

Open to the Public — Accessibility & Accommodations Law Updates

May 2010 in this issue

Washington Watch 1

"Kindling" the Flame for Plaintiffs 2

3rd Circuit Expands Accommodation Obligations 4

Is the Writing On the Screen? 7

Service Animal Rule Going to the Dogs 8

2nd Circuit Rules on Individual Liability 13

9th Circuit Expands Coverage of Rehab Act 14

Highlights of Hearing on ADA Issues in the Digital Age 16

Changes Proposed to Standards 19

Introduction

"Open to the Public - Accessibility & Accommodations Law Updates" is a periodic newsletter offering analysis and guidance to business, local and state governments, and not-for-profit organizations on issues regarding access and accommodation for persons with disabilities. Virtually every facility that opens its doors to the public is covered by the Americans with Disabilities Act, the Rehabilitation Act of 1973 and/or the Fair Housing Act. As laws and regulations grow increasingly complex, owners, operators, landlords and tenants (and employers generally) face heightened scrutiny by governmental agencies and disability rights advocates.

Washington Watch/Medical Documents

by Carolyn Doppelt Gray, Esq., with special thanks to David H. Diamond, Esq. and Alison M. Langlais, Esq.

The Americans with Disabilities Act (ADA) 20th Anniversary Celebration Spawns Regulatory Activity

+ *Long awaited revisions to the Standards for Accessible Design may be published by the U.S. Department of Justice*, around the ADA's 20th anniversary date this July 26th. When published, these final rules will include both design issues related to e.g.: accessible seating in entertainment venues/stadiums, arenas, raceways, etc.; recreational facilities and policies relating to: e.g.: changes in the definition of service animals.

+ *One anticipated high water mark*: publication of the notice of proposed rulemaking (NPRM) for the *Passenger Vessel Accessibility Guidelines* has been delayed past late summer 2010. These guidelines, to supplement the Access Board's ADA Accessibility Guidelines for Transportation Vehicles, will apply to ferries, excursion boats, cruise ships and other passenger vessels.

+ *Hearing held: Access Board Proposes Amendments to ADA requirements for self-service machines*: Changes under Board consideration include requiring at each location: re: ATM, self-service fare vending, collection or adjustment machines – and self-service machines used for ticketing, check-in or check-out, seat selection, boarding passes, or ordering food in restaurants – that at least one of each type of machine provided shall be accessible. Self-service drive up only machines would be exempted from these proposed changes.

The draft text is available on the Board's website (<http://www.access-board.gov/508.htm>). Comments should be received by June 21, 2010. (For further details see Weitzman/Schleifer article below.)

+ Under the recently passed health care reform bill, officially known as the *Patient Protection and Affordable Care Act (Act)*, in addition to making significant changes in the health insurance area, the Act also *mandates expanded accessibility to diagnostic medical equipment for people with disabilities*. The Access Board, which has the responsibility to promulgate related standards within the next two years, will review equipment such as examination tables and chairs, weight scales, x-ray machines and other radiological and mammography equipment in consultation with the Commissioner of the Food and Drug Administration. These standards will require independent entry to, use of, and exit from, equipment “to the maximum extent possible in physician’s offices, clinics, emergency rooms, hospitals, and other medical settings. The newly established Medical Diagnostic Equipment Federal Ad Hoc Committee held their first meeting in closed session on May 11, 2010. A public information meeting on medical diagnostic equipment accessibility is scheduled to be held on July 27, 2010.

> In order to capture related categories for data collection, the federal government has amended the Uniform Categories and Collection Requirements under the Public Health Service Act (42 U.S.C. 201 *et seq*). Those amendments include identifying locations where individuals with disabilities have access to primary, acute and long-term care; the number of providers with accessible facilities and equipment (including medical diagnostic equipment) to meet needs and the number of employees of health care providers “trained in disability awareness and patient care of individuals with disabilities.” *Id.*

+ Advance Notice of Proposed Rulemaking issued to begin the process of updating standards for electronic and information technology. Since the Access Board issued the Telecommunications Act of 1996 Accessibility Guidelines and the Electronic and Information Technology Accessibility Standards under the Workforce Investment Act of 1998, which includes Section 508 of the Rehabilitation Act Amendments, technology has undergone rapid change. In an effort to both capture those changes, and to harmonize, to the extent possible, those changes with similar global efforts, the Board has decided to update and revise both the guidelines and the standards. See www.access-board.gov/sec508/refresh/report/index.htm for a detailed report on these proposed revisions. The draft text is available on the Board's website (<http://www.access-board.gov/508.htm>). Comments should be received by June 21, 2010. (For further details see Weitzman/Schleifer article below.)

“Kindling” the Flame for Plaintiffs: Legal Challenges to the Use of the Kindle and E-Readers in the Classroom

by Jacqueline M. Dorn, Esq. and Joshua A. Stein, Esq.

In a case of first impression, on June 25, 2009, the National Federation of the Blind (“NFB”) and the American Council for the Blind (“ACB”), along with Darrell Shandrow, an Arizona State University (“ASU”) journalism student with a visual impairment, filed a lawsuit in federal court in Arizona seeking to prevent the Arizona Board of Regents and ASU from adopting a pilot program that replaces the use of text books in select classes

with an electronic reader device (“e-reader”), Amazon’s Kindle DX. See *Nat’l Fed. of Blind v. Arizona Bd. of Regents.*, No. 09-cv-01359-PHX-GMS, 2009 U.S. Dist. LEXIS 96684 (D. Ariz. Oct. 16, 2009).

Officials from ASU had agreed to participate in Amazon’s pilot program starting in May 2009 after the Fall 2007 Educause conference. However, just a month after the product launch, the NFB and ACB – the two major U.S. organizations that support and advocate in the interests of individuals who are blind or have visual impairments – filed the lawsuit, alleging that the Kindle DX is not fully or equally accessible to individuals who are blind in violation of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973 (“Rehab Act”). *Id.*

Section 309 in Title II of the ADA requires that: “Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.” 42 U.S.C. § 12189. Section 504 of the Rehab Act contains similar protections. See 29 U.S.C. § 794.

Even though the Kindle DX is capable of reading electronic books, or “e-books,” aloud, the NFB and ACB alleged that there were several key features of the device that are not accessible. Specifically, its menu (which is used for selecting a book, activating features and configuring device settings), its web browser, and its note-taking feature do not have voice-reading capabilities. Plaintiffs claimed that this provides sighted students with a “new avenue for reading” that is not granted to students with visual impairments. Plaintiff Shandrow said: “I feel the need for equal accessibility. [T]o have an accessible Kindle reading device and accessible books is a civil right. We want the pilot program, we just want it to be accessible.” See <http://newsbreaks.infotoday.com/NewsBreaks/The-DOJ-and-ADA-Mandate-Ebook-Readers-Be-Accessible-to-All-60756.asp> (last visited 5/14/10).

