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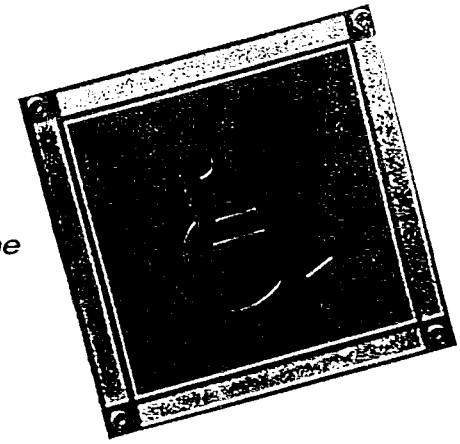
Banker Beware! Due Diligence With Service Providers

Are You Accessible?

An Update on the Americans with Disabilities Act

by Brian Irion

By now we all have become familiar with the Americans with Disabilities Act (ADA). We know that Title I of the ADA prohibits discrimination in the terms and conditions of employment of the disabled and that Title III of the act requires that facilities and goods and services available to the public be easily accessible to and usable by disabled people. Automated teller machines (ATMs) have been raised or lowered; parking lots have been repainted to create disabled parking spots; curbs have been cut; ramps have been constructed; and doors and aisles have been widened. One might think the ADA compliance effort is finished. Wrong.



More often than not, plaintiffs' counsel will not take a case unless it is relatively certain that the client is disabled, the defendant can be held liable, and the facility in question is a "place of public accommodation."

According to the Department of Justice Web site, six federal appellate court cases were handed down in the period from April to September 2000 (www.usdoj.gov). Considering that approximately 95 percent of all cases settle before ever going to trial, that only a handful of the federal district court cases even reach an appellate court, and that only some of the decisions from the appellate courts are published, simple math indicates that hundreds of cases are being filed every year.

The Winter 1992 issue of ABA *Bank Compliance* focused on making bank facilities comply with the then-looming Americans with Disabilities Act. This article will highlight the current focus of Title III cases and provide some guidance on how banks can reduce the likelihood of exorbitant litigation costs and damages to a successful plaintiff.

Title III of the ADA: An Overview

The ADA has five titles, only two of which, Title I and Title III, impose duties on private commercial businesses. Generally, Title I prohibits discrimination in the terms and conditions of employment.

Title III imposes a number of obligations on public facilities. First, it requires all public accommodations to make their services and goods available to disabled people unless doing so would fundamentally alter the nature of the goods and services being offered. For instance, a parking lot that otherwise could accommodate large vans with platform lifts cannot ban such vans (which often are used by the disabled) on aesthetic grounds. Next, Title III requires that auxiliary aids and services be provided to the disabled to allow them equal enjoyment to the goods, services, and facilities available to the public. While the business can choose what aid or service will be used, that aid or service must be effective. For example, Braille loan documents may not be necessary if a tape-recorded copy is provided or if employees are made available to read the loan documents to blind customers. Third, Title III requires that new construction comply with the ADA Accessibility Guidelines (ADAAG is essentially a federal building code regarding accessibility). Alterations or remodels to the "essential functions" of the bank (such as teller counters, platform officers' areas, vaults, and ATMs) also may trigger requirements to make other areas of the bank accessible (such as pathways to and from the altered area). Finally, barriers to the disabled must be removed where "readily achievable" and auxiliary aids and services provided where it is not an "undue burden" or it would fundamentally alter the good or service.

"Readily achievable" means "able to be achieved without substantial difficulty or expense." "Undue burden" means "significant difficulty or expense." What is readily achievable or an undue burden is determined on a case-by-case basis and depends on a number of factors, including the financial resources of the branch and bank holding company, and the nature, benefit, and cost of the change. Hence, what may be readily achievable for a profitable bank one year may not be readily achievable for another bank or for the same bank in a less profitable year.

