CLM National Conference
Houston, Texas
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LOOKING BACK…LOOKING FORWARD WITH THE AMERICANS WITH DISABILITIES ACT

I. A Promise of Equality Through Accessibility:

"This act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control over their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream.

Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights. It will guarantee fair and just access.
It will guarantee fair and just access to the fruits of American life which we all must be able to enjoy.

And then, first, the ADA ensures that employers covered by the act cannot discriminate against qualified individuals with disabilities. Second, the ADA ensures access to public accommodations such as restaurants, hotels, shopping centers and offices. And, third, the ADA ensures expanded access to transportation services. And, fourth, the ADA ensures equivalent telephone services people with speech or hearing impediments."

Remarks of President George H.W. Bush, July 26, 1990, Washington, D.C.

It is altogether fitting, as we gather in Houston, Texas, that we review the progress of President Bush's signature domestic legislative achievement and its prospects for the future of diversity.

II. What The Numbers Tell Us:

In the Morbidity and Mortality Weekly Report published by the Center for Disease Control and Prevention, a July 15, 2015 article entitled: "Prevalence of Disability and Disability Types Among Adults-United States 2013" outlines that 22.8% of adults reported disability including mobility, cognition, independence, sight and self-care. This did not include hearing. As a result, as America ages demographically, the number of and percentage of population covered by the Americans With Disabilities Act (ADA) will only increase. This demographic trend poses great legal, moral and societal questions in the context of public accommodation and access. This presentation focuses on access to public accommodation.

ADA, unlike many other civil rights initiatives, relies heavily on private enforcement. While many of the claims on and lawsuits filed have some merit, patterns observed paint a picture of pitfalls in litigation for its own sake. For example, the American Institute of Architects reviewed Federal ADA suits from 2005 to 2013. In its findings including nearly 15,000 suits, almost half, or 7,188 were filed in California. **Of that 7,188, over 4,000 of them were filed by only 41 plaintiffs.** Florida, in a similar pattern, was in second with 3,303 total lawsuits.

A frequent flyer is the "drive by" claim where someone drives past a parking lot of a public establishment, checks if there are 20 parking spaces without a handicap space, takes a photo and proceeds with a claim and/or suit. Obviously the lofty goals of ADA and the pitfalls of private enforcement demonstrate a gap between ideal and reality.

III. Letter Of The Law Enforcement:

There's nothing like an exciting, interesting feature movie at a local theater. Theaters, like any construction project, are subject to construction variance. In United States v. AMC Entertainment, Inc., 245 F. Supp.2nd 1094, 1100 (C.D. Cal., 2003), the Court observed:

> "… many of the standards set forth in the ADA AG speak in terms of minimums that must be provided. AMC's argument suggests that the Court should shave a half an inch or an inch off these articulated minimums…**This argument is simply not persuasive.**"

In the restaurant and hospitality field, the experience of the customer is also an important factor. In many instances, good enough is simply not good enough. An example is found in Maurizio Antoninetti v. Chipotle Mexican Grill, Inc. 643 F. 3rd 1165 (9th Cir., 2010).

The Chipotle experience includes the opportunity to see ingredients, select them and observe the preparation of the food. There was a 45 inch wall to see over to do so. In a wheel chair, Antoninetti was unable to see the Chipotle personnel doing so. Alternatives like viewing from the end of the line or at the table with containers was deemed not to be sufficient. It remanded to the trial court to award greater attorney's fees to plaintiff.

As a result of this legal determination, Chipotle ultimately ripped out the 45 inch walls in favor of newer 6 inch at numerous restaurants at the cost of millions of dollars instead of

continuing to fight in litigation. Ironically, the lower elevation has caused their employees to stoop more, require back braces and expose Chipotle to worker's compensation claims.

In California wine country, this concept was also articulated in Moliski v. Foley Estate Vineyard 531 F. 3rd 1043 (9th Cir., 2008) the Court considered a variety of features including a wine counter height of 42 inches. Although the vineyard provided wine service on an ADA compliant gazebo as an alternative, the Court determined this also was not good enough.

