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THE ADA, CALIFORNIA ACCESS LAWS & YOUR ROLE IN THE PROCESS

Recent attention in the press has highlighted issues of concern for business owners: Disability access (ADA) litigation. Hearing about such litigation can strike fear for you as the owner of a dental practice providing vital services to the community. However, taking some simple measures: examining your operations, assessing your physical space, knowing where you stand, and creating a plan are critical steps to enable you to defend yourself in the event of such a claim against your practice. Even more importantly, you can create an inclusive environment.

Dental practices are businesses that provide essential services to society. You welcome your patients and provide service centered on your patient's needs, but how does this figure in with the ADA and state accessibility requirements? There are some mistaken beliefs

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that should be cleared up, and then we can discuss how to become compliant, reduce risk and grow your practice at the same time.

There are many players in this game; landlords who own non-compliant spaces that they lease to unsuspecting businesses; licensed architects that do not properly apply both federal and state accessibility requirements when they design alterations to existing buildings or when designing new spaces; contractors who also do not properly apply accessibility regulations (a majority of the construction in the U.S. is done without the involvement of licensed architects); city, county or state building officials who do not catch errors in their mandated plan review or building inspection process and the average building owner who has not remained current on his/her responsibilities under state and

federal civil rights law. All of these groups of individuals can be at fault when discrimination exists against persons with disabilities due to physical barriers to access. Add into this mix the fact that there is a predominant frustration among people with disabilities that, 16 years after passage of the ADA, businesses should pay attention to access requirements along with laws that provide for money awards for not complying.

Discrimination Can Take Many Forms

In the recent spate of news regarding the ADA, persons who use wheelchairs have been at center stage. It may be necessary to make physical alterations to the building that you practice in and we will discuss that scenario later in the article, but in reality, people with mobility impairments, those requiring the use of wheelchairs, crutches, walkers, canes, etc. make up a very small segment of the population (e.g. 5%¹). Far more numerous are those with hearing, sight, hand or speech impairments. Building a ramp or providing accessible parking may have no effect on the ability of a deaf person to reach your practice or receive dental services. It is important to establish that fact because focusing on ramps and wheelchairs can give business owners a false sense of security, while other simple measures are often overlooked that can provide access to large numbers of people with other types of disabilities. The following illustrates several scenarios:

1. A person enters your practice with a service dog. The dog may perform a specific function for the person, such as picking up things that the person cannot due to arthritis, or the dog may be a companion or therapy dog allowed under the ADA due to a psychiatric condition, etc. Possible responses: Ask others in the waiting area if they have allergies to dogs. If not, allow the dog to remain next to the patient during their visit, if it is well-behaved. If persons are found to be allergic or fearful, re-schedule this patient's visit to a time in which no

other patients with allergies or a fear of dogs will be present in the waiting room.

2. A blind person or someone with low vision calls your office to set an appointment for an examination, and asks if you provide your patient agreement in Braille print or online so that they can read it with their special software prior to coming in for their first appointment. Possible responses: Obtain Braille printed patient agreements and other essential forms to keep on hand (cost-free from CompuBraille², a local non-profit), provide the agreement as a non-PDF file for use as an email attachment or on CD that can be mailed, or offer to read the written agreement or other essential forms to the patient in a confidential area at your office. Also, ask the patient if they can provide their confidential medical history to you in written form that they can bring with them to their visit. If not, offer to read the appropriate forms to them and fill them out when they come in for their appointment. Usually, this is a one-time service that makes it possible for the patient to use your dental practice for all of their dental services, and perhaps would encourage them to recommend your practice to their family and friends.
3. A person comes into your office and you notice that they are hard of hearing. They could either be severely hard of hearing or deaf. Possible responses: Rather than raising your voice in hopes that they can better hear you, try carrying on the conversation by writing down your questions and answers. Also, consider purchasing a portable assistive listening device (RadioShack sells one for \$40 that works in tandem with a set of headphones for those who need amplification). Many deaf persons make use of the California Relay System, which provides a service that allows them to use the phone by way of a middleman who reads what they type on a teletype machine, or TTY, to the person that they call. This

requires no special training, as they call you and the middleman speaks directly to you. This system may result in pauses in phone conversations, but have some patience and it will pay off for the person calling, and for you in the long run.

