Using the ADA and state disability laws to enhance clients' recovery in personal injury cases

By Steven L. Derby

If one of your clients with a disability is injured because of the failure of a business, property owner or government entity to follow the ADA and California disability rights laws, you have a chance to double or triple your client's damages recovery, settle the case quickly, and potentially recover your attorneys' fees, costs and expenses. I litigated my first "ADA/PI" cross-over case in the late 1990s and have honed my approach to these matters over the past two decades. In the four years since my transition from personal injury attorney to disability rights attorney, I have refined it even more. Now I want to share my approach with you.

A. Does your client have a disability?

First, you need to determine whether *before* the injury, your client had a "disability."

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"Disability" under the ADA is a physical or mental condition that substantially affects a major life activity. Life activities include walking, talking, hearing, seeing, working and driving. (42 USC § 12111 et seq.) In California, the definition is even more inclusive because it removes the word "substantial" from the definition. (Cal. Gov. Code § 12926.) Many of our clients who walk slowly or with a limp qualify as well as those who walk with any type of assistance (cane, walker, wheelchair). A good shorthand analysis is to ask whether your client has or could qualify for a disabled placard for their car. The California DMV issues those placards using the federal test for disability. (Cal. Vehicle Code § 5007.)

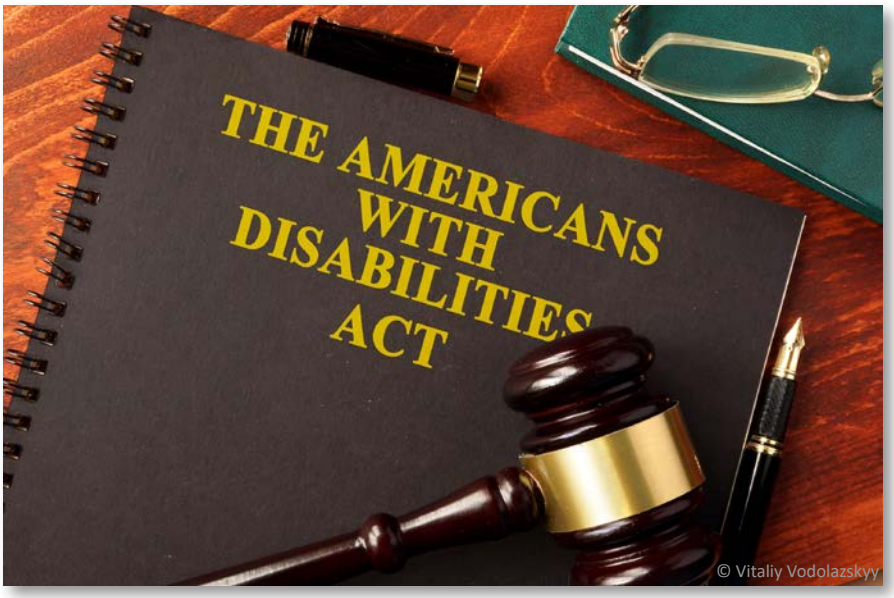
B. Is there an access violation?

The ADA is a federal civil rights law enacted in 1991. It prohibits discrimination in employment (Title I), in connection with places of public accommodation and transportation (Title III) and government entities (Title II). Under the mandate of the ADA, the Department of Justice and the Department of Transportation promulgated an extensive set of rules and regulations which set forth, in exacting detail, how covered entities must act in order to assure "full and equal access" to the estimated 54 million people with disabilities. The ADA's regulations address access in the built environment, controlling the design, construction and maintenance of everything from walking surfaces to the operating pressure and closing speed of doors. The ADA can apply to buildings and structures built long before it was enacted but determining which regulations apply is a complex analysis for which you will need a Certified Access Specialist, an experienced disability access attorney or both.

