

*Why the ADA matters to you.  
Comply now or pay later.*

**23<sup>rd</sup> Annual  
Meet the Money®  
New Strategies for a New Economy**

**May 2013**

***Moderator:* David Sudeck, Jeffer Mangels Butler & Mitchell LLP**

***Panelists:***

**Martin H. Orlick, Jeffer Mangels Butler & Mitchell LLP**

**Bonnie Lewkowicz, Access Northern California**

**Mark Burden, Rim Hospitality**

**M. Bradley Gaskins, The McIntosh Group**



"What, Me Worry?"

Alfred E. Neuman, Mad Magazine

# History of Accessibility Laws

- The Americans with Disabilities Act of 1990 - comprehensive civil rights legislation
- Five Titles. We will focus on Title III – Public Accommodations
- **Over 16,500 ADA** lawsuits in the US, 8,000 alone in California since 2000, followed by Florida, New York, Texas, Pennsylvania and Illinois
  - Since January 2010, 3,000 ADA complaints were filed in Los Angeles County Superior Court
  - Why? – California allows minimum statutory damages
  - Many against hotel owners and operators
- ADA compliance is good for business – *it is the law!*
- David will introduce “ADA Friendly”

# New Federal Regulations

- 2010 ADA Title III Guidelines:
  1. Updates the 1991 regulations
  2. Set new standards of accessibility
  3. Clarifies or expands key operational accessibility requirements (e.g., reservation policies and procedures, service animals, effective communication, reach ranges, condo hotels).
  4. Pool lifts and transfer walls
  5. Regulates new activities not previously including in the 1991 Guidelines

# Statutory Overview

ADA Title III prohibits discrimination against individuals with disabilities by places of public accommodation, such as hotels, inns, condo hotels

ADA Title III requires that public accommodations:

- not discriminate on the basis of disability;
- have accessible facilities;
- make reasonable modifications to their policies, practices, and procedures; and
- provide auxiliary aids and services free to ensure effective communication with individuals with disabilities.

# ADA Risk Management for Hotel Owners and Operators

- Who is covered by the ADA?
- What is a "disability" under the Act?
  - An actual or perceived disability which prevents participation in major life activities
- ADA imposes "**joint and several**" **liability on owners, lessors, lessees and operators** of public accommodations
  - What is a "public accommodation?"
  - **Owners** typically are responsible for the architectural and as-built conditions of the property
  - **Operators** typically set policies, practices and procedures and have liability

# Public Accommodations

Since March 15, 2012, public accommodations must comply with the new construction and alterations regulations of the 2010 Standards.

- “Readily achievable” means “*easily accomplishable and able to be carried out without much difficulty or expense.*” The application of this standard is highly case specific and depends on a number of factors.
- Safe Harbor Protections

# Existing Recreational Elements That Must Now Comply With The 2010 Standards

- Swimming pools/spas
- Saunas and steam rooms
- Exercise rooms and equipment
- Play areas
- Fishing piers / recreational boating facilities
- Golf courses, practice greens and sand traps
- Amusement rides



# ADA Due Diligence for Hotel Lenders, Owners and Operators

- **Typical Due Diligence Checklists include:**
  - Financial
  - Title
  - Environmental
  - Structural
- **Add ADA Due Diligence to Your Checklist:**
  - Our client's secrets are only safe with a lawyer-attorney work product protection

# ADA Due Diligence for Hotel Lenders, Owners and Operators

- **ADA Due Diligence When Purchasing Debt**
  - Purchasing Debt for Investment
  - Purchasing Debt with the Intent to Foreclose
- **ADA Due Diligence for Lenders**
  - DOJ's position on foreclosure successor liability
  - DOJ Technical Assistance Manual, III - Public Accommodations  
“Is a bank that acquires ownership of a place of public accommodation through foreclosure subject to Title III? Answer: Yes. Any owner of a place of public accommodation is covered as a public accommodation regardless of the intended or actual duration of its ownership.”
  - Louisville, KY – DOJ Consent Decree
  - Days Inn, Rockland, ILL – DOJ Investigation
- **How do you select the right due diligence team?**
  - It's all about experience and understanding real estate transactions

# ADA Enterprise-Wide Compliance

## How to Avoid Becoming an ADA Target

Be proactive, cover all the bases – start with a critical self-analysis

- **Enterprise-wide ADA Compliance Programs**
  - Written policies, practices and procedures
  - Confidential Attorney-Client System-wide ADA surveys
  - Cyberaccessibility
  - Website accessibility for blind and low-vision persons
    - The Hilton-DOJ Settlement
    - The Target case
    - The Charles Schwab Settlement
  - Providing auxiliary aids and services for hearing impaired and other disabled persons
    - Hearing impaired kits

# New Technologies in Auxiliary Aids and Services

- Telecommunications Relay Services (TRS)
- TTY Internet Protocol Communications Devices
- Effective communications



# Popular Urban Legends of the ADA

- "My hotel was constructed before the ADA, so I'm grandfathered in, right?"
- "I hired a licensed architect and general contractor to design and build my hotel, so I can rely on them to get it right, can I not?"
- "The building department approved my plans and said my hotel was code compliant when it issued the Certificate of Occupancy, so it is compliant, right?"
- "I'm just the operator, so why am I responsible for ADA violations?"
- "I own the hotel and it is separately managed, so why am I responsible for ADA violations?"

# Policies, Practices and Procedures

- The DOJ 10 questions
- Does the business have effective written ADA compliance policies, practices and procedures?
- Do you follow them?
- Have you performed an enterprise-wide ADA assessment?

# Policies, Practices and Procedures The New Service Animal



# Service Animals Under the ADA and California Law

- Guide dogs, signal dogs, service dogs – Cal. Civil Code § 54.2
- Dogs and miniature horses only - ADA
- Comfort animals are not service animals
  - You **may** ask whether the guest needs the animal because of a disability;
  - You **cannot** request proof of training or license for the service animal;
  - You **cannot** ask a guest to explain or verify his/her disability;
  - You **may** ask what tasks has this animal been trained to perform.
- You **cannot** charge a pet fee or cleaning charge
  - You **may** charge for actual damage
- You **can** have a violent animal removed



# Segways - Mobility Devices

- Segways are now considered power-driven mobility devices
  - Segway max. speed: 12.5 mph
  - Avg. running speed: 6-10 mph



# Mobility Devices

And you can still get sued.



