CALIFORNIA COMMISSION ON DISABILITY ACCESS
FULL COMMISSION

Teleconference Meeting Minutes
April 28, 2021

1. Call to Order

Chair Chris Downey welcomed everyone and called the meeting of the California Commission on Disability Access (CCDA or Commission) to order at 10:06 a.m. Due to the ongoing health emergency, and consistent with Executive Order N-29-20, this meeting was conducted entirely by Zoom and teleconference.

Roll Call

Staff Member Saenz called the roll and confirmed the presence of a quorum.

Commissioners Present:
Chris Downey, Chair
Douglas Wiele, Vice Chair
Guy Leemhuis, Immediate Past Chair
Tiffany Allen
Rob Bonta, Attorney General, represented by Deputy Attorney General Anthony Seferian
Ida Clair, State Architect represented by Deputy State Architect Kurt Cooknick
Drake Dillard
Souraya Sue ElHessen
Brian Holloway
Melissa Hurtado, Senator represented by Aakash Vashee and Elizabeth Hess
Jacqueline Jackson
Brian Jones, Senator represented by Brixton Layne
Tom Lackey, Assembly Member
Ashley Leon-Vasquez
Scott Lillibridge
Michael Paravagna

Commissioners Absent:
Assembly Member Jim Frazier

Staff Present:
Angela Jemmott, Executive Director
Kamran Qazi, Legal Counsel
Adam Barsanti, Associate Governmental Program Analyst
Theresa Brown, Data and Research Analyst
Stephanie Groce, Disability Access Technician
Phil McPhaul, Operations Manager
Davina Saenz, Marketing and Outreach Analyst

Also Present:
Regina Brink, California Council of the Blind
Anthony Goldsmith, Derby, McGuinness, and Goldsmith, LLP

Zeenat Hassan, Disability Rights California
Irakli M. Karbelashvili, AllAccess Law Group
Kristina Launey, Seyfarth Shaw LLP
Celia McGuinness, Derby, McGuinness, and Goldsmith, LLP
Tanya Moore, Moore Law Firm
David Peters, California Justice Alliance
Dennis Price, Potter Handy
Will Rehling, Accessible San Francisco
Syroun Sanossian, SZS Engineering Access
Chief Magistrate Judge Joseph C. Spero, United States District Court
Peter Strojnik, Strojnik Law Firm
Remi Tan, Z&L Properties
Chris Vaughan, Vaughan and Associates

Pledge of Allegiance

Chair Downey led the Commission in the Pledge of Allegiance.

Housekeeping Items

Staff Member Saenz reviewed the meeting protocols.

2. Approval of Meeting Minutes (January 27, 2021) – Action

Motion: Commissioner Holloway moved to approve the January 27, 2021, California Commission on Disability Access Full Commission Meeting Minutes as presented. Commissioner Paravagna seconded. Motion carried unanimously with no abstentions.

3. Comments from the Public on Issues Not on this Agenda

No members of the public addressed the Commission.

4. Subcommittee – Update and Discussion

a. Legislative Committee

Commissioner Paravagna, Chair of the Legislative Committee, stated the Committee reached out to community members to enrich the conversation around the noncompliance of the legal community of Senate Bill (SB) 1186, which mandated that pre-litigation letters and complaints be submitted to the CCDA as part of its Data Collection Project. The Committee is looking at possibilities for this noncompliance such as the need for more education or enforcement in order to better address this issue, and the role the Commission can play, including putting information on the website. More discussion is required.

Commissioner Paravagna stated the Committee also looked at the Disability Access and Education Revolving Fund, which is underutilized. A $5.00 fee for every business license in the state goes toward this fund. He stated the need to communicate that these funds are available for use for disability awareness training. He suggested outreaching to the California League of Cities, the California State Association of Counties (CSAC), and each member of the Legislature as a way to help spread the word.

Commissioner Paravagna stated the Committee historically hosted coffee meetings at the Capital with legislative members to discuss the work of the Commission. Due to the COVID-19 pandemic, these meetings have been put on hold so the Committee is discussing creating a one-page informational document about the Commission to send to legislative members' offices, along with hosting Zoom meetings to enhance that effort.

