrete structure and that because the Internet website did not exist in any particular geographic location, the plaintiffs were unable to demonstrate that Southwest's website impeded their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency.

Now, what was interesting is that on appeal the plaintiffs changed their argument and alledged that there was a nexus between the website and any of Southwest's physical property. This was not alledged in the District Court, but they brought it up for the first time in appeal.

Now because they, therefore, dropped the argument that the website itself, or the Internet itself, was a place of public accommodation, the Appellate Court ruled that they had made a procedural error and dismissed the appeal, basically leaving

open the question of what would have happened had the plaintiffs stayed with their argument on the District Court and argued that the website itself, that the Internet, was a place of public accommodation, and it's unclear what the Appellate Court would have ruled had that issue been presented to them.

Now because of the procedural errors that -- the 11th Circuit never made that decision and so the District Court's decision, to date, is the only case to specifically rule on whether the Internet is a place of public accommodation under Title III of the ADA.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

I would like to point out that the National Federation for The Blind and other groups have brought a number of cases over the years, and all of these cases have settled out of court. And what you will note is that there is very little case law on it, and part of the reason is that most companies when faced with this type of action, certainly have either taken the view that it isn't worth fighting for the public relations value or that as they looked at the cases that another court would very much not take or follow the District Court opinion here.

Darren Mungerson - *Jenner & Block - Associate*

If you go with that point, that's something that is mentioned with regard to -- by the 11th Circuit is that they may not necessarily agree with the District Court, but because the question wasn't properly brought to them, they sort of passed on it.

Now what other, if any other, court is presented with this question, who knows what would happen as far as that case goes. Now, as we'll talk about later there is certainly authority for the Internet being found to be a place of public accommodation based upon agency regulations and determinations and opinions.

If you'll turn to the next slide which is the 36th slide, courts remain split regarding whether a place of public accommodation must be a physical concrete place. In the case Carpart vs. Automotive Wholesaler's Association, the First Circuit held that a place of public accommodation does not need to be a physical, concrete structure.

In that case, the First Circuit said it would be irrational to conclude that somebody who enters an office to purchase services are protected by the ADA, but somebody who wants to purchase the exact same thing over the telephone or through the mail are not protected. They go on to say that the Congress could not have intended that to be the result.

Turning to the next slide, the Seventh Circuit in Doe vs. Mutual of Omaha also went on to discuss public accommodations, and in that case, the court stated that the core meaning of the provision discussing public accommodation is plain and that the owner or operator of a store, hotel, restaurant, dentist's office, et cetera, that is open to the public can not exclude disabled people from entering the facility, and once in, from using the facility in the same way that the non-disabled do. Under this language, that seems to be an indication that a public accommodation must be a facility, which is contrary to what the First Circuit had determined.

If you'll turn to the next slide, the Sixth Circuit, like the court in Southwest Airlines, held that a place of public accommodation is limited to a concrete, physical place.

So I--I'm sorry, I apologize, going back to Doe. The Seventh Circuit stated that the physical space or an electronic space, so the Seventh Circuit actually had indicated that it may not have to be a physical space in order to be a place of public accommodation. So you've got the First Circuit and the Seventh Circuit at least indicating that a place of public accommodation could be some place that's not a physical facility, that it could be, in the First Circuit, talking about use of telephone or mail, in the Seventh Circuit talking about an electronic space, whereas the Sixth Circuit has indicated that it has to be a concrete, physical place.

Now if you'll turn to the next slide, outside of the core decisions, the Department of Justice has publicly taken the position that the Internet is a place of public accommodation under Title III of the ADA. In a 1996 letter to Senator Tom Harkin, in as well as an amicus brief that the Department of Justice has filed in some of these cases brought by blind advocacy groups, the Department of Justice has stated that they support access to non-physical locations, such as on-line credit card statement accessibility, et cetera.

Turning to the next slide, which would be the 40th slide in the presentation, the Department of Transportation also issued proposed regulations in November, 2004. The public comment period expired in March of this year that would require all airline Web sites to be accessible by visually impaired persons, essentially making the court's decision in Southwest moot.

