

# “ADVISING CLIENTS REGARDING ADA ACCESSIBILITY LAWSUITS IN CALIFORNIA”

By

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## 1. Introduction

In recent years, there have been a multitude of ADA accessibility lawsuits filed against businesses for alleged violations of the Americans With Disabilities Act of 1990, and corresponding California law consisting of the Unruh Civil Rights Act (Civil Code § 51 *et seq.*), the Disabled Persons Act (Civil Code § 54 *et seq.*), and the building standards set forth in Title 24 of the California Code of Regulations. Typically, the alleged violations involve lack of handicapped parking and inaccessible restrooms at businesses such as restaurants, motels, retail stores, and office buildings. Under California law, violators of these standards may be found liable for up to three times the amount of actual damages, but not less than \$4,000, plus attorney's fees and costs, even if the violation is seemingly trivial.

Conflicting access standards under California and federal laws, lack of continuing education for building inspectors and architects, and inconsistent interpretations of state law have made compliance with disability-access standards in California difficult. The business community has long complained of disability-access lawsuits filed by plaintiffs more interested in monetary gain than in promoting access for individuals with disabilities. Nearly 40 percent of all ADA accessibility lawsuits in the United States are filed in the State of California.

Nevertheless, Americans with disabilities represent a lucrative consumer market. The U.S. Census Bureau's 2010 Survey of Income and Program Participation (SIPP) found that there are 56.7 million people with disabilities in the U.S (roughly 18.7% of the U.S. population). Moreover, in 2010, there were more than 49% of those age 65 and older with disabilities. According to the U.S. Dept. of Labor, individuals with disabilities have \$200 billion in annual discretionary income to spend -- twice as much as the teen market!

Business owners should remember that good access means good business. Can a business really afford to exclude 20% of its potential customers? Simple measures taken to provide access to people with disabilities also will increase foot traffic by attracting other portions of the population, such as senior citizens, parents with small children in strollers, and people with temporary injuries.

In 2008, the California Legislature enacted **Senate Bill 1608** (effective January 1, 2009), in an effort to decrease unwarranted disability-access litigation. Although SB 1608 significantly reduced the settlement value of each lawsuit, the number of ADA accessibility lawsuits actually filed increased by several orders of magnitude.

On September 19, 2012, Governor Jerry Brown signed into law **Senate Bill 1186**, which became effective immediately. SB 1186, designed to promote and facilitate compliance, significantly reduces damages against business owners who correct alleged violations within 30 to 60 days of receiving a complaint. It prohibits "demand for money" pre-litigation letters. It also prevents "stacking" of multiple claims to increase monetary damages, requiring a plaintiff to explain the need for multiple visits to the same business with a known uncorrected barrier to access. Commercial landlords must disclose whether the property underwent a CASp inspection, and if so, whether the property was determined to meet all applicable standards.

In 2015, the California Legislature enacted **Assembly Bill 1521** (effective October 10, 2015) to limit the practice of high-volume lawsuits motivated by the goal of obtaining quick settlements with business owners, rather than correcting violations of construction-related accessibility standards. Under AB 1521, plaintiff lawyers are required to notify the California Commission on Disability Access within five business days of a judgment, settlement or dismissal. The new law requires that a Judicial Council verified answer form be provided with a demand letter or complaint, requires a "high-frequency litigant" to pay a supplemental filing fee of \$1,000, and requires high-frequency litigants to disclose the number of previous complaints they have filed, the reason they were in the geographic area where they encountered the problem and state why they visited the place subject to their complaint.

In 2016, the California Legislature enacted **Senate Bill 269** (effective May 10, 2016) which provides some extra protection for small businesses against claims of disabled access violations by eliminating minimum statutory damages for certain minor "technical violations".

Also in 2016, the California Legislature enacted **Assembly Bill 2093** (effective September 16, 2016) to help businesses assess whether commercial rental property is compliant with disability access laws.

## **2. Myths and Misconceptions Regarding Accessibility Lawsuits**

- A. The Americans with Disabilities Act is a building code law.
- B. ADA accessibility lawsuits are frivolous lawsuits.
- C. ADA plaintiffs are "vexatious litigants".

- D. A pre-litigation notice is necessary before a lawsuit can be filed.
- E. Only landlords, not tenants, are liable for removing accessibility barriers.
- F. Older buildings are exempt ("grandfathered") from complying with the ADA accessibility laws.
- G. A business that settles an ADA lawsuit cannot be sued again.
- H. Using a licensed general contractor and obtaining the proper building permit guarantees compliance with the ADA accessibility laws.
- I. Only persons who sit in wheelchairs are considered disabled persons.
- J. Nothing in recent years has been done in California to decrease unwarranted disability-access litigation.

