



THE  
ADA  
COMPLIANCE  
AND DEFENSE  
GUIDE



Understanding,  
preventing and defending  
ADA claims and  
enforcement actions

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Published by the Global Hospitality Group® of JMBM  
Los Angeles, California  
January 2015  
1st edition

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- [How To Buy And Sell A Hotel Handbook](#)
- [The Lenders Handbook for Troubled Hotels](#)
- [The ADA Compliance and Defense Guide](#)

This Guide is provided for informational purposes only.  
Legal advice should be based on your specific situation  
and provided by a qualified attorney.

# Table of Contents

Preface by Jim Butler .....	vi
Introduction.....	viii
About the authors.....	ix
CHAPTER 1 — OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT	
The Americans With Disabilities Act (ADA).....	2
Tips and traps for ADA compliance.....	6
CHAPTER 2 — THE ADA LITIGATION AND COMPLIANCE LANDSCAPE	
ADA sweeps by the U.S. Department of Justice — coming to a theater district near you soon.....	11
Is the DOJ’s ADA Compliance Survey coming to your city soon? .....	14
What questions are included in the DOJ’s ADA Compliance Review questionnaire? .....	19
<i>Case Study:</i> Starwood Hotels and The Phoenician .....	22
<i>Case Study:</i> DOJ sues three of NYC’s top Zagat- rated restaurants for ADA violations .....	28
<i>Case Study:</i> Hilton’s precedent-setting ADA Consent Decree and Settlement with the DOJ requires much more than just removing architectural barriers.....	33
Striking the right balance between ADA compliance and protecting business owners.....	39
Auxiliary Aids: FedEx sued for failure to provide effective auxiliary aids and services to communicate with employees and job applicants .....	44

# Table of Contents

How to handle an ADA lawsuit . . . and how not to do it.....	48
<i>Case study:</i> How the Cinemark case affects all hotels, but particularly conference centers and meeting hotels .....	52
California’s Certified Access Specialist program – does it provide all of the intended ADA protections? .....	59
Finally! Relief from abusive ADA litigation in California? Maybe not!.....	62

## CHAPTER 3 – ADA POLICIES, PRACTICES AND PROCEDURES

FAQs on service animal requirements of the ADA.....	70
Updating service animal policies of your hotel or other “place of lodging” .....	73
Pool Lifts: GlobeSt.com interviews JMBM’s ADA Compliance and Defense Lawyers.....	76
When disabled hotel guests’ needs go beyond the norm for typical guests, what do hotel owners and managers have to do? .....	79

## CHAPTER 4 – TIMESHARES AND FRACTIONALS

Timeshare and fractionals: Does your exit strategy or repositioning your property create ADA problems?.....	82
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## CHAPTER 5 – HOT TOPICS ON THE ADA

Websites: The importance of an ADA-compliant reservation system .....	86
Websites: Department of Justice poised to adopt accessible website standards .....	88

# Table of Contents

Websites: How your hotel or retail website can make you a target for ADA lawsuits .....	91
<i>Case Study:</i> Charles Schwab settles claim over website accessibility under the Americans with Disabilities Act.....	96
Golf Courses: ADA compliance standards for golf courses. What do they mean to you? .....	99
Buying a hotel or other place of accommodation? Don't buy an ADA lawsuit or DOJ investigation .....	104
Contributing Authors.....	107



## Preface by Jim Butler

*The ADA Guide traces its roots to the Hotel Law Blog.*

The *ADA Guide* is drawn from articles that first appeared on the Hotel Law Blog, and that have been edited so that the information is current as of the date of the *Guide's* publication. Since the launch of the Hotel Law Blog in 2006, our articles on the Americans with Disabilities Act (ADA) have been among the site's most widely read.

Hotel owners, commercial developers, financial institutions, shopping center developers, retailers and other places of "public accommodation" want disabled guests and customers to feel welcome. They also know that alleged ADA violations can be costly to defend and result in unwanted publicity. It is in response to their concerns that we have compiled these articles into the *ADA Guide*.

Our team of ADA lawyers has counseled hundreds of clients, bringing their organizations into compliance with the ADA, including their properties, websites, call centers, ATMs and retail kiosks, reservation systems, written policies and procedures, and related staff training. We also advise clients on insurance coverage and possible indemnity claims, and assist companies in responding to ADA investigations undertaken by the U.S. Department of Justice, Civil Rights Division.

We have defended more than 600 ADA and related accessibility claims across the U.S. The properties with targeted violations are all "public accommodations," including hotels, resorts, timeshares, theaters, sports arenas, and other commercial real estate such as apartment communities, shopping centers, retail stores and banks.

This *Guide* would not be possible without the work of my partner, Marty Orlick, whose leadership and commitment to serving companies in the ADA arena are unparalleled. And while the *Guide* cannot convey the depth of his team's experience, all the lawyers of JMBM's ADA Compliance and



Defense Group and JMBM's Global Hospitality Group® join me in hoping that the *ADA Guide* will be useful to you and your organization.

We invite you to contact us with any thoughts you would like to share on this topic, as we enjoy discussing “what it all means” with our industry friends. And if our resources and experience can help you in any way, please call on us.

Jim Butler

Author of [www.HotelLawBlog.com](http://www.HotelLawBlog.com)

Founding partner of Jeffer Mangels Butler & Mitchell LLP

Chairman of JMBM's Global Hospitality Group® and Chinese Investment Group™

Founder and Chairman, Meet the Money® National Hotel Finance & Investment Conference





## Introduction

Signed into law by President George H.W. Bush in 1990, and amended in 2010, the Americans with Disabilities Act (ADA) is the nation's most sweeping civil rights law designed to eliminate discrimination based on disability. This *ADA Guide* addresses architectural and communication barriers, and operational activities under Title III of the ADA, which concerns “public accommodations” such as hotels, restaurants, golf courses, spas, stadiums, banks, shopping centers, retail stores, schools and office buildings, and other commercial facilities.

In this *Guide*, you will find practical information about complying with the ADA at your place of public accommodation. You will find articles that include information about diverse topics such as service animals, websites, counter heights, ITT relay systems, pool lifts and reservation systems, all of which are affected by the ADA.

The *Guide* also covers ADA investigations by the U.S. Department of Justice – the risks, the mechanics, and the consequences – as illustrated by actual cases. Buyers and sellers of hotels and other places of accommodation will be interested in the article that explains how the ADA can significantly affect the value of your business in a buy/sell transaction.

The *ADA Guide* is intended to be a valuable resource of practical information for the clients and friends of Jeffer Mangels Butler & Mitchell LLP. But it cannot replace the counsel of an experienced ADA attorney. We know this is an area where an ounce of prevention is worth a pound of cure, which is why JMBM has been called on to implement portfolio-wide ADA compliance programs for Fortune 100 companies.

We also know that organizations and properties not in compliance with the ADA are vulnerable to lawsuits which, if not addressed properly, can result in upwardly spiraling costs and unwanted reputation risk. JMBM's ADA Compliance and Defense Group lawyers, led by Marty Orlick have defended more than 600 ADA lawsuits, and draw on this experience in bringing you this *Guide*.

## About the authors

**Jim Butler** is recognized as one of the top hotel lawyers in the world (Google® “hotel lawyer” and you will see why).



As the Chairman of JMBM’s Global Hospitality Group® and Chinese Investment Group™ at Jeffer Mangels Butler & Mitchell LLP (JMBM), he devotes 100% of his law practice to hospitality, helping hotel owners, developers, investors and their lenders to exploit opportunities and find solutions to problems. Over the years, Jim and his team have been involved in more than \$71 billion of hotel transactions

involving more than 3,800 properties all over the world, providing one of the most extensive virtual databases of market terms for deals and financings.

The lawyers of JMBM’s Global Hospitality Group® comprise the premier hospitality practice in a full-service law firm, and provide a full range of services for the hospitality industry. But Jim and his team are more than just great hotel lawyers. They are also hospitality consultants and business advisors who help clients unlock and preserve value in hospitality properties.

Jim’s commitment to providing thought leadership to the hospitality industry is evidenced by his roles as publisher of the [Hotel Law Blog](#) and chairman of the national hotel and investment conference, [Meet the Money®](#).

In addition to the *ADA Guide*, Jim is the co-author of three other books in the *We Wrote the Book™* series: *The HMA and Franchise Handbook*, *The How to Buy a Hotel Handbook*, and *The Lenders Handbook for Troubled Hotels*, which can be downloaded from the Resource Center page on [www.HotelLawyer.com](http://www.HotelLawyer.com).

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**Marty Orlick** is recognized as one of the nation's top ADA lawyers.



Marty, a “Dirt Lawyer” is the Chair of the ADA Compliance and Defense Group at Jeffer Mangels Butler & Mitchell LLP (JMBM), a senior member of JMBM’s Global Hospitality Group® and a partner in JMBM’s Real Estate Department. He is a nationally-recognized leader in the field of ADA law.

Marty counsels and defends owners, operators and developers of hotels, golf courses, restaurants, spas and other hospitality properties in enterprise-wide compliance and litigation issues related to the Americans with Disabilities Act. He also represents the nation’s leading financial institutions, banks, shopping centers and retailers, as well as professional sports arenas, wineries, residential communities, and other industries in ADA issues. His experience ranges from representing hotels and other businesses that are investigated by the U.S. Department of Justice, Civil Rights Division for alleged ADA violations to representing a nationwide chain of thousands of bank branches in achieving system-wide ADA compliance.

Marty is a member of the prestigious American College of Real Estate Lawyers; a member of the Advisory Board of the Advanced Leasing Institute, Georgetown Law Center; and a member and frequent conference lecturer for the International Council of Shopping Centers. He is a regular contributor to the *Hotel Law Blog*.

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# CHAPTER 1

## OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

# The Americans With Disabilities Act (ADA)

## *Background and key issues for places of public accommodation*

**S**igned into law by President George H.W. Bush in 1990, and amended in 2010, the Americans with Disabilities Act (ADA) is the country's most important civil rights law that prohibits discrimination based on disability. The ADA guarantees equal opportunity for persons with disabilities in employment, public accommodations, transportation, government services and telecommunications.

### **ADA Title III — Public Accommodations and Commercial Facilities**

*The ADA's Title III Regulations* cover businesses and facilities that are commercial facilities and "public accommodations" such as hotels, restaurants, golf courses, spas, stadiums, banks, shopping centers, retail stores and office buildings. Title III of the ADA states that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." Among other specifics, Title III requires:

- Businesses to make reasonable modifications to their policies, practices, and procedures necessary to accommodate persons with disabilities;
- Removal of architectural barriers to entering and using newly constructed, altered and existing facilities when "readily achievable";
- Businesses to provide auxiliary aids and services when they are necessary to ensure effective communication with persons with hearing, vision, or speech disabilities.

## **ADA Accessibility Guidelines (ADAAG) for the built environment**

The Americans with Disabilities Act Accessibility Guidelines (ADAAG) were developed by numerous federal agencies to provide guidance and set standards for implementing the ADA, are enforced by the U.S. Department of Justice, and apply to state and local government facilities, public accommodations, and commercial facilities. The standards were last revised in 2010 (known as the “2010 Standards”) and went into effect on March 15, 2012. The 2010 Standards set national minimum requirements – both scoping and technical – for newly designed and constructed or altered buildings. The requirements can be very precise and complex, and must be adhered to, as courts have held that “obedience to the ‘spirit of the ADA’ does not excuse noncompliance with the ADAAG’s requirements.” *Chapman v. Pier 1 Imports (US), Inc.*, quoting *Long v. Coast Resorts, Inc.*

### **Accessibility to communications**

The ADA also applies to certain non-architectural barriers such as effective communications. ADA lawsuits and DOJ investigations have been launched against hotels, financial institutions, shopping centers, retail chains and other businesses that resulted in changes to their websites to make them accessible to the sight-impaired. Theaters have been sued and now provide closed captions for the hearing-impaired. This is a developing area of the law, and the DOJ has announced its intent to issue standards in this area. The U.S. Equal Employment Opportunity Commission filed suit against FedEx for failing to provide Qualified American Sign Language Interpreters and similar interpretive services to deaf and hard-of-hearing employees and job applicants. Effective communication investigations and litigation are on the rise and will surely increase in numbers.

### **ADA Compliance — policies, practices, procedures and training**

Compliance with the ADA has necessitated that businesses develop policies, practices and procedures for maintaining ADA-compliant facilities and interacting with disabled employees and customers. Practices and procedures might include basic



courtesies in general and how to interact with persons with disabilities, how to accommodate service animals, what kinds of accommodations, rooms and services need to be available to disabled hotel guests, and what kinds of requests made by disabled customers are unreasonable.

Training employees in how to best serve disabled customers has become equally important. Many companies have undertaken “ADA Compliance Audits” to ensure that not only their properties, but their policies and procedures are in alignment with the requirements of the ADA. As technology advances, the activities covered by the ADA continue to expand.

## **ADA litigation landscape**

Implementing the ADA has been complex and expensive. It has given rise to a plethora of regulations and numerous changes in the way governments and commercial enterprises design, build and operate their businesses.

The DOJ is active in enforcing ADA compliance on a selective basis, generally where actions will have a significant impact in a geographic area or industry. In addition to the DOJ, the ADA also gives individuals and advocacy groups the right to file lawsuits that enforce its provisions – companies large and small, nationwide, have been the target of such lawsuits.

These private enforcement lawsuits have proliferated, particularly in states like California where state laws make it possible for plaintiffs to recover attorneys’ fees and litigation costs in addition to minimum statutory and treble damages. (For defendants, these costs are in addition to those related to correcting ADA violations.)

Further, in some states, like California, disabled plaintiffs may challenge **all** the barriers in the hotel, restaurant, bank, shopping center, retail store or other place of public accommodation that are related to his or her disability – regardless of whether the plaintiff personally encountered the barriers.

These conditions have made it possible for atypical “serial plaintiffs” and their lawyers to make a tidy living from settlements paid out in ADA lawsuits. Businesses of all sizes

have been subjected to these sue-and-settle tactics. Business and industry trade groups, as well as legislative bodies have been involved in reforms that will curb this kind of abusive litigation, but change has been incremental.

## **The Future of the ADA**

The ADA has been the law since 1990 and its effects have been widespread. Millions of disabled Americans have better access to the full and equal enjoyment of facilities and goods. The world of commerce is dynamic, as is the law, and the applications of the ADA will continue to develop – including into areas we are just beginning to understand. Keeping abreast of ever-changing technical and legal aspects of the ADA's requirements is a challenge, but it has never been as critical since non-compliance carries significant litigation and reputation risks. Business owners who want to remain competitive will welcome disabled consumers by running a business that embraces both the spirit and the letter of the law.



## Tips and traps for ADA compliance

### *Testing two common ADA myths*

**T**here have been more than 20,000 ADA lawsuits filed in the United States. Failure to comply is expensive and bad for business. It is important to be ADA-friendly.

There is abundant law and lore in ADA compliance. Lore is often passed by word of mouth and often attains the status of urban legends or mythology. Not all urban legends are right.

**Myth #1:** “My property was built before the ADA was enacted. We haven’t done anything to it other than cosmetic updates and routine repair and maintenance, so we’re grandfathered in.”

**Reality:** This is false. Every place of “public accommodation” (every hotel, restaurant, retail and other facility open to the public) is covered by the requirements of the ADA. There are few exceptions. As a business, you have to evaluate if barrier removal is readily achievable. The ADA defines “readily achievable” barrier removal as “*easily accomplishable and able to be carried out without much difficulty or expense.*”

The ADA’s barrier removal standards apply to architectural barriers and barriers created as a result of policies, practices and procedures. A public accommodation must modify both architectural and policy barriers if readily achievable.

**Myth #2:** “The building inspector reviewed my plans, gave me a permit and a Certificate of Occupancy. Therefore, my property must be in compliance with accessibility laws.”

**Reality:** This is false. Building and safety review do not ensure compliance with accessibility laws, and it offers you no protection from liability.

## **Current status of ADA requirements for pool and spa lifts**

Since this requirement is now in effect (as of January 31, 2013), all public accommodations including hotels, motels, inns and most timeshares, are required to install fixed pool lifts at all pools and spas, unless it is not readily achievable.

## **What's effective now in the 2010 ADA Standards?**

*Facilities/Elements* – The following facilities and elements are now covered by the 2010 ADA Standards. All public accommodations must comply with the Standards relating to these facilities and elements to the extent readily achievable:

- Golf courses, including miniature golf courses – this includes golf cart access directly to the tees and greens. The standards do not yet require golf courses to provide an accessible golf cart.
- Pools and spas – this includes lift, ramp and other requirements
- Play areas and play structures
- Boat launches
- Amusement parks
- Fitness facilities

Standards in effect for all public accommodations (as of March 15, 2012):

- *Hotel Reservation Requirements* – With limited exceptions, all public accommodation reservation agents must be able to identify accessible features, accessible rooms must be held back as the last rooms rented (so as to be available for reservation by individuals with disabilities), and accessible rooms, once booked must be hard blocked for the reserving party.

