

Navigating Legal Challenges & Opportunities in Real Estate

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OVERVIEW

- ADA WEBSITE ACCESSIBILITY
- COPYRIGHT INFRINGEMENT
- RESPA UPDATE
- CYBERFRAUD

ADA WEBSITE ACCESSIBILITY

TITLE III AMERICANS WITH DISABILITIES ACT

- Prohibits discrimination against people with disabilities “in the full and equal enjoyment of the goods, services, facilities,...by an person who owns ... or operates a place of public accommodation.”
- “Place of public accommodation” means business that provides goods and services to the public.
- Issue: Must a website comply with the ADA?

WHAT DOES THE DOJ SAY?

- DOJ position- all websites must be accessible.
- 2010: Advance Notice of Proposed Rulemaking:
https://www.ada.gov/anprm2010/web%20anprm_2010.htm
- 2016: Supplemental Advance Notice of Proposed Rulemaking: <https://www.ada.gov/regs2016/sanprm.html>
- Consent orders in settled lawsuits.

WHAT DOES THE LAW SAY?

- Case law varies by jurisdiction:
 - 3rd, 6th, 9th, and 11th Federal Appellate Circuit Courts:
 - ADA only applies to websites with a “nexus” to a public-accommodation physical structure.
 - E.g., Target’s website has a nexus to Target’s physical stores; Netflix does not.
 - 1st, 2nd, and 7th Federal Appellate Circuit Courts:
 - ADA applies to both physical and electronic spaces, no “nexus” test.

WHAT DOES “WEBSITE ACCESSIBILITY” MEAN?

- WCAG 2.0 Guidelines
- Website interacts well with adaptive technology.
- Maximized compatibility with assistive technologies.
- Text alternatives for any non-text content.
- Content presented in different ways without losing information or structure.
- Readable and understandable web navigation tools.
- Functionality available from a keyboard.
- Separate foreground from background.

ROBLES V. DOMINOS PIZZA, LLC

No. CV1606599SJOSPX, 2017 WL 1330216 (C.D. Cal. Mar. 20, 2017), appeal filed (9th Cir. Apr. 13, 2017)

- Plaintiff alleged Domino's website failed to comply with WCAG 2.0 guidelines and therefore violated the Americans with Disabilities Act.
- Court granted Defendant's motion to dismiss based on the primary jurisdiction doctrine- no DOJ guidelines governing accessibility.
- Court called on Congress, the Attorney General, and the Department of Justice to take action.

GIL V. WINN-DIXIE STORES, INC.

No. CV1623020 2017 WL 2547242 (S.D. Fla. June 13, 2017)

- Sight impaired individual seeking to use screen reading technology to access grocery store site for coupons, fill prescriptions, and use store locator.
- Winn admitted it would cost less than \$40k to make site accessible; had budgeted \$250k for this purpose.
- Court: Winn-Dixie violated the ADA by having an inaccessible website (including third-party vendors inaccessible operating on website.)

BEST PRACTICES FOR ADA **WEBSITE ACCESSIBILITY**

- Include an accessibility statement on your website.
- Talk to your website provider.
 - Review current accessibility of website.
 - Establish plan for making it more accessible.
 - Discuss indemnification.
- Require third party vendors to offer accessibility features.
- Stay tuned for further DOJ guidance.

BEST PRACTICES FOR ADA WEBSITE ACCESSIBILITY

Accessibility

The National Association of REALTORS® (NAR) is committed to providing an accessible website. If you have difficulty accessing content, have difficulty viewing a file on the website, or notice any accessibility problems, please [contact NAR](#) to specify the nature of the accessibility issue and any assistive technology you use. NAR will strive to provide the content you need in the format you require.

NAR welcomes your suggestions and comments about improving ongoing efforts to increase the accessibility of this website.

Web Accessibility Help

There are actions you can take to adjust your web browser to make your web experience more accessible.