Commissioner Paravagna stated the Legislative and the Education and Outreach (E&O) Committees have been working together. He thanked the E&O Committee for that productive partnership.

b. Education and Outreach

Commissioner ElHessen, Chair of the Education and Outreach (E&O) Committee, thanked the Legislative Committee for their partnership. She stated the Committee is working to increase Committee Membership with a balanced selection of representatives from Northern and Southern California who represent cities, counties, and associations, and then separating them into cohorts to work on various projects. She asked Commissioners to send names of possible candidates to staff.

Commissioner ElHessen stated Chair Downey and Executive Director Jemmott are working on completing the audio captioning for the current public service announcements (PSAs).

c. Checklist Committee

Commissioner Holloway, Chair of the Checklist Committee, stated the Committee completed the CCDA California Consumer Toolkit for the Restaurant Industry and are now taking a new direction to create something similar for business owners and business tenants relative to the best way to meet parking needs of the disability community and comply with state and federal regulations.

Action Items

- Commissioners are to send names of possible E&O Committee Members to staff.

5. CCDA Executive Director Report – Update and Discussion

a. Administrative and Operational

Executive Director Jemmott stated staff has been looking at internal processes to run more efficiently. She introduced new Operations Manager Phil McPhaul. She stated, due to the increased budget, the CCDA has contracted with entities to help with internal processes.

Action Items

- No action items.

6. CCDA Strategic Goal – Update and Discussion

a. 2021 Goal: Data Collection Project

Executive Director Jemmott reviewed the 2021 CCDA Strategic Goal and Critical Paths document, which was included in the meeting materials. A roundtable discussion on the Data Collection Project is scheduled later today.

Theresa Brown, Data and Research Analyst, provided an overview of submission rates, compliance rates, and education opportunities for attorneys submitting their information on the CCDA Legal Portal.

Questions and Discussion

Vice Chair Wiele stated this is a fundamental, foundational element of the CCDA's work. He stated he is grateful for the progress being made.

Action Items

- No action items.

7. Amendments to CCDA Bylaws – Update, Discussion, and Action

a. Review the Suggested Amendments for Adoption

Executive Director Jemmott reviewed the proposed amendments to the bylaws in the Bylaws Amendment Proposal document, which was included in the meeting materials.

> **Motion:** Vice Chair Wiele moved to approve the proposed amendments to the bylaws as presented. Commissioner Holloway seconded. Motion carried unanimously with no abstentions.

BREAK

8. Legislative Bill Tracking – Update and Discussion

a. AB 29 (Cooper) State bodies: meetings.

b. **AB 105 (Holden) The Upward Mobility Act of 2021: boards and commissions: civil service: examinations: classifications.**
c. **AB 339 (Lee) State and local government: open meetings.**
d. **AB 580 (Rodriguez) Emergency services: vulnerable populations.**
e. **AB 885 (Quirk) Bagley-Keene Open Meeting Act: teleconferencing.**

Executive Director Jemmott summarized the CCDA Legislative Status Report on the bills staff is tracking, which was included in the meeting materials.

Questions and Discussion

Commissioner ElHessen asked if the disability community is included in the populations listed in Assembly Bill (AB) 105.

Executive Director Jemmott stated this question was sent to the Office of Legislative Affairs. Staff has not yet received an answer.

Commissioner Paravagna asked about access to public meeting locations in AB 105, such as access being connected to an Americans with Disabilities Act (ADA) Transition Plan. He stated this bill could be used to push agencies into compliance that have not yet done an ADA Transition Plan, which was federally mandated in 1992.

Public Comment

Regina Brink, Assistant Director of Governmental Affairs, California Council of the Blind, referred to AB 580 and asked if this bill lessens the amount of representation on emergency preparedness committees of other disabled groups that may already be participating.

Commissioner Allen stated this bill is meant to give direction to local communities to ensure that the emergency services industry plans, prepares, and responds accordingly to all vulnerable populations with access and functional needs who would be adversely or disproportionately affected by a disaster or catastrophic event.

Action Items

- Staff is to seek clarification from DGS Office of Legislative Affairs to confirm inclusion of disabled persons in AB 105.
- Staff is to seek clarification on whether mental disabilities fall under the category of cognitive disabilities or if it should be listed separately in AB 580.