- *Service Animals* – Only dogs and miniature horses (unless, with respect to horses, the party seeking to exclude them can make certain showings) are service animals under the ADA. Public accommodations are not permitted to ask most questions relating to service animals, to charge a pet fee for service animals, or to exclude service animals (except under very limited circumstances). Emotional Support animals are no longer deemed to be service animals. State and local laws and the Fair Housing Act and the Air Carrier Act may provide for broader use of service animals.
- *Mobility Devices* – Segways are now, along with wheelchairs and a number of other motorized devices, considered power-driven mobility devices, and the burden is on the public accommodation to show why they should not be permitted on the property.
- *Communication Devices* – You are required to provide effective methods of communication and to provide an interpreter for individuals with hearing impairment. There are a host of restrictions against communicating in an impermissible manner, including with the minor children of individuals with disabilities.

Guest room requirements for mobility and communication features apply to new and altered public accommodations and existing buildings.

**If you do not have written ADA and local accessibility policies and procedures for your hotel or timeshare property, then you are taking unnecessary risks.**

## **What can you do to avoid liability?**

- *Training* – Training is critically important, and it can help prevent expensive litigation and reputational risk. Thought must go into the preparation of an accessible room, and the approach

must be different depending on the disability of the individual who has booked the room. JMBM performs site inspection surveys and works with hotel operators to train the staff to address the needs and concerns of individuals with disabilities.

- *ADA Surveys & Site Inspections* – Even if you own or operate a newly constructed property, an ADA survey will likely reveal areas of non-compliance and rooms for improvement in policies and procedures. By working with a Certified Access Specialist Program (CAsp) certified consultant, you may enjoy certain protections against liability while you seek to bring your property into compliance.
- *Website Accessibility* – This is an area of focus for the Department of Justice. This area is evolving, but your website must already comply with all current reservation requirements.

## **Federal ADA compliance is not enough**

Note that state accessibility requirements are often more comprehensive than the requirements of the ADA. Consult experienced counsel when establishing your accessibility policies.

## **Develop a strategy to avoid costly litigation**

In any event, figure out an effective implementation strategy that will allow you to be proactive. If you get sued or get a devastating Yelp review, then you didn't do your job. Develop a plan now.

# **CHAPTER 2**

## **THE ADA LITIGATION AND COMPLIANCE LANDSCAPE**

## ADA sweeps by the U.S. Department of Justice — coming to a theater district near you soon

**S**ince 2005, the United States Department of Justice (DOJ) has been conducting Americans with Disabilities Act sweeps of hotels within a mile of the Times Square Theater District in New York City. These sweeps, which determine the property's compliance with accessibility standards, cover nearly every property without differentiation: boutique, luxury, national brands, limited service. No type of property is immune. What the hotels have in common is their proximity to Time Square.

The DOJ has primary jurisdiction to enforce the ADA. Since there is no federal "building department" which is responsible for enforcing the ADA in private construction, the DOJ has left enforcement of the ADA to local building departments. When serious violations are brought to the attention of the DOJ in areas where significant and high profile industry-wide impacts can be achieved, however, they will enforce the ADA through the offices of local U.S. Attorneys' offices around the country.

### **The Manhattan Hotels ADA Compliance Review**

In order to evaluate each Time Square-adjacent property's compliance with the ADA, the DOJ administers a survey, to be signed under penalty of perjury. The 20-page document is called "The Manhattan Hotels ADA Compliance Review" and was initially mailed to 60 Manhattan hotels early in 2005. The questionnaire details every aspect of the ADA applicable to hotels, and the properties are given 30 days to respond, under oath. Depending on the survey responses, the hotel is either deemed compliant or subject to further scrutiny.

The survey evaluates well-understood ADA standards outlining access, such as accessible parking, public entrances, reception areas, paths of travel, conference rooms, fitness rooms, pools and accessible guest rooms. This is not a "drive-by" snapshot as previously seen in some lawsuits. It is a comprehensive survey of the hotel's accessibility features.



The level of detail required in the hotel's response is significant. The DOJ wants to know not only if the hotel has the required number of rooms for disabled guests, the required number of rooms with roll-in showers, and the required number of rooms for the hearing impaired – they want to know if these rooms are dispersed equally among types of rooms and suites, smoking and non-smoking rooms, bed sizes, rooms with and without views, and spread equally among all floors. They want to know how these rooms are priced relative to other rooms, and about on-property and on-line registration and check-in policies and procedures.

The DOJ is also interested in reviewing the hotel's written ADA policies, practices and procedures manual. If modifications were made to accommodate the ADA in the past, the DOJ wants a copy of the permits for the work performed. They asks for "as built" drawings, which are then reviewed by the Department's architectural staff for ADA compliance. Hotels are asked for any imminent plans for ADA modifications, as well as for those planned in the next three, six and twelve months. No stone is left unturned.

## **Site inspections trigger architectural and procedural changes**

After the survey is returned, a team of experts from the DOJ and from the New York Attorney General's office makes on-site inspections to verify the information provided by each hotel. The team includes investigators, architects specializing in accessible design, and other professionals.

To comply with the ADA, hotels are making architectural changes and implementing new policies and procedures, depending on the results of the site inspection. Initially, there were a number of hotels that dragged their heels and a few that refused to cooperate. That was a big mistake. The DOJ and the New York Attorney General are committed to a barrier-free hotel industry, and can impose penalties as well as file lawsuits. Hotels are not, and should not be, interested in either of those scenarios. Likewise, the DOJ would prefer to enter into a Voluntary Compliance Agreement with the hotels rather than force compliance through litigation.

## Other cities could be targeted

What if you don't have a hotel in New York City – should you care? Absolutely.

Barrier removal is required by law and is good for business. The DOJ's reach is nationwide and it is possible they will target other cities like Boston, San Francisco, Chicago, Miami, Orlando, and San Diego – cities that attract a large tourist population. In this scenario, the DOJ would engage the help of the Attorney General's office in those jurisdictions.

Hotels that have experienced ADA litigation – particularly in California where plaintiffs can recover actual, punitive and statutory damages, as well as attorneys' fees – understand that the lawsuit is quite often about the money and less about strict compliance with the ADA standards.

What you have in Manhattan, however, is the highest level government enforcement agency pursuing real change. The DOJ and the AG have the resources to follow up repeatedly, and the muscle to enforce change. To help avoid future lawsuits, it is wise to hire a competent ADA adviser with a long background in the type of litigation these cases can cause. An ADA attorney will retain experts, recommend cost-effective barrier removal strategies, present the facts to the DOJ and negotiate a reasonable resolution – taking into account the Department's objectives and the resources of the hotel. A good advisor will conduct a thorough compliance audit – one that should pre-emptively catch any issues that might otherwise be located by the DOJ.



## Is the DOJ's ADA Compliance Survey coming to your city soon?

### *What to do when you receive the DOJ's ADA Compliance Review questionnaire*

**E**ven if you don't have a hotel in Manhattan, you will want to know about the Manhattan Hotels ADA Compliance Review Survey conducted by the U.S. Department of Justice (DOJ). The DOJ's reach is nationwide and other cities are targeted for the same kind of survey and enforcement.

In the previous article, we described the sweeping scope of the DOJ's ADA Compliance Review Survey of Manhattan hotels. Hoteliers who receive the questionnaire should be aware that DOJ investigators may have already been to their hotel – in fact, the DOJ's sub rosa investigation may be why the hotel received the survey in the first place.

The conversation below, between Jim Butler and Marty Orlick, covers what hotel owners and managers should do when they receive the DOJ's ADA Compliance Review questionnaire in the mail.

### **What to do when you receive an ADA Compliance Questionnaire from the U.S. Department of Justice**

**Jim Butler:** So, I am a hotel owner or manager and I get an envelope from the DOJ with the ADA Compliance Review questionnaire inside. What do I do?

**Marty Orlick:** First, take it very seriously. Make sure the questionnaire gets to the right person as quickly as possible. That person should call an experienced ADA lawyer to walk them through this potential minefield of questions. The DOJ is surveying both hotel owners and managers, and the last thing you want is for this document to be sitting in someone's inbox while the person tries to figure out what it means and who should be dealing with it.

Every question on the form has been carefully crafted to elicit important information about ADA compliance. The survey is specifically focused on identifying architectural access barriers and, equally important, your hotel's ADA policies and procedures. It is very detailed. Completing the questionnaire will take time and careful thought.

Don't complete it yourself. Have a lawyer review it and advise you, first.

**Jim:** Why can't a knowledgeable hotel professional answer the questionnaire? Why should a lawyer get involved?

**Marty:** Each question is designed to obtain precise information about complex, technical compliance with the ADA guidelines. Each answer may create liability. Your answers can also help you to avoid exposure.

The questions must be thoroughly understood from a "Standard of Compliance" as defined by law. The right answer to a misunderstood question can cause serious problems that could cost you dearly. For example, the age of the property and the year that construction or "alterations" were performed can significantly impact the answers to questions.

Many hoteliers have spent time and money making their properties accessible to the disabled, and they may believe genuinely – but erroneously – that their properties are in compliance with the ADA, when in fact they still have barriers as defined under Title III.

**Jim:** Give us an example of a question that could cause a hotelier problems.

**Marty:** Questions about guest rooms have to be answered with great care. The questionnaire will likely ask for a description of all room categories in the hotel, and the number of accessible rooms in each distinct

room class, as hotels are generally required to provide accessible rooms in each class.

The thing you have to ask is: What is a category or room class? If this part of the questionnaire is completed by listing each marketing or price-point category, as opposed to actual different room types, you are going to have a problem. You should consider identifying guest rooms according to functional categories based on the types of amenities they offer. Your hotel may have many marketing-driven categories for rooms, but in actuality your rooms may simply be singles, doubles, queens, kings and suites.

In other words, if your “suite,” for marketing purposes, is a room that has an extra lamp, you may describe it separately for marketing purposes but you may not want to list it in a separate category on the questionnaire. If rooms cost an additional five dollars per floor, but there is no difference between the rooms on the 17th and 18th floors, they should not be listed in separate categories.

**Jim:** That could be tricky. Is there a little leeway in answering this questionnaire?

**Marty:** No, not much. You must be absolutely truthful! Remember, the questionnaire is submitted under penalty of perjury. Besides, it is likely that a DOJ investigator has already been to your hotel and knows the types of rooms you have.

**Jim:** What else should the owner or manager do, after he or she gives you a call?

**Marty:** The ADA Compliance Review specifically focuses on the hotel’s written accessibility policies and procedures. So, the ADA lawyer should ask you to start pulling together documentation. We need to review the written ADA policies and procedures that are provided to staff to see what they look like. Policies and procedure manuals should detail all the devices

installed and all the processes the hotel has established for serving disabled guests.

**Jim:** Give us some examples of what those documents would include.

**Marty:** Your written policies and procedures manuals should include how to easily identify which ADA compliant rooms are available when customers call for reservations. It should include procedures for hooking up Telecommunications Devices for the Deaf (TDD) or smoke alarms for the hearing or seeing impaired, or any other specialized equipment needed for specific disabilities including repositioning furniture and guest amenities.

It should also include procedures for the evacuation of disabled guests in event of emergency, and how to deal properly with disabled guests who have service animals.

**Jim:** That's a long list – is that it?

**Marty:** No, not by a long shot. You need to show how your reservations, sales and operating staff are trained in all these procedures.

**Jim:** So the first thing a hotel owner or manager does is call you and send you the questionnaire. Then you direct them to collect this documentation. Now what happens?

**Marty:** Next, we will set up a time for a professional independent access consultant to review your property for access barriers and we will respond to that part of the questionnaire. As I mentioned, the DOJ has probably already been through your property, so you want to respond to this part very carefully. After you turn in the survey, the DOJ will come in with their team and perform a more formal site inspection.



**Jim:** So, what happens after the DOJ performs their inspection?

**Marty:** The DOJ's people will determine what action needs to be taken. At that point, my job as your ADA lawyer is to advise you as to what is required by law and what is not, and to negotiate a reasonable resolution, taking into account the DOJ's concerns and the resources you have available. We will most likely come up with a voluntary compliance agreement that everyone can live with. The goal here is to bring your hotel into compliance and provide accessibility to your disabled guests in a way that works for everyone.

**Jim:** With your experience in defending more than 600 ADA cases, how would you say that these ADA sweeps by the DOJ differ from the other ADA lawsuits you defend?

**Marty:** The issues are not much different. However, the DOJ is more serious about meaningful change than some ADA plaintiffs I have dealt with in the past. The DOJ is typically more concerned about compliance.

**Jim:** Thanks, Marty.

## What questions are included in the DOJ's ADA Compliance Review questionnaire?

**I**n response to an ADA complaint made against your company (or in the case of a sweep against companies similar to yours), the U.S. Department of Justice (DOJ) sends you detailed questionnaire, requesting a written response within a specific period of time – which could be as little as 30 days! What do you do?

As we discussed in the previous article, it is critically important that an experienced ADA lawyer review the questionnaire and advise you before you answer the questions.

Why? Because every question on the form has been carefully crafted to elicit important information about ADA compliance and every answer you give has the potential of creating liability.

Even if you believe you are in compliance with the ADA, get a lawyer's advice! The ADA reaches far beyond architectural barriers to include many parts of your operation. As technology advances and plaintiffs' lawyers get more creative, the ADA's coverage continues to expand into areas that may not be so obvious.

Answering the DOJ's questions – which must be done under the penalty of perjury – will involve digging into numerous nooks and crannies of your facilities, operations, policies and procedures. It will take a concerted effort, and you need to get started!

### What's on the questionnaire?

It would be easy to gauge ADA compliance if the DOJ had a “boiler plate” questionnaire. However, it is likely the United States Attorney is investigating a specific complaint against your company and will develop questions that address that specific issue. But there are broad areas that pop up in many questionnaires, and they are significant.



## **Policies, procedures and training**

In most cases, no matter the specific complaint at hand, there will be a request for documentation of policies, procedures and training with respect to accessibility in your organization. You will encounter such questions as:

- What are your company's policies and procedures for dealing with disabled individuals? When was each implemented?
- How are policies and procedures communicated to guests, customers, and staff?
- How is staff trained to deal with disabled guests, customers and staff? Can you provide detailed documentation of training?
- What ADA complaints have been made against you in the past, and how were they resolved? Can you provide all documentation?

The broad areas of questioning above might have many subparts, requesting granular specifics. But no matter the specific complaint under investigation, the DOJ will be very interested in your company's policies, procedures and training (or the lack thereof).

## **Architectural barriers**

If the investigation involves architectural barriers, such as paths of travel, accessible parking, counter heights and so on, you may be asked to provide evidence of written policies, practices and procedures, blueprints or photos of specific architectural details, and financial statements of your organization's entire structure.

## **Digital accessibility**

If the investigation involves digital access to a website, reservation system or other electronic media, you may be asked about auxiliary aids, technology, and call center support.

## **Communication barriers**

If the investigation involves accessibility for hearing-impaired or sight-impaired individuals, you may be asked a series of detailed questions about auxiliary aids such as Telecommunications Relay Service (TRS), e-readers, and Communications Access Realtime Translation (CART) capabilities. Areas of questioning may include your policies and procedures with protecting customer and employee confidentiality.

In all cases, a prompt and thorough internal investigation that will enable you to answer questions and locate relevant documents must be undertaken.

With all the information at hand, a lawyer will advise you how to answer all questions truthfully, minimize liability, and comply with the requirements of the ADA.



## Case Study: Starwood Hotels and The Phoenician

*How an ADA compliance audit could have avoided a terrible result*

Over the last decade, the U.S. Department of Justice (DOJ) has focused on hotels, restaurants and resorts as well as retail and banking for enforcement of the Americans with Disabilities Act of 1990 (ADA).

In late 2013, the DOJ made an example of Starwood Hotels and Resorts Worldwide, Inc. and The Phoenician as to the importance of ADA compliance by every hotel operator and business owner. The Settlement Agreement stunned our ADA team, because of how easily these major problems could have been avoided and how an industry leader like Starwood could find itself the target of a DOJ investigation over such basic barriers.

The compliance areas detailed in the Settlement Agreement are routine, run-of-the-mill, ADA check-list items that could have been easily identified and corrected by Starwood itself. Instead, Starwood and The Phoenician were dragged through the expense, reputational risk and hassle of a 5-year government investigation. What were they thinking? These industry leaders will be top-of-mind to DOJ investigators for years to come.

First, the DOJ investigation of The Phoenician and Starwood didn't happen in a vacuum. Here is just a sample of what went on the past few years:

- At the 2013 National ADA Symposium, which our team attended, the former Chief of the DOJ's Civil Rights Division (the principal enforcement agency for the ADA), noted that the hospitality industry remains a prime focus of the Department's civil rights investigations.
- The DOJ announced that it settled an investigation of the Milford Plaza Hotel, NYC. The hotel's owner

agreed to bring the property into ADA compliance within a brief period of time dictated by the government, thus ending another multi-year investigation.

- In a highly publicized action, the owners of the top 50 Zagat-rated restaurants in New York City received a 17-page survey form from the DOJ to determine their compliance with the accessibility requirements of the ADA. Most of the restaurants entered into voluntary compliance agreements, but in October 2012, the DOJ filed lawsuits against three of the restaurants.
- In 2010, the DOJ and Hilton Worldwide Inc. entered into a 45-page “comprehensive precedent-setting agreement under the ADA that will make state-of-the art accessibility changes to approximately 900 hotels nationwide.” The agreement includes not only Hilton-owned properties, but properties where Hilton is the manager or franchisor. In addition to the removal of architectural barriers, the agreement specifies changes in reservation policies and addresses website accessibility.
- In January 2009, the DOJ conducted its notorious Times Square Manhattan Theater District “ADA sweep” of nearly 60 hotels. We represented one of those hotels and can tell you that DOJ investigations must be taken very, very seriously.