The ADA is Not The Culprit

It seems like the Americans with Disabilities Act (ADA) has been dubbed in the media and public opinion, as the basis for a rash of litigation. The curious thing is that, as Californians, we all know that our state is on the cutting edge of many advances in technology, research, environmental innovation, and yes, that tendency to excel extends to laws that have advanced access for persons with disabilities in our state and through our example and influence, throughout the U.S. As Californians, it is in our nature to be innovative and in terms of access, that tendency has become a double-edged sword. If you examine the history of access laws, the ADA was a recent addition to the club when it was passed in 1990. It only served to extend existing federal regulations dating back to the Rehabilitation Act of 1973 that prohibited discrimination in federal facilities, and other federally funded programs. In fact, our own innovative state law predated the ADA and provides broader coverage than the ADA.

In 1968 and 1970, our legislature passed laws that not only prohibited discrimination, but allowed for damages in the case of intentional discrimination, which is not the case under the ADA. In fact, damages are more far limited under the ADA; plaintiffs are only given primarily injunctive relief. Injunctive relief means a court directs that barriers to access are required to be removed by the defendant and attorneys' fees can be awarded. However, under the California Unruh Civil Rights Act, plaintiffs can be awarded a minimum of \$4,000 per violation plus attorney's fees and, in addition, under the California Disabled Persons Act, plaintiffs can collect another minimum of \$1,000 per violation plus attorney's fees. A single parking stall can have multiple violations, let alone entry doors, restrooms, etc.

Thus, the more stringent state laws that include an easier standard to qualify as a person with a disability are those that should be your focus. The federal ADA law clearly defers to our state access laws that provide higher standards for access.

Compliance & Professional Responsibility

Where does all of this leave you? Well, the intent of a civil rights law is to ensure that

people are treated equally. Some people believe a myth that claims that existing buildings, especially very old or historic structures are exempt from accessibility requirements, but no grandfather clause³ exists that allows the denial of civil rights. If such a clause existed, it would be like saying that if you were born before the Civil Rights Act of 1964 was instituted, that you would not be covered by it, and thereby prohibited from voting or exercising other basic civil rights. Congress gave the Department of Justice the responsibility to enforce the ADA, and they have published manuals for small businesses, towns and other entities that explain the responsibilities under the Act. See their ADA homepage at <http://www.usdoj.gov/crt/ada/adahom1.htm>. There is a gap between what building code requires and what constitutes a violation of civil rights. The scenarios described above illustrate how policies and procedures can provide accessible facilities in cases where physical alterations cannot.

Many people have developed negative feelings about disabled access, or even about persons with disabilities. The fact is, as a medical professional, you understand that when you are required to comply with statutes governing your dental practice and you do not comply for more than 30 years, that there will be serious consequences. The situation with non-compliance to access laws in existing buildings is no different. If you own or lease your building and it has not been physically altered to be compliant to current accessibility regulations, there is a high likelihood that you are vulnerable to litigation and, more importantly, it is likely that you are discriminating against persons with disabilities because they cannot use your facilities. The point that is often missed here is that people with disabilities really just want to be able to live as independently as possible and be provided with the choices in life that we all enjoy and probably take for granted. People with disabilities should not be forced to travel out of the way to one gas station, one supermarket or one dentist's office because it is the only one that they can use. Equal access and integration into existing services was and is the intent of the law.

So, if we ask the question again, "where does this leave you" - could you now answer? Here it is; in California, you are required to provide facilities that are *usable by and accessible to* persons with disabilities. There are claims that businesses are being driven from the state due to litigation, but in actuality, the state population continues to grow, as well as the

number of businesses, despite high living and housing costs. The issue of access litigation, although significant, will not change that much. Keep in mind also that population projections tell us that the numbers of people with disabilities increase with age. If we look at the number of "baby-boomers" approaching retirement age, your market for your services will be dramatically different in the future. Providing access will be a smart business practice to meet the demands of your customers! We have clients who have experienced a 10% increase in business, simply through opening their facilities to persons with disabilities by making them physically accessible.

"Intent" is What Counts

One of the biggest problems is that either existing buildings have not been altered to be made compliant or new construction has not been designed or constructed to be compliant. If you own a building and have made no efforts in the past to provide access to persons with disabilities by making physical alterations, you may have little proof that you intended to comply with existing laws. On the other hand, if you have made alterations, and a complaint is filed before the alterations were completed, you may have a good chance of proving that you intended to comply. Intent is crucial, because perfect buildings do not exist and because plaintiffs must prove intentional discrimination, in order to claim damages under California access laws.

In August of this year, in an unexpected ruling, an appeals court in Los Angeles found that an access case involving only two minor violations was unintentional, and did not justify the payment of damages under the state's Unruh Act. In fact, the small business involved was in the process of construction to remove all physical barriers in their building but two low severity barriers remained. That fact illustrated to the Appellate judge that their intent was to comply - thus, no intentional discrimination was proven and no damages were awarded. The long-range effect of that recent ruling is not yet known, but it could be significant for those who have reason to fight these lawsuits. In most cases, the building has not been altered and the small business has no ability to defend themselves.