The university offered to assist students with visual impairments in the pilot courses through its disability resource centers. These centers provide alternative means for the students to be able to obtain their coursework and readings (e.g., by converting traditional textbooks to Braille). However, because the university subsidized and provided the e-readers to the students as a part of the pilot program, the plaintiffs alleged that the university was denying them full and equal benefits of the program.

Shortly after filing the lawsuit against ASU, the NFB and ACB filed complaints with the U.S. Department of Education and the Department of Justice (“DOJ”) against five other academic institutions that also were participating in the Kindle DX pilot program – Case Western Reserve University, the Darden School of Business at the University of Virginia, Pace University, Princeton University, and Reed College. The DOJ promptly investigated the complaints.

On January 11, 2010, plaintiffs and ASU reached an unpublished settlement agreement to which the DOJ was a party. See <http://www.justice.gov/opa/pr/2010/January/10-crt-030.html> (last visited 5/14/10). Not surprisingly, two days later, on January 13, 2010, the DOJ announced that it entered into separate agreements with Case Western Reserve University, Pace University, and Reed College. Since that time, on March 29, 2010, the DOJ also has entered into a similar final settlement agreement with Princeton University.

These agreements, which become effective at the end of the pilot projects, provide that the universities will not purchase, recommend, require or promote the use of the Kindle

DX or any other e-reader in classes unless the devices are “fully accessible” to students with visual impairments. They also contain a functional definition of “accessible” when applied to e-readers. Further, the agreement in the ASU case did not involve the payment of any damages or attorney’s fees or costs. Finally, during the course of the investigation and negotiations, Kindle DX manufacturer Amazon.com, Inc. posted a notice on its website indicating its intention, by the end of 2010, to make the menu and navigation controls of the Kindle DX fully accessible to individuals who are blind or have low visions by extending the text-to-speech feature to these functions. See <http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf> (last visited 5/14/10).

The Kindle DX cases demonstrate how the DOJ and the courts are more frequently interpreting the obligations to provide “full and equal enjoyment” and “effective communication” broadly to encompass new technologies. In the words of Assistant Attorney General Thomas E. Perez at the DOJ: “Advancing technology is systematically changing the way universities approach education, but we must be sure that emerging technologies offer individuals with disabilities the same opportunities as other students...These agreements underscore the importance of full and equal educational opportunities for everyone.”

See <http://www.justice.gov/opa/pr/2010/January/10-crt-030.html> (last visited 5/14/10).

The fact the neither the ADA or the Rehab Act contain any express language regarding emerging technologies or even mention the most ubiquitous technology of the century – the Internet – has not escaped DOJ. Indeed, DOJ clearly recognizes the need for reform. In a recent statement, on April 22, 2010, to the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Principal Deputy Assistant Attorney General Samuel R. Bagenstos made clear that “access to the Internet and emerging technologies is . . . a fundamental issue of civil rights” that the DOJ will strive to remedy. See <http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf> (last visited 5/14/10). In his statement, Bagenstos expressly cited the Kindle DX cases as an example of the “digital divide [] growing between individuals with and without disabilities” and applauded the settlement agreements as furthering “an integrated experience for students with disabilities who will not have to rely on separate accommodations to gain access to course materials” – an integration, which as he states, is at the “core” of the ADA and Section 504. *Id.*

Third Circuit Holds That The ADA Can Obligate an Employer to Reasonably Accommodate an Employee’s Disability-Related Difficulties in Getting to Work

By Jurate Schwartz, Esq. and Fredric C. Leffler, Esq.

In a recent ADA case, *Colwell v. Rite Aid Corporation*, No. 08-4675, 2010 U.S. App. LEXIS 7249 (3d Cir. Apr. 8, 2010), the U.S. Court of Appeals for the Third Circuit reversed summary judgment for the employer and held that employers may need to make reasonable shift changes, allowing an employee with a visual impairment to work the day shift only in order to accommodate the employee’s disability-related difficulties in getting to work.

Jeanette Colwell was a former part-time cashier at Rite Aid. Ms. Colwell’s shifts at Rite Aid varied, but more often than not, she was scheduled to work weekdays from 5:00

PM to 9:00 PM. After she became blind in one eye, Ms. Colwell informed her supervisor that her partial blindness made it dangerous and difficult for her to drive at night. In response, the supervisor told Ms. Colwell that she could not be assigned to day shifts exclusively because it “wouldn’t be fair” to the other workers. Ms. Colwell provided her supervisor with a doctor’s note stating that the doctor recommended that Ms. Colwell not drive at night. The supervisor, nevertheless, informed Ms. Colwell that she was unwilling to assign Ms. Colwell day shifts only, and continued to schedule her for a mixture of day and night shifts. Ms. Colwell told her supervisor that her grandson would pick her up when he could but added that she could not always depend on others for a ride.

After a second conversation with her supervisor, Ms. Colwell discussed her desire to change to day shifts with her union representative. The union representative contacted Ms. Colwell’s supervisor to discuss the matter, and later informed Ms. Colwell that “he got nowhere.” While the union representative proposed and scheduled a meeting with Ms. Colwell and her supervisor, the supervisor failed to show up for that meeting. He said he would set up another meeting but Ms. Colwell was “too fed up at the time,” submitted her resignation by leaving her supervisor a handwritten note stating that she “had not been given fair treatment,” and gave Rite Aid two weeks’ notice.

Subsequently, Ms. Colwell sued Rite Aid, asserting that she was an employee with a disability whom the company failed to accommodate, and also claimed that she was the subject of retaliation, age discrimination, and a constructive discharge under the Americans with Disabilities Act (“ADA”), the Age Discrimination in Employment Act, and the Pennsylvania Human Rights Act (“PHRA”). Following discovery, both sides sought summary judgment from the federal district court. Rite Aid’s motion was granted, resulting in dismissal of the lawsuit.

On the reasonable accommodation issue, the District Court concluded that the accommodation that Ms. Colwell sought had nothing to do with the work environment or the manner and circumstances under which she performed her work and that Rite Aid had no duty to accommodate Ms. Colwell’s commute to work. In so holding, the District Court observed that “the ADA is designed to cover barriers to an employee’s ability to work that exist inside the workplace, not difficulties over which the employer has no control” and that imputing a duty to accommodate Ms. Colwell was tantamount to “mak[ing] an employer responsible for how an employee gets to work, a situation which expands the employer’s responsibility beyond the ADA’s intention.”