- I am blind or can't see very well
- I find a keyboard or mouse hard to use
- I am deaf or hard of hearing

NAR ADA RESOURCES

- **WINDOW TO THE LAW VIDEOS:**

- “Websites and the ADA” :
 - <http://www.nar.realtor/videos/window-to-the-law-accessible-websites-and-the-ada>
- “ADA Basics”:
 - <http://www.nar.realtor/videos/window-to-the-law-ada-basic>

- **CASE SUMMARIES:**

- *Robles*:
 - <https://www.nar.realtor/legal-case-summaries/website-accessibility-lawsuit-dismissed>
- *Winn Dixie*:
 - <https://www.nar.realtor/legal-case-summaries/court-rules-ada-applies-to-website>

- **REALTOR® MAGAZINE ARTICLES:**

- “Is Your Website ADA Compliant?”
 - <http://realtormag.realtor.org/ADAwebsite>
- “Accessibility Is a Broker’s Responsibility”
 - <http://realtormag.realtor.org/for-brokers/network/article/2015/01/accessibility-broker-s-responsibility>
- “Head Off Web Site Accessibility Issues”
 - <http://realtormag.realtor.org/law-and-ethics/feature/article/2014/07/head-website-accessibility-issues>
- “Websites: Public Accommodations?”
 - <http://realtormag.realtor.org/law-and-ethics/feature/article/2014/09/websites-public-accommodations>

Copyright Infringement on Websites

- Infringement by displaying infringing material on one's own website, or a website of another.
- Infringement when infringing material is posted to your site by others.

VHT v. Zillow

- *VHT, Inc. v. Zillow Group, Inc.*, No. 2-15-cv-1096 (W.D. Wash. 2015).
- \$8.23 million jury verdict against Zillow, reduced to \$4 million, now on appeal.
- **Agents and brokers need to know what rights they have in photographs**

VHT v. Zillow

“With respect to the vast majority (and perhaps all) of the images at issue, **brokers or MLSs have granted Zillow “perpetual” unrestricted permission** to display the VHT photographs under representations and warranties that they have the right to do so . . . **The providers also agree to indemnify Zillow** for breach of these warranties.”

- *VHT, Inc. v. Zillow Group, Inc.*, No. 2-14-cv-1096 (W.D. Wash. 2015)(Zillow’s Motion for Judgement on the Pleadings for Failure to Join Indispensable Parties)

Copyright Infringement

- *Boatman v. Coldwell Banker Honig-Bell*, No. 16-08397 (N.D. Ill. 2016).
- *Boatman v. Kepple Premier Real Estate, The Kepple Team, Linda Kepple, Tricia Yocum, James Corkery and Ann Corkery*, No. 1:17-cv-01009-JES-JEH (Cent. Dist. Ill. 2017).

Copyright Infringement

Obtain proper ownership or permission for photos.

- Secure rights from those who take photos (agents, photographers, owners) before posting or submitting.
- Use Sample Photography Agreements at:
<https://www.nar.realtor/law-and-ethics/listing-photo-sample-agreements>
- Also see <https://www.nar.realtor/law-and-ethics/managing-listing-content/how-to-manage-and-protect-listing-content>

Content Placed by Others: Comply with DMCA Safe Harbor

- **Designate a “Copyright Agent” to receive takedown requests.**
 - Display agent name, phone and email address on website.
 - New electronic filing procedure; previously designated agents will need to re-register by Dec. 31, 2017.
 - Agents will need to renew every 3 years.
 - Fee reduced from \$105 to \$6.
 - Additional info:
<http://www.copyright.gov/rulemaking/online/NPR/>

Comply with DMCA Safe Harbor

- **Must not have knowledge of infringing activity or facts that make infringing activity apparent.**
 - Cannot turn a “blind eye” to any infringing activities
- **Must implement and display notice of a termination policy for repeat infringers.**
 - Check out the Terms of Use on www.nar.realtor for sample language under “Termination”:
<https://www.nar.realtor/terms-of-use>.

Comply with DMCA Safe Harbor

- **May not control the infringing activity or receive a direct financial benefit from the infringing activity.**
 - Direct financial benefit: actual infringing activity is a draw for users and not just added benefit.
- **Promptly remove allegedly infringing material from website when a notice is sent to designated agent.**

RESPA UPDATE

RESPA Section 8(a): “No person shall give and no person shall accept any ... thing of value pursuant to any agreement ... that business incident to ... a real estate settlement service ... shall be referred to any person.”

But Section 8(c)(2) permits payments

“...to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed,....”

that is, for services, goods, or facilities actually provided and where the payment bears a reasonable relationship to the fair market value of the goods or services provided.

PHH CORP., v. CFPB, On Petition For Review Of An Order Of the Consumer Financial Protection Bureau, pending before DC Fed. Circuit Ct. of Appeals.

CFPB SETTLEMENTS IN RE: PROSPECT MORTGAGE

- *In re: Prospect Mortg.*, 2017 CFPB 0006 (Jan. 31, 2017).
- *In re: RGC Serv. Inc.*, 2017 CFPB 0009 (Jan. 31, 2017).
- *In re: Willamette Legacy, LLC*, 2017 CFPB 0008 (Jan. 31, 2017).
- *In re: Planet HomeLending, LLC*, 2017 CFPB 0007 (Jan. 31, 2017).