Historical Perspective

At the inception of the ADA, the vagueness of the act led to a number of suits to determine its parameters. In the first few years, questions arose over the following:

- the definition of disability and who was disabled;
- whether franchisors can be held liable as persons who "own, operate, lease, or lease to" places of public accommodation;
- whether the Department of Justice's interpretation of ADAAG should be accorded any evidentiary deference;
- what is included in the "direct threat" exemption to providing services to the disabled (recall the airline passenger with Tourette's Syndrome who was denied access to a plane);
- the difference between discriminating and contracting with a discriminating entity; and

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Casey Martin Does Not Walk Alone

A *sampling of* ADA *cases*

Martin v. PGA *Tour, Inc.*

Permitting a disabled professional golfer to use a golf cart during tournaments would not fundamentally alter the nature of services provided by the Professional Golfers' Association, so as to preclude the finding that the association discriminated against the golfer by denying him use of a cart; the fatigue factor injected into the game by the walking requirement was not significant, and, because golfer was required to walk about 25 percent of the course even when he was allowed to use a cart, and endured pain while getting in and out of the cart, he endured greater fatigue when allowed to use a cart than his able-bodied competitors did by walking.

Abbott v. Bragdon

Dentist failed to establish due process claim based on his contention that the Americans with Disabilities Act violated his fundamental right to freedom of contract by forcing him to accept patients against his will. The dentist was found to have violated ADA public accommodations provisions by refusing to treat a patient with Human Immunodeficiency Virus (HIV) in his office. The dentist's refusal to treat patient with asymptomatic HIV in his office, when he instead offered to treat the patient in a hospital, was not justified under ADA on the basis of significant risk, but, rather, if the dentist implemented precautions recommended by the Centers for Disease Control, treatment of the patient in his office posed no direct threat to the health or safety of others. The CDC's reasonable medical judgment indicated that the dentist could protect himself by diligently implementing CDC recommended precautions, and neither life-long duration nor severity of the disease outweighed the evidence as to how the disease was transmitted and the slight probability of transmission.

Stoutenborough v. National Football League, Inc.

The National Football League, its member club, and media were not "places" of public accommodation within the meaning of Title III of the ADA prohibiting places of public accommodations from denying disabled individuals equal access to services. The NFL's "blackout rule," which prohibits live local broadcasts of home football games that are not sold out 72 hours before game time, applies equally to both hearing and hearing-impaired populations and, therefore, is not discriminatory in violation of ADA. The fact that hearing individuals can listen to a "blacked-out" game, if broadcasted by radio, is irrelevant, because the "blackout rule" does not reach radio broadcasting.

Paralyzed Veterans of America v. D.C. *Arena* L.P.

The Department of Justice's interpretation of a guideline requiring wheelchair areas in public accommodations covered by the ADA to provide users with lines of sight comparable to members of the general public was entitled to deference, notwithstanding that the Architectural and Transportation Barriers Compliance Board, rather than the Department of Justice, actually drafted the regulation.

Independent Living Resources v. Oregon Arena Corp.

Both the landlord who owns a building housing a place of public accommodation and the tenant who operates a place of public accommodation are fully liable for compliance with all provisions of ADA relating to that place of public accommodation. While the landlord and tenant may by lease or other contract allocate responsibility for compliance with regulations, such allocation is only effective as between the parties.

Atakpa v. Perimeter OB-GYN *Associates,* P.C.

A nurse-midwife employed by a medical clinic could not be held liable under the ADA for the clinic's allegedly discriminatory HIV testing practices, where the nurse-midwife did not own, lease, or operate the clinic.

Howard v. Cherry Hills Cutters, Inc.

An individual can be held liable under ADA's civil enforcement provision.

Ware v. Wyoming Bd. of Law Examiners

State's Board of Law Examiners, as a public entity, was not subject to liability under ADA for civil fines and penalties.

For complete citations for these cases, please contact the editor: ksaxton@aba.com.

ATMs and Blind Users' Access

by Nessa Feddis

In recent years automatic teller machines have been a focal point for representatives for the blind who have been pressing for compliance with the Americans with Disabilities Act Accessibility Guidelines. ATMs have been a target for several reasons. ATMs offer a basic and convenient access to vital products — bank accounts. Convenient access to bank services, especially cash withdrawal, is a critical service, and blind customers have complained of the indignity — and security risks — associated with asking a stranger to withdraw cash from their accounts at an ATM. In addition, advocates for the blind believe that just as curb cuts continually remind the public of the needs of wheelchair users, ATM features that assist blind users will sensitize the public to the needs of the blind community. ATMs are particularly important because they can remind people not only of the general needs of blind people but also of their particular needs regarding technologically advanced products.

