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Collaborative Law Practice: How it Can Be Used in Resolving Automobile Dealership Disputes

*By M. Christina Floyd, Hampton Roads General Counsel, PLLC**

A. Collaborative Law Basics

The practice of collaborative law owes its foundation to Minnesota family law practitioner Stuart Webb. After becoming disillusioned with adversarial litigation, he sought to develop a form of legal practice where lawyers could assist their clients in resolving disputes without intensifying their conflict.[1] Mr. Webb's goal has been well realized over the past twenty years, as collaborative law is now practiced in at least thirty-five states as well as internationally.[2] In addition, the Uniform Collaborative Law Act ("UCLA")[3] has been promulgated, leading a number of states to adopt collaborative law statutes.[4] In 2007, the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility issued an ethics opinion approving the collaborative law process.[5] Accordingly, collaborative law has become an accepted form of alternate dispute resolution ("ADR").

Collaborative law practice is basically a contractual negotiation process in which the parties and their lawyers agree through execution of a Participation Agreement to use problem-solving techniques to build agreements tailored to meet the parties' fundamental needs.[6] A central premise of the process is that participants can have the "best of both worlds," by combining win-win problem solving with the protection of representation by legal counsel.[7] The parties and their lawyers typically engage in confidential "four-way" meetings (meetings attended by both lawyers and both clients) that may also include neutral expert advisors, such as financial professionals.[8] Under the Participation Agreement, the parties agree to be transparent in their interactions, including communicating openly and sharing information without use of formal discovery techniques, in order to enhance and expedite the dispute resolution process.[9]

In essence, the collaborative law process requires the parties to have a basic level of trust and willingness to participate in good faith. Renowned Collaborative Law commentator Pauline H. Tesler illustrates this when she describes "transparency" as a key collaborative concept:

> It includes the following: honesty and candor about what one is doing and why one is doing it (both lawyers and clients); conduct of information exchange and negotiations in four-way meetings attended by both clients and both lawyers so that all important conversations are six-way communications experienced directly by each participant; candor about goals, priorities, and reasoning; and accountability and acceptance

* This article is meant to bring awareness to this topic and is not intended to be used as legal advice.

> of responsibility. When transparency is present, there are no hidden agendas or hidden balls; there is no secret tactical maneuvering; there are no triangulated attempts to blame absent persons for faults never disclosed to them; there is no taking advantage of misunderstandings or errors.[10]

Accordingly, the parties and lawyers must enter the process with some belief that the other participants intend to act with honesty and integrity.

The collaborative law process is distinguished from other ADR processes by the requirement of a disqualification provision in the Participation Agreement. This entails an agreement among the participants that the collaborative attorneys will withdraw and be replaced by litigation counsel if either party seeks court intervention before the case is resolved through collaboration.[11] The process is described in the Prefatory Note to the UCLA as follows:

> Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law, as compared to other forms of alternative dispute resolution such as mediation, is that parties are represented by lawyers ("collaborative lawyers") during negotiation. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement ("disqualification requirement"). Parties thus retain collaborative lawyers for the limited purpose of acting as advocates and counselors during the negotiation process.[12]

The disqualification agreement promotes the parties' commitment to settle, as they will incur additional expense and delay if either seeks court involvement, which triggers the required withdrawal of the collaborative lawyers and the engagement of new litigation counsel. Disqualification also creates an incentive for lawyers to focus on settlement rather than adversarial court processes, so as to avoid the financial consequence of disqualification.[13]

The UCLA emphasizes the collaborative lawyer's duty to seek informed consent from the parties before entering into a collaborative participation agreement. Under section 14 of the UCLA, collaborative lawyers are required to take steps to ensure that a decision to participate is informed and voluntary.[14] Because collaborative law is a limited form of representation, under Rule 1.2 of the ABA Model Rules of Professional Conduct, the limitation of the scope of representation must be a reasonable one under the circumstances, and the client must give informed consent.[15] Section 14(1) of the UCLA requires collaborative lawyers to "assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter."[16] The prospective party must be provided with "information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives."[17] The lawyer must also advise the prospective party that the collaborative process will terminate if court intervention is sought, that it is a voluntary process and either party can terminate the collaborative process without cause, and that barring certain exceptions (such as emergency orders), the lawyer may not represent a party in front of a tribunal concerning matters related to the collaborative matter.[18]

