

INTRODUCTION

Several of our member clubs have inquired about the application of the Americans with Disabilities Act to their specific circumstances. In an effort to provide general information to our clubs and members about the Act and its potential impact upon their club operations and/or them individually, I have prepared a brief explanation of what the Act is, what it covers, and what exemptions are present within the Act. It is hoped that this general informational document will allow our clubs to become educated about this expansive Act and its potential impact upon their particular situation. This is a general informational document and is not meant as specific legal advice with regards to individual situations. Clubs and/or individuals should always seek their own legal counsel to determine specific facts and application of the law to their unique situation. Because we have such a wide variety of ownership interest in our clubs, each club could be treated differently under the Act. One of the many benefits of membership in AANR is that it offers consultation with other legal counsel concerning issues that may affect your club. This is one of those issues.

1. History and Purpose

The Equal Opportunity for Individuals with Disabilities Act, also known as the Americans with Disabilities Act (ADA), is a civil rights act passed by the United States Congress and signed into law by President Bush on July 26, 1990. The Act extends the same basic civil rights protections that women and minorities have been given in previous legislation to individuals with physical or mental disabilities. Congress determined that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”

In conducting research on the need for the ADA, Congress found that physical and mental disabilities do not diminish a person’s right to fully participate in all aspects of society, however, discrimination against this group of individuals often results in their inability to fully participate. Forms of discrimination such as isolation and segregation are a serious social problem that occur in critical areas such as “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” Until the passage of the ADA, most individuals who experienced discrimination on the basis of a disability had no legal recourse to redress such discrimination.

The purpose of the ADA is to provide a clear mandate for the elimination of discrimination against individuals with disabilities and provide strong, enforceable standards addressing such discrimination. The ADA gives individuals with disabilities equal rights to participate in all aspects of society and provides a legal mechanism to

guarantee such participation is always protected. The Act ensures that the Federal Government plays a central role in enforcing all of the standards contained in the ADA.

2. Structure

The ADA is divided into three main components called “titles.” Each title describes the actions that certain groups must take to provide equal rights to individuals with disabilities:

- **Title I – Employment:** Title I outlines provisions concerning the employment of individuals with disabilities and applies to private employers, state and local governments, employment agencies, and labor organizations.
- **Title II – State and Local Governments:** Title II applies to the operations of state and local governments. This subsection prohibits discrimination in all of the programs, activities, and services of these public entities.
- **Title III – Private Entities:** Title III applies to all privately owned entities that are classified as “public accommodations” or “commercial facilities” by the ADA. This document will focus on the Title III requirements of the Act and provide a basic introduction to the definitions, requirements, and exemptions of the ADA that apply to private (not public or government) entities.

3. Definition of a Disability

Title III of the ADA protects three categories of individuals with disabilities:

- 1) Individuals who have a physical or mental impairment that substantially limits one or more major life activities;
- 2) Individuals who have a record of a physical or mental impairment that substantially limited one or more of the individual's major life activities; and
- 3) Individuals who are regarded as having such an impairment, whether they have the impairment or not.

To constitute a "disability," a condition must substantially limit a major life activity. Major life activities include such activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

4. Coverage

As noted above, Title III of the ADA covers places of public accommodation and commercial facilities and both are subject to requirements for new construction and alteration. In addition to these building requirements, places of public accommodation must be operated in accordance with the full range of Title III requirements that prohibit

discrimination, such as nondiscriminatory eligibility criteria; reasonable modifications in policies, practices, and procedures; provision of auxiliary aids; and removal of barriers in existing facilities. These requirements will be covered later in the document, but first specific definitions of the covered entities are described below.

4.1 *Public Accommodations*

Public accommodations are subject to the broad range of Title III requirements. To be considered a public accommodation, an entity must be private and it must own, lease, lease to, or operate a place of public accommodation. A place of public accommodation is a facility whose operations affect commerce and fall within at least one of the following 12 categories:

- 1) Places of lodging (e.g., inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);
- 2) Establishments serving food or drink (e.g., restaurants and bars);
- 3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
- 4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
- 5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
- 6) Service establishments (e.g., Laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
- 7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
- 8) Places of public display or collection (e.g., museums, libraries, galleries);
- 9) Places of recreation (e.g., parks, zoos, amusement parks);
- 10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);
- 11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
- 12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

Can a facility be considered a place of public accommodation if it does not fall under one of these 12 categories?

No, the 12 categories are an exhaustive list. However, within each category the examples given are just illustrations. For example, the category "sales or rental establishments" would include many facilities other than those specifically listed, such as video stores, carpet showrooms, and athletic equipment stores.

Three "real world" examples of how a public accommodation is defined in the ADA are listed below.

EXAMPLE 1: A private residential apartment complex includes a swimming pool for use by apartment tenants and their guests. The complex also sells pool "memberships" generally to the public. The pool qualifies as a place of public accommodation.

EXAMPLE 2: A residential condominium association maintains a longstanding policy of restricting use of its party room to owners, residents, and their guests. Consistent with that policy, it refuses to rent the room to local businesses and community organizations as a meeting place for educational seminars. The party room is not a place of public accommodation.

EXAMPLE 3: A private residential apartment complex contains a rental office. The rental office is a place of public accommodation.