Blind people often are frustrated by technological advances that actually diminish their ability to use even such simple products as digital thermostats or digital oven settings, much less sophisticated facilities, such as the Internet. Their belief is that the increased sensitivity to their needs derived from the blind user features on ATMs will transfer to other unrelated products. Developers will then design new products that take into consideration the needs of the blind and avoid the more expensive retrofitting. In this sense, visible, omnipresent facilities such as ATMs become important in a much broader sense than simple access to banking services.

For these reasons, in recent years representatives for the blind have been approaching ATM owners about improving blind users' access to the machines, relying on the 1992 ADAAG requirement that ATMs be "accessible to and independently usable by persons with vision impairments." With some exceptions, ADA is generally enforced through private lawsuits. Solutions have varied as technology has improved and presented better solutions.

When ADAAG first went into effect in 1992, as a practical matter, Braille templates offered the only assistance to blind ATM users: ATMs that verified user input or provided voice response were simply unavailable for a shared ATM network environment. Today, however, that is changing.

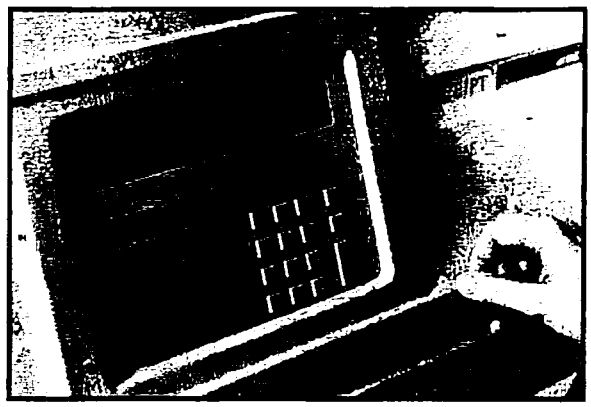
Representatives for the blind are now demanding that ATMs provide audio output in some fashion. They argue that Braille instructions are insufficient: They provide only cursory instructions that cannot guide users through a transaction, and only a relatively small percentage of blind people read Braille.

Moreover, voice is now technologically feasible. Indeed, a number of banks today have installed "talking" ATMs and other audio-assistance features. (Headsets or phones carried by the blind users ensure privacy.) In addition, the Access Board in November 1999 proposed to amend ADAAG to specifically require audible "verification of user input," displayed text and labels, and receipts. The Access Board is expected to finalize changes to ADAAG this year.

That is not to say that there are not significant challenges and costs associated with providing voice on ATMs. "Voice echo," which states the function or number associated with a particular key, is relatively easy as that information is available locally at the ATM. The biggest challenge has been

to provide in audible format "dynamic" information, that is, information coming from the host. This includes, for example, balance information, error messages, third-party names, and account nicknames. Even if it is technically feasible to present such dynamic information in an audible format, cost may be significant. In addition to the ATM hardware, there are expenses associated with ATM software, both at the local, host, and network levels. However, technology in any given month advances so that a workable and practical solution may resolve these issues in the near future.

Making new ATMs accessible may be the easier challenge. In many ways, how and whether to make existing ATMs accessible raises greater concerns and questions. Retrofitting existing ATMs can be much more expensive, particularly given the manual labor. In addition, older models may not be able to be retrofitted.



Furthermore, it is not clear how the current regulation applies to existing ATMs or how a modified new regulation would apply to existing ATMs. The general rule under ADA is that facilities existing in 1992 only had to remove barriers if this was "readily achievable" and provide auxiliary aids and services if doing so was not an "undue burden." However, in general, facilities installed subsequently have to comply with ADAAG. It is not clear how this should be applied in the ATM environment.

When ADAAG went into effect in 1992, it was not possible to purchase and install an ATM that provided audible text. Presumably and logically then, it could not have been required.

Some plaintiff's lawyers assert, however, that voice was required for all ATMs installed after 1992 — or at least to those installed after audio output technology became available — under the current "independently usable" standard. Therefore, they argue, any ATM installed after 1992, or when technology became available, must be retrofitted or replaced to provide audio output. Representatives for the blind argue for broad and strict coverage to existing ATMs because they fear that otherwise, given the saturated ATM market, applying it only prospectively will mean far fewer ATMs will be accessible. These representatives have used such arguments to persuade some banks to develop schedules to install and retrofit ATMs so that they are accessible to blind users.