B. Advantages of the Collaborative Process in Resolving Disputes

In theory, any matter that can be litigated is capable of resolution through Collaborative Law. Legal disputes in the areas of business, commercial, construction, contracts, corporations, environmental, franchise, insurance, intellectual property, employment relations, mergers and acquisitions, personal injury, real property transactions, antitrust, and torts, are prime examples of matters that can be resolved using the collaborative process. Advantages of using the collaborative process include:

- **Lower Cost** - collaborative practice is generally less costly and time-consuming than litigation.
- **Client Involvement** - the client is a vital part of the settlement team (consisting of both parties and both attorneys), hence clients have a greater sense of involvement in the decision-making which affects their lives.
- **Interdisciplinary Team Supportive Approach** - experts are not aligned with a party, therefore each client is supported in a manner that allows the attorneys and all other professional members of the team to work cooperatively with one another in resolving issues.
- **Less Stress** - the process is much less fear and anxiety provoking than traditional court proceedings or the threat of such proceedings. Everyone can focus on settlement without the imminent threat of "going to court."
- **Win-Win Climate** - collaborative practice creates a positive climate and an opportunity exists for participants to work within that climate to facilitates "win-win" settlements and maintenance of a positive relationship between the parties.
- **Speed** - collaborative practice can be much less time-consuming than cases which get bogged down by lengthy discovery, hearings and court calendars.

- **Creativity** - collaborative practice encourages creative solutions in resolving issues.
- **Clients in Charge** - the non-adversarial nature of collaborative practice shifts decision-making into the hands of the clients where it belongs, rather than into the hands of a third party, such as the judge.

C. How and when does the Collaborative Process Work?

After the parties decide to engage in the collaborative process, there are typically several basic stages:

- The participants, including the lawyers, sign the Participation Agreement, which sets the ground rules and expectations of all participants, defines and limits the engagement of the lawyers; and explains the expectations about confidentiality, voluntary disclosure and "opting out" of the adversarial court system while in the collaborative process;
- The participants engage in four-way meetings designed to develop an understanding of each party's interests, concerns and goals, and the lawyers assist the parties to address immediate concerns;
- The participants work together and individually to gather and disclose necessary information;
- Through additional meetings the participants brainstorm possible solutions and select mutually acceptable solutions.

While each case is unique and may involve additional activities, these stages form the core of the collaborative process. In addition, the role of the lawyer in the collaborative process is essential to its success and usually includes the following:

- Counseling the client on the law and practical consequences;
- Use of interest-based negotiation skills;
- Working with the other collaborative lawyer as a team member with shared responsibility for the process and outcome;
- Helping the client articulate interests and reach agreements that meet their needs;
- Representing the client's interests while validating other participants' interests;
- Acting as an agent of common sense and reality;
- Requiring full disclosure by both clients;
- Refraining from using adversarial techniques; and,
- Preparing legal documents and the settlement agreement.

The collaborative process may not be ideal for resolving all disputes, such as when the parties are entrenched in their positions and adamant about "winning". Instead, the collaborative process works best:

- When the clients want control over outcome and are willing to participate;
- When a continuing relationship is desired or required
- When resources matter (money, time available in each day, and the impact on the participants' energy from distraction, stress and lost opportunities);
- When time lost matters;
- When privacy matters; and
- When the client can't get what they need in a court.

