

Regulation of Attorneys Pursuing Disability Access Claims and Litigation

There are a number of ways that existing federal and state laws and systems regulate the conduct of attorneys pursuing disability access claims. These mechanisms have been and continue to be used to sanction and discipline attorneys who engage in fraudulent, unethical or unscrupulous behavior while pursuing disability access claims under the ADA. Such mechanisms are a more effective and appropriate way to stop these behaviors than weakening the ability of all individuals with disabilities to enforce their rights under the ADA.

State Bars.

State bars are dedicated to ensuring ethical and professional attorney conduct. State bars accept and investigate complaints about attorney conduct, and administer attorney discipline. For example, in 2008, the State Bar of California initiated several disciplinary charges against attorney Thomas Edward Frankovich regarding his conduct in litigating disability access claims. After a seven-day trial, the State Bar Court dismissed certain charges, but found that Mr. Frankovich had violated the Rules of Professional Responsibility by communicating with a business owner without his attorney present. The State Bar Court issued a public reproof of Mr. Frankovich, and required that he comply with certain conditions for one year, including meeting periodically with a probation deputy, promptly responding to any inquiries, and submitting quarterly written reports. The court also required that he attend Ethics School, re-take the Multistate Professional Ethics Examination, and that he pay the State Bar for the costs of the prosecution. *In the Matter of Thomas Edward Frankovich*, Member No. 74414, Nos. 04-O-15890-PEM & 06-J-13032 (State Bar Court of California, June 25, 2009).

Court Sanctions.

Rule 11 of the Federal Rules of Civil Procedure authorizes courts to sanction attorneys for filing a pleading for an improper purpose, such as to harass the opposing party, delay the proceedings, or increase the expense of litigation. Fed. R. Civ. P. 11(b)-(c). In addition, a federal court “has the inherent power to levy sanctions in response to abusive litigation practices.” *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 928 (C.D. Cal. 2005), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007); *accord Deutsch v. Henry*, No. A-15-CV-490-LY-ML, 2016 WL 7165993 (W.D. Tex. Dec. 7, 2016), at *15. Sanctions may include an award of attorneys’ fees. *Deutsch*, 2016 WL 7165993 at *16. State courts have analogous powers to regulate the matters that come before them.

California Examples.

Citing a history of pre-litigation and litigation tactics – including demand letters that the court found to include unethical legal advice to unrepresented, adverse parties – the Central District of California required that a disability access attorney “file a motion requesting leave of court before filing any new complaints alleging violations of Title III of the Americans with Disabilities Act in the United States District Court for the Central District of California,” and attach a copy of the court’s order to any such motion. *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924, 934 (C.D. Cal. 2005). The order was affirmed by the Ninth Circuit. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007).

In another case, the Central District of California disqualified an attorney from representing the plaintiff in a disability access case based on the attorney's conduct in visiting the business site and meeting with the business owner without the owner's lawyer present, in violation of the California Rules of Professional Responsibility. The court also referred the matter to the State Bar. *Jankey v. Belmont Restaurant*, 2:04-cv-08617-MMM-SH (C.D. Cal. Apr. 26, 2005). Thereafter, a three-judge discipline panel for the court found a "serious and willful" violation, and ordered that the attorney be suspended for six months from practicing law in the Central District. *In the Matter of Thomas E. Frankovich*, Case No. CV06-2517 (C.D. Cal. June 23, 2006).

The Northern District of California recently reviewed a string of authorities rejecting an attorney's position that his mentally disabled client – an individual with a traumatic brain injury – has standing to challenge physical access barriers based on the client's perseverance. The district court imposed an order requiring that the attorney file a copy of the court's order in any other matters where he is making a similar argument. *Kinney v. Bridge*, No. 3:16-CV-03211-CRB, 2017 WL 492832, at *4 (N.D. Cal. Feb. 7, 2017).

Arizona Examples.

The District Court of Arizona recently sanctioned two attorneys based on their representations to defense counsel that they intended to pursue their federal claims, and thereafter dismissing the claims, causing increased legal fees for the defendant. The district court reasoned that "these decisions reflect expensive bait-and-switch maneuvers aimed at 'prolonging litigation and imposing costs on the opposing party.'" The court ordered the attorneys together with their client to reimburse the defendant for its attorneys' fees. *Advocates for Individuals with Disabilities Found. Inc. v. Golden Rule Properties LLC*, No. CV-16-02413-PHX-GMS, 2016 WL 5939468, at *6 (D. Ariz. Oct. 13, 2016), *reconsideration denied*, No. CV-16-02413-PHX-GMS, 2016 WL 6563632 (D. Ariz. Nov. 4, 2016).

