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Meet Early, Settle Often

Taking talk-first, sue-later tactics to the public sphere

By Matthew Hirsch
RECORDER STAFF WRITER

Linda Dardarian and Elaine "Lainey" Feingold are in the midst of a long winning streak in disability access cases — and so are their opponents.

In eight years, the East Bay plaintiff lawyers have settled more than two dozen disputes without filing suit, or even bringing in a mediator.

Now, after targeting Fortune 500 companies to deliver public accommodations, such as ATMs retooled for the visually impaired, the two have begun testing their settle-first strategy on public agencies. On Wednesday, they announced a deal with the San Francisco Municipal Transportation Agency that provides for new audible pedestrian signals at a minimum of 80 traffic intersections.

But the East Bay attorneys face some uncertainty as they take their negotiating tactic into uncharted waters. Some disability lawyers say branching out from the model that's made them successful might make it harder to convince target organizations they're better off playing ball.

When Dardarian and Feingold send demand letters to organizations they claim are violating disability access laws, they offer to avoid litigation by sitting down with a small group of defense lawyers and technical experts and working out an agreement, a format known as structured negotiation. The letters generally mention the legal basis for a claim of attorneys fees, as well, Dardarian said.

From square one, the plaintiff lawyers' success depends on carefully balancing cooperation with the looming threat of litigation.

NEW TARGET: East Bay attorneys Elaine "Lainey" Feingold, left, and Linda Dardarian have used so-called structured negotiations to get several companies — and just recently, a public agency — to make adjustments to benefit disabled people.

CHRISTINE JEGAN

Dardarian, a partner at Oakland's Goldstein, Demchak, Baller, Borgen & Dardarian, might be best known for wage-and-hour class actions. She was co-lead counsel in an overtime suit against Siebel Systems Inc. that settled in April for $27.5 million. And two years ago, she brokered a $30 million settlement with Countrywide Home Loans for account executives who claimed they were improperly classified as exempt from wage-and-hour laws.

In the mid-1990s, Dardarian's law partner, Barry Goldstein, heard from a blind attorney friend that he had trouble withdrawing money from ATM machines. That prompted Dardarian to plunge into disability access cases with Feingold, a Berkeley solo who used to work at Berkeley's Disability Rights Education and Defense Fund.

As a result of their negotiations with Wells Fargo, Citibank and other companies since then, Dardarian said, there are now about 50,000 talking ATMs in the United States, including thousands that communicate in Spanish and English.

More recently, Dardarian and Feingold have gotten retailers, including Wal-Mart, Safeway and Trader Joe's, to install tactile point-of-sale machines so blind customers can use their debit cards without assistance. They've also been working to persuade companies to adjust their consumer Web sites so they're more user-friendly for people with visual disabilities. They announced a deal with RadioShack last

week.

This week's MTA agreement was their first with a public agency.

At the request of clients — three nonprofits and an advocate representing the blind community — Dardarian and Feingold began pressing the San Francisco MTA for audible pedestrian signals three years ago. They put a demand letter in the mail to Chief Deputy City Attorney Therese Stewart.

As the agreement went up for final approval by the MTA board this week, Stewart said she is always willing to listen when someone approaches the city with demands — "it's sort of like free discovery" — but that it doesn't mean all claims can be resolved without litigation.

"A lot depends on the trust you have with people and the way in which they approach you," she said.

Stewart said she knew Dardarian and Feingold were "credible, capable" lawyers from previous dealings with the two. More importantly, though, their demand letter laid out their claims and their desire to find a resolution.

"How can you say, 'No, we won't talk to you?' It's stupid, in most circumstances," said Stewart, who turned over the dispute to Julia Friedlander, the MTA's general counsel, and Deputy City Attorney Christiane Hayashi.

Hayashi said that as she was leading the negotiations over the last year, "at no time … was it confrontational enough for anybody to talk about going to court."

Unlike the deals Dardarian and Feingold have reached with large corporations, every aspect of the MTA agreement is open to public scrutiny — right down to the agreed-upon attorneys fees. MTA will pay Dardarian's and Feingold's firms $360,000, and up to $95,000 to monitor the agreement through 2010. Under the agreement, their clients will also get $30,000.

A SLIPPERY SLOPE?

Laurence Paradis, an attorney at Disability Rights Advocates in Berkeley, hasn't always found public agencies so cooperative.

He said his office uses structured negotiations in about 25 percent of its cases. But in separate disability access cases against Sacramento, Caltrans and administrators of the state's high school exit exam, Paradis said, he's found that public agencies are "particularly reluctant" to resolve things out of court.

"For whatever reason, their attitude is, 'If you don't like it, file a lawsuit,'" he said.

So far, Dardarian and Feingold say they have found an open line of communication each time they've sent a demand letter for some sort of public accommodation on behalf of the blind.

But some defense lawyers who haven't gotten a letter say they would caution clients against any agreement that goes beyond federal and state disability access requirements.

Jon Meer, a Los Angeles partner at DLA Piper, said such agreements can backfire in future litigation. "When you're approached to do something that might seem creative, it can be dangerous to honor those requirements, because it leads to a slippery slope where you can't possibly accommodate every potential hurdle for every potential disability," he said.

Stephen Hirschfeld, a partner at San Francisco's Curiale Dellaverson Hirschfeld & Kraemer, said companies also have to weigh the costs and benefits of any negotiated deal. Even though companies want to avoid fighting a disability suit in public, Hirschfeld said, they won't agree to a deal if they can get a better one from a judge.

"Where there are gray areas, what most defense lawyers are trying to do is figure out a modest way of resolving a dispute which allows them to accomplish the goals of disability access, but isn't an undue hardship as far as cost is involved," he said.

Defense lawyer John Fox, however, was so impressed by Dardarian and Feingold's negotiating technique that he's occasionally mimicked it when defending against Title VII race and sex discrimination claims.

The Palo Alto-based Manatt, Phelps & Phillips partner said he reached an $8 million deal on behalf of a Fortune 10 company to settle the discrimination claims of some 3,700 employees.

Fox, who has worked opposite the East Bay duo, said Dardarian and Feingold offer a level of informality in negotiations that's unmatched, even by traditional mediation providers like JAMS and the American Arbitration Association.

"The informality allows for a more relaxed schedule, so your life and your clients' life isn't crazed."

Whether it's due to the format of the negotiations, or the attorneys' personalities, "I find that my clients are willing to do things in a structured negotiation that they'd probably never do in a settlement agreement, a court of law or an arbitral forum," he said.

Of course, Dardarian and Feingold acknowledge there's a natural limit to how far their ADR model can extend.

"Most of the issues we're dealing with are customer service issues," Feingold said. In contrast, she said, big-ticket employment suits like *Dukes v. Wal-Mart Stores*, 01-02252, a gender discrimination class action now in federal court, are ill-suited for informal negotiations. "There's too many dollars [at stake]."

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