### 3. Federal and State Laws

#### A. Americans With Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.)

Title III of the ADA prohibits discrimination based on disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who ***owns, leases (or leases to) or operates*** a place of ***public accommodation***. [42 U.S.C. § 12182(a)].

Congress adopted two distinct standards for regulating building accessibility:

- 1) Requires removal of architectural barriers in facilities existing before January 26, 1993 where such removal is ***"readily achievable"***, meaning easily accomplishable and able to be carried out without much difficulty or expense. [42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv)].
- 2) Facilities newly built or altered after January 26, 1993 must be ***"readily accessible ...and usable,"*** and must comply with extensive and detailed regulations, amounting to a federal building code, known as the ADA Accessibility Guidelines (or "ADAAG"), which is essentially an encyclopedia of design standards. [42 U.S.C. § 12183(a); 28 C.F.R. § 36].

The ADA provides for private enforcement actions by individuals as well as by advocacy organizations representing such individuals. In those actions, the plaintiffs can only seek ***injunctive relief*** to have the violation remedied. [42 U.S.C.S. §§ 12188(a)(1)]. The Department of Justice can also bring an enforcement action and seek compensatory ***damages*** for victims and ***civil penalties*** in addition to injunctive relief.

In addition, the prevailing party is entitled to recover reasonable ***attorney's fees***. [42 U.S.C. § 12205]. However, cases have held that a prevailing *defendant* will only be allowed attorneys' fees if the defendant proves that the plaintiff's suit was frivolous, unreasonable, or without foundation. (Summers v A. Teichert & Son (1997) 127 F.3d 1150; Adkins v Briggs & Stratton Corp. (1998) 159 F.3d 306; Bruce v. City of Gainesville (1999) 177 F.3d 949; Brown v Lucky Stores, Inc. (2001) 246 F.3d 1182.)

## **B. California Unruh Civil Rights Act (Civil Code § 51 et seq.)**

California has more demanding accessibility standards than the federal government.

The Unruh Civil Rights Act prohibits discrimination based on disability with respect to "accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever," and which incorporates the ADA, making ADA violations also violations of this act.

Authorizes recovery of ***statutory damages*** of \$4,000 per violation [Civil Code § 52(a)] and ***punitive damages*** [Civil Code § 52(b)(1)].

Plaintiff also entitled to reasonable ***attorney's fees***. [Civil Code §52(a)(3)]. *Note that while § 52 of the Unruh Act does expressly provide for attorneys' fees for the plaintiff, it does not provide for attorneys' fees for the defendant, nor does it frame the attorneys' fees issue in terms of the "prevailing party" language.*

## **C. California Disabled Persons Act (Civil Code §§ 54-55.2)**

The Disabled Persons Act (DPA) guarantees to persons with disabilities "the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, ... public facilities, and other public places" and also incorporates the ADA, making ADA violations also violations of this act.

Authorizes ***statutory damages*** of \$1,000 per violation and ***injunctive relief***. [Civil Code §§ 54.3, 55]. No punitive damages.

Prevailing party entitled to reasonable **attorney's fees**. [Civil Code §§ 54.3, 55].

Due to differences in statutory penalties, plaintiff must elect between seeking damages under § 52 or 54.3 for the same act or failure to act. [Civil Code § 54.3(c)].

**D. California Building Standards Code (Title 24 of Code of Regulations)**

All buildings constructed or altered after July 1, 1970 must comply with standards governing the physical accessibility of public accommodations. A violation of these standards, as set forth in Title 24, constitutes a violation of both the Unruh Civil Rights Act and the Disabled Persons Act.

**E. Senate Bill 1608 (California Legislation effective 1/1/2009, adding *inter alia*, Civil Code §§ 55.3, 55.51, 55.55, 55.56 and amending Business & Professions Code § 5600 and Health & Safety Code § 18949.29)**

- Requires licensed architects and building inspectors to complete specified hours of **continuing education** coursework in disability access requirements. [Bus. & Prof. Code § 5600 and Health & Safety Code § 18949.29]

- Establishes a new independent 19-member **California Commission on Disability Access** which will conduct studies and make reports to the Legislature on disability access throughout the state. [Govt. Code §8299, *et seq.*]

- Enacts the **Construction-Related Accessibility Standards Compliance Act** [Civil Code §55.51, *et seq.*] to provide for the inspection of sites by Certified Access Specialist (CASp). Requires every local building department, commencing July 1, 2010, to have a Certified Access Specialist (CASp) to review and approve a business' plan for a building permit in order to minimize the inadvertent approval of a non-access compliant project. After the CASp determines that a business meets applicable construction-related accessibility standards and issues a report of that determination, the business is permitted to display a CASp-issued numbered, watermarked "Disability Access Certificate." The current CASp list published by the State Architect can be found at [https://www.apps.dgs.ca.gov/casp/casp\\_certified\\_list.aspx](https://www.apps.dgs.ca.gov/casp/casp_certified_list.aspx).

