April 2011 Volume 42, Issue 4

# The Marin Lawyer

An Official Publication of the Marin County Bar Association

## GENERAL MEMBERSHIP MEETING

### EXECUTIVE DIRECTOR OF THE STATE BAR OF CALIFORNIA TO SPEAK AT THE APRIL MEETING

Joe Dunn, Executive Director of the State Bar of California will address the Marin County Bar Association at its monthly membership meeting at noon on **Wednesday, April 27, 2011**, at San Rafael Joe's, 931 Fourth Street in San Rafael.

The focus of his address will be, "The Political Challenges to the Judiciary and the Legal Profession." Always a vivacious speaker, this promises to be a informative, interesting and lively talk.

Joe Dunn is an accomplished trial attorney. In 1998, he was elected to the California State Senate to represent the 34th Senate District in central Orange County. During that term he lead the State's investigation into Enron's involvement in the 2000-2001 energy crisis. He was reelected in 2002. Upon leaving the Senate, he was appointed as CEO of the California Medical Association. He held that position until becoming the Executive Director of the State Bar.

Please register for this exciting program by completing and returning the reservation form on page 2, by calling the bar office at 415-499-1314 or by emailing jsalas@30nsp.org.

## Calendar of Events

General Membership Meeting
**April 27th**
12 – 1:30 pm

**April 19th**
Diversity Section
12:15 pm

**April 20th**
ADR Section Meeting
12 – 1:30 pm

**April 20th**
Probate & Estate Planning Meeting
12 -1:30 pm

**April 21st**
Real Property Section Meeting
12 – 1:30 pm

**April 25th**
Probate & Trusts Mentor Group
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

## In This Issue



Sara B. Allman was Guest Editor of this issue of *The Marin Lawyer*. Kate Rockas is Series Editor for 2011.

## A FEW TIPS ON HOW TO AVOID OR MITIGATE THE IMPACT OF AN ADA LAWSUIT

*By Sara B. Allman* © 2011*

**Introduction**

The ADA requires businesses (including those who own, lease or operate them) to be accessible to disabled persons who utilize their goods and services. The ADA imposes an affirmative duty on all businesses open to the public to remove architectural barriers if the removal is "readily achievable." (42 U.S.C. §12182(b)(2)(A)(iv).) Readily achievable is defined as "easily accomplishable and able to be carried out without much difficulty or expense." (42 U.S.C. §12181(9); 28 C.F.R. §36.104.) Aggrieved individuals may sue to enforce the ADA and, if successful, obtain injunctive relief and an award of attorney's fees. (42 U.S.C. §§12188(a)(1); 2000a-

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## LAW DAY CLINIC

The next Law Day Clinic is Saturday, April 30, 2011, from 9:30 a.m. to 4:30 a.m. If you are interested in volunteering for this event, contact Nancy Murphy at (415) 492-0230 or email her at nmurphy@legalaidmarin.org. Lunch will be provided for volunteers.

## FAMILY LAW SETTLEMENT CONFERENCE TEMPORARY JUDGE

The Marin County Superior Court is seeking qualified family law attorneys/mediators to serve as temporary judges to supervise family law settlement conferences. The Court is establishing a panel of attorneys to conduct these settlement conferences on a rotating basis. Candidates should be available approximately one day per month for service.

Eligible candidates must be active members in good standing of the California State Bar for a period of at least ten years prior to appointment and may not have any disciplinary action pending. Training and experience in family law mediation is preferred. Pursuant to California Rule of Court 2.812, candidates will have attended and successfully completed nine hours of training in the areas of bench conduct and demeanor, ethics, and relevant substantive law, prior to appointment. Compensation for performing these duties will be at the rate of $120/$240 per half/full day (no benefits). Appointees will work under the general supervision of the Presiding Judge and must comply with the Canons of Judicial Ethics.

If interested, please submit a detailed resume describing your background and qualifications no later than 4:00 p.m. on Friday, April 29, 2011 to: Marin County Superior Court, Human Resources Department. Attn: Settlement Conference Temporary Judge Application, P.O. Box 4988, San Rafael, CA 94913-4988

For additional information regarding this position, contact Scott Beseda, Human Resources Manager, at: (415) 444-7348. EEO/AA: Marin County Superior Court is an Equal Opportunity Employer



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3(a).) Monetary damages are not recoverable, although most ADA complaints also include state law claims for monetary damages. (42 U.S.C. §§12188(a)(2).) The Unruh Civil Rights Act, Civil Code §52(a), provides statutory damages of "up to a maximum of three times the amount of actual damage but in no case less than $4,000," for each "offense" of discrimination. And, the plaintiff need not prove that the discrimination is "intentional" for there to be a monetary recovery. (Munson v. Del Taco (2009) 46 Cal.4th 661, 665.)

But, the focus of this article is not to inform you on ADA law per se, but rather to provide you a few practical pointers to help your business clients avoid or mitigate the consequences of an ADA lawsuit.