Now, under this proposal, it would not only apply to airline Web sites but also Web sites that act as affiliates or agents of airlines; this would include Orbitz or Expedia. These would have to be accessible as well.

Turning to the next slide, the National Council on Disability testified before the House Judiciary Committee in February, 2000 that the Internet is a place of public accommodation under Title 3 of the ADA.

Now, finally, I'd like to turn to Section 508 of the Rehabilitation Act Amendments of 1998. Now while these do not apply to purely private companies, it does require that federal agencies ensure that electronic and information technology is accessible to all, specifically Section 508A2A of the Rehabilitation Act mandates that the Architectural and Transportation Barriers Compliance Board publish standard setting forth a definition of electronic and information technology and a technical and the functional performance criteria as necessary for accessibility for such technology.

So you've got a number of either federal agencies or other governmental related associations that have come out and said that the Internet is a place of public accommodation. So I think that you would have to at least assume that for this to go to the court in litigation, that that court would, you know, there's a very likelihood of probability that the Internet would be found to be a place of public accommodation.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Darren, I'd like to read a question from one of our participants here regarding 508 compliance and companies doing business not only with the federal government, but also with the general public, and, specifically, they wanted us to say to what extent must a Web site be 508 compliant, whether they all need to have only those pages that cater direct to the government or is it the entire site?

And, again, it's going to be somewhat based on the facts of and the purposes having the site (inaudible). Literally, it only has to be those pages that cater to the government, but you have to take that interpretation and experience having worked on it very broadly, and if you have any pages on your site that might be used to relate to what you're doing (ph) on behalf of the government. And if your site has actually something that is being done under a contract with the federal government, you've got to cater to, because you're providing a service, under a federal government contract for customers in that way or for, you know, individuals that that agency is serving.

In those instances, you do have to provide for the entire site to be compliant, but even where you'd have in that situation where you're acting as an agent for the federal government or you're contracting where you're providing a service or just providing directly to the government, you have to be thinking about what pages might a government or person doing this with the government had access.

And so you might need to take a look at terms and condition pages, pages that are under links about, you know, various -- some of the other links and things, so from a practical matter, you may end up realizing that you need to make your entire site accessible and not just to specific pages.

But, generally, you know, you will find that, and I think in the majority of cases, that it would be easier to really do the whole site to try to make (inaudible) of which pages (inaudible), which one is (inaudible).

If you are faced with that law, we'd recommend, to some extent, actually to bifurcate the site (inaudible) possible and that way, if you've got pages that are in front of you (ph), you don't have it on the site that's part of a company that's doing a (inaudible) contract with a 508 agency.

Darren Mungerson - *Jenner & Block - Associate*

I'd like to turn next to an interesting case that came out of the Northern District of Georgia in 2002, which is the Martin v. Metropolitan Atlanta Rapid Transit Authority, and this really sheds some light with regard to what types of accommodations or what type of steps an employer or (inaudible) in a public accommodation has to make when there are alternatives available.

And as you'll see from the description of the case here that there were several individuals with disabilities who filed a lawsuit against MARTA, which is Atlanta's public transit agency, alledging violations of the ADA.

Now part of that lawsuit was that the information with regard to schedule and route information was not available through the Web site and a few other type technologies. Now, MARTA's schedule and the route information was available to the general public in master (ph) brochures located at MARTA's stations, as well as on the Web site.

Now, the Web site of MARTA admitted in the lawsuit that it was not accessible to visually impaired individuals and it was not compliant with text-to-speech translation program. Therefore, the lawsuit alleged that blind or low-vision persons could obtain the information from MARTA only by speaking on the phone with representatives or by waiting for brail schedules to be mailed to them.

Now the court in that case granted a preliminary injunction and ruled that MARTA was in violation of the ADA mandate, and that mandate is, of course, making adequate communications capacity available to accessible formats in technology to enable users to obtain information and scheduled services.

The court recognized that a transit customer with disabilities could not adequately use the bus system because schedule and route information is not available in a usable format. Therefore, the court ordered MARTA to make its Web site accessible and provide other alternative access in a timely and equal manner.

