

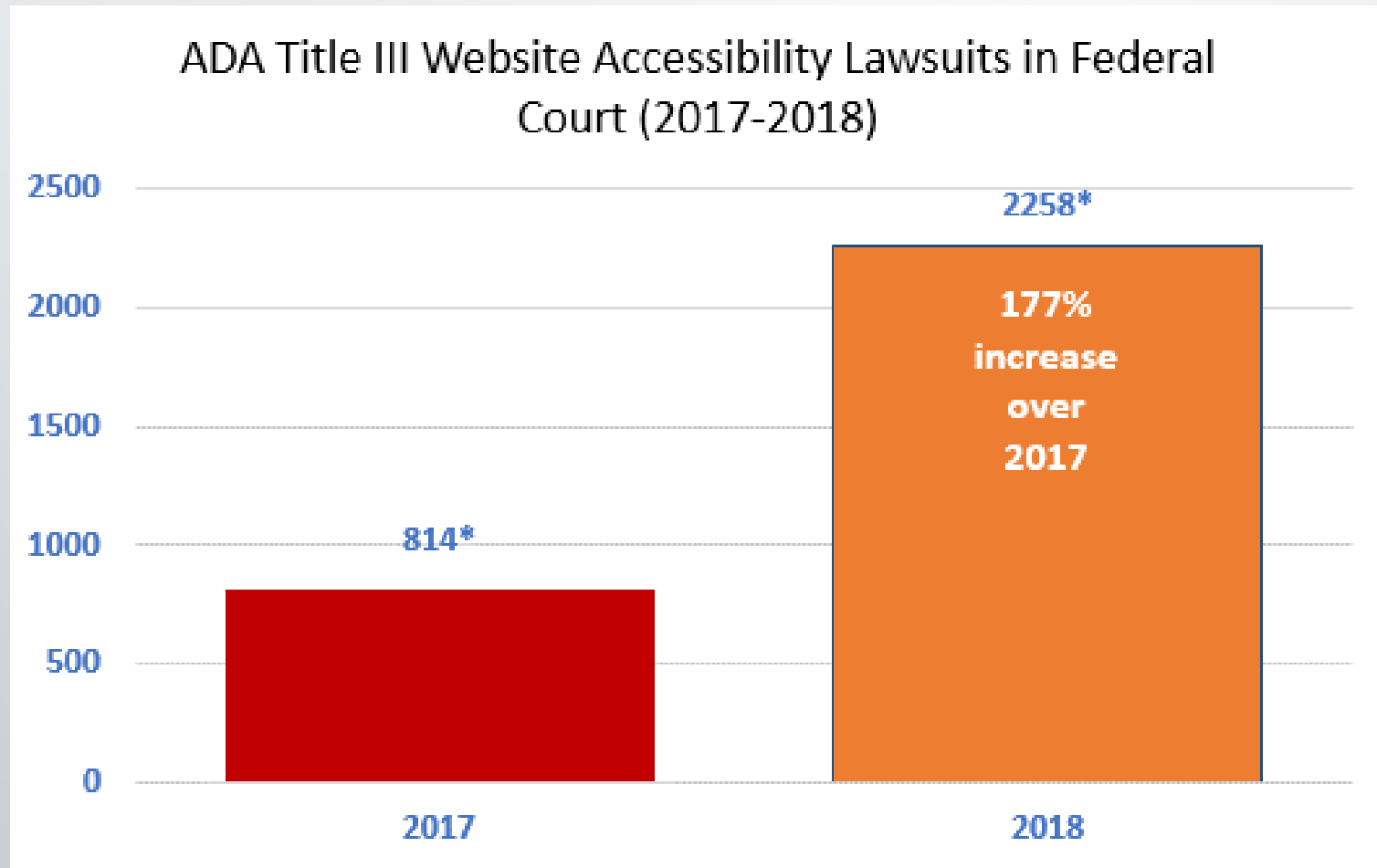
Get Compliant or Get Sued! The ADA and Public Entity Websites