Lunch Break

9. Title III Alleged Disability Access Violations: Case Filing Compliance – Roundtable Discussion

Presenters:

- Chief Magistrate Judge Joseph C. Spero, United States District Court
- Anthony Goldsmith, Derby, McGuinness, and Goldsmith, LLP
- Zeenat Hassan, Disability Rights California
- Irakli Karbelashvili, AllAccess Law Group
- Kristina Launey, Seyfarth Shaw LLP
- Celia McGuinness, Derby, McGuinness, and Goldsmith, LLP
- Tanya Moore, Moore Law Firm
- David Peters, California Justice Alliance
- Dennis Price, Potter Handy, LLP
- Syroun Sanossian, SZS Engineering Access
- Peter Strojnik, Strojnik Law Firm
- Cris Vaughan, Vaughan and Associates

Executive Director Jemmott stated today's roundtable discussion will be a casual introduction of this topic to the Commission and stakeholders. The discussion will be moderated by Commissioner Leemhuis.

Commissioner Leemhuis, Immediate Past Chair, welcomed the Honorable Joseph C. Spero, Chief Magistrate Judge, United States District Court for the Northern District of California, and invited him to introduce today's roundtable discussion on disability access and public accommodation cases in California.

Chief Magistrate Judge Spero provided information from his experience working in the federal court for Northern California. He stated his district extends along the coast from Monterey to the Oregon border and includes all San Francisco Bay Area counties. He stated his district court experience is not the same as most individuals' experiences with ADA access cases, which is that the cases will resolve. He stated delays in that resolution have tremendous consequences – the delay in the implementation of the access barrier elimination that the parties agreed to and the fact that, if there is a delay in the settlement, attorney fees are incurred, which increases the cost of the settlement and the cost of compliance. He stated General Order 56, ADA Access Litigation, which is applicable to all Title III cases and which focuses on resolution immediately upon the filing of a case, is designed to combat these issues. This is done in a number of ways:

- The first part of the General Order stays the litigation, so no one is wasting their time on unnecessary litigation activities. This remains in place for an overwhelming majority of cases; however, the stay can be lifted when necessary.
- Parties are ordered within 60 days of the complaint being served to do a joint site inspection. The lawyers must be physically present at the site and an individual from each party who has authority to make decisions, including on settlement, must attend.
    - At the site inspection, the plaintiff must identify the barriers and the corrective action. The defendant must indicate what they think of the barriers and proposed corrective actions and what they are willing to do. If the

defendant has a view that it is not something that is required by the disability rules because it is not readily achievable, the defendant must give information about that. The parties often bring their experts to those inspections that they would be relying on in the case, not necessarily Certified Access Specialists (CASps). The hope is that, if everyone gets together right away to focus on the barriers and what can be done, it can expedite case resolution.

- A settlement meeting is required within 35 days of the site inspection. A judge or mediator is not present. All parties attend; the plaintiff must make appropriate demands beginning with the fix and, ultimately, if the fix is agreed upon, with some monetary demands, and the defendant must respond.

The focus for the first 90 days is entirely on settlement. Although it will not be without value if the parties proceed to litigation, the hope is that the goal of litigation is to settle the case.

- Only after the completion of the first three bulleted items, and if the case was not settled at the settlement meeting, the case is referred to mediation, where a third party will help them settle the case.

These four bulleted items happen within the first 130 to 140 days of the litigation.

- At this point, attorney fees can begin to be incurred in litigating, where they can ask the court for a case management conference. The hope is that this process will encourage settlement without unnecessary litigation activities.

Chief Magistrate Judge Spero stated the impact of General Order 56 is quite dramatic. He stated the General Order was not in effect during his first ten years as a Magistrate Judge and the parties would litigate, take depositions, and bring motions to the court, all while they were trying to theoretically settle the case. A great deal of money was spent and attorney fees were quite significant for litigating in court. Since the General Order was put in place, cases settle before they get to a judge for a resolution of anything substantive. The theory is this is because the General Order forces the parties to focus on resolution first and to try to determine if there can be a settlement. This saves money for the parties because nearly all cases settle without the need for a case management conference.

Chief Magistrate Judge Spero showed a brief chart showing ADA access filings, ADA mediation referrals, and ADA settlement conferences for the Northern District of California for the last five years. For the last few years, approximately 50 percent of the cases were referred to remediation or settlement conferences. He noted there has been very little litigation activity in any of his court's cases. Having the parties focus on the mediation, settlement, site visit, and discussion before doing litigation has had beneficial effects, resulting in a typical ADA case having very little litigation activity.