### **The DOJ settles five-year ADA investigation of Starwood Hotels and Resorts Worldwide Inc. and The Phoenician Hotel and Resort**

The DOJ’s settlement with Starwood Hotels and the Phoenician Hotel resolved a five-year ADA investigation and compliance review by the DOJ. The U.S. Attorney General through the Civil Rights Division of the DOJ conducted an initial site inspection and instituted a lengthy ADA compliance investigation.

## The Complaint

Most of these kinds of DOJ investigations are triggered by a confidential complaint made by a single disabled guest who allegedly encounters access barriers at a single property. This is likely how the Starwood/Phoenician investigation began.

The administrative complaint alleges that The Phoenician violates Title III of the ADA because several of its “accessible” guest rooms, public restrooms and other public amenities were inaccessible to guests who use wheelchairs. Inaccessible guest rooms and toilet rooms in lobbies are among the most common elements cited in ADA reinforcement actions and private litigation against hotels, whether the property is an existing, newly-constructed or altered hotel.

Despite careful design and construction, even experienced architects fail to take into consideration all the complex and interrelated design dimensions required under the ADA Standards and state building codes, and contractors often fail to build in compliance with such standards.

Because The Phoenician was designed and built for first occupancy before January 26, 1992, it has been required to remove readily achievable barriers which interfere or prevent access by guests in wheelchairs, and to bring any altered elements of the property into compliance.

## The Settlement Agreement

Starwood and The Phoenician had until December 31, 2014 to make all alterations required under the settlement in conformity with the 2010 Americans with Disabilities Act Accessibility Guidelines (ADAAG) which became effective March 15, 2012. The changes were made in two phases, tied to Starwood’s fiscal years.

To be completed before the end of 2013, the hotel agreed to complete modifications to two accessible guest rooms: install tactile signage (raised lettering and Braille room number signs), lower security latches and closet rods, reconfigure the roll-in showers to provide compliant space dimensions, adjust the toilet center line, install compliant grab bars, reconfigure the lavatory

height and insulate the under-sink pipes. ADA barrier removal doesn't get much more basic than that.

The height of the guest room thermostat controls and dead bolt locks was also lowered. The hotel relocated the accessible parking spaces in the garage to assure they are on the shortest accessible routes to the lobby and other public areas, and where sufficient overhead clearance is provided. The hotel is also to ensure that the showers, saunas, steam rooms, the men's and women's golf locker rooms and toilet rooms are in compliance with the 2010 ADA Standards. These basic modifications had to be completed within 180 days.

A number of the fixes are simple and inexpensive to address, such as insulating under-sink pipes, lowering or adding coat hooks or "D-shaped handles on the accessible stall doors, or installing off-set flanges to adjust the centerline of toilets. Other modifications, like expanding bathroom compartments, leveling floor drains, and expanding roll-in showers are not so easy to implement and can be prohibitively expensive.

### **The big take-away: This DOJ investigation (and its expense) was totally avoidable**

The DOJ investigation of The Phoenician and Starwood – and its expense over five years – never should have happened. Frankly, the barriers described in the settlement are typical of the hundreds of hotels and resorts that have been surveyed by JMBM's ADA lawyers and our consultants. These barriers are generally detectible by the trained eye and, after examination by trained ADA specialists, can be resolved with proper repair and routine maintenance.

The choice is rather simple:

1. **BE PROACTIVE:** Conduct your own ADA survey and implement a reasonable compliance plan, or
2. **DO NOTHING:** Take the risk that the DOJ, a plaintiffs' advocacy group or court will do it for you, with deadlines you cannot easily meet or afford, and requirements that are likely to be

tougher and more expensive than what otherwise would have been “good enough.”

## **Moving forward**

If you are planning a proactive course of action, we usually advise that your counsel should retain an experienced ADA compliance and defense lawyer to quarterback your ADA audit. You want your ADA counsel to engage ADA architects and access specialists to establish attorney-client privileges and attorney work product protections.

If you’re going to do it, do it right. It is best to undertake an enterprise-wide ADA compliance program to evaluate your entire portfolio. But, at a minimum, you should:

- assess your high-risk properties; and
- develop written policies and standard operating procedures for guest service excellence as they relate to disabled guests.

The DOJ should never have seen any of these fundamental barriers. They should have been remediated before the DOJ’s investigators and architects stepped foot on the property.

In addition to the brick-and-mortar ADA issues addressed by The Phoenician, you should consider whether your written reservation policies meet the 2010 ADA Standards, whether your website is accessible to blind and low vision viewers, and whether your hotel is accessible to deaf and hard-of-hearing guests – particularly when you have any meeting or conference facilities. All these issues are covered by the ADA.

If you choose to ignore the repeated lessons of non-compliance, you may have an even more urgent need to contact your lawyer.

Too often we see property owners and managers get “stuck” on pool lifts or some other single element of ADA compliance. Don’t focus on any single element. The best approach to avoiding an ADA lawsuit is to conduct an ADA compliance and prevention survey of your business. The survey should include an assessment of the following:

- Physical facilities – the brick and mortar
- Written ADA policies, practices and procedures manual
- Reservation system compliance with best practices
- Website accessibility for blind and low-vision guests
- Staff training and competency on using auxiliary aids and services for persons with disabilities (audio and visual)
- Call center and operator training and compliance to accept the many types of Telecommunication Relay Services (TRS) used by deaf, hard-of-hearing and speech-impaired guests and potential guests. (The DOJ has been particularly aggressive when it comes to enforcing hotel policies, practices and procedures regarding effective communication)

Subpar performance on any one of these elements could mean trouble in an ADA suit.

The survey should be done under representation of an attorney, which will give the results of the survey protection under attorney work product protection.

[Click here to review the Settlement Agreement with Starwood Hotels and The Phoenician](#)



## **Case Study: DOJ sues three of NYC's top Zagat-rated restaurants for ADA violations**

*Some practical advice on what to do when the Department of Justice knocks on your door with an ADA survey*

**A**ctually, the DOJ does not usually “knock on your door.” Normally the DOJ mails you the ADA survey form. But it does come down to the same thing.

By the time you get a DOJ survey, a lot of your flexibility is gone – but it is not too late to protect yourself if you seek experienced counsel immediately.

Over the past 10 years we have seen a rising tide of increased public and private enforcement of the ADA. While many are being distracted by pool lifts and other new ADA requirements, private advocacy groups and the DOJ keep banging away on the basics.

For example, in a single week, one ADA plaintiff's lawyer filed 19 lawsuits in the Los Angeles federal court (Central District of California).

Here is how the DOJ decided to make an example out of the top-rated Zagat restaurants in New York City.

### **DOJ targets NYC's top Zagat-rated restaurants for ADA violations**

You have worked for years to get top Zagat ratings for your restaurant. After years of hard work, you've made it! And because of that, food lovers from around the world will beat a path to your door.

But, so too will the Department of Justice (DOJ), as the owners and operators of Manhattan's top 50 Zagat-rated restaurants found out.

Each restaurant received a 17-page survey form, courtesy of the Civil Rights Division of the U.S. Attorney’s Office, Southern District of New York (SDNY), for the purpose of determining compliance of their establishments with the accessibility requirements of the ADA.

Then, in October 2012, the DOJ filed a lawsuit against the owners and operators of three of those restaurants. All of the named defendants are part of the Rosa Mexicano restaurant chain. The lawsuit alleges numerous violations of the ADA.

Here’s what happened and how the Rosa Mexicano chain could have avoided the lawsuit.

## **Background: Manhattan Restaurants ADA Compliance Initiative**

Under the ADA, all facilities in the United States that are “public accommodations,” including hotels, restaurants, and retail facilities must comply with state and federal standards that make their establishments accessible to and usable by customers with disabilities. Many mistakenly think that the ADA is a set of federal building code standards. It is not! It is the most sweeping civil rights protection for disabled Americans. Sure, there are state building codes and federal design-related guidelines involved, but the ADA assures disabled Americans full, equal and independent access to public accommodations.

The DOJ has primary jurisdiction to enforce the ADA, but since there is no federal “building department,” the DOJ has mostly left enforcement of the ADA to local building departments and private lawsuits.

However, in New York, the U.S. Attorneys Office has committed resources for achieving industry-wide impacts for ADA compliance in Manhattan. The recent sweep of the 50 most popular Zagat-rated restaurants in Manhattan is termed the Manhattan Restaurants ADA Compliance Initiative. It is not the first such DOJ ADA initiative in Manhattan.



## **DOJ's sweep of 60 Times Square hotels**

In 2005, the “Manhattan ADA Hotels Initiative” focused on the accessibility of 60 hotels in Manhattan’s Time Square Theater District. While most hotels (including our client’s property) cooperated with the DOJ, completing the surveys and entering into Voluntary Compliance Agreements (VCAs) to bring their properties into compliance, five did not. Those five were eventually sued by the U.S. Attorneys Office SDNY. In the end, they agreed to essentially the same terms as the hotels that complied voluntarily – but they suffered civil penalties and expensive litigation, as well.

If the owner and operator of the Rosa Mexicano restaurants had done their homework and received proper counsel, they could have saved money and avoided the lawsuit, not to mention the negative reputations/risk that ensued.

## **The Survey required for the top 50 Zagat restaurants**

Titled the “Manhattan Restaurants ADA Compliance Review Survey Form,” the questionnaire was developed to ascertain whether restaurants meet the basic requirements of the ADA, including the architectural standards set forth in the Americans with Disabilities Act Accessibility Guidelines (ADAAG). To that end, the survey questionnaire asks for detailed information about the physical aspects of the restaurant such as dining areas, entrances, waiting areas, bars and restrooms. The survey response is one of the most critical documents in the investigative process and should only be completed with the aid of ADA legal experts. The requirements of the ADA Standards are technical and complex. Innocent, seemingly innocuous questions can have serious implications.

The ADA requirements go far beyond the physical aspects of the premises. The survey form covers these aspects of restaurant operations as well, including reservations systems, Telecommunications Relay Service and website accessibility, written accessibility policies, practices, procedures, and service animal policies. The DOJ is also keenly interested in receiving your written ADA policies, practices and procedures manual.

The form also asks owners and operators what they intend to do in the next 6 months to address ADA policies and procedures, and what they intend to do in the next three years to remove architectural barriers that prevent accessibility.

The DOJ made sub rosa investigative site inspections to verify the accuracy of the information reported in the survey forms, as they did with hotels in the Times Square hotel ADA survey.

## **Voluntary Compliance Agreements**

Most restaurants – as most of the hotels before them – have entered into Voluntary Compliance Agreements with the DOJ, detailing the changes they will make in their properties and operations to become ADA compliant.

The survey form may seem innocuous, but it is a prosecutorial trap for the unwary. Both the survey form and the VCAs are detailed legal forms. Scuttlebutt says that many restaurants did not bother to retain legal counsel to help them reply to the survey and to fully understand the consequences of each response. This will likely prove a costly mistake.

Any time you get a DOJ survey for ADA compliance, you would be wise to take the survey and VCAs very seriously. Consulting with experienced ADA counsel is recommended through all phases of a DOJ survey and investigation.

## **What's next?**

Manhattan restaurants not included in the survey should take heed and come into compliance before they are investigated or sued. The U.S. Attorney SDNY has a web page asking disabled citizens to let them know of any public accommodations that are not accessible.

Will the U.S. Attorney's Office in New York and other cities like Chicago, San Francisco, or Los Angeles, announce additional lawsuits against Zagat top-rated restaurants? The answer to this question remains to be seen.

Restaurants in other parts of the nation are not immune to lawsuits filed by the DOJ, advocacy groups, or private litigators.



The ADA is an area where an ounce of prevention is worth far more than a pound of cure.

Bon appétit!

# Case Study: Hilton's precedent-setting ADA Consent Decree and Settlement with the DOJ requires much more than just removing architectural barriers

*Precedent-setting agreement affects all hotel brands in the Hilton brand family*

On November 9, 2010, the U.S. Department of Justice's Civil Rights Division (DOJ) and Hilton Worldwide, Inc. announced that they entered into a 45-page "comprehensive precedent-setting agreement under the Americans with Disabilities Act of 1990 (ADA) that will make state-of-the-art accessibility changes to approximately 900 hotels nationwide."

More than the usual removal of architectural barriers, the changes include providing disabled guests the same room choices as other guests, guaranteeing accessible rooms will be available when they have been reserved, and making the central Internet reservation system more accessible. The agreement includes not only Hilton-owned properties, but properties where Hilton is the manager or franchisor.

The lawsuit was filed after the DOJ completed ADA surveys of 13 Hilton-related hotels. Hilton denied all allegations, but cooperated with DOJ investigators throughout the extended investigation and agreed to pay a \$50,000 civil penalty.

## Background of lawsuit

The Court-approved Consent Decree and Final Judgment resolved the lawsuit *US v. Hilton Worldwide, Inc.*, filed in the United States District Court for the District of Columbia. The lawsuit alleges that Hilton, Conrad Hotels and Resorts, Doubletree, Embassy Suites, Hampton Inn, Hampton Garden Inn, Hilton Grand Vacations, Homewood Suites, the Waldorf Astoria, the Waldorf Astoria Collection and Home2Suites by Hilton have policies, practices and procedures which discriminate against individuals with disabilities.

The lawsuit also alleges that Hilton either owns, manages, or enters into franchise license agreements with the owners of hotels that failed to design and construct facilities built after January 26, 1993, (the date the ADA was fully effective), that were in compliance with the “new construction standards” of the ADA. The DOJ focused on hotels built after the 1993 date because those properties were required to be constructed without any access barriers. This strategy enabled the DOJ to avoid the more complex litigation issues involved in “readily achievable barrier removal” that is required of properties built prior to 1993.

The Complaint alleged that hotels were designed and built without the federally mandated number of accessible guestrooms dispersed among the different categories of available accommodations (suites, deluxe rooms, view rooms, etc.).

## **Complaints, sweeps, and system-wide investigations**

Typically, a DOJ hotel investigation begins with a single guest complaint at a particular hotel which is ignored or poorly handled by the owner or operator. Matters commonly escalate if the guest files a formal ADA complaint with the DOJ’s Civil Rights Division. All complaints are investigated.

The DOJ may also institute geographical “sweeps” such as the New York Times Square/Theater District and the top Zagat-rated restaurant investigations that took place over the past several years. These comprehensive ADA investigations of 60 Times Square hotels and 50 top Zagat-rated restaurants – including boutique hotels and international flag properties – were initiated after a single guest’s complaint. A similar sweep of apartment complexes took place in Louisville, Kentucky.

The DOJ has also initiated a number of system-wide investigations against the nation’s leading hotels and retailers. Over the years, the DOJ has litigated or otherwise negotiated Consent Decrees with such prominent hotel flags as Ramada Ltd. (2010), Days Inns of America, Inc. (1999), Marriott International, Inc., Courtyard Management Corporation (1996), Motel 6

Operating LP (2004 and 2007) and Bass Hotels and Resorts (1998).

## **Accessible reservation systems and policies**

While the alleged architectural barriers are commonplace in ADA hotel litigation, the inclusion of online and telephonic reservations systems is one reason the agreement is viewed as “precedent-setting.” The Consent Order requires Hilton’s on-line reservations system to become accessible and its website to provide timely information about the accessible elements in its hotels.

The DOJ accused Hilton of failing “to provide individuals with disabilities the same opportunity to reserve accessible guestrooms using its on-line and telephonic reservations systems that are available for reserving other Hilton Hotel rooms.” Specifically, the DOJ alleged that guests with disabilities are unable to reserve specific types of accessible sleeping accommodations through the Hilton Reservations and Customer Care system, in violation of the ADA. It also alleged that Hilton’s central reservations system does not ensure that disabled guests receive the accessible accommodations they reserve — that upon arrival, disabled guests may not be provided with the accessible sleeping accommodations they reserved, such as a particular room type, a room with a tub or roll-in shower, or a visual alarm for deaf or hard-of-hearing individuals.

Guests will soon be able to reserve and be assured of booking specific types of accessible guestrooms with specific features. Hilton must offer disabled guests free upgrades in a more expensive room class, if available, if the reserved accessible guestroom is unavailable at registration. Hilton will revamp its website to provide access to guests who are blind or of low-vision.

## **Franchisor liability for ADA compliance**

Another groundbreaking aspect of the case is that the Consent Order is the first time Main Justice has compelled a franchisor to require all franchisees and all properties under Hilton’s management and control, to survey their facilities for ADA compliance and to either certify that each property is ADA



compliant, or bring them into compliance. Historically, franchisors which merely license their brands, products and know-how – but do not actually build or operate the facilities – have not been held liable under the ADA for the acts or omissions of their franchisees.

The DOJ alleged that, as franchisor, Hilton was substantially involved in the design and construction of its owned, managed and franchised hotels and that these properties are not readily accessible to and usable by individuals with disabilities, as required by Title III of the ADA.

