

## Title III of the Americans With Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act

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### Introduction

On July 26, 1990, President Bush signed the Americans with Disabilities Act (ADA) into law. The ADA is the world's first comprehensive civil rights law for people with disabilities.<sup>1</sup> The law has five titles: Title I prohibits discrimination in employment; Title II prohibits discrimination in state and local public services; Title III prohibits discrimination by public accommodations and services operated by public entities; Title IV provides for telecommunication services for the deaf; and Title V discusses the law's technical provisions, such as attorney fees and alternatives to lawsuits.<sup>2</sup>

This article focuses on the provisions of Title III which require removal of barriers in existing facilities, and argues that those provisions are not being fully utilized. Many businesses across the nation have not complied with the ADA's accessibility requirements.<sup>3</sup> In addition, the procedures through which the people negatively affected by this non-compliance can raise and resolve this issue are inadequate.<sup>4</sup> Part I examines the state of law before the ADA and the reasons for its enactment. Part II explains Title III's scope, re-

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1. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND U.S. DEPARTMENT OF JUSTICE, *THE AMERICANS WITH DISABILITIES ACT HANDBOOK*, October 1991, at 1 of Preamble [hereinafter *HANDBOOK*].

2. *PEOPLE WITH DISABILITIES EXPLAIN IT ALL FOR YOU: YOUR GUIDE TO THE PUBLIC ACCOMMODATIONS REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT 23-24* (Mary Johnson et. al eds., Avocado Press) (1992) [hereinafter *PEOPLE WITH DISABILITIES EXPLAIN IT*].

3. This statement, along with others later in the article are based on the author's observances and personal experiences. The author is a person with a disability and has used a wheelchair since 1986.

4. See *infra* notes 94-105.

quirements, available enforcement procedures, non-compliance remedies, and effective dates. Part III exposes the widespread inaccessibility problem that remains today more than two years after Title III went into effect. Part IV proposes implementation of local community mediation dispute resolution programs to achieve Title III's requirements faster and more efficiently.

## I. Why Was the ADA Needed?

Historically, society has tended to isolate and segregate people with disabilities.<sup>5</sup> Today, despite some improvements, disability discrimination continues to be a serious and pervasive social problem.<sup>6</sup> In addition, "[u]nlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."<sup>7</sup> According to census data, national polls and other studies, people with disabilities as a group occupy an inferior status in society and are severely disadvantaged socially, vocationally, economically and educationally.<sup>8</sup>

Federal legislation addressing discrimination against people with disabilities existed prior to the ADA.<sup>9</sup> In 1983 the U.S. Commission on Civil Rights identified twenty-nine federal statutory prohibitions of discrimination against people with disabilities.<sup>10</sup> Among these, the 1973 Rehabilitation Act was the most important.<sup>11</sup> Under Section 504<sup>12</sup> many citizens with disabilities were given an opportunity to receive an education, find full-time or part-time employment, and begin to live in a more barrier-free environment.<sup>13</sup> Although Congress did pass some additional laws which

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5. The Americans with Disabilities Act of 1990, § 2(a)(2) (codified as 42 U.S.C. § 12101 (1990)).

6. *Id.*

7. *Id.*

8. *Id.*

9. BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT, AND COMPLIANCE 15 (1990) [hereinafter ADA: A PRACTICAL AND LEGAL GUIDE].

10. *Id.*

11. Edward Hudak, *Rehabilitation Act Gets More Opportunity*, DETROIT FREE PRESS, Jan. 31, 1993, at 2H. See generally, ADA: A PRACTICAL AND LEGAL GUIDE, *supra* note 9, at 20-23 (describing Rehabilitation Act §§ 501, 503 and 504).

12. Section 504 of the Rehabilitation Act was a major conceptual foundation for the ADA. ADA: A PRACTICAL AND LEGAL GUIDE, *supra* note 9, at 21. Section 505 made these opportunities available because it prohibited discrimination against any "otherwise qualified individual with handicaps" in any program or activity that received federal financial assistance. *Id.*

13. Hudak, *supra* note 11, at 2H. The Rehabilitation Act was strong in providing services underwritten by tax dollars from federal, state and local governments. *Id.*

addressed the needs of citizens with disabilities between 1983 and the passage of the ADA in 1990,<sup>14</sup> only the Fair Housing Amendments Act of 1988 and the Air Carriers Access Act of 1986 addressed discrimination in private sector activities against people with disabilities.<sup>15</sup> The other legislative efforts applied only to the federal government, recipients of federal financial assistance, or federal contractors.<sup>16</sup>