To find a CASp who is also a California Access Specialist Institute member, go to: <https://casinstitute.org/casp>. *Note that a CASp inspection and report does not bind the court and does not affect the*

*court's ultimate authority to make findings of fact and law. Nor does the CASp inspection and report prevent recovery of damages by a person with a disability who is personally or actually deterred from accessing a place of public accommodation because of an access violation.*

- Requires a court, upon application by a "qualified defendant" (business owner who obtained a determination of compliance from a CASp) to issue a **90-day stay** of the accessibility claim, and to schedule a mandatory **early evaluation conference** at which both parties must appear in person. *Note that this stay and early evaluation conference procedure is not a "right-to-cure" period nor is it a "safe harbor".*

- Requires a plaintiff's attorney to provide a **written advisory** with each demand for money letter or complaint for any construction-related accessibility claim (in a form entitled "**Information For Building Owners and Tenants**" developed by the Judicial Council explaining the right to a court stay and early evaluation conference to assess the merits of the claim). *Note that this is not a pre-lawsuit notification provision. There are no preconditions that a person with a disability or his/her attorney must meet in order to file a civil rights action for a disability access violation.*

- With respect to awarding reasonable **attorney's fees** in construction-related accessibility lawsuits filed on or after January 1, 2009, new Civil Code § 55.55 provides that the court may consider written settlement offers made and rejected.

- With respect to **statutory damages** for construction-related accessibility lawsuits filed on or after January 1, 2009, Civil Code § 55.56 provides that statutory damages under § 52(a) or 54.3(a) may be recovered only if plaintiff personally encountered or had actual knowledge of a violation on a particular occasion, and may be assessed **per occasion rather than per each violation** of construction-related accessibility standards at the site. [Civil Code § 55.56(f)]

F. **Senate Bill 1186** (California Legislation, portions enacted on **9/19/2012**, adding Business & Professions Code § 6106.2, amending Civil Code §§ 55.3, 55.52, 55.53, 55.54, 55.56, and adding Civil Code §§ 55.31, 55.32, 55.545, and 1938, adding Code of Civil Procedure § 425.50, amending Government Code § 4459.8, adding Government Code §§ 4465, 4467, 4469, 4470, replacing Government Code §§ 8299.06, 8299.07, and 8299.08, and adding Health & Safety Code § 18944.15)

Attorneys:

- **Prohibits "demand for money" pre-litigation letters.** Violating attorneys can be disciplined commencing January 1, 2013. [Bus. & Prof. Code § 6106.2]
- Attorney demand letters and complaints alleging construction-related accessibility claims **must state facts sufficient** to allow the defendant to identify the basis for the claim, including an explanation of the specific access barrier or barriers the claimant encountered or by which the claimant is allegedly deterred, the date or dates of the alleged violations, and the manner in which the barrier was encountered or in which the claimant was deterred. [Civil Code §§ 55.3, 55.31; Code Civ. Proc. § 425.50] This prevents a plaintiff from "stacking" multiple claims, requiring a plaintiff to explain the need for multiple visits to the same business with a known uncorrected barrier to access, thereby potentially limiting application of the \$4,000 statutory minimum damage award.
- Attorney providing a demand letter alleging construction-related accessibility claims must include state bar number on the letter, and send copy of demand letter (until January 1, 2016) to the **State Bar** and to the **California Commission on Disability Access**. Attorney serving a complaint must send a copy to the Commission on Disability Access within 5 business days. [Civil Code § 55.32; Govt. Code § 8299.08]
- Complaints alleging construction-related accessibility claims must be **verified** under penalty of perjury by the plaintiff (or be subject to a motion to strike), effective January 1, 2013. [Code of Civil Procedure § 425.50]
- Attorney serving construction-related accessibility summons and complaint must also serve a written advisory notice to defendant. The California Judicial Council must update the written advisory form before July 1, 2013. [Civil Code § 55.54]
- Defendant's liability for **minimum statutory damages may be reduced to \$1,000 per offense** (instead of \$4,000) if a business is in a location that was completed after January 1, 2008, or any business in California that has received a Certified Access Specialist (CASp) inspection, that business will have 60 days to correct all construction-related violations within 60 days of being served with complaint (along with other requirements) [Civil Code § 55.56(f)(1)],