At a high level, the Consent Decree requires Hilton and its franchisees to survey their properties within 12 months after the Consent Decree is effective and bring them into ADA compliance. When Hilton enters into new franchise or management agreements, renews or extends old ones, the owners will be required to survey their facilities, and if necessary, bring them into ADA compliance. They must offer a variety of accessible room types (including at least one suite), provide premium views, assure the required number of guestrooms are available (including those with roll-in showers and permanent or removable tub seats), and provide accessible guestrooms for deaf and hard-of-hearing patrons.

The generally accepted legal standard has been that a franchisor cannot be held liable under Section 303 of the ADA unless it owns, leases or operates the franchised hotels or retail stores. The two leading cases involved Days Inns of America, Inc. and American Dairy Queen Corporation, and those courts held that a franchisor's right under a franchise agreement to set operating and brand standards for building, equipment or quality control does not make it an "operator." All that may be changing, in light of Hilton's Consent Order.

## **Ongoing ADA compliance and training**

Consistent with many chain-wide Consent Orders, Hilton must hire a national ADA Compliance Coordinator to carry out the mandates of the Consent Order. Each property is required to train a point-person to resolve accessibility complaints. Hilton is also to select an "ADA Inspector" to verify compliance.

ADA training will be mandatory for all staff, whose essential jobs require them to interact with guests. Front desk employees, general managers and chief building engineers will undergo additional training regarding assignment of accessible guestrooms, emergency procedures, policy changes, maintenance of accessible features, use of all accessible features and communications equipment.

## **Moving forward**

The U.S. Department of Justice’s Civil Rights Division is aggressively enforcing the Americans with Disabilities Act of 1990 . The DOJ has focused particularly on national and regional hotel chains, individual hotels, national retailers, apartment complexes and transportation facilities. Unlike some private plaintiff’s lawyers that we regularly encounter, DOJ lawyers are dedicated, skillful and committed to just one aim: to provide full and equal access to public accommodations, nationally.

Although the DOJ is authorized by statute to file litigation to enforce the ADA and to seek money damages, its lawyers are primarily motivated to obtain barrier removal. Seeking money damages is secondary, if an issue at all.

The DOJ has obtained Consent Orders against such prominent hotels as New York New-York Hotel and Casino, LLC (2001), the Ocean Palms Beach Resort (2009), Sheraton Grand Sacramento Hotel (2010), Crown Plaza Times Hotel (2010) and Norwegian Cruise Line (2010). Consent Orders have also been obtained against such prominent retailers and restaurants such as AMC Entertainment, Inc. (2010), Blockbuster, Inc. (2010), Wal-Mart Stores, Inc. (2009), Sylvan Learning Centers, L.L.C. (2007), Shoney’s LLC (2006), Sunoco, Inc. (2005), and Safeway, Inc. (2004).

The Hilton case highlights the fact that the DOJ is not only laser-focused on architectural barriers in hotels, but it is equally focused on the new ADA frontier – cyberaccessibility. The case also suggests that it’s a whole new ballgame when it comes to franchisor liability for ADA compliance, and companies with franchised properties will need to rethink their exposure in this area and develop strategies to ensure ADA compliance.





We at JMBM are experienced in representing hotels in DOJ investigations. Our experience with DOJ attorneys is that they are very straightforward and fair-minded in their approach, and very serious in their relentless pursuit of achieving full and equal access for the disabled.

The DOJ wants to assure – system wide and nationwide – when individuals with disabilities check into a hotel, they will receive the accessible features they need to enjoy a good night's sleep. Our job as ADA lawyers is to make sure our clients enjoy a good night's sleep, too, by achieving a high level of compliance with the ADA, and working successfully with the DOJ to make that happen, when necessary.

[Click here to see the Hilton Consent Decree in US v Hilton Worldwide Inc.](#)

## Striking the right balance between ADA compliance and protecting business owners

*A blast against a New York lawyer for filing frivolous, serial ADA lawsuits*

**T**he ADA defense and compliance team at JMBM has long advocated compliance with the Americans with Disabilities Act. ADA compliance is good business and it is the law.

But we have all seen flagrant abuses of this law in the hands of certain plaintiffs and attorneys who literally file thousands of cases. Recently, one lawyer filed 18 cases in one day against various small minority-owned businesses for purported ADA violations.

It seems as if both courts and legislatures are getting fed up with abusive practices by some plaintiffs and their attorneys.

In this article, we want to recognize a recent federal court decision that reflected outrage at abusive plaintiffs and their lawyers which detract from the spirit and noble purpose of the ADA. We think this kind of insight and approach will help to strike a better balance that we believe was the intent of the ADA.

### **Federal court condemns frivolous, serial ADA litigation which subverts the noble purpose of the ADA and the entire legal profession**

On March 28, 2013, a Federal Judge in the Eastern District of New York excoriated plaintiff Mike Costello's attorneys for filing scores of frivolous ADA lawsuits against mom-and-pop businesses over technical or non-existent deviations from the ADA Standards simply to line their own pockets. See, *Costello v. Flatman, LLC, 11-CV-00287*.

### **Dozens of "boilerplate" ADA lawsuits**

In 2011, the plaintiff, Mike Costello, filed a complaint against a Subway franchisee and his landlord under the ADA and New

York Human Rights laws. The same day, the plaintiff and his lawyers filed seven other identical ADA lawsuits against small businesses located within a two-block radius of the Subway store. Costello later amended his complaint to bring in another defendant who ignored the lawsuit, resulting in a default being taken. After the Court issued a \$14.31 default judgment, plaintiff's counsel filed a motion for fees and litigation costs in the amount of \$15,172 supposedly incurred in prosecuting the action. [Note: This is not a typographical error. The damages were \$14.31. The attorneys' fees sought were more than fifteen thousand dollars.]

The Judge noted that in a boilerplate complaint, Costello alleged that he is disabled, required a wheelchair for mobility, and that he visited a Subway restaurant where he encountered various ADA barriers which prevented him from enjoying the goods and services offered at Subway. The plaintiff was represented by two law firms, one from New York the other from Florida. The Court found that together, these attorneys filed dozens of boilerplate ADA lawsuits alleging very similar barriers only to force the defendants to pay money to settle the cases.

## **Goal of the ADA**

The Court noted that the goal of the ADA is to remedy discrimination against individuals with disabilities in employment and full and equal access to the goods and services offered by public accommodations like banks, retail stores, restaurants, hotels, museums, golf courses, and amusement parks. Title III of the ADA requires the removal of structural and programmatic barriers in existing public accommodations "where such removal is readily achievable, and in newly altered or constructed buildings." (As stated earlier, the ADA defines "readily achievable" barrier removal as "*easily accomplishable and able to be carried out without much difficulty or expense.*")

The ADA contains both a private right of action for individuals and advocacy groups, and a public right of action by the Attorney General. The only remedies for a private individual under the ADA are injunctive relief (barrier removal) and the recovery of attorney's fees and litigation costs. The Department

of Justice (DOJ) can also impose fines of \$75,000 for the first occurrence and \$150,000 for each subsequent ADA violation.

## **New York (like California) awards attorneys' fees and damages to plaintiffs**

New York, like California and several other states, also permits private plaintiffs to recover damages for ADA violations. (California, for example, permits private plaintiffs to alternatively recover either a) three times actual damages or \$4,000, or b) \$1,000 per offense each time the plaintiff visited the business, or knowing of the existence of barriers, was deterred from returning). Costello sued under the ADA, but coupled the federal claim with damage claims available under the New York State Human Rights Laws and The New York City Human Rights Laws.

## **Appalled at an abusive pattern of litigation**

The Court, appalled to find a similar litigation pattern in dozens of lawsuits filed by these attorneys in New York and Florida noted that:

Some plaintiffs and their attorneys have found a way to circumvent the will of Congress by seeking money damages while retaining federal jurisdiction.

In a highly unusual turn of events, the Judge visited each of the eight small businesses sued by plaintiff and observed that some of the alleged violations were frivolous. In the Subway complaint, plaintiff alleged that the public bathroom was non-compliant. The Judge observed that there was no public bathroom at all.

The Court in an impassioned opinion reduced the attorney's billing rates for filing boilerplate pleadings, found their time entries were excessive (even fictitious) and denied their motion for attorneys' fees and litigation costs.

## **Plaintiff focused on financial gain rather than the intent of the ADA**

Considering the spirit and noble intent of the ADA, the Judge commented:

The ADA is a testament to the country's effort to protect some of its most vulnerable citizens. It is one of the most significant federal statutes that was born out of this nation's Civil Rights movement and was enacted to ensure that disabled individuals have equal and safe access to the same benefits and accommodations as every other American. However, a troubling reality is that cases like the one presently before the court have the effect of being less about ensuring access for those with disabilities and more about lining counsel's pockets.

The Court cited a prominent California ADA opinion in *Molski v. Mandarin Touch Restaurants*, 347 F. Supp.2d 860 (C.D.Cal. 2004):

The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing the business of the violations and attempting to remedy the matter through conciliation and voluntary compliance, a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.

### **Lawsuits had no effect on ADA accessibility**

In *Costello v. Flatham*, the Court analyzed the ADA lawsuits filed by the two lawyers and determined that they had no impact on improving accessibility. Upon visiting each of the businesses named other lawsuits, the Court expressed its shock to see most, if not all, of the alleged barriers were still there. The Court did not highlight the existing barriers to invite more litigation against these businesses, but to bring attention to the "troubling litigation tactics" used by these two lawyers.

The Court found that "This is indicative of the mendacious conduct that is central to counsel's litigation scheme."

## **Plaintiff's attorneys' fees denied**

In denying plaintiff's fee motion, the Court went out of its way to chastise the plaintiff's attorneys and their inexcusable litigation scheme of preying on small businesses.

Those who take on the honorable cause of representing disabled individuals must recognize that they not only represent their fellow lawyers of the bar, but also the legal giants who paved the way for passage of crucial civil rights legislation like the ADA.

The Court concluded with the thoughts of one such Civil Rights legal giant Charles Hamilton Houston, who famously said "a lawyer is either a social engineer or he's a parasite on society."

The conduct of counsel is indicative of a parasite disguised as a social engineer. It must stop.

The Court intends to report its findings to state bar authorities and to Chief Judges across the country about the attorneys' mendacious litigation tactics if these lawyers continue to litigate in this fashion.

## **Auxiliary Aids: FedEx sued for failure to provide effective auxiliary aids and services to communicate with employees and job applicants**

**E**ffective communication with blind, low-vision, deaf, hard-of-hearing, speech impaired and cognitively challenged employees, potential employees, customers and guests is one of the fundamental tenets of the Americans with Disabilities Act. For nearly 25 years, the ADA has been the most sweeping civil rights legislation, designed to provide persons with disabilities full and equal access to public accommodations, employment and potential employment.

In its latest effort to enforce the ADA's effective communication requirements, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit in a Baltimore federal court against FedEx, charging the overnight delivery giant with failing to provide basic auxiliary aids and services to effectively communicate with its deaf, hard-of-hearing and speech impaired employees and job applicants.

The suit accuses FedEx of not providing Qualified American Sign Language interpreters, Communications Access Realtime Translation ("CART") services or closed captioned training videos during new hire orientation or staff and safety meetings to its employees and job applicants in violation of the ADA's requirement that businesses provide such auxiliary aids and services.

### **What is a "Qualified" American Sign Language Interpreter?**

The ADA requires that persons requesting sign language interpreting services be provided with "qualified interpreters." The ADA defines a "qualified interpreter" as an "interpreter who is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary vocabulary." Qualified American Sign Language interpreters must be provided to deaf, hard-of-hearing and speech-impaired customers, guests, employees and potential employees upon

request, at no cost, with reasonable notice. In simple transactions such as checking into a hotel, buying groceries or making a bank deposit, it is generally appropriate for a business to effectively communicate by passing notes, texting, emailing or reading lips. However, in more complex interactions, such as medical treatment, completing a home or business loan, meeting with a wealth manager, lawyer or accountant, or an employment interview, if requested, the business must provide technically proficient Qualified American Sign Language interpreters at no cost to the customer, employee or job applicant.

Qualified American Sign Language interpreters are specially trained to translate and interpret specialized or complex interactions using technical language related to such subjects. Despite reasonable requests, it is not always possible to get a Qualified American Sign Language interpreter to a meeting in order to accommodate the customer's, employee's or job applicant's schedule, particularly in certain parts of the country or with little notice. So, what can you do?

### **What is CART?**

With CART, everything that is spoken is "captioned" live for persons who are deaf and hard-of-hearing. CART is an important communication technological advance, and every business owner, employer or human resources director needs to know about it. When an actual Qualified American Sign Language interpreter cannot be timely engaged, CART is one of the most effective auxiliary aids available. CART can be captioned on a single iPad, laptop or PDA, or it can be displayed on an overhead screen or on the Internet. The CART interpreter types onto a stenotype machine which translates shorthand into real-time captioning, with little or no lag time. The process can be done wirelessly to serve remote locations where Qualified American Sign Language interpreters are not available.

### **Is the EEOC lawsuit the first of its kind?**

The FedEx lawsuit is one of many "effective communications" cases. It is similar to a series of lawsuits filed against several California state agencies for allegedly refusing to provide Qualified American Sign Language interpreters to their deaf, hard-of-hearing and speech-impaired employees at all times





during the work day, during all internal staff meetings and at offsite conferences. These suits alleged that the agencies' failure to provide effective auxiliary aids and services prevented deaf and hard-of-hearing employees from fulfilling their job responsibilities and hindering career advancement. The advocacy group plaintiff alleged that note taking, memos, meeting agenda and similar forms of communications were inadequate and that each agency was required to have a number of Qualified American Sign Language interpreters on staff and immediately available.

## **How does this affect your business?**

Every business that is classified as a "public accommodation" under the ADA is required to effectively communicate with its customers, employees and prospective employees upon request. We discussed effective communication in a simple transaction. In complex job interviews, daily work interactions, conferences, staff and safety meetings, classroom lectures, CART or Qualified American Sign Language interpreters are effective ways to communicate with persons who are deaf, hard-of-hearing or speech impaired.

## **What auxiliary aids and services are available and how do you obtain them?**

When you need to provide auxiliary aids and services, do you have a documented system in place to access these resources? How do you identify and provide for them? Do you have defensible written policies, practices and procedures in place to assure effective communication with guests, customers, employees and potential employees?

Companies need to review these questions and include providing "effective communication" with guests, customers, employees and job applicants as a component of their enterprise-wide ADA compliance program.

The DOJ, other governmental agencies, advocacy groups and private litigants have expanded litigation against companies who fail to provide a wide variety of auxiliary aids and services to effectively communicate with guests, customers, employees and job applicants. FedEx is the latest, highest profile lawsuit.

We have not seen the end of effective communication litigation, and steps should be taken to avoid the risk of expensive litigation and reputation risks.

This ADA lawyer's advice? Don't wait for the outcome of the FedEx case to act.



## How to handle an ADA lawsuit . . . and how not to do it

**T**he hotel lawyers at JMBM's Global Hospitality Group® and ADA Compliance and Defense Group see a lot of ADA cases and believe that the claims will continue to increase significantly over the rest of the decade as a result of the current political climate, new regulations, higher priorities assigned by the Department of Justice, and passionate advocacy groups and private litigants seeking to make the country ADA compliant.

We get frequent calls from people served with new ADA complaints. Most of these business, hotel and restaurant owners just want to resolve the litigation at the lowest possible cost, including both the compliance cost and legal fees. Of course they don't want to be sued by another plaintiff on the same, or similar, claim later, but that is a somewhat different problem that we also deal with.

JMBM's ADA Compliance and Defense team has defended more than 600 ADA claims. We know most of the plaintiffs, their strategies, their hot buttons, and their weaknesses. We know how to defend or settle cases with the least exposure to future claims and at the lowest all-in cost.

### **Ruskin's Common Law of Business Balance**

We think that John Ruskin had it right in his famous Common Law of Business Balance. Here is his famous quote:

#### **Common Law of Business Balance**

It's unwise to pay too much, but it's worse to pay too little. When you pay too much, you lose a little money – that is all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do. The common law of business balance prohibits paying a little and getting a lot – it can't be done. If you deal with the lowest bidder, it is well to add something for the risk you run, and if you do that you will have enough to pay for something better.

*John Ruskin (1819-1900)*

## How Ruskin's law applies to ADA defense cases

Here is an actual case study that has some important lessons for us on how to handle an ADA case – or rather how not to handle an ADA case. When the defendant first called us about this case, based on our experience with this plaintiff, we knew we could've settled the case for an all-in settlement cost (including legal fees) of less than \$50,000.

Although we substituted out of the case, we continue to receive notices of all developments after that and followed it with considerable interest. We were shocked to see that the new defense lawyer and client permitted this case to go to trial. And we hated to hear that the client lost the case, incurred huge legal fees with a “cheaper lawyer” for taking the case all the way to a judgment, and now is facing an additional \$232,000 for plaintiff's legal fees that it will have to cover. We were also concerned about certain precedents that may have resulted from the trial court's ruling.