On appeal, with the support of the Equal Employment Opportunity Commission, Ms. Colwell argued that the District Court erred in dismissing her claims because Rite Aid had an obligation under the ADA to accommodate her with a shift change in deference to her disability and the limitations she confronted in commuting to work at night by reason of her partial blindness. A unanimous panel of the United States Court of Appeals for the Third Circuit agreed with Ms. Colwell and reversed the District Court’s summary judgment for Rite Aid on Ms. Colwell’s failure to accommodate claim. The panel held that under certain circumstances the ADA can obligate an employer to accommodate an employee’s disability-related difficulties in getting to work, if reasonable. One such circumstance is when the requested accommodation is a change in a workplace condition that is entirely within an employer’s control and that would, as a result, allow the employee to get to work and perform her job. In so holding, the panel relied on the statutory language of the ADA, 42 U.S.C. § 12111(9)(B), observing that the accommodations listed in the statute are not exclusive and stating that Congress specifically contemplated workplace accessibility, noting that a reasonable accommodation can include a modified work

schedule or adjustments to the work environment, including the manner or circumstances under which a position is customarily performed, which would enable an employee with disabilities to enjoy equal employment opportunities as are enjoyed by similarly situated employees without disabilities. Hence, the Court of Appeals ruled “as a matter of law that changing Colwell’s working schedule to day shifts in order to alleviate her disability-related difficulties in getting to work is a type of accommodation that the ADA contemplates.”

The Third Circuit panel additionally found support in *Lyons v. Legal Aid Society*, 68 F.3d 1512 (2d Cir. 1995), in which the Second Circuit held that a viable ADA claim could be stated based on an employer’s denial of an employee’s request for financial assistance to pay for a parking space close to work as an accommodation for her severe physical impairments. While taking no position on the Second Circuit’s observation that a reasonable accommodation could, possibly, include funds to pay for a disabled employee’s parking space adjacent to the employer’s business, the Third Circuit reasoned that there was nothing inherently unreasonable in requiring an employer to change an employee’s work schedule to day shifts only in order to alleviate her disability-related difficulties in getting to work. In this regard, too, the Third Circuit cited the ADA’s legislative history to the effect that “persons who may require modified work schedules are persons with mobility impairments who depend on a public transportation system that is not currently fully accessible.”

The Third Circuit found the District Court’s reasoning that a change in shifts had nothing to do with the work environment or the manner and circumstance under which Ms. Colwell performed her work “perplexing”. “The scheduling of shifts is not done outside the workplace but inside the workplace,” the Third Circuit stated. Therefore, the ADA contemplates that employers may need to make reasonable shift changes to accommodate a disabled employee’s disability-related difficulties in getting to work. The Third Circuit made it clear that its holding does not make employers responsible for how an employee gets to work and does not necessarily require Rite Aid to provide the shift change Ms. Colwell desired. Noting that Rite Aid made no factual argument about the reasonableness of Ms. Colwell’s request, nor had it argued that scheduling Ms. Colwell for day shifts would have been an undue hardship, the Court of Appeals left these questions to a jury.

The Third Circuit affirmed summary judgment for Rite Aid on Ms. Colwell’s other claims.

By its decision in *Colwell*, the Third Circuit joined the Second Circuit in holding that, in appropriate circumstances, the ADA may require an employer to reasonably accommodate a disabled employee with assistance related to her ability to get to work.

Is the Writing On the Screen? The Ninth Circuit Clarifies Movie Theater Captioning Obligations

by Joshua A. Stein, Esq.

In *State of Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*, No. 08-16075, 2010 U.S. App. LEXIS 9042 (9th Cir. Apr. 30, 2010), the United States Court of Appeals for the Ninth Circuit recently held that while open captioning is not a required auxiliary aid or service in movie theaters as a matter of law under the Americans with Disabilities Act (“ADA”), other forms of closed captioning and descriptive narration (e.g.,

rear-projection captioning) may be a required auxiliary aid and service, absent a showing by the movie theater of undue burden or a fundamental alteration of its services.

This lawsuit was originally brought in the United States District Court for the District of Arizona by the State of Arizona along with Frederick Lindstrom and Larry Wanger (individuals with hearing loss and near total blindness, respectively) against Harkins Amusement Enterprises, Inc. and its affiliates (“Harkins”) alleging that Harkins movie theaters violated the ADA and the Arizona Americans with Disabilities Act (“AzDA”) by failing to provide open or closed captioning for patrons with hearing impairments and audio descriptions of a movie’s visual elements for patrons with visual impairments. The district court granted Harkins’ motion to dismiss on the ground that neither the ADA nor the AzDA required movie theaters to provide captioning under the theory that neither law requires places of public accommodation to alter the content of their services. For the reasons set forth below, the Ninth Circuit affirmed the lower court’s dismissal of plaintiffs’ claims seeking open captioning, but reversed the dismissal of plaintiffs’ claim seeking closed captioning and descriptive narration.

Under Title III of the ADA, discrimination by a place of public accommodation (including movie theaters), includes the failure to take steps “necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals *because of the absence of auxiliary aids and services*, unless that entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added). Included in the ADA’s definition of auxiliary aids and services are, among other things: (i) effective methods of making aurally delivered materials available to individuals with hearing impairments; (ii) effective methods of making visually delivered materials available to individuals with visual impairments; and (iii) other similar services and actions. 42 U.S.C. § 12103(1). Federal regulations elaborate on this definition, specifically including, among other options: (i) computer-aided transcription services; (ii) assistive listening devices and systems; (iii) closed caption decoders; (iv) open and closed captioning; (v) video text displays; and (vi) audio recordings. 28 C.F.R. § 36.303(b).

Based upon these definitions, the court held that movie captioning and audio descriptions are clearly auxiliary aids and services because they are “effective methods” of making aurally and/or visually delivered materials to individuals with hearing and/or vision impairments. *Harkins* at *9-10. Having reached that conclusion, the court rejected Harkins’ argument that captioning and descriptive narration fall outside the ADA as a matter of law because the ADA does not require the provision of different goods or services, which Harkins argued was exactly what plaintiffs’ requests amounted to. Instead, the court held that, per the plain language of the statute, places of public accommodation have an obligation to provide auxiliary aids and services that enable guests with disabilities to enjoy the goods and services being provided to others. *Id.* at *12-*14. While auxiliary aids and services such as captioning and descriptive narration are – by their nature – additional and/or different services, they are nevertheless expressly mandated by the ADA. *Id.* at *15-16.

Despite this general obligation, the court held that not all of the possible auxiliary aids and services sought by plaintiffs were required by the ADA. Specifically, the court acknowledged that Harkins was entitled to rely upon the Department of Justice’s (“DOJ”) Preamble to Regulation of Non-discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities which plainly states, “[m]ovie theaters are

not required by § 36.303 to present open-captioned films.” 28 C.F.R. pt. 36, App. B(C), at 727 (2009). *Id.* at *16-*19. Therefore, open captioning in movie theaters is not required by the ADA.