The federal laws enacted prior to the ADA did not significantly reduce the existence of widespread discrimination against people with disabilities.<sup>17</sup> Discrimination continued unchecked in practice because of a lack of awareness of the laws that did exist,<sup>18</sup> and because federal and state law requirements lacked continuity.<sup>19</sup>

The following story<sup>20</sup> illustrates this lack of continuity. "Bill" uses a motorized wheelchair and is partially paralyzed from having polio as a child. He wants to go shopping and he has money.<sup>21</sup> The problem is getting to the store — and getting in. Bill's city has a law (Bill's state has a law about this also, as do most states) which requires that curb corners have ramps put into them. However, the law has not been enforced. There is a curb cut at the end of Bill's block, but there is no corresponding one across the street. To get a bus, Bill needs to get to the other side.

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However, the Rehabilitation Act was weak in the areas of public accommodations, telecommunications, and private-sector employment. *Id.* In October 1992 the Rehabilitation Act was amended to conform to the ADA. *Id.*

14. ADA: A PRACTICAL AND LEGAL GUIDE, *supra* note 9, at 15. For example, the Air Carriers Access Act, Voting Accessibility Act, and the Fair Housing Amendments Act. *Id.* at 23-26.

15. *Id.* at 26. The Fair Housing Amendments Act of 1988 (FHAA) was enacted to correct and expand the enforcement mechanisms in Title VIII of the Civil Rights Act of 1968 (commonly called the Fair Housing Act), which prohibits discrimination on the basis of race, religion, sex, or national origin in the sale or rental of private housing. *Id.* at 24-25. The FHAA is the first major, substantive federal civil rights law that added a new class — individuals with disabilities — to the list of people protected from discrimination. *Id.* at 25.

The Air Carriers Access Act of 1986 (ACAA) amended the Federal Aviation Act to prohibit discrimination against people with disabilities by all air carriers. *Id.* at 23. Previously, the Rehabilitation Act of 1973 Section 504 prohibited discrimination against people with disabilities only by airlines receiving federal financial assistance. *Id.*

16. *Id.* at 26.

17. *Id.*

18. PEOPLE WITH DISABILITIES EXPLAIN IT, *supra* note 2, at 5 (enforcement of these laws was also rare).

19. *Id.*

20. This story was adapted from a story appearing in the book, PEOPLE WITH DISABILITIES EXPLAIN IT, *supra* note 2, at 5-7.

21. It is not uncommon for people with disabilities to be treated rudely or ignored when attempting to purchase goods. This is due to the fact that people with disabilities are stereotypically perceived as poor. See *supra* note 3.

Luckily, Bill lives in a city that has wheelchair lifts in most of its buses. Although the Rehabilitation Act requires buses to be accessible, the transit industry fought this requirement for years, preferring to "serve" people like Bill with special van services. The problem with these services is that, unlike regular bus, subway, or commuter train services, these vans have to be scheduled 24 hours to a week in advance. Emergency replacement of a cable on a computer before a big project is due cannot be planned in advance. Emergencies arise and when they do, a person needs to run out and buy something immediately, not in a day or week.

An additional problem with special van services is that since there were more people wanting rides than places for riders, bus companies "prioritized" the rides by what they considered to be important. Doctor's appointments were considered top priority. This irritated people who use wheelchairs, because they get sick no more often than people who do not use wheelchairs. If a person merely wanted to shop, they were far down on the ride list. Consequently, people without their own vehicle, and/or people who could not climb aboard a bus, never went anywhere but to the doctor because they could not get the van.

Bill's city has buses with lifts that work, so he gets to the computer store where he needs to buy more disks so he can finish his term paper. However, when he arrives, he finds two steps and cannot get in. The steps are fairly small, but for Bill and his motorized chair they might as well total fifty. Bill cannot be lifted because in addition to his weight, motorized chairs weigh several hundred pounds. Bill does not want to risk his safety or the safety of others, so an offer to help him over the steps is an unattractive option. Bill wants what most people have — and take for granted — the ability<sup>22</sup> to go to the store and buy disks like any other ordinary college student.