Chief Magistrate Judge Spero stated one of the topics that this roundtable will address is compliance with the statutes. He stated the General Order requires the parties to do

any number of things and, when they do it, they must certify to the court that it has been done. He shared his experience that compliance with the General Order requirements has been inconsistent. He stated more work is being done to ensure that everyone gets into compliance eventually. More actions have needed to be taken to ensure that individuals had a site visit or settlement conference with decision-makers present. One of the ways to ensure compliance has been to get the magistrate judges more involved in compliance efforts to ensure that the General Order is taken seriously.

Questions and Discussion

Commissioner Leemhuis thanked Chief Magistrate Judge Spero for his enlightening introduction. He summarized that there was concern in the business community when these statutes were being created, particularly SB 1186, about high-volume lawsuits being brought not from individuals encountering barriers while visiting establishments, but from individuals noting potential barriers throughout a community from the vantage point of their automobiles, which become known by the unfortunate term "drive-by lawsuits." Due to the high number of cases being filed, a system was created where attorneys were required to send the establishment a demand letter or pre-litigation letter as a first step in a case and to send a copy of those letters, along with the complaint, to the CCDA and the State Bar. He asked the members of the roundtable to provide feedback on a series of questions:

Questions to plaintiff attorneys:

- What are your current experiences in filing Title III disability access cases in the state of California?
- Where do you normally file between the State or Federal Courts? Why? What are the district challenges or opportunities between two court systems in filing these cases?

Questions to defense attorneys:

- What have been your most common interactions defending clients of Title III disability access cases or pre-litigation letters?
- What are the differences in defending cases in State and Federal Courts?

Questions to both defense and plaintiff attorneys:

- In 2009, SB 1608 defined the appropriate communications within a pre-litigation letter. Then, in 2013, SB 1186 required all pre-litigation letters to be sent to both the CCDA and the State Bar. The State Bar had the responsibility of reporting annually the number of letters they received and the number of letters received that investigated the potential violation of Civil Code section 55.31 or 55.32.
- What are your thoughts on the so few numbers of suspected violations reported by the Bar? Are you surprised?

Anthony Goldsmith, Derby, McGuinness, and Goldsmith, LLP, stated he was on the stakeholder committees for both SB 1608 and SB 1186. He stated the reason the State Bar is reporting so few violations with respect to the demand letter requirement is the requirement to submit pre-litigation letters to the State Bar unquestionably has had a chilling effect on using letters to try to solve cases. The driving issue was individuals being plastered with these money-demand letters. He stated individuals would literally drive by and put letters on windows or under doors. He stated his law firm has a number of cases that do not only involve access issues but cross over to personal injury. The requirement to submit pre-litigation letters to the State Bar has made it difficult to open the matter with a pre-litigation letter. He asked about others' experiences in this.

Peter Strojnik, Strojnik Law Firm, stated there is confusion among attorneys and the State Bar about the Manner of Resolution question on the CCDA's Case Resolution Reporting Form. The options to check are settlement, judgment, or dismissal. He stated there is a dismissal following any settlement. He asked if the CCDA would like attorneys to check both the "settlement" and "dismissal" boxes. He suggested a checkbox for "dismissal pursuant to settlement."

Mr. Strojnik asked for a definition for the date of settlement. Part of the requirement is that the attorney must report the resolution on the CCDA's online portal within five days. The date of settlement could be the date two lawyers agree on a settlement, the date an agreement was sent to the other attorney, the date the agreement was redlined, or the date the parties sign the agreement. He asked when the CCDA considers a case settled.

Chris Vaughan, Vaughan and Associates, stated, with regard to pre-litigation letters, the environment has changed. The primary pre-litigation letters currently seen have to do with website accessibility more than physical barriers. Also, there has been an increase in pre-litigation letters from out-of-state lawyers and/or out-of-state plaintiffs. This creates questions about how this impacts the litigation environment in California.

Mr. Vaughan stated, in terms of defending state and federal cases, there is a difference procedurally that sometimes is more complicated in state court due to having 58 counties with 58 approaches to implementing the provisions of the statute. Federal courts have their own efforts to resolve cases early. The overwhelming majority of judges will, upon application from a defendant, issue a stay and mandatory mediation conference to be completed within 90 days. He stated the short timeframe and the fact that active and substantive participation is expected at the mediation conference accomplishes much of the same results as the Northern District process under the General Order, although it does not require the site inspection that is required under the General Order. The resolution of those cases ends up being less total money paid by the defendant, which may be a reflection of the shortened time within which cases can be addressed and resolved.