There is also confusion about how any new specifications adopted by ADAAG and the Department of Justice would apply to existing ATMs. At the very least, if an ATM provided some audio output prior to the adoption of any new regulations, the ATM owner should only have to retrofit if it is "readily achievable" or not an "undue burden." Banks are looking for relief with regard to application of the new standard to existing ATMs given the potential cost.

Until a final regulation is adopted, banks should seriously investigate how they can make ATMs more accessible to blind users. Start by talking with blind customers and representatives, who can help you understand blind users' needs and suggest appropriate solutions. In addition, a bank is less likely to be a target for a lawsuit if it has in good faith worked with blind groups and customers and has implemented a plan to ensure that these consumers have the best possible access to vital services like ATMs. When developing the plan for accessibility, banks should also contact their ATM vendors and third-party processors, if applicable, for technical advice.

Editor's Note: The American Bankers Association has been actively involved in this issue. It has submitted comments to the Access Board on its 1999 proposal and testified at the Access Board's hearings. In addition, the ABA has attempted to bring together the various interested parties, including ATM owners, vendors, networks, software vendors, and representatives for the blind to work on a technical, as well as a legal, solution. Meetings are being held to try to reach a consensus on a final regulation that the Access Board can consider in its deliberations.

Aspects of Facilities Compliance Under ADAAG

Element	ADA: All references are to ADAAG (28 C.F.R. § 1191.1 App.) unless stated otherwise.

Accessible Route: A continuous unobstructed path connecting accessible elements and spaces of a building or facility.

Number of Routes on Exterior of Facilities: At least one accessible route shall be provided from public transportation stops, accessible parking spaces, passenger loading zones if provided, and streets or sidewalks to an accessible building entrance, and at least one such route shall connect accessible buildings and facilities. 4.1.2. Accessible route shall to maximum extent feasible coincide with the route for the general public. 4.3.2.

Accessible Routes: Minimum clear width is 36 inches. Where 180-degree turn is necessary on route, turn-around space must be at least 48 inches. If a route is not at least 60 inches wide, "T" intersections or a 60-inch x 60-inch space must be provided at least every 200 feet. 4.3.3, 4.3.4. Accessible routes must have at least 80 inches of clear headroom. If the area adjoining an accessible route has less than 80 inches of headroom, a detectable warning must be placed to notify visually impaired persons. 4.3.5, 4.4.2. The surface area must be firm, slip-resistant, and stable. Carpets cannot exceed ½ inch in height. Grates shall not have openings greater than ½ inch in the direction of travel. 4.5. Slope along the direction of travel shall not exceed 1:20. 4.3.7. Changes in level greater than ¼ inch shall be beveled. 4.5.2.

Space Allowance, Reach Ranges, and Protruding Objects: The minimum clear width for a single wheelchair is 32 inches at any point and 36 inches continuously; 60 inches is needed for two wheelchairs to pass or for one to turn around in one place. 4.2.1-3. If clear floor space allows only for forward reach, the maximum high forward reach is 48 inches; the maximum low forward reach is 15 inches. Side reach cannot be lower than 9 inches or higher than 54 inches. 4.2.4. Objects protruding from walls between 27 inches to 80 inches high may not protrude more than 4 inches. Objects protruding below 27 inches high may protrude any amount but shall not reduce the clear width of an accessible route or maneuvering space. 4.4.1

Parking Spaces and Lots: In general, at least 4 percent must be accessible in normal retail establishments with lots of up to 100 spaces and 2 percent of spaces over 100 must be accessible. 4.1.2(5).

Further, one in every eight accessible spaces shall be "van accessible." This requires it be served by an access aisle at least 96 inches wide and have vertical clearance of at least 96 inches at loading zones. 4.1.2(5). It also shall provide a sign for van accessibility.

An accessible space must be at least 96 inches (8 feet) wide and located on the shortest accessible route to an accessible entrance and each spot shall have an adjacent access aisle at least 96 inches (8 feet) wide with 98 inches vertical clearance. 4.6.2, 4.6.3, 4.6.5. The slope must be no greater than 1:50 in any direction. 4.6.3.