Prior to 1990, no law required that the store provide an entrance for Bill or that a salesperson come out and address Bill's needs at the door. So, even with the state curb cut law and the city's requirement of lifts on buses, and even if Bill could have found a way up the second curb to the bus stop, he still could not accomplish this simple task.

Without access to goods, services, and facilities, people with disabilities will continue to be kept out of society. They will continue to be kept unemployed, poor, and welfare dependent.<sup>23</sup> With-

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22. "Ability" is not meant to imply ability in terms of being nondisabled. Bill wants the ability to go to the store as a person with a disability.

23. PEOPLE WITH DISABILITIES EXPLAIN IT, *supra* note 2, at 7-8.

out access to everyday life, society will continue to perceive people with disabilities as lifeless, sad, and captive to their disability. Without access, society will not realize that people with disabilities also want and need to go into sporting stores, high fashion or business clothing stores, courthouses, professional/technical workplaces, schools, and to their children's school conferences. Without access, society will continue to breed misconceptions about people with disabilities and the long-standing barriers against integrating people with disabilities into the social mainstream will not be removed.

Progress can be achieved. Patrisha Wright of the Disability Rights Education and Defense Fund (DREDF) states, "[in time] non-disabled people will grow accustomed to having more disabled people in their physical space."<sup>24</sup> When this happens, she believes, more barriers will fall.<sup>25</sup>

## II. Title III: Public Accommodations and Services Operated by Private Entities

The Department of Justice (DOJ) is the agency responsible for implementing Title III of the ADA. The DOJ developed and published the final rules that govern Title III, including a detailed analysis explaining its requirements.<sup>26</sup> In addition, the DOJ provides information and technical assistance concerning Title III to people with disabilities, businesses, and the affected public.<sup>27</sup> The Public Access Section of the Civil Rights Division of the DOJ is responsible for investigating and litigating complaints alleging violations of Title III of the ADA.<sup>28</sup>

Title III generally became effective on January 26, 1992, eighteen months after it was enacted.<sup>29</sup> For businesses with ten or fewer employees and gross receipts of \$500,000 or less, the Act became effective on January 26, 1993.<sup>30</sup>

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24. Mimi Hall, *Doors Open to Disabled: More Access Due Under Landmark Law*, USA TODAY, July 22, 1993, at 1A.

25. *Id.*

26. HANDBOOK, *supra* note 1, at III-2 of Title III.

27. HANDBOOK, *supra* note 1, at 1 of Introduction. The DOJ is also responsible for providing technical assistance regarding Title II of the ADA, which addresses public services. *Id.*

28. U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, PUBLIC ACCESS SECTION, STATUS REPORT: ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT TITLE III 3 (July 1993) [hereinafter ENFORCEMENT REPORT]. This Section also handles the Department's litigation under Title II of the ADA. *Id.*

29. HANDBOOK, *supra* note 1, at III-165 of Title III, Section 36.508, Analysis. See also 28 C.F.R. § 36.508(a) (1993).

30. HANDBOOK, *supra* note 1, at III-165 of Title III, Section 36.508, Analysis. 28 C.F.R. § 36.508(b)(1) did not allow any civil action to be brought under section 302 of

Title III prohibits discrimination on the basis of disability in public accommodations.<sup>31</sup> It mandates that places of public accommodation and commercial facilities<sup>32</sup> be designed, constructed, and altered in compliance with its accessibility standards.<sup>33</sup> Title III also requires that examinations or courses related to licensing or certification for professional or trade purposes be accessible to persons with disabilities.<sup>34</sup> Over five million private establishments are places of public accommodation.<sup>35</sup> These places include restaurants, hotels, theaters, convention centers, retail stores, shopping centers, dry cleaners, laundromats, pharmacies, lawyers' offices, hospitals, museums, libraries, parks, zoos, day care centers, and bowling alleys.<sup>36</sup> Essentially, most of the places people go in their everyday lives are public accommodations.

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the ADA against businesses with 25 or fewer employees and gross receipts of \$1,000,000 or less before July 26, 1992. *Id.* See also 28 C.F.R. § 36.508(b) (1993).