However, the court refused to extend that exception to all forms of captioning. In reaching its ruling, the court highlighted that closed captioning is expressly included among the regulations’ examples of auxiliary aids and services (28 C.F.R. 36.303(b)(1)). *Id.* at *19. The court also rejected Harkins’ argument that the same degree of deference should be given to language included in 2004 guidelines published by Architectural and Transportation Barriers Compliance Board (“Access Board”) and language in a 2008 DOJ notice of proposed rulemaking (both of which suggest that the ADA does not (or at least might not) require any type of captioning in movie theaters) as the court gave to the DOJ Preamble. *Id.* at *19-20. The Ninth Circuit followed its own precedent and declined to give deference to Access Board guidelines that were not yet adopted by DOJ, and, similarly, refused to defer to proposed DOJ regulations. *Id.* at *21.

In closing, the Court stressed that it was not necessarily holding that closed captioning and descriptive narrative were required in Harkins’ movie theaters. *Id.* at *22-23. The Court noted that Harkins could still possibly avail itself of several defenses, including that the adoption of either of these auxiliary aids and services might constitute an undue burden or fundamentally alter the nature of its services. *Id.* Those issues were left to be decided before the lower court on remand.

Service Animal Rule Going to the Dogs: Proposed Rule Eliminates Wild Animals, And “Comfort” Animals from “Service Animal” Definition

by Meredith Bailey, Esq. and Carolyn Doppelt Gray, Esq.

Proposed changes to the service animal rule have “sent fur flying” as the proposal would limit qualifying services animals to dogs (and similar domesticated animals) while eliminating the use of other species – such as monkeys and reptiles – as sanctioned “service animals.” The proposed changes also would specifically prohibit “comfort animals” from qualifying as service animals.

For businesses, the proposed species limitation would ease compliance burdens by creating a bright-line exclusion of exotic animals as service animals. Monkeys, rodents, and reptiles, among others, would no longer be permitted to accompany individuals with disabilities into places of public accommodation, such as restaurants, movie theaters, educational facilities, stadiums, stores, hotels, trains, fitness centers, and museums.¹

A more difficult compliance question is presented by how businesses will distinguish between “comfort animals” — animals whose sole function is to provide emotional support or promote emotional well-being — from “psychiatric service animals” that would still qualify as service animals under the proposed regulations.

¹ 28 C.F.R. § 36.104(5)(1-12) (listing twelve (12) categories of facilities included in the definition “Place of public accommodation”).

I. The Current Definition of “Service Animal”?

The existing regulation implementing Title III of the Americans with Disabilities Act (“ADA”) defines a “service animal” as “any guide dog, signal dog or other animal *individually trained* to provide assistance for the benefit of an individual with a disability.”² (Emphasis added).

The ADA defines “disability” as any “mental or physical impairment that substantially limits one or more major life activities.”³ In 2008, the ADA Amendments Act (“ADAAA”) expanded the ADA’s definition of “disability” by modifying key terms of that definition, including expanding the definition of “major life activities.”⁴ The effect of the 2008 amendments has been to increase the pool of qualified individuals with disabilities under the ADA. In turn, the number of individuals who may be legally entitled to be accompanied by a service animal into a place of public accommodation has grown dramatically.

The current regulations implementing Title II (state and local government) and Title III (public accommodations) of the ADA require that covered entities allow individuals with disabilities to be accompanied by their service animals. Service animals are not “pets.” Rather, service animals are individually trained animals that work, provide assistance, and perform tasks for the person with a disability.

Guide dogs used by individuals who are blind or have low vision may be the most familiar service animal. But the current definition does not limit “service animals” to canines. In recent years, monkeys have risen in prominence as service animals because they can often be trained to perform tasks that dogs cannot, such as scratching an itch or retrieving small items. In Washington state, a boa constrictor’s ability to warn his owner of impending seizures qualifies the reptile as a service animal under the current regulations.⁵

II. Proposed Changes to “Service Animal” Definition

On June 17, 2008, the U.S. Department of Justice (“DOJ”) published its notice of proposed rulemaking (“NPRM”) to amend 28 CFR Part 35. In it, the DOJ explained that it “wishe[d] to clarify the obligations of public entities to accommodate individuals with disabilities who use service animals”⁶ through proposed amendments to the service animal rule.

A. Elimination of Certain Species

First, the proposed amendments eliminate certain species from coverage under the ADA, even if the other elements of the definition are satisfied. The proposed definition would limit “service animals” to any dog or other common domestic animal. Due to the proliferation of animal types that have been used as “service animals,” including wild

² 28 C.F.R. § 36.104 (2010).

³ See Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, as amended by ADA Amendments Act of 2008, Pub. L. 110-325 (Sept. 25, 2008).

⁴ ADA Amendments Act of 2008, *supra* n.3.

⁵ Nancy Bartley, *Debate grows over what defines a service animal*, SEATTLE TIMES, Oct. 19, 2009, available at: http://seattletimes.nwsource.com/html/localnews/2010091144_serviceanimals19m.html (last visited on May 4, 2010).

⁶ 73 Fed. Reg. 34,515-34,516 (June 17, 2008) (to be codified at 28 C.F.R. pt. 35).

animals, the proposed amendments would exclude wild animals (including non-human primates born in captivity), reptiles, rabbits, farm animals, ferrets, amphibians and rodents as qualifying under the definition of service animals.

At the July 15, 2008 hearing on the NPRM, many individuals stated the proposed species restriction goes too far by excluding types of animals that are known for providing essential services to individuals with disabilities, such as miniature horses being used as guide animals and certain types of captive bred monkeys. One individual testified that “[t]hese task trained animals have provided essential services to their handlers for many years and prohibiting them would unnecessarily restrict the independence of their handlers.”⁷

Second, the proposed amendments include new regulatory text that would specifically prohibit “comfort animals” from qualifying as service animals. The text proposed by DOJ would revise

§ 35.104 to state that “[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.”

B. Retention of Psychiatric Service Animals

The proposed amendment makes clear that the exclusion of “comfort animals” from ADA coverage does not mean that persons with psychiatric, cognitive or mental disabilities cannot use service animals. Rather, the proposed rule acknowledges the existence of specific service animals which are trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine, room searches, or turning on lights for persons with Post Traumatic Stress Disorder.

Psychiatric service animals include specially trained service dogs that assist traumatized veterans reintegrate into activities of daily living. Recent legislation introduced by Senator Al Franken (D-Minn.) will devote millions of dollars to the study of whether scientific research supports anecdotal reports that dogs might speed recovery from the psychological wounds of the wars in Iraq and Afghanistan. The [Service Dogs for Veterans Act](#) (S. 1495), signed into law on October 22, 2009, creates a three-year pilot program to evaluate the benefits of using psychiatric service dogs to help treat veterans with physical or mental injuries.