Marketing Service Agreements

Properly structured MSA's:

- Compensation not based on or related to number or success of referrals;
- Compensation is based fair market value of marketing services actually provided.

Co-Marketing Arrangements

- CFPB addressing Zillow co-marketing portal for possible RESPA violations and unfair trade practices.
- CFPB has provided no guidance, but a co-marketing platform was part of the Prospect Mortgage settlement.

NAR RESPA Do's & DON'TS

- Provides guidance addressing entering into MSAs, co-marketing arrangements, in the absence of guidance from the CFPB.
- Only applies to federal law; state and local laws may also apply.

RESPA RESOURCES

- **Window to the Law Videos**
 - **CFPB Consent Orders for RESPA Violations**
 - <https://www.nar.realtor/videos/window-to-the-law-video-cfpb-consent-orders-for-respa-violations>
 - **RESPA FAQ**
 - <https://www.nar.realtor/videos/window-to-the-law-respa>
- **RESPA page on nar.realtor**
 - <https://www.nar.realtor/topics/real-estate-settlement-procedures-act-respa>
- **RESPA FAQ**
 - <https://www.nar.realtor/topics/real-estate-settlement-procedures-act-respa/respa-faq>

RESPA RESOURCES (CONT.)

- **Dos and Don'ts for Co-marketing**
 - <http://narfocus.com/billdatabase/clientfiles/172/4/2855.pdf>
- **RESPA products for sale:**
 - **RESPA Do's Don'ts for MSAs**
 - <https://store.realtor.org/product/brochure/respa-do-s-and-don-ts-msas?sku=126-123>
 - **Complying with RESPA**
 - <https://store.realtor.org/product/brochure/respa-guide-complying-real-estate-settlement-procedures-act-download?sku=E126-110>

CYBERFRAUD

SMALL BUSINESSES ARE A TARGET

- In 2015, forty-three percent of all cyberattacks were directed at small to midsize businesses (250 or less employees.)*
- Dangerous misconception: “I’m too small to bother with.”
- Cybercriminals know that the small guys are less protected.

* Source: Symantec 2016 Cybersecurity Report

REAL ESTATE IS PRIME TARGET

- Smaller to mid-sized companies.
- Busy professionals focused on clients, deals.
- Multiple separate players during transactions:
Buyer, seller, buyer's agent, seller's agent,
escrow agent, lawyer, mortgage broker,
banks.
- Real estate purchases involve large sums.

NEW SCAMS

- Highly sophisticated/organized crime.
- Virtually indistinguishable from legitimate email:
 - From recognized (but hacked) account; or
 - Subtle difference in email address.
- Looks to be from trusted source.
- Right timing, right tone, right information.

WIRE FRAUD IN REAL ESTATE TRANSACTIONS

- Hacker breaks into email account undetected.
- Sends email to buyer just before a money transfer.
- Looks like legitimate email from agent, attorney, other trusted participant.
- Claims last minute change to wiring instructions.
- Buyer wires money to criminal.
- Difficult to trace perpetrator and retrieve money.

BEST PRACTICES **FOR PREVENTION**

- Inform clients at the outset of this epidemic. Consider using written disclosures.
- Avoid sending wire instructions (and any sensitive financial information) via email.
- Instruct homebuyers to call the intended recipient of wired funds immediately prior to sending the funds.
- Use an independently verified phone number.

NAR RESOURCES

- **Wire Fraud Landing Page:** <https://www.nar.realtor/topics/wire-fraud>
- **Video Alerts and Education:**
 - <https://www.nar.realtor/videos/wire-fraud-alert-for-buyers>
 - <https://www.nar.realtor/videos/window-to-the-law-data-security-program-basics>
 - <https://www.nar.realtor/videos/window-to-the-law-cyberscams-and-the-real-estate-professional>
- **Cyber and Fidelity Insurance Report:**
 - <https://www.nar.realtor/reports/cyber-and-fidelity-insurance-report>
- **Articles:**
 - <http://www.nar.realtor/articles/request-to-redirect-funds-should-trigger-caution>
 - <http://www.nar.realtor/articles/internet-security-best-practice>
 - <https://www.nar.realtor/articles/urgent-alert-sophisticated-email-scams-targeting-the-real-estate-industry>

THANK YOU!