D. Use of Collaborative Law to Resolve Dealership Disputes

The collaborative process can be effectively used in resolving business and commercial disputes in dealerships. Dealerships endeavor to provide goods and services in a way that creates and maintains good will, respect, and a reputation for excellence in their communities; to promote sound business relationships; and to earn profits. Although there are no current anecdotal examples of the use of collaborative law to resolve dealership disputes, the process has been effectively used to resolve a wide-range of business and commercial disputes in other settings. For example, business break-ups and succession issues, dissolution of partnerships, consumer issues, breach of contract claims, non-profit and vendor issues are all types of disputes that lend themselves to resolution using the collaborative process. Like all collaborative cases, the core premise for using the collaborative process in resolving business and commercial disputes is a focus on the parties' interests and a belief that the clients are capable of creating better outcomes than the court system.

The collaborative process can also be effectively used in resolving employment disputes. Dealerships understand that the people they employ are their greatest assets. Sometimes, however, misunderstandings or disagreements occur in the workplace that can lead to legal disputes. Collaborative Practice offers employers and employees a way to resolve legal conflicts and employee complaints that does not result in hardening of positions, loss of productivity, emotional turmoil and large legal bills. Instead, collaborative lawyers work closely with their clients and each other to explore options that address the interests and concerns of the parties without apprehension that positions might shift toward litigation.

Collaborative Practice can also be used successfully when there are employment contract issues, allegations arising from discipline or termination, co-worker disputes, workplace harassment or bullying, employee requests for accommodation, and the like. Whether the employment relationship is continuing or not, the collaborative process can help clients reach practical solutions to workplace disputes.

Conclusion

In the last century, people with a dispute automatically thought of going to court. In this century, more and more people are turning to Alternate Dispute Resolution methods to resolve their differences. Given the current economic climate and often inhospitable reception automotive dealers receive from judges and juries, it is crucial that legal counsel work with dealer clients to develop appropriate methods for responding to conflicts and resolving disputes. Collaborative law should be one such method considered.

For more information on collaborative law, contact: International Academy of Collaborative Professionals, www.collaborativepractice.com. ■

References

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3. Unif. Collaborative Law Act, prefatory note (2009), in 38 Hofstra L. Rev. 421, 459 (2010) [hereinafter "UCLA"].
4. See Jennifer M. Kuhn, *Working Around the Withdrawal Agreement: Statutory Evidentiary Safeguards Negate the Need for a Withdrawal Agreement in Collaborative Law Proceedings,* 30 Campbell L. Rev. 363, 365 (2008); Cal. Fam. Code §2013 (West Supp. 2010); N.C. Gen Stat. §50-70 (2009); Tex. Fam. Code Ann. §153.0072 (Vernon 2008); Tex. Fam. Code Ann. §6.603 (Vernon 2006).
5. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007) [hereinafter Formal Op.].
6. See UCLA, prefatory note, at 426.
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8. Hansen & Hildebrand, supra note 1, at 41-44, 51-55; Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice,* 21 J. Am. Acad. Matrim. Law. 155, 162-63 (2008).
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10. Tesler, supra note 9, at 78.
11. UCLA, prefatory note, at 426-27; Hansen & Hildebrand, supra note 1, at 29-30, 32-34; Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change,* 50 Ariz. L. Rev. 289, 290-91 (2008).
12. UCLA, prefatory note, at 425 (citation omitted).
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14. UCLA §14, at 484.
15. Formal Op., supra note 5, at 3; Ethics Subcommittee, ABA Section of Dispute Resolution, *Summary of Ethics Rules Governing Collaborative Practice*, 15 Tex. Wesleyan L. Rev. 555, 559 (2009) (Rule 1.2 requires a two-pronged analysis: is the scope reasonable under the circumstances, and is there informed consent?); see also Model Rules of Prof'l Conduct R. 1.0(e) (2007) (Informed consent is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."); Scott R. Peppet, *The Ethics of Collaborative Law,* 2008 J. Disp. Resol. 131, 157 (noting that a limited scope agreement must be reasonable under the circumstances and that collaborative law may not be reasonable in cases involving spousal or child abuse).
16. UCLA §14, at 484.
17. Id. §14(2), at 484.
18. Id. §14(3)(A), (B), (C), at 484.

