

# Defending Title III ADA Claims

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# Presenter

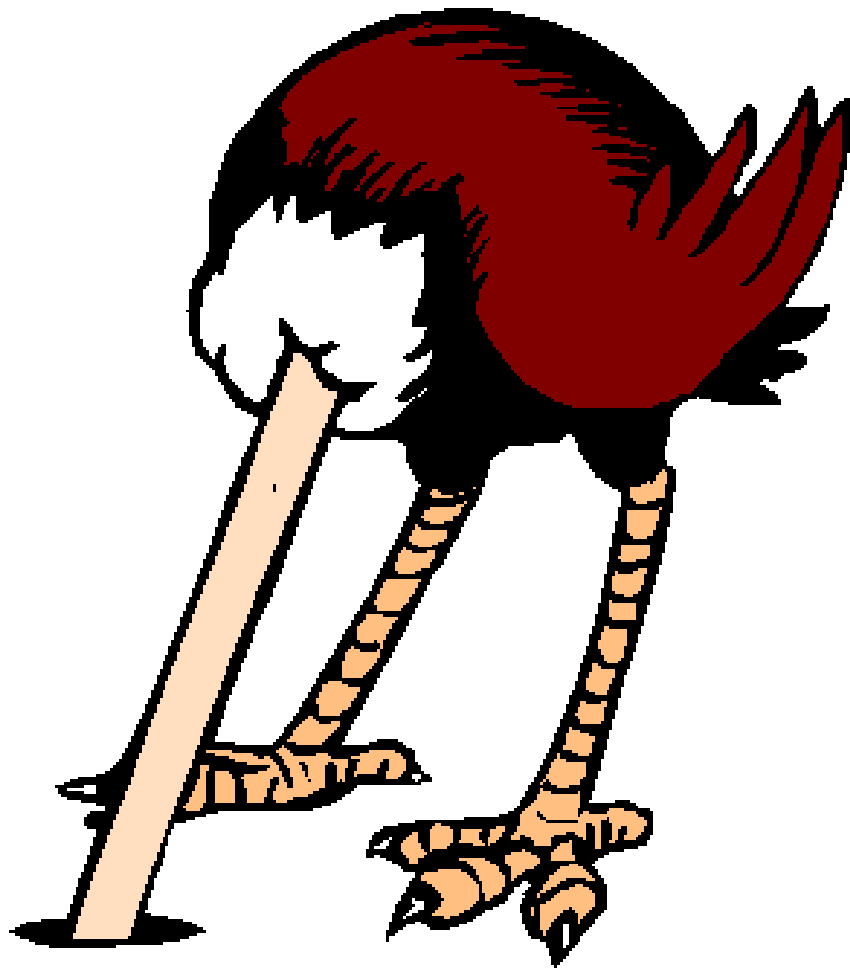


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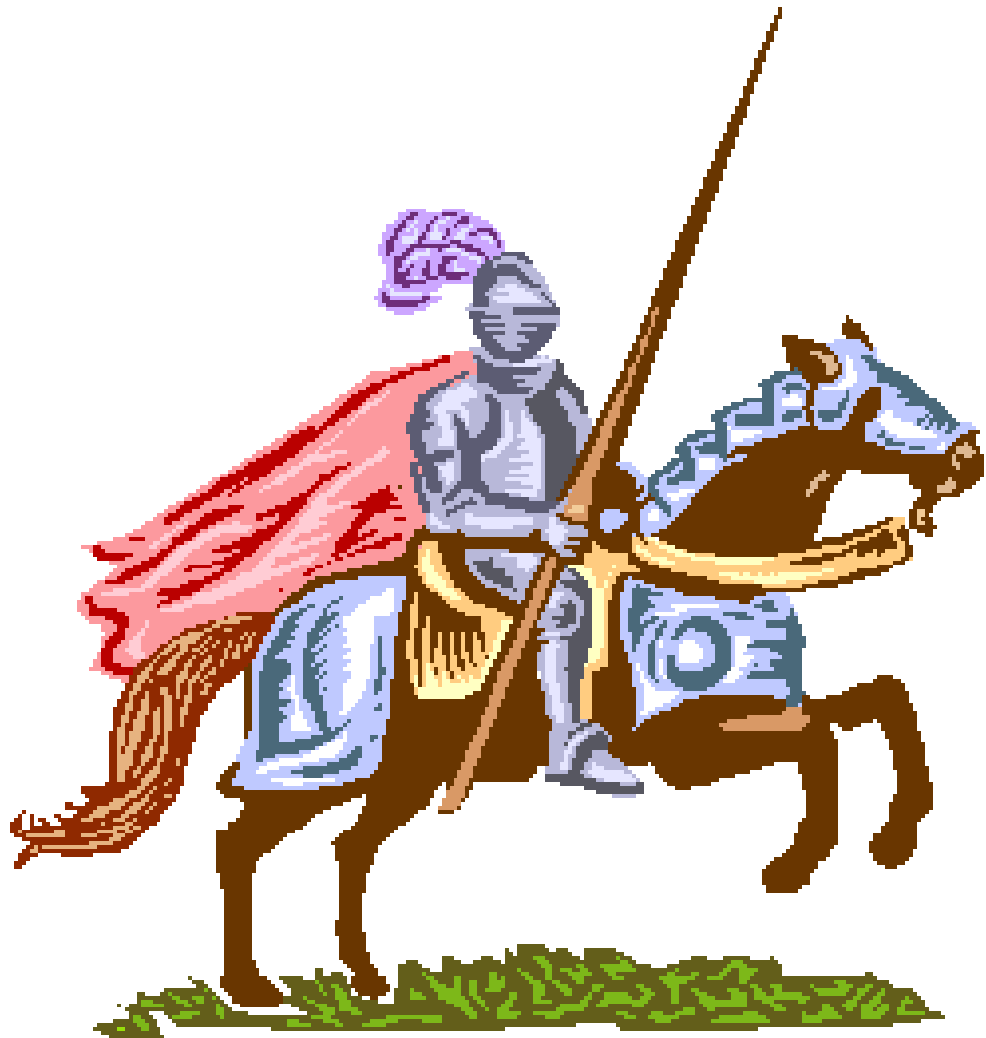
**Wilson, Elser, Moskowitz, Edelman & Dicker LLP**

