

## RESOLUTION 01-05-02

### DIGEST

#### Disabled Persons Act: Pre-Filing Notice Requirement

Amends Civil Code section 54.3 to require a 90-day pre-filing notice.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### Reasons:

This resolution amends Civil Code section 54.3 to require a 90-day pre-filing notice. This resolution should be disapproved because it will have an unjustified adverse impact on disabled persons' rights.

Individuals with disabilities have the same right of access to public streets and buildings (Civ. Code, § 54) and the same right of access to common carriers and places of public accommodation (Civ. Code, § 54.1) as any other members of the public. Both sections provide that a violation of the federal Americans with Disabilities Act (ADA) is a violation of the rights guaranteed by those sections. (Civ. Code, §§ 54, subd.(c), & 54.1, subd. (d).) Individuals who suffer violations of those rights may recover treble damages or \$1,000, whichever is greater, together with their attorney's fees. (Civ. Code, § 54.3, subd. (a).) The law thereby encourages private plaintiffs to enforce those statutory rights and encourages attorneys to accept those cases.

This resolution would tend to discourage litigation enforcing those rights by providing that anyone seeking relief under Civil Code section 54.3 on the basis of violations of the ADA must first give the defendants 90 days pre-filing notice of the "specific facts that constitute the alleged violation". If the plaintiff fails to do so, the court loses jurisdiction over the action, even to the extent that it seeks injunctive relief. As a result, businesses will play "chicken" with the disabled--waiting until served with a pre-filing notice and evaluating whether it is "specific" enough before correcting access problems. Moreover, under the resolution if the plaintiff does not state sufficiently "specific" facts to give proper pre-filing notice, the plaintiff's attorney shall be sanctioned and shall not receive any fees even if he or she corrects the notice problem. Thus, this resolution will discourage attorneys from taking these cases and so limit disabled persons' access to justice.

Moreover, this broadly worded resolution would affect, not only actions for nominal damages for lack of access, but also actions for serious physical injury resulting from a lack of access, such as suits involving death or serious injury. There is no justification for imposing these kinds of jurisdictional hurdles in such actions. The proponent does not cite any evidence for her assertion that a "cottage industry" of spurious suits exists. Even if such "cottage industry" does exist, the social benefit of enabling such suits outweighs the cost of a few professional plaintiffs who take advantage of the law.

### SECTION/COMMITTEE REPORT

THE STATE BAR OF CALIFORNIA (State Bar Standing Committee on Legal Professionals with

Disabilities)

Recommendation: DISAPPROVE

Reasons:

The State Bar Committee on Legal Professionals with Disabilities (CLPD) recommends that the State Bar take a position of “Disapprove” on this resolution. The resolution would impose unnecessary obstacles in the way of enforcement of disability rights. The proposed amendments would have the effect of shortening the current statute of limitations on these claims by requiring individuals to discover the violation, obtain legal representation, find the entity legally responsible for the violation, and notify the business, providing an additional 90 days before the statute runs out. It would be conceivable that the statute would run before the person with disabilities could comply with the added burdens.

For decades, California businesses have been required to survey their properties, procedures, and policies and to determine necessary changes to make their businesses accessible to people with disabilities. This resolution would exempt businesses from their affirmative obligations and would put the burden on the disabled population to identify violations for businesses. Despite the ongoing educational efforts of people with disabilities, many businesses have continued to do nothing and have waited to be sued. The proposed amendments would effectively reduce any penalties for businesses in violation of the ADA provisions and, as a result, would provide even less incentive to businesses to take the initiative to provide accommodations for people with disabilities.

Additionally, the “reasons” for the Resolution are overstated. There is no cottage industry in false ADA claims. Individuals with disabilities cannot recover either damages (limited to \$1,000) or attorneys’ fees unless they prevail. If businesses merely corrected minor violations referred to by the proponent, the most they would be liable for is \$1,000 and a small amount of attorneys’ fees. Fees are determined by judges as to what is reasonable and, in fact, are not excessive.

Finally, the proposed amendments would have no substantive effect. The Unruh Act prohibits disability rights violations to the same extent as the ADA. It will remain unaffected by this Resolution and people with disabilities will continue to have the ability to sue under that Act without providing notification.