31. The statutory definition of "public accommodation" in section 301(7) of the ADA has been adapted to include the term "place of public accommodation". HANDBOOK, *supra* note 1, at III-26 of Title III, Section 36.104, Analysis. The final rule defines "place of accommodation" as a facility, operated by a private entity, whose operations affect commerce and fall within one of 12 specified categories. *Id.* The final rule defines "public accommodation" as a private entity that owns, leases (or leases to), or operates a place of public accommodation. *Id.* This is consistent with section 302(a) of the ADA, which places the obligation not to discriminate on any person who owns, leases (or leases to), or operates a place of public accommodation. *Id.* at III-26-27.

The definition of public accommodation incorporates the 12 categories of facilities represented in the statutory definition of public accommodation in section 301(7) of the ADA: 1) Places of lodging; 2) Establishments serving food or drink; 3) Places of exhibition or entertainment; 4) Places of public gathering; 5) Sales or rental establishments; 6) Service establishments; 7) Stations used for specified public transportation; 8) Places of public display or collection; 9) Places of recreation; 10) Places of education; 11) Social service center establishments; 12) Places of exercise or recreation. *Id.* at III-27. The list of categories is exhaustive, however the representative examples of facilities within each category are not. *Id.* See also The Americans with Disabilities Act of 1990 § 301(7) (codified as 42 U.S.C. 12181 § (1990)).

32. Commercial facilities are defined as nonresidential facilities, whose operations affect commerce, that are intended for nonresidential use by a private entity, and are not covered or exempted from coverage under the Fair Housing Act of 1968. 28 C.F.R. § 36.104 (1993). This would include office buildings, factories, and warehouses. U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, TITLE III HIGHLIGHTS, 2 (1991) [hereinafter HIGHLIGHTS]. See also The Americans with Disabilities Act of 1990 § 301(2), 42 U.S.C. § 12181, (1990).

33. HANDBOOK, *supra* note 1, at III-9 of Title III, Section 36.101, Analysis. See also The Americans with Disabilities Act of 1990 § 302(a) (codified as 42 U.S.C. § 12182 (1990)).

34. HANDBOOK, *supra* note 1, at III-9 of Title III, Section 36.101, Analysis. See also The Americans with Disabilities Act of 1990 § 302(a) (codified as 42 U.S.C. § 12182 (1990)). Title III does not cover entities controlled by religious organizations, including places of worship, or private clubs. HIGHLIGHTS, *supra* note 32, at 2.

35. HIGHLIGHTS, *supra* note 32, at 2.

36. *Id.*

The ADA also requires the removal of "architectural barriers, and communication barriers that are structural in nature, in existing facilities, . . . where such removal is readily achievable."<sup>37</sup> "Readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense."<sup>38</sup> The rules regarding removal of barriers in existing facilities,<sup>39</sup> alternatives to barrier removal,<sup>40</sup> seating in assembly areas,<sup>41</sup> and transportation provided by public accommodations,<sup>42</sup> only cover those barriers that are readily removable.<sup>43</sup> Congress intended that a wide range of factors be considered in determining whether an action is readily achievable.<sup>44</sup> Consequently, the definition lists several factors that should be considered in any particular circumstance.

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37. Americans with Disabilities Act of 1990 § 302(b)(2)(A)(iv) (codified as 42 U.S.C. § 12182 (1990)).

38. 28 C.F.R. § 36.104 (1993). This definition follows the statutory definition found in section 301(9) of the ADA. HANDBOOK, *supra* note 1, at III-34 of Title III, Section 36.104, Analysis. Examples of readily achievable steps to remove barriers include, but are not limited to, the following: 1) installing ramps; 2) making curb cuts in sidewalks and entrances; 3) repositioning shelves; 4) rearranging tables, chairs, vending machines, display racks, and other furniture; 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 raised toilet seats; 16) installing a full length bathroom mirror; 17) repositioning the paper towel dispenser in the 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 21) installing vehicle hand controls. 28 C.F.R. § 36.304(b) (1993).

Inclusion of a measure on this list does not mean the measure will be readily achievable in all circumstances, rather what is readily achievable is to be determined on a case-by-case basis in light of the particular circumstances presented and the factors listed in the definition on readily achievable. HANDBOOK, *supra* note 1\*, at III-87 of Title III, Section 36.304 Analysis; *See infra* note 44 (listing the factors that should be considered when determining what is readily achievable).

39. 28 C.F.R. § 36.304(a) (1993).

40. *Id.*

41. *Id.*

42. 28 C.F.R. § 36.310(b) (1993).