III. “Service Animals” must be admitted into covered entities

As previously noted, the current DOJ regulations require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but the regulations do not impose any type of formal training requirements or certification process. Without certification or licensing requirements, the decision whether to admit an animal claimed to impart cognitive or therapeutic benefits is discretionary and may present a difficult decision for covered entities. To help offset this conundrum,

⁷ Testimony of Tiffany Huggard-Lee, Dep’t of Justice, Transcript of The Public Hearing On Notices Of Proposed Rulemaking, July 15, 2008, available at: http://www.ada.gov/NPRM2008/public_hearing_transcript.htm#c42_mt. (last visited on May 18, 2010).

businesses may ask the individual accompanied by a service animal: “How does this animal assist you?” Nonetheless, distinctions between “comfort” and “psychiatric” animals may be semantic and not readily grasped by those employees charged with deciding which animals fall within the revised “service animal” definition should the proposed rulemaking be implemented. Therefore, at this juncture, if uncertainty exists, we caution businesses to be overly inclusive in recognizing canines described as “psychiatric animals.”⁸

In anticipation of the final rule, the chart below summarizes relevant DOJ guidance⁹ on how to best accommodate individuals with disabilities who utilize service animals.

⁸ The DOJ’s Civil Rights Division oversees the review of the NPRM and the publication of the final rules. A review of the rules that began in 2008 was suspended during the administration change. It is expected that DOJ will publish the final rule around, or starting after, the 20th anniversary of ADA, July 26, 2010.

⁹ U.S. Dep’t of Justice, Civil Rights Div., “Commonly Asked Questions About Service Animals in Places of Business,” (Jan. 14, 2008), available at: <http://www.ada.gov/qasrvc.htm> (last visited on May 11, 2010); DOJ, “ADA Business Brief: Service Animals” (April 2002) available at <http://www.ada.gov/svcabrpt.pdf> (last visited May 11, 2010).

IV. General Guidance

<ul style="list-style-type: none"> ✓ <u>DO</u> let service animals in, even if you have a “no pets” policy. Service animals are not pets. The ADA requires that businesses modify any “no pets” policy to allow the use of a service animal by a person with a disability. ✓ You <i>may</i> inquire as to how the service animal helps the individual. 	<ul style="list-style-type: none"> * <u>DON'T</u> ask about the person's disability.
<ul style="list-style-type: none"> ✓ <u>DO</u> admit all types of service animals, not just guide dogs. If a business refuses to admit any other type of service animal on the basis of state or local laws, it is a violation of the ADA. In this situation, the ADA provides greater protection for individuals with disabilities and so it takes priority over local or state laws or regulations. 	<ul style="list-style-type: none"> * <u>DON'T</u> ask a person with a disability to remove his or her service animal from the premises unless: <ul style="list-style-type: none"> (1) the animal is out of control and the individual with the disability does not take effective action to control the animal (for example a dog that barks repeatedly during a movie); or (2) the animal poses a direct threat to the health or safety of others.
<ul style="list-style-type: none"> ✓ <u>DO</u> permit the service animal to accompany the individual with a disability to all areas where non-disabled persons are allowed to go. An individual with a service animal may not be segregated from other non-disabled individuals. 	<ul style="list-style-type: none"> * <u>DON'T</u> charge a maintenance or cleaning fee for individuals who bring service animals into the business. Neither a deposit nor a surcharge may be imposed on an individual with a disability as a condition to allowing a service animal to accompany the individual with a disability. However, businesses or other covered entities may charge individuals with disabilities if a service animal causes damage so long as it is the regular practice of the entity to charge non-disabled customers for the same types of damages.

Second Circuit Holds That There Is No Individual Liability for ADA Retaliation Claims

by Joshua A. Stein, Esq.

Resolving an issue of first impression for the circuit, the United States Court of Appeals for the Second Circuit recently held that there is no individual liability for retaliation claims brought under the Americans with Disabilities Act (“ADA”). *Spiegel v. Schulmann*, No. 06-5914, 2010 U.S. App. LEXIS 9274 (2d Cir. May 6, 2010).

The lawsuit alleged that Spiegel was terminated from his position as an instructor at a Tiger Schulmann Karate School because of his weight. Shortly after Spiegel notified defendants of his intent to file a charge of employment discrimination with the Connecticut Commission of Human Rights and Opportunities, Spiegel’s friend and roommate Schatzberg was terminated from his position as an instructor at a different Tiger Schulmann Karate School and the corporate defendant filed a state court action against Spiegel for attempted interference with the contract of another of defendant’s employees. In addition to asserting several other claims (including one under the New York City Human Rights Law which was remanded for further proceedings), Plaintiffs alleged that Schatzberg’s termination and the state court law suit were acts of retaliation in violation of the anti-retaliation provisions of the ADA. The defendants filed a motion for summary judgment which was granted in its entirety by the United States District Court for the Eastern District of New York. *Schulmann* at *4-5.

The Second Circuit affirmed the lower court’s holding that there is no individual liability for retaliation claims brought under the ADA. *Id.* at * 15-16. 42 U.S.C. § 12203 sets forth the ADA’s prohibition of retaliation and adopts the general remedies of the overall statute set forth in 42 U.S.C. § 12117. In turn, 42 U.S.C. § 12117 adopts the “powers, remedies, and procedures” set forth in Title VII of the Civil Rights Act. The Second Circuit has previously held that the remedial provisions of Title VII, do not afford a claim for individual liability. *Tomka v. Seller Corp.*, 66 F.3d 1295, 1313-14 (2d Cir. 1995). Therefore, the court explained that it follows that because the retaliation provision of the ADA expressly borrows the remedies set forth in Title VII, it cannot provide for a claim of individual liability. *Schulmann*, at *15.

In reaching its conclusion, the court recognized that its decision could be arguably contrary to a literal reading of 42 U.S.C. §12203(a) which includes the phrase “no person” and could imply individual liability. *Id.* at *15. However, the court explained that “12203 presents that ‘rare case []’ in which ‘a broader consideration of’ the ADA, in light of the remedial provisions of Title VII, ‘indicates that this interpretation of the statutory language does not comport with Congress’[s] clearly expressed intent.’” *Id.*, citing *Tomka*, 66 F.3d at 1314.

9th Circuit Decision Extends Protection of the Rehabilitation Act to Independent Contractors, Further Exacerbates Circuit Split

by Joe C. Nuzzo, Esq. and Joshua A. Stein, Esq.