Starting in 1968, California Law mandated that public buildings in California comply with certain minimal accessibility standards. (Cal. Gov. Code § 4450.) These interim standards were replaced by the full set of regulations (which largely mirror the federal regulations) in 1981 – 12 years before the effective date of the ADA.[1] Thus, even if there is no violation of the ADA California has its own standards which can give rise to liability under its own civil rights laws – each provide for an award of damages to a disabled person when they suffer, at a minimum, "difficulty, discomfort or embarrassment" due to a violation of the ADA and, in some circumstances, a violation of the provisions of California access standards (which predate the ADA). Again, an analysis of how and when these standards apply requires an experienced access specialist or experienced disability rights attorney.

C. Is there a nexus between the access violation and the injury?

Once you have determined that your client had a disability prior to their injury and that there was an access violation, then you need to find a causal connection or nexus between your client's disability and the injury. (*Urhausen v. Long Drugs Stores California, Inc.* (2007) 155 Cal.App.4th



These statutes also allow for the recovery of attorneys' fees and costs in addition to all other relief.

254, 264 [65 Cal.Rptr.3d 838, 845].) In *Urhausen,* a disabled person tripped over a curb and fell, suffering serious injuries. Defendant did not dispute the disability but challenged the nexus claiming that the disabled person chose deliberately not to park in the handicapped parking space which had a clear and accessible path to the entrance. The court agreed. A similar case from the federal court went the other way. In *Cohen v. City of Culver City* (9th Cir. 2014) 754 F.3d 690, 693, plaintiff was injured when he tried to step onto a curb and fell. The facts were virtually identical to *Urhausen* but this plaintiff prevailed because the accessible path (a curb cut) was blocked by a display stand and so there was no accessible path that the plaintiff deliberately chose not to take. So unless your client deliberately chose not to take a safe accessible path, then the nexus can be established.

D. Maximizing your client's recovery using disabled access laws

Any violation of the ADA is a *per se* violation of the Unruh Civil Rights Act (the "Unruh Act") (Cal. Civ. Code § 51(f)) and the California Disabled Persons Act (Cal. Civil Code § 54.1(c)). A violation of the California Building Code regulations that require accessibility for people with disabilities may also constitute a violation of the general anti-discrimination provisions of both the Unruh Act and the CDPA. The Unruh Act and CDPA impose strict statutory liability and their enforcement provisions allow a jury to award up to three times the amount of actual damages.[2] Actual damages under Unruh and CDPA include both general damages (including non-quantifiable damages for emotional distress) and special damages (including pecuniarily measurable damages for out-of-pocket losses). (Cal. Civ. Code § 52(h).) It has been held that "access" standards exist to provide and require safe access. (*Urhausen, supra.*) Therefore, these regulations are for the safety of disabled persons and also provide a basis for a *negligence per se* argument.

E. Calculating the settlement value of your case

Whatever amount a jury sees fit to award your client for their injuries, including all damages recoverable under California tort law, the defendants' exposure is three times that amount under either the Unruh Act or CDPA. Further, these statutes also allow for the recovery of attorneys' fees and costs in addition to all other relief.[3] So rather than taking part of your client's recovery as your fee, the defendant has to pay you for your time and expenses spent suing them. This reality is something that completely changes the litigation dynamic if you make it clear to the defense and the defense carrier from the beginning of litigation.

Assuming that defendants are aware of their risks, ADA/PI cross-over cases settle more quickly and for more money than a simple negligence action because everything the defense does (or makes you do) costs them more money. Also, to the extent that you plead an ADA cause of action, you can file these cases in federal court where they move to ADR much more quickly.[4] Additionally, in federal court, you can move for partial summary judgment to establish liability then have a jury calculate damages.[5] Liability is established under the Unruh Act or the CDPA by showing (1) your client is a disabled person, (2) the client encountered one or more "access barriers" that violated the ADA or the California Building Code, and (3) that encounter caused the client "difficulty, discomfort or embarrassment." (Cal. Civil Code § 55.56.)

