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Legal News for Clients is published periodically by Litchford & Christopher Professional Association. It contains summaries of court decisions and other materials in an effort to keep you abreast of recent developments in areas of the law in which the firm represents clients. Each edition, however, does not necessarily cover cases and information relevant to all of the firm's practice areas. The substantive areas covered in each edition are selected by the firm's lawyers at their discretion based on their views of the significance of the cases and the other information available at the time of publication. The material covered in *Legal News for Clients* is condensed and is not intended to provide legal advice. While the information set forth in each article is accurate, every situation presents unique factual and legal considerations. Accordingly, we encourage you to consult an attorney for proper legal advice before taking any action based on the information summarized in *Legal News for Clients*. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. You may write to us at the address listed above, call us at (407) 422-6600, fax us at (407) 841-0325, or contact us through our website at www.litchris.com.

In This Edition . . .

- U.S. District Court Reins ADA Plaintiffs
- Your Word Is As Good As Your Bond
- Witnesses Can Be Asked To Create Exhibits During Depositions
- If You Sign, You're Liable
- Welcome Christine Ho

Hal K. Litchford * Donald E. Christopher * David G. Lerner * Alan B. Taylor * G. Steven Fender
Scott K. Lippman (1964-2004) * Richard C. Swank * Paul E. DeHart * Jason W. Hill * Christine M. Ho

Antitrust and Unfair Competition
Financial Fraud
Business Torts
Real Property Transactions
Corporate Control Disputes
Civil Litigation

Agreements Not To Compete
Patent, Trademark, Copyright Infringement
Employment Discrimination
Real Property Disputes
Motor Vehicle Dealership Relations
Commercial Litigation

Trade Secrets
Contract Disputes
Public Accommodations
Corporate Transactions
Partnership Disputes
Class Actions

COURT REJECTS PLAINTIFFS' REQUEST TO CONDUCT A FULL ADA AUDIT OF DEFENDANT'S PREMISES

Title III of the Americans with Disabilities Act provides in part as follows: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” In a private action under Title III, a successful plaintiff may only obtain injunctive relief and attorney’s fees; money damages are not available. Discrimination prohibited by the Act includes the “failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable.” Where removal of the barriers is not readily achievable, a defendant may be liable if it fails to make those goods, services, and facilities available through alternative methods if such methods are readily achievable. The term “readily achievable” is defined in the statute to mean “easily accomplishable and able to be carried out without much difficulty or expense.”

Included within the regulations promulgated to implement Title III are accessibility guidelines that provide the minimum technical requirements for compliance with the Act for new construction or alterations to existing facilities. These guidelines are known as the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, or “ADAAG” for short. The Act imposes a less rigorous standard of compliance on “existing facilities,” which are those constructed for first occupancy before January 26, 1993, as compared with those “new facilities” constructed for first occupancy after that date. Regarding existing facilities, the compromise that Title III of the Act makes is to require only reasonable modifications and readily achievable barrier removals or alternate methods. What this means, then, is that Title III only requires existing places of public accommodation to take remedial measures that are effective, practical, and fiscally manageable.

In recent years, a number of not-for-profit organizations promoting the rights of the disabled and their individual members have filed hundreds and hundreds of lawsuits against property owners for declaratory and injunctive relief and attorney’s fees under Title III of the ADA. Typically, the complaints set forth myriad alleged barriers to access regardless of the nature of the disability of the named individual plaintiff. In other words, if a named individual plaintiff has only a hearing-related disability, the complaint may also center its causes of action on mobility- or other non-hearing-related barriers. Based upon these broad allegations, the plaintiffs seek in discovery to conduct an inspection of all aspects of an establishment and not just those that may specifically pertain to the case at hand.