**What Can Be Done Now?**

**First, don't wait for the lawsuit to come.**

ADA suits are on the rise, and disabled plaintiffs and their counsel are trolling for public accommodations to sue. And for good reason—as noted above, the suits are fee generating. If the plaintiff prevails, the court will award plaintiff attorney's fees. A judicially enforceable settlement agreement or consent decree that binds the defendant to make changes provides a predicate for the award. Thus, in a case of liability, your client effectively will be paying for both you and the plaintiff's counsel to negotiate and litigate against each other. Experienced plaintiff's lawyers typically claim fees at a high hourly rate, including fees for pre-suit "investigation."

On the other hand, it has not been easy, to say the least, for a defendant to obtain an award of its fees when

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it prevails. Under the ADA, the court exercises discretion and must find that plaintiff's case was frivolous in order for the defendant to secure a fee award. Under the attorney's fees provision of the California Disabled Persons Act, Civil Code §55, which incorporates the ADA, there is a mandatory "prevailing party" fee award. The California Supreme Court is presently reviewing whether or not §55 is preempted by the ADA in connection with a prevailing defendant fee award affirmed under §55 by the Court of Appeal in Jankey v. Lee (2010) 181 Cal.App.4th 1173, review granted May 12, 2010, S180890.

**Your client thus should avoid an ADA lawsuit whenever possible, because, simply put, it's expensive.**

Some of your clients may already understand that, when alterations are made to the premises, ADA upgrades under Title 24 of the California Building Code are triggered as to the area of the alteration, the path of travel to it, and the sanitary facilities. But, many commercial landlords and tenants have the misimpression that they are not otherwise obligated to remove barriers—unless a city inspector requires them to do so. This is not correct. The readily achievable barrier removal standard applies even if there have been no alterations and irrespective of what a local government official requires or does not require. And, while explaining this last point to your clients, you should also disabuse them of the notion that there is a "grandfather clause" that will insulate them from the readily achievable barrier removal standard. There isn't.

Counsel your client to obtain an ADA access survey now to determine any access violations. The client should then be advised to fix all the problems that are identified in the survey. To this end, make sure that the survey is conducted by a qualified certified access specialist (CASp) who is highly experienced in conducting ADA surveys. Ideally, the report should go through you, rather than your client, as this may privilege it from disclosure in any subsequent litigation. Finally, have the certified access specialist re-inspect after the remedial work is done, to ensure compliance, and issue a certificate of compliance that can be posted prominently at the premises. It is obvious, but bears repeating here, that, if there are no barriers to disabled access, it is probable that your client will avoid an ADA suit altogether.

Second, some insurers are now writing policies that may cover certain ADA lawsuits. Recommend that your client look into that coverage now. Otherwise, under a standard CGL policy, unless the plaintiff alleges an "occurrence" resulting in "bodily injury" (which allegation is relatively rare), generally there will be no insurance coverage.

Third, review the lease agreement. Liability under the ADA is joint and several, so, unless there is an express allocation of responsibility as between landlord and tenant, both are on the hook. As a practical matter, this means that the landlord will bear the risk if the tenant is not financially able to make access changes or to finance the defense and the resolution of the case. Although arguments can be made for allocation under compliance with law, indemnification, and alterations provisions of a lease, the better approach would be to draft a provision or addendum that expressly allocates ADA responsibility, specifies a cooperative way for the parties to defend an ADA lawsuit, and requires (at its inception) removal of barriers to access.

**Don't Ignore the Warning Letter**

The ADA has been in existence for over 20 years. The plaintiff will argue that it is irresponsible, if not reckless, to ignore it. Although a pre-litigation warning letter is not required under the ADA, sometimes in order to persuade a business to provide access, enhance the recoverability of attorney's fees, and/or increase the potential punitive damages exposure to the business, an ADA plaintiff will send one out anyway a few months before filing suit. (This letter typically is in English [even though the small business tenant to whom it is addressed may not be able to read English], with an unknown sender's name on the envelope, and sent by regular mail. The letter may be addressed to both landlord and tenant, but sometimes is sent only to the tenant's address. Predictably, the letter ends up lost, discarded or never received.)

A pre-litigation warning letter purports to put the potential defendants on notice of claimed access violations and demand their correction. If such a letter survives and comes to your attention, you should advise your clients that they must not ignore this warning letter or delay acting on it. Instead, they should act immediately to obtain a survey, remove any barriers to access, and secure a CASp certificate.

If your client is served with a lawsuit, and undertakes the remediation immediately, this will eliminate the ability of the plaintiff to re-visit the business and re-encounter bar-

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riers to access. It is not uncommon for a plaintiff to return to the targeted facility several times after the warning letter, and to continue to return even after the lawsuit is filed—to attempt to increase his or her damages claim. The plaintiff will then argue that each visit is a separate, compensable instance of discrimination and try to claim up to $4,000 in additional damages for each re-visit. By removing the barriers to access as promptly as possible, you also take this strategy away from the plaintiff.

