



### **OWNERS, CONTRACTORS, LAWYERS AND TITLE III**

by W. Christopher Barrier

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

Title III of the **Americans With Disabilities Act** applies to projects that were newly constructed for first occupancy after January 26, 1993 or were altered after January 26, 1992. (Presumably, alterations were covered first because they involve less lead time than new structures.) In any event, Title III remains confusing to owners, contractors, lawyers and also to the people it was intended to benefit.

For example, about the time Title III became effective, the engineer for an improvement district effecting street and sidewalk improvements and the contractor both understood that the curbs needed access ramps---but, neither understood that those ramps had to be grooved for greater wheelchair traction. So, the contractor had to go back and cut them in, basically by hand.

#### **What you don't know can hurt...**

They had the defense of unfamiliarity. Harder to understand are more recent cases where

apartment buildings and hotels were constructed without the extra-wide doors that Title III requires. Their owners were cut no slack by the regulators or the courts---every door had to be altered.

On the disabled person's side, several years ago a visually impaired person demanded that the Arkansas Symphony provide her with the program notes in braille, invoking Title III. (It applies to the accessibility of the building, not to entertainment productions within it, the Symphony gently explained. She may have been thinking of "reasonable accommodations" under Title I, the employment discrimination section at which the United States Supreme Court has been diligently whittling away.)

### **Places of "public accommodation"...**

In simplest terms, under Title III, places of public accommodation (hotels, restaurants, some office buildings, schools, auditoriums, city halls, court houses), within the time frames noted, must be constructed or altered so as not to discriminate against, exclude, segregate or treat unequally people with disabilities. In instances where it is "easily accomplishable and able to be carried out without much difficulty or expense," existing buildings must be altered, even if no remodeling is otherwise planned.

Title III and its implementing regulations (42 USC Secs. 12181-12189; 28 CFR Part 36) also contain specific requirements related to architectural standards (including door widths); policies, practices and procedures; communication with people with hearing, speech or vision impairments; and other access requirements.

### **...don't include every place...**

Not every commercial building is "public" and not every portion of an otherwise public

building is subject to Title III. For example, while the showroom of an automobile dealership might have to be handicap-accessible, including public restrooms, the chief executive's private office and the employees-only restroom need not be, if non-disabled customers are also excluded.

Business owners who are still confused and uneasy about Title III, and about whether or not their businesses comply, should act promptly to put their fears to rest by retaining a consultant well-versed in ADA issues to evaluate their facilities. That consultant may be an architect or perhaps a contractor (but probably not a lawyer). The experience and expertise of the evaluating consultant and a satisfied client list are far more important than certifications.

### **Not just bricks and mortar...**

The evaluation has to go beyond the facilities and also comprehend *policies and procedures* which are in themselves benign, but which have the effect of discriminating against the disabled---for example, a policy requiring prospective purchasers at that theoretical automobile dealership to come to an office that is not handicap-accessible to fill out a credit application.

There are limits. Moving the credit office to the ground floor is probably not going to "fundamentally alter" the business of the automobile dealership. On the other hand, there is simply no way to alter Wild River Country to make it completely handicap-accessible without making it a totally different operation than it is today.

### **Raising the roof...**

If the only place a ramp could be located at the theoretical automobile dealership

would require removing an essential roof support, the alteration is "technically infeasible." If the only place to locate it would result in fuel and exhaust fumes being drawn into the ventilation system, the alteration would pose "a significant risk to the health and safety of individuals with disabilities or others." Hence, under the regulations, the alteration would not be required.

When presented with a Title III claim, property owners need to step back and rationally decide what is reasonably achievable and practically necessary---not what would be available in a perfect world (such as braille playbills). There may also be procedural defenses, such as standing---a person who has impaired vision has no standing to ask for a wheelchair ramp.

### **Preventive medicine...**

But, seeking an evaluation before a claim is made can be very cost-effective, because even an innocent or unknowing violation of Title III can result in the award of attorney's fees and costs to the complaining party. Further, Title III litigation can be time-consuming and expensive, not just in legal fees, but for expert witnesses as well.

In any event, the cost of the evaluation and of reasonable corrective action may be far less than the cost of litigation, not to mention unfavorable public perceptions. And it is not too late to start that process the first time an individual brings it to the owner's attention. A problem- solving mindset will save money and grief, while a bunker mentality will guarantee spending plenty of both.

*Chris Barrier is a graduate of Hendrix College and Duke University School of Law. He practices at the Mitchell Williams law firm in Little Rock where he has served as chair of the firm's Business Practice Group. He is former chair of the Arkansas Bar Association's sections on both real estate and banking law, and has practiced in those areas for over 40 years, as well as writing and speaking on them. He has been consistently included in the real estate category of The Best Lawyers in America.*