# Complying with the ADA

## “Barrier Removal”

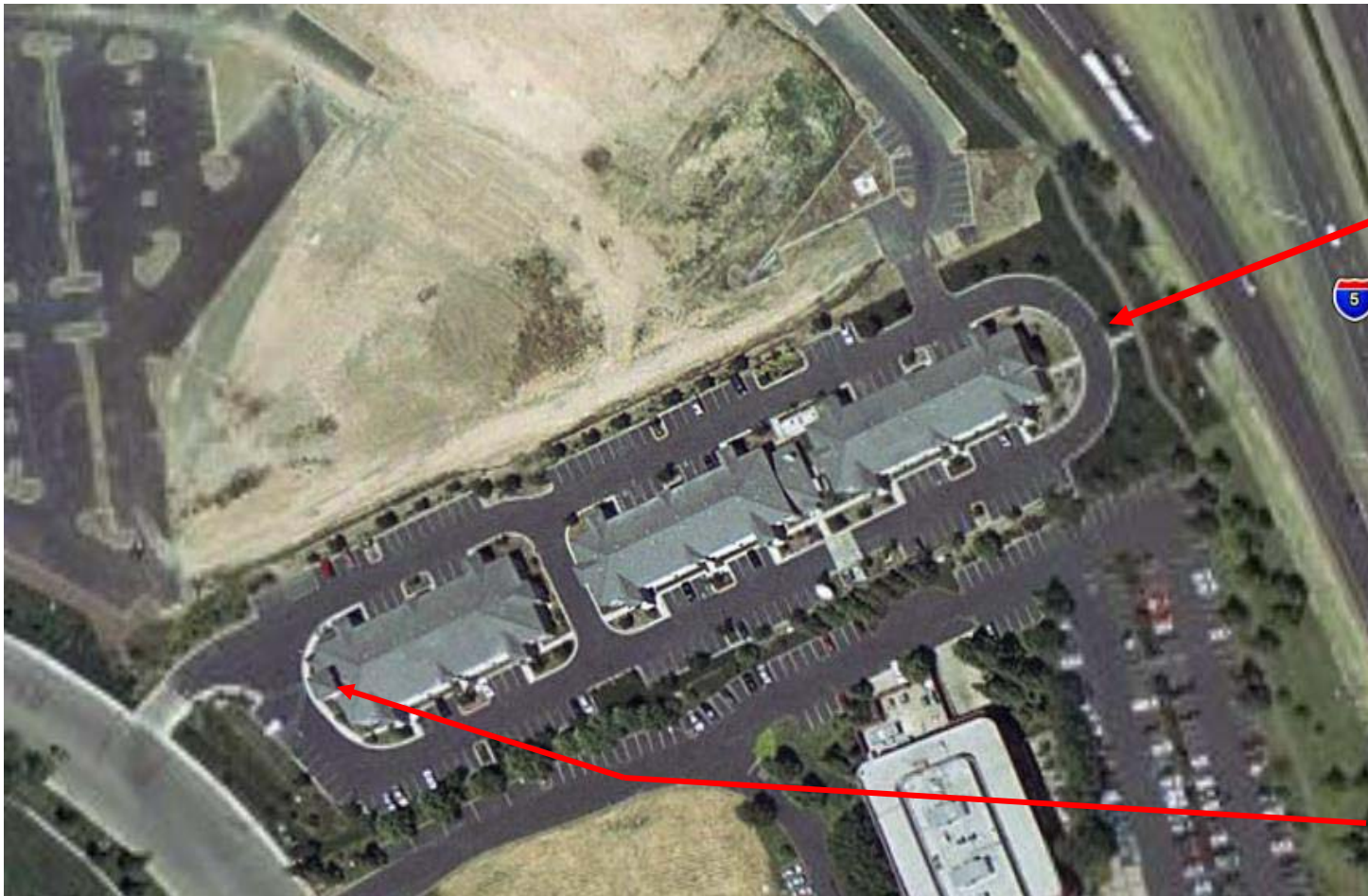
### (Bringing non-compliant hotels into compliance)

- Summary of Barriers at typical hotels
  - Accessible Paths of Travel from the public right away and throughout the hotel
  - Accessible Entrance, Registration - Check-in Counters;
  - Parking Areas – Valet Parking, Loading Zones
  - Public Facilities – Concierge Services, Business Centers, Fitness Centers, Conference Facilities
  - Restaurants and Bars
  - Guest Rooms
  - Kitchens and bathrooms
  - Day Spas
  - Recreational centers and clubhouses
  - Pools and Jacuzzi's – February 1, 2013 Compliance Date for Pool lifts, Transition Walls
    - Fixed pool lift at each water element
    - Is your pool lift on order?