Access requirements are complex and we recommend using a competent access specialist that comes recommended by local building officials and carries errors and omissions liability insurance. They can properly assess your building and identify all barriers to

access with no bias as to the outcome of project. Access specialists have no incentive to recommend more work than is necessary and can serve as a neutral party during the alterations process to ensure that the intended results are achieved. It is difficult to expect that an architect or contractor that has made a mistake early in the process will then identify that mistake to their client and thereby experience a financial loss. When an access consultant is retained, they will have influence only over the identification of barriers, rather than being responsible for both the “diagnosis and treatment,” where conflicts of interest can occur if an architect or contractor is involved in determining what barriers need to be removed, which in turn, establishes the extent of the design work that they then can bill you for. Past that, contractors who claim to be experts in access code regulations are seldom that, and have no professional license like architects do. Past that, they seldom carry Errors & Omissions Liability insurance, which would cover their work in case their work does not result in improved compliance.

Generally, building plans for alterations or new construction must be reviewed and approved prior to construction by the local city or county. That entity is also responsible to inspect the construction and sign off on it, but they are not legally culpable for what they allow to slip by. Of course you intend to solve existing problems by altering or building new facilities, but it is often the case that the design and construction professionals you hired and expected to be experts in access are nothing of the kind. This is one of the most insidious problems in access consulting today – building owners pay to have improvements made to their buildings only to find that they are still not compliant due to lapses in design, construction or inspection.

The state legislature has watched this go on for years and recently took action by passing legislation that required the Division of State Architect to develop a Certified Access Specialist program (CASp) that provides training, examination and certification of both Access Specialists and Access Architects (architects that specialize in access). However, due to pressure from the governing bodies that license architects and provide professional association, it is only voluntary. This new program will begin testing in early 2007. After the program begins the certification process, we strongly recommend that you hire an Access Consultant who is CASp certified and, if you need to make alterations, hire a CASp-certified Access Architect.

Litigation is the rough road to compliance. Other routes are simpler and you are always in a better position when you know where the issues in your building lie, rather than waiting for a summons to be delivered or for your patients to go to other practices that have spent the time and money to make their practices accessible to all groups of persons with disabilities.

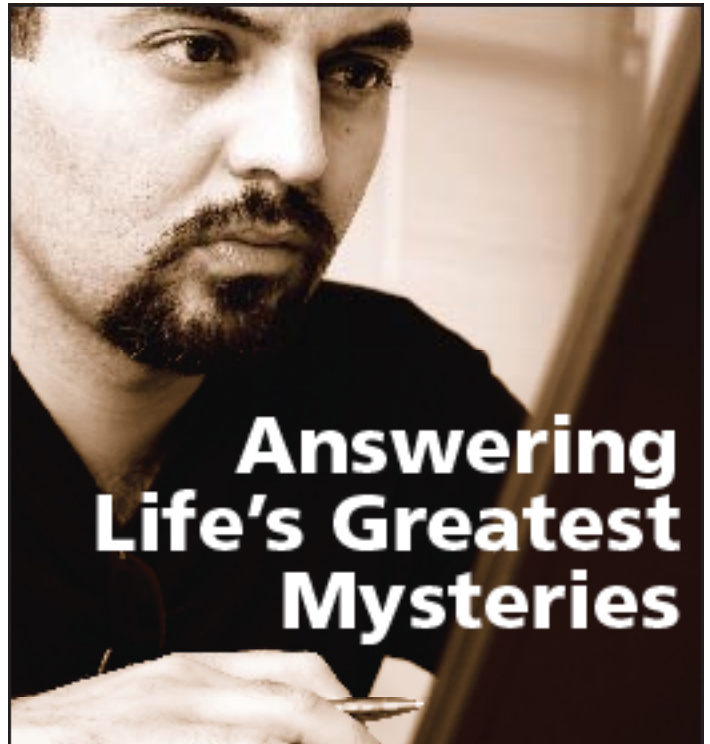
Knowledge is power; be in control of your environment and make informed decisions. Some litigation is frivolous; use experts who can assist you in determining when to fight and when not to.

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¹ U.S. Census Data 2002 found at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02ta.html>

² **CompuBraille**; 2791 24th Street in the Sierra 2 Community Center, Room 8 Sacramento, California 95818 (916)-452-6189

³ US Small Business Administration & Department of Justice — Americans with Disabilities Act (ADA) Guide for Small Businesses; p.2. <http://www.usdoj.gov/crt/ada/smbusgd.pdf> ■



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