An Arizona state trial court recently granted a motion by the state Attorney General to consolidate about 1,700 similar complaints filed by Advocates For Individuals With Disabilities Foundation, Inc. *Advocates For Individuals With Disabilities Foundation, Inc. v. Consolidated Defendants*, CV 2016-090506 consol. (Maricopa Cty. Super. Ct. Sept. 23, 2016).

Texas Example.

In December 2016, a magistrate judge for the Western District of Texas ruled on consolidated defense motions for sanctions in six disability access cases brought by the same plaintiff and lawyer pair. The lawyer for the six defendants presented evidence that the plaintiff's attorney engaged in extensive sanctionable conduct, including: false statements that the defense lawyer used racial slurs; a fabricated email; an unfounded criminal stalking charge made against the defense lawyer; violations of the Texas Disciplinary Rules of Professional Conduct; baseless court filings; and a baseless grievance to the State Bar of Texas. Plaintiff's counsel invoked the Fifth Amendment at the evidentiary hearing in response to the court's questioning. The court concluded that plaintiff's counsel had "engaged in serious and habitual misconduct." *Deutsch*, 2016 WL 7165993 at *16. The court awarded fees and costs against the plaintiff's lawyer in a total amount of more than \$175,000, and referred the matter to the Western District of Texas

Disciplinary Committee for possible disbarment from the Western District of Texas is proper. *Id.* at *24.

The Disciplinary Committee issued a detailed report and recommended disbarment. In July 2017, upon considering the Committee's recommendations, the court adopted most of the Committee's report and entered a decision and order suspending the lawyer from practice for three years, and requiring him to undergo ethics training before applying for readmission. *In re: Matter of Disciplinary Complaint Against Omar W. Rosales, Esq.*, No. 5:16-mc-01326-DAE (W.D. Tex. July 11, 2017).

New Mexico Example.

A federal magistrate judge in New Mexico recently recommended dismissal of all 99 cases brought by the same attorney and same plaintiff against New Mexico businesses alleging violations of the ADA. The magistrate concluded that the cases were malicious and brought for the purpose of harassing businesses into settling and to secure financial gain rather than remedying ADA violations. The magistrate also recommended denying the plaintiff's request to waive filing fees in these cases, charging the plaintiff \$40,000 to cover those fees. *Carton v. Carroll Ventures, Inc.*, No. 17-0037 KG/SCY, Proposed Findings of Fact and Recommended Disposition (D. N.M. July 10, 2017).

Attorneys' Fees.

A plaintiff's ability to recover attorneys' fees from a business is limited in several ways under existing law. Under federal law, if a defendant makes all of the needed access fixes and moots the case, a plaintiff cannot be a prevailing party, and cannot obtain attorneys' fees and costs under the ADA. *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 600 (2001).

Further, federal courts have the discretion to reduce or deny an award of attorneys' and costs fees based on various factors, including attorney conduct. *See Molski v. Conrad's La Canada Rest.*, 479 F. App'x 771, 772 (9th Cir. 2012) ("The district court did not abuse its discretion in denying Plaintiffs' motion for attorney's fees [for their disability access claims against a restaurant]. ... [T]he district court based its conclusion on Plaintiffs' poor conduct demonstrated through litigation tactics and requests for excessive fees, Plaintiffs' minimal success in the litigation, and the unjust hardship Defendants would experience. In addition, the district court did not abuse its discretion in denying Plaintiffs' motion for litigation costs.").

State courts may similarly deny or reduce attorneys' fees. California courts, for example, may apply a "negative multiplier" to the lodestar based on the circumstances, including attorney conduct. *Molski v. Evergreen Dynasty Corp.*, No. B208988, 2009 WL 2916771, at *3 (Cal. Ct. App. Sept. 14, 2009) ("The court's application of a negative multiplier [of 0.10, reducing lodestar from \$66,591.50 to \$6,659.15] was also within its discretion and reflected consideration of each relevant factor.").