Commissioner Leemhuis stated one of the things that continues to be an area of controversy in how these issues are discussed is there are some individuals who are using a name only to file multiple lawsuits who have never been to the site. Someone drives by the site and sees access violations on the outside of the building and therefore files a lawsuit. He asked who should file a lawsuit and if there is a problem with someone filing multiple lawsuits in a particular community where they may not have visited. He asked if attorneys should be private attorneys general and take it upon themselves to file lawsuits or if they should wait until a member of the public tries to enter that establishment.

Celia McGuinness, Derby, McGuinness, and Goldsmith, LLP, Mediator on the Northern District Panel, and former Commissioner, stated plaintiffs are private attorneys general. These laws are enforced not by a building department or a government entity but by the individuals who are either harmed or at risk of being harmed by the violations. Private attorneys general statutes are a time-honored and frequently-used method of ensuring compliance with the law without adding layers of government bureaucracy. Anyone who is a person with a disability or a person who is affiliated with a person with a disability who sees a violation should be able to raise it.

Ms. McGuinness stated there have been two legal questions. The first is the standing question of whether a person who has encountered a barrier or could encounter a barrier has the right to bring a lawsuit. That is a legal question that is decided in court. The Ninth Circuit has determined that a person who either encounters a barrier or is deterred because they are aware of a barrier has a right to bring a lawsuit. The reason for that broad standing is to ensure that the policy behind the ADA and state laws are honored. The purpose is to have full and equal access for people with disabilities; having a broad definition of who can bring a lawsuit fosters that policy. A second reason for that broad standing is that bringing a lawsuit because of deterrents also creates certain efficiencies in most cases. An individual lawsuit does not need to be brought every time a barrier is encountered.

Ms. McGuinness stated the second legal question, which is not implicated under federal law because there are no damages allowed under the ADA but under state law that does provide for damages, the Legislature determined that in order to qualify for damages, a person either has to have encountered a barrier and experienced difficulty, embarrassment, or discomfort as a result, or they have to be deterred from having gone to the facility because of their knowledge of a barrier. The framework is already there for a person to be precluded from getting damages if they do not meet those requirements. They still have a right to seek injunction, which furthers public policy, but there are limitations on who can get damages. Many people should be bringing these lawsuits because it is the only way that this law is enforced.

Commissioner Leemhuis stated this seems to be an area where there are cross-points. He asked if defense lawyers think there are cases that run afoul of what the statute says and, if so, what they are and how to contend with Ms. McGuinness's comments.

Mr. Vaughan stated the description given by Ms. McGuinness is accurate. There is no question that this is an important civil right and that the law is enforced by private lawsuits. The question is if there is an issue, when California is estimated to have between 12 and 18 percent of the disabled population in the United States and yet is rapidly approaching 50 percent of all ADA lawsuits filed nationwide.

Mr. Vaughan stated there is also no question that the courts in virtually all districts in California have essentially ruled that a plaintiff can sue as many properties as they wish if those properties have barriers to access. The question is, when a person lives 100 to 400 miles away and they sue up to 100 properties that far from their home, if they are genuinely there and discriminated against that number of times or if there is some other motive or agenda. The question is the application of the law. From a defense standpoint, the belief at some level is that the cases are motivated in certain circumstances by an economic motive rather than some other motive. It creates a question in the mind of the public that the motive is other than to acquire disability access.

Commissioner Leemhuis asked how to determine that the motivation is financial or if that determination is made simply because of proximity. He gave the example of traveling to San Francisco or Monterey once a year and finding barriers to access.

Mr. Vaughan stated there is a difference, objectively, from the scenario described. It requires a case-by-case analysis and the court is the arbiter of standing. An individual wanting to gain access for themselves or a family member is different from a plaintiff who goes to Monterey once a year and files 300 lawsuits for businesses within Monterey County. These are two different factual scenarios with two different impacts of the law that may need to be considered.