The Ninth Circuit’s decision in *Fleming v. Yuma Regional Medical Center*, 587 F.3d 938 (9th Cir. 2009), joins a growing list of recent developments which provide additional

protections to an increasing number of individuals with disabilities. While employers and places of public accommodations must be mindful of this trend, the *Yuma* decision is not likely to have as significantly far-reaching consequences, as some might fear. The holding, which expands the protections of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to cover independent contractors, is predicated upon reasoning that cannot be readily applied to other disability-rights statutes, such as the Americans with Disabilities Act of 1990 (“ADA”), nor is the decision without critics, as Courts of Appeals in the District of Columbia Circuit, the Sixth Circuit, and the Eighth Circuit all have reached contrary conclusions to the Ninth Circuit. See *Redd v. Summers*, 232 F.3d 933 (D.C. Cir. 2000), *Hiler v. Brown*, 177 F.3d 542 (6th Cir. 1999), and *Wojewski v. Rapid City Regional Hosp., Inc.*, 450 F.3d 338 (8th Cir. 2006).

Lester Fleming, an anesthesiologist who suffers from sickle cell anemia, filed suit against his former employer, Yuma Regional Medical Center (“Yuma”), following Yuma’s denial of Dr. Fleming’s request for accommodations regarding his operating room and call schedules. *Yuma*, 587 F.3d at 940. Dr. Fleming’s complaint alleged breach of contract and employment discrimination in violation of § 504 of the Rehabilitation Act, which prohibits discrimination on the basis of an individual’s disability by all programs or activities that receive federal funding (in addition to certain governmental entities). *Id.* The critical question presented to the Ninth Circuit was whether Dr. Fleming – whose contract with Yuma provided him work as an independent contractor – was protected by § 504(d) of the Rehabilitation Act or whether the Rehabilitation Act only covers employees, similar to the ADA, in suits alleging employment discrimination.

In looking to resolve this question, the Ninth Circuit cited, in particular, the broad application of the Rehabilitation Act, covering “‘all of the operations of . . . an entire corporation, partnership, or other private organization, or an entire sole proprietorship’ if the entity as a whole receives federal assistance or if the entity ‘is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation,’ and various other services.” *Id.*, citing 29 U.S.C. § 794(b)(3)(A). This language is distinct from other statutes, such as Title I of the ADA, which covers only the employer-employee relationship for employment discrimination matters and covers only employers with fifteen or more employees.

Complicating the analysis, however, is the fact that Section 504(d) of the Rehabilitation Act provides that, in cases involving allegations of employment discrimination, the determination of whether or not the Rehabilitation Act has been violated will be determined by referring to the “standards” set forth in Title I of the ADA. *Id.* at 940. The critical determination for the Ninth Circuit was whether the Rehabilitation Act’s reference to the “standards” set forth in Title I of the ADA to determine whether employment discrimination has occurred requires the court to consider Title I of the ADA in its entirety (including its limitation to individuals who are employees), as Yuma argued, or whether a court should look to Title I only to determine whether the conduct in question constitutes discrimination. Under the latter theory, a court, in finding that the conduct in question constitutes employment discrimination, would then look to the language of the Rehabilitation Act for all other determinations, such as the threshold issue of who is covered under the Act.

The Ninth Circuit held that the Rehabilitation Act’s reference to the “standards” of Title I of the ADA did not incorporate Title I in its entirety. Instead, the court found that the broad language of the Rehabilitation Act – in particular the Act’s reference to covering all “otherwise qualified individuals” and its application to “all of the operations” of covered

entities – evidenced Congress’s intent to cover a larger group of individuals and, therefore, declined to also incorporate the limitations contained in Title I of the ADA, such as its limitation in coverage to the “the employer-employee relationship.” *Id.* at 942. Also pertinent for the Ninth Circuit was the language used by Congress to refer to Title I of the ADA, citing the “standards” of the ADA, without any other language of incorporation to suggest that the definitions and limitations of the ADA were incorporated as well. *Id.* at 943. Instead, the Court determined that the Rehabilitation Act requires only that a court look to the ADA to determine what conduct violates the Rehabilitation Act. *Id.* at 944.

The *Yuma* decision brings the Ninth Circuit in line with the Tenth Circuit’s decision in *Schrader v. Ray*, 296 F.3d 968 (10th Cir. 2002). In *Schrader*, the Tenth Circuit similarly held that the Rehabilitation Act did not incorporate Title I of the ADA in its entirety, and, therefore, an employer who received federal assistance but had fewer than fifteen employees – which would exclude the employer from coverage under the ADA – was, nevertheless, subject to the Rehabilitation Act.

The *Yuma* and *Schrader* decisions put the Ninth and Tenth Circuits at odds with the District of Columbia Circuit, the Sixth Circuit, and the Eighth Circuit. The Eighth Circuit’s decision in *Wojewski*, 450 F.3d at 345, specifically declined to extend the coverage of the Rehabilitation Act to independent contractors. The Sixth Circuit found, in *Hiler*, 177 F.3d at 547, that the Rehabilitation Act and the ADA borrowed the definition of “employer” from Title VII of the Civil Rights Act of 1964 and, thus, held that a supervisor could not be individually liable under Title VII’s definition of “employer.” Finally, the District of Columbia Circuit concluded that an individual’s proper classification as an independent contractor “leaves [the individual] with no protection against employment discrimination” under the Rehabilitation Act. *Redd*, 232 F.3d at 937.

Given that *Yuma* furthered the split among Circuit Courts, it is certainly possible, if not likely, that the issue will eventually be presented to the Supreme Court for resolution. Nevertheless, its impact – both in the present and in the foreseeable future – while of import, is not apt to be as broad as some might fear. The holding in *Yuma* is limited to § 504 of the Rehabilitation Act and, therefore, only applies to programs and/or activities receiving federal financial assistance (along with certain governmental agencies) in the Ninth Circuit. Indeed, the *Yuma* decision specifically notes that its holding does not speak to the ADA or to the well-established decisions of other Circuits holding that independent contractors are not covered by Title I of the ADA. Moreover, the *Yuma* decision bases its holding on the Rehabilitation Act’s particularly broad and unique definition of “programs or activity” – language which is not similarly prevalent in other employment discrimination statutes. Therefore, even if this issue ultimately makes it way before the Supreme Court, and the Supreme Court adopts the general holdings of the Ninth and Tenth Circuits – as opposed to the Sixth, Eighth, and D.C. Circuits – that § 504 of the Rehabilitation Act’s prohibition against discrimination on the basis of disability applies to independent contractors, such a ruling would still be several steps away from any sort of general protection of independent contractors by all employment discrimination statutes.

Of course, despite the Rehabilitation Act’s limited applicability to private programs or activities that receive federal funding, the number of such entities is, perhaps, greater now than ever before. The economic downturn over the past few years has seen the extension of federal funds to a number of businesses that were in economic crisis, most notably through the federal government’s Troubled Asset Relief Program (“TARP”). Thus, if the Supreme Court were to hold that § 504 of the Rehabilitation Act applied to

independent contractors and/or employers with fewer than fifteen employees, such a ruling, combined with the increased number of companies receiving federal funding, would certainly expand the number of individuals covered by the broad protections of the Rehabilitation Act.