Therefore, although there are legislative efforts to curb abuses enacted and more to be considered, the reality is that compliance with ADA is not simply desirable-it's the law which will be strictly enforced.

IV. Is Relaxation Of Stringent Enforcement Wise ?

In an attempt to focus ADA compliance away from litigation and into a more collaborative model, efforts in Congress are taking shape to restructure the dialogue to solutions instead of litigation. Congressman Ted Poe of Texas introduced H.R. 620, The ADA Education and Reform Act of 2017. The gist of the legislation, driven, in part, by drive-by claims, seeks to provide an additional step of providing businesses an opportunity to correct alleged ADA deficiencies before a lawsuit is filed. This legislation has been reported out of the House Judiciary Committee.

Debate will focus on whether the opportunity to repair alleged deficiencies of ADA creates a shift of the burden of proof onto the disabled rather than to enforce a pro-active duty on the business community to comply with ADA in the first instance. It shapes up to be a classic argument between business groups, the disabled community and advocates for both over whether the ability to repair to avoid a lawsuit undermines the basic principles of ADA.

On the one hand, there is historic evidence of lawsuits for their own sake. On the other, the ADA is written with simple, strict language for its enforcement. Is litigation first, repair second preferable over the opportunity to repair first and litigate second ? There are well reasoned arguments on both sides. Those in favor of present ADA enforcement may argue that the intent of the statute is to protect and not protract. Those in favor of modification may argue that since ADA is now 27 years old, thoroughly integrated in modern design and construction practices, including specialized inspections, that the risk of the new approach gutting the legislation is between slim and none.

At the time of preparing this narrative, this legislation is pending. Its course will be followed closely by all stakeholders and may result in further development by this conference.

Various state's legislatures have similarly enacted laws covering these areas including required disclosures of whether there is or is not compliance with ADA for the lease of commercial property, building standards and other measures. The basic rule of the road is to follow the most stringent requirements, whether they be state or Federal, as the best practice to ensure compliance, minimize potential liability for and subsequent costs to owners, builders, designers, trades and other stakeholders of the building community.

V. Websites And ADA:

Recent trends in litigation have moved from physical to virtual: from the walkway to the web. With much of the retail, restaurant and hospitality business transforming their models from brick and mortar to the convenience of the worldwide web, the burden that is placed on the members of the public who are not sighted have become more visible. The access to purchasing goods, services, meals and entertainment have shifted from an in person experience to a remote and perhaps virtual one.

Obviously, none of this existed on July 26, 1990. ADA is not drafted with the web in mind.

The form of this litigation is more innovative with the use of representative or class actions covering a broad brush of the population challenged by the use of the web. The question turns, in significant part, whether the website is a "... place of public accommodation." As this uncertainty prevails, with different states and courts taking potentially inconsistent positions, in the management of risk and promotion of diversity, businesses should err on the side of accessibility:

1. Provide alternatives for non-text content to be changed into large print or braille;
2. Provide alternatives to video or audio only content;
3. Pro-actively create original content which can be presented in different forms;
4. Provide additional ease in spacing out content;
5. Make the alternative mediums available through common keyboard technology;
6. Develop user testing of alternative features using the same content to assess performance, results and adjust as necessary; and,
7. Use website updates as opportunities to reduce and eliminate barriers to access.

As regulations develop and checklist compliance with them, stakeholders are reminded that like the web itself, compliance is perpetually changing. Consultation with experts well-versed in the practice for and compliance with website guidelines is strongly recommended.

VI. Will Insurance Pay For This ?

Several potential policies may apply: comprehensive general liability, errors and omissions, umbrella insurance, employment practices liability insurance and directors and officer's coverage. With potentially as many outcomes as our 50 states can muster, the best practice is to consult with your broker and attorney for whether there is coverage under any or all of these policies. The key issue is an assessment of whether the damages are insurable.

Quite often, ADA suits involve a potentially major expense for correction. It could be removal and replacement of entire walls, walkways or other physical structures. It may be a complete redesign of a website with additional features accessible for a more highly diverse population with a wide spectrum of disabilities. It may be an in kind payment of damages such as free or discounted services, restitution or disgorgement of membership fees with payment of the disabled person or class members' attorney's fees.