**FACT Risk Management & Educational
Conference**

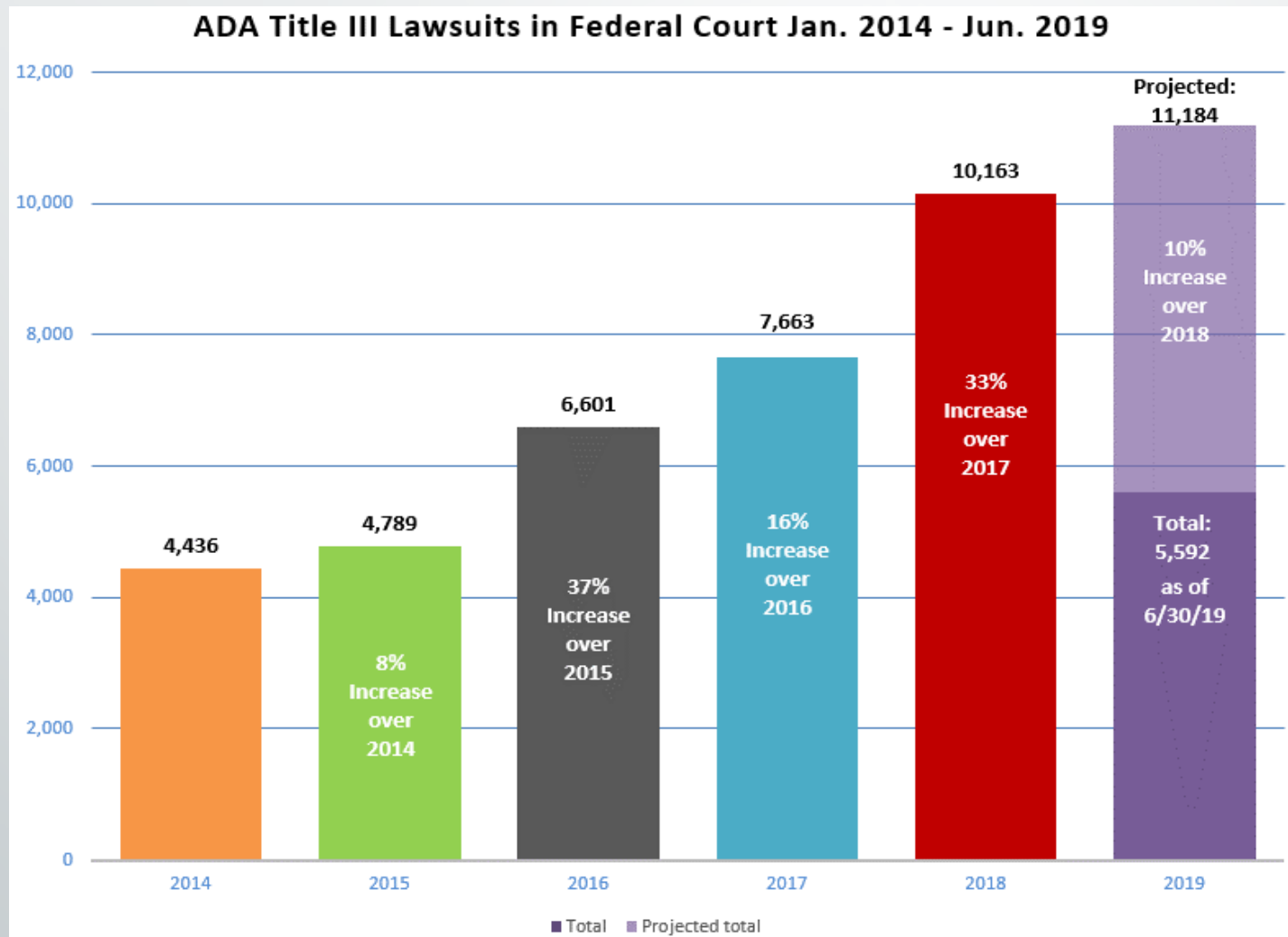
**Hilton Sandestin Beach Golf Resort & Spa
December 6, 2019**

Joseph D. Tessitore, Esquire
Bell & Roper, P.A.
2707 E. Jefferson Street
Orlando, FL 32803
www.bellroperlaw.com