Moreover, a plaintiff who brings a frivolous case in federal court may be required to pay the defendant's attorneys' fees. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Summers v. Teichert & Son*, 127 F.3d 1150, 1154 (9th Cir. 1997) (court must first find that "the

plaintiff's action was frivolous, unreasonable or without foundation"). The District Court of Arizona recently awarded fees to a disability access defendant under this standard. *Advocates for Individuals with Disabilities Found. Inc. v. CHCT Arizona LLC*, No. CV-16-03091-PHX-JJT, 2017 WL 541318, at *1 (D. Ariz. Feb. 10, 2017) (awarding fees to defendant upon finding "an obvious lack of standing in federal court" where the plaintiff had filed over 1000 nearly identical actions in Arizona state court).

Extortion and Other Criminal Charges.

Courts have found that improper attorney demand letters may violate laws against extortion and theft. *See, e.g. Flatley v. Mauro*, 39 Cal. 4th 299, 330, 139 P.3d 2, 22 (2006) (“Evaluating Mauro's conduct, we conclude that the letter and subsequent phone calls constitute criminal extortion as a matter of law.”); *State v. Hynes*, 159 N.H. 187, 199, 978 A.2d 264, 274 (2009) (“It is apparent that the defendant, acting as an attorney, sent a letter to the salon demanding money and threatening to file a lawsuit if it did not pay him. The defendant did not have a client who had suffered from the alleged discriminatory pricing at the salon, nor had he been a client of the salon himself. In fact, the money the defendant demanded, and eventually received, was for his own personal gain.”).

Minnesota attorney Paul Hansmeier is a recent example of how criminal law may apply to attorney conduct. Mr. Hansmeier and his clients engaged in “copyright trolling” – they obtained the copyrights to porn movies, and then threatened legal action to extract monetary settlements from individuals who downloaded the videos. When court sanctions blocked these activities, Mr. Hansmeier began suing private businesses for ADA access violations, allegedly seeking monetary settlements rather than access improvements. One client, Disability Support Alliance, alleged that Mr. Hansmeier stole settlement funds, and reported that it was cooperating with the FBI.

Mr. Hansmeier has been indicted by federal authorities for fraud, perjury, and money laundering for his activities in securing settlement payouts through fraudulent copyright litigation. *United States v. Paul R. Hansmeier and John L. Steele*, CR-16-344 (D. Minn. Dec. 14, 2016). And in a disability access case brought by Mr. Hansmeier, the District Court of Minnesota has permitted the defendant to pursue counter-claims for abuse of process and civil conspiracy. *Disability Support All. v. Monali, Inc.*, No. 15-CV-1522 (MJD/TNL), 2016 WL 859442 (D. Minn. Feb. 12, 2016), *report and recommendation adopted*, No. 15-CV-1522 (MJD/TNL), 2016 WL 868174 (D. Minn. Mar. 4, 2016).

Based on these unlawful activities, Mr. Hansmeier has been indefinitely suspended from the practice of law. *In re Disciplinary Action against Hansmeier*, 884 N.W.2d 863 (Minn. 2016). And based on his misconduct as an attorney, his personal bankruptcy has been converted by the bankruptcy court from Chapter 13 (restructuring) to Chapter 7 (liquidation). *In re Hansmeier*, No. BR 15-42460-KHS, 2016 WL 483360, at *2 (Bankr. D. Minn. Feb. 3, 2016), *aff'd*, 558 B.R. 299 (B.A.P. 8th Cir. 2016).

A state criminal court in Riverside County sentenced a man to 20 years' imprisonment and 40 years of mandatory supervision after he pled guilty to 143 counts of felony extortion and theft for posing as a disability advocate and demanding monetary “settlements” of businesses for their ADA violations to avoid threatened lawsuits for violating the ADA. The man told victims that he would be guaranteed a court award up to \$40,000.00 in damages plus attorney's fees if they did not enter a settlement with him. The man was also ordered to pay \$58,000 in restitution to victims. Rachel Kleine, *Wildomar Man Pleads Guilty to 143 Felony Counts Including ADA Fraud*, *Inland Empire Sports & News*, Dec. 2, 2016, <http://iesportsnews.com/wildomar-man-pleads-guilty-143-felony-counts-involving-ada-fraud>; *California Man Gets 60 Years for Extorting Businesses*, *FoxBusiness*, Aug. 15, 2017,

<http://www.foxbusiness.com/markets/2017/08/15/california-man-gets-60-years-for-extorting-businesses.html>.