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Hospitality Law Group

Public Accommodations and the Americans with Disabilities Act

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Scandaglia & Ryan is providing this overview as a primer for hotel owners and hotel management to help them gain a better understanding of: (1) the basic requirements of Title III of the American with Disabilities Act ("ADA"); (2) the guidelines for complying with Title III of the ADA; and (3) ways in which to avoid or minimize ADA litigation. This primer also includes an assessment of the litigation risks for hotels in the Chicago area that are not in compliance with Title III of the ADA.[1]

For your convenience, we have summarized several measures that hotel owners and hotel management could immediately take to begin complying with Title III of the ADA and minimizing the risks for ADA litigation:

1. **Conduct a Title III Assessment of Your Facility Under Attorney Supervision;**
2. **Remove Barriers If Readily Achievable;**
3. **Train Staff to Properly Respond to Known and Unknown Situations;**
4. **Communicate Effectively and Honestly with Guests; and**
5. **Anticipate the Changing Legal Landscape.**

While it is impossible to completely prevent ADA litigation, by taking these suggested measures, and by engaging counsel working with a qualified AIA licensed architect to prepare and oversee an ADA compliance program, you can best position your hotel to provide outstanding service to your disabled guests while minimizing ADA exposure.

[1] This article has been prepared by Scandaglia & Ryan for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act upon this without seeking professional counsel.

The following sections are discussed in the rest of this ADA primer:

- **Overview of ADA Regulation of Public Accommodations**
- **Compliance with ADA Standards for Accessible Design**
- **Steps for Avoiding or Minimizing ADA Litigation**
- **The Risk of ADA Litigation for Hotels That Are Not in Compliance with the ADA**

OVERVIEW OF ADA REGULATION OF PUBLIC ACCOMMODATIONS

Title III of the ADA provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations of any place of public accommodation—which includes hotels and other places of lodging. The obligations for existing facilities are not the same as those for newly constructed public accommodations. This ADA primer focuses on existing facilities.[2]

The ADA requires hotels (termed places of "public accommodation") to provide every guest—regardless of disability—an equal opportunity to enjoy the hotel's services and facilities. Thus, hotels must provide services to accommodate guests with a wide range of disabilities including vision impairment or blindness, difficulty hearing or deafness, physical disabilities requiring a wheelchair, debilitating diseases such as cancer, and many others. What this means in a practical sense is that existing facilities must either: (1) remove structural barriers to the disabled when "readily achievable" or (2) if not readily achievable, provide alternate goods, services, privileges, advantages, and accommodations through readily achievable methods.

[2] For new construction, each component of the building must be fully ADA compliant and thus the architect should consult with an ADA design specialist. For renovations on existing structures, Title III imposes obligations on owners to make renovated areas "readily accessible to and usable by individuals with disabilities." The ADA does not require existing facilities to become fully ADA compliant, but it does require alterations to existing facilities to comply with accessibility requirements, and for the altered portions to be readily accessible to the "maximum extent feasible."

The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." This standard is not specifically defined, and application varies based on a number of factors that include the benefit conferred, the cost of the modification, and the overall financial resources of the facility. Thus, the bar is set much higher for a national chain than for a small family-owned roadside inn.

For these reasons it is important for hotel owners and management not only to identify and eliminate known barriers, but also to be flexible in dealing with unforeseen situations as they arise. One should not simply use a wait-and-see approach—instead, the best protection may be achieved by removing barriers when readily achievable, and training the staff to respond properly to situations as they develop.

COMPLIANCE WITH ADA STANDARDS FOR ACCESSIBLE DESIGN

The ADA is enforced by the United States Department of Justice, which has issued regulations governing the standards for accessible design. The standards are very detailed and are strictly construed. Even the slightest deviation from the standards can result in a finding of non-compliance by the Department of Justice, and such deviations can be used as the basis for a private civil lawsuit. The number of standards promulgated by the Department of Justice are far too numerous and far too detailed to be reproduced in their entirety in this document. However, to demonstrate the nature and breadth of the regulations, the following highlights several common barriers that should be addressed and includes certain standards for various disabilities:

Examples of General Steps to Remove Barriers

- Installing ramps and making curb cuts in sidewalks and entrances.

