

Insert tab here:

Defending ADA
Claim

(Arial Narrow)



Course Evaluation

How to Defend a Title III ADA Accessibility Claim
Jennifer Heitman, Wilson Elser Moskowitz, Edelman & Dicker

For each question, please circle the answer that comes closest to your opinion.

1-strongly disagree 2-disagree 3-neutral 4-agree 5-strongly agree

⤴ This program was presented in a lively, stimulating way	1	2	3	4	5
⤴ The content was interesting and informative	1	2	3	4	5
⤴ The information presented will be useful to me	1	2	3	4	5

⤴ **What other topics in this area should we consider for next year?**

⤴ **Other Comments?**

Your comments will ensure a successful program next year. Thank you.
Please place this form in the designated box located in each session.

Jennifer Heitman, Esq.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
3 Gannett Drive
White Plains, New York 10604
(914) 872-7650
jennifer.heitman@wilsonelser.com



Jennifer Heitman is a Partner at Wilson, Elser, Moskowitz, Edelman & Dicker, LLP. Wilson Elser is a full-service law firm with 23 offices across the U.S. and in London, and lawyers admitted to practice in 40 states. The firm provides international scope through its network of affiliate firms in France, Germany and Mexico.

Jennifer's practice is focused on counseling and defending the hospitality industry with regard to compliance with Title III of the Americans with Disabilities Act. She has successfully represented hotels, motels and other places of public accommodation that have been sued or are under investigation by the Department of Justice or New York State Department of Human Rights for alleged violations of ADA, FHA, and similar state and city laws. Jennifer is an experienced state and federal court litigator whose practice extends to matters involving premises liability, security guard liability, construction site accidents and labor law claims. Her clients include contractors, municipalities, property owners, independent businesses and hotels. Jennifer is a skilled advocate, effectively and efficiently representing her clients at every stage of litigation from preliminary investigation of a claim to resolution by mediation or trial. Her practice also includes matters involving insurance coverage, specifically coverage analysis and litigation.

Jennifer is a member of the firm's Hospitality Industry Initiative, General Liability & Casualty Practice Group, Employment Practice Group, Insurance-Reinsurance Coverage Practice Group, Associate Mentor Program and Diversity Committee. Prior to joining Wilson Elser, she was an Assistant District Attorney in Bronx County.

Defending Title III ADA Claims

Jennifer Heitman, Esq.,
Wilson, Elser, Moskowitz, Edelman & Dicker LLP

Presenter



Jennifer Heitman, Esq.,
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.

Application of Title III

- 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

THE TENTH ANNUAL
**2013 HOSPITALITY LAW
CONFERENCE**
COOPERATING SPONSORS: HOSPITALITY & RESTAURANT ASSOCIATION
FEBRUARY 8-10, 2013 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

Notice of Claim

HospitalityLawyer.com

THE TENTH ANNUAL
**2013 HOSPITALITY LAW
CONFERENCE**
COOPERATING SPONSORS: HOSPITALITY & RESTAURANT ASSOCIATION
FEBRUARY 8-10, 2013 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

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

HospitalityLawyer.com

THE TENTH ANNUAL
**2013 HOSPITALITY LAW
CONFERENCE**
COOPERATING SPONSORS: HOSPITALITY & RESTAURANT ASSOCIATION
FEBRUARY 8-10, 2013 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

What Should I Do?

HospitalityLawyer.com

**THE TENTH ANNUAL
2013 HOSPITALITY LAW
CONFERENCE**
COOPERATING SPONSORS: HOSPITALITY & HOTEL ASSOCIATION
FEBRUARY 8-10, 2013 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

The Best Defense = Full Compliance

HospitalityLawyer.com

**THE TENTH ANNUAL
2013 HOSPITALITY LAW
CONFERENCE**
COOPERATING SPONSORS: HOSPITALITY & HOTEL ASSOCIATION
FEBRUARY 8-10, 2013 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

What Has Been Done?

HospitalityLawyer.com

**THE TENTH ANNUAL
2013 HOSPITALITY LAW
CONFERENCE**
COOPERATING SPONSORS: HOSPITALITY & HOTEL ASSOCIATION
FEBRUARY 8-10, 2013 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

Avoiding a Claim

HospitalityLawyer.com

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

Handling an Investigation by the Department of Justice

Investigation by Department of Justice

- Demonstrate commitment to full and equal access to goods and services.
- Respond with documentation of ADA assessment and ADA related written policies/procedures.
- 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.
- Maintain good communication with investigating attorney.
- 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
Department of Justice
28 CFR Part 36
Revised as of July 3, 1994
Non-discrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities
Excerpt from 28 CFR Part 36
ADA Standards for Accessible Design

2010 ADA Standards for Accessible Design
Department of Justice
September 15, 2010

THE TENTH ANNUAL
**HOSPITALITY LAW
 CONFERENCE**
FEBRUARY 8-10, 2012 • HOUSTON, TEXAS
 PRESENTED BY HOSPITALITYLAWYER.COM

2010 Standards

28 CFR
 Part 36
 Subpart D

+

2004
 ADAAG

=

2010 ADA
 Standards
 for
 Accessible
 Design

HospitalityLawyer.com

THE TENTH ANNUAL
**HOSPITALITY LAW
 CONFERENCE**
FEBRUARY 8-10, 2012 • HOUSTON, TEXAS
 PRESENTED BY HOSPITALITYLAWYER.COM

What Standard Applies?

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

Compliance with the 2010 Standards is required.

HospitalityLawyer.com

THE TENTH ANNUAL
**HOSPITALITY LAW
 CONFERENCE**
FEBRUARY 8-10, 2012 • HOUSTON, TEXAS
 PRESENTED BY HOSPITALITYLAWYER.COM

What Standard Applies?

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

HospitalityLawyer.com

What Standard Applies?

Determine If Property Existed Before 1993?

Or Was Constructed or Altered after 1993?

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

Safe Harbor or No Safe Harbor

To what extent do facilities in existence as of March 15, 2012 have to comply with 2010 Standards?

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.

Safe Harbor or No Safe Harbor

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.

Safe Harbor or No Safe Harbor

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.

THE TENTH ANNUAL
**HOSPITALITY LAW
 CONFERENCE**
COOPERATING SPONSORS: HOTEL & RESTAURANT ASSOCIATION OF AMERICA
FEBRUARY 8-10, 2012 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

Myth v. Reality

HospitalityLawyer.com

THE TENTH ANNUAL
**HOSPITALITY LAW
 CONFERENCE**
COOPERATING SPONSORS: HOTEL & RESTAURANT ASSOCIATION OF AMERICA
FEBRUARY 8-10, 2012 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

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.”

HospitalityLawyer.com

THE TENTH ANNUAL
**HOSPITALITY LAW
 CONFERENCE**
COOPERATING SPONSORS: HOTEL & RESTAURANT ASSOCIATION OF AMERICA
FEBRUARY 8-10, 2012 • HOUSTON, TEXAS
PRESENTED BY HOSPITALITYLAWYER.COM

Myth v. Reality

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.

HospitalityLawyer.com

Myth v. Reality

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 v. Reality

Myth:

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

Reality:

Many requirements are relatively inexpensive to fix.

Myth v. Reality

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*

Action Items

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?