-or-

**reduced to \$2,000 per offense** (instead of \$4,000) if defendant corrects violations within 30 days of being served with complaint, *and* the defendant is a small business with 25 or less employees within last 3 years and with gross receipts of less than \$3.5 million. [Civil Code § 55.56(f)(2)]

#### CASp:

CASp are an integral part of solution to the accessibility issues:

- Terminology revisions which are directly relevant to CASps: **"Meets applicable standards"** and **"Inspected by a CASp"**. [Civil Code § 55.52(a)]
- Sets forth the CASp's obligations upon completing inspection of a site. [Civil Code § 55.53]
- Certain defendants not qualifying for early evaluation conference may (until January 1, 2018) request a **mandatory evaluation conference**. [Civil Code § 55.545]
- CASp certification effective for 3 years. [Govt. Code § 4459.8]

#### Cities and Counties:

- Establishes a **Disability Access and Education Revolving Fund**. [Govt. Code § 4465]
- Local cities and counties must collect additional \$1 state fee for each business license or permit application or renewal from January 1, 2013 to December 31, 2018. [Govt. Code § 4467] Provides an avenue for local cities and counties to expand the CASp program in their communities, to help bring local businesses into ADA compliance, and develop tools to help educate the business community in expanding ADA access.
- Requires cities and counties to provide information regarding disability access laws for each business license or permit application or renewal effective January 1, 2013. [Govt. Code § 4469]
- Redefines the goals, objectives and obligations of the **California Commission on Disability Access**. [Govt. Code 8299.06, 8299.07, 8299.08] See <http://www.cdda.ca.gov/>

#### Commercial Leases:

- **Commercial property owner must state on every lease or rental agreement executed on or after July 1, 2013 whether the property has**



undergone a CASp inspection, and if so, whether property has been determined to meet all applicable standards. [Civil Code § 1938]

G. **Assembly Bill 1521** (California Legislation effective **10/10/2015**, amending Civil Code §§ 55.3, 55.32, and 55.54, amending Code of Civil Procedure § 425.50, adding Code of Civil Procedure § 425.55, and adding Government Code §§ 68085.35 and 70616.5)

- Includes a revision to the current mandatory written advisory which must be provided with a demand letter or complaint for any construction-related accessibility claim to include additional information regarding the rights and obligations of business owners and commercial tenants. [Civil Code § 55.3(b)]
- Requires that a **Judicial Council verified answer form** be provided with a demand letter or complaint to allow a defendant to respond to the complaint in the event a complaint is filed (a Judicial Council verified answer form should be ready by July 1, 2016). [Civil Code § 55.3(b)]
- Extends existing requirement that lawyers send a copy of the demand letter to the State Bar (which is now required until January 1, 2019). [Civil Code § 55.32(a)(2).]
- Requires lawyers who send or serve a complaint to notify the California Commission on Disability Access **within five business days of judgment, settlement or dismissal** and provide the agency with specified information, including whether or not the construction-related accessibility violations alleged in the complaint were remedied in whole or in part, or if not, whether or not another favorable result was achieved after the plaintiff filed the complaint or provided the demand letter. [Civil Code § 55.32(b).] The Commission's Case Resolution Reporting Form can be found at:

<http://www.cdda.ca.gov/res/docs/pdf/CCDA%20CRR%20001.pdf>

- Defines **“high-frequency litigant”** [Code Civ. Proc. § 425.55]:

**“High frequency litigant”** in a construction-related accessibility case as defined in Code of Civil Procedure § 425.55(b) means one or more of the following:

- (1) A plaintiff who has filed 10 or more complaints alleging a construction-related accessibility violation within the 12-month period immediately preceding the filing of the current complaint alleging a construction-related accessibility violation.

(2) An attorney who has represented as attorney of record 10 or more high-frequency litigant plaintiffs in actions that were resolved within the 12-month period immediately preceding the filing of the current complaint alleging a construction-related accessibility violation, *excluding* all of the following actions:

(A) An action in which an early evaluation conference was held pursuant to Section 55.54 of the Civil Code.

(B) An action in which judgment was entered in favor of the plaintiff.

(C) An action in which the construction-related accessibility violations alleged in the complaint were remedied in whole or in part, or a favorable result was achieved, after the plaintiff filed a complaint or provided a demand letter, as defined Civil Code § 55.3.