- Repositioning shelves, rearranging tables, chairs, vending machines, display racks, and other furniture.
- Repositioning telephones.
- Adding raised markings (Braille) on elevator control buttons.
- Installing flashing alarm lights.
- Widening doors and installing offset hinges to widen doorways.
- Eliminating a turnstile or providing an alternative accessible path.
- Installing accessible door hardware.
- Installing grab bars in bathroom stalls, rearranging toilet partitions to increase maneuvering space, and installing a raised toilet seat.
- Insulating lavatory pipes under sinks to prevent burns.
- Installing a full-length bathroom mirror.
- Repositioning the paper towel dispenser in a bathroom.
- Creating designated accessible parking spaces.
- Installing an accessible paper cup dispenser at an existing inaccessible water fountain.
- Removing high pile, low density carpeting.
- Installing vehicle hand controls.

Specific Standards for Wheelchair-Bound Guests

- All places of public accommodation are required to have accessible sleeping rooms or suites, the number of which varies according to the total number of rooms. For example, for hotels with 76-100 rooms, four rooms must be

accessible and one room must have a roll-in shower. For hotels with 300-400 rooms, the hotel must have eight accessible rooms and four rooms with roll-in showers.

- For hotels with a variety of types of rooms (*e.g.*, standard rooms, junior suites, standard suites, luxury suites), the accessible rooms must be dispersed within each type of room that the hotel offers.
- At least one accessible route is necessary for disabled guests to travel from public transportation stops, accessible parking spaces, and passenger loading zones, if provided, to public streets, sidewalks, or an accessible building entrance.
- Wheelchair-bound guests must have full and unfettered access to all common areas of the hotel, including but not limited to public restrooms, restaurants, lounges, swimming pools, and spas.
- At least half of all public entrances must be accessible, and at least one must be a ground floor entrance.
- If public telephones are provided, at least one phone must be accessible to the disabled on each floor that has phones.
- In bathrooms, there must enough turning space for a 180 degree wheelchair turn (60 inches in diameter or a T-shaped space).
- Each stairway adjacent to an area of rescue assistance must have a minimum clear width of 48 inches between handrails.
- Carpet maximum pile thickness is one-half inch and the entire exposed length must be fastened to a floor surface with trim.
- All elevator floor buttons must be no higher than 54 inches above the finished floor for side approach (48 inches for

front approach).

- All emergency controls should be grouped at the bottom of the elevator panel.
- Doorways shall have a minimum clear opening of 32 inches.
- Accessible sleeping rooms must have 36-inch clear width for maneuvering space allocated along both sides of the bed.

Standards for Hearing-Impaired Guests

- The standards require a certain number of sleeping accommodations for persons with hearing impairments. For example, for hotels with 76-100 rooms, four rooms should be accessible for persons with hearing impairments.
- If televisions are provided in five or more guest rooms, hotels must be able to provide, upon request, a means for decoding captions for use by any individual with impaired hearing.
- All telephones that are required to be accessible must be equipped with a volume control. In addition, 25% (but at least one) of all other telephones provided must be equipped with a volume control and are to be dispersed among all types of public telephones.
- A visible signal shall be provided at each elevator entrance to indicate which car is answering a call.
- The level of illumination for elevator controls shall be at least five footcandles.
- Emergency intercommunication systems for elevators cannot require voice communication.
- Visual alarms signal appliances shall be integrated into all

places of public accommodation. Such alarms shall be a xenon strobe type or equivalent and the standards include minimum requirements for pulse duration, light intensity and flash rate.