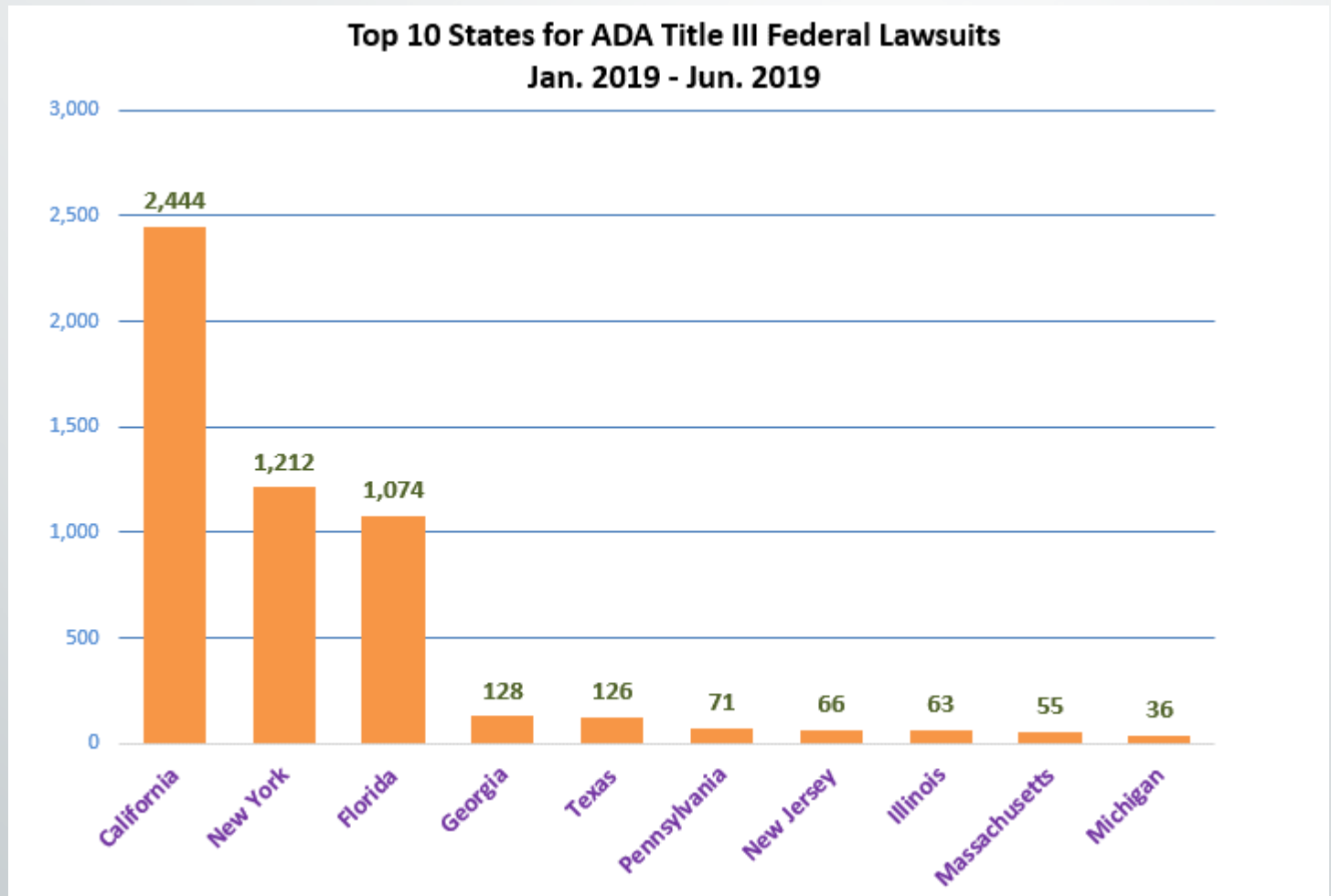
Rise of ADA Website Accessibility Lawsuits



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Rise of ADA Website Accessibility Lawsuits

- Title III of ADA – applicable to private places of public accommodation
- Title II of ADA – applicable to governmental entities
- There are some differences in the applicable legal standards, but these suits target the same accessibility issues
- Title II suits which are being filed in Florida target all branches of government - state, counties, cities, districts, constitutional officers, etc.
- Starting in South Florida, heading north



Reasons For Recent Increase In Filing of ADA Suits

- Fee driven - prevailing plaintiff entitled to award of attorney's fees and costs under Title II of ADA.
- Lack of clear direction from DOJ regarding the governing standards for website accessibility for persons with disabilities.
- Plaintiff's recent success litigating these cases in federal court.
- Development of technology and recognition of society's increasing reliance upon electronic access to private/public services/programs.