4.2 Commercial Facilities

The requirements of Title III for new construction and alterations cover commercial facilities, which include nonresidential facilities, such as office buildings, factories, and warehouses, whose operations affect commerce. A building may contain both commercial facilities and places of public accommodation.

4.3 Exemptions

Under the Americans with Disabilities Act (ADA), a private entity (an entity not affiliated with or run by a state or local government) has obligations under Title III of the Act if it is considered a "public accommodation" or "commercial facility." However, Congress has allowed certain exemptions from ADA Title III requirements for "private clubs."

4.3.1 Private Clubs

How is a "private club" defined under the ADA?

Congress does not specifically define the term “private club” in the ADA. However, Congress references Title II of the Civil Rights Act of 1964 in its description of the “private club” term, which adds some insight into its meaning. When Congress does not define a term or is intentionally vague in defining a term within a federal statute, the United States federal court system must carefully examine the wording of the statute to determine the exact meaning intended by Congress. How do the courts define the term “private club” in the context of the ADA?

The court system has noted that “the determination of whether an organization is a private club is necessarily a factually intensive inquiry examining whether the organization is open to the public at large,” and that “in determining whether an establishment is in fact a private club, there is no single test.” However, the United States federal court system has been most inclined to find private club status in cases where the majority of the following criteria are met:

- 1) **Members exercise a high degree of control over club operations.** The organization is often characterized by “attributes of self-government and member-ownership traditionally associated with private clubs.” Entities that are owned or run by a small group of people making the majority of the decisions for the organization are generally unable to meet this criterion.
- 2) **The membership selection process is highly selective.** Courts have placed a great emphasis on the selectivity factor. The Supreme Court of the United States has found that the organization must have “a plan or purpose of exclusiveness” that makes the organization genuinely selective. Admission to membership must not be without the exercise of sound discretion and judgment. For example, a private club might attempt to select or restrict membership or access on the basis of personal, cultural, or religious affinity, thus creating a sense of social cohesiveness, shared identity, or continuity.

The more pertinent factor regarding selectivity is the connection between the organization's purpose (factor 5) and its membership requirements. An organization may qualify as a private club if its constitution, oath, or by-laws contain requirements that serve to purposefully exclude non-qualifying applicants. The organization must exercise selectivity beliefs, principles, and purpose that ensure that membership is not open to every individual who seeks to participate, but only those who will commit to living by certain values.

- 3) **Substantial membership fees are charged.** The "membership" device must be considered to be more than a “subterfuge” to avoid coverage of the Act. The fee may not be a trivial amount meant to falsely indicate the creation of a private club, but shall be meaningful for the given organization’s purpose and goals.

- 4) **The entity is operated on a nonprofit basis.** Traditionally, for an organization to be considered a private club it must not be “simply a business operated for a profit.” Although an organization’s status as a nonprofit does not automatically entitle it to classification as a private club, the courts tend to rely heavily on the presence of nonprofit status for consideration as a private club. Also note that the organization must not be publicly funded.
- 5) **The club was not founded specifically to avoid compliance with federal civil rights laws.** A clear purpose of the club’s existence should be evident from documents such as a constitution, by-laws, or doctrine. The membership selection process should aid in furthering the club’s goals and reasons for existence.
- 6) **The history of the organization.** The very purpose of the private club exception found in Title III of the ADA is to preserve the right of truly private organizations to maintain their unique existence. Thus, the courts often look for a continuous history of membership selectivity and genuine purpose when deciding on private club status.
- 7) **Whether the club advertises for members.** Although this condition may be used to determine whether the club is a business, a public accommodation, or open to the general public, the courts note that Congress did not intend to condition the private club exclusion on the popularity of the organization. The courts have found that the size of the club or its advertising methods do not exclude an organization from private club status if enough of the previous criteria are met. The fact that an organization is successful in recruiting members does not mean that it is not also genuinely selective in determining who those members will be.

Below are two examples of possible applications of the criteria described above.

EXAMPLE 4: A private country club that would be considered a "private club" for ADA purposes rents space to a private day care center that is also open to the children of nonmembers. Although the private club would maintain its exemption for its other operations, it would have Title III obligations with respect to the operation of the day care center because that space is made available for nonmembers as a place of public accommodation.

EXAMPLE 5: A recreational area attempted to gain private club status by requiring a “membership” fee of 25 cents. The court examined the operations of the organization and found that the area was not a private club, but was a “public accommodation” as defined in the ADA. The findings included:

- 1) The snack bar was found to be an “establishment serving food or drink” that affected commerce as defined in the Act.
- 2) It was found that under the provisions of the Act, the snack bar's status as a covered establishment automatically brought the entire recreational facility within the ambit of the Act.

- 3) The recreational facility itself was also a covered public accommodation as a "place of entertainment," which affected commerce within the meaning of the Act because such statutory category included establishments where patrons directly participated in some sport or activity, as well as those where patrons were spectators or listeners.
- 4) The "membership" fee was considered to be trivial and designed as a subterfuge to avoid coverage of the Act.

4.3.2 *Religious entities*

Religious entities are exempt from the requirements of Title III of the ADA. A religious entity is defined as a religious organization or an entity controlled by a religious organization, including a place of worship. The exemption covers all of the activities of a religious entity, whether religious or secular. However, a religious entity would be subject to the employment obligations of Title I of the ADA if it has enough employees to meet the requirements for coverage.