Accessible spots and van-accessible spots should be designated by the international accessibility sign and van accessible sign as appropriate:

VAN ACCESSIBLE

(⅛ of accessible spots)

Building Entrances, Doors, and Controls: At least 50 percent of all building entrances must be accessible. There must be at least the same number of accessible entrances as total number of entrances required by local building and fire codes. At least one accessible entrance must connect with an accessible route and parking. 4.1.3(8). Directional signage must be placed on inaccessible entrances (see "Signage"). Accessible doors cannot be revolving or turnstile. 4.13.2. The door must have a minimum width of 32 inches and the depth cannot be larger than 24 inches. 4.3.5. The area around the door should be clear from obstructions within 60 inches of the hinge and at least 18 inches from the swinging side of the door. 4.13.6. Doors in series must not swing toward each other and must have at least 48 inches space between them, not including the swing radius. 4.13.7. In general, thresholds should not exceed ½ in height. Latches, controls and handles must be operable without tight grasping or twisting, and doors must open without significant push force. 4.13.9 The maximum force to push a door generally should not exceed 5 lbs. 4.13.11.

Display Units, Racks: Shelves or display units accessible to the public must also be on an accessible route. 4.1.3 (12)(b).

Drinking Fountains: At least 50 percent of drinking fountains must be accessible, meaning that they must comply with reach requirements both for wheelchairs and for those who have trouble stooping (usually a "hi-lo" design fountain). 4.1.3 (10). For persons who use wheelchairs, spouts not to exceed 36 inches high, shall be located at the front of the fountain, shall project at least 4 inches high, and be directed nearly parallel to the front. Controls to operate the fountain are the same as for doors (no tight twisting, gripping, etc.) 4.15.

Signage: Signs directing patrons to accessible parking, passenger loading zones, entrances when not all are accessible, and toilet facilities when not all are accessible shall be provided. 4.1.2(7). Volume control and text telephones, and assistive listening systems also shall be identified by international symbols for these devices. 4.30.7. When telephone banks do not have text telephones, directional signage is required.

Overhead signs (at least 80 inches clear headroom) must have characters at least 3 inches high. Mounting height for permanent identification of rooms shall be 60 inches to the center of the sign. 4.30.6. Letters and numerals shall be raised at least ⅛ inch and shall be accompanied by Grade 2 Braille. 4.30.4. The characters and background shall be non-glare finish. Characters shall contrast with the background. 4.30.5. Building directories, menus, and other temporary signs are not required to comply. 4.1.3(16).

Elevators: Complex rules: In general, for buildings other than health care offices, shopping malls and those places of public accommodation designated by the Attorney General, elevators are only required where building is no more than two stories, or has less than 3,000 square feet per story (including ground floor). 28 C.F.R. §§ 36.401, 36.404.

Accessible elevators must have a leveling feature that brings the car within ½ inch of floor height. Call buttons shall be centered at 42 inches high, shall be at least ¾ inch high, and shall have visual call and answer features. Visible and audible signals (once for "up," twice for "down") shall be at each hoistway. Raised and Braille floor designations shall be at each hoistway entrance. Doors must remain open at least 3 seconds for each door call. The entrance shall be at least 36 inches wide, and the car shall be at least 51 inches deep and 68 inches wide. Car floor buttons shall not be more than 54 inches high for side reach and 48 inches for front reach. 4.10.

Rest Rooms: All should be accessible and should be on an accessible route. Within rest rooms, at least one water closet, urinal, lavatory, and mirror shall be accessible 4.1.3 (11), 4.22. Toilet seat should be between 17 inches and 19 inches high and should have grab bars affixed between 33 inches and 36 inches high along the side and/or back of the toilet. Clear space on the toilet side should be at least 36 inches. Minimum frontal clearance in floor space varies between 56 inches and 66 inches, depending upon arrangement, compartment door location, etc. 4.16.

Lavatories should be mounted with the rim no higher than 34 inches and should have a clearance of at least 29 inches from the floor. Approach space should be at least minimum clear floor space of 30 inches by 48 inches 4.24. (See also "Space Allowance and Reach").

Urinals shall not exceed 17 inches at rim and shall have the minimum clear floor space for approach. 4.18.

Faucets and toilet controls should be lever operated, push type, or electronically controlled. If self-closing valves are used, they should remain on for at least 10 seconds. 4.16.5, 4.17.5. Hot water and drainpipes should be insulated or configured to protect against contact. 4.19.4.

The bottom of the reflecting surface of the mirrors should not exceed 40 inches above the floor. 4.19.6.