In Macort and Access Now, Inc. v. Goodwill Industries-Manasota, Inc., the U.S. District Court for the Middle District of Florida prohibited the plaintiffs from conducting an all-out ADA audit during discovery. In this case, the plaintiffs filed a complaint against Goodwill listing nineteen “non-exclusive” specific barriers to access. After the complaint was filed, the District Judge ordered the parties to retain the necessary expert opinions to address promptly and efficiently the issue of Goodwill’s compliance with the ADA and to move the case toward settlement. Goodwill reviewed the complaint, remedied the specific issues that were raised, and requested the plaintiffs to dismiss the case. Goodwill’s position was that by remedying all

barriers to access listed in the complaint, the plaintiffs no longer had standing to bring a claim, and the complaint was moot.

The plaintiffs countered by serving the defendant with a request to inspect the premises and photograph its areas of public accommodation to document all of the barriers to access that existed. The plaintiffs took the position that they were entitled to conduct a complete audit and unlimited inspection of the property to determine full ADA compliance, including looking for any barriers not related to plaintiff Macort's mobility-related disability. They also argued specifically that they were entitled to inspect for barriers to access that Macort did not encounter. Goodwill sought to limit the inspection to the specific barriers listed in the plaintiffs' complaint so they could determine if the alleged architectural barriers had been remedied as the defendant claimed.

The court found that plaintiff Macort, who has only a mobility restriction, was clearly prohibited from complaining about all types of ADA violations on behalf of all disabled individuals. The court also determined that plaintiffs were not entitled to conduct an inspection to determine whether there were mobility-related barriers on Goodwill's property other than those Macort specifically encountered and specified in the complaint. In this regard, the plaintiffs argued that they were not required to have previously encountered these additional barriers because they need not have engaged in the futile gesture of visiting a building containing known barriers that the owner had no intention of remedying. The court rejected the "futile gesture" argument. In doing so, the District Judge noted that there was no indication that the defendant intended to violate the ADA, and in fact the defendant stated on the record it remedied all of the barriers to access that were specifically listed in the complaint.

For all of these reasons, the court held that plaintiffs' discovery request was overbroad and burdensome. It allowed plaintiffs to conduct an inspection, but the inspection was limited to the nineteen specific barriers to access they alleged in their complaint for the purpose of verifying the defendant's assertions that it had eliminated those specific barriers.

COURT REFUSES TO CONSIDER AN ERRATA SHEET THAT ALTERS THE SUBSTANCE OF DEPOSITION TESTIMONY

More often than not, interrogatories are answered with the benefit of substantial input and editing by the lawyers for the party on whom they are served. Depending on the caliber and craftiness of the lawyers framing the answers, the usefulness of interrogatory discovery varies. Even so, interrogatories that seek information that is not subject to manipulation, such as names, addresses, dates, locations, and the like, remain important and efficient discovery tools.

Unlike interrogatories, questions propounded in a deposition upon oral examination can only be answered by the witness. There are very limited instances in which the witness' lawyer can instruct her to refuse to answer a deposition question. The pressure of the deposition setting and the contemporaneous nature of the answers often yield extraordinarily valuable information for a case.

The pertinent federal and state rules of civil procedure provide a deponent with an opportunity to review the transcript of her deposition, if she wishes, and make certain changes on what is known as an errata sheet. The federal and state rules specifically provide that the witness may make changes in “form or substance” to the transcript and state the reasons for the changes. As a practical matter, errata sheets are used to note and correct typographical errors in the transcription of the testimony. Every once in a while, they are used to try and alter the substance and import of the previous testimony. Notwithstanding the rules that seem to allow such changes to be made, the courts and opposing parties will not let the witness get away with doing so.

This issue was recently addressed by the U.S. District Court for the Middle District of Florida in the case styled Reynolds v. International Business Machines Corporation. There, Edwin Reynolds interviewed for and obtained a position with IBM as a contracts negotiation executive in May 1999. He worked on various projects. His supervisors gave him only average reviews. At the end of February 2001, he sent an e-mail to one of his supervisors seeking information on the proper procedure for requesting medical leave for some contemplated knee surgery. Around one week later on March 6, 2001, his supervisors met with him to discuss his performance. Before the meeting, IBM decided that he was going to be placed on a Performance Improvement Plan. In the meeting, Reynolds was given information on where his skills were lacking and the areas in which he needed to improve. He also was given the option of resigning with an enhanced severance package or going on the PIP to save his job. He decided to participate in the PIP. During the PIP period, Reynolds still did not perform satisfactorily, and at the end of this ninety-day period his employment with IBM was terminated.