5. ADA Title III Requirements

5.1 *Prohibition of Discrimination*

A public accommodation may not discriminate against an individual with a disability in the operation of a place of public accommodation. The ADA prohibits discriminatory denial of services or benefits to individuals with disabilities. Just as under the Civil Rights Act of 1964 a restaurant cannot refuse to admit an individual because of his or her race, under the ADA it cannot refuse to admit an individual merely because he or she has a disability.

In addition, a public accommodation may not discriminate against individuals or entities because of their known relationship or association with persons who have disabilities. This prohibition applies to cases where the public accommodation has knowledge of both the individual's disability and his or her relationship to another individual or entity. In addition to familial relationships, the prohibition covers any type of association between the individual or entity that is discriminated against and the individual or individuals with disabilities, if the discrimination is actually based on the disability.

Similarly, individuals who exercise their rights under the ADA, or assist others in exercising their rights, are protected from retaliation. The prohibition against retaliation or coercion applies broadly to any individual or entity that seeks to prevent an individual from exercising his or her rights or to retaliate against him or her for having exercised those rights. Any form of retaliation or coercion, including threats, intimidation, or interference, is prohibited if it is intended to interfere with the exercise of rights under the ADA.

A public accommodation may not impose eligibility criteria that either screen out or tend to screen out persons with disabilities from fully and equally enjoying any goods, services, privileges, advantages, or accommodations offered to individuals without disabilities, unless it can show that such requirements are necessary for the provision of the goods, services, privileges, advantages, or accommodations.

The ADA prohibits unnecessary inquiries into the existence of a disability.

EXAMPLE 6: A private summer camp requires parents to fill out a questionnaire and to submit medical documentation regarding their children's ability to participate in various camp activities. The questionnaire is acceptable if the summer camp can demonstrate that each piece of information requested is needed to ensure safe participation in camp activities. The camp, however, may not use this information to screen out children with disabilities from admittance to the camp.

EXAMPLE 7: A retail store requires applicants for a store credit card to supply information regarding their physical or mental health history. This policy violates the ADA because such information is not relevant to a determination of credit worthiness.

Although compliance may result in some additional cost, a public accommodation may not place a surcharge only on particular individuals with disabilities or groups of individuals with disabilities to cover these expenses.

EXAMPLE 8: In order to ensure effective communication with a deaf patient during an office visit, a doctor arranges for the services of a sign language interpreter. The cost of the interpreter's services must be absorbed by the doctor.

EXAMPLE 9: A community civic association arranges to provide interpreting services for a deaf individual wishing to attend a business seminar sponsored by the organization in rented space at a local motel. The interpreting service requires the organization to provide payment in full prior to the seminar. Due to a business emergency, the individual is unable to attend. The organization may not charge the deaf individual for the cost of the unused interpreting services.

5.1.1 *Exemption: Direct Threat*

A public accommodation may exclude an individual with a disability from participation in an activity, if that individual's participation would result in a direct threat to the health or safety of others. The public accommodation must determine that there is a significant risk to others that cannot be eliminated or reduced to an acceptable level by reasonable modifications to the public accommodation's policies, practices, or procedures or by the provision of appropriate auxiliary aids or services. The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or

stereotypes about the effects of a particular disability; it must be based on an individual assessment that considers the particular activity and the actual abilities and disabilities of the individual.

The individual assessment must be based on reasonable judgment that relies on current medical evidence, or on the best available objective evidence, to determine

- 1) The nature, duration, and severity of the risk;
- 2) The probability that the potential injury will actually occur; and
- 3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

Making this assessment will not usually require the services of a physician. Sources for medical knowledge include public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

5.2 Individuals' Right to Participate

Individuals with disabilities may not be denied full and equal enjoyment of the "goods, services, facilities, privileges, advantages, or accommodations" offered by a place of public accommodation. This phrase applies to whatever type of good or service a public accommodation provides to its customers or clients. Several broad principles underlie the nondiscrimination requirements of Title III:

- 1) Equal opportunity to participate;
- 2) Equal opportunity to benefit;
- 3) Receipt of benefits in the most integrated setting appropriate;
- 4) Individuals with disabilities must be integrated to the maximum extent appropriate;
- 5) Separate programs are permitted where necessary to ensure equal opportunity. A separate program must be appropriate to the particular individual.
- 6) Individuals with disabilities cannot be excluded from the regular program or required to accept special services or benefits.

The ADA requires that these principles be followed, but it does not guarantee that an individual with a disability must achieve an identical result or level of achievement as persons without disabilities.

EXAMPLE 10: An individual who uses a wheelchair may not be excluded from an exercise class at a health club because he or she cannot do all of the exercises and derive the same result from the class as persons without disabilities.

5.2.1 Separate Programs and the Right to Choose

A public accommodation may offer separate or special programs necessary to provide individuals with disabilities an equal opportunity to benefit from the programs. Such programs must, however, be specifically designed to meet the needs of the individuals with disabilities for whom they are provided.

EXAMPLE 11: A private athletic facility may sponsor a separate basketball league for individuals who use wheelchairs.