M. Christina Floyd is the founder of the law firm Hampton Roads General Counsel, PLLC. She previously served as in-house General Counsel to the Hall Automotive Group, which operated 18 automotive dealerships and a consumer finance company. Chris concentrates her law practice in general business and commercial matters, employment relations, automotive law and alternate dispute resolution, including service as a certified mediator and trained collaborative professional. She is a member of the NADC Board of Directors.

TAX FORM
IRS Updates Form 8300

The IRS has revised Form 8300 for reporting receipt of cash in excess of $10,000. The revisions do not appear to affect the two pages of the form that are filled in by a dealer. The changes appear to be limited to minor editorial revisions and revisions to the instructions concerning taxpayer identification numbers.

The form does, however, mandate that it is the version to be used for transactions after June 30, 2011. Consequently, if your clients have hard copies of IRS Form 8300 that are not the June 2011 revision they should discard those. The IRS provides an online form at www.irs.gov that can be filled in and printed for filing. By that method your clients can be sure that they are using the most current form.

President's Message

Patricia E.M. Covington
Hudson Cook, LLP
NADC President

When a dealer calls, one never knows what question(s) the dealer will ask. It could be about firing an employee, or about a letter the dealer received from the manufacturer requesting a facility upgrade. The dealer could be calling about doing a revamping of his website or joining Facebook, and what issues he needs to worry about. There are so many – diverse and abundant – legal issues that affect the business of our clients. At times it can be hard to keep up and know where to turn for help.

We, as counselors to our dealer clients (many of us are more than attorneys, we're hand-holders and business advice sounding boards), have our hands full. There is plenty we are expected to know, and even more things we are expected to know are developing in the current climate of change.

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We, at the NADC, are here to help. But, we can't do it on our own. We need your help too. Here's a good example. We are beginning to plan for the Fall Conference. It's scheduled for October 10th in Chicago. Yes, Chicago again. I will digress for just a moment …

> Why Chicago? Well, first location, location, location. Chicago is one of the easiest cities to fly into from anywhere in the country. Most large cities have a direct flight, which is particularly important because our time is valuable (most of us get paid by the hour) and the fall conference is a one-day event. Second, we've been treated pretty wonderfully at the Trump Towers, the host hotel for our conference. It may come as a shock, since using the terms "Trump" and "good value" in the same sentence seems like an oxymoron, but the price tag for a room at the Trump Towers is incredibly (unbelievably) competitive and a "good value" as compared to other hotels where conferences are hosted.

Okay, back to how you can help. We've established a Planning Committee that will be discussing the curriculum for our Fall Conference. Of course, we'll have our own ideas for topics and issues of interest, but we want to hear from you. What would you like to learn about? What developments should we update you on? What's interesting, what's not? We want to know. You can email me directly at pcovington@hudco.com or Erin Hussey, our wonderful Executive Director, at ehussey@dealercounsel.com. The Planning Committee will consider all ideas. And if we like your topic but can't fit it into this one-day event, we'll save it for next spring's annual meeting, or consider covering it in a webinar. Webinars are a cost-efficient means of covering topics that may not have broad appeal or are too narrow or technical to cover in a large setting. So, please, send us your ideas; we'll be carefully considering them.

I mentioned webinars. We are working on one for late summer. The panel of speakers has been established and we've had our first conference call to discuss content. The topic is the tax implications of factory image upgrade payments. So, stay tuned . . . Erin will be sending additional information about it in July.

That's the first thing you can do. Yes, there's more. The second thing you can do is get to know our associate members. Associate members are companies and organizations that support the NADC and are interested in furthering our goals. They're here to help us! Many of our associate members are services and goods providers to our clients –

- Accountants
- Business Valuation Consultants
- F&I Compliance Product Providers
- Forms Providers
- Insurance Companies
- Insurance Specialists & Consultants
- Sale-Leaseback Providers & Specialists
- Expert Witnesses
- Software and Hardware Providers
- Management Consultants
- Sellers of Repair Shop Tools
- Other Types of Dealer Consultants

These folks help our clients run their businesses! They help make them more profitable. When your client calls asking for a referral for a particular product or service, wouldn't it be nice to know the referral on a first-name basis. Sure, it's great to be able to call a colleague and ask who he or she could refer you to, but wouldn't you feel even better about the referral if you knew the company, maybe had talked to a principal of the company at one of our NADC conferences, or even knew that these services existed. I'm not talking about knee-deep knowledge, but, simply knowing that these providers exist and may have helpful products or services. One other thing to think about . . . our associate members interact a whole lot (all on their own) with dealers. Hmmm, it might be nice if they knew who you were too!