**TEXT OF RESOLUTION**

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Civil Code section 54.3 to read as follows:

- 1 §54.3
- 2 (a) Any person or persons, firm or corporation who denies or interferes with
- 3 admittance to or enjoyment of the public facilities as specified in Section 54 and 54.1 or
- 4 otherwise interferes with the rights of an individual with a disability under Sections 54, 54.1 and
- 5 54.2 is liable for each offense for the actual damages and any amount as may be determined by a
- 6 jury, or the court sitting without a jury, up to a maximum of three times the amount of actual
- 7 damages but in no case less than one thousand dollars (\$1,000), and attorney’s fees as may be
- 8 determined by the court in addition thereto, suffered by any person denied any of the rights

9 provided in Sections 54, 54.1, and 54.2. "Interfere," for purposes of this section, includes, but is  
10 not limited to, preventing or causing the prevention of a guide dog, signal dog, or service dog from  
11 carrying out its functions in assisting a disabled person.

12 (b) Any person who claims to be aggrieved by an alleged unlawful practice in  
13 violation of Section 54, 54.1, or 54.2 may also file a verified complaint with the Department of  
14 Fair Employment and Housing pursuant to Section 12948 of the Government code. The  
15 remedies in this section are nonexclusive and are in addition to any other remedy provided by  
16 law, including, but not limited to, any action for injunctive or other equitable relief available to the  
17 aggrieved party or brought in the name of the people of this state or of the United States.

18 (c) A person may not be held liable for damages pursuant to both this section and  
19 Section 52 for the same act or failure to act.

20 (d) A person, firm, or corporation may not be liable for damages pursuant to this section  
21 for a violation of subdivision (c) of Section 54 or subdivision (d) of Section 54.1 and a court shall  
22 not have jurisdiction over a civil action filed under subdivision (c) of Section 54 or subdivision (d)  
23 of Section 54.1 unless:

24 (1) before filing the complaint, the plaintiff provided to the defendant notice of the alleged  
25 violation, and the notice was provided by registered mail or in person;

26 (2) the notice identified the specific facts that constitute the alleged violation, including  
27 identification of the location at which the alleged violation occurred and the date on  
28 which the violation occurred;

29 (3) ninety (90) or more days have elapsed after the date on which the notice was so  
30 provided before the plaintiff filed the complaint;

31 (4) the notice informed the defendant that the civil action could not be commenced until  
32 the expiration of such 90-day period; and

33 (5) the complaint states that, as of the date on which the complaint is filed, the defendant  
34 has not corrected the alleged violation.

35 (e) With respect to a civil action that does not meet the criteria under subdivision (d)  
36 of this Section to provide jurisdiction to the court involved, the following applies:

37 (1) The court shall impose an appropriate sanction on the attorney for the plaintiff (and  
38 notwithstanding the lack of jurisdiction over the action, the court shall have jurisdiction  
39 to impose and enforce the sanction).

40 (2) If the criteria are subsequently met and the civil action proceeds, the court may not  
41 allow the plaintiff any attorneys' fees (including litigation expenses) or costs under this  
42 Section.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

#### STATEMENT OF REASONS

Existing Law: Imposes significant monetary penalties (including awards of attorneys' fees) on persons, firms, or corporations who have denied full and equal access to disabled persons to businesses and

other public accommodations by way of physical and/or structural barriers, provisions of services, or other means.

This Resolution: Amends Civil Code section 54.3 to require, as a precondition to commencing a civil action with respect to a place of public accommodation or a commercial facility, that an opportunity be provided to investigate and correct alleged violations.

The Problem: Under existing law, very few defenses are available to a landlord or business owner who runs afoul of the Americans with Disabilities Act, regardless of whether the violation is inadvertent or minor and regardless of whether disabled persons have actually been denied access to the establishment and its services in any manner. If it can be established that federal accessibility guidelines have not been strictly complied with, then plaintiffs are awarded significant monetary penalties, injunctive relief, and attorneys' fees. In many cases, the business owner has been lulled into a false sense of compliance through reliance on use permits granted after inspections by city or county officials, unaware that local government officials do not usually review for strict compliance with the ADA or its companion state legislation.

As a result, a cottage industry has arisen by which "professional plaintiffs" are paid to canvas business communities in search of perceived ADA violations, no matter how minor, upon which civil actions are then filed. Often, the form complaints do not state the specific violation(s), the location of the business, or the date when the violation(s) occurred, which results in increased litigation costs and delay before the problem is identified and resolved. Existing law provides little incentive to early resolution: If a violation has in fact occurred, defendants pay all attorneys' fees and costs. This has resulted in much abuse of the ADA and the civil court system. This resolution, which would require plaintiffs to first notify a business owner of a suspected violation and provide a limited opportunity for the problem to be corrected prior to the commencement of litigation, mirrors pending federal legislation and will result in legitimate accessibility barriers being identified and remediated more quickly and effectively than what occurs under existing law.

## IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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## COUNTERARGUMENT

CONTRA COSTA COUNTY BAR ASSOCIATION

The proponent wishes to make a 90-day notice a jurisdictional prerequisite to an action for violation of disability access laws, with monetary sanctions imposed for failure to comply. While some form of notice provision might be useful under some circumstances, this draconian measure punishes victims, sets potential traps for plaintiffs and allows defendants to evade the law.

The unlawful failure to provide the required access frequently causes embarrassment, humiliation and injury to those whom these laws were designed to protect. This resolution would immunize businesses from liability for injuries occurring before or during the 90-day notice period. Moreover, a plaintiff apparently could not seek either injunctive relief or damages for any violations other than those specifically listed in the required 90-day notice, even if the plaintiff could not have known about the violations because there was no access to the facility. There is also no provision either for tolling any applicable statutes of limitations or for dealing with unknown defendants.

The provisions of Civil Code section 54 et seq. relating to the rights of the disabled to public access and the remedies for violations of disability access laws have been part of California law for more than 30 years, and the ADA has been on the books for more than ten years. No business person can claim blameless ignorance of this important anti-discrimination legislation.

**ORANGE COUNTY BAR ASSOCIATION**

This resolution does not prevent the problem it is purportedly designed to end. Instead it encourages property owners to delay making the expenditures necessary to enable disabled persons access to facilities and commercial establishments. If the goal is to stop meritless claims based on minor code violations that do not prevent access to the facility a better solution would be to require that there is an actual denial of access by a disabled person.

**SANTA CLARA COUNTY BAR ASSOCIATION**

The proposed resolution would require a person who claims to be aggrieved by another's violation of a well-established and publicized law (Americans with Disabilities Act) to advise the alleged violator of the law before the aggrieved person may sue. Should the aggrieved disabled person fail to do so, he or she may be sanctioned and precluded from recovering attorneys' fees or costs.

This resolution is a trap door for the disabled plaintiff. If he or she fails to meet this additional pre-filing requirement, valuable rights will be lost. First, the proposed resolution effectively shortens, by 90 days, the statute of limitations to pursue such claims. Secondly, its sanctions are too severe. Where a disabled person fails to meet the 90-day notice requirement, he or she can be sanctioned, and precluded from recovering his or her attorneys' fees or costs. As a matter of public policy, the California legislature permitted the recovery of these items to provide an incentive for well-qualified attorneys to accept and pursue the claims of the disabled many of whom could not otherwise afford capable representation. To remove that incentive would, in many cases, effectively deprive disabled people of quality representation, thereby rendering this section useless in a significant number of legitimate cases. That would be bad public policy.

Ignorance of the law is not a defense. Establishing laws to the contrary, such as this proposed resolution, is poor public policy. People, firms and corporations already have notice of the requirements of the Americans with Disabilities Act. Businesses and public agencies are required to post notices of people's rights under this Act. An aggrieved person should not have to bear the burden of giving further notice and being penalized for failing to do so. Current discovery procedures permit the identification of the violation in a brief and reasonable amount of time. If the claims are frivolous, attorneys' fees and costs will not be recovered.

#### WOMEN LAWYERS ASSOCIATION OF LOS ANGELES

This resolution raises hurdles that even a sophisticated plaintiff could have difficulty clearing, such as drafting a notice with sufficient specificity. The greater problem, however, lays with the draconian nature of the remedies. In the event an unsophisticated plaintiff attempts to proceed with a lawsuit in pro per without giving detailed notice to defendant first, the remedies provided by this resolution ensure that such plaintiff will never be represented. Indeed, the resolution *requires* that the attorney representing a plaintiff who did not give notice be sanctioned, and that there be no possibility of attorneys fees. There is no way that any attorney would ever agree to represent a plaintiff who — while he or she might have an extremely meritorious case — made a mistake at the beginning of the lawsuit.

In addition, this resolution, which contemplates violations in the physical environment, essentially takes away *any* remedy from the plaintiff who was subject to a one-time violation. For example, if a person with a seeing-eye dog is denied admittance to a building, that person could never make any recovery, as long as the offender agreed not to deny admittance in the future. Such a result is surely contrary to the purpose of this section.