- Focused on counseling and defending the hospitality industry
- Experienced federal and state court litigator
- Partner at full-service law firm with 23 offices across the U.S. and in London, and lawyers admitted to practice in 40 states.









## Americans with Disabilities Act (ADA)

Title III of the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment of the good, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a).

## Does Title III Apply To You?

Title III applies to public accommodations and commercial facilities.



# Public Accommodations and Commercial Facilities?

- Facilities whose operations will affect commerce
- Private entity that owns, leases (or leases to), or operates a place of public accommodation
- Place of lodging, restaurant, bar, gymnasium, health spa, bowling alley, golf course, place of exercise or recreation

## Notice of Claim

Common forms include:

- Complaint letter from potential plaintiff
- Warning letter from plaintiff's attorney
- Notice of investigation from the Department of Justice
- Federal lawsuit
- Solicitation letter from defense attorneys

# **The Best Defense = Full Compliance**

# What's Next?

## Pre-Suit/Pre-Investigation

- Full compliance is the best defense
- Review your ADA guest rooms and public restrooms for compliance
- Ensure accessible paths of travel from parking areas and through public areas
- Do not ignore a complaint or warning letter
- Prioritize exterior modifications
- Make least expensive modifications immediately
- Notify plaintiff of modifications

## Investigation by Department of Justice

- Demonstrate commitment to full and equal access to goods and services. Document ADA compliance assessment and ADA related written policies/procedures.
- Be responsive. Maintain open communication.
- Determine if insurance coverage is available for defense costs.
- Determine whether indemnification is available for modification costs.
- Involve responsible property partners (lessors, lessees, operators, managers, owners) in early claim evaluation.
- Analyze ADA consultant report to reduce violations.
- Settlement agreement for property modifications. Identify entity responsible for modifications.
- Civil penalties only if pattern of discrimination/violations.

## Defending a Private Lawsuit

- Investigate compliance of property, not limited to plaintiff's allegations.
- If non-compliant issues, settle quickly to cap plaintiff's attorneys fees. Delay indemnification claims.
- If compliant, consider dismissal motion and potential challenges on procedural grounds.
- Plaintiff needs standing and must meet burden of proof
- Damages include injunctive relief and attorneys fees. No monetary damages under the ADA.
- Confidentiality Agreement

# What Standard Applies?

code of  
federal regulations

reprint

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**Department of Justice**


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**28 CFR Part 36**  
 Revised as of July 1, 1994

Nondiscrimination on the Basis of  
 Disability by Public Accommodations  
 and in Commercial Facilities

**Excerpt from 28 CFR Part 36:**

**ADA Standards for  
 Accessible Design**





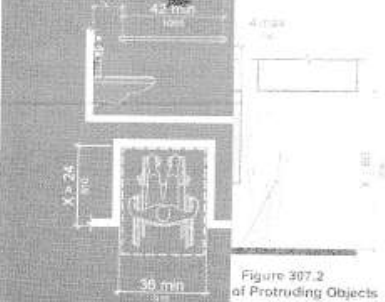


Figure 307.2  
of Protruding Objects

## 2010 ADA Standards for Accessible Design

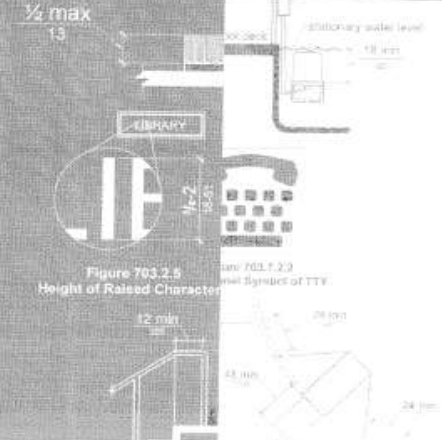


Figure 703.2.5  
Height of Raised Character

Figure 703.2.2  
Level Symbol of TTY

**Department of Justice**  
 September 15, 2010



## Future Construction and Alterations...

Future construction and alterations completed after March 15, 2012...