So, here's another stay tuned . . . soon we'll be adding an easy way to search for our associate members on our website. Keep an eye out for it.

We are working hard at the NADC to help you be prepared for those "who knows what I'll be asked today" calls from your dealer clients. So, let us know if you have an idea you want us to consider.

Until next time …

Patty Covington

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Please contact Erin Hussey at ehussey@dealercounsel.com for available opportunities (see pg. 10).

Disability For All or Everyone is Disabled

By Ronald C. Smith, Attorney at Law, Stewart & Irwin, P.C.

Feature Article

In late March, the Equal Employment Opportunity Commission ("EEOC") published regulations implementing the 2008 amendments to the Americans with Disabilities Act. These regulations became effective May 24, 2011. The net effect of these regulations is that probably every employee at some point in time during their working career will be considered to be "disabled" within the meaning of the Act. The amendments and the regulations sweep aside a number of court cases that had been decided during the period from 1991 to 2006. These cases by and large provided a common sense approach to disability in the workplace. A bit of history is in order.

After passage of the original Americans with Disabilities Act in 1991, the EEOC sought to engraft rather expansive regulations for the implementation of the Act. Over a period of years, courts construed the Act much more narrowly than did the EEOC. Given the changes and make-up of Congress as a result of the 2006 elections, legislation to overturn several of these court decisions was introduced and ultimately became the basis for the ADA Amendments Act of 2008 ("ADAAA" or" Amendments Act"). The EEOC has reacted with a fury. The regulations not only expand employee rights through a remarkable expansion of the definition of disability and other standards but also subordinate the disability standard as not to be interpreted so as to create a "demanding standard for disability." As the regulations say, the

> "primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis." CFR Sec. 1630.1(c)(4). (Emphasis supplied).

Given the expansive nature of these regulations, one would seriously wonder if the scope of the Act is now shifted by regulation (not by law) to making sure that the workplace is cleansed from any potential "discriminatory environment" and not focused on individuals with disabilities. The regulations seem to be more of an aspirational nature than an objective standard. The difficulties that employers are going to have in compliance matters will be substantial if not monumental.

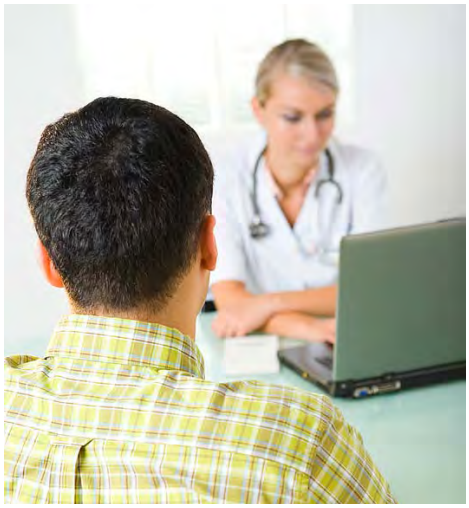
The last straws, apparently, for Congress and the EEOC were the Supreme Court cases of Sutton v. United Airlines 527 US 471 (1999) and Toyota Manufacturing, KY. Inc. v. Williams 534 US 184 (2002) and other lower court cases which essentially required a finding of employee disability before the Act came into play. These cases also set a standard that a determination of whether or not an impairment substantially limits a major life activity is to be determined considering the ameliorating effects of mitigating measures such as medicine. For example, if insulin can control diabetes or medication can control blood pressure, then the employee may not be considered to be disabled for coverage under the Act.