*Note that the determination whether an attorney is a high-frequency litigant shall be made solely on the basis of the verified complaint and any other publicly available documents. No party may conduct discovery with respect to whether an attorney is a high-frequency litigant. [Code Civ. Proc. § 425.50(f)].*

- Sets a **supplemental high-frequency litigant filing fee of \$1,000** for high-frequency litigants [Govt. Code § 70616.5]. Failure to pay the \$1,000 fee shall have the same effect as the failure to pay a filing fee.

*[Commentary: Most plaintiffs who file ADA lawsuits in state superior court obtain a fee waiver, including a waiver of the supplemental high-frequency litigant fee. Moreover, if a plaintiff actually pays the supplemental fee of \$1,000, defendants who desire to settle actually end up paying an extra \$1,000 to settle.]*

- Requires high-frequency litigants disclose the number of previous complaints they have filed, the reason they were in the geographic area where they encountered the problem and state why they visited the place subject to their complaint [Code Civ. Proc. § 425.50(a)(4)(A)].

- Establishes procedures for a court stay and early evaluation conferences in cases that involve a high-frequency litigant and procedures for requesting a court order for a **joint inspection** of the premises during an early evaluation conference. [Civil Code § 55.54.]

**H. Senate Bill 269 (California Legislation effective **5/10/2016**, amending Civil Code §§ 55.53 and 55.56, amending Government**

**Code §§ 4459.7, 4459.8, and 8299.06, and adding Government Code §65941.6)**

For all new actions regarding discrimination relating to a construction-related accessibility standard filed after May 10, 2016, SB 269 [Civil Code §55.56(e)] establishes a **rebuttable presumption** that certain **“technical violations”** do not cause a plaintiff to experience difficulty, discomfort, or embarrassment sufficient to entitle the plaintiff to an award of minimum statutory damages if certain specified conditions are met:

- 1) The defendant must be a "small business" as defined by Civil Code §55.56(g)(2)(B), *i.e.*, employ 25 or fewer employees, and have average annual gross receipts of less than \$3.5 million over the previous three years.
- 2) The defendant must **correct within 15 days** of the service of the complaint or receipt of a written notice, whichever is earlier, **all of the technical violations** that are the basis of the claim.
- 3) Pursuant to Civil Code §55.56(e)(1), the claim must be based on one or more of the following seven **“technical violations”**:
  - A) Interior signs (other than directional signs or signs that identify accessible parts of the facility);
  - B) The lack of exterior signs, other than parking signs and directional signs;
  - C) The order in which parking signs are placed or the exact location or wording of parking signs, so long as the parking signs are clearly visible and indicate the location of accessible parking and van-accessible parking;
  - D) The color of parking signs, provided the color of the background contrasts with the color of the information on the sign;
  - E) The color of parking lot striping;
  - F) Faded, chipped, damaged or deteriorated paint of otherwise fully compliant parking spaces and passenger access aisles; and

- G) The presence or condition of detectable warning surfaces on ramps, except where the ramp is part of a pedestrian path of travel that intersects with a vehicular lane or other hazardous area.

*[Commentary: A "rebuttable presumption" is not tantamount to conclusive evidence. Therefore, a plaintiff is still entitled to present evidence at the time of trial to counter the rebuttable presumption. In other words, a defendant does not simply win on the basis of SB 269.]*

SB 269 also **exempts** a defendant from liability for minimum statutory damages with respect to a structure or area inspected by a Certified Access Specialist (CASp) for a period of 120 days following the date of an inspection by a CASp, if **all** of the following conditions as set forth under Civil Code §55.56(g)(3) are met:

1) The business employs 50 or fewer employees on average over the last three years, or for the years it has been in existence if fewer than three years;

2) The structure or area of the alleged violation was the subject of an inspection report indicating "CASp determination pending" or "Inspected by a CASp";

3) The CASp inspection predates the filing of a claim or demand letter from a plaintiff; **and**

4) The business has corrected, within 120 days of the date of the inspection (and up to 180 days if delays are caused by a building permit approval), all construction-related violations in the structure or area inspected by the CASp that are noted in the CASp report that are the basis for the claim.

Note that a business may only claim the protection from liability **once** for each structure or area inspected by the CASp. [Civil Code §55.56(g)(4)]

I. **Assembly Bill 2093 (California Legislation effective 9/16/2016, amending Civil Code § 1938)**

On September 16, 2016, Governor Brown signed into law Assembly Bill 2093 (which took effect immediately) to help businesses assess whether commercial rental property is compliant with disability access laws.

AB 2093 requires a commercial property landlord to state on every lease or rental agreement executed on or after January 1, 2017,

whether or not the premises has been inspected by California Certified Access Specialist (CASP). [Civil Code § 1938(a).]