Mr. Cooknick asked why energy is not expended to learn what the object of the transaction is here. He stated it should be correcting the violation, not enriching someone through the Unruh Act. He asked why it must be considered an enrichment for the person who travels to Monterey and files multiple lawsuits. Business owners should be grateful for making them aware of the limitations of their establishments. He suggested pursuing these as an alternative and, if there is to be a settlement, that it goes into an escrow account to correct the violation.

Mr. Goldsmith stated these are violations of California civil rights, which have consequences. Civil rights laws were designed to use penalties as a means of prompting individuals proactively to do what is required as well as recognizing that there is a harm in fact to persons who encounter these barriers. The framework created through the legislative action of trying to limit damages to specific circumstances whether they are fair or foul in anyone's opinion is part and parcel of the state's recognition that there is a harm as well as a need for an incentive.

Mr. Cooknick stated he was discussing serial litigants. There are those who are out there to do good but there are also those out there to enrich themselves and who do

not care if the violation is corrected. The most reasonable thing after dissolving someone's civil rights violation is ensuring that the violation is corrected. He stated he has not heard much about how to do that.

Mr. Goldsmith stated General Order 56 is an ideal model for resolution of litigation and should be adopted at the state and local levels. He asked if Mr. Cooknick is questioning the concept of why there are damages in California, if that is equitable, and if it promotes access. The answer is definitely yes. He suggested asking how it could be after all these years and these laws, which are effective at promoting more access than in other states, that there are still situations where barriers can be found everywhere in parking lots and exterior routes that could have been competently corrected by any licensed contractor. The question is not why there is more litigation in California than in other states; the question is why the state has not created enough of an incentive to eliminate patent barriers. He asked what the state of California can do to encourage greater proactivity on the part of individuals who own commercial property where there are public accommodations and the operators of those public accommodations to come into compliance.

Commissioner Leemhuis stated the CCDA receives primarily state complaints. One of the things the CCDA is trying to understand is why there seems to be a trend to file in federal court versus state court, what is wrong with the state court system, given that the damages come with the state law, and why it appears that more claims are being filed in federal court than state court.

Ms. McGuinness stated her firm mostly files in federal court because most of their practice is in the Northern District and General Order 56 is an efficient and effective system, the judges pay close and fair attention to the issues in these cases, and her firm prefers to practice in federal court. It is possible that the procedures that have been implemented over the past five years with the early evaluations are having some sort of impact and causing individuals to switch from state court to federal court. The prerequisite for getting an early evaluation in state court is to have done a CASp report but most businesses have not taken advantage of that. She stated it is not the Legislature's procedures that are having an impact on why people file in federal versus state court. It could be that state courts are more impacted and that justice is faster in federal courts.

Dennis Price, Potter Handy, LLP, stated his firm files the most cases in this area of law in the state of California. He stated his firm prefers federal court for many reasons but those reasons are irrelevant to the new procedures that have been put in place. As a practical matter, having a patchwork set of rules for counties with electronic filing for some counties but not for others creates huge impediments to keeping track of cases. The federal court system is much better than anything that exists in the state of California.

Mr. Price stated the underfunded state court system takes years to get a case to trial. It sometimes takes a year to get a Motion to Dismiss heard in Los Angeles County. Justice

delayed is justice denied in the state courts. The federal courts have better continuity of rulings, which is better for justice. Appellate practice is substantially easier in the federal courts. The Department of Justice, as a matter of policy, does not get involved in state court appeals. Even when filing in state court, 50 to 60 percent of the time, the case will be removed to federal court anyway. The state court system is inferior to the federal court system from every point of view.

Commissioner Leemhuis asked for the approximate number of these cases that Potter Handy files annually.

Mr. Price stated approximately 2,200 to 2,500 cases per year.

Commissioner Leemhuis asked why the CCDA and the State Bar are not receiving the required copies of the demand letters and complaints when cases are filed in federal court.

Mr. Price stated his firm does not send demand letters. The procedure that has been put in place actively discourages it. It creates burdens on clients. A Supreme Court decision in the early 2000s actively discourages law firms from getting remediation done prior to litigation. There are a number of reasons why a demand letter would not be brought in these cases. He stated his firm complies with the rest of the procedures – they notify when cases are open and when they are closed. Sending demand letters opens law firms up to being accused of extortion.