# Typical ADA Barriers



# Typical ADA Barriers



**Recreational  
trail access  
and  
throughout  
the site**

**Lobby**

# Typical ADA Barriers

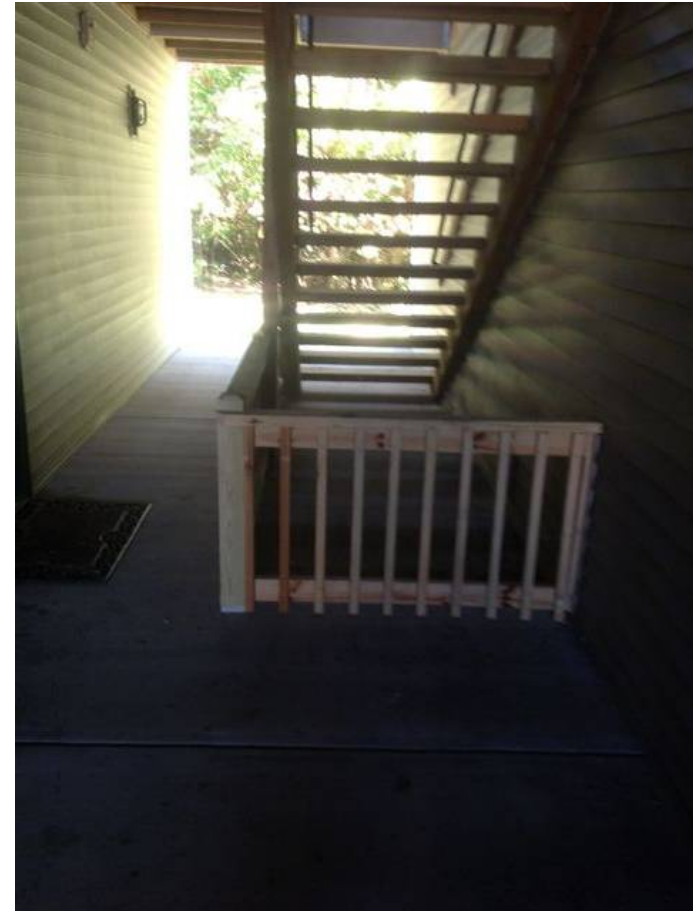


Non-compliant Steep Walkway  
to Hotel Entrance

# Typical ADA Barriers

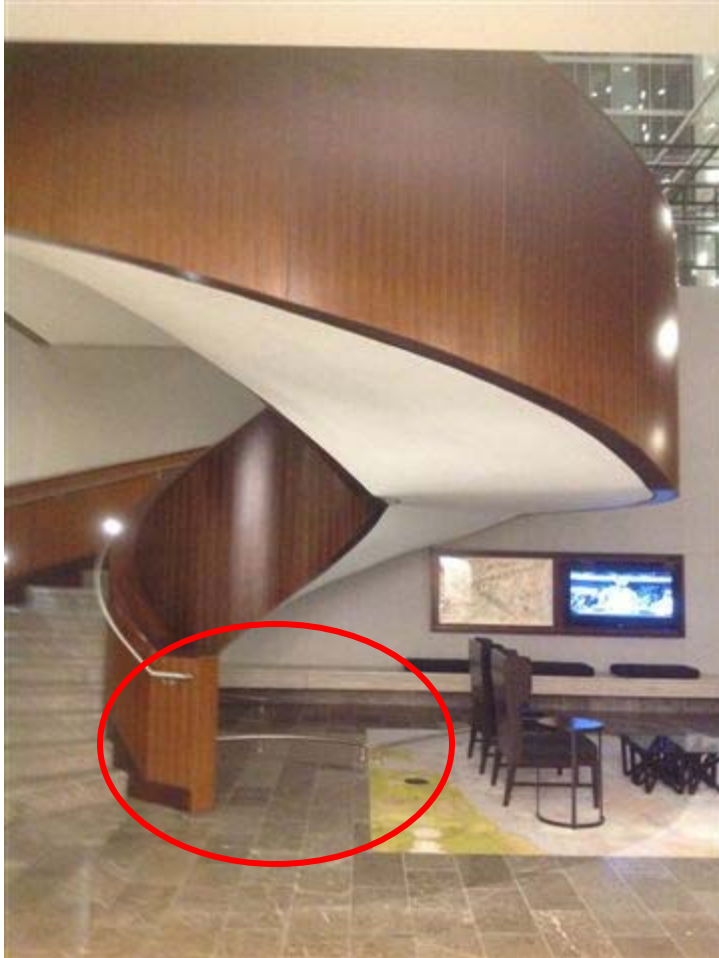


Lobby Escalator Presents  
A Dangerous Protruding Object



Solution to Stair  
Overhead Obstruction

# Typical ADA Barriers



Elegant Solution to  
Overhead Obstruction



Elegant Solution to  
Overhead Obstruction



# Typical ADA Barriers



Inconsiderate Placement of Tree Blocks Parking Access Aisle



Disregard of Accessible Parking Space

# Registration Counter



Inaccessible Registration or Transaction Counters

# Typical Non-compliance in Hotels



No accessible path of travel  
from parking spaces to entrance



Signage must be clearly  
visible

# Typical Non-compliance in Hotels



No pool lift



No spa lift or transition wall

# Typical Non-compliance in Hotels



# Typical Non-compliance in Hotels



Elegant Accessible Restroom Solution

# Typical Non-compliance in Hotels



Lack of clear floor space and path of travel



Clothesrod, iron, and ironing board too high



Lamp switch requires tight twisting and grasping to operate



27" knee clearance required

# Typical Non-compliance in Hotels



No route to patio / balcony



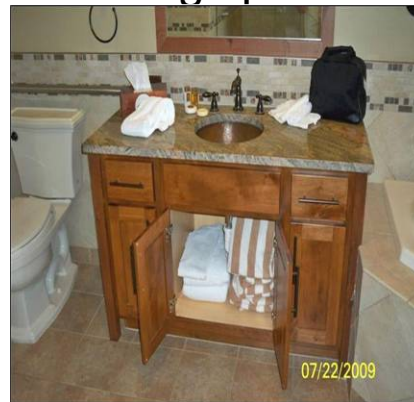
No wheelchair turning space



Microwave mounted beyond reach range



50% of storage is beyond reach range



No knee and toe space



W/C too close to wall and lavatory



# Typical Non-compliance in Hotels



Kitchen Sink Knee Clearance and Insulation

# Typical Non-compliance in Hotels



Elegant Wheelchair Lift



Elegant Wheelchair Lift

# Anatomy of an ADA/FHA Lawsuit

**What do you do when your client is served with a Summons and Complaint – or worse, an investigation letter or subpoena from the DOJ?**

- Take a deep breath
- Take stock of your client's ADA compliance initiatives
- Contact experienced counsel
- Perform a site-specific and enterprise-wide ADA assessment

# Governmental Investigations, Individual Plaintiff and Advocacy Group Litigation

- DOJ Enforcement Actions – No Target is Too Large or Too Small
  - DOJ/Hilton Worldwide Consent Decree - Post-1993 construction
  - 2,800 locations, 13 investigated – system-wide Consent Decree
  - Franchisor liability for ADA compliance
  - DOJ industry sweeps and system-wide investigations
  - NYC - Zagat top 50 restaurants

# Governmental Investigations, Individual Plaintiff and Advocacy Group Litigation

- Fines and other costs – DOJ has recently stepped up enforcement and penalties
  1. injunctive relief;
  2. damages for aggrieved persons; and
  3. civil penalty of up to \$55,000 for the first violation and \$110,000 for each subsequent violation.
- State civil rights agencies
- Private advocacy groups
- Private right of action through individual and class action litigation

# Non-Compliance Risks

- Federal Lawsuits by Private Plaintiffs
  - Plaintiffs can proceed directly to federal (or state) court.
  - Scope: Cases can involve one or more facilities.
  - Class actions are an option under the right circumstances.
  - Types of relief:
    1. injunctive relief; and
    2. attorneys' fees.
  - No monetary damages.
  - State law claims may be added that do provide for monetary damages.



What is the most important thing to know about the ADA?

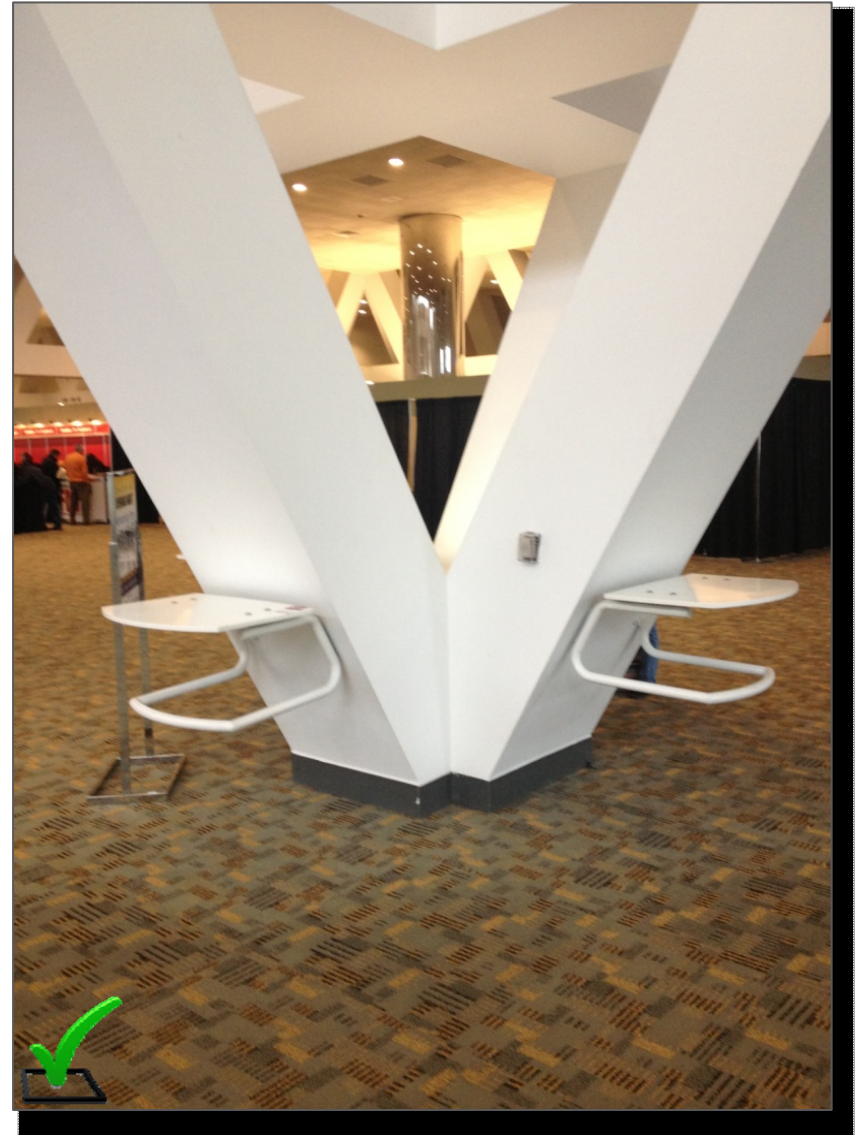
It's a Civil Rights Law  
NOT a Building Code!