Ultimately, the *Yuma* decision also represents another in a series of recent developments providing additional protections to a greater number of individuals with disabilities. Following on the heels of the enactment of ADA Amendments Act (“ADAAA”), the issuance of the Notice of Proposed Rulemaking for the Equal Employment Opportunity Commission’s proposed ADAAA regulations, and with an administration in Washington placing a renewed focus on accessibility as a high-priority issue, the protective reach of the ADA and the Rehabilitation Act is expanding. More so now than ever before, employers and places of public accommodations would be wise to cease viewing accessibility obligations as simply a series of rules, standards, and regulations, and start utilizing a civil rights prism that applies these statutes both more expansively and creatively.

House Judiciary Subcommittee Conducts Hearing on ADA Issues in the Digital Age

by Kristine K. Huggins, Esq. and Joshua A. Stein, Esq.

In yet another demonstration of the current administration’s interest in aggressively enforcing, and arguably expanding, the reach of the Americans with Disabilities Act (“ADA”) over new technology, on April 22, 2010, the U.S. House of Representatives Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a public hearing on Achieving the Promise of the Americans with Disabilities Act in the Digital Age. The hearing focused on the need to enhance the ability, and better enforce the rights, of individuals with disabilities to have equal access to emerging technologies, including websites.

Testifying at the hearing were a series of individuals committed to improving access to technology for individuals with disabilities: Samuel Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights, Department of Justice (“DOJ”); Mark Richert, Director of Public Policy, American Foundation for the Blind (“AFB”) (one of the primary advocacy groups representing individuals who are blind or have visual impairments); Judy Brewer, Director of the Web Accessibility Initiative (“WAI”) at the World Wide Web Consortium (“W3C”) (an initiative committed to working with organizations around the world to develop strategies, guidelines, and resources to help make the Web accessible to individuals with disabilities); Steven Jacobs, President, IDEAL Group, Inc. (a company that provides accessible electronic and Internet technology products and services); and, Daniel Goldstein, Partner, Brown, Goldstein & Levy, LLP (counsel for the National Federation of the Blind (“NFB”), an advocacy group representing individuals who are blind or have visual impairments that is arguably the most active in pursuing website accessibility complaints).

The Department of Justice (“DOJ”) is responsible for regulating accessibility for governmental entities, recipients of federal funds, and places of public accommodation and, in doing so, enforces Titles II and III of the ADA as well as Sections 504 and 508 of the Rehabilitation Act. Along with the Access Board, DOJ is ultimately responsible for developing, interpreting, and implementing the regulations and guidelines that define the

obligations of both governmental entities and places of public accommodation. Recently, DOJ has increased its efforts to regulate the accessibility of new and developing technologies – particularly the internet. In his testimony, Mr. Bagenstos stressed that access to information and electronic technologies is an issue of civil rights for individuals with disabilities because, with many companies using internet technologies for both hiring and recruiting, the gateways to employment and education opportunities are becoming increasingly web-based. In addition, institutions of higher education frequently rely on the Internet, in some cases for degree programs, and in others, for course assignments and discussions groups.

During his testimony, Mr. Bagenstos acknowledged that only two cases have specifically addressed the application of Title III to private company websites, with each court reaching a different conclusion. However, as Mr. Bagenstos reiterated, DOJ operates under the view that Title III applies to *any* activity or service offered by a public accommodation either on or off the premises. Therefore, DOJ takes the position that state and local government websites, websites of recipients of federal funding, *and* the websites of private entities that are public accommodations are covered by either the ADA or the Rehab Act and must be fully accessible to individuals with disabilities. Mr. Bagenstos explained that DOJ believes, “The broad mandate of the ADA to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be served to today’s technologically advanced society only if it is clear to businesses, employers, and educators, among others, that their website must be accessible.”

To strengthen its position and clarify the obligations DOJ believes are presently required by law, DOJ is contemplating issuing guidance on issues that arise with respect to websites of private entities that are places of public accommodations covered by Title III.¹⁰ Mr. Bagenstos explained that, “[W]e in the Federal government must provide the leadership to make certain that individuals with disabilities are not excluded from the virtual world in the same way that they were historically excluded from ‘brick and mortar’ facilities.” Should this initiative go forward, Mr. Bagenstos indicated that DOJ will solicit public comments from all interested parties. He did not indicate when the process would begin. In the interim, Mr. Bagenstos cited both the existing website accessibility standards for Section 508 and those developed by the WAI as guidelines for website accessibility.

Given their backgrounds, it should come as no surprise that the testimony given by the other speakers all joined Mr. Bagenstos in calling for increased efforts to achieve accessibility in new technology, with a particular focus on the Internet.

In that vein, Mr. Jacobs emphasized his company’s position that making websites accessible is neither prohibitively difficult nor unduly costly, and in most cases will not affect the format or appearance of a website. He then detailed the various tools available to companies to make their websites and other web-based resources and applications fully accessible to individuals with disabilities.

Furthermore, Ms. Brewer, testified that the Web Content Accessibility Guidelines developed by her organization WAI are suitable for both simple and complex websites,

¹⁰ In 2003, DOJ issued guidance regarding the accessibility of state and local government websites. See <http://www.ada.gov/websites2.htm>.

can be applied to any web technology, and have extensive, freely available technical support materials. Indeed, as noted above, DOJ has cited the WAI's Guidelines as a helpful resource, referencing it in negotiated ADA settlements in the banking, retail, and sports industries.

During Mr. Richert's testimony, he discussed other efforts currently underway in the federal government that would also push towards achieving website accessibility for individuals with disabilities. For example, the Federal Communications Commission ("FCC") has established goals for making commercial websites accessible to individuals with disabilities.¹¹ As part of its National Broadband Plan, the FCC recommends that DOJ amend its regulations to clarify the obligations of commercial establishments under Title III with respect to their websites. In addition, Mr. Richert urged the passage of H.R. 3101, the Twenty-first Century Communications and Video Accessibility Act – "a bipartisan piece of legislation that would ensure that mobile and other Internet-enabled devices and video technology are accessible to, and usable by, individuals with disabilities." Finally, Mr. Richert also noted that even in the absence of such express legislation, several large companies have already started to take steps towards achieving website accessibility.

Mr. Goldstein highlighted the many efforts of NFB to promote making technology accessible for individuals with disabilities, including its lawsuits against, and settlements with, a variety of companies in the technology and retail sectors regarding technology such as websites, and e-readers. Mr. Goldstein also stressed the need for the use of accessible technology in the education sector. And, like the other speakers, he urged the adoption of additional laws and regulations to clarify and augment obligations to make technology accessible to individuals with disabilities.