Even if a separate or special program for individuals with disabilities is offered, a public accommodation cannot deny an individual with a disability participation in its regular program, unless some other limitation on the obligation to provide services applies (see below). Individuals with disabilities are entitled to participate in regular programs, even if the public accommodation could reasonably believe that they cannot benefit from the regular program. These individuals are also not required to accept special "benefits" if they choose not to do so.

EXAMPLE 12: A public accommodation cannot exclude a person who is blind from a standard museum tour, where touching objects is not permitted, if he or she prefers the standard tour.

EXAMPLE 13: ABC Theater offers reduced rate tickets for individuals with disabilities and requires appropriate documentation for eligibility for the reduced rates. ABC cannot require an individual who qualifies for the reduced rate to present documentation or accept the reduced rate, if he or she chooses to pay the full price.

5.2.2 Modifications to the Regular Program

When a public accommodation offers a special program for individuals with a particular disability, but an individual with that disability elects to participate in the regular program rather than in the separate program, the public accommodation may still have obligations to provide an opportunity for that individual to benefit from the regular program. The fact that a separate program is offered may be a factor in determining the extent of the obligations under the regular program, but only if the separate program is appropriate to the needs of the particular individual with a disability.

5.3 Public Accommodations' Responsibilities

A public accommodation must reasonably modify its policies, practices, or procedures to avoid discrimination. If the public accommodation can demonstrate, however, that a modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations it provides, it is not required to make the modification.

EXAMPLE 14: Under its obligation to remove architectural barriers where it is readily achievable to do so, a local motel has greatly improved physical access in several of its rooms. However, under its present reservation system, the motel is unable to guarantee that, when a person requests an accessible room, one of the new rooms will actually be available when he or she arrives. The ADA requires the motel to make reasonable modifications in its reservation system to ensure the availability of the accessible room.

5.3.1 *Service Animals*

A public accommodation must modify its policies to permit the use of a service animal by an individual with a disability, unless doing so would result in a fundamental alteration or jeopardize the safe operation of the public accommodation. Service animals include dogs individually trained to do work or perform tasks for the benefit of an individual with a disability. Tasks typically performed by service animals include guiding people with impaired vision, alerting individuals with impaired hearing to the presence of intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, retrieving dropped items, etc.

The care or supervision of a service animal is the responsibility of his or her owner, not the public accommodation. A public accommodation may not require an individual with a disability to post a deposit as a condition to permitting a service animal to accompany its owner in a place of public accommodation, even if such deposits are required for pets. The crime deterrent effects of an animal's presence and the provision of emotional support, well being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

A number of States have programs to certify service animals. A private entity, however, may not insist on proof of State certification before permitting the entry of a service animal to a place of public accommodation.

A public accommodation may ask an individual with a disability to remove a service animal from the premises if the animal is out of control and the animal's handler does not take effective action to control it or the animal is not housebroken.

5.3.2 *Accessibility of Special Goods*

As a general rule, a public accommodation is not required to alter its inventory to carry accessible or special products that are designed for or easier to use by customers with disabilities, such as books on tape or foods that meet special dietary needs, unless special requests are also taken from other customers and the requested item may be obtained from a regular supplier.

5.3.3 *Personal Services and Devices*

A public accommodation is not required to provide individuals with disabilities with personal or individually prescribed devices, such as wheelchairs, prescription eyeglasses,

or hearing aids, or to provide services of a personal nature, such as assistance in eating, toileting, or dressing.

Although discussed here as a limit on the duty to make reasonable modifications, this provision applies to all aspects of the Title III rule and limits the obligations of public accommodations in areas such as the provision of auxiliary aids and services and alternatives to barrier removal. However, the phrase "services of a personal nature" is not to be interpreted as referring to minor assistance provided to individuals with disabilities. For example, measures taken as alternatives to barrier removal, such as retrieving items from shelves or providing curb service or home delivery, or actions required as modifications in policies, practices, and procedures, such as a waiter's removing the cover from a customer's straw, a kitchen's cutting up food into smaller pieces, or a bank's filling out a deposit slip, would not be considered "services of a personal nature."

5.4 Auxiliary Aids

A public accommodation is required to provide auxiliary aids and services that are necessary to ensure equal access to the goods, services, facilities, privileges, or accommodations that it offers, unless an undue burden or a fundamental alteration would result.

Who is entitled to auxiliary aids? This obligation extends only to individuals with disabilities who have physical or mental impairments, such as vision, hearing, or speech impairments that substantially limit the ability to communicate. Measures taken to accommodate individuals with other types of disabilities are covered by other Title III requirements such as "reasonable modifications" and "alternatives to barrier removal" (see below).

EXAMPLE 15: W, an individual who is blind, needs assistance in locating and removing an item from a grocery store shelf. A store employee who locates the desired item for W would be providing an "auxiliary aid or service."

BUT: If G, who uses a wheelchair, receives the same retrieval service, not because of a disability related to communication, but rather because of his inability to physically reach the desired item, the store would be making a required "reasonable modification" in its practices.

5.4.1 Effective Communication

In order to provide equal access, a public accommodation is required to make available appropriate auxiliary aids and services where necessary to ensure effective communication. The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved.