“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...”



# THE MCINTOSH GROUP

## ADA FOCUSED







# THE MCINTOSH GROUP

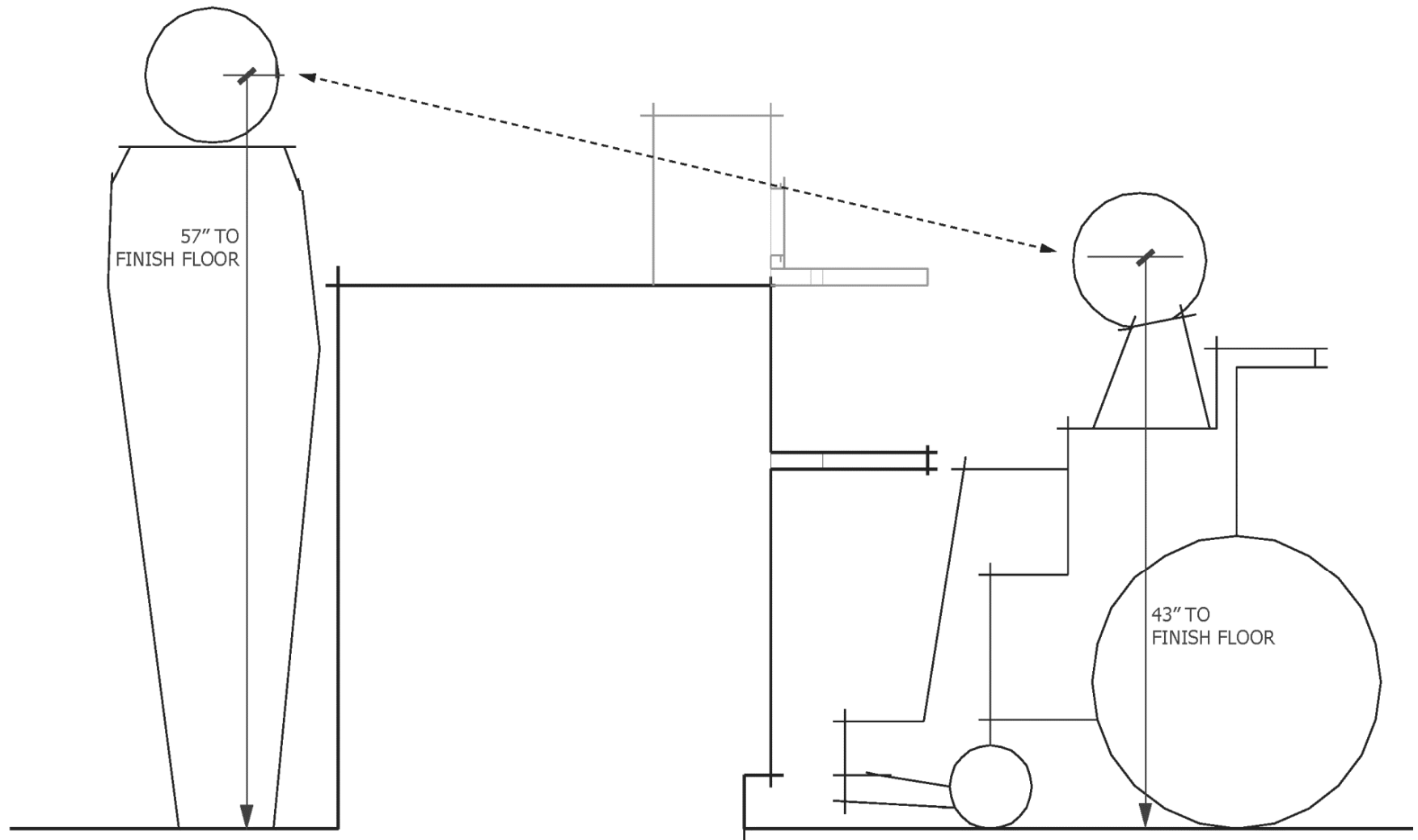
## ADA FOCUSED





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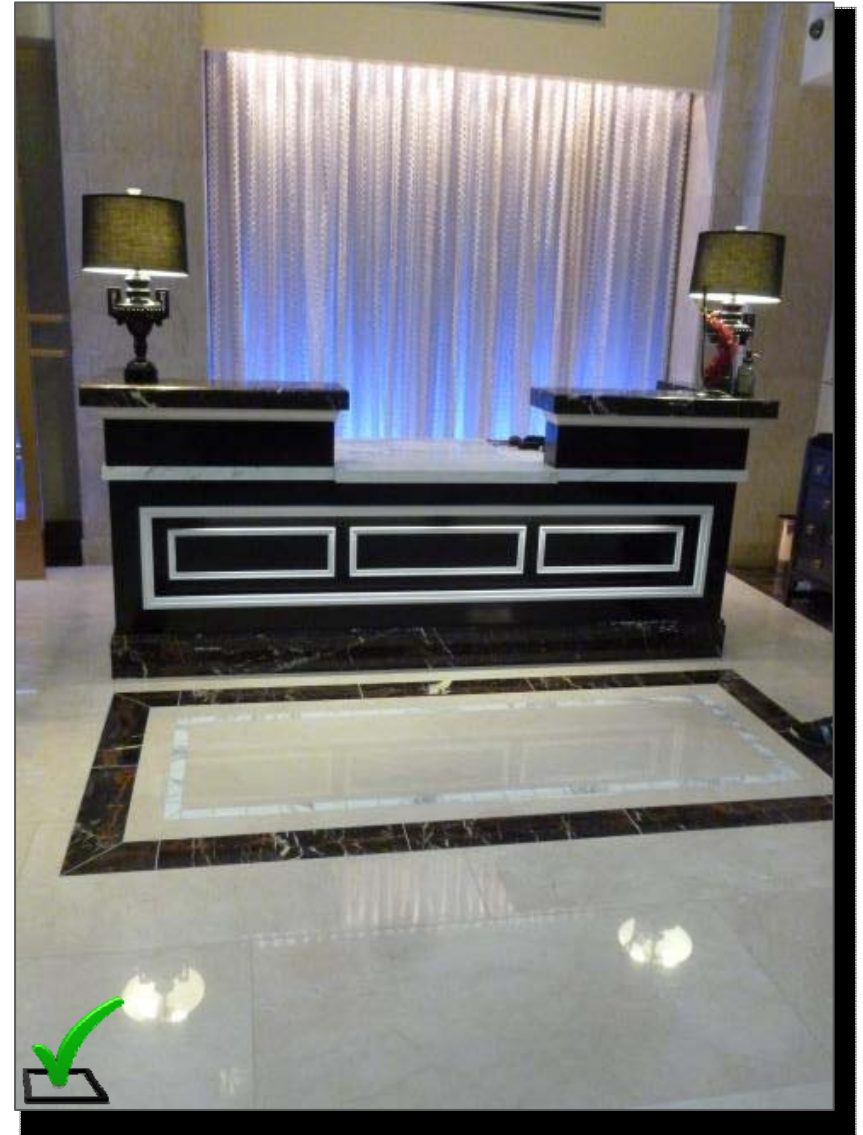