Compliance with the 2010 Standards is required.

## Newly Covered Elements...

Compliance with the 2010 Standards by March 15, 2012 is required.

swimming pools \* accessible routes in court sports facilities  
\* saunas and steam rooms \* play areas \* exercise  
machines \* reservations \* ticketing

## Existed Before 1993 ...

- If your construction or alteration was completed before 1993 and no alterations were made since January 26, 1992, then readily achievable elements must comply with either the 1991 Standards or 2010 Standards by March 15, 2012.
- If your construction or alteration was completed before 1993 but an individual element was altered after January 26, 1992 and such alteration complies with the 1991 Standards, then the element falls within the safe harbor provision of the 2010 Standard and does not need to comply with the 2010 Standard.
- If your construction or alteration was completed before 1993 but an individual element was altered after January 26, 1992 and such alteration does not comply with the 1991 Standards, then the element must comply with the 1991 Standard or the 2010 Standard by March 15, 2012.

## Constructed or Altered After 1993...

- If the individual element complies with 1991 Standards, then the element falls within the safe harbor provision of the 2010 Standard and does not need to comply with the 2010 Standard.
- If the individual element does not comply with 1991 standards, then the element must comply with the 1991 Standard or the 2010 Standard by March 15, 2012.

## “Readily Achievable”

- Removal of a barrier must be “accomplishable and able to be carried out without much difficulty or expense.”
- Depends on many factors including:
  - the nature and the cost of the modification
  - the overall financial resources of the business in question
  - the number of persons employed at the facility
  - the impact of removing the barrier on the operation of the facility

# Safe Harbor or No Safe Harbor

### **Limited Safe Harbor:**

Elements that comply with 1991 Standards as of March 15, 2012 will not have to comply with 2010 Standards until they are altered.

## **No Safe Harbor:**

Elements in facilities in existence as of March 15, 2012 that do not comply with the 1991 Standards will be assessed against the 2010 Standards as follows:

- if any element was constructed prior to January 26, 1993 and not altered since then, it must remove barriers to the extent readily achievable. The 2010 Standards will be used as a guide to determining what is a barrier.
- if the element was altered after January 26, 1992, it must comply with the 2010 Standards to the maximum extent feasible.
- if the element was constructed after January 26, 1993, it must comply with the 2010 Standards unless doing so is structurally impracticable.



## **No Safe Harbor:**

Elements in existing facilities that are covered for the first time in the 2010 Standards must comply with the 2010 Standards by March 15, 2012 to the extent readily achievable.

# Myth v. Reality

**Myth:**

“My old building is not subject to the ADA.”

**Reality:**

All public accommodations are subject to remove barriers  
that are “readily achievable.”

**Myth:**

“ADA compliance is the responsibility of my landlord  
(or tenant).”

**Reality:**

While that may be true under the terms of the lease, both  
the landlord and tenant are subject to liability for ADA  
violations.

**Myth:**

“I had a permit that allowed the building to be constructed in this manner.”

**Reality:**

Even if the design and construction were approved, it does not provide a defense if the building is not in compliance with the ADA.

**Myth:**

“I cannot afford to fix the areas that are not in compliance.”

**Reality:**

Many requirements are relatively inexpensive to fix.

**Myth:**

“My facility (or parts of my facility) are not really open to the public.”

**Reality:**

If a single member of the public is allowed access to the facility, a plaintiff can argue it is a public accommodation.

## The Real Danger

As of March 15, 2012, a Title III plaintiff needs very little to cause difficulty and expense ...

- ▶ *a little time*

- ▶ *a copy of the 2010 Standards*

and

- ▶ *a tape measure*



# **Your “To-Do” List before March 15, 2012**

- Review elements that will be subject to stricter or different specifications under 2010 Standards. If not compliant with 1991 Standards, decide whether to bring them into compliance with 1991 Standards to take advantage of the safe harbor.
- Bring newly covered elements into compliance with 2010 Standards to the extent doing so is “readily achievable.”
- Consider whether any upcoming alterations or new construction projects should comply with the 2010 Standards.
- Modify reservations systems to comply with new requirements.
- Contact ATM provider to discuss cost and process for adding communications features by 2010 Standards.
- Develop policy for other power-driven mobility devices

- Review and update effective communication policy as needed
- Review and update service animal policies based on new regulations (but beware of state specific requirements).
- Revise event ticketing policies
- Prepare a written ADA compliance assessment of your facilities, services, policies and procedures.
- Have a written action plan to remedy any non-compliant items, with a corresponding budget line item.

# Questions?

# Session Evaluation

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