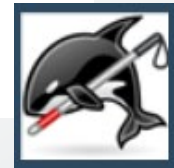
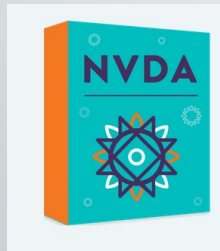
Reasons For Recent Increase In Filing of ADA Suits

- However, the legal duty to ensure that website are accessible to disabled individuals is not a new concept.
- Rehabilitation Act became law in 1973.
- ADA became law in 1990.
- DOJ's "ADA Best Practices Tool Kit for State and Local Governments" relating to websites was published in 2005.
- Target was successfully sued for inaccessibility of its website in California in 2009.
- This liability exposure has become a front-burner item due to the recent proliferation of ADA website lawsuits.

How do People with Disabilities (Primarily Visual Impairments) Use a Website?

- What does the term “website accessibility” mean and why is it important?

Orca is a free, open source, flexible, and extensible screen reader that provides access to the graphical desktop via user-customizable combinations of speech, braille, and/or magnification.



How Do People With Disabilities (Primarily Visual Impairments) Use A Website?

- Use of screen reader software by the visually impaired. e.g., JAWS; NVDA - translates written text and images to spoken words.
- Microsoft added similar functionality to Outlook and Word - Outlook “Speak” feature plays back written text as spoken words.
- Use of keyboard combinations - visually impaired person may not be able to use a mouse, see a cursor.
- Closed captioning for persons who are hearing impaired - YouTube allows you to add software-generated subtitles and closed captioning to videos – approx. 70% accurate (with variability for audio quality) - other software options available in marketplace.

Primary Issues Affecting Website Accessibility

- a. Out of date software is used to design website – not compatible with current screen reader software.
- b. Color contrast of web pages – difficult to read.
- c. Page not logically structured so person can navigate through page without using mouse.
- d. Images not adequately or properly tagged.
- e. Documents/images scanned/posted to website without text recognition.
- f. Lack of control over person(s) authorized to post documents to website.
- g. Closed captioning (hearing impaired) or audio description (visually impaired) of content.

Understanding ADA Website Accessibility

- How are the ADA and Rehabilitation Act implicated with respect to governmental websites?
- Title II of the ADA imposes an affirmative obligation on a governmental entity to provide **full** and **equal** enjoyment of its “... services, programs and activities...” to individuals with disabilities.
- An entity’s website is unquestionably a “... service, program or activity...” which is subject to the ADA. *Reininger v. Oklahoma*, 292 F. Supp. 3d 1254(W. D. Oklahoma, 2017)

Understanding ADA Website Accessibility

To prevail on a claim under Title II of the ADA a plaintiff must allege and ultimately prove:

- (1) that he is a “qualified individual with a disability;”
- (2) that he was “excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity” or otherwise “discriminated [against] by such entity;”
- (3) “by reason of such disability.”

42 U.S.C. § 12132; *Shotz v Cates*, 256 F.3d 1077 (11th Cir 2001); *Silva v Baptist Health South Florida*, 856 F3d 824 (11th Cir. 2017).

Understanding ADA Website Accessibility

Available Remedies for Prevailing Plaintiffs under Title II:

- Compensatory damages upon showing of intentional discrimination or “deliberate indifference.”
- Injunctive and declaratory relief.
- Attorney’s fees and costs.
- Compensatory damages are available under Title II and Section 504 upon a showing of “discriminatory intent,” which can be satisfied by a showing of deliberate indifference. *Liese v. Indian River Cty. Hosp. Dist.*, 701 F.3d 334, 342 (11th Cir. 2012).

Understanding ADA Website Accessibility

Bottom line - if information (documents, video, links, etc.) contained on your entity's website is not equally accessible to disabled individuals, with the use of adaptive technology, your entity, if sued, will likely be found by a court to be in violation of the ADA.

- Not horseshoes!
- No participation trophies!
- However, 100% compliance with WCAG is likely not feasible nor legally mandated.

What Are the Governing Standards?