And so, essentially, what the court said is even though users of MARTA could get the same information by ordering brail schedules, by, you know, calling up the MARTA representative, that was not equivalent, that it was not that they were denying these people the access to the information because the Web site was inaccessible.

And so this really comes into play with regard to such questions as, well, if an employee can't for example - if an employee can't use the information on the Web site to make, for example, an order to a company, but they could call somebody and place that same order, basically under this court's decision, that's not necessarily an equivalent. So that's something to keep in mind when deciding what steps somebody needs to take to make their Web sites accessible to individuals of visual or other types of disabilities.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Darren, I think this is a good case to also discuss when we (inaudible) a kiosk and particularly in the last couple of years, we've seen an explosion of the use of technology and self-serve kiosk, self-serve checkout counters in supermarkets.

You're seeing a greater use of information terminals in stores where, you know, (inaudible) check to see of things are in stock or to see about (inaudible) in different colors, you might go to a self-use kiosk in a store, in a department store.

You go the airport now and a lot of the airlines are having self-serve check ins and, you know, the ability to have that alternative access available and that it being reasonably accessible, I think becomes very important here, and I think companies need to consider when they're deciding how many self-serve checkouts they will have versus how many manned checkouts that are available, you need to take into consideration of how much that affects wait times, speed of use, and where there are other considerations that the self-serve checkouts provide that the manned doesn't.

One area might be to the extent that a self-serve provides a different level of privacy which might be important in certain circumstances.

Darren Mungerson - *Jenner & Block - Associate*

And I agree. And, you know, there are really 2 things that - you know, there are really 2 types of kiosks. The question of whether it's somebody else who is, you know, the question of whether it's the manufacturer or whether it's the company who is gaining money from the kiosk that would be an issue, from a practical standpoint, the person who is, I guess, operating the kiosk would be the entity that would be responsible for making it compliant with the ADA.

Now, as a practical matter, because the entity that's, you know, gaining the income or making it available is going to have to be compliant, the manufacturers will then generally have to be making these things compliant due to demand from their - basically from their consumers, to people that are buying these kiosks.

So I think that, you know, what we'll see down the line is that it's not necessarily going to matter who's going to handle liability for this, but it is going to end up having, you know, these types of kiosks, or eventually I think going to have to be made accessible to people with visual or other types of impairments.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Yes. But I think, particularly we were talking at (inaudible), yes, one must consider the access for somebody who is in a wheelchair or has trouble standing for long periods of time and, you know, or has motor skills issues they might need help looking at things.

And people sometimes, when they design these kiosks and things, they should take time to think about, you know, what are the availabilities for people to handle these different aspects of it. And again, in many instances in the store situation, having a manned checkout or capability or having somebody available to assist with the use of the kiosk, may very well be a sufficient accommodation.

But again, you also need to think about if you're operating in a retail environment, what are going to be the other demands on that person's time and is that person going to be reasonably available or are they going to end up making the customer - which won't be very good from a customer service perspective - make the customer have to wait, you know, a significant amount of time before they can be assisted.

Darren Mungerson - *Jenner & Block - Associate*

Right. And that really falls into, you know, the general principal that these things all have to be looked at on a case-by-case basis. There is no automatic answer that something has to be done this way or that way. While there are tendencies, it really is going to depend upon the facts of the situation.

Now turning to the next slide that's entitled 'State Law of Public Accommodation Issues,' you'll see that in 2004, California actually passed legislation addressing this issue to some extent. Now, in what they call this point-of-sale legislation, which is California Financial Code, Section 13082, they put it out there to stop (ph) these point of sale devices that do not allow a blind or visually impaired person to enter his or her personal identification number or any other personal information necessary to process a transaction with the same degree of privacy given all other individuals.

So therefore, if a point of sale system, and this is going on to the next slide, that is changed or modified can include a video touch screen and must have a textually (ph) discernable numerical keypad with raised dots so that blind and visually impaired persons can use it.