EXAMPLE 16: In a retail location, passing notes with a clerk (for hearing impaired customers) or reading product information to a blind individual are adequate to ensure

effective communication. Of course, if the individual is unreasonably demanding or is shopping when the store is extremely busy, it may be an undue burden to spend extended periods of time with him/her.

Public accommodations should consult with individuals with disabilities wherever possible to determine what type of auxiliary aid is needed to ensure effective communication. In many cases, more than one type of auxiliary aid or service may make effective communication possible. While consultation is strongly encouraged, the ultimate decision as to what measures to take to ensure effective communication rests in the hands of the public accommodation, provided that the method chosen results in effective communication.

EXAMPLE 17: A patient who is deaf brings his own sign language interpreter for an office visit without prior consultation and bills the physician for the cost of the interpreter. The physician is not obligated to comply with the unilateral determination by the patient that an interpreter is necessary. The physician must be given an opportunity to consult with the patient and make an independent assessment of what type of auxiliary aid, if any, is necessary to ensure effective communication. If the patient believes that the physician's decision will not lead to effective communication, then the patient may challenge that decision under Title III by initiating litigation or filing a complaint with the Department of Justice.

If a sign language interpreter is required for effective communication, must only a certified interpreter be provided? No. The key question in determining whether effective communication will result is whether the interpreter is "qualified," not whether he or she has been actually certified by an official licensing body. A qualified interpreter is one "who is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary." An individual does not have to be certified in order to meet this standard.

5.4.2 Examples of Auxiliary Aids and Services

5.4.2.1 Deaf or Hard of Hearing

Examples include qualified interpreters, note takers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, and exchange of written notes. Hotels, motels, and other places of lodging that provide televisions in five or more guest rooms must provide closed caption decoder service upon request.

5.4.2.2 Visually Impaired

Examples include qualified readers, taped texts, audio recordings, Brailled materials, large print materials, and assistance in locating items.

5.4.2.3 *Speech Impairments*

Examples include TDD's, computer terminals, speech synthesizers, and communication boards.

5.4.3 *Limitations and Undue Burdens*

A public accommodation is not required to provide any auxiliary aid or service that would fundamentally alter the nature of the goods or services offered or that would result in an undue burden.

However, the fact that providing a particular auxiliary aid or service would result in a fundamental alteration or undue burden does not necessarily relieve a public accommodation from its obligation to ensure effective communication. The public accommodation must still provide an alternative auxiliary aid or service that would not result in an undue burden or fundamental alteration but that would ensure effective communication to the maximum extent possible, if one is available.

Example 18: It may be an undue burden for a small private historic house museum on a shoestring budget to provide a sign language interpreter for a deaf individual wishing to participate in a tour. Providing a written script of the tour, however, would be an alternative that would be unlikely to result in an undue burden.

5.4.3.1 *What is a fundamental alteration?*

A fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.

5.4.3.2 *What is an undue burden?*

An undue burden is defined as a "significant difficulty or expense." Among the factors to be considered in determining whether an action would result in an undue burden are the following:

- 1) The nature and cost of the action;
- 2) The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
- 3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

5.5 Removal of Barriers

Public accommodations must remove architectural barriers and communication barriers that are structural in nature in existing facilities, when it is readily achievable to do so.

5.5.1 Architectural Barriers

Architectural barriers are physical elements of a facility that impede access by people with disabilities. These barriers include more than obvious impediments such as steps and curbs that prevent access by people who use wheelchairs.

In many facilities, telephones, drinking fountains, mirrors, and paper towel dispensers are mounted at a height that makes them inaccessible to people using wheelchairs. Conventional doorknobs and operating controls may impede access by people who have limited manual dexterity. Deep pile carpeting on floors and unpaved exterior ground surfaces often are a barrier to access by people who use wheelchairs and people who use other mobility aids, such as crutches. Impediments caused by the location of temporary or movable structures, such as furniture, equipment, and display racks, are also considered architectural barriers.

The term "facility" includes all or any part of a building, structure, equipment, vehicle, site (including roads, walks, passageways, and parking lots), or other real or personal property. Both permanent and temporary facilities are subject to the barrier removal requirements.

5.5.2 Communication Barriers (Structural)

Communication barriers that are "structural in nature" are barriers that are an integral part of the physical structure of a facility. Examples include conventional signage, which generally is inaccessible to people who have vision impairments, and audible alarm systems, which are inaccessible to people with hearing impairments. Structural communication barriers also include the use of physical partitions that hamper the passage of sound waves between employees and customers, and the absence of adequate sound buffers in noisy areas that would reduce the extraneous noise that interferes with communication with people who have limited hearing.

How does the communication barrier removal requirement relate to the obligation to provide auxiliary aids? Communications devices, such as TDD's, telephone handset

amplifiers, assistive listening devices, and digital checkout displays, are not an integral part of the physical structure of the building and, therefore, are considered auxiliary aids under Title III regulations. The failure to provide auxiliary aids is not a communication barrier that is structural in nature. The obligation to remove structural communications barriers is independent of any obligation to provide auxiliary aids and services.

5.5.3 Transportation Barriers

Public accommodations that provide transportation to their clients or customers must remove barriers to the extent that it is readily achievable to do so. Public accommodations that provide transportation service must also comply with the applicable portions of the ADA regulation issued by the Department of Transportation.