Commissioner Leemhuis stated he was hearing in today's discussion that, for those who are using demand letters the correct way as a remediation, law firms are finding this requirement of a demand letter onerous and are instead choosing to simply file the lawsuit so there will not be a pre-litigation opportunity to resolve the issues because of the perception that it is all about extortion. Individuals who are not just asking for money but are trying to get the access issue resolved are now forced to just file the lawsuit. He asked if this is a fair statement.

Mr. Price agreed. The rules that were put into effect are good and well-motivated. In California, there used to be attorneys who were doing unscrupulous things under the protection of the ADA and the Unruh Act. It motivated the reduced penalties that went in under Civil Code section 55.56 that went into this high-frequency litigant designation. He stated Potter Handy is one of the two unnamed firms that bring a high percentage of the cases that are named in the preamble of that statute. The high-frequency litigant designation was intended to discourage vexatious litigation. That was premised on the fact that there were these two firms that were filing all these cases. This is not true. The vast majority of these cases are based on well-founded violations of state and federal law. For anyone trying to enforce those statutes rather than simply get dollars out of them, these procedures have put up hurdles that make the cases more expensive. Unfortunately, some judges have erected even more barriers. He gave the example of a procedure created in the Central District of a *sua sponte* dismissal of any state claim being filed in federal court. Instead of reducing the number of cases that

are filed, now, very often, there ends up being two cases for every one that is filed in the Central District – the ADA case in the federal court and a parallel state case that gets filed after that. He suggested considering changes to the second and third order effects because these procedures are not helping the situation and are hurting legitimate lawsuits.

Commissioner Leemhuis asked the rhetorical question of whether the lack of a pre-litigation process furthers the perception that the only cure for this is litigation.

Ms. McGuinness agreed with Mr. Price's comments and added that it is not just that it is technically or procedurally difficult to file a demand letter, attorneys actually have to report themselves to the State Bar and are literally risking their Bar Card and their livelihood when they send one of these demand letters. She stated her firm has not sent a demand letter for construction-related access cases since the new law went into effect. This is because the risk is so high, the statute is not well-written, the statute has not been interpreted, and no one wants to be the first one to find out how to do it wrong.

Mr. Vaughan stated the changes made by the Legislature have not had any real effect on reducing the number of cases being brought and has not been effective in addressing those issues. This is an important civil right. The concept of damages being an incentive to compliance has not worked. There is a genuine lack of information on the part of defendants, especially small defendants. It is a matter of the lack of information and the lack of comprehension of what it really means. A piece that is missing is that there is no agency assigned to enforce or educate about this. Although this agency would not necessarily encourage compliance, it would be a step in the right direction.

Commissioner Leemhuis stated the Commission is planning a follow-up discussion on the CCDA online portal and invited everyone to participate. He suggested putting together a Committee with the members of the roundtable to make recommendations to the Legislature on models that may work better in the state for everyone involved.

Mr. Vaughan stated there already is a system is place. It simply does not work well to resolve cases early in the state court system with 58 different versions in the 58 counties in California.

Commissioner Leemhuis asked the members of the roundtable if it would be helpful to have uniformity on models that work better in the state for getting through these cases.

Mr. Goldsmith stated it would be helpful. He stated his firm has consistently advocated for the adoption of General Order 56 as a universal process. It focuses on access and is effective, functional, and efficient. He suggested three pieces of legislative activity:

- Shift some of the burden from micro-businesses to commercial landlords under the theory that a commercial landlord putting a piece of property into commerce is in a substantially better place to understand that there are laws and

regulations that impact the ownership and leasing of commercial property and, more often than not, are in a superior financial position.

  - The greater protection and the burden shifting to commercial landlords and away from true mom-and-pop stores would not only create greater compliance, but would eliminate much of the hostility between two parties who should be naturally aligned – customers with disabilities and small business owners who would like to sell them goods and services.

- Parking lots need to be regularly redone – resurfacing, restriping, flat work, and path of travel. Require certification from the contractor at each of those times through a small form with checkboxes on ADA issues to help with compliance.
- Enhanced tax credits for barrier removal would be a great incentive and would be supported by the business and disability communities.

Mr. Goldsmith stated these ideas would improve compliance without diminishing civil rights and would get more information out to both micro-business tenants and commercial landlords. Additional discussion on these ideas and re-presenting some of them to the Legislature would be beneficial. He stated his firm would love to participate in that.