## A case study in how not to handle an ADA defense?

When sued by a serial plaintiff, the defendant hotel made a good decision in contacting JMBM's Global Hospitality Group® and our ADA Compliance and Defense Group, a team which has litigated more than 600 ADA cases for hotels, resorts, restaurants, shopping centers, retailers, wineries and banks.

We had a pretty good idea of the litigation scenario that would unfold. We also had litigated with the plaintiff and her counsel before and we had a good idea of their strategy and tactics. Just as important, we had a relationship and credibility with them. They were aware that we knew our way around the ADA block and that they would have to come to a resolution early in the lawsuit.

Based on our knowledge of this plaintiff attorney's typical game plan, we warned the defendant hotel that if the case was not strategically managed, the plaintiff's attorneys' fees and costs would be astronomical. We presented the client with a comprehensive guideline for evaluating the case and coming to a resolution without litigation.

Our strategy involved an initial assessment of the architectural and programmatic access barriers at the hotel and to put a resolution protocol in place. The first step was to contact plaintiff's counsel to meet onsite and establish assessment and resolution protocol.

**Mistake #1.** This is where the defendant hotel made its first mistake. After considering our strategy and resolution protocol, it decided that our hourly rates for implementing the strategy were too high, and they decided to retain counsel with a much lower hourly rate, but also little ADA defense experience. We substituted out of the case.

**Mistake #2.** Then the defendant hotel and its inexperienced ADA counsel decided to undertake an aggressive and confrontational litigation posture. While resisting a "monetary shakedown" and fighting back is an understandable emotional response to these kinds of ADA lawsuits, a lawyer's job is to advise his or her client as to all available options and recommend a course of action based on facts, knowledge and experience. The client still makes the call. And in this case, it was the wrong one.

**Mistake #3.** Based on our knowledge of the plaintiff's counsel (who is very experienced in ADA claims) we knew that an aggressive litigation campaign was ill-advised, and that an out-of-court resolution was the most cost-effective for the hotel. But the defendant hotel and their bargain-rate attorney with little ADA experience took it to trial. An assessment of the architectural and programmatic access barriers at the hotel, performed by a knowledgeable access consultant, would have revealed what the court found at trial: a number of access barriers existed at the hotel. The trial judge heard the evidence and entered judgment for the plaintiff.

## The result

The court awarded the plaintiff damages and attorneys' fees, expert fees and litigation costs. The hotel now has to remedy the

access barriers, pay damages and is on the hook for five times more than the estimated total cost of the defense and resolution we initially proposed.

Not surprisingly, the plaintiff's counsel filed a motion to be awarded nearly \$250,000 in attorneys' fees, and the hotel filed an objection asking the court to reduce the fees to a fraction of what the plaintiff is seeking. The case subsequently settled for an undisclosed amount. Ironically, the inexperienced and lower billing rate ADA defense counsel for the hotel asked us to file a declaration in opposition to the plaintiff's fee motion.

What is most unfortunate is that it was all avoidable.

As Ruskin said: It's unwise to pay too much, but it's worse to pay too little.

Understanding the anatomy of ADA cases is critical in determining outcome. It can be the difference between early resolution and going to trial and losing. It can be the difference between paying the fees charged by an experienced attorney for an economical resolution and losing a court case and thereby becoming liable for hundreds of thousands of dollars in damages, remediation, and plaintiff's fees and costs.

## **Case study: How the Cinemark case affects all hotels, but particularly conference centers and meeting hotels**

**W**hat do movie theaters and hotels have in common? For one thing, both movie theaters and hotels are considered public accommodations under the Americans with Disabilities Act and both are required to provide disabled patrons equal access to facilities, including accessibility to movies, slideshows, and other audio and video presentations. In some instances, new technology can make it easier to achieve equal access... but it still can be a challenge.

A class action filed against Cinemark USA Inc. for discrimination against hearing impaired individuals due to lack of closed-captioning in theaters could have broad implications for hotels, particularly conference centers and hotels which cater to meetings and group business, in addition to hotels that cater to state organizations and governmental groups.

What responsibilities do hotels have to deaf and hard-of-hearing guests? And what are the exceptions? How do hotels best protect themselves? How do hotels maximize business opportunities by providing auxiliary aides and services?

### **Does the ADA now require all hotels to provide personal hearing or closed caption devices for deaf and hard-of-hearing guests? What's next?**

In November 2010, a disability rights group launched class action litigation against Cinemark's theaters in California on behalf of "The Association of Late Deafened Adults." In its complaint, the group accused Cinemark of discriminatory practices against deaf and hard-of-hearing patrons due to its "consistent refusal" to provide closed (and open) captioned theater experiences at its theaters in Alameda County, California. Although the lawsuit is locally focused, it is of keen interest to the hotel industry and its implications are important.

## Why should hotel owners be concerned?

Having defended more than 600 ADA cases, we know that there is a well-defined core of ADA plaintiffs and plaintiffs' lawyers. We have seen most of them on multiple occasions. A few dozen of these people are responsible for thousands of ADA lawsuits. Hotels should be concerned because this community of ADA plaintiffs and lawyers spawn a huge number of lawsuits, often 5-10 per day in California alone. They tend to use copycat procedures to proliferate the litigation. So once a particular cause of action has been formulated, they will copy that form of complaint and apply it to other defendants they find in the hotel directories or websites.

Remember, some of these plaintiffs may be motivated by financial recovery, but many more are genuinely committed to making the built environment more accessible for the disabled, whatever the cost. The publicity of attacking high profile hotel operators and owners helps them further that cause.

A number of advocacy groups, attorneys and the Department of Justice are now focusing their resources on businesses that fail to provide effective communications aids and services to deaf, hard-of-hearing and blind customers. The Cinemark lawsuit is the most recent attack in this vein.

We believe that there are some strategies and approaches to minimize the attractiveness of your hotel to such an attack, and to build a strong defense if the attack comes.

While the first and easiest targets of discriminatory theater experiences may be movie, concert and performing arts theaters, the next obvious targets are hotels where meetings and conferences are held. But you don't have to run an elaborate conference center or rely on group business meetings to be a prime target for these new ADA suits. Your hotel is already in the sights of these plaintiffs. This is not about *whether* they will attack, it is about *when* they will sue you.

The disability advocate group's complaint in the Cinemark case states that "Over two-thirds of Americans attend movies each year. Yet, without some form of captioning, countless seniors and those with hearing loss, cannot enjoy a trip to the movies



because they are unable to hear or understand the dialogue.” More specifically, the plaintiffs argue that Cinemark’s discriminatory practices violate the Unruh Civil Rights Act (California Civil Code sections 51 and 52), the Disabled Persons Act (California Civil Code section 54.3), and the Americans with Disabilities Act, which prohibit discrimination on the basis of disability. All of these arguments could also easily be applied to hotels with conference centers.

## **Closed and open captions**

Closed captions can be best explained by understanding open captions, which are familiar to all of us. Open captions are on-screen text descriptions of dialogue and other sounds which are always in view and cannot be turned off. They are like subtitles you typically see at the bottom of the screen, or a sign language interpreter signing at the side of a stage. Closed captions, on the other hand, can be turned on and off by the viewer and may require a special device. Disability rights advocates insist that closed captioning, such as rear window captioning, be provided to each disabled individual.

## **Does this apply to my hotel? The legal perspective**

To ensure equal access, public accommodations must ensure that no individual with a disability may be “treated differently than other individuals because of the absence of auxiliary aids and services.” Examples of auxiliary aids and services include closed caption, rear-window captioning and open captioning, used by individuals who are deaf and hard-of-hearing. With the advances in technology, it is argued that at least one form of captioning is now required in virtually all hotel rooms, meeting rooms, bars, restaurants, and other accommodations with televised services. (FYI: Nearly all television sets built since 1993 with screens of 13 inches or more that are sold in the United States have closed captioning embedded in the television set. The closed captioning becomes visible when you use a special decoder, either as a separate box or built into the television set.)

So even the no frills, economy hotel must deal with these issues on television sets in guest rooms, as well as in a lobby or sports bar. And having the devices may not be enough if you don’t also have easy-to-read notices or cards advising guests what devices

are available and how to use them. Staff, too, need to be trained on the use of auxiliary aides and services. The recent Consent Order between the DOJ and Hilton International and other settlements require proof of such ongoing staff training.

Does the ADA require hotels to accommodate hearing-impaired guests? In short, the answer is yes. By law, hotels and conference centers, as public accommodations, must provide auxiliary aids and services. However, public accommodations are not required to make every possible device available or to meet the specific, specialized needs of each individual customer. Furthermore, what is required will be shaped by the services actually offered.

### **Limited safeguard from unreasonable ADA standards**

The ADA does have a safeguard that if provision of a particular auxiliary aid or service would result in a fundamental alteration of goods, services, or in an undue burden, i.e., significant difficulty or expense, the ADA would allow an alternative auxiliary aid or service, if one exists, which would ensure equal facilitation to the maximum extent for disabled individuals.

Thus, if the no frills hotel does not have any television sets for any rooms, it does not have to provide television sets for hearing- or vision-impaired guests. And, as long as that no frills hotel does not have any meeting space or equipment, it does not have to provide AV equipment for disabled guests.

### **Conference Centers, Meeting and Group Hotels**

This case is particularly important for conference center hotels, and those that cater to group and meeting business. These hotels do provide a broad range of audio visual facilities for meetings, conferences, presentations, class reunions, weddings, bar mitzvahs and the like. There are often extensive sound and video projection systems that are very reminiscent of movie theaters, such as those involved in the Cinemark case.

Conference centers tend to have their meeting rooms fully-equipped with all the AV equipment “built in” and hard wired. They will be the most like the movie theaters in the Cinemark case and they will also be high profile targets for the new crop of



ADA plaintiffs. But all the luxury hotels like Four Seasons, Ritz-Carlton, St. Regis, and even the large meeting hotels like so many Marriotts, Hyatts, Hiltons, Westins, Sheratons, and the like will also be attractive for these plaintiffs. Hotels that hold Bar Association and local, state and federal agency functions should be acutely aware of the need to provide the latest technological advances in auxiliary aids and services.

## **What auxiliary aids are required?**

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length and complexity of the communication; and the context which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aids or services are needed to ensure effective communication, but the ultimate decision of what measure to take rests with the public accommodation, provided that the method chosen results in effective communication.

## **Related issues**

There are a host of related issues that we are advising our clients on, concerning the kinds of notice (content, size, format, location, etc.) that should be given to all guests about the availability of auxiliary devices. There are also some very complex issues about what happens when AV equipment and set up is outsourced. Is the outsourced AV provider affiliated with the hotel? Does the hotel receive any financial benefit from use of the AV provider? Does the AV provider have auxiliary equipment available at reasonable prices, and do they, or does the group provide notice of availability to disabled guests? Already, we are aware of one reported case which found the event promoter and the convention center liable for not complying with federal access laws. All these issues just scratch the surface, but you get the idea.

## **10 questions that every hotel owner and operator should ask themselves about ADA compliance for visually-impaired, deaf and hard-of-hearing guests**

1. If your hotel meeting and conference facilities appeal to a broad range of groups or organizations that include disabled individuals (as nearly all do), are you providing auxiliary aids and services for visually-impaired, deaf and hard-of-hearing guests?
2. Have you implemented plans to protect yourself from this type of “new frontier” ADA litigation?
3. Have you had an “ADA audit” done by an expert team looking to protect your interests?
4. Have you taken action to stay on top of the technology for hearing- and sight-impaired guests/conference attendees?
5. Have you specifically investigated your hotel’s need to provide auxiliary aids and services?
6. Do you have written policies and procedures for providing auxiliary aids and services to guests/conference attendees?
7. Do you have written policies and procedures for training staff on the need for and use of auxiliary aids and services for disabled guests/conference attendees?
8. Do you have the necessary auxiliary aids and services on site? Are there aids and services available from sister properties if you run short?
9. Do you have policies in place for testing auxiliary aids and services to be sure they are working and properly maintained?
10. Do you have plans to investigate and purchase the latest in closed captioned technology?



If you answered “no” to any of these questions, or have been investigated by a state or federal authority about the types of auxiliary aids and services you offer at your hotel, you need to develop and implement written policies, practices and procedures.

We have seen lots of ADA case theories developed over the years, and each one fuels a new spate of lawsuits by copycat plaintiffs. You will always be much better off by running an ADA compliance audit *before* the lawsuit or DOJ investigation starts.

[Click here to read Cinemark’s announcement about the settlement of this case.](#)

## California's Certified Access Specialist program — does it provide all of the intended ADA protections?

*CASp may not be a "silver bullet," but CASp compliance is still a smart move!*

California's 2009 Construction-Related Accessibility Standards Compliance Act was designed to curb abusive ADA litigation by creating the Certified Access Specialist program (CASp). CASp enables business owners to follow procedures to certify that their facilities meet state and federal accessibility standards. One benefit CASp offers is that business owners with certification have the option to stay or stop all construction-related ADA litigation initiated against them and instead proceed to mediation, making it possible to avoid expensive and lengthy proceedings that drive up legal fees. A recent court decision, however, suggests this may not be the case when sued in federal court, suggesting that CASp may not offer all the benefits intended by the California legislators.

### California's Construction-Related Accessibility Standards Compliance Act

The Act defines a construction-related accessibility lawsuit as any civil claim brought against a public accommodation based on a violation of standards that require new or existing construction to comply with accessibility guidelines laid out in the Americans with Disability Act, the California Disabled Persons Act, the California Unruh Act and any other state or federal law. Under the Act, a defendant has 30 days to file an application for a stay and early evaluation conference. This application must include: a signed declaration that the site has been CASp-inspected or is in the process of an inspection; that a report has been filed by a certified access specialist; and verification that there has been no construction started or completed since certification was issued that might impact accessibility. Immediately after receiving the application for stay and early evaluation, the court must grant a 90-day stay and



schedule a mandatory early evaluation conference conducted by a superior court judge or commissioner.

## **Possible restrictions on CASp benefits in federal ADA litigation**

In August 2010, the United States District Court, Eastern District of California, ruled in *O'Campo v. Chico Mall, LLP* that a “public accommodation” certified under the Act is not entitled to the state procedural benefits and protections afforded by the Act if the action is filed in federal court under the ADA. The *O'Campo* court found that the ADA does not provide for mandatory stays and early settlement conferences for a CASp-inspected public accommodation, and concluded that any state law requiring that a claim brought under the ADA be subjected to such a procedure clearly conflicts with federal law. The *O'Campo* court arrived at the same result regarding parallel state law claims. Because the ADA and “state claims turn on virtually identical facts and similar theories of liability,” it would be “an inappropriate use of judicial resources to have the federal courts and the state courts simultaneously resolve cases with virtually identical facts.”

Since *O'Campo* is an Eastern District of California Court Opinion, until the Ninth Circuit Court of Appeals decides to issue an opinion, other Districts (such as the Northern District and Southern District of California) with standing general orders in ADA cases providing protections afforded under this Act may reach a different result. Certification under CASp, however, still offers other benefits, including, for example, guidance on a determination of the amount of reasonable attorneys’ fees and costs for construction-related accessibility standards claims. The Act also provides that statutory damages are recoverable only if the violation or violations of one or more of the construction related accessibility standards denied the plaintiff full and equal access to the place of the public accommodation on a particular occasion.

## **What's it all mean?**

We think that *O'Campo* is a “bad decision” and look for other courts to come up with a better result, and ultimately to overrule this case. In the meantime, prudent California hotel owners and operators will continue to obtain CASp certifications; however,

they should know that CASp is not a silver bullet that will enable them to stop all construction-related ADA litigation and proceed to mediation, at least when sued in the Eastern District of California.



## **Finally! Relief from abusive ADA litigation in California? Maybe not!**

*Will changes in California law discourage abusive ADA litigation? The jury is still out . . .*

**S**ince January 2001, over 20,000 lawsuits alleging violations of the Americans with Disabilities Act (“ADA”) have been filed in federal courts across the country. More of these lawsuits were filed in California than in any other state (over 9,000). It seems clear that California is a hotbed of ADA litigation because California law awards damages and attorneys’ fees to private plaintiffs for defendant’s ADA violations – treble damages, with minimum statutory damages of \$4,000 (prior to the passing of this Senate Bill), and punitive damages. An unknown number of accessibility cases have been filed in California state courts, and countless more claims have been threatened against mostly small business owners. The California Commission on Disabilities on Access noted that between September 2012 and December 31, 2013, more than 3,050 ADA lawsuits were reported to it under the new law.

Past efforts to curtail ADA litigation abuse in California have been marginally successful. Unfortunately, California legislation (SB 1186) may also provide limited relief from abusive ADA litigation. Key provisions of the new law became effective January 1, 2013. California SB 1186, through comprehensive amendments to a number of California laws, including provisions of the California Civil Code (Sections 55.3, *et seq.*), was intended to provide protection for the owners and operators of public accommodations who are making good faith efforts to comply with the ADA.

An overview of the main provisions of the new California law and our ADA Defense Lawyer observations from the trenches regarding the new law follows.