If the premises **has** been inspected, a commercial property landlord must provide the tenant with a current disability access inspection certificate and inspection report or a copy of a CASp inspection report if the premises has been issued an inspection report indicating that they "meet applicable standards". [Civil Code § 1938(d).]

If the premises has **not** been issued a disability access inspection certificate, the lease or rental agreement must include the following statutory language as set forth under Civil Code § 1938(e):

"A Certified Access Specialist (CASP) can inspect the subject premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under state law. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant, if requested by the lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the premises."

A prospective tenant has the opportunity to review any CASp report prior to execution of the lease or rental agreement, and if the report is not provided at least 48 hours prior to execution of a lease or rental agreement, the prospective tenant the right to rescind the lease or agreement, based upon information contained in the report, for 72 hours after execution of the agreement. [Civil Code § 1938(c).]

AB 2093 also establishes a **presumption** that making repairs or modifications necessary to correct violations of construction-related accessibility standards that are noted in a CASp report is the commercial **landlord's** responsibility unless otherwise agreed upon by the parties to the lease or rental agreement. [Civil Code § 1938(c).]

The inspections and disclosures required under AB 2093 will hopefully reduce the financial impact of abusive lawsuits against California small businesses involving alleged disability access violations.

#### 4. Useful Recent Case Law Authority

Kohler v. Presidio Int'l, Inc. (9th Cir. 2015) 782 F.3d 1064 [ADA plaintiff is not required to provide "specialized or technical knowledge" through an expert witness to prove a violation]

Kohler v. Bed Bath & Beyond of Cal., LLC (9th Cir. 2015) 780 F.3d 1260 [retail store tenant was not obligated to remediate purported access barriers in the shopping center parking lot because it did not own the parking lot; ADA did not impose liability for ADA violations that occurred in areas exclusively under a landlord's control]

Chapman v. Pier 1 Imps. (U.S.) Inc. (9th Cir. 2015) 779 F.3d 1001 [presence of items in aisles is not "temporary" just because the obstructing items in the aisles were placed there by customers and would have been moved on request or eventually]

Rodriguez v. Barrita, Inc. (N.D.Cal. 2014) 10 F.Supp.3d 1062, 1077 [a plaintiff cannot recover separate minimum statutory damages for each barrier that was present at the time of single visit; multiple violations within one facility do not necessarily give rise to multiple awards of statutory damages]

Strong v. Valdez Fine Foods (9th Cir. 2013) 724 F.3d 1042 [expert witness not required to instruct the jury on the law of ADA compliance]

Moreno v. Town & Country Liquors, 2012 U.S. Dist. LEXIS 100711, 10-11 (E.D. Cal. July 18, 2012); Kalani v. Mother Lode Investors, 2012 U.S. Dist. LEXIS 92340 (E.D. Cal. July 2, 2012) [California Construction-Related Accessibility Standards Compliance Act is inapplicable to Unruh Act and CDPA lawsuits filed in federal court]

Kohler v. Rednap, Inc. (C.D.Cal. 2011) 794 F.Supp.2d 1091, 1094 [California Civil Code § 55.56 makes clear that statutory damages may be assessed based on each particular occasion that the plaintiff was denied full and equal access, and not upon the number of violations of construction-related accessibility standards identified at the place of public accommodation where the denial of full and equal access occurred]

Munson v. Del Taco, Inc. (2009) 46 Cal.4th 661 [a plaintiff who seeks damages claiming the denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act and the ADA need not prove intentional discrimination]

Louie v. BFS Retail & Commercial Operations, LLC (2009) 178 Cal.App.4th 1544 [res judicata did not bar state law damage claim under California's Disabled Persons Act despite a consent decree in a federal class action under the ADA]

Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal.App.4th 966 [discusses the threshold issue of whether the marina is a place of public accommodation]

Reycraft v. Lee (2009) 177 Cal.App.4th 1211 [disabled guest at a mobile home park did not have to sue the park for failure to comply with accessibility standards because she did not register or pay a guest fee and thus could not show that she presented herself to the park with intent of utilizing services in manner they were typically offered to the public]

Carolyn v. Orange Park Community Assn. (2009) 177 Cal.App.4th 1090 [private property owner does not convert private recreational property into a public accommodation by failing to deny access to the public]

Kittok v. Leslie's Poolmart, Inc. (C.D. Cal. 2009) 687 F.Supp.2d 953 [fact that plaintiff and her counsel filed multiple similar suits is of little import if this case is meritorious; the persistence of plaintiffs in bringing multiple lawsuits alleging unequal access to places of public accommodation does not demonstrate wrongdoing by plaintiffs anymore than it shows a hesitation of businesses to comply with the law]