In October 2002, Reynolds sued IBM alleging his termination from his employment was discriminatory in violation of the Age Discrimination in Employment Act, the Americans with Disabilities Act, ERISA, and the Florida Civil Rights Act. IBM moved for summary judgment.

The crux of Reynolds’ claim was that he was placed on the PIP shortly after he sent the February 2001 e-mail asking for information about medical leave. The inference he wanted to draw from the timing of these events was that IBM did not decide to convene the subsequent March 2001 meeting where he was placed on the PIP until after – and in response to – his February e-mail. At his deposition, Reynolds testified that his supervisor called him two or three weeks before the March 6 meeting to schedule it with him. This deposition testimony was consistent with the supervisor’s deposition testimony that she had already set up the March 6 meeting by the time she received the February e-mail. Within a month after his deposition was taken though, Reynolds filled out an errata sheet in which he changed the “two or three weeks” testimony from his deposition to “a little before the meeting.” He also wrote that he could not recall if his supervisor contacted him “a week or a few days” before the March 6 meeting.

The court noted that the Eleventh Circuit had not addressed this particular issue but other federal circuit courts of appeals had dealt with situations where a deponent filed an errata sheet that materially changed the substance of the original deposition testimony. It reviewed those various decisions and found persuasive their analyses of the issue – in particular, their analogizing the situation to the rule that an affidavit may not be used to contradict a witness’ prior sworn statement. With specific reference to the applicable rule of civil procedure, one of these courts reasoned that the rule could not be interpreted to allow a witness to alter what was

said under oath because doing so would allow a witness to give no thought at all to her answers and then later craft artful responses to be included on an errata sheet. That court specifically noted that “[d]epositions are different from interrogatories in that regard. A deposition is not a take home examination.” One of the other courts to which the Middle District looked concluded that a change in the substance of deposition testimony, which contradicts the transcript, is impermissible unless the change can plausibly be represented as the correction of a transcription error. The specific example it gave was the accidental dropping by the court reporter of the word “not” in an answer.

In this case, Reynolds did not argue that the portion of his deposition he sought to change was the result of erroneous transcription; instead, he contended he confused the March 6, 2001 meeting with an earlier meeting he had in January 2001. Other portions of his deposition testimony in which he answered direct questions about the substance of the various meetings, however, made it clear that he was not confused about the timing of the March 6 meeting or the sequence of events. The court concluded, therefore, that taken as a whole his deposition answers did not reflect any obvious confusion that would justify material alterations to the original testimony by using the errata sheet. Therefore, the court disregarded the errata sheet testimony in its entirety. As a result, Reynolds’ original deposition testimony that he knew about the March 6 meeting two or three weeks before he sent the February e-mail undermined any causal relationship between his sending the e-mail and his being placed on the PIP. Accordingly, he failed to establish a prima facie case because he could not show he was placed on the PIP under circumstances giving rise to an inference of discrimination. For these and other reasons, summary judgment on each and every claim was granted for IBM, and the case was closed.

DEFENDANT’S COUNSEL IS SANCTIONED FOR INSTRUCTING A DEPONENT TO REFUSE TO WRITE AN EXEMPLAR DURING DEPOSITION

Depositions upon oral examination are intended to elicit oral testimony in response to oral questioning by the examiner. Occasionally, a deponent will be asked to sketch a scene, write a list of names, put a mark on a previously produced document, or create some other sort of handwritten exhibit during the deposition. In any of these situations, does the deponent’s counsel have the right to instruct the witness to refuse to comply with the examiner’s request?

The answer, generally, is “no” according to Magistrate Judge Brown of the U.S. District Court for the Southern District of Florida. In Dalmau v. Viacao Aera Rio-Grandense, a representative of the defendant was being deposed when plaintiff’s counsel asked him to write an exemplar. Defense counsel objected and instructed the witness to refuse to do so. Plaintiff filed a motion to compel and for sanctions, contending that the instruction was improper. In response, defense counsel argued that the purpose of a deposition is to take oral testimony, and the rules covering the means of recording the examination do not suggest that handwritten exhibits created during the deposition can properly be recorded by the stenographer within the meaning of the rule. The lawyer for the defendant summed up his position by declaring that depositions cannot be used to instruct witnesses to take written dictation.