- DOJ has rule making authority under the ADA – supposed to enact regulations to inform public and private sector of its legal duties.
- DOJ has presently elected not to issue rules for website accessibility – despite multiple requests from Congress and the public.
- In the absence of regulations from DOJ, Courts have been relying upon standards promulgated by World Wide Web Consortium (W3C). *Hindel v. Husted*, 2017 WL 432 839 (S.D. Ohio 2017)
- These standards are known as the Web Content Accessibility Guidelines (WCAG). Current version: WCAG 2.1.
- WCAG 2.0 Level AA is now the accessibility standard for federal executive agencies' websites and websites of commercial air carriers subject to the Air Carrier Access Act.

Important Cases

National Federation of the Blind v. Target Corp.

- 2009 WL 2390261 (N.D. Cal. 2009).
- Plaintiffs brought a class action lawsuit against Target over inaccessibility of its website to visually impaired individuals.
- The court certified a national plaintiff class and a California plaintiff subclass.
- Target settled the California plaintiff subclass' claims for \$6,000,000.00, agreed to remediate its website to meet accessibility standards, and agreed to continued compliance monitoring.
- The court awarded the plaintiffs \$3,738,864.96 in attorney's fees and costs at the conclusion of litigation.

Important Cases

Gil v. Winn Dixie Stores, Inc. S.D. Fla. 2017.

- A blind individual sued Winn Dixie over alleged inaccessibility of its website for individuals using screen reader software.
- After a bench trial, the court agreed that Winn Dixie violated the ADA by having a website that was inaccessible to visually impaired individuals.
- The court ordered WD to remediate its website to conform to the WCAG guidelines, within approximately 6 months from the date of the injunction, conduct mandatory employee accessibility training, and conduct regular accessibility tests upon its website.
- Plaintiff's attorneys obtained a \$105,271.06 award for attorneys' fees and costs.
- Appeal remains pending in the United States Court of Appeals for the Eleventh Circuit



Important Cases

The potential exists for multiple lawsuits even if the entity has settled with one plaintiff and is working towards fixing website.

Haynes v. Hooters of America, LLC 893 F.3d 781 (11th Cir. 2018).

- Blind individual sued Hooters over accessibility of its website.
- Hooters was already remediating its website after it had been sued and settled with another blind individual.
- Hooters' prior settlement agreement did not render the *Haynes* lawsuit moot because Haynes was not a party to the prior agreement, identified new barriers and sought different injunctive relief for which the existing settlement agreement did not provide.
- The Western District of Pennsylvania reached a similar result in *Gathers v. New York & Company*, 2017 WL 387083.

Important Cases

- **Article III Standing Cases**
 - ***Price v. City of Ocala***
 - M.D. Fla. 5:19-cv-39-Oc-30PRL
 - District Judge James S. Moody, Jr.
 - ***Gomez v. Marion County***
 - M.D. Fla. 5:19-cv-29-Oc-30PRL
 - District Judge James S. Moody, Jr.
 - ***Price v. Town of Longboat Key***
 - M.D. Fla. 8:19-cv-591-T-02AAS
 - District Judge William F. Jung
 - ***Gomez v. Town of Juno Beach***
 - S.D. Fla. 9:19-cv-80518-ROSENBERG/REINHART
 - District Judge Robin S. Rosenberg

Important Cases

- ***Price v. City of Ocala***
 - Judge Moody examined closely whether the plaintiff satisfied Article III's standing requirement through the complaint
 - Factors considered (non-exclusive):
 1. Plaintiff's connection with the defendant governmental entity
 2. The type of information that is inaccessible
 3. The relation between the inaccessibility and a plaintiff's alleged future harm
 - Judge Moody concluded that the plaintiff had not satisfied the standing requirement because he alleged no meaningful connection to the City of Ocala, did not allege what specific information was inaccessible to him through the City's website, and did not specify how the inaccessible information supposedly hindered his ability to be involved with the City's government.
 - So, Judge Moody dismissed the plaintiff's complaint without prejudice and with leave to amend
 - The plaintiff later voluntarily dismissed the case without prejudice

Important Cases

- ***Price v. Town of Longboat Key***
 - Judge Jung followed *City of Ocala* and dismissed the complaint without prejudice for lack of standing
- ***Gomez v. Marion County***
 - Judge Moody re-applied his standing test from *City of Ocala* and dismissed the case for lack of standing without leave to amend
- **Since the *City of Ocala*, *Town of Longboat Key*, and *Marion County* decisions were issued, the serial ADA plaintiffs have continued filing lawsuits and have added allegations regarding their claimed connection to the defendant in an attempt to satisfy the standing requirement**

Important Cases

- ***Gomez v. Town of Juno Beach***
 - The plaintiff alleged that he is looking for a new place to live, that he has visited Juno Beach in the past, and that he considers Juno Beach a viable living option. He claimed he needed the Town's electronic documents to assess the Town's policies for people with disabilities and whether the Town is a fit for his family.
 - Judge Rosenberg specifically addressed *Price v. City of Ocala* and distinguished it.
 - Judge Rosenberg held that the plaintiff had Article III standing to sue the Town and denied the Town's motion to dismiss.