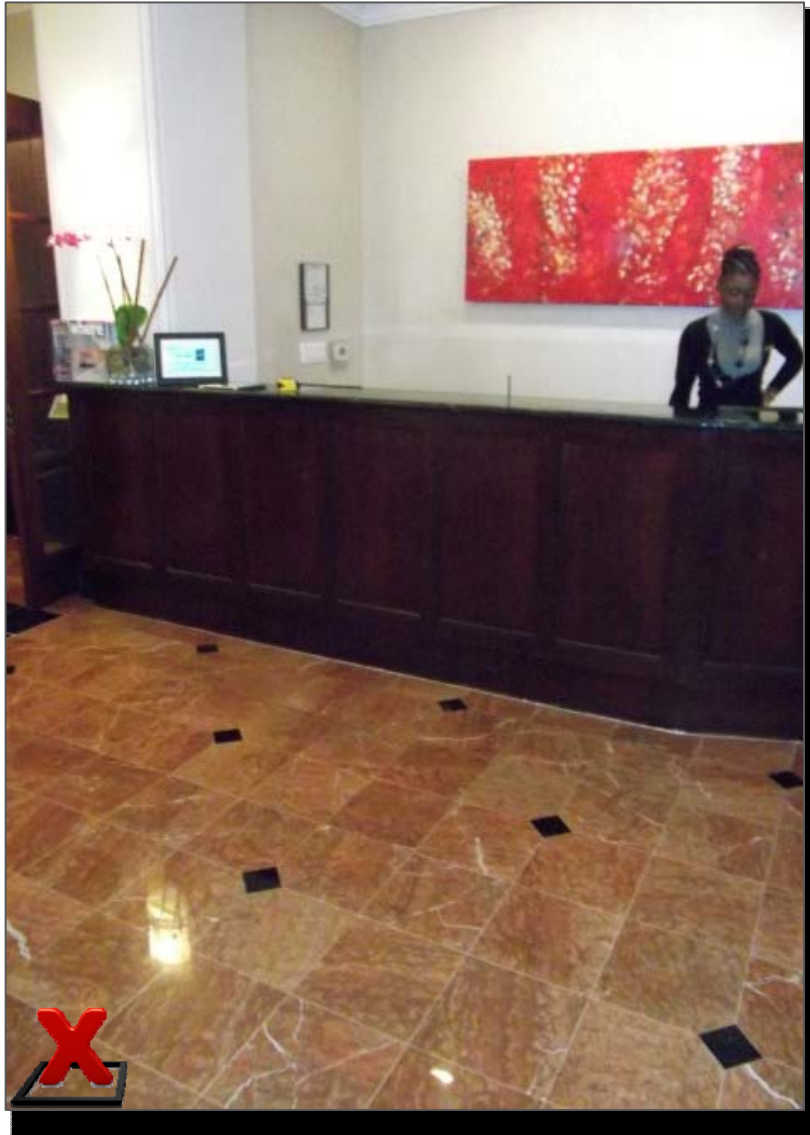
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# THE MCINTOSH GROUP

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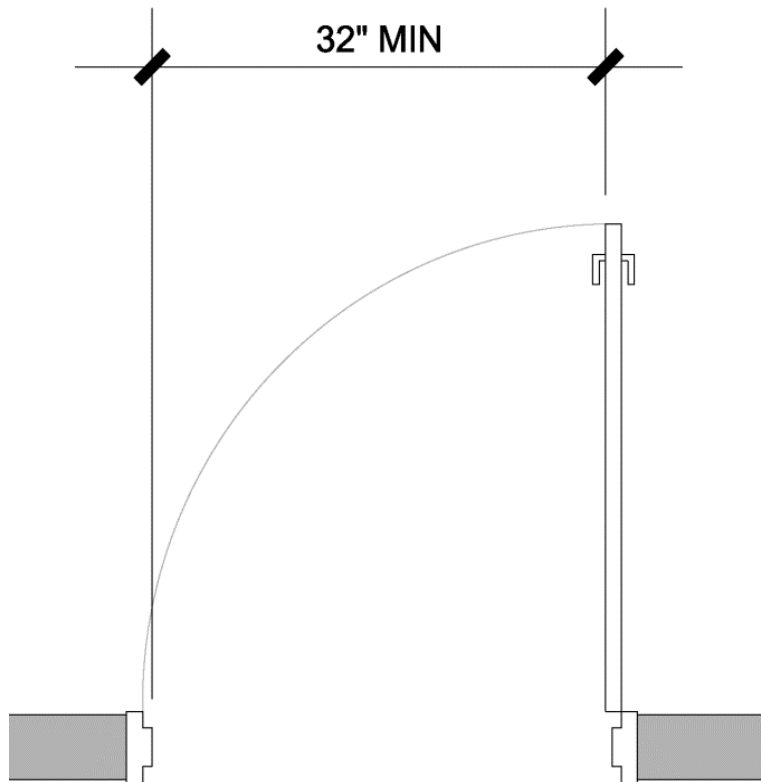