The court rejected each of these arguments. It began its analysis by noting that an attorney representing a deponent has no right to instruct the deponent to refuse to do something during a deposition unless that “something” is privileged, in violation of a limitation on evidence directed by the court, or counsel intends to terminate the deposition to present a motion for protective order because the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent. In this case, the defendant did not present a motion for protective order, the request by plaintiff’s counsel did not invade a privilege, and it did not violate a limitation on the evidence. The court then construed the rule providing for depositions on oral examinations to mean that the questioning must be oral but the answers do not necessarily also have to be oral. Finally, the court noted that exhibits are routinely used during depositions, and court reporters mark and identify deposition exhibits every day. Here, the written exemplar would also have been marked and identified by the reporter, and it was of no consequence that the exhibit would have been a handwritten one created during the deposition.

Therefore, in what he believed was a question of first impression in the Eleventh Circuit, the Magistrate Judge granted the plaintiff’s motion to compel and ordered the witness to be re-produced for deposition. He also granted the plaintiff’s motion for sanctions and ordered defense counsel (not the defendant itself) to pay the reasonable costs, including attorney’s fees, incurred by the plaintiff as a result of the filing of the motion to compel and the continuation of the deposition.

ADDING A CORPORATE TITLE TO A SIGNATURE ON A PERSONAL GUARANTEE DOES NOT PROTECT AGAINST INDIVIDUAL LIABILITY

Brave Coast, Inc. obtained a credit application from Great Lakes Products, Inc. so that Brave Coast could purchase seafood from Great Lakes. Brave Coast’s president signed the application. Under his signature, the word “president” was typed in a blank following the word “title.” Immediately underneath the signature line, the credit application stated, in preprinted type, “I personally guarantee payment on this account and agree to the terms of this credit application which is incorporated into this guarantee.”

Great Lakes made several deliveries of seafood to Brave Coast and sent it several invoices. Brave Coast wrote several checks in partial payment of the account, but the checks were dishonored. Great Lakes sued to collect the sums it was owed. One count of the complaint was against the president of Brave Coast, individually, based on his alleged personal guarantee.

In Great Lakes Products, Inc. v. Wojciechowski, Great Lakes moved for summary judgment on all counts. The trial court granted summary judgment against Brave Coast but denied the motion as to its president in his individual capacity. The president subsequently filed a motion for summary judgment on the issue of his personal liability, and that motion was granted. Great Lakes appealed.

Florida's Third District Court of Appeal reversed. It framed the issue as whether the president's signature on the credit application gave Great Lakes the right to proceed against him individually based on the guarantee language in the application. The president argued that by signing the credit application only in his capacity as an officer of Brave Coast, as reflected by the insertion of his corporate title underneath his signature, and not individually (which would have been reflected by his not including his title on the signature block), then he could not be personally liable for the company's account. The appellate court disagreed. While it is generally correct that signing a document in a representative capacity only does not give rise to personal liability, such is not the case when it comes to guarantees. The court held that as a matter of law, an individual who executes a guarantee as an officer of a corporation by inserting his corporate title after his signature on a document cannot defeat the purpose of the personal guarantee when, by its express terms, the document contains provisions for individual liability.

WELCOME CHRISTINE HO

In our last edition of *Legal News for Clients*, we introduced you to new associate Jason Hill. It is our pleasure now also to introduce you to our other new associate, Christine M. Ho. Christine graduated from the William and Mary School of Law in May, where she was a member of the William and Mary Law Review and an officer of the Asian Law Student Association. Christine received her Bachelor of Arts degree in government, *cum laude*, from the College of William and Mary. Christine was a member of several honor societies during her undergraduate career.

We are thrilled to have Christine on our team and know you will appreciate her hard work on your legal matters.