**Get the Case Resolved As Quickly As Possible**

Since 2005, ADA cases in the Northern District have been subject to General Order 56, which sets forth a timeline for initial disclosures, a joint site inspection (within 100 days of filing suit), and mediation. Discovery and all other proceedings are stayed. This allows the parties to meet and confer on the injunctive relief aspect of the case—the remediation that needs to be done to bring the premises into ADA compliance and that could be ordered by the court. Once the scope of the remediation is tentatively agreed upon, then the plaintiff must provide a settlement demand and itemization of attorney's fees and damages to the defendant. The parties can then settle informally or, if they are not able to do so, the plaintiff may file a Notice of Need for Mediation.

After you tender to any available insurance and answer and raise the appropriate defenses, the goal in most cases is to resolve the injunctive relief aspect of the case as quickly as possible, secure the settlement demand, and settle. Generally, the longer the case goes on, the more difficult it becomes to settle it—as the attorney's fees on both sides mount. As frequent press accounts confirm, the grim reality is that many defendants do not survive an ADA lawsuit. They cannot afford defending the suit, paying for the remediation, and paying out a monetary settlement. So the best course is to settle quickly and, when appropriate, attempt to negotiate a payment plan to help your client stay in business.

The court has an excellent ADR program, but the cost of preparing for and attending the mediation can be significant, and, in many cases, the cost will effectively increase plaintiff's counsel's attorney's fee claim too and eat into the available resources the client has to pay the plaintiff in settlement. If possible, and depending on the complexity of the remedial issues presented, the case should be settled before mediation.

To achieve the goal of early resolution, you should make every attempt to have the property surveyed by a certified access specialist as soon as you receive the suit. Under General Order 56, only the parties and their counsel are required to attend the joint site inspection—the parties' experts attend when the parties "elect." This being the case, it often makes better sense to have your expert survey the site well in advance of the joint site inspection rather than wait for the joint site inspection (at which his or her attendance is not mandatory) to occur.

In most cases, you should encourage your client to remove the barriers to access, if any were identified in the survey, before the joint site inspection. However, not every case calls for a race to effect the remediation up front—each case must be evaluated according to its own facts and circumstances. For example, if plans need to be drawn and permits obtained, early remediation may not be feasible. But what can be done in advance, without plans and permits, should be done. And, even though a plaintiff only has standing to make claims relating to his or her disability, it makes no sense for your client to remove some, but not all, architectural barriers—and risk getting sued again by a different plaintiff with a different disability.

By removing all access barriers prior to the joint site inspection, only the monetary aspect of the settlement is left to negotiate. Another added benefit is that your client may avoid being subject to a consent decree. A consent decree is a stipulated court order that, inter alia, specifies the injunctive relief and typically carries with it significant penalties and enforcement provisions. It also requires time to negotiate a proposed consent decree, which translates to more out of pocket attorney's fees for the client that could otherwise be put to better use removing barriers to access up front.

By mooting the injunctive relief aspect of the case at the earliest time, the federal court's subject matter jurisdiction is also called into question. Since the ADA only provides for injunctive relief and attorney's fees, the case is subject to dismissal for lack of subject matter jurisdiction. The plaintiff may face an uphill battle attempting to persuade the federal court to exercise its supplemental jurisdiction to retain only the plaintiff's state law claims once the injunctive relief is moot.

The downside of advising your client to undertake the remedial work before the joint site inspection is that the plaintiff may not agree that what was done is sufficient to satisfy the requirements of the ADA. If the plaintiff does not agree, the injunctive relief aspect of the case remains in dispute and it may take more time, and more fees, to settle the case. As a rule of thumb, the fewer and simpler the access barriers alleged in the complaint, the less risk there is in removing them (consistent with your expert's recommendations) before the joint site inspection.

**Comment**

Despite the "shakedown" approach of many ADA plaintiffs and the harsh effect an ADA lawsuit has on a small business, the good intention of the law should not be overlooked. It is a positive for a business to improve access for the disabled—if "readily achievable." It is a positive for the disabled community to have equal access. Some architectural barriers can be removed by very simple measures, such as relocating fixtures in the public restroom or lowering a cash counter. Even installing an electric door opener, adding signage, or re-striping a parking lot can often be done fairly quickly and cheaply. If your client takes the required steps now, an ADA lawsuit may be avoided. If your client is sued and acts quickly to take the required steps then, the negative consequences of an ADA lawsuit can be minimized.

** Sara B. Allman is president of Allman & Nielsen, P.C. Her civil litigation practice is devoted in large part to counseling and defending commercial landlords and tenants in ADA lawsuits in federal court. She can be reached at Allman & Nielsen, P.C., 100 Larkspur Landing Circle, suite 212, Larkspur, CA 94939; telephone: (415) 461-2700, e-mail: all-niel@comcast.net.*