Before launching into a discussion of specific regulations, it should be noted that the practical effect of the amendments and regulations is to create additional weapons in the arsenal of employees, unions and employment attorneys to allege discrimination against a company as a result of an adverse employment action taken against an employee. In addition to the myriad of discrimination charges now available, it will be very easy for an employee to contend that he/she was discriminated against by the employer by reason of a disability. Plaintiff attorneys typically allege that employees are discriminated against because of a disability so that the employer does not need to incur additional cost and expense in providing the employee with more expensive health insurance. These regulations also change the burden of proof. Pre-reg it was up to the employee to show that the employee had a disability but could still perform the major functions of the job as reasonably required by the employer per the job description. Post-reg it is up to the employer to prove that the employee has a disability and cannot substantially perform the job duties with reasonable

accommodation. This total change in the burden of proof is going to make it more costly and probably less effective for employers to challenge disability claims even though the employer may have a meritorious defense. The employer will still have a defense that an impairment is "transitory and minor," with the effects of an impairment lasting or expected to last fewer than six months. However, as an example, prior to the regs a hysterectomy was considered to be transitory in nature and the courts determined it did not fall under the Act since the employee was expected to recover. Now, however, as will be seen in a moment, a hysterectomy affects the reproductive system which would now create a disability. Several times throughout the text of the regulation, the EEOC makes it clear that the term "disability" is to be broadly construed in favor of expansive coverage to the maximum extent allowable and that the determination of disability "need not be the subject of rigorous examination". The reader can draw their own conclusion about whether disability is really important in the regulatory scheme of things or whether or not it is simply now a subordinated term.

The evisceration of the old Act and the referenced court cases begins with expansive changes in definitions. Physical or mental impairment that substantially limits one or more major life activities now includes any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more body systems. Examples are neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, urinary, immune circulatory, hematic, lymphatic, skin and endocrine, or any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation") organic brain syndrome, emotional or mental illness, and specific learning disabilities. That pretty much covers the waterfront.

The definition of major life activities



has also been expanded: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, alerting, reading, concentrating, thinking, communicating, interacting with others, and working. Interacting with others is interesting, as is concentrating and thinking. The operation of a major bodily function not only includes functions or different systems, such as immune systems, special sense organs, and skin, normal cell growth, digestive, urinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hematic, lymphatic, musculoskeletal, and reproductive functions, but also includes the operation of an individual organ within a body system. Hence, the hysterectomy example above. Question as to whether or not removal of a gall bladder, the most frequent surgery in the United States, would render someone disabled since it's an individual organ within the digestive system and sometimes results in chronic stomach difficulties, depending upon the individual's fat intake. If you are reading this article, it might be worthwhile to take a moment and let the mind wander into all sorts of interesting scenarios or combinations. For example, would an employee suffer disability harassment at the hands of other employees if he were teased for having Viagra around? Certainly under these expansive definitions, erectile dysfunction is a condition of the reproductive function, hence some court may say that the employee is disabled.

Continuing on down Lewis Carroll Lane, the regs go on to state that a major life activity is not determined by whether or not it is of "central import to daily life". The regs further state that "substantial limits" shall be construed broadly in favor of expansive coverage and is "not meant to be a demanding standard". "An impairment need not prevent or significantly or severely restrict the individual from performing a major life activity in order to be considered substantially limiting". The standard in the reg is about whether the limitation of an individual to perform a major activity "as compared to most people in the general population". One might assert that with these broad standards, most older people of the general population are probably disabled. Once again, the regulation states "the primary object of attention in cases brought under the ADA should be whether covered entities (almost all employers) have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity". The regs then degrade the issue of substantial limits to a major life activity, stating that a determination "should not demand extensive analysis". Specifically the regs say that substantial limits should not be construed as applied under the old Americans with Disability Act. The comparison of an individual's performance of a major life activity to performance of the same major life activity by most people in the general population usually will not require "scientific, medical or statistical analysis". One is left to wonder whether mere antidotal observations will suffice. Specifically the regs say that the determination is to be made without regard to the ameliorative effects of mitigating measures other than ordinary eyeglasses or contact lenses. Essentially this means that an individual can work 80 hours per week and be highly productive; however they are still disabled. Go figure! Also, any