43. HANDBOOK, *supra* note 1, at III-35 of Title III, Section 36.104, Analysis.

44. HANDBOOK, *supra* note 1, at III-35 of Title III, Section 36.104, Analysis. The list of factors included in the definition comes from section 301(9) of the ADA. *Id.* The factors to be considered include: 1) the nature and cost of the action; 2) the overall financial resources of the site or sites involved in the action, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, including crime prevention measures, or the impact of the action otherwise 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,

The ADA balances the concern of guaranteeing access to people with disabilities with the cost concerns of businesses and other private entities by setting a lower standard for barrier removal in existing facilities than for new construction and alterations.<sup>45</sup> This is based on the assumption that access can be incorporated into the initial stages of design and construction more conveniently and economically.<sup>46</sup> People with disabilities want to participate in life's opportunities and they want businesses and other private entities to make a real effort to let that happen, but they do not want to cause financial ruin to businesses.<sup>47</sup>

Since available resources for barrier removal may be inadequate to remove all barriers at any given time, Section 36.304(c) of the final rules recommends priorities for public accommodations in removing barriers in existing facilities.<sup>48</sup> The highest priority is placed on measures that will allow people with disabilities to physically enter a place of public accommodation.<sup>49</sup> Next, a place of public accommodation should take measures that provide access to areas where goods and services are available to the public.<sup>50</sup> Then,

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and location of its facilities; and 5) if applicable, the type of operation or operations of any parent corporation or entity, including composition, structure, and functions of the workforce of the parent corporation or entity. 28 C.F.R. § 36.104 (1993). The list of factors in this section is intended to make clear that, in some instances, resources beyond reach of the local facility, where the barrier must be removed, may be relevant in determining if an action is readily achievable. HANDBOOK, *supra* note 1, at III-35 of Title III, Section 36.104, Analysis.

45. HANDBOOK, *supra* note 1, at III-85-86 of Title III, Section 36.304, Analysis. See, 28 C.F.R. §§ 36.401-36.406, for information regarding regulation for new construction and alterations.

46. *Id.*

47. PEOPLE WITH DISABILITIES EXPLAIN IT, *supra* note 2, at 27-28.

48. HANDBOOK, *supra* note 1, at III-89 of Title III, Section 36.304, Analysis. The final rules provide that the priorities are no longer mandatory. *Id.* This reflects the concern "that mandatory priorities would increase the likelihood of litigation and inappropriately reduce the discretion of public accommodations to determine the most effective mix of barrier removal measures to undertake in particular circumstances." *Id.*

49. HANDBOOK, *supra* note 1, at III-90 of Title III, Section 36.304, Analysis. 28 C.F.R. § 36.304(c)(1) provides that "[f]irst, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces." 28 C.F.R. § 36.304(c)(1) (1993).

50. HANDBOOK, *supra* note 1, at III-90 of Title III, Section 36.304, Analysis. 28 C.F.R. § 36.304(c)(2) provides that:

[s]econd, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, providing brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.

28 C.F.R. § 36.304(c)(2) (1993).



priority is placed on measures to provide access to restrooms.<sup>51</sup> Last, priority is placed on the remaining measures required to remove other existing barriers.<sup>52</sup>

The obligation to engage in readily achievable barrier removal is a continuing one.<sup>53</sup> Barrier removal not readily achievable initially may later be required because of a change of circumstances.<sup>54</sup> The DOJ did not explicitly require any annual assessment or self-evaluation.<sup>55</sup> Instead, it only urges public accommodations to establish procedures for ongoing assessment of their compliance with the ADA, and notes that serious efforts to do so may reduce the threat of litigation and save resources by identifying the most efficient means of providing required access.<sup>56</sup>

If a public accommodation demonstrates that barrier removal is not readily achievable, the establishment must "make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, if those methods are readily achievable."<sup>57</sup> The final regulation provides several examples of barrier removal alternatives.<sup>58</sup> For instance, a public accommodation must, if readily achievable, provide curb service or home delivery, retrieve merchandise from inaccessible racks or shelves, and relocate activities to accessible locations.<sup>59</sup>

The ADA has several enforcement procedures. Individuals who are being subjected to disability discrimination<sup>60</sup> may initiate private lawsuits for preventive relief, which may include "an application for a permanent or temporary injunction, restraining order, or other order."<sup>61</sup> Injunctive relief "shall include an order to alter facilities to make such facilities readily accessible to and useable by

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51. 28 C.F.R. § 36.304(c)(3) provides that "[t]hird, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars." 28 C.F.R. 36.304(c)(3) (1993).