# THE MCINTOSH GROUP

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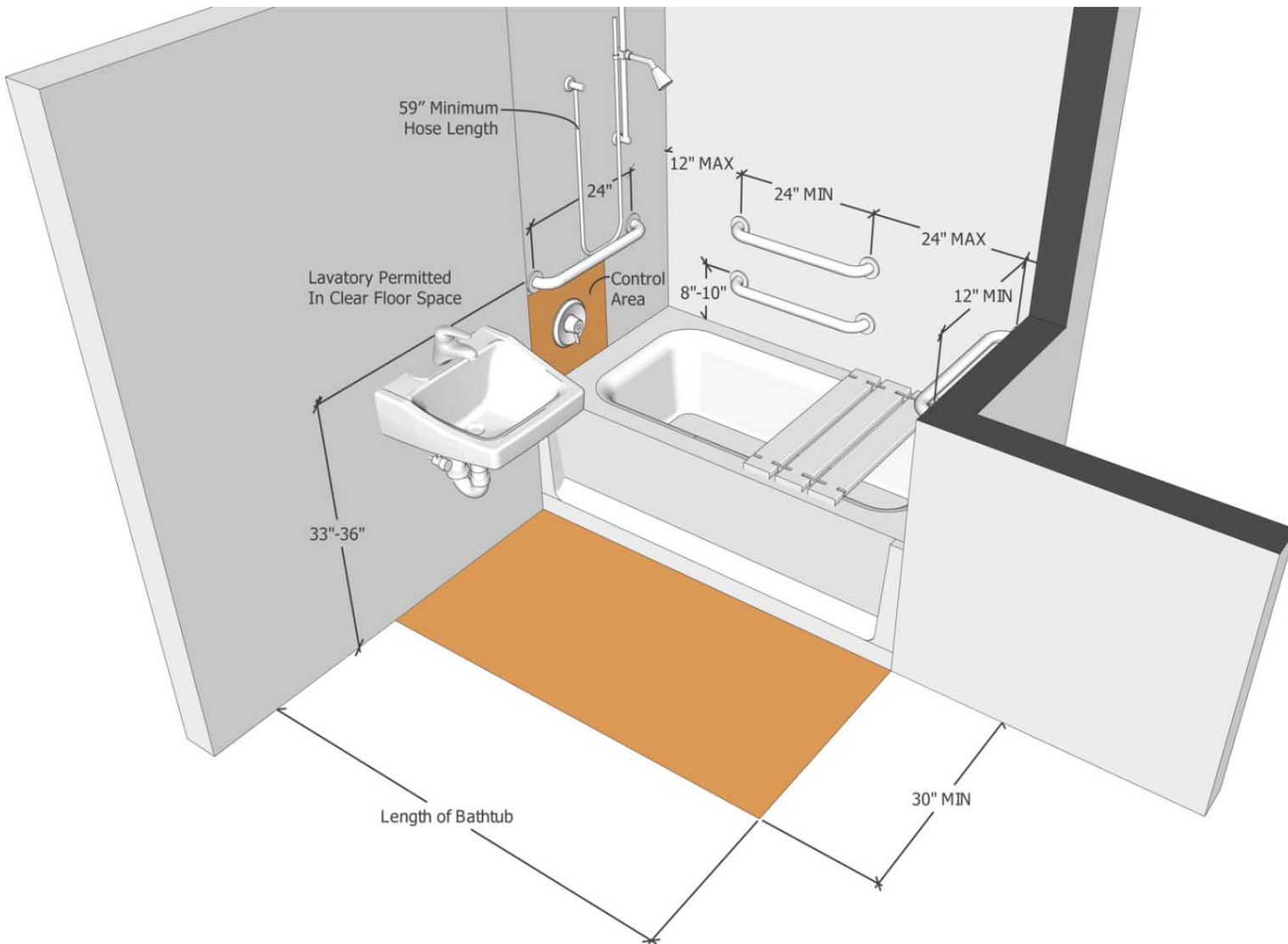
**Doors:** Entrances, doors and doorways providing user passage into and within guest rooms that are not required to provide mobility features shall only be required to comply with section 404.2.3 Clear Width.