	<b>SB 1186 Provision</b>	<b>JMBM ADA Defense Lawyer Observations</b>
<b>1</b>	<p>Allows specified defendants to request a stay of court proceedings and an early evaluation conference. These defendants and their projects must meet certain requirements, such as (A) were approved pursuant to the local building permit and inspection process, (B) were approved by a local public building department inspector who is a CASp certified specialist, and (C) meet the definition of a “small business” provided in the Code.</p>	<p>At this time, California State Courts do not have adequate resources or a plan in place to process the numerous requests for stays and early neutral evaluation conferences that may arise. It may cost more to stay the proceedings and go through the ENE process than a business can pay to settle litigation.</p> <p>It is not clear whether California’s Federal Courts will give any weight to the changes in California law. One federal court in the Eastern District refused to follow the procedural requirements of SB 1186. The Northern District adopted General Order S6 which gives similar protection.</p> <p>With respect to clause (B), we, on the defense side, have been arguing for years that a building owner or tenant should be able to rely on the local building department’s plan check, building permit, inspections and the issued Certificate of Occupancy. However,</p>

	<b>SB 1186 Provision</b>	<b>JMBM ADA Defense Lawyer Observations</b>
		<p>Courts have been reluctant to follow such a rule.</p> <p>Until 2008, there were no requirements that building departments have a CASp certified building inspector on staff. The first building officials became CASp certified in mid-2009. Generally, however, building owners and tenants should not assume that building department sign-off on construction necessarily means that their property is ADA-compliant.</p>
<b>2</b>	<p>Reduces minimum statutory damages from \$4,000 per offense to \$1,000 per offense with respect to those defendants that satisfy clause (A) or (B) of the paragraph above, if all violations that have been identified in the complaint are brought into compliance with the ADA within either 30 or 60 days after a business owner is served with a summons and complaint. A small business, as defined, that does not meet the foregoing requirements, may still</p>	<p>The reduction in minimum statutory damages has not yet caused plaintiff's lawyers to reduce their damage claims, but the changes to the law are recent.</p> <p>Some ADA violations cannot reasonably be addressed in 30 or 60 days, as applicable (particularly if architectural drawings or acquiring materials, permits and construction contracts are necessary), and in such cases, the reduction of the minimum statutory</p>

	<b>SB 1186 Provision</b>	<b>JMBM ADA Defense Lawyer Observations</b>
	<p>have damages reduced to \$2,000 if the violations are addressed within 30 or 60 days of service.</p>	<p>damages may be illusory. Some plaintiffs' attorneys now plead that the alleged barriers are intentional and that under 1186 damages cannot be reduced if the barriers cause intentional discrimination. As a practical matter, this requires a costly motion or trial.</p>
<p><b>3</b></p>	<p>Requires commercial property owners to include a statement in any rental agreement executed after July 1, 2013 as to whether the subject property has undergone inspection by a certified access specialist.</p>	<p>This provision is intended to give small business owners a heads up as to whether they are leasing a building that may have access barriers which may lead to litigation. See <i>Ramirez v Sam's For Play Café</i>.</p>
<p><b>4</b></p>	<p>Requires that the Court consider the reasonableness of the plaintiff's conduct in connection with "stacked claims" (where a plaintiff visits the same property repeatedly to file multiple claims for the same violation), particularly in light of the plaintiff's obligations to mitigate damages, if any. Furthermore, multiple claimed violations of the</p>	<p>We are hopeful that this provision will result in a reduction of damages, but we have not yet realized any benefit from this new requirement.</p>

	<b>SB 1186 Provision</b>	<b>JMBM ADA Defense Lawyer Observations</b>
	<p>ADA may now be considered to be one violation depending on the circumstances.</p>	
<p><b>5</b></p>	<p>Bans “pre-litigation demand letters” in which plaintiffs seek a specific amount of money without actually filing a lawsuit. Specifically, a demand letter may offer pre-litigation settlement negotiations, but shall not state any specific potential monetary liability for any asserted claim or claims, and may only state: “The property owner or tenant, or both, may be civilly liable for actual and statutory damages for a violation of a construction-related accessibility requirement.”</p> <p>Furthermore, under SB 1186, an attorney must provide a written advisory, which must also include statutory language and his or her State Bar license number, that includes sufficient detail to allow a reasonable business owner to identify the basis of the claim, and a copy must be sent to the California Commission</p>	<p>In the past, demand letters often have requested a payment to avoid costly litigation. Some do not even request that the property in question correct the alleged violation.</p> <p>So far, we are finding that this requirement is only postponing the demands for money until after litigation has been filed. It has had little effect on the number of claims or anything more than the timing of monetary demands. We are seeing the monetary settlement demands increasing.</p> <p>Notices of 3,050 lawsuits were sent to the CCDA in the 15 months from September 2012 and December 31, 2013.</p>

	<b>SB 1186 Provision</b>	<b>JMBM ADA Defense Lawyer Observations</b>
	on Disability Access (CCDA) and, until January 1, 2016, to the California State Bar. Any attorney violating these requirements may be subject to discipline by the California State Bar.	
<b>6</b>	Requires that any complaint based on a construction-related accessibility claim must be verified by the plaintiff under oath. Until January 1, 2016, an attorney must submit a copy of the verified complaint to the CCDA.	This procedural requirement heightens the pleaders due diligence, but as a practical matter will not affect ADA lawsuits.
<b>7</b>	Increases business license fees to fund the enhancement of the State's certified access specialist program.	A sign of the times.

### Overall evaluation of California law changes

It remains to be seen whether these fees will improve accessibility. California Civil Code Sections 55 and 56 Construction-Reliability Accessibility Claims did not go as far as some wanted. Many business owners advocated for a restriction on litigation until after a potential defendant had been given a reasonable time to correct alleged violations (which would have provided similar protections to those provided under other legislation [SB 800], which helped to curb the abuse of construction defect litigation against condominium developers). However, SB 1186 did not provide this protection.



Experienced plaintiff's attorneys have already figured out how to circumvent the new law's lower damage remedies. It does not appear to be slowing the number of lawsuits.

From our perspective, if and when the court system is equipped to handle the additional burdens imposed by SB 1186, the most important benefit of the new law may be the ability of a defendant to petition the state court to stay proceedings and order an early evaluation conference before significant attorney's fees have been incurred. It is harder to come to a reasonable settlement when significant legal fees are incurred by both sides.

Ultimately, the best protection is to secure a CASp certified survey under the supervision of an experienced ADA attorney to protect the confidentiality of the report and to correct any violations under the ADA that are identified in that survey (if and to the extent that such correction is required under applicable law).

# CHAPTER 3

## ADA POLICIES, PRACTICES AND PROCEDURES





# FAQs on service animal requirements of the ADA

## *Why Uber was sued over service animals*

**O**n September 9, 2014, Uber Technologies was sued in Federal Court in San Francisco for violating the Americans with Disabilities Act (ADA) and California’s Unruh Act. The suit arose from the claim that UberX drivers refused to allow blind riders to bring their service dogs. This is just the latest in a long history of complaints or enforcement actions involving service animals under the ADA and corresponding state laws such as California’s Unruh Act.

## **FAQs about the ADA’s legal requirements for service animals**

Because so many people ask us about service animal issues, we thought it might be helpful to provide our friends with some guidelines on the major questions in this area through a series of frequently asked questions or FAQs about this subject.

### **What qualifies as a service animal?**

Under the 2010 ADA Standards, a dog or miniature horse that “is individually trained to do work or perform tasks for the benefit of an individual with a disability” qualifies as a service animal. The “work” or “tasks” performed by a service animal must be directly related to the individual’s disability. For example, the service animal might pull a wheelchair, guide a visually impaired person, alert a deaf owner, or assist an individual with psychiatric disabilities.

Comfort animals and pets are expressly NOT service animals under the 2010 ADA Standards. Comfort animals merely provide emotional support and are not individually trained to assist with a disability according to the ADA. However, state and local laws and the Fair Housing Act expand what types of animals are service animals and may protect comfort or emotional support animals.

## **What can you ask a customer who enters your business with an animal?**

Businesses and their representatives who come in contact with the public *may ask only two questions* of individuals regarding their service animals:

1. Is the animal required because of a disability?
2. What work or task has the animal been specially trained to perform?

## **What businesses may NOT ask:**

Businesses may not ask anything else. For example, they may NOT ask

- For proof of training or license for the service animal;
- For the guest to explain or verify his/her disability;
- For a demonstration of the service animal's training or abilities.

## **Do you have to alter your establishment to accommodate service animals?**

A public accommodation is not required to accommodate a service animal when doing so would result in a fundamental alteration to the nature of the business. Here are some examples:

The following do NOT qualify as fundamental alterations:

- Accommodation of a service animal at a restaurant or location that serves food (even if health codes prohibit animals).
- Accommodation at a hotel, bank, doctor's office, shopping center, a retail store or a busy sports facility.



The following would qualify as a “fundamental alteration” and does not have to be accommodated:

- A service dog that is actively barking at a cinema or theater.
- An aggressive and threatening service animal.

### Common questions and answers about service animals:

ISSUE	QUESTION	ANSWER
<b>Allergies:</b>	Can we deny service animals if others are allergic to the animals?	<b>NO.</b>
<b>Fear:</b>	Can we deny service animals if others are afraid of dogs in general?	<b>NO.</b>
<b>Special Care:</b>	Is my business required to provide service animal care such as food or a place for the animal to relieve itself?	<b>NO.</b>

[Click here to read the complaint in National Federation of the Blind v. Uber Technologies.](#)

## Updating service animal policies of your hotel or other “place of lodging”

**T**he Department of Justice published revised final regulations implementing the Americans with Disabilities Act for Title III (public accommodations and commercial facilities) on September 15, 2010. Certain of these amendments became effective as of March 15, 2011, including revisions to the provisions of the ADA governing service animals.

### Rules relating to service animals

First and foremost...according to federal law, service animals are not pets. For example, health codes that prohibit animals in restaurants do not apply to service animals. Your hotel may be “pet free” for some purposes, but that policy cannot apply to service animals. The law says that service animals are working animals that have been trained to perform tasks for disabled persons such as guiding the blind, alerting the deaf, pulling wheelchairs, providing seizure alerts, and calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack (which must be distinguished from a “comfort” animal, as discussed below).

### Dogs and miniature horses as service animals

In the new provisions, the federal law was changed to more narrowly define “service animals” to include individually trained dogs which assist their owners with physical impairments. Under the ADA, as revised, “comfort animals” (whose sole function is to provide comfort or emotional support) are no longer considered service animals, as they were prior to the most recent changes. However, state and local regulations, the Fair Housing Act and the federal Air Carriers Act protect emotional support or “comfort animals.”

In addition to the provisions about dogs as service animals, the revised ADA Standards now have a provision about miniature horses (which generally weigh between 70 and 100 pounds) that have been individually trained to do work or perform tasks for people with disabilities. Entities covered by the ADA must now also modify their policies to permit miniature horses where



reasonable. The revised regulations provide for the weighing of certain factors to determine if miniature horses can be accommodated in a facility: “(1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner’s control; (3) whether the facility can accommodate the miniature horse’s type, size, and weight; and (4) whether the miniature horse’s presence will not compromise legitimate safety requirements necessary for safe operation of the facility.”

**Impermissible exclusion of a service animal or other inappropriate action violate the ADA, which applies in all 50 states and to all types of public accommodations, including all “places of lodging.”**

The definitions of these properties was expanded as of March 15, 2011 to cover many timeshare and other vacation ownership properties and also includes most hotels, motels, inns, restaurants, sports facilities, stadiums, wineries, retail stores, apartment houses and senior living facilities.

Failure to comply with the service animal requirements of the ADA can result in an expensive lawsuit and corresponding reputational risks. Note, however, that compliance with federal law does not mean that you are free of liability; state and local laws may differ from the ADA, and these accessibility laws may still prohibit a public accommodation from restricting access to animals that are not considered “service animals” under the ADA.

**Limitations relating to service animals**

Under the ADA, hotels and all other public accommodations are required to treat disabled guests with service animals like all other guests. Specifically, they are to be provided the same services and access to all areas of the property where other guests are generally allowed. If other guests complain of the mere presence of the service animal, the business’ staff should explain that the law requires “places of public accommodation” to let disabled guests have service animals.

A business may ask only if an animal is a service animal trained to assist the guest with a disability and what tasks the animal has been trained to perform. It is impermissible to require a special

ID card or certification for the animal or any proof of the person's disability. Furthermore, disabled persons cannot be charged extra fees or deposits based on the presence of the service animal (even if such a fee is generally charged for pets), including any clean-up advanced fees (unless due to damages caused by the animal).

Under the ADA, service animals must be harnessed, leashed, or tethered, unless such restraints interfere with the service animal's work or the individual's disability prevents using these devices. In that case, the individual must maintain control of the service animal through voice or other controls. The owner/handler of a service animal is responsible for controlling the service animal and paying to repair any damage caused by the service animal. If the animal does become unreasonably disruptive or threatening, the owner is responsible for controlling it. If it cannot be controlled, the animal may be excluded, but the guest should be welcome to stay without the animal. Courts have made it clear that unless a service animal is disruptive (in a manner unrelated to its service function) or dangerous, it may not be removed or excluded. In any event, most service animals are particularly well trained to be around people and are not dangerous.

The property owner and operator are not required to provide special services for service animals like food, water, doggy bags, leashes, or to clean a service animal's "accidents." However, the legislative history of the ADA indicates that if the staff cleans the rooms generally and puts guests' items away, then the staff should do the same with the animal's accoutrements.

### **Establishing written policies is critical**

To avoid issues with service animals, it is important to develop and implement written policies and procedures for handling service animal issues, and it is equally important to regularly train your staff on implementation of those policies and procedures.

Our ADA Compliance and Defense group works with our clients to train management and staff on effective service animal do's and don'ts to enhance the guest experience and to comply with the law to avoid litigation and reputational risks.



## Pool Lifts: GlobeSt.com interviews JMBM's ADA Compliance and Defense Lawyers

It is always a good feeling when someone you respect pays you a nice compliment. That happened when Miriam Lamey, who covers the hotel sector for *GlobeSt.com*, called us to discuss the meaning and importance of ADA regulations that will go into effect March 15, 2012.

Here is the interview that *GlobeSt.com* ran on February 24, 2012:

### Hotels Handle Pool Lift Regulations

By Miriam Lamey

**SAN FRANCISCO**—The Department of Justice gave March 15 as the deadline for all hotel properties to install pool lifts for disabled guests who could not otherwise use the facilities independently. According to the DOJ, these lifts must be fixed, well-maintained, and exclusive to each pool.

Recently, Marty Orlick, an Americans with Disabilities Act defense lawyer, sat down with *GlobeSt.com*'s Miriam Lamey to discuss the impending deadline and how the hotel industry has and will respond to the requirements.

A question and answer session follows:

*GlobeSt.com: What do you think the new regulations mean for the industry?*

**Orlick:** This requirement for accessible pool lifts is not new. The actual requirement has been around for the past 15 years. There have been advocacy groups and therapeutic practitioners who have been advocating for pool lifts for that long. And there were a lot of things that take a long time: It takes a while for the technology to catch up with the ideology. And so therapists and advocacy groups and individuals were pressing for pool

lifts and other types of devices including health and fitness equipment while the technology didn't exist. And there weren't the right manufacturers; there were a lot of questions about what the standards should be for this type of device. In 2008, the Department of Justice made it clear that they were going to be developing some guidelines for accessible pools. But up until 2010 when these standards were approved, the only requirement was to [be able to] get someone with a disability to the pool.

*GlobeSt.com: So what are hospitality operators supposed to do after that?*

*Orlick:* Well, that's the point. But, that was the extent of the law: you just needed an accessible path of travel to the pool. Not to get into the pool. And for years, disabled advocacy groups have been complaining about it. Some problems included that there was no way for people to get in or out of the pool, independently or with other assistance. So, an individual [with a disability] would be now paying for the pool that's built into his or her rates, and they don't get to use the pool facilities as anyone else would.

*GlobeSt.com: What was the response?*

*Orlick:* Well, the Access Board and Department of Justice worked on developing technical standards for pool lifts. And, they've done that over the last couple of years. Now, the 2010 standards include scoping provisions – in other words, how many pool lifts does a hotel have to have, where they need to be and the technical requirements. Now, scoping requirements and technical requirements are part of 2010 standards. [The latter] define what the lift is supposed to look like, how it is supposed to operate and so on. The seat is supposed to be a certain size, the lift is supposed to drop 18 inches into the water, things like that.

*GlobeSt.com: What does that mean to the industry?*



**Orlick:** The industry is confused – it’s genuinely confused. It’s confused and I’m getting phone calls every day – every couple of hours! – from operators of hotels who are saying “what do I do?” And their concerns are in part financial, but they are not financially-driven. I don’t believe that. They are more driven to asking, “what does the Department of Justice actually require?” And “what does it mean as far as the operations of my property?”

Currently, the Department of Justice says you have to have fixed pool lifts and you can’t share a pool lift between water elements. At least one has to be at each location because one of the main ideas of the Americans with Disabilities Act is to provide independent accessibility so that someone who’s disabled doesn’t have to wait for someone else to help. And so, for example, I as a disabled guest want to go for a swim because I can’t sleep at night. It makes sense that I want to be able to go down to the pool, get in the water and swim around and not have to wait for the 18 year old or the person on night duty help me get in or out of the pool, or in and out of the hot tub – the [hotel workers] are not trained to help someone who is disabled, who may have very specific needs and requirements.