5.5.4 “Readily Achievable” Barrier Removal

Public accommodations are required to remove barriers only when it is "readily achievable" to do so. "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense.

The ADA establishes different standards for existing facilities and new construction. In existing facilities, where retrofitting may be expensive, the requirement to provide access is less stringent than it is in new construction and alterations, where accessibility can be incorporated in the initial stages of design and construction without a significant increase in cost.

This standard also requires a lesser degree of effort on the part of a public accommodation than the "undue burden" limitation on the auxiliary aids requirements of the ADA. In that sense, it can be characterized as a lower standard.

Determining if barrier removal is readily achievable is necessarily a case-by-case judgment. The factors to consider are the same as those in the “what is an undue burden” section above.

What barriers will it be "readily achievable" to remove? There is no definitive answer to this question because determinations as to which barriers can be removed without much difficulty or expense must be made on a case-by-case basis. Below is a list of 20 examples of modifications that may be readily achievable:

- 1) Installing ramps;
- 2) Making curb cuts in sidewalks and entrances;
- 3) Repositioning shelves;
- 4) Rearranging furniture, vending machines, and display racks;
- 5) Repositioning telephones;
- 6) Adding raised markings on elevator control buttons;
- 7) Installing flashing alarm lights;
- 8) Widening doors;

- 9) Installing offset hinges to widen doorways;
- 10) Eliminating a turnstile or providing an alternative accessible path;
- 11) Installing accessible door hardware;
- 12) Installing grab bars in toilet stalls;
- 13) Rearranging toilet partitions to increase maneuvering space;
- 14) Insulating lavatory pipes under sinks to prevent burns;
- 15) Installing a raised toilet seat;
- 16) Installing a full-length bathroom mirror;
- 17) Repositioning the paper towel dispenser in a bathroom;
- 18) Creating designated accessible parking spaces;
- 19) Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
- 20) Removing high pile, low density carpeting; or

Are public accommodations required to retrofit existing buildings by adding elevators? A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. The readily achievable standard does not require barrier removal that requires extensive restructuring or burdensome expense. Thus, where it is not readily achievable to do, the ADA would not require a public accommodation to provide access to an area reachable only by a flight of stairs.

5.5.5 Historic Buildings

Barrier removal would not be considered "readily achievable" if it would threaten or destroy the historic significance of a building or facility that is eligible for listing in the National Register of Historic Places or is designated as historic under State or local law.

5.5.6 Cost

The ADA permits consideration of factors other than the initial cost of the physical removal of a barrier.

EXAMPLE 19: CDE convenience store determines that it would be inexpensive to remove shelves to provide access to wheelchair users throughout the store. However, this change would result in a significant loss of selling space that would have an adverse effect on its business. In this case, the removal of the shelves is not readily achievable and, thus, is not required by the ADA.

EXAMPLE 20: BCD Hardware Store provides three parking spaces for its customers. BCD determines that it would be inexpensive to restripe the parking lot to create an accessible space and reserve it for use by persons with disabilities. However, this change would reduce the available parking for individuals who do not have disabilities. The loss of parking (not just the cost of the paint for restriping) can be considered in determining whether the action is readily achievable.

5.5.7 Barrier Removal Standards

The Department of Justice has published specific technical requirements in the ADA Accessibility Guidelines (ADAAG). Please see the reference section of this document for more details.

5.5.8 Continuing Obligation

The obligation to engage in readily achievable barrier removal is a continuing one. Over time, barrier removal that initially was not readily achievable may later be required because of changed circumstances.

5.5.9 Priorities for Barrier Removal

Because the resources available for barrier removal may not be adequate to remove all existing barriers at any given time, a way to determine which barriers should be mitigated or eliminated first is suggested. The purpose of these priorities is to facilitate long-term business planning and to maximize the degree of effective access that will result from any given level of expenditure. These priorities are not mandatory. Public accommodations are free to exercise discretion in determining the most effective "mix" of barrier removal measures to undertake in their facilities.

The first priority should be to enable individuals with disabilities to physically enter a facility. This priority on "getting through the door" recognizes that providing physical access to a facility from public sidewalks, public transportation, or parking is generally preferable to any alternative arrangements in terms of both business efficiency and the dignity of individuals with disabilities.

The second priority is for measures that provide access to those areas of a place of public accommodation where goods and services are made available to the public. For example, in a hardware store, to the extent that it is readily achievable to do so, individuals with disabilities should be given access not only to assistance at the front desk, but also access, like that available to other customers, to the retail display areas of the store.

The third priority should be providing access to restrooms, if restrooms are made available for customers or clients.

The fourth priority is to remove any remaining barriers to using the public accommodation's facility by, for example, lowering telephones.

Public accommodations are urged to establish procedures for an ongoing assessment of their compliance with the ADA's barrier removal requirements. This process should include consultation with individuals with disabilities or organizations representing them. A serious effort at self-assessment and consultation can diminish the threat of litigation and save resources by identifying the most efficient means of providing required access.

It is recommended that a public accommodation develop an implementation plan designed to achieve compliance with the ADA's barrier removal requirements. Such a plan, if appropriately designed and diligently executed, could serve as evidence of a good faith effort to comply with the ADA's barrier removal requirements.