Telephones: If telephones are provided to the public on more than an incidental basis, at least one telephone per floor and at least one per bank of phones must comply with rules on protruding objects (four inches if in a corridor). Maximum mounting height should be 48 inches (front approach) or 54 inches (side approach). Floor clearance space should be at least 30 inches by 48 inches. Accessible phone should have volume controls and text phone should be included if there are at least four phones at a site and at least one is inside. ADAAG 4.1.3 (17). Cord must be at least 29 inches long. If four or more public telephones are provided at a site, and one is in an interior location, it should accommodate a text telephone (note signage requirements). ADAAG 4.1.3 (17), 4.31.

Emergency Warning Systems: If emergency warning systems are provided, they shall include both audible and visual warning systems. Emergency audible alarms shall produce a sound at least 15 dbA in excess of the prevailing equivalent sound level in the space, not to exceed 120 dbA. Visual alarms shall be clear or unfiltered white, a xenon strobe or equivalent and shall be of an intensity of at least 75 candela. They should be at least every 50' in common hallways or corridors and at least 80 inches above the floor. 4.1.3 (14), 4.28.

Seating Spaces: Accessible seating should comprise at least 5 percent of all seating, and shall be on an accessible route. 4.1.3 (18). Clear knee space of at least 27 inches high, 30 inches wide, and 19 inches deep shall be provided. The tops of tables or counters shall be from 28 inches to 34 inches. 4.32.

Teller Counters: At banking or cashier teller counters, a portion of the main counter must be a minimum of 36 inches in length and a maximum of 36 inches high. An auxiliary or folding counter that has these attributes is acceptable. 7.2.

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- whether a television "blackout" of football games not sold out 72 hours before kickoff discriminates against the hearing-impaired.

These and other fundamental questions largely have been determined for the time being. The more recent cases, decided or pending, focus on more specific questions, such as whether a professional golfer with a disability should be able to play using a cart rather than walking the course, as is required of other golfers, and whether public entities such as states are subject to the ADA or enjoy sovereign immunity.

While some of these cases involving questions about the definition of disability and place of accommodation have garnered national attention, the fact is that the vast majority of cases now being filed involve access to the facilities and to goods and services offered. More often than not, plaintiffs' counsel will not take a case unless it is relatively certain that the client is disabled, the defendant can be held liable, and the facility in question is a "place of public accommodation." Recognize, however, that the Department of Justice has significantly more resources to devote to such arcane questions and has had significant success in many cases (see www.usdoj.gov/crt/ada/enforce.htm).

Access: The Most Common Lawsuit

A large number of Title III ADA suits are filed in the U.S. District Court for the Northern District of California, possibly due in part to the high number of disability rights groups located there. Disability Rights Education and Defense Fund (DREDF, see www.dredf.org), Disability Rights Advocates (www.dralegal.org), and other nonprofit organizations, as well as number of plaintiffs' rights law firms, all are based in or around the San Francisco Bay area. As a result, the judges of the district may see a larger number of ADA Title III lawsuits than judges in other parts of the country.

Bernard Zimmerman, a magistrate judge for the Northern District of California sitting in San Francisco, has seen his share of ADA suits. "Perhaps the majority of ADA cases being filed here are access cases," he said. "And although the ADA has become more familiar to more people and its details are more clearly defined, 90 percent of the access cases involve simple issues: Either the defendant is in compliance with the ADA or it is not."

Consider the ADAAG as a national uniform building code, and the absence of compliance at your bank as a "slip-and-fall" suit waiting to happen like a banana peel on a grocery store floor.

The typical defendant also has changed over the time the ADA has been in effect. "While the common defendant used to be a large company, an increasing number of cases are currently directed against smaller outfits or franchises. On the franchise front, some cases are brought on an individual basis, while others are prosecuted as class actions," Zimmerman said.

Defendants often respond to claims of ADA violations with the defense that they were not aware of the particular requirement or that they still are in the process of making their facilities compliant. The ADA and the ADAAG, published by the Architectural Transportation Barriers Compliance Board (Access Board), are lengthy and complicated. In many cases companies mistakenly assume that if a local official from a municipality's building department issues a certificate of occupancy or completion, the building is in compliance. The simple fact, however, is that there is no governmental entity to issue a "safe harbor" certificate and ADAAG is publicly available (www.usdoj.gov/crt/ada/publicat.htm). Finally, as exemplified in the case involving actor Clint Eastwood's Mission Ranch Hotel in Carmel, California, defendants often believe they are the targets for extortion by plaintiffs' lawyers seeking the attorneys fees that accompany a successful lawsuit.