It’s a whole different thing if that same person can go over to the chair lift, slide out of their wheelchair, transfer onto the lift, manually use the controls, swing out over the water, set themselves in and swim. And then when they’re done they can get out again – they don’t have to wait for anyone.

# When disabled hotel guests' needs go beyond the norm for typical guests, what do hotel owners and managers have to do?

*Are there any limits?*

**M**any of our hotel clients struggle to define what “auxiliary aides and services” imply for their business and how they can comply with federal ADA standards when certain extreme situations occur.

Take for example, a federal lawsuit filed by a paralyzed guest against an Akron, Ohio hotel after he was banned for accidentally soiling his linens because his colostomy bag failed while he was asleep. Though he paid for the linens and left the maid a hefty tip, he was allegedly told by a night desk clerk that he was “banned for life” by the hotel manager when he attempted to stay at the hotel again. He is now suing the hotel under the Americans with Disabilities Act for discrimination against the disabled.

Was the hotel manager’s decision to ban the disabled guest legally justified? Or, should the hotel have rightfully provided special personal services? This is not an easy question to answer, but here are some guidelines to clarify ADA boundaries.

The ADA requires public accommodations to provide auxiliary aides and services to disabled guests; however, it specifically does not require a public accommodation to provide customers, clients or participants with personal devices such as wheelchairs, and individually prescribed devices, such as prescription eyeglasses or hearing aids, or services of a personal nature, including assistance in eating, toileting or dressing. Does this umbrella of personal assistance include cleaning up a disabled guest’s biological waste? Not only have employees not been generally trained to handle human waste, but the situation also presents hazardous public health issues for staff and other guests.



While this case is extreme, it is common for hotel guests, including those who are disabled, to have needs that go beyond the typical lodging services provided for guests in general. It is important to remember that hotels are not hospitals or nursing homes. Hotels have a responsibility to individuals with disabilities to ensure that they receive the privileges that the facilities offer as fully as possible, but not when the need fundamentally alters the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or places an undue burden on hotel staff.

On the other hand, the types of auxiliary aides and services that a hotel should provide include: telecommunications devices and services for deaf or hearing-impaired guests, a means of decoding captions for individuals with impaired hearing in places of lodging that provides televisions in five or more guest rooms, an effective method of making visually delivered materials available to individuals with visual impairment, and services that ensure effective communication with disabled individuals.

The level of service a hotel should provide to comply with the ADA can be unclear. Combined with weaving your way through federal and state laws, compliance can turn into more of a maze than a hotel owner would expect. The cost to lodging operators in litigation and reputational risk each year is many millions of dollars. The best way to deal with these issues is to engage knowledgeable legal and business advisors to assist you in developing your hotel's written ADA policies and procedures.

# CHAPTER 4

## TIMESHARES AND FRACTIONALS

## **Timeshare and fractionals: Does your exit strategy or repositioning your property create ADA problems?**

**W**hen selling or repositioning your timeshare, condo hotel or fractional property, it is important to understand what physical modifications may involve upgrades under the Americans with Disabilities Act and applicable state disabled access laws.

### **How can you determine if your property is compliant with applicable access laws?**

To determine whether a modification to a structure is an “alteration” under the Americans with Disabilities Act, the following are considerations:

1. The aggregate cost of the modification relative to the physical and financial characteristics of the structure
2. The physical scope of the modification (*e.g.*, What specific portions of the structure were modified? Did the modification affect only the structure’s surfaces or did it affect the structural components? Did the modifications affect only personal property or did it affect fixtures that are considered realty? Did the modifications affect the “usability” of the building or facility?)
3. The reason for undertaking the modification (*e.g.*, maintenance? improvement? to change the purpose, function, or use of the structure?)

Basically, as the cost, degree, and scope of the modifications increase, the ADA Standards may change. However, even an inexpensive or minor modification to an important accessible element of a property may be regarded as an “alteration” if it fundamentally changes the use or “usability” of the facility.

If the property in question is older it is not “grandfathered in” under the ADA, because preexisting buildings have an ongoing

obligation to remove access barriers to the extent it is readily achievable to do so. The property may currently comply with the Act even though the physical characteristics of the property would not comply if built today. If the property is renovated, certain areas may need to comply with the alterations standards of the ADA and state laws.

In determining whether a property complies with the requirements of the ADA, compliance authorities (e.g., building and safety officials in connection with the issuance of a building permit) will likely focus in part on whether the inaccessibility of a property to a disabled person constitutes discrimination. Keep in mind that neither the issuance of a building permit by a department of building and safety or its equivalent nor the preparation of design plans by a licensed architect is a guarantee that a property complies with state and federal requirements relating to disabled access. In particular, out-of-state and international architecture firms may not be sufficiently familiar with accessibility requirements to serve as a meaningful resource in this regard. You should have an expert attorney, along with an experienced local site-adapt architect or access consultant, conduct an overview of the plans.

## **What is the “Path of Travel” and must it be accessible?**

Relevant provisions of the ADA provide that “discrimination” includes “a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of, or access to, an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible ... where such alterations ... are not disproportionate to the overall alterations.” That being said, the Department of Justice in its implementing regulation does recognize that normal maintenance and certain upgrades that do not affect the “usability” of the building or facility are not alterations.



Where certain alterations are made, it is possible that the path of travel to the altered area must also be made accessible for the disabled, and the defined path of travel may be much broader than you would expect. However, the cost of modifying a path of travel may be considered, when it was the alteration of a portion of a property that triggered the additional requirement to make the path of travel to the altered area accessible. Specifically, a proportionality requirement (looking at the cost of modifying the path of travel in proportion to the cost of the unit alterations) can limit the extent to which a supporting area must be made accessible. A different standard may apply when architectural barriers exist that limit accessibility. This analysis is complex, and you should be sure to have competent counsel and consultants review the standards and the facility with you.

### **Should you be concerned?**

The Department of Justice and local Attorneys General offices are stepping up the enforcement of federal and state accessibility requirements. The factors relating to compliance requirements are not straightforward and you should consult with ADA counsel in connection with any renovation that you are contemplating or undertaking.

# CHAPTER 5

## HOT TOPICS ON THE ADA



## Websites: The importance of an ADA-compliant reservation system

As reported in the Hotel Law Blog, in 2010 the DOJ revised the regulations implementing the Americans with Disabilities Act (ADA) for the first time in nearly 20 years. Some of these changes became effective in 2011, and others became effective March 15, 2012.

While the revisions to the ADA Standards include broad changes in many areas, this article focuses on the changes to reservation policies. The Department of Justice made these changes in response to a large number of complaints by disabled hotel guests, most of whom reserved an accessible hotel room only to find upon check-in that the room they reserved was either not available or not accessible. These turn-downs are referred to in ADA parlance as “failed reservations.”

The ADA changes to reservation policies became effective on March 15, 2012, and are explained below.

### How the ADA Standards on reservations affect hotels

The 2010 ADA Standards include some broad changes to the following topics: the definitions of “disability” and “place of lodging,” reservation policies, standards for accessible design, service animals, mobility devices, communications with customers, and safe harbor provisions relating to “readily achievable barrier removal.” This article includes a discussion of only the changes to reservation policies.

With certain exceptions, “places of lodging” must now:

- Ensure that individuals with disabilities can make reservations during the same hours and in the same manner as individuals without disabilities (note the use of the word “same,” not “substantially similar,” as requested by some hotel industry lobbyists);
- Identify and describe accessible features and inaccessible features in the hotel and guest rooms in

enough detail to allow an individual with disabilities to assess whether a hotel meets his or her needs;

- Ensure that accessible guest rooms are held for use by individuals with disabilities until all other guest rooms of that type have been rented;
- Reserve, upon request, accessible guest rooms or specific types of guest rooms and ensure that the reserved rooms are blocked and removed from all reservations systems; and
- Guarantee that a specific accessible guest room, once reserved, is held for the reserving customer. While there are limited obligations that apply to third-party reservation operators who do not own and operate the places of lodging; the amended Standards require places of lodging that use third-party reservations services make reasonable efforts to make accessible rooms available through at least some of these services and they must provide these third-party services with information concerning the accessible features of the hotel and the accessible rooms.

The reservation requirements now require that hotels and other hotel-like facilities properly train their staff and implement significant changes in reservation policies. For example, the reservations staff must be able to identify which specific features are included in a hotel's accessible guest rooms; an accessible bathroom may meet accessibility requirements with either a bathtub or a roll-in shower, but the specific feature may make a difference to a particular disabled person so it must be identified.

## Websites: Department of Justice poised to adopt accessible website standards

Since at least 2000, the U.S. Department of Justice (DOJ) has been advocating standardized website development and content to promote access to blind and low vision internet users. In 2013, the DOJ withdrew its proposed Advanced Notice of Proposed Rule Making (ANPRM) which would have established standardized internet protocols by adopting the Web Content Accessibility Guidelines (WCAG) 2.0.

In 2006, we reported on the landmark case *National Federation of the Blind v. Target Corporation*, regarding “cyberaccessibility” (a term we coined). *Target* was the first case in which any court ruled that the ADA applied to a retail website. With limited exception, the few courts that had addressed the subject uniformly held that the ADA only applied to brick and mortar architectural barriers, not to internet retail channels (*Access Now, Inc. v. Southwest Airlines.*)

Target argued that it complied with the ADA because its retail stores were fully compliant and that its website channel was not covered by the ADA standards. The Court disagreed. Plaintiffs’ class certification motion was granted. Target paid a hefty sum and implemented WCAG standards to make its website accessible to blind and low-vision customers. The *Target* decision was followed with *Rendon v. Valleycrest Productions Ltd.* Since *Target*, the DOJ and other agencies have imposed accessibility requirements for web content and services in Consent Decrees and Settlement Agreements with such industry leaders as Amazon.com, Netflix, H&R Block, Hilton International and others.

Whether the DOJ will implement web standards is not a matter of “if,” but “when.” The regulations will “establish requirements for making goods, services, facilities, privileges, accommodations, or advantages” offered by state and local government agencies and businesses via the Internet, “specifically at sites on the World Wide Web,” accessible to persons with disabilities.

On November 25, 2014, the DOJ Civil Rights Division issued its Advance Notice of Proposed Rule Making entitled “Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations.” These revised regulations, when adopted, will implement web site development standards that the DOJ has been working on for nearly a decade.

The DOJ has solicited public comment on the rules, and the date for announcing the new rules has been extended several times. At this time, announcement for the proposed guidelines for website access for public accommodations has been extended until June 2015.

### **Guidance on the accessibility standards to websites**

The Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) has developed recognized guidelines for voluntary website accessibility. The WCAG standards will guide software developers to create web content and services which are more accessible to persons with vision-related disabilities. The current version of the WCAG is the 2.0 with a success factor of either “A,” “AA,” or “AAA.” The WCAG 2.0 contains 12 standards which each website must meet to conform to the WCAG 2.0 under one of the three “success factors.”

The DOJ believes that the website accessibility standards reach entities that provide ongoing goods and services that fall within the 12 categories of “public accommodations” as defined in the ADA regulations, including by way of example, hotels, financial institutions, shopping centers, retail stores, restaurants, arenas. The regulations are intended to cover public accommodations that “operate exclusively or through some type of presence on the Web – whether hosting their own website or participating in a host’s website” – and not personal, noncommercial websites or postings.



## **After new rules are announced, how soon must websites comply?**

As of now, there is no effective compliance date. As guidance, the DOJ recently provided an 18-month phase-in period for the 2010 ADA Standards from publication of the final rule.

In the case of websites, the Department noted that it is considering a six-month effective date for newly designed websites (“those placed online for the first time six months after the publication of the final rule”) and for new pages on existing websites, including navigation components. For existing websites or pages, the DOJ is considering a two-year phase-in period from the publication of the final rule.

The proposed comprehensive website guidelines are complex and require professional technical consultation. Initially, we suggest that businesses conduct self-evaluations to determine whether their websites are accessible, to identify system gaps, and to implement a viable remediation plan. Since your secrets are only safe with an attorney, we recommend that you retain ADA compliance counsel experienced in cyberaccessibility to retain the consultants and guide the process to provide confidential, privileged reports and direction.

JMBM’s ADA Compliance and Defense Group works with the top website compliance firms and regularly consults with clients on enterprise-wide compliance programs. Please contact us if you have any questions regarding website ADA compliance.

# Websites: How your hotel or retail website can make you a target for ADA lawsuits

A decision by a Federal judge has ruled that the ADA's architectural barrier requirements can apply to websites, which set the stage for ensuing litigation.

Is your website accessible to the blind and those with impaired eyesight?

If you use a third-party reservation system, are you liable if their website is not accessible?

## How can the ADA apply to websites?

When the Americans with Disabilities Act was enacted by Congress in July 1990, the Internet was in its infancy and few, if any, considered its applicability to cyberspace. But a San Francisco Federal judge's decision not to dismiss a discrimination case against retailer Target Corporation brought the issue to the forefront. Believed to be the first court ruling determining that the ADA's architectural barrier requirements can apply to the website of a private business, the stage was set for increased ADA litigation involving web accessibility.

Target defended the lawsuit confident that its website and stores complied with all applicable laws. But some plaintiffs' ADA lawyers argued that the website for an online retail operation was an extension of the store, and because the retail operation is clearly defined in the ADA as a "place of public accommodation," the website is similarly required to be accessible to the public.

## What is an "accessible" website?

Many consumers with visual impairments rely on the Internet as the most efficient method of making reservations and conducting personal business, and in such as retail purchases and financial and professional transactions. Thus, accessible websites are more likely to drive sales to visually disabled customers. This could be a golden marketing opportunity for



hoteliers that rely on the Internet as a source for guest reservations.

It is estimated that of the nearly 10 million visually impaired people in the United States, 1.5 million use assisted technologies such as screen reader technology to access Websites and communicate over the Internet. Screen reader technology converts website text to an audio format by reading the displayed screens. Accessible websites provide computer codes that are compatible with screen reader software.

Although the Web Accessibility Initiative and other groups have been advocating for Internet standardization for some time – the Web Accessibility Initiative of the World Wide Web Consortium (3WC) developed design and functional standards – no written guidelines for Website accessibility have been adopted for the private sector. The Americans with Disabilities Act Accessibility Guidelines (“ADAAG”) became effective March 15, 2012. Accessible website “construction” is not included in the revisions. The DOJ announced that it will announce website accessibility guidelines in June 2015.

## **What has changed?**

Until the *Target* decision, the leading case on Internet accessibility was *Access Now, Inc. v. Southwest Airlines Co.*, decided in 2002. In that case, the plaintiffs – an advocacy group and a blind individual – sued Southwest Airlines alleging that its website was inaccessible to visually impaired consumers using screen readers. The plaintiffs argued that Southwest’s website violated the ADA, that the website was a “place of public accommodation,” as defined in the ADA, and that it was not useable by visually impaired customers. Many state laws mirror the ADA’s mandate.

The court rejected the plaintiffs’ argument, holding that the defined categories of “public accommodations” in the ADA all relate to “brick and mortar” facilities. The court also pointed out that the plaintiffs were able to access the services provided by Southwest’s Website through other sources – the telephone, ticket counters and travel agents.

The *Southwest Airlines* court did, however, recognize the rapidly changing technological landscape and the explosive growth in the use of the Internet by millions of people, including those with disabilities, and acknowledged that not all courts might feel so constrained by the statutory language of the ADA to limit its application to brick and mortar accommodations. In fact, not long after the *Southwest Airlines* decision, a Georgia court decided that Atlanta's public transit district was required to make its website accessible to the blind under Title II (applicable to government programs and services). Further, the federal government requires that under Section 508 of the Rehabilitation Act, all federal websites be accessible. The Federal standards and guidelines were the catalyst for disability rights groups to demand the private sector also provide Internet accommodations.

In 2004, New York State Attorney General Eliot Spitzer settled a case with two major travel websites, Priceline.com and Ramada.com, to make their sites more accessible to blind and visually impaired users. The argument in these cases was the same: that websites are an extension of a hotel's status as a "place of public accommodation" under the ADA. The Attorney General noted that accessible websites are the wave of the future.

### **From "Drive-bys" to "Surf-bys"**

For years, our ADA Compliance and Defense lawyers have defended hotels and other businesses against "drive-by" lawsuits where disability advocacy groups send a disabled "customer" to an establishment to check for a host of often very technical ADA violations. If any barriers to access arguably exist, the "customer" files a lawsuit against the establishment under the ADA and related state laws. In some cases, a single plaintiff may visit a number of hotels or restaurants in a given area on the same day, and file lawsuits against all of them claiming similar physical, psychological and emotional injuries in each instance.

Consider now, the number of websites one potential plaintiff could visit in a day while surfing the Internet! It is no wonder there is intense concern about a potential flood of lawsuits resulting from Internet "surf-bys."



## What about third-party providers?

It is a common practice for hotels to outsource their reservation system to third-party service providers. But as far as the general public is concerned, reservations are being taken by the hotel itself. Can your hotel become the target of ADA cyberspace lawsuits for the practices of third-party vendors? While no one knows how a court will answer this question, it is likely that sooner rather than later, plaintiffs groups will test the waters by filing additional lawsuits in these circumstances.