In developing an implementation plan for readily achievable barrier removal, a public accommodation should consult with local organizations representing persons with disabilities to solicit their suggestions for cost-effective means of making individual places of public accommodation accessible. These organizations may provide useful guidance to public accommodations in identifying the most significant barriers to remove and the most efficient means of removing them.

5.5.10 Alternatives to Barrier Removal

When a public accommodation can demonstrate that the removal of barriers is not readily achievable, the public accommodation must make its goods and services available through alternative methods, if such methods are readily achievable.

EXAMPLE 21: A retail store determines that it is not readily achievable to rearrange display racks to make every aisle accessible. However, the store is still required to make the goods and services that are located along inaccessible aisles available to individuals with disabilities through alternative methods. For example, the store could instruct a clerk to retrieve inaccessible merchandise, if it is readily achievable to do so.

EXAMPLE 22: A restaurant determines that it is not readily achievable to remove physical barriers to access in a specific area of the restaurant. The restaurant must offer the same menu in an accessible area of the restaurant, unless it would not be readily achievable to do so.

Security is a factor that may be considered when a public accommodation is determining if an alternative method of delivering its goods or services is readily achievable.

5.6 Seating in Assembly Areas

Public accommodations are required to remove barriers to physical access in assembly areas such as theaters, lecture halls, and conference rooms with fixed seating. If it is readily achievable to do so, public accommodations that operate places of assembly must locate seating for individuals who use wheelchairs so that it

- 1) Is dispersed throughout the seating area;
- 2) Provides lines of sight and choices of admission prices comparable to those offered to the general public;
- 3) Adjoins an accessible route for emergency egress; and
- 4) Permits people who use wheelchairs to sit with their friends or family.

If it is not readily achievable to remove seats to allow individuals who use wheelchairs to

sit next to accompanying family members or friends, the public accommodation may meet its obligation by providing portable chairs or other means to allow the accompanying individuals to sit with the persons who use wheelchairs. Portable chairs or other means must be provided only when it is readily achievable to do so.

In order to facilitate seating of wheelchair users who wish to transfer to existing seating when fixed seating is provided, a public accommodation must provide, to the extent readily achievable, a reasonable number of seats with removable aisle-side armrests. Many persons who use wheelchairs are able to transfer to fixed seating with this relatively minor modification. This solution avoids the potential safety hazard created by the use of portable chairs, and it also fosters integration. In situations when a person who uses a wheelchair transfers to existing seating, the public accommodation may provide assistance in handling the wheelchair of the patron with the disability.

5.7 New Construction

All newly constructed places of public accommodation and commercial facilities must be readily accessible to and usable by individuals with disabilities to the extent that it is not structurally impracticable. This requirement and the requirement for accessible alterations are the only requirements that apply to commercial facilities.

"Readily accessible and usable" means that facilities must be built in strict compliance with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) (see the reference section of this document). There is no cost defense to the new construction requirements.

The phrase "structurally impracticable" means that unique characteristics of the land prevent the incorporation of accessibility features in a facility. In such a case, the new construction requirements apply except where the private entity can demonstrate that it is structurally impracticable to meet those requirements. This exception is very narrow and will be used in only rare and unusual circumstances.

5.7.1 Commercial Facilities in a Home

When a commercial facility, such as a home sales office or production workshop, is located in a home, the portion used exclusively as a commercial facility, as well as the portion used both as a commercial facility and for residential purposes, are covered by the new construction and alterations requirements. The covered areas include not only the rooms used as a commercial facility but also an accessible route to the commercial facility from the sidewalk, through the doorway, through the hallway, and other portions of the home, such as restrooms, used by employees and visitors.

5.7.2 Elevators

Elevators are not required in facilities under three stories or with fewer than 3000 square feet per floor, unless the building is a shopping center or mall; professional office of a health care provider; public transit station; or airport passenger terminal.

Even in buildings that are exempt from the elevator requirement, all other ADAAG requirements (apart from the requirement for an elevator) must still be met.

5.8 Alterations

An alteration in a place of public accommodation must be readily accessible to and usable by individuals with disabilities in accordance with ADAAG to the maximum extent feasible.

An alteration is any change that affects usability. It includes remodeling, renovation, rearrangements in structural parts, and changes or rearrangement of walls and full-height partitions. Normal maintenance, reroofing, painting, wallpapering, asbestos removal, and changes to electrical and mechanical systems are not "alterations," unless they affect usability.

EXAMPLE 23: An electrical outlet is being relocated. The location of the new outlet can affect usability by an individual who uses a wheelchair because this is an alteration that must be done in accordance with ADAAG reach requirements. BUT: If only the electrical wiring inside the wall is being changed, usability by an individual with disabilities is not affected. Thus, the wiring need not be done in compliance with ADAAG because it is not an "alteration."

5.8.1 Maximum Extent Feasible

Occasionally, the nature of a facility makes it impossible to comply with all of the alterations standards. In such a case, features must only be made accessible to the extent that it is technically feasible to do so. The fact that adding accessibility features during an alteration may increase costs does not mean compliance is technically infeasible. Cost is not to be considered. Moreover, even when it may be technically infeasible to comply with standards for individuals with certain disabilities, the alteration must still comply with standards for individuals with other impairments.