# THE MCINTOSH GROUP

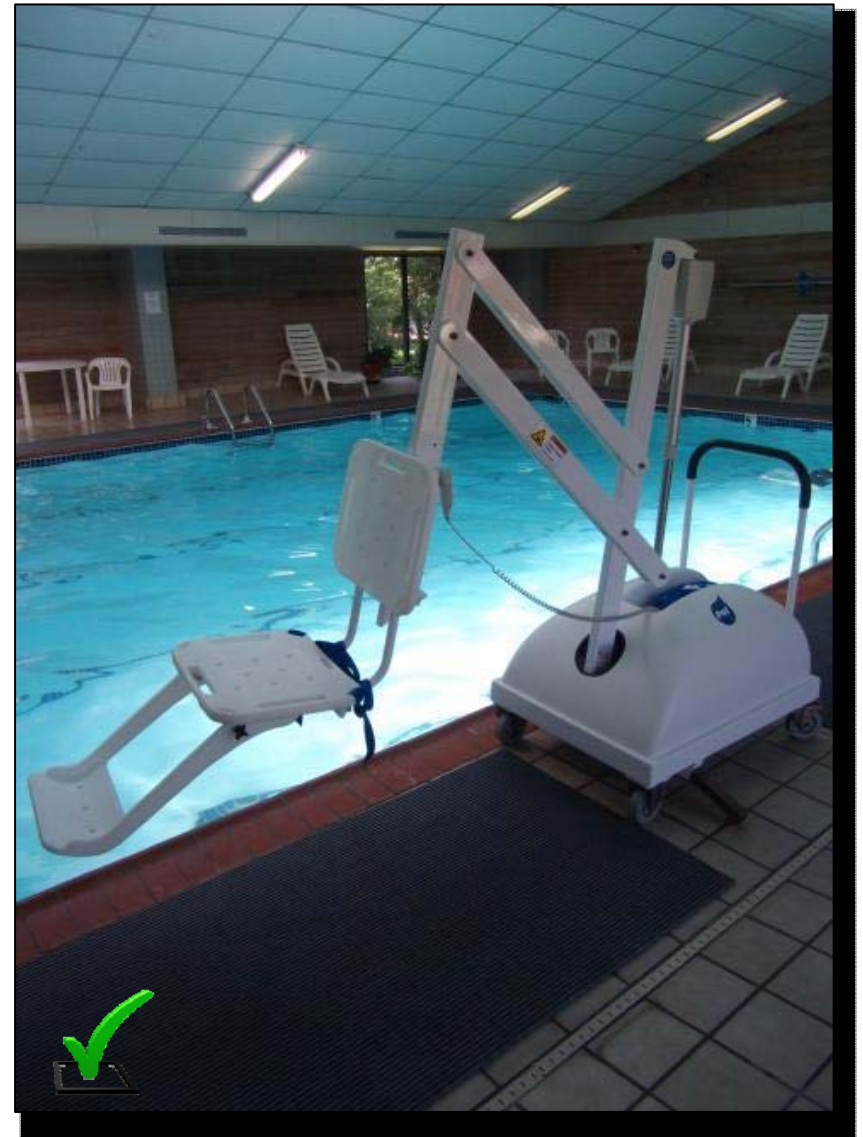
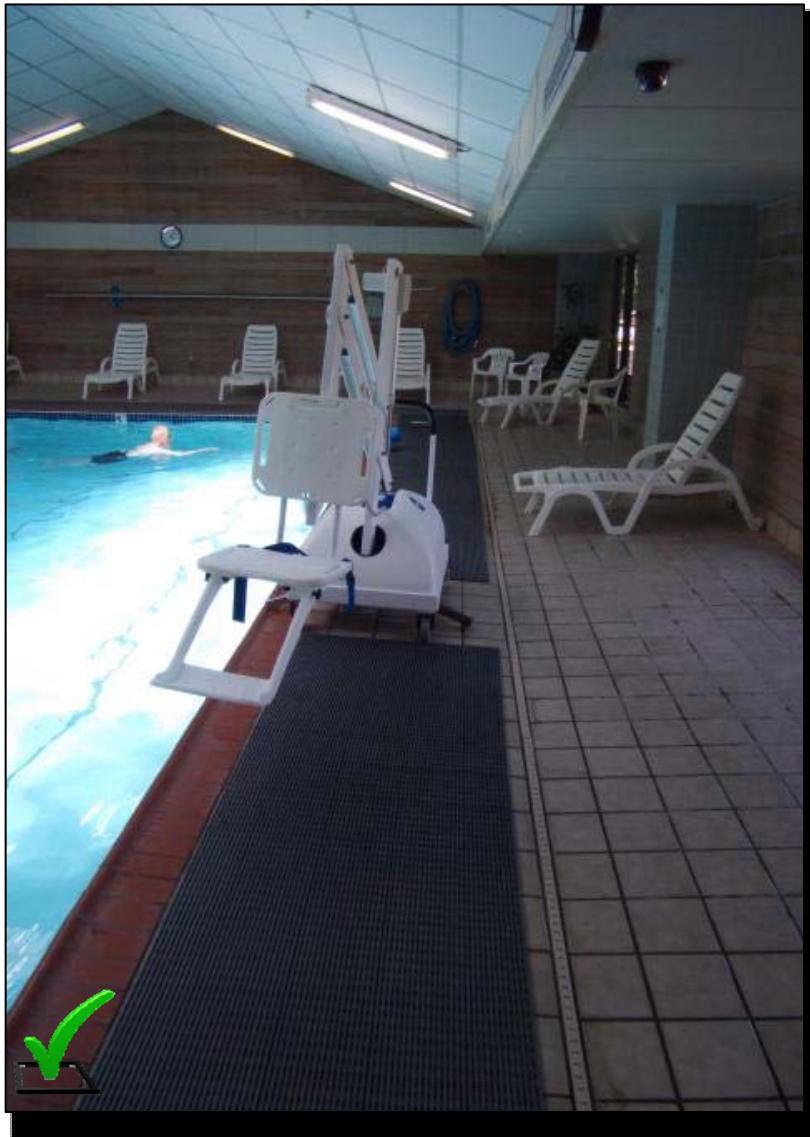
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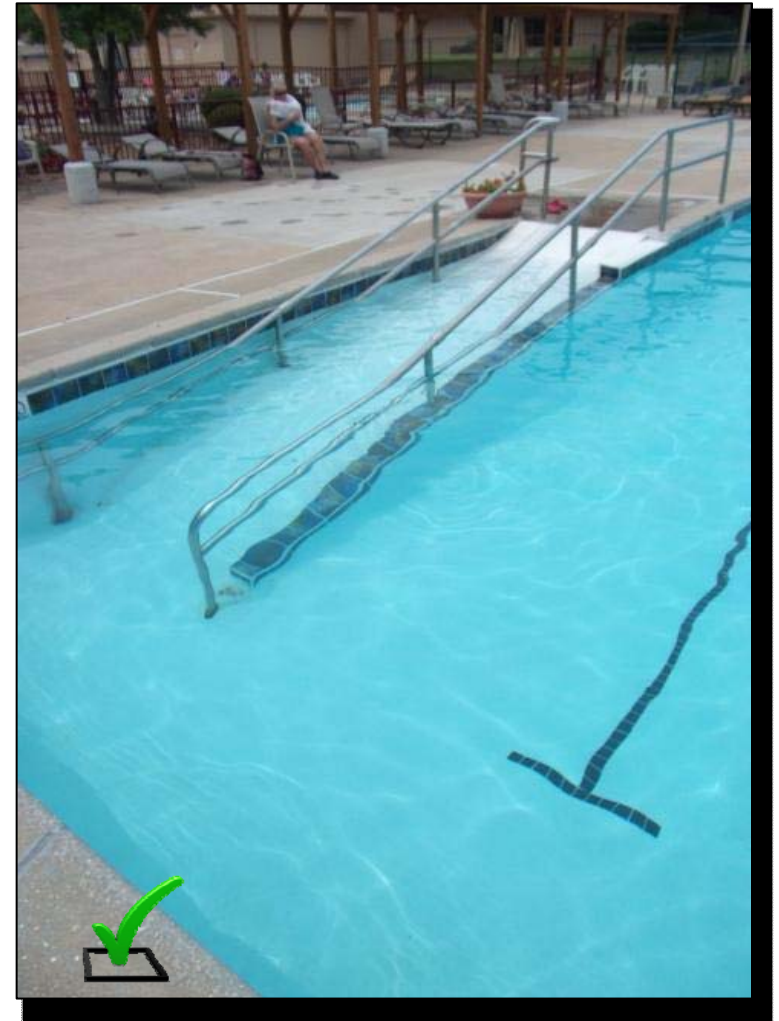
## ADA FOCUSED







**Sloped Entries:** Sloped entries shall comply with Section 1009.3





# THE MCINTOSH GROUP

## ADA FOCUSED





# Knowledge is the key

Doing good and you know it?

That's good....

Doing bad and you know it?

That's also good....

Don't know how you're doing?

That's bad....

# **Beyond Ramps: Welcoming Guests With Disabilities**

Bonnie Lewkowicz  
Access Northern California

**“You Have To Ramp The  
Human Mind Before The  
Rest Of The Ramps Will  
Work”** white house aide

ADA compliance does not necessarily  
equate to hospitality

# The Disability Market

- Open Doors Organization study 2002 and 2005
  - First-ever nationwide surveys on American travelers with disabilities
  - Conducted by Harris Interactive
- 54 million people with disabilities in the U.S. have a combined income of more than \$175 billion



# The Disability Market

- In 2002, people with disabilities took 32 million trips and spent more than \$27 billion over a two-year period or \$13.5 billion annually on travel:
    - \$4.2 billion on hotels
    - \$3.3 billion on airfare
    - \$2.7 billion on food and beverage
    - \$3.4 billion on retail, transportation, and other activities
- This does not include expenditures by travel companions (family or friends) and the vast majority do not travel alone
- 20% of all adults with disabilities travel at least 6 times every two years