Now, this California law, specifically exempts ATMs and motor fuel dispensers, but essentially everything else where you would be entering basically using a point of service sale or touch pad which may include even things such as automated bridal registries, things like that, there is at least under California law, those would have to be made if they could be used to make purchases or the point of sale would have to be compliant with this law and, therefore, allowing a person that has visual impairment to basically use a touch pad as opposed to the types of screen touching that, I'm sure, we're all used to.

And as noted here in the slide, as technology expands, we should be expecting that lower states are going to follow California's lead in this regard and enact laws that require public accommodations of disabled persons in this type of situation. So, I think it's very relevant to the question with regard to the kiosks.

Now turning to the next page, or the next slide, where it's entitled, 'Tips for Public Accommodations,' now, web sites can be made more accessible to visually impaired persons, and there are several organizations that have developed standards for accessibility, and one such standard is referred to as Bobby compliance and there is also a worldwide Web consortium which is known as W3C that provide information and services to Web sites to allow them to become compliant with technology that allows these to be accessible to disabled individuals.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

And the last slide that's provided here of the Web cast hasn't been linked to both W3C's organization and to a Web site to test to see if your site is Bobby compliant; you can actually type in the URL for the site or for the page, and it will run a test on it.

Darren Mungerson - *Jenner & Block - Associate*

Yes. And the screen-reading software has 3 main components, and first, the software provides keyboard equivalence for most commands that usually would be performed by clicking on the screen with a mouse. And one should keep in mind that these Web sites, it's not just about visual impairment, that certain physical disabilities could limit the use of the mouse or the types of navigational aids and these should be considered when developing a web site or making it compliant with the ADA.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

I also would like to point out that with, in fact, visual impairment, that we aren't just talking about obvious (ph) visual concerns. You also need to think about people who may be colorblind, that there are also issues with people who are dyslexic as far as how confusing the screen is and there are lines (ph) and layouts that you can look at and use and follow that will help you to make your site more accessible to people with those sorts of disabilities, as well.

Darren Mungerson - *Jenner & Block - Associate*

Right, exactly. And turning to the next slide, most of these screen-reading programs are compatible with Windows controls. So, I mean, that's something to keep in mind to indicate that some of these changes aren't nearly as monumental or as difficult to overcome as some might think.

Now, the screen readers can also display a textual message in place of an image on a computer screen with an explanation of that visual image.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

And this sort of ties into where there may be a picture, it gets translated into text, which then gets read by the screen-reading software. So, it's not necessarily that you have to eliminate any types of pictures or designs on a web site, just that these types of pictures have to be enabled to be eventually translated into text by these programs.

Darren Mungerson - *Jenner & Block - Associate*

Now, the next slide, and I think Jonathan would want to touch on this, references non U.S. laws.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

To start with, I want to point out that a number of countries have laws that address accessibility on the Internet. The EU had initiated consultation on Web access for the disabled, but actually recently, they've completed and there have been discussions about passing a directive at the EU level on access to the Internet and Web sites for the disabled.

The UK, United Kingdom, has since 1995 addressed this in the Disability Discrimination Act which is very equivalent to the Americans with Disabilities Act, and particularly, the 2002 code of practice specifically addresses Web sites and states that Web sites must be made accessible to the handicapped and the visually impaired. And so, therefore, and they are very specific (inaudible), again, generally adopting the W3C consortiums recommendations and approach.

In Australia, there is actually the Maguire vs. SOCOG, which actually stands for the Sydney Operating Committee for the Olympics, basically in connection with the Sydney Olympics, the Maguire (inaudible) claimed that the way to seek tickets for the Olympics that was over a Web site, was discriminated against those individuals who were blind at the site, and actually he was very successful in that case, and they had to change the way that they were doing it, so there's an example of a case outside of the country. So there are a number of countries, other countries, and I just wouldn't have a chance to provide an exhaustive review of it, or address the issue.

So certainly, if you look at your Web site and think about that you're addressing not just people in the United States, but internationally, you do need to look at these issues.

Darren Mungerson - *Jenner & Block - Associate*

Yes, in particular with a global economy here where business can be done over the Internet anywhere in the world, you have to keep in mind that there may be certain regulations in other countries that if you're doing business there that you have to abide by outside of the U.S. as well.