impairment that is episodic or in remission is a disability if when active it would affect a major life activity. It is also acceptable that only one major life activity need be affected in order to qualify. Consideration must be given to the "difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed and/or the way an impairment affects the operation of a major bodily function". Also, negative side effects of medications or burdens associated with particular treatment may be considered in determining whether the individual's impairment substantially limits a major life activity.

Two prongs, "record of" or "regarded as" a disability also are substantially enhanced for the benefit of the employee. "The focus is on how a major life activity is substantially limited and not on what outcomes an individual can achieve". For example, a mildly dyslexic individual can be a Rhodes Scholar but may still be disabled because of "additional time or effort he or she must spend to read, write, or learn compared to most people in the general population". Again, whether or not an individual has a record of a disability is given broad construction and the regs caution "should not demand extensive analysis". Again, the comparison is to most people in the general population.

In terms of an individual being regarded as having an impairment, again the definition is broadened to an almost asinine standard "if the individual is subjected to a prohibited action because of actual perceived physical or mental impairment, whether or not that impairment substantially limits or is perceived to substantially limit a major life activity". The notion of "perceived" is interesting.

Under the regulation, defenses are pretty much restricted to those conditions that are "transitory and minor," therefore the employer must undergo an analysis of whether or not the condition is both transitory and minor, although the regulations do not give any assistance as to minor other than stating "as lasting or expected to last six months or less".

The Appendix to Part 1630 CFR Vol. 7617003 et seq. gives the reader a glimpse into the mindset of the bureaucratic structure. The regulations are so politicized that the notes go on to assert that the use of the term "Americans" in the title is "not intended to imply that the ADA only applies to United States' citizens. Rather the ADA protects all qualified individuals with disabilities regardless of their citizenship status or nationality from discrimination by a covered entity". Arguably this covers persons in the United States illegally. The notes also cite specific cases that should be overruled. In U.S. v. Happy Time Day Care, the note states the court struggled to analyze whether the impact of HIV infections substantially limit various major life activities to a five-year old child. Now that five-year old child is covered. Also in Gonzales v. National Board of Medical Examiners, 225 F 3rd 620 (6th, Circuit 2000), the court found that a high achieving academician who was diagnosed with a learning disability was not substantially limited since the individual had achieved a significant level of academic success. Now under these regulations, that individual will be disabled. Refusing to hire applicants with scarred skin will violate the Act, as the employee would be regarded as having a disability. Misdiagnosed employees could still qualify under the Act as being disabled as having a record of such a disability even though they do not actually have a disability.

Taken in totality, the amendments and the resulting regulations drafted by Department of Labor under its present leadership clearly show that employers must have a heightened awareness of the important part that disability plays in the employment decision making process. Plaintiffs' lawyers undoubtedly will take advantage of the newly regulated advantages in demands for settlement and litigation with employers. It will be incumbent upon those of us advising businesses to exercise care, discretion and good judgment in giving such advice. It is going to be more important than ever that clients be drilled about contacting counsel when any adverse employment action is considered against any employee who can be perceived with a disability, no matter what the conventional wisdom was under the prior regulatory scheme. Considering the expansive nature of these new regulations, almost everyone will be disabled if for no other reason than the ravages of age. Documentation of violations of existing work rules and codes of conduct will be extraordinarily important. This gets back to the fundamentals of employer defense "records, records and more records". The employer will be deemed to be guilty until the employer proves itself innocent. This, coupled with the other hyper-expansive nature of the regulations, will make for difficult times ahead. ■

Ronald Smith is an Attorney with the law firm Stewart & Irwin, P.C. in Indianapolis, IN. Ron has represented hundreds of automobile dealerships throughout the Midwest, Southeast and Eastern United States since the late 1960s.

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