It is wise for hotels to confirm that the websites of their third-party providers are accessible to those with visual impairments and the blind. Currently, Department of Justice Consent Decrees and Voluntary Compliance Agreements involving the hotel industry uniformly require hotel reservation systems to provide up-to-date information on the accessible features of their hotels. It would not be surprising to see an additional requirement for websites to be accessible to the visually impaired and blind.

## Act now to avoid liability

While many hotel brands and individual properties are aware of the needs of visually impaired consumers and already provide codes within their websites that make it possible for screenreading software to “read” their text, others have been unaware of the issue, or have been slow to act. They cannot afford to wait any longer.

The plaintiff in the *Target* case, the National Federation of the Blind, estimated that Target would need to spend between \$20,000 and \$40,000 to make its website accessible to the visually impaired. Because the technology is far from universal, the actual cost is difficult to estimate. The cost of retrofitting websites will be a factor when courts consider what reasonable accommodations should be made to a company’s website, if any.

But now is the time for hoteliers and retailers to review their websites for accessibility to the visually impaired. They will also want to review the websites of third-party providers that accept reservations for their hotels. There are technological barriers to be overcome, for sure. But the end result could be a golden marketing opportunity for hoteliers to market their services to a

sizeable market segment of visually impaired consumers, or the new source of accessibility litigation.

## **Case Study: Charles Schwab settles claim over website accessibility under the Americans with Disabilities Act**

**O**n May 2, 2012, Charles Schwab & Co. announced an initiative to make its website more accessible for all customers, particularly those who are blind or have sight disabilities. This high-profile development was part of the settlement of a claim by a prominent Bay Area disabilities advocacy group, a Charles Schwab customer for more than 25 years.

While many have focused on the Americans with Disabilities Act's ever-changing architectural barrier removal requirements, we continue to see the DOJ and private advocacy groups driving to enforce the original regulations promulgated 20 years ago under the ADA.

### **Charles Schwab settlement is one of 15 prominent web site settlements**

Charles Schwab, one of the nation's leading securities broker-dealers and a disability rights advocacy attorney announced last week that they settled a year-long claim by a blind customer that its website was inaccessible to blind, low vision and cognitively challenged customers. The structured negotiations concluded this dispute short of trial.

With this settlement, Charles Schwab joins a list of prominent companies which have settled website accessibility complaints. Charles Schwab agreed that it will make its website more accessible and inclusive for all customers, and agreed to implement the Web Content Accessibility Guidelines (WCAG) Version 2.0 Level AA which will make its website navigable by disabled customers.

An informal complaint backed by the threat of litigation and administrative investigations was lodged with Charles Schwab by the lawyer for a blind day trader. The claimant was a long-time Schwab customer and herself a computer programmer. One morning, she found that she could no longer navigate the

Schwab website using JAWS software and was prevented from making trades on-line. The JAWS software reads aloud the text of the page so blind and low vision customers can access the website. Apparently, the website was updated and the prior screen reader software was no longer accessible.

## **No DOJ-approved standard for websites**

The Department of Justice (DOJ) has not approved and adopted any formal standards for website accessibility and recently withdrew its Notice of Proposed Rule Making for web access standards. It is widely anticipated that the DOJ will formally adopt the current WCAG Standards in 2015. The Web Accessibility Initiative (WAI) has been working for years and has promulgated the WCAG which is widely recognized as the “gold standard” for web access. However, given the almost daily changes in technology and the complexities of cyberspace, there are no official website standards.

Most recent DOJ investigations and settlements have focused on website accessibility. Target Corp. paid over \$6 million to settle a website ADA class action. This precedent-setting case paved the way for cyberaccessibility litigation by Main Justice and advocacy groups.

## **What does this settlement mean to you?**

If you have not examined your website for ADA compliance, now is the time to do it. Not only does your website need to comply with the substantive requirements for listing hotel accessible features, for example, but the website itself needs to be accessible to disabled customers. You need to ask yourself some questions. For example:

- What standards of accessibility is your website hosting?
- How do you measure website compliance?
- How often do you audit your website for ADA compliance?



- Is your website accessible to and independently useable by blind and low-vision customers?
- What steps are you taking to make your website accessible?

We see the Charles Schwab settlement as reinforcing the importance of ADA compliance for website accessibility as dramatically emphasized in the Hilton ADA settlement with the DOJ. In that landmark settlement, Hilton agreed to implement changes to its websites to make them accessible to all customers.

### **Wakeup call for compliance**

Now is the time to audit your website and implement changes to make it accessible, if you have not taken action to make it accessible to disabled customers. Website accessibility audits are far more technical than an ADA Compliance Audit of the physical premises, and every business requires highly specialized expertise.

Charles Schwab has implemented enhanced website accessibility features based on a time table set by a settlement agreement. If you are proactive, you can set your own time table, control the content of your website, and control your own destiny.

[For a copy of the Charles Schwab Settlement Agreement, click here.](#)

# Golf Courses: ADA compliance standards for golf courses. What do they mean to you?

**G**olf courses are one type of “public accommodation” (along with hotels, restaurants, retail stores and the like) specifically targeted by the ADA Standards that have been effective since March 15, 2012.

The 2010 ADA Standards, discussed below, brought about a significant change in the legal standard applicable to golf facilities.

## ADA compliance is par for the course

Do you remember when top pro golfer Casey Martin successfully sued under the Americans with Disabilities Act (the ADA) to require the PGA to change its tournament policies to permit him to use a golf cart to accommodate his disability? Martin’s suit alleged that the PGA’s rule banning use of golf carts in certain of its tournaments violated the ADA. The United States Supreme Court sided with him. *PGA Tour, Inc. vs. Casey Martin* (2001) 532 U.S. 661.

Who knew then that in 2010, the DOJ would implement sweeping accessibility requirements for public and private golf courses? Well, every golf course owner, lessee and operator who was paying attention to the evolution of the ADA should have seen these changes on the horizon. Golf courses are specifically identified as public accommodations under the ADA. The 2010 changes to physical accessibility and policies and procedures have been on the radar screen of recreational advocates, disabled golf enthusiasts, the U.S. Access Board and the DOJ for a long time.

In fact, the initial 1991 ADA guidelines applied to public facilities at golf courses just as any other business serving the general public. Many golf course owners implemented these accessibility changes over the past two decades. Others did not. No matter, because effective March 15, 2012, all public, municipal and private golf courses open to play by the general



public must comply with the requirements of the 2010 ADA Standards for accessible design, for newly constructed, altered and existing golf courses.

## **What are your compliance obligations under the 1991 ADA Standards applicable to golf courses?**

For 20 years, golf course owners, tenants and operators had to comply with the 1991 ADA accessibility requirements. To begin the analysis of whether your golf courses are ADA compliant, owners and operators must ask themselves whether their courses meet the 1991 ADA Standards. If your course has been surveyed by an access specialist and found to comply with the 1991 ADA Standards, you are on the back nine at even par. If your course does not comply with the 1991 Standards, pick up your ball and take a bogey. Such golf courses not only need to comply with the 1991 Standards, but now they need to comply with the 2010 Standards, as well.

The 1991 ADA Standards which have applied to golf courses include:

- Accessible parking
- Exterior accessible paths of travel
- Building entrances
- Course offices
- Public restrooms
- Restaurants and bars
- Public meeting rooms
- Pro shops/retail locations
- Clubhouses
- Locker rooms

## **What are your compliance obligations under the 2010 ADA Standards?**

The 1991 Standards did not apply to the golf course itself. The 2010 Standards, however, apply (for the first time) to the following golf course elements:

- Tee boxes
- Putting greens

- Golf cart passage on paths and on the course
- Practice facilities, greens, driving ranges
- Swimming pools with pool lifts, recreation facilities
- Miniature golf courses
- Weather shelters
- Temporary facilities (bleachers for tournaments, portable facilities concessions)

After March 15, 2012, any newly constructed or altered golf course must comply with the new requirements. Previously existing courses are governed by Title III of the ADA's readily achievable barrier removal standards. If a course is owned or operated by or on municipal land, it is also subject to Title II's program accessibility.

As the owner or operator, you must remove physical and communication access barriers. This would include a program of accepting Telecommunications Relay Services (TRS) for deaf and hard-of-hearing golfers and providing auxiliary aids and services for blind or low vision golfers.

Remember that readily achievable barrier removal applies to those barriers which are "easily accomplishable and able to be carried out without much difficulty or expense." What is readily achievable for a single course owner or operator may be far less than the barrier removal obligations of a multi-course or national owner or operator.

Golf course owners and operators must implement policies and procedures that ensure there are no barriers to entry which affect disabled golfers.

### **The Safe Harbor under the 2010 ADA Standards**

To alleviate some of the burden to businesses which over the last 20 years complied with the 1991 Standards, the DOJ adopted the "safe harbor" protection for existing courses. Golf course elements that comply with the 1991 Standards did not need to be changed to comply with the 2010 Standards until these elements are modified after March 15, 2012. However, there is no safe harbor for elements in existing courses for requirements that were not included in the 1991 Standards. So, you need to comply





with these new requirements if they are readily achievable, whether or not you alter your course.

The ADA has long required access to and from the parking lot to the clubhouse, pro shop, bag drop, cart rental, public restrooms, restaurants, bars and other public amenities. The 2010 Standards require an accessible route or golf cart passage from the tee box to the fairway and onto the greens. A golf cart passage is a “continuous passage on which a motorized golf cart can operate.”

A specified number of teeing greens, putting greens and weather shelters must now be made accessible. Every putting green must be designed and built to permit a golf cart to enter, park, play the hole and exit. Practice greens, driving ranges and other practice areas must now provide a ratio of accessible elements.

If your course holds tournaments or charitable events, permanent or temporary viewing stands must provide accessible features. Because golfers are not supposed to hit into the rough or hazards like bunkers, such elements are not required to be accessible. But, if there is a practice bunker, it must allow a cart to enter and leave the bunker.

## **When do you need to comply with the 2010 Standards, and are you ready to tee off on your newly accessible course?**

All public and private golf courses which permit public play or hold tournaments were required to meet the new 2010 Standards after March 15, 2012. At multiple course complexes, all courses must meet the 2010 ADA Standards. The DOJ considers any private course or golf club which allows any public access or holds public tournaments or functions to be subject to the ADA.

## **What alterations trigger ADA compliance?**

Redesigning a clubhouse, parking lot, restaurant, bar or other public amenity is generally a code-trigger alteration requiring ADA compliance. Redesigning a tee box, fairway or green is considered to be a code-trigger alteration. General course maintenance or changing the pin location, or relocating a bunker are not considered alterations.

## **What is the current status of “accessible” golf carts?**

For more than a decade, the DOJ has been working on standards for accessible golf carts. Currently, there is no standard for golf carts. The DOJ is working to determine the number of golf carts that must be at each course and to adopt safety standards for golf carts. The DOJ Advanced Notice of Proposed Rule Making for Fixtures and Equipment of July 2010, addresses the issue, but that process has not been resolved.

## **What does all of this mean to you?**

After March 15, 2012, all newly constructed and altered golf courses must comply with the 2010 ADA Standards. Such alterations must comply with new construction standards where it is technically feasible. Existing courses must comply with the “readily achievable barrier removal” standard.

## **Have you audited your golf course for ADA compliance?**

The DOJ has made it clear that business owners should survey their properties for compliance and implement a plan to remove those obstacles which may impede a disabled golfer from playing the course. If you have not conducted an accessibility survey of your course and implemented a compliance plan, you need to do so, now.

## Buying a hotel or other place of accommodation? Don't buy an ADA lawsuit or DOJ investigation

**A**s hotel investors get caught up in the momentum of a good hotel purchase, they should make sure that their due diligence examination includes one item that many checklists fail to cover – whether the hotel's physical property and operating procedures comply with the Americans with Disabilities Act (ADA), and similar state statutes.

### Private plaintiff lawsuits

The last decade has seen an explosion of private plaintiff lawsuits, including class actions and actions against individual hotels (and other properties classified as public accommodations), alleging violations of the ADA. In states like California where ADA plaintiffs can recover actual, punitive and statutory damages, individual plaintiffs of the “sue-and settle” variety have filed thousands of lawsuits claiming nearly identical violations at numerous locations.

### DOJ investigations

In addition to private plaintiff lawsuits, the United States Department of Justice also has actively sought to enforce the ADA in the form of individual property investigations, geographical sweeps, and system-wide investigations.

*Individual property investigations.* A DOJ investigation of an individual property often begins with a guest complaint at a particular hotel which is ignored or poorly handled by the owner or operator. Matters commonly escalate if the guest files a formal ADA complaint with the DOJ's Civil Rights Division. All complaints are actively investigated.

*Geographic sweeps.* The DOJ has also instituted geographical “sweeps” such as the New York Times Square/Theater District investigations from several years ago. This comprehensive ADA investigation of 60 Times Square hotels – including boutique hotels and international flag properties – was initiated after a single guest's complaint. It was a targeted investigation.

*System-wide investigations.* The DOJ has also initiated a number of system-wide investigations against the nation's leading hotels and retailers. Over the years, the DOJ has litigated or otherwise negotiated Consent Orders or Decrees with other prominent hotel flags such as Ramada Ltd. (2010), Days Inns of America, Inc. (1999), Marriott International, Inc., Courtyard Management Corporation (1996), Motel 6 Operating LP (2004 and 2007) and Bass Hotels and Resorts (1998). In November 2010, the DOJ and Hilton Worldwide, Inc. entered into a 45-page "comprehensive precedent-setting agreement under the ADA that will make state-of-the-art accessibility changes to approximately 900 hotels nationwide."

### **What it means to hotel investors**

The current legal landscape has created a new reality for investors. It is very possible for an investor, when purchasing a hotel or motel, to buy itself an ADA lawsuit. The property may contain architectural barriers that violate the ADA and may give rise to a private plaintiff lawsuit and/or a complaint to the DOJ that leads to a DOJ investigation. The policies and procedures of the hotel operation may also be in violation of the ADA. (Procedures would include items such as online and third-party reservations, how to deal with service animals or how to ensure that the number of guest rooms which must be fully accessible are available.) It is also possible the hotel may be currently under investigation by the DOJ, or is currently the subject of an ADA lawsuit. We have represented a number of hotel buyers who found themselves in this situation, including a foreclosure buyer who inherited a DOJ Consent Order.

Moreover, substantial revisions to the Americans with Disabilities Act Accessibility Guidelines (ADAAG) were included in the DOJ's revised 2010 Standards that implement the ADA. These new Standards went into effect on March 15, 2011 (with certain exceptions, and those went into effect on March 15, 2012). The 2010 ADA Standards impose both technical requirements, (e.g. the specifications a property must meet to be fully accessible), and scoping requirements (e.g. the number of rooms or elements in a facility which must be fully accessible).

Investors should protect themselves before completing a purchase transaction, by performing due diligence in this area. For example, if potential ADA violations exist, the investor can either require that the seller correct the problems as a condition of closing, obtain an estimate for the barrier removal and demand from the seller a credit in escrow or to reduce the purchase price accordingly. Prior to completing a purchase, the investor should consider performing due diligence in three broad areas:

- *Legal.* Determine whether the property is being investigated by the DOJ or if there are existing ADA lawsuits against the owner or operator;
- *Architectural.* Retain an ADA consultant to survey the property and determine whether architectural barriers exist;
- *Communications.* Determine if the hotel's website and reservation system are accessible;
- *Operational.* Determine whether the hotel's operator has effective policies and procedures for serving disabled guests.

If the property is in California, the investor can also seek protection under California's 2009 Construction-Related Accessibility Standards Compliance Act which is designed to curb abusive ADA litigation through the Certified Access Specialist program (CASp). CASp enables business to go through a process to "certify" that their facilities meet state and federal accessibility standards. One benefit CASp offers is that business owners with certification have the option to stay or stop all construction-related ADA litigation initiated against them in state court, and instead proceed to mediation, making it possible to avoid expensive and lengthy proceedings that drive up legal fees.

## Contributing Authors

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# THE ADA COMPLIANCE AND DEFENSE GUIDE

**T**he **ADA Compliance and Defense Guide** is a valuable resource for owner and operators of hotels, restaurants, golf courses, spas and sports facilities, banks and other financial institutions, retail stores, shopping centers and other places of “public accommodation,” as defined by the Americans with Disabilities Act (ADA).

Written in plain language for business people, the Guide includes articles on ADA compliance for websites, new construction, ITT relay systems, service animals, pool lifts, reservation systems, and more. It covers what to do if your business is investigated by the U.S. Department of Justice for possible ADA violations and includes numerous case studies of ADA lawsuits.

Drawing on experience gained over more than 20 years as lawyers and advisors, authors Jim Butler and Marty Orlick provide readers with information about ADA compliance and litigation that is both practical and useful.

## About the Authors



**Jim Butler** is the Chairman of JMBM’s Global Hospitality Group® and Chinese Investment Group™, the author of the Hotel Law Blog and Chairman of the national hotel finance and investment conference, Meet the Money®. He devotes 100% of his law practice to hospitality, helping hotel owners, developers, investors and their lenders to exploit opportunities and find solutions to problems. Over the years, Jim and his team have been involved in more than \$71 billion of hotel transactions involving more than 3,800 properties all over the world, providing one of the most extensive virtual databases of market terms for deals and financings.



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