F. Advantages to filing in federal court

The ADA is a federal statute over which federal courts have original jurisdiction. (28 USC § 1331.) Federal courts have supplemental or "pendent" jurisdiction over any related state causes of action arising under the same facts. (28 USC § 1367.) There are several benefits to filing these cases in federal court in seeking injunctive relief (remediation of access barriers) as well as damages under state law. First, liability under the Unruh Act and the CDPA effectively creates strict liability and so federal courts are therefore unlikely to allow comparative fault as an affirmative defense. A negligence analysis and associated concepts of comparative fault do not apply to claims of discrimination based on violation of civil rights.[6]

Another advantage of filing in federal court is that many federal courts in

California have been critical of the reduction of the reasonable value of medical care to the amount paid by insurance under *Howell v. Hamilton Meats* and its progeny. Some of these courts have simply disagreed with *Howell* as a doctrine, voicing many of the same arguments made unsuccessfully in state court.[7] Note that not all federal judges have seen this the same way, but there are enough decisions going both ways (and no ruling from the Ninth Circuit Court of Appeals to settle the argument) that you can argue against an automatic *Howell* reduction.

G. Conclusion

Filing the appropriate case as an "ADA/PI" cross-over in state or federal court is a "game changer" in a number of ways. The rules and regulations give you an articulable standard to argue for liability in mediation, summary judgment or trial. The availability of treble damages and attorneys' fees mean that everything the defense does to make you work harder and spend more money costs them in the end. These cases tend to settle more quickly, especially when filed in federal court, because of the fee-shifting statutes, mandatory ADR procedures and the possibility of partial summary judgment. Finally, some of the strategies that defendants use to reduce your client's recovery – comparative fault and a *Howell* reduction – are not necessarily going to work, especially in federal court. ■

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[1] While the ADA was signed into law on July 26, 1991, it was not applied to buildings or facilities for 30 months (2.5 years) to allow businesses and entities to get into compliance. Most didn't.

[2] Cal. Civil Code §§ 52 and 54.3. (See, *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir.2000); *Walnut Creek Manor v. Fair Employment Hous. Comm'n.,* (1991) 54 Cal.3d 245, 284 Cal.Rptr. 718, 814 P.2d 704, 708–09; *Boemio v. Love's Rest.* (S.D.Cal.1997) 954 F. Supp. 204, 208. See also *Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937, 944–945 [overruled on other grounds by *Dukes v. Wal-Mart Stores, Inc.* (9th Cir. 2010) 603 F.3d 57].)

[3] Cal. Code of Civ. Proc. § 52 and 54.1.

[4] In the Northern District of California, for instance, the court sends all of these cases through a procedure called "General Order 56." This puts a stay on discovery until after a joint site inspection and mediation, which usually occurs a few months after filing. Well over 80% of all cases settle in this process.

[5] See FRCP Rule 56(a).

[6] *Castellano v. Access Premier Realty 7, Inc.* 2015 WL 7423821 at *2 (E.D. Cal. 2015) at *2 (tenant was denied requested accommodation of an emotional support animal); *Johnson v. Golden Empire Transit Dist.,* No. 1:14-cv-001841-LJO, 2015 WL 1541285 at *3 (E.D. Cal. Apr. 7, 2015); *Ingram v. Pac. Gas & Elec. Co., No*. 12–CV–02777–JST, 2014 WL 295829, at *3 (N.D. Cal. Jan. 27, 2014); *J & J Sports Prods. Inc. v. Ramirez Bernal, No.* 1:12-cv-01512-AWI, 2014 WL 2042120 at *6 (E.D. Cal. May 16, 2014); *Vogel v. Linden Optometry APC*, 2013 WL 1831686, at *4 (C.D. Cal. 2013).

[7] *Castellanos v. Maya*, No. 15-cv-00272-JSW, 2016 U.S. Dist. LEXIS 194228, at *3 (N.D. Cal. July 7, 2016). Other courts have distinguished *Howell* where the court is adjudicating a claim (e.g. civil rights) over which the federal courts have jurisdiction and holding that the *Howell* approach is pre-empted by federal law. *Bordegaray v. Cty. of Santa Barbara*, No. 2:14-cv-8610-CAS(JPR), 2016 U.S. Dist. LEXIS 173754, at *45 (C.D. Cal. Dec. 13, 2016) .