5.8.2 Path of Travel

When an alteration is made to a "primary function area," not only must that alteration be done in compliance with ADAAG, but there must also be an accessible path of travel from the altered area to the entrance. The "path of travel" requirement includes an accessible route to the altered area and the bathrooms, telephones, and drinking fountains

serving the area. Alterations to provide an accessible path of travel are required to the extent that they are not "disproportionate" to the original alteration, that is, to the extent that the added accessibility costs do not exceed 20 percent of the cost of the original alteration to the primary function area.

A path of travel is a continuous route connecting the altered area to the entrance. It can include sidewalks, lobbies, corridors, rooms, and elevators. It also includes phones, restrooms, and drinking fountains serving the altered area.

A primary function area is any area where a major activity takes place. It includes both the customer services areas and work areas in places of public accommodation. It includes all offices and work areas in commercial facilities. It does not include mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors, or restrooms.

Alterations to windows, hardware, controls, electrical outlets, and signs do not trigger path of travel requirements. (If they affect usability, however, they are still considered to be "alterations" and must be done accessibly.) ADAAG gives some additional exceptions: the path of travel requirement is not triggered if alteration work is limited solely to the electrical, mechanical, or plumbing system, hazardous material abatement, or automatic sprinkler retrofitting, unless the project involves alteration to elements required to be accessible.

EXAMPLE 24: An office building manager is replacing all of the room number signs. This is an "alteration" because it can affect usability by an individual who is blind. Thus, the new signs must comply with ADAAG requirements for permanent signs. However, the path of travel requirement is not triggered. Even though an alteration is being made in a primary function area, alterations to "signs" are in the list of alterations that will never trigger the path of travel requirement.

5.8.2.1 Path of Travel Cost Considerations

What costs can be included in determining whether the 20 percent disproportionality limitation has been met? Widening doorways, installing ramps, making bathrooms accessible, lowering telephones, relocating water fountains, as well as any other costs associated with making the path of travel accessible, can be included.

What if the cost of making an accessible path of travel would exceed the cost of the original alteration by much more than 20 percent? In such a case, is the entity exempt from the path of travel requirement? No. The entity must still make the path of travel accessible to the extent possible without going over 20 percent, giving priority to those elements that provide the greatest degree of access. Changes should be made in the following order: accessible entrance, accessible route to the altered area, at least one accessible restroom for each sex or single unisex restroom, phones, drinking fountains, and then other elements such as parking, storage, and alarms.

Whenever an area containing a primary function is altered, other alterations to that area (or to other areas on the same path of travel) made within the preceding three years are considered together in determining disproportionality.

5.8.3 Elevator Exemption

The requirements for elevator installation are the same as those for new construction described above.

5.8.4 Alterations and Historic Preservation

Alterations to historic properties must comply with the historic property provisions of ADAAG, to the maximum extent feasible. Under those provisions, alterations should be done in full compliance with the alterations standards for other types of buildings. However, if following the usual standards would threaten or destroy the historic significance of a feature of the building, alternative standards may be used. The decision to use alternative standards for that feature must be made in consultation with the appropriate advisory board designated in ADAAG, and interested persons should be invited to participate in the decision-making process.

"Historic properties" are properties that are listed or that are eligible for listing in the National Register or Historic Places or properties designated as historic under State or local law.

What are the alternative requirements? The alternative requirements provide a minimal level of access:

- 1) An accessible route is only required from one site access point (such as the parking lot).
- 2) A ramp may be steeper than is ordinarily permitted.
- 3) The accessible entrance does not need to be the one used by the general public.
- 4) Only one accessible toilet is required, and it may be unisex.
- 5) Accessible routes are only required on the level of the accessible entrance.

But what if complying with even these minimal alternative requirements will threaten or destroy the historic significance? In such a case, which is rare, structural changes need not be made. Rather, alternative methods can be used to provide access, such as providing auxiliary aids or modifying policies.

5.8.5 Maintenance of Accessible Features

Public accommodations must maintain in working order equipment and features of facilities that are required to provide ready access to individuals with disabilities. Isolated or temporary interruptions in access due to maintenance and repair of accessible features are not prohibited. Where a public accommodation must provide an accessible route, the route must remain accessible and not blocked by obstacles such as furniture, filing

cabinets, or potted plants. Similarly, accessible doors must be unlocked when the place of public accommodation is open for business.

Although it is recognized that mechanical failures in equipment such as elevators or automatic doors will occur from time to time, the obligation to ensure that facilities are readily accessible to and usable by individuals with disabilities would be violated, if repairs are not made promptly or if improper or inadequate maintenance causes repeated and persistent failures. Inoperable or "out of service" equipment does not meet the requirements for providing access to a place of public accommodation.

CONCLUSION:

It has been my experience in visiting numerous nudist clubs that the owners and individuals who make up our clubs are overly sensitive to the needs of others who use our clubs. One of the great things about being a nudist is that we are aware of body differences and are so much more accepting of those differences than the general population tends to be. If an individual wishes to participate in a particular event or needs access to a particular area at a nudist club there always seems to be more than enough volunteers to make sure that happens. The Americans with Disabilities Act now legislates actions that we as nudists have undertaken since our very beginnings. It is my hope that this brief explanation of the Act will help guide your club and individual actions in the future.

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