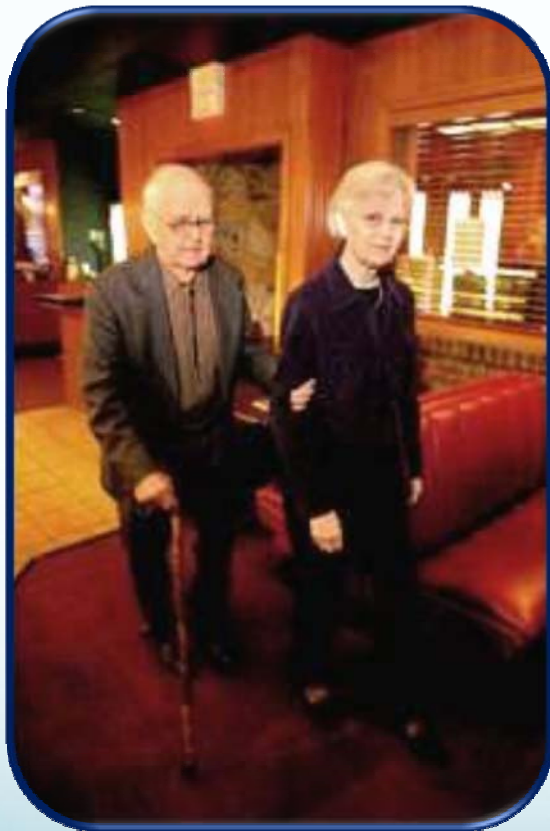
# Lodging

- From 2002 to 2005, the average number of hotel stays increased 50%
- Top features or services that hotels would need to offer to encourage more frequent hotel stays:
  - 1) rooms close to entrance, hotel restaurants and transportation
  - 2) more accommodating staff

According to a General Accounting Office report, implementing the access provisions of the ADA has increased revenues in the hotel and hospitality industry by 12 percent



# The Bigger Picture



- Every day 8,000-10,000 people turn 65
- Estimated 130 million people with disabilities in Europe have annual spending potential of €68 billion
- World-wide 15% of population has a disability

# Customer Service Matters



# 4 Simple Steps To Excellent Customer Service



- Staff Training
- Fine-Tune Access
- Website
- Access Team

# 1. Disability Sensitivity Training



- Helps remove the “Fear Factor
- Staff learn important skills on how to interact appropriately with persons with a variety of disabilities
- It’s proactive
- Demonstrates a welcoming attitude

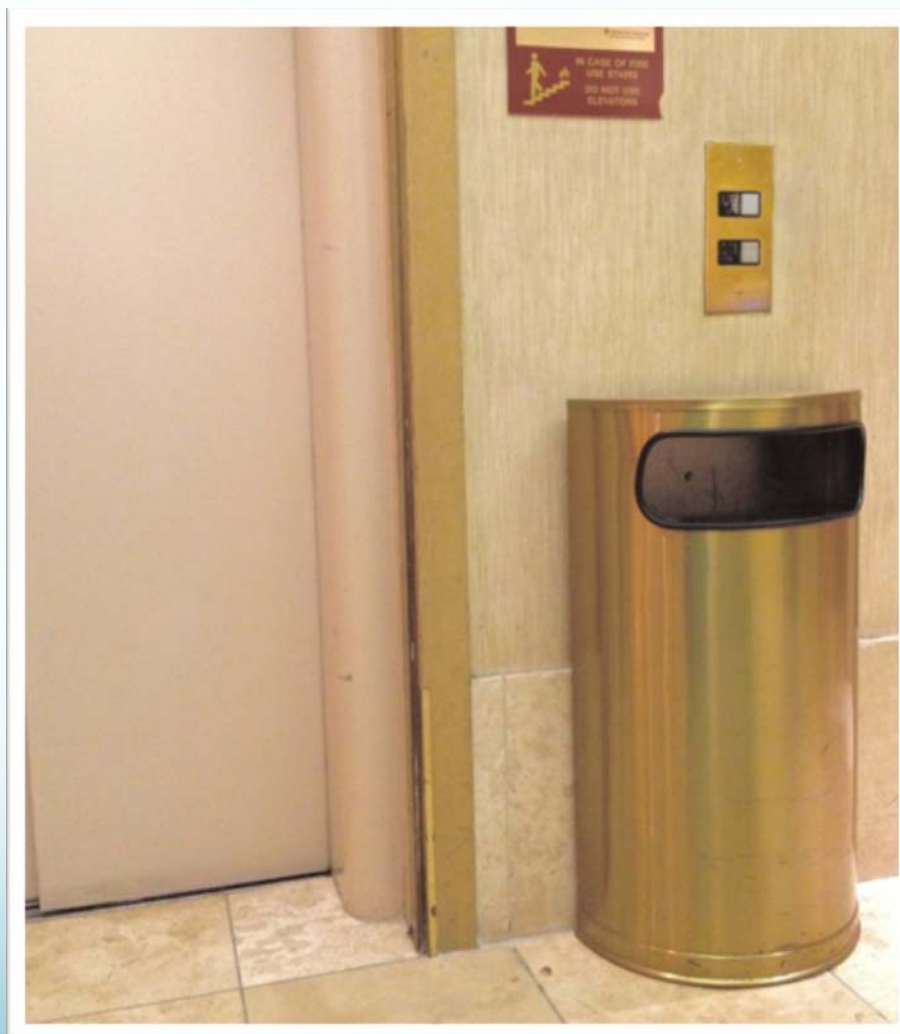
# Training Components

- Tips on basic assistance techniques
- Guiding someone who is blind
- Service animal FAQ's
- ADA relevant to lodging industry
- Appropriate language



## 2. Fine-Tune Access: Details Matter

- A property walk through can reveal barriers that are often simple and inexpensive to fix.
  - Potted plants and brochure stands on the lowered counter at registration
  - Waste bins block elevator call button
  - Waste bins or small tables that block strike-side clearance in restrooms





- Furniture and other nonstructural items that block access
- Heavy doors
- Door knobs, latches and switches that require tight grasping/twisting



# 3. Website is Welcoming

- Complies with 2010 ADA Regs for reservations
- Uses language that is universal
  - 1 King Mob/Hearing RI SHWR
  - 2 Queen ADA with transfer shower
- Detailed accessibility information easily found
- Usable to people with reading disabilities

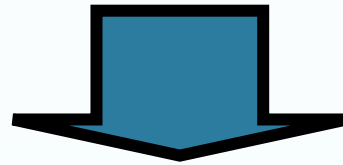


## 4. Designate Access Team

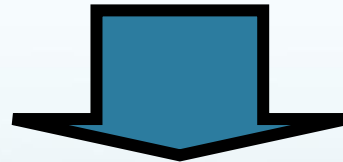
- Most effective way to create and maintain accessibility over time
- Becomes the “go-to” people in the company
- Can help prevent and resolve complaints
- Brings the “access” perspective to all policies, facilities and services

# The Stages of ADA Compliance

**Denial**



**Acceptance**



**Enlightenment**

# Paradigm Shift

View customers with  
disabilities as a valued guest

**Not** as a problem to be dealt  
with!

# Questions?

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