As the testimony at this hearing demonstrates, the issue of the accessibility of Internet-based and similar technologies for individuals with disabilities continues to be at the forefront of the developing body of civil rights law and DOJ's current agenda. Proskauer's Accessibility and Accommodations Practice Group will continue to monitor this area and keep you informed of further developments.

Changes Proposed to Standards for Information and Communication Technology and Access to Self-Service Machines

by Beth E. Schleifer, Esq. and Allan H. Weitzman, Esq.

In August 1998, Congress signed into law the Rehabilitation Act Amendments of 1998. Section 508 of the Rehabilitation Act Amendments requires Federal departments and agencies to make their electronic and information technology fully accessible to individuals with disabilities. The stated purpose of Section 508 was to eliminate barriers in information technology, to make available new opportunities for people with disabilities, and to encourage development of technologies that will help achieve these goals.

¹¹ Indeed, in April 2010, the FCC released its own first-ever paper on accessibility and technology – "A Giant Leap & A Big Deal: Delivering on the Promise of Equal Access to Broadband for People with Disabilities" – which stressed many of the same points and offered several similar suggestions to the testimony at this hearing.

Under Section 508, when federal departments and agencies develop, procure, maintain or use electronic and information technology, they must ensure that federal employees and members of the public with disabilities have access to and use of electronic and information technology that is comparable to the level of access and usability available to persons without disabilities, unless it would impose an undue burden to do so. Congress appointed the Architectural and Transportation Barriers Compliance Board (“Access Board”) as the administrative agency responsible for periodically reviewing and, as needed, updating the technical and functional requirements of section 508 to account for technological advancements and changes in electronic and information technology.

On March 22, 2010, the Access Board published an Advanced Notice for Proposed Rulemaking (“ANPRM”) in the Federal Register, announcing its intention to revise and, where appropriate, supplement its standards for electronic and information technology in the federal sector covered by section 508 and by Section 255 of the Telecommunications Act of 1996. The draft, entitled “Information and Communication Technology (“ICT”) Standards and Guidelines,” is based on recommendations from the Telecommunications and Electronic Information Technology Advisory Committee (“TEITAC”). The Access Board organized TEITAC to review the original standards and guidelines and to proffer suggested changes. The 41-member TEITAC included industry representatives, disability groups, US and international standard-setting bodies, and government agencies. The ICT revisions are largely based on recommendations by TEITAC, although some revisions reflect changes independently added by the Access Board.

The ICT features a new structure and format that fully integrates the technical requirements of Sections 508 and 255. According to the Access Board, combining the technical requirements in this manner maximizes clarity and convenience because the ICT is equally applicable to both laws.

Some key highlights of the proposed rule include provisions that:

- > Abandon the Access Board’s prior regulatory approach of structuring the technical provisions based on discreet product types in favor of a more elastic organizational approach in which provisions are grouped by the features or capabilities of a product.
- > Provide for the inclusion of the term “on or behalf of agencies” in the application section of the ICT standards to allow for coverage of technologies used by contractors under a contract with a federal department or agency.

- > Limit “comparable access” to electronic information and data regardless of transmission or storage method to “official communications” by Federal agencies or agency representatives. “Official communications” refer to: (a) communications to Federal employees that contain information necessary for those employees to perform their job functions and information relevant to enjoyment of the benefits and privileges of employment; or (b) communications by a Federal agency to members of the general public that contain information necessary for the conduct of official business with the agency.
- > Recommend the removal of three out of the current six general exceptions to conformance with ICT provisions.
- > Propose harmonization between the ICT standards and the Web Content Accessibility Guidelines (WCAG) 2.0.
- > Require Federal agencies to provide alternative methods of communication through help desks and technical support services and to provide end-user support and materials in alternate formats.
- > Modify the current standards to require that each mode of operation and information retrieval of a product meet the functionality performance criteria instead of “at least one.”
- > Increase the accessible mode that accommodates visual acuity from 20/70 to 20/200, which is the legal definition of blindness, so that more users with limited vision can use a visual-based mode instead of non-visual accessible modes.
- > Provide for enhanced auditory features for individuals with limited hearing, including at least one mode of operation that improves clarity, reduces background noise, and allows for volume control.
- > Require ICT with closed functionality to be accessible by individuals with disabilities without requiring assistive technology other than personal headsets.
- > Add an ICT requirement for forward reach range, and lowers side reach range from 54 inches to 48 inches in accordance with the current standards found in the Americans with Disabilities (ADA) and Architectural Barriers Act (ABA) guidelines.
- > Require that when text, images of text, and symbols are provided on hardware for product use, it must also be provided in at least one other mode of operation that conveys the same information in electronic format, unless an exception applies.

As part of this rulemaking, the Access Board has also proposed revisions to the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”). In particular, the Access Board seeks to supplement ADAAG to address access to interactive transaction machines (ITMs), such as point-of-sale devices, kiosks and other self-service machines by individuals with disabilities. The Access Board aims to supplement ADAAG 220 (ATMs, Fare Machines, and Self-Service Machines) to extend coverage to self-service machines used for ticketing, check-in or check-out, seat selection, boarding passes, or ordering food in restaurants and cafeterias. According to the Access Board, the proposed changes would require that:

- > Where automatic teller machines or self-service fare vending, collection, or adjustment machines are provided, at least one of each type provided at each location shall be accessible. Where bins are provided for envelopes, waste paper, or other purposes, at least one of each type must also be accessible.

- > Where self-service machines, other than automatic teller machines and fare machines meet the definition of ITC, and they are used for ticketing, check-in or check-out, seat selection, boarding passes, or ordering food in restaurants and cafeterias, at least one of each type provided at each location shall be accessible.

Drive-up only self-service machines would be exempted from these proposed changes.

The draft provisions are currently open for public comment through June 21, 2010. As part of its review process, the Access Board hopes to elicit general comments on the proposed revisions, including their necessity, advantages and disadvantages, costs and benefits, and any alternative policies or noticeable gaps. At the close of the public-comment period, the Access Board will review the input received and prepare a proposed rule, before giving the public another opportunity to submit comments. Instructions on how to view and submit public comments are available on the Access Board's website at: <http://www.access-board.gov/508.htm>.

We are pleased to offer this newsletter to you and look forward to bringing you our analysis of significant cases, developments, and trends in the area of public accommodations and guidance as to compliance with the myriad of regulations and laws.

For more information about this practice group, contact:

Carolyn Doppelt Gray, Co-Chair
202.416.5842 – cgray@proskauer.com

Joshua A. Stein, Co-Chair
212.969.3552 – jstein@proskauer.com

Allan H. Weitzman, Co-Chair
561.995.4760 – aweitzman@proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris | São Paulo | Washington, D.C.
www.proskauer.com

© 2010 PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.