

From: **Rep. Norm Thurston** <normthurston64@gmail.com>
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Subject: Comments on ADA lawsuits
To: Jacey Skinner <j Skinner@utcourts.gov>
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Jacey,

I thought it would be helpful to send my thoughts in preparation for the committee meeting. I hope this is helpful to understand from the legislative perspective some of the issues.

My original intent in bringing this legislation was to address bad behavior by a few attorneys and their clients who are attempting to exploit provisions of the ADA to pad their revenues. As you know, in the legislative process questions were raised about separation of powers and preemption that may limit our ability to address this problem through legislation. The following describes elements of a "business model" that is concerning to me as a policy maker and that I hope can be addressed.

Some attorneys are creating for themselves a business opportunity to pursue revenue from the business community. The first step is to recruit potential plaintiffs on craigslist.com or social media. The recruits are promised compensation for every ADA violation that they identify. They are instructed or encouraged to look for ADA violations wherever they can find them, including businesses that they have never patronized and do not intend to patronize.

Once a violation is identified, the attorneys send the business owner a demand letter, typically requesting three things - 1) remedy the specific violations, 2) sign a non-disclosure agreement, and 3) pay the attorney a settlement amount. In exchange, the attorney promises to not pursue the matter in federal court.

I believe that the attorneys are exploiting to their financial advantage the lack of information available to the business owner in the following ways:

1. Most businesses are not familiar with the enforcement provisions of the ADA law, especially the resources required to respond to a complaint in federal court. The attorneys in question point out that settling the case in advance will be easier and probably cheaper than finding and retaining an attorney as an encouragement to agree to the settlement.
2. Under the ADA, in most cases, if the case proceeds to federal court and the plaintiff is successful, the only remedy is for the attorneys to recover legal expenses. Plaintiffs are not entitled to damages or compensation. However, settlements have no restrictions or limitations, and do not have to be based on actual costs or attorney fees. By settling, attorneys can collect more than the cost of their time as well as provide compensation to the plaintiffs, which helps to justify and perpetuate the business model. This arguably allows the attorney to obtain unjust compensation in excess of actual and reasonable attorney fees.
3. Businesses typically do not know and are not informed that the non-disclosure and settlements are not required by the ADA. Under the ADA, they are only required to fix the violations and may be required to pay attorney fees if court action is taken.
4. Attorneys in some cases are filing complaints in federal court before the demand letter is provided. While this is allowed by the ADA, it is arguably being abused for the purpose of providing additional leverage to encourage settlement.

I have also heard of other questionable actions taken by attorneys through demand letters to encourage settlement that seem to be designed solely to generate revenue. As a matter of policy, I find that this type of behavior by attorneys is not ethical. Specific behaviors and elements that should be prohibited as unethical with regard to ADA claims include:

1. Attorneys should not actively recruit potential plaintiffs and encourage them to identify violations at businesses that they have never and do not intend to patronize and especially should not promise to pay them a "finders fee" for each violation that they identify.
2. Attorneys should not file ADA complaints in federal court before allowing the business owner an opportunity to correct the issues. (While lawful, this seems highly unethical as an abuse of process.) Court filings should be limited to cases where the business owner refuses to come into compliance with the ADA.
3. Demand letters should provide sufficient detail to allow a business to know how to fix the ADA violation.
4. Demand letters should not:
 - a. assert violations that the attorney or plaintiff knows have been previously held not to be violations in the courts,
 - b. assert violations of the ADA when the attorney or plaintiff knows that the assertion is not an actual violation,
 - c. assert or threaten that the required settlement amount will increase if the business retains or consults an attorney,
 - d. specify an unreasonably short period of time to settle, submit payment, or to remedy the violations given the number and

complexity of alleged violations,

e. assert that a complaint has been filed in federal court, when no complaint has been filed, or

f. include any other type of false or misleading statement, especially those designed to encourage settlement.