Mr. Price stated he would also like to participate in these processes but cautioned against more unfunded mandates and procedures in the courts. These will not help but will make it worse. Things like General Order 56 are good but they are only good when there is a system in place to implement it.

Mr. Price challenged the premise of what is being done here. Eliminating frivolous lawsuits is an admirable goal but reducing lawsuits in and of itself is not. These lawsuits are being brought because it is a First Amendment protected activity to have grievances heard in court. State and federal rights are being violated. The only way to reduce lawsuits is to reduce the violations. Mr. Goldsmith's ideas that he proposed are good and there are many other ideas out there. That narrative needs to be shifted to how to make California more accessible not less litigious. The litigiousness is good.

Commissioner Leemhuis asked Chief Magistrate Judge Spero to share his closing comments.

Chief Magistrate Judge Spero thanked everyone for their input. He stated all points of view expressed today have some legitimacy and it is great that everyone is collaborating to come up with ideas that can get to both the underlying problem with regard to access and the consequences that may flow from that underlying problem, which is the use of resources in litigation. He stated he appreciated everyone's hard work.

Chair Downey thanked the members of the roundtable for their participation and helpful discussion.

Commissioner ElHessen stated today's discussion brought to light more of what the Education and Outreach Committee needs to focus on in terms of compliance issues for small businesses and for local and state governments. She stated she looked forward to coordinating a cohort to address some of these issues in education and outreach to stakeholders.

Commissioner Dillard agreed. He thanked the panel for their enlightening discussion.

Commissioner Leon-Vazquez stated she is a small business owner. She agreed that today's discussion was enlightening. She agreed with focusing on education and stated educating small business owners will reduce the number of lawsuits. The end goal is to provide access to the disability community. This should be the bottom line.

Commissioner Holloway stated today's discussion was helpful. He stated he looked forward to pursuing this work.

Public Comment

Remi Tan, Principal Architect, Z&L Properties, San Francisco, stated many of these lawsuits are filed against small businesses, some of which have been there for years without a change of use. This change of use in a commercial space, such as a significant renovation, is what triggers when ADA compliance measures are put in place. These lawsuits force these businesses into an uncomfortable situation so that they may have to close their shop because they cannot afford to make the necessary changes. The speaker stated the need for a grant program that businesses can apply for to bring the businesses into compliance so they will not be forced to go out of business.

Commissioner Leemhuis stated there are tax incentives and the proof of undue burden to help businesses. He suggested having a symposium on true mom-and-pop businesses and what really goes on with the ADA.

Will Rehling, Accessible San Francisco, stated one thing that California excels at relative to any other state is the robust availability of administrative adjudication of disputes. There is a huge core of administrative law judges used by many agencies. He suggested researching if there is a way to provide administrative adjudication of ADA cases for low-cost resolutions.

Will Rehling encouraged the Commission to continue to invigorate and expand the CASp program. The speaker stated concern that the number of CASps has leveled off. Many CASps are jurisdictional and work for cities and counties and do not provide CASp reports for private businesses. The speaker stated they continue to hear of CASps who tell their clients not to get a CASp report but that they will write their clients a letter stating their position. This needs to be addressed.

Will Rehling stated there are still many business owners who are unaware of their obligations. The speaker suggested a tax credit for getting a CASp report as a way to address this.

Will Rehling stated, since the California Building Code has come in close alignment with the ADA, one of the potential administrative avenues for better accessibility compliance could be reinvigorating local enforcement of Building Code accessibility compliance. The speaker asked about the number of businesses that have not done an alteration or construction since 1982 when the first accessibility standards were implemented. The speaker stated they would like to speak with staff offline to further discuss some of these issues.

Action Items

- No action items.

10. Future Agenda Items

Commissioner Paravagna stated there has been a significant staff turnover during the past year. He asked for a staff member to introduce themselves at each meeting as a good team-building exercise.

Commissioner ElHessen asked to develop a cohort in regards to follow-up on today's discussion on the expansion of education and outreach to stakeholders specially in relation to compliance.

11. Adjourn

Motion: Commissioner ElHessen moved to adjourn the April 28, 2021, California Commission on Disability Access Full Commission meeting. Commissioner Jackson seconded. Motion carried unanimously.

There being no further business, Chair Downey adjourned the meeting at 2:49 p.m.