Frequently Asked Questions

- Can you shut down website or remove content?
- What can be done now to protect your agency?
 1. Develop and implement a formal action plan to bring your website into compliance with WCAG 2.1;
 2. Add an accessibility statement/policy to your website which includes point of contact for assistance;
 3. Engage in a qualitative analysis of material currently published on your website and remove material which is not mandated or of limited use.
 4. Prioritize remediation of most heavily trafficked web pages;
 5. Evaluate the necessity for live-streaming video content.
- What should you do if you receive a request for documents in an accessible format?
- What should you do if you are served with an ADA website suit?
- Can you refuse to make website accessible due to cost?

Resources

1. Examples of accessible websites you may wish to consider:
 - (a) Islamorada, Florida: www.Islamorada.fl.us
 - (b) Target: www.target.com
2. ADA's Guide for Small Towns: www.ada.gov/smtown.pdf
3. Five Municipalities Doing Captioning Right:
<https://www.3playmedia.com/2018/03/01/5-municipalities-doing-captioning-right/>
4. Web Accessibility Initiative: www.w3.org
5. ADA Best Practices Tool Kit for State and Local Governments:
<https://www.ada.gov/pcatoolkit/chap5toolkit.htm>

Resources

6. Sonoma County California Web Accessibility Help Page:
<http://sonomacounty.ca.gov/Services/Web-Standards-and-Guidelines/>

Specifically, it contains a Making a PDF File Accessible- Step by Step page at: <http://sonomacounty.ca.gov/Services/Webstandards/Making-a-PDF-File-Accessible-Step-by-Step/>

7. WebAIM (Web accessibility in mind) provides not educational information on accessibility but also offers an online 8-week Document Accessibility Course for a fee of \$125.00. This course can be located at: <https://webaim.org/training/docs/>

8. Deque University is an online educational center at:
https://www.deque.com/training/online-deque-university/?gclid=EAIaIQobChMI_YeJksbj3wIVxluGCh3dfQlbEAAYASAAEgLunvD_BwE

Ransomware - Don't Become a Hostage!



“The usual stuff — a new virus from the Joker, spyware from the Penguin, malicious code from Cat Woman, another phishing scheme from the Riddler.”

What is Ransomware?

- **Ransomware** is a type of malicious software, or malware, designed to deny access to a computer system or data until a ransom is paid.
- **Ransomware** typically spreads through phishing emails or by unknowingly visiting an infected website.

Recent Headlines

- 8/17/19 – Texas - At least 20 local government entities across Texas have been taken hostage by a coordinated ransomware attack, the Texas Department of Information Resources announced Friday.
- 6/19/19 - Hit by Ransomware Attack, Florida City Agrees to Pay Hackers \$600,000, Riviera Beach, FL.
- 6/07/19 – Park DuValle Health Center paid hackers \$70,000, after a ransomware attack locked won medical records of about 20,000 patients for almost two months.

What we know presently

For the Public Sector:

1. Approximately 52% involved hacking
2. Approximately 28% involved malware
3. 95.6% of malware delivered by email.
4. 64.4% involved an office type document

Purpose:

1. 71% financial motivation
2. 29% use of stolen credentials

What can be done to try and prevent being held hostage



- Policies and protocols regarding how to handle emails.
- Proper training on how to identify and handle unknown emails.
- Have excellent IT support and proper backups of your networks.
- Consider segmenting your network.

What can be done to try and prevent being held hostage cont'd

- Keep up to date with updates.
- Multi-Factor Authentication.
- Train your System Administrators on cyber defense. Seminars and courses that give in depth explanation of risks and ho to prevent attacks.
- If you are attacked – how to respond to minimize the compromise.
- Back-ups, Back-ups, Back-ups!!!



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