Standards for Guests Who Are Blind or Who Have Impaired Vision

- Virtually all signage must include Braille, including elevator call buttons and room numbers.
- Elevator entrances require hall lanterns that give audible signals (sounding once for the up direction and twice for the down direction) or verbal enunciators that say "up" or "down."
- An audible signal must sound as an elevator car passes or stops at a floor served by the elevator. An automatic verbal announcement of the floor number at which the car stops or passes may be substituted for the audible signal.
- Audible emergency alarms must be provided throughout the hotel.

Note: The standards do not require that Braille restaurant menus or Braille contracts be provided to guests; however, we strongly recommend that staff be prepared to read aloud such materials to the guests upon request.

The above lists are just a small sampling of the type and variety of ADA standards that have been promulgated by the Department of Justice. They are provided merely to give the reader a glimpse of the many obligations imposed on hotel owners by the ADA. For more detail, the Department of Justice has a wide range of materials available on ADA compliance at the ADA Homepage — http://www.usdoj.gov/crt/ada/. The following documents might be particularly applicable to public accommodations such as yours:

- *ADA Checklist for Readily Achievable Barrier Removal;*
- *ADA Business Brief: Communicating with Guests Who Are Deaf or Hard of Hearing in Hotels, Motels, and Other Places of Transient Lodging;*
- *ADA Guide for Places of Lodging: Serving Guests Who Are Blind or Who Have Low Vision;*
- *ADA Technical Assistance Update: Common Questions: Readily Achievable Barrier Removal; Design Questions: Van Accessible Parking Spaces;*
- *ADA Guide for Small Businesses; and*
- *ADA Standards for Accessible Design*

STEPS FOR AVOIDING OR MINIMIZING ADA LITIGATION

1. Conduct a Title III Assessment of Your Facility Under Attorney Supervision

If an ADA Title III assessment has not been performed for your public accommodation, such an assessment should be performed to identify compliance—or non-compliance—with the ADA. We recommend that an AIA licensed architect with expertise in the technical aspects of the ADA conduct the assessment under the supervision of an attorney who is knowledgeable of ADA technical requirements. The assessment should be documented, and a process for barrier removal should be prepared. Because the ADA only requires readily achievable barrier removal, the process document should identify any non-compliant items that cannot be removed due to economic or structural infeasibility. However, if this process is done without an attorney, these documents may be discoverable in litigation; thus, we strongly recommend the assessment be done in conjunction with an

attorney in order to protect the documents under attorney-client and work-product privileges.

2. Remove Barriers If Readily Achievable

The best method for compliance with the ADA is to remove barriers that are readily achievable. Most ADA lawsuits are over access, parking, restrooms, and lack of proper signage. Thus, barrier removal in these areas should immediately be undertaken, especially where the costs are insignificant.

Waiting for litigation is not the best method for achieving ADA compliance, as settling with an individual claimant will resolve only the claim with respect to that particular individual or for that particular disability and issue—thus, we highly recommend removing barriers where appropriate and reasonable. Should barrier removal appear not to be readily achievable because of the cost or structural difficulties involved, we highly recommend that an attorney be consulted to document the reasons for leaving the barriers in place.

3. Train Staff to Properly Respond to Known and Unknown Situations

Training the staff to anticipate and properly handle any ADA concern is extremely important. We strongly recommend that an attorney develop ADA compliance guidelines and training manuals for places of public accommodations. Hotels should also conduct regular training and prepare their staff for dealing with new and novel situations. A well-trained staff that can address the concerns of disabled guests will minimize the likelihood of an ADA complaint. As such, any new employee orientation program should include ADA training, with periodic "refresher" training for existing employees. As part of the ongoing effort to comply with the ADA, specific written policies should be implemented to eliminate any question as to how to handle specific ADA inquiries. For example, front desk staff need to be

able to locate and provide a TDD telephone immediately upon request, and a written policy should be established to set forth specific procedures to follow when a guest asks for a TDD telephone. A well-trained staff will be able to address most ADA inquiries, and the written policy should be in place to ensure uniformity of response to all typical inquiries.