Californians For Disability Rights v. Mervyn's LLC (2008) 165 Cal.App.4th 571 [claim that store did not provide adequate pathways, making merchandise inaccessible to persons using wheelchairs or other mobility devices; useful for complete synopsis of disability civil rights law]

Les Jankey v. Poop Deck (9<sup>th</sup> Cir. 2008) 537 F.3d 1122 [reversing denial of attorney's fees to plaintiff who did not provide any prelitigation notice]

Ron Wilson v. Frances Murillo (2008) 163 Cal.App.4th 1124 [discusses anti-retaliation and anti-interference provisions of the ADA; see fn. 3, commenting on Wilson's numerous ADA lawsuits as not being frivolous or harassing, nor Wilson being a vexatious litigant]

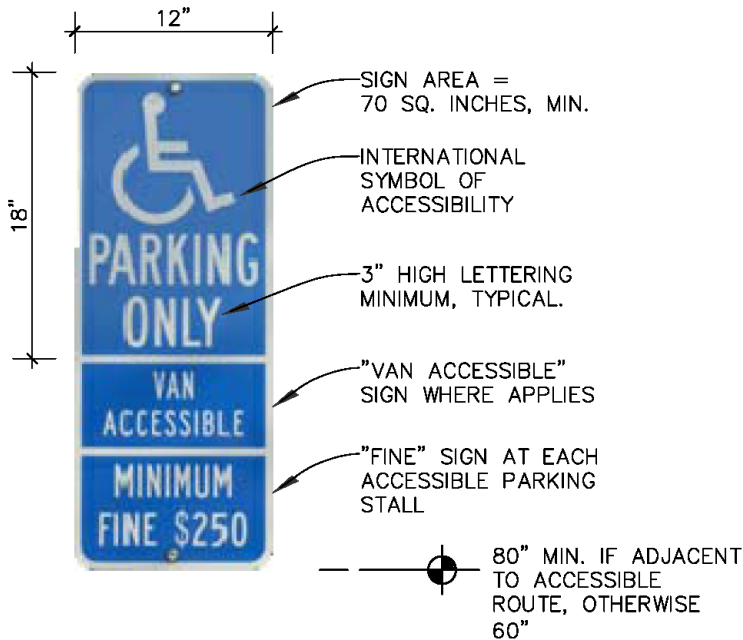
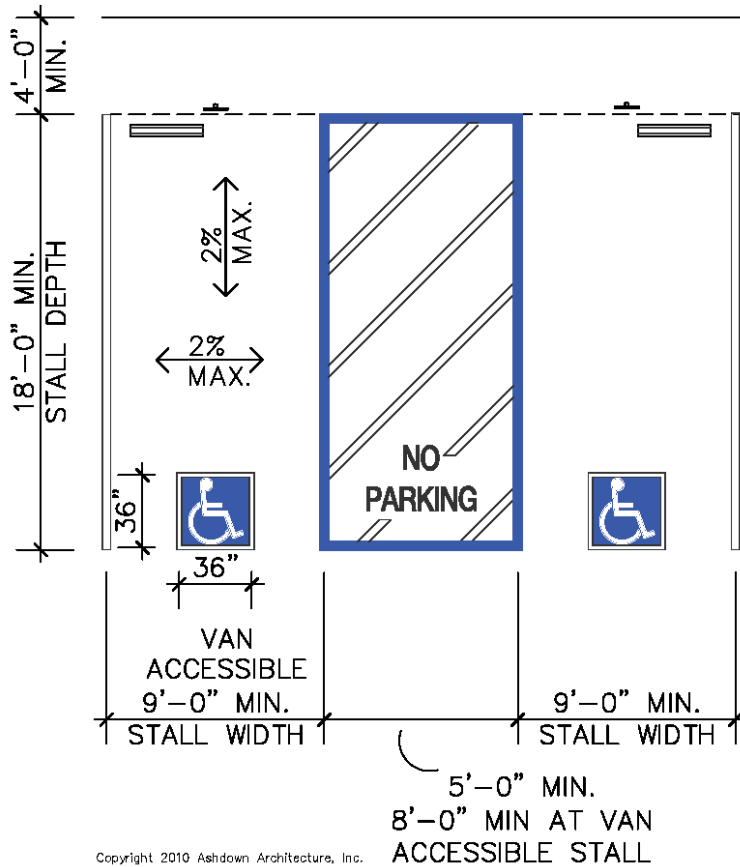
Doran v. 7-Eleven, Inc. (9<sup>th</sup> Cir. 2008) 524 F.3d 1034 [plaintiff who has standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability; permits expert site inspection to add new violations]