Plaintiffs counter that the act has been in effect for a decade, and some state counterparts to the ADA have been in effect even longer. Plaintiffs continue that if a defendant isn't in compliance by now, it probably has no intention of becoming so and the only way to obtain compliance is to sue the defendant. Often, the cost of complying is far less than the attorneys' fees ultimately sought in any settlement.

Some Prophylactic Measures

Unfortunately, these cases simply aren't going away. The best defense is to avoid the suit before it ever happens. First, if your bank isn't in compliance with the ADA yet, make it so now. With the advent of the Internet as a source of easy access to government documents, there's no time like now to look at and print the relevant docu-

ments, starting with www.accessboard.gov. If ADAAG is confusing at first, consider using the table on pages 44–45 as a basic index. Special guidelines and information regarding ATMs can be found on pages 42–43. Banks also should consult with disability groups to learn about the needs and preference of various disabled groups. This is often your best resource for making the bank accessible to all disabled people.

Second, consider conducting a compliance audit. Many architectural firms conduct compliance audits and reviews. Zimmerman noted, "The key in dealing with most of these lawsuits is compliance. Many of these issues are cut and dried. Businesses ought to consider doing a compliance audit or having one done." Third, respond to plaintiffs' attorneys' demand letters as soon as possible to avoid a suit. If necessary, ask for more time, more clarification, or an opportunity to meet with the putative plaintiff outside the presence of attorneys to see what results can be achieved pre-litigation. Plaintiff's counsel in the case against Eastwood's Mission Ranch Hotel sent a demand letter and purportedly initiated suit within two weeks. Though the outcry against the alleged tactic may have garnered Eastwood public sympathy and a congressional ear, the effort no doubt cost him significant attorneys' fees.

Conclusion

Lawsuits under the ADA have not gone away, though the issues are easier than they once were. Consider the ADAAG as a national uniform building code, and the absence of compliance at your bank as a "slip-and-fall" suit waiting to happen like a banana peel on a grocery store floor. Add in the fact that unlike a slip-and-fall lawsuit, the ADA awards attorneys' fees to a successful plaintiff, and you will have the proper respect for Title III of the ADA. Grocery stores typically maintain "sweep logs" to show reasonable measures have been taken to maintain a safe premise. Similarly, banks and other public accommodations should create "ADA compliance logs" showing attempts to identify shortcomings and to comply with ADAAG. Though lawsuits cannot be eliminated, they can be minimized and the likelihood of damages lessened. ❖

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about the authors

Brian Irion heads the litigation department of Capstone Law Group LLP (www.capstonelaw.com). He received bachelor's and law degrees from the University of California at Davis in 1982 and 1985, respectively. Irion's practice focuses on intellectual property, corporate governance, employment, real property, and general commercial litigation, and he has taken a number of cases to trial. He also counsels his clients on avoiding litigation and minimizing litigation risks. A published author and frequent lecturer, Irion was the recipient of the 1997 Community Service Award from the National Multiple Sclerosis Society for his work in employment rights of the disabled.

Nessa Feddis is senior federal counsel to the ABA's Government Relations Division. She focuses on consumer banking and payment system issues both in the federal legislative and regulatory arenas. Her responsibilities include relaying ABA's position on such issues to Congress and the banking regulatory agencies and educating bankers on new laws and regulations. In recent years, she has been involved with regulatory and legislative matters relating to consumer credit, credit and debit cards, ATMs, deposit accounts, payments systems, and check fraud. Feddis also was originally involved in the ADA issue in 1992 when the act was passed, taking part in ABA discussions with blind groups about accessibility. She has been involved further during the past few years and sits on the ANSI A117 Committee, which also considers these issues. Feddis holds a law degree from Catholic University and is a member of the Washington, D.C., Bar Association. She is also a fellow of the American College of Consumer Financial Services Lawyers. Her articles discussing regulatory and legislative developments in consumer banking matters have appeared in *ABA Banking Journal* and *ABA Bank Compliance*.