And the last slide, as Jonathan mentioned, does contain some information with regard to the worldwide Web consortium and Bobby and also provides a Web site where if you want to test your Web site to determine if it is Bobby compliant, you can go to http:www.ks.org/bobby (ph), and you will type in your Web site and it will come back and let you know if it is Bobby compliant.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Well, that wraps up the main part of the presentation. We have a few minutes left if anybody has any questions, they can e-mail me. There is a link on the web site also, or just Jonathan, J-O-N-A-T-H-A-N, dot Spencer, S-P-E-N-C-E-R, at emp.shentel, S-H-E-N-T-E-L, dot com.

Also, feel free to e-mail after the call if you want to do a follow-up question, we'll try and give an anser to anyone who has been on this call, but basically, you know, I think some of the key takeaways with regard to ADA compliance with respect to the Internet and with respect to what we'll say a self-serve kiosk, and even electronic demonstrations.

Maybe not self-serve, but the other area one might want to look at is, any time use of technology that the customer is going to interact with or that your employees are going to interact with, you know, in the retail environment, in the employment environment, you do have to take into concern these ADA issues and look at reasonable accommodations.

The one thing that I'd also like to point out from experience having worked with this, that it is -while there is an additional cost in being ADA compliant, the cost if one prepares and plans to be ADA compliant at the beginning and takes these issues and concerns when designing the kiosk, when designing a Web site, it's far less. You know, maybe the cost might be an additional 10% there versus the cost of having a retrofit the system to become ADA compliant after the fact, which can certainly be considerably higher.

So if you're concerned about this, my recommendation is to get with those individuals who are involved in designing your web sites, your Intranet sites, or work in (inaudible), and to think about these issues ahead of time because, again, sometimes the cost can be very nominal if you do planning on it.

Darren Mungerson - *Jenner & Block - Associate*

And to add to that, Jonathan, one cost that you can't discount is the cost of potential litigation as well. As you saw, there was an $8 million punitive damages award that probably could have been avoided for much less simply by complying with the ADA or making steps to comply with the ADA. So not only would you have an increased cost in having to retrofit technology, but you may have litigation expenses or damages on top of that as well.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

Right. Well, an additional point that I would like to make is that there are a number of groups that represent people with various disabilities and have not hesitated to take action to engage in, or threaten to engage in, name-and-shame activities.

You know, bring action as, you know, starting back with the National Federation of (inaudible) in the AOL case. In the UK, actually the government there, the agency responsible for enforcing their equivalent act, has stated that, you know, they are intending to engage in a name and shame against certain companies if they don't get into compliance, or at least warning that they would do so.

So again, it is something that I think you need to - that companies need to take seriously. It's something that again prevention is a lot easier and you know, think of the PR costs versus the customer base.

Darren Mungerson - *Jenner & Block - Associate*

And one other thing that I'd like to touch on is that there are a number of groups, governmental and private agencies, that are willing to assist employers or companies to make a Web site compliant to basically provide for reasonable accommodations

through technology for their employees. And so, this is a source of, if there are costs that seem to be prohibitive for an employer in making these accommodations, there are resources available where they could get assistance from these either private funds or through the government to make these reasonable accommodations, and that's something that I think an employer faced with the possibility of having to provide a reasonable accommodation would be wise to look into.

Jonathan Spencer - *Association of Corporate Counsel - Chair of the Information Technology Law & E-commerce & Committee*

I think that's certainly an action which (inaudible) particularly in employment arena that if one has investigated the different forms of accommodation available, that will go a long - and you decide to go with an accommodation that is different from what your employee has requested, will go a long way in lodging (ph) defense in the case. I think that's really all the time. We haven't gotten any additional questions, so I'd like to thank everyone for tuning into our web cast.

I thank Darren and Jenner & Block for sponsoring the web cast, and I'd also like to again put this in for anyone who is interested in information technology or e-commerce law issues to become more active in the community's activities. We'd like to put on more web casts. If you have an idea for a Web Cast, feel free to e-mail me with it or join our monthly calls and you just go to the ACC Web site and you'll find information about when our next meeting is. Generally, it is the first Thursday of each month. Again, thank you everyone.