In addition, the staff should be prepared for unforeseen events and know that a "reasonable request" may have to trump a standard hotel policy. For instance, even if the hotel has a "no pets allowed" policy, accommodations must be made for seeing-eye dogs. Thus, having staff that is prepared to react to situations and exercise good judgment will greatly aid with ADA compliance and will minimize litigation. Your staff's mantra should be based on the question: "How may I be of assistance?"

Finally, the staff should be prepared to provide alternative methods of accessibility. Such methods may include: arranging curbside service, reading a contract aloud to a visually impaired customer, or providing a chair to a physically disabled customer who requests one.

4. Communicate Effectively and Honestly with Guests

A major key to minimizing ADA litigation is effective and honest communication. Disabled guests must be able to communicate their needs and employees must be trained to listen and respond. Management should make sure that the staff is trained to listen for special needs and is prepared to take extra, reasonable steps to accommodate guests when requested (or even anticipate their needs).

Furthermore, and even more so than with any other guest, a disabled guest should never be led to believe that a hotel's accessibility is greater than it actually is. Accordingly, all materials and comments (in any marketing materials, on websites, or over the telephone) must explain what the hotel can—and cannot—offer the disabled guest. A disappointed or angered disabled guest is far more likely to file an ADA complaint than one who has

been honestly notified that the facility may have some barriers to access.

5. Anticipate the Changing Legal Landscape

Finally, it is very important to remember that the ADA was signed into law in 1990, and since that time the regulations governing accessibility in public accommodations have changed often. For example, in July 2004, the United States Access Board released new design guidelines to cover access for people with disabilities. The Department of Justice has initiated its rule making process on these guidelines, and they may become law in the very near future.

The Department of Justice has often indicated its interest in enforcing not just the letter of the law, but the spirit of the law as well. Accordingly, while it is always important to comply with the current ADA law, it may well serve a public accommodation to exceed the rules where practicable. Not only would this put your facility in front of a law that may rapidly change in the near future, it shows a commitment to the spirit of the law. Finally, and perhaps most importantly, if there are non-compliance concerns that cannot be rectified, a willingness to comply with the spirit of the law may demonstrate that the barrier removal was not readily achievable.

THE RISK OF ADA LITIGATION FOR HOTELS THAT ARE NOT IN COMPLIANCE WITH THE ADA

Hotel owners should be aware of the potential risks of ADA litigation for hotels that might not be in compliance with Title III of ADA. Although assessing the risks of litigation before moving forward with an ADA Title III compliance program is often desired, it is important for a hotel owner to understand that it is difficult to predict whether a specific hotel will be sued. In fact, there are two separate, but related, risks. One risk is whether a lawsuit (whether filed or unfiled) ultimately will be successful. Attorneys familiar with the ADA can provide a hotel owner with a reasonable

expectation of the likelihood of success of an ADA lawsuit based on a preliminary evaluation of the property.

However, it is far more difficult to assess as an initial matter, the risk that an individual hotel will be sued. The Justice Department does not maintain records of private lawsuits filed for violations of Title III, and the great majority of lawsuits result in confidential settlements. Thus, there is not a wealth of public information from which to identify trends or value potential claims. Instead, we must glean information regarding numbers of lawsuits and current trends from other sources. Furthermore, the numbers and trends only give a partial picture of the likelihood of a lawsuit—in many cases the determining factor is the mindset of the potential litigant.

While most hotel owners can reduce the risk of a lawsuit by addressing certain matters, every hotel faces some degree of risk of an ADA lawsuit. Furthermore, hotels may be targeted for reasons wholly unrelated to the level of egregiousness of their Title III violations. For example, hotels may be targeted if they are high profile properties or if they are perceived to have "deep pockets." However, smaller hotels may be targeted if a plaintiff's lawyer perceives a potential for a quick and lucrative resolution. Simply put, although some trends can be identified, there is no way to definitively assess the risk of a lawsuit being filed.