52. 28 C.F.R. § 36.304(c)(4) provides that "[f]ourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, advantages, or accommodations of a place of public accommodation." 28 C.F.R. 36.304(c)(4) (1993).

53. HANDBOOK, *supra* note 1, at III-88 of Title III, Section 36.304, Analysis.

54. *Id.*

55. *Id.*

56. *Id.* at III-88-89.

57. 28 C.F.R. 36.305(a) (1993).

58. 28 C.F.R. 36.305(b) (1993).

59. *Id.*

60. Also, a person who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of Section 303 of the ADA, which requires new construction and alterations to be readily accessible and useable by persons with disabilities, may initiate a private suit. 28 C.F.R. § 36.501(a) (1993).

61. 28 C.F.R. § 36.501(a) (1993).

individuals with disabilities to the extent required by the Act."<sup>62</sup> No monetary damage award is available in private lawsuits.<sup>63</sup>

Alternatively, the United States Attorney General has the power to investigate alleged violations of Title III.<sup>64</sup> This can be initiated in two ways. Individuals who believe they have been discriminated against under Title III "may request the Department to institute an investigation"<sup>65</sup> or the Attorney General may initiate a compliance review of a suspected violation.<sup>66</sup> Following a compliance review or investigation, or at the discretion of the Attorney General, the Attorney General may commence a civil action in any U.S. district court.<sup>67</sup> However, before commencing the suit the DOJ must have reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination in violation of the ADA and such discrimination must raise an issue of general public importance.<sup>68</sup>

In a suit by the Attorney General the court may grant any equitable relief it considers appropriate.<sup>69</sup> In addition, the court may order other relief it considers appropriate, including monetary damages, when requested by the Attorney General.<sup>70</sup> Also, the court may vindicate the public interest by assessing a civil penalty against a covered entity in an amount not exceeding \$50,000 for a

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62. 28 C.F.R. § 36.501(b) (1993).

63. HIGHLIGHTS, *supra* note 32, at 10.

64. 28 C.F.R. § 36.502(a) (1993).

65. 28 C.F.R. § 36.502(b) (1993).

66. 28 C.F.R. § 36.502(c) (1993). The ADA does not establish a comprehensive administrative enforcement mechanism for investigation and resolution of all complaints received. HANDBOOK, *supra* note 1, at III-158 of Title III, Section 36.502 Analysis. The legislative history notes that investigation of alleged violations and compliance reviews are essential to effective enforcement of the Title III. *Id.* Congress placed the burden of such activities on the Attorney General by establishing that such officer is expected to engage in active enforcement and to allocate sufficient resources to carry out this responsibility. *Id.*

67. 28 C.F.R. § 36.503 (1993). The Attorney General has delegated enforcement authority under the ADA to the Assistant Attorney General for Civil Rights. HANDBOOK, *supra* note 1, at III-159 of Title III, Section 36.503, Analysis.

68. 28 C.F.R. § 36.503 (1993).

69. According to final regulation section 36.504(1) this may include: i) granting temporary, preliminary, or permanent relief; ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and iii) making facilities accessible to and useable by persons with disabilities. 28 C.F.R. § 36.504(1) (1993).

70. 28 C.F.R. § 36.504(a)(2) (1993). Section 36.504(c) makes it clear that the terms "monetary damages" and "other relief" do not include punitive damages. HANDBOOK, *supra* note 1, at III-160 of Title III, Section 36.504, Analysis. The terms do include all forms of compensatory damages, including out-of-pocket expenses and damages for pain and suffering. *Id.*

first violation and not exceeding \$100,000 for a second violation.<sup>71</sup> Courts and agencies are authorized to award reasonable attorney's fees, including litigation expenses and costs.<sup>72</sup> In addition, Section 36.506 encourages "the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration" to resolve disputes arising under the ADA.<sup>73</sup>

### III. Access Is Still a Problem

As of September 23, 1993, the Public Access Section of the DOJ had received only 1,727 Title III complaints; 1,232 complaints have been opened for investigation and 284 complaints have been closed.<sup>74</sup> Sixty-two per cent concerned barrier removal in existing facilities.<sup>75</sup>

By July 1993, the DOJ was involved in only one lawsuit involving an alleged failure to undertake a readily achievable barrier removal.<sup>76</sup> Also as of July 1993, the DOJ had entered into three formal settlement agreements<sup>77</sup> under Title III that involved barrier removal.<sup>78</sup> In addition, the DOJ has resolved several barrier

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71. HANDBOOK, *supra* note 1, at III-160 of Title III, Section 36.504, Analysis. See also 28 C.F.R. § 36.504(a)(3) (1993).

