

compliance efforts, no business is exempt from compliance because of a failure to understand or receive technical assistance in implementing removal of barriers.

New Construction/Alterations

Since January 26, 1993, the law provides that all new commercial facilities and places of public accommodation must be fully accessible to the disabled. If a building permit for a commercial building is approved after January 26, 1992, and receives its first certification of occupancy after January 26, 1993, it must be fully usable by individuals with disabilities. If the permit was approved prior to January 26, 1992, the building is not subject to Title III rules pertaining to new construction even if first occupancy occurs after January 26, 1993. However, the building must still meet the barrier-removal requirements discussed above.

When there are alterations to a commercial facility or place of public accommodation, the altered areas of the facility must be fully accessible to the disabled. Alterations are defined as remodeling, renovation, or reconstruction that affect the use of the building. Alterations do not include usual maintenance such as painting, reroofing, asbestos removal, and most changes to the electrical and mechanical systems except for switches and controls. If the structural conditions of an existing building or facility make it impossible to fulfill the Title III accessibility requirements, those accessibility requirements shall be deemed “technically infeasible.”

With respect to an alteration of a building or a facility, “technically infeasible” means that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility. Where required alterations are technically infeasible, the owner will not have to comply with the alteration requirements of the ADA. It should be noted, however, that if compliance is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible. Any elements or features of the building or facility that are being altered and can be made accessible shall be made accessible within the scope of the alteration.

Penalties for Noncompliance with the ADA

Design professionals face considerable risk under the ADA. As a civil rights law, the ADA specifies that either a private individual or the U.S. Attorney's office can bring a suit against a public accommodation that violates the ADA. It is not necessary to allege discrimination "after the fact." A lawsuit can be filed if the petitioner has reasonable grounds to believe that discrimination is "about to occur" in either a new construction project or an alteration.

One particular case against an architectural firm deserves mentioning. In *United States v. Ellerbe Becket, Inc.*,⁵ the United States filed an action against Ellerbe Becket, Inc., an architectural firm, for violations of the ADA. The complaint alleged that Ellerbe had engaged in a pattern or practice of designing new sports arenas across the United States that failed to comply with the ADA and its implementing regulation regarding lines of sight for disabled patrons.

Ellerbe maintained that the ADA was not clear and was open to interpretation as to precisely what was required. Although the government settled with Ellerbe in 1998 for an agreement by Ellerbe to design new stadiums so spectators in wheelchairs still have a full view when other fans stand up, the case presents an example of how easy it is for a designer to incur liability for ADA violations. In order to avoid liability where ADA provisions are unclear and open to interpretation, designers should inform their clients in writing of the ADA issues and require the owner to make the final determination concerning how far they should go in ensuring ADA compliance.

CONCLUSION

There is more to the art of negotiating contracts than limiting liability or deciding how to protect your intellectual property. It is widely recognized that even today's seemingly simple construction projects are far more complex than those built even ten years ago. Owners and designers alike are facing increasing choices in the means and methods of design and construction. It has therefore become more important than ever to integrate business and legal

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