To help explain the risk of ADA litigation, this primer illustrates the recent trend of "drive-by" ADA lawsuits, provides some data and analysis of federal ADA lawsuits that have been filed, and highlights a single litigant (Access 4 All) as a case-study to estimate the possibility of an ADA lawsuit for a hotel in Illinois.

Historical Perspective

In 1990, the Americans with Disabilities Act was signed into law. Title III of the ADA, which governs places of public accommodation, did not go into effect until January 26, 1992. The overwhelming majority of Title III

lawsuits filed against hotels have occurred within the last eight years.

"Drive-By" ADA Lawsuits

Because the ADA contains no provision providing a hotel owner with an opportunity to cure non-compliance upon notice, the ADA has spawned an incredible number of "drive-by" lawsuits. These lawsuits are typically filed without notice to the defendants, and thus have earned the name "drive-by" because neither the plaintiffs nor their attorneys make any attempt to communicate their concerns with the defendant. Instead, the lawsuit may be filed so that the plaintiff and attorney can take advantage of the ADA attorneys' fee provision.

This problem is so acute that at the March 7, 2007, ADA Business Connection Leadership Meeting in Charlotte, North Carolina, Wan Kim, the Justice Department's Assistant Attorney General for Civil Rights, stated: "The other reason I would like this group to take charge and lead the way in the provision of accessibility is an issue that I know concerns all of us: the so-called 'drive-by' ADA lawsuits. I want you to know that the Department of Justice does not support abusive or frivolous lawsuits." Although there is discussion in Congress to amend this statute to provide for notice and an opportunity to cure prior to the filing of ADA lawsuits, currently the vast majority of ADA lawsuits are filed without any prior notice whatsoever.

Many articles have been written discussing the rash of "drive-by" ADA litigation. These articles address the parties involved in these lawsuits, referring to: (1) the individuals, such as Jarek Molski—who alone had filed 400-500 ADA lawsuits as of May 2007; (2) the organizations—such as Accessibility for All and ADA Access Today—which filed more than 40 lawsuits against New York hotels in a span of a few months; and (3) the law firms—such as Fuller Mallah & Associates in Miami, which filed more than 700 ADA lawsuits from 1998 to 2001. The articles (and our research) show that California, Florida and New York businesses are most often the targets for ADA lawsuits, in fact, some research estimates that there have been more

than 14,000 ADA lawsuits filed in California alone.

It is likely that hotels will continue to be targeted for ADA lawsuits, and when they are, they probably will have no notice of the alleged violations. In addition, should an ADA lawsuit be brought against a hotel, the costs of such lawsuits may be quite high. The National Federation of Independent Business Legal Foundation estimates the total cost to California small-business owners for litigating "drive-by" ADA lawsuits to be $34 million each year.

Attorneys' Fees and Settlement

Again, it is always possible that plaintiffs' counsel in an ADA lawsuit will be more concerned with collecting attorneys' fees than with creating access for the disabled. However, ADA lawsuits typically are not brought on a class action basis, and thus, the risk of a lawsuit is not eliminated with the settlement of an individual ADA lawsuit. As such, should a hotel agree to pay an ADA plaintiff's attorneys' fees in return for a settlement agreement that fails to address all non-compliant matters, another ADA lawsuit can be brought by a different plaintiff at any time thereafter.[3]

Federal Lawsuits

Since January 1, 2000, nearly 600 ADA cases have been filed against public accommodations in federal courts. More than 250 of these cases have been filed in California, nearly 150 in Florida, and at least 11 in Illinois.

[3] For this reason, Scandaglia & Ryan strongly recommends that any settlement with an ADA plaintiff include a Confidentiality and Non-Disclosure Agreement. Permitting publication of the settlement agreement and/or of payment of attorneys' fees would likely invite future lawsuits.

Case Study – Access 4 All

The pattern for many individual plaintiffs and for disability groups has been to file numerous lawsuits against a wide range of public accommodations. Below is an example of one such lawsuit.

Access 4 All Inc. is a Florida not-for-profit corporation that was formed in 2000.[4] Access 4 All is currently represented by the North Miami law firm of Fuller, Fuller and Associates, PA. Since January 1, 2004, Access 4 All has filed 35 ADA federal lawsuits in Florida. During that same time period, Access 4 All filed another 64 ADA lawsuits in the federal courts of New York, with the vast majority filed in the Southern District of New York (New York City). Additionally, Access 4 All filed 15 ADA lawsuits in Georgia and nine ADA lawsuits in Massachusetts.

Access 4 All also has filed ADA lawsuits in Illinois. Between May 24, 2006 and October 31, 2006, Access 4 All filed 9 ADA lawsuits in the United States District Court for the Northern District of Illinois. Defendants include the Renaissance Oakbrook Hotel, the Radisson, Hotel Allegro, Sutton Place, the Essex Inn and Hilton Hotels.

Every one of these cases settled, many within six months of the filing of the complaint, and all of them had settled within a year-and-a-half of filing. Although no lawsuits have been filed by Access 4 All in Illinois since October 31, 2006, we expect that they will target the Chicago-area market to "test the waters" and if successful, expand the operation. It is clear that this plaintiff, and we assume others with similar goals, has identified Chicago as fertile ground for ADA lawsuits.

[4] Scandaglia & Ryan has represented parties adverse to another client of the Fuller law firm and we are very familiar with that law firm's practice and procedure.

Is Chicago a Target?

Indeed, there are at least three factors that make Chicago an attractive target for "drive-by" ADA lawsuits by Access 4 All or other ADA litigants. *First*, no Midwestern city has the quantity of hotels as Chicago, nor does any Midwestern city have as many 4-star and 5-star hotels as Chicago. *Second*, over the course of the last few years, there has been significant renovation work performed on a number of prominent hotels in Chicago (*e.g.*, The Renaissance Hotel, The Palmer House, The Doubletree Hotel in Streeterville [formerly Holiday Inn City Centre], The W Hotel, and The Blackstone Hotel, just to name a few). Because renovation work triggers additional obligations under the ADA (requiring the renovations to comply with *all* ADA regulations, not just those that are "readily achievable"), it is not surprising that "drive-by" plaintiffs would be attracted to such hotels for potential lawsuits. *Third*, plaintiffs, rightfully or wrongfully, may perceive Chicago as more of a plaintiff-friendly city than perhaps Las Vegas, Dallas, or Houston.[5]

In short, we anticipate that Chicago hotels will increasingly be sued for violations of Title III of the Americans with Disabilities Act.

Final Analysis of the Risk of Litigation

As we have stated above, it is impossible to definitively assess whether an individual hotel will face an ADA lawsuit. However, with national and regional trends of "drive-by" ADA lawsuits by repeat individual and group litigants, it seems more and more likely that Chicago hotels, in particular, will face ADA lawsuits in the near future. Even though it is impossible to prevent all litigation, the best solution still remains taking steps to further ADA compliance, and, in the event a lawsuit is filed, to engage counsel that is knowledgeable and adept in handling ADA litigation.

[5] The Institute for Legal Reform recently ranked the legal fairness of the 50 states, and Illinois was ranked 46th (only West Virginia, Louisiana, Mississippi and Alabama were lower).

CONCLUSION

This ADA primer is only the beginning for achieving ADA compliance and minimizing ADA litigation. The recommended measures for ADA compliance outlined throughout will take time and effort on your part, as well as the advice of counsel experienced with the technical aspects of ADA regulation. And while a hotel owner may never completely eliminate the possibility of a lawsuit, following these measures should significantly minimize the risk of a lawsuit.

If you need any assistance in addressing ADA compliance or ADA litigation prevention please contact Gregory Scandaglia at (312) 580-2054. Scandaglia & Ryan attorneys are seasoned practitioners in dealing with ADA matters having represented hotels from New York to California in the defense of ADA claims. We are prepared to effectively assist hotels owners with ADA compliance programs and litigation defense.