As the environment shifts, the exposures increase and the financial risk grows, the better path is to assess these potential challenges as opportunities in concert with management, consultants with expertise, insurance broker and counsel to design the best profile of pro-active effort and risk transfer. Perhaps more than ever, the evolution of the ADA to a more diverse and dynamic population requires re-visiting principles of enterprise risk management making all stakeholders in the process participate to create and innovate the best available model as well as to share its risk and benefits.

VII. Taking Your Own Medicine: The Florida Courts:

As transparency is revealing and enlightening, the path of the Florida Courts is refreshing. The Florida Courts established a website presence with links, downloadable forms for the public to identify and report concerns with facilities and compliance with ADA. In addition, the Florida Courts have taken an aggressive approach to make it easier for the public to air grievances on their facilities with ADA information and contacts for each of its Circuit Courts, District Courts of Appeal and the Florida Supreme Court. Finally, Florida has made it easier for the public to request and obtain accommodation as well as accessibility to its facilities. More information on Florida Courts is found at flcourts.org/adainformation.

VIII. State Standards And ADA:

State legislatures have chosen to act in accordance with the principles of ADA but in many cases to address those principles through construction codes. This may serve to focus all team members in a new project design, rather than leaving the issue to architects. On existing building renovations, especially in remote unincorporated areas, there may be no professional design involvement at all. Forward-thinking general contractors and even sub-contractors occasionally educate themselves as accessibility specialists to avoid later claims.

The Texas Accessibility Standards is an example of efforts to eliminate architectural barriers, and, one hopes, assist developers and small business owners in anticipating their liabilities. As administered through the Texas Department of Licensing and Regulation, it is primarily based on ADA standards and adult dimensions and anthropomorphics. It recognizes concurrent application of ADA and sets more detailed measurements for consideration in the design and construction of improvements.

It is also worth noting that in unincorporated areas accessibility standards may be the only enforceable building code.

Many states have chosen to look at accessibility more closely since ADA. As a general rule, it is highly recommended that both Federal and state standards are considered and the most stringent selected among those available.

IX. Expertise And Experience:

In many of the states, specialization and licensure to consider, advise and opine on accessibility is more the norm than the exception. These resources are unique, but exceptionally valuable as the move to prevention rather than cure is recognized to conserve

valuable resources for other endeavors in a competitive world where the distribution and investment of human and financial capital is at a premium.

X. <u>Where Do We Go From Here</u>:

It is the authors' view that ADA currently requires strict compliance for legal risk, but a more seasoned common sense approach for its future. As our economy expands and contracts, the value of our resources needs to focus on solutions first, litigation second.

An analogy is the date for implementation of ADA. Many designers and builders scurried up the steps of building departments throughout the country to avoid processing their design and improvement plans under ADA. The stories of those days may reveal anecdotal humor, but reveal how much we have changed. We all like to be "grandfathered" in. This was considered by many to be wise at that time since the cost of re-design was prohibitive and would potentially terminate many projects before their completion.

Over time, attitudes and aptitudes change. After all, the world is not flat, the earth is not at the center of the universe, separate, but equal is dead and diversity is strength and not a weakness. We have come, over the fullness of time, to value and accept people for who they are and not how they look. ADA is the bridge across which many who could not pass before ultimately did.

Disability is no longer a curse. We do not cross the street to avoid passing someone in a wheelchair. Buildings are designed with openings to accommodate those with limited mobility. Jurors who are deaf and blind sit to decide cases of great import in our courts with requisite assistance. Educational programs are designed to address cognitively and developmentally impaired at early ages to promote a useful role for every life in our society.

It is the challenge is to see ADA, looking back, and looking forward, as the opportunity of our time to promote inclusion and value of each individual. Hidden behind a disability is a contribution if we dare to discover it. It will be the legacy of the next generation to find that the path started by ADA creates fulfillment consistent with the promise of America.

Respectfully submitted,

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