72. HANDBOOK, *supra* note 1, III-162 of Title III, Section 36.505, Analysis. See also 28 C.F.R. § 36.505 (1993).

73. 28 C.F.R. § 36.506 (1993). See also The Americans with Disabilities Act of 1990 § 513 (codified as 42 U.S.C. 12212 (1990)).

74. U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, PUBLIC ACCESS SECTION, STATUS OF COMPLAINTS AS OF 9-23-93.

75. ENFORCEMENT REPORT, *supra* note 28, at 4 (bar graph).

76. ENFORCEMENT REPORT, *supra* note 28, at 5. The case is *Pinnock v. International House of Pancakes Franchisee*, No. 92-1370-R, 1993 U.S. Dist. LEXIS 16399, (S. Dist. of Ca. Nov. 8, 1993) which held that the public accommodations provisions of the ADA are within Congress' Commerce Clause power, are not unconstitutionally vague or retroactive, and do not unconstitutionally delegate Congress' authority or violate the Takings Clause. 62 U.S.L.W. 2342.

77. A formal settlement agreement is in writing, is signed by the DOJ and the respondent, and involves provisions for enforcement, but involves no court action. ENFORCEMENT REPORT, *supra* note 28, at 6.

78. *Id.*; see also U.S. DEPARTMENT OF JUSTICE, PRESS RELEASE, July 15, 1993. The first settlement agreement "resolved a complaint that a branch of the Municipal Credit Union in New York City could only be entered by steps and was therefore inaccessible to people who use wheelchairs." ENFORCEMENT REPORT, *supra* note 28, at 6. It was alleged that the Credit Union failed to take steps to remove the barriers to access and that such steps were readily achievable. *Id.* "The Credit Union agreed to install a permanent ramp at the entrance, to notify its customers of the change, post appropriate signs, and instruct staff to provide any requested assistance to individuals with disabilities." *Id.*

The other formal settlement agreement was reached with the Inter-Continental Hotel in New York. *Id.* Over the next five years, the 691 room hotel will make numerous changes, including installing ramps at its front entrance and lobby restaurant, modifying several public restrooms, installing a platform lift to the main

removal complaints informally, without litigation or a formal settlement.<sup>79</sup> These figures show that some access disputes have been identified and successfully resolved. Thus, the ADA and the work of the DOJ have gradually improved access for people with disabilities.<sup>80</sup>

Nonetheless, the DOJ's efforts are not far reaching enough and much remains to be done. Nearly four years after the ADA became federal law and over two years since Title III became effective with respect to most businesses, many public places are still not in compliance.<sup>81</sup> For instance, when the Utah Assistant Attorney General, who uses a wheelchair, went to Chicago in August, 1993, he had to call six "major" restaurants before he found one that was accessible by wheelchair.<sup>82</sup> A trip through nearly any community today will expose the many barriers faced by people who use wheelchairs. It is common to find raised entryway thresholds, steps, or an absence of ramps at store or building entrances; doors are often in awkward places where a wheelchair user can not simultaneously open the door and maneuver a wheelchair inside; parking spaces are not wide enough so that wheelchair lifts can be used; check out lanes and aisles between store goods are too narrow to fit a wheel-

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meeting room and ballroom. U.S. DEPARTMENT OF JUSTICE, PRESS RELEASE, July 15, 1993. The hotel will also alter 21 guest rooms of several types and price ranges to make them accessible to people with mobility impairments and equip those rooms and an additional 14 rooms with auxiliary aids for people who are deaf or hard of hearing. *Id.* Also, the hotel will change reservation and room assignment policies to assure that accessible rooms are available for those who request them. *Id.*

In July 26, 1993 the DOJ announced that it formally settled with Sardi's Restaurant in New York, New York. U.S. DEPARTMENT OF JUSTICE, PRESS RELEASE, July 26, 1993. The agreement resolved a complaint which "alleged that the restaurant's restrooms were wholly inaccessible to individuals who