## 5. Practical Considerations and Tips Regarding Accessibility Lawsuits

- A. Tender defense of accessibility lawsuit to insurance carrier.
- B. Landlords and tenants are equally responsible for accessibility issues, but the financial responsibility can be contractually delegated to either the landlord or the tenant in the commercial lease agreement.
- C. Places of public accommodation must remove architectural barriers when a major renovation is performed **or** when “readily achievable”.
- D. Obtain a CASP inspection report to identify potential accessibility problems prior to litigation, and if there is already pending or threatened litigation, to ascertain validity of claims and estimated costs to remove barriers.
- E. Obviously, it is essential to seek ADA expertise whenever an alteration or renovation is under consideration in order to ensure compliance.
- F. Consider not expending resources (especially if limited) proving issues such as how many lawsuits the plaintiff has filed, or whether and how many times the plaintiff actually visited the business.
- G. Settlements consist of both monetary payment **and** barrier removal.
  - 1. Since there is no *res judicata* or collateral estoppel, most of a defendant's monies ought to be spent on barrier removal to reduce the possibility of future lawsuits by different plaintiffs.
  - 2. To minimize monetary payment as well as the necessity to make costly physical changes, articulate reasons as to why barrier removal is not readily achievable.
  - 3. Confidentiality clauses in settlement agreements may help facilitate a lower dollar amount for settlement.
- H. The **lack of van-accessible parking space(s)** is the most common litigated issue. Therefore, at a minimum, make van accessible parking a priority. See the top 10 issues at <http://www.cdda.ca.gov/Reports.htm>.
- I. There are **tax incentives** for improving accessibility and removing architectural barriers. IRC Section 44 allows a **tax credit** of up to \$5,000 per year for small businesses (less than \$1 million in revenue and 30 or fewer full-time employees). (See IRS Form 8826.) IRC Section 190 allows a **tax deduction** of up to \$15,000 per year for all businesses. (See IRS Publication 535.)



# Van Accessible Parking Requirements and Signage:



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**Frank W. Chen (陳威宏律師)** was born in Taipei, Taiwan, and came to the United States in 1968 at the age of 4. He received his undergraduate degree in Economics from Stanford University in 1985, and his law degree from UCLA School of Law in 1988. He has been practicing law for the past twenty-nine years, specializing in the areas of real estate and business litigation for small businesses. He has successfully tried dozens of cases to verdict, as well as obtained favorable results in arbitrations and mediations. In 2005, 2006, 2010, 2012, 2013, 2014, 2015, 2016 and 2017, he was selected for inclusion in Southern California Super Lawyers, a distinction given only to the top 5% of all lawyers in the state. In 2010, 2011, 2013, 2014, 2015 and 2016, he was named as one of Pasadena Magazine's Top Attorneys.

In recognition for his public service involvement, he was named a recipient of *California Lawyer Magazine's* Attorney of the Year (CLAY) Award for 2003. He is also the recipient of the Asian Pacific American Legal Center of Southern California's Pro Bono Service Award in 2003. Both of these awards were given for his volunteer work with state and local prosecutors, local elected officials, legislators, and the State Bar of California in coordinating a unique and sweeping defense to abusive litigation brought by the Trevor Law Group of Beverly Hills. In 2006, he received the Southern California Chinese Lawyers Association's Judge Delbert E. Wong Distinguished Service Award. Also in 2006, he received recognition from California Assemblymember Judy Chu at the 49th Assembly District's Third Annual Asian Pacific Islander American Heritage Month Celebration for making significant contributions as a Community Leader. In 2007, he received the Los Angeles New Horizons Lions Club's Citizen of the Year award.

Throughout his entire career as a lawyer, he has volunteered to teach numerous seminars on real estate, ADA accessibility, business and employment law for various bar associations, community groups, and non-profit and professional organizations. Since 2005, he has volunteered as a Temporary Judge (Judge Pro Tem) for the Los Angeles Superior Court.

He is a former President of the Southern California Chinese Lawyers Association (2000-2001), a former President of the Taiwanese American Lawyers Association (2004-2005), a former Trustee of the Los Angeles County Bar Association (2001-2003), a former Board Member of the Asian Pacific American Bar Association of Los Angeles County (2001-2003), a Past President of the Alhambra Chamber of Commerce (2013-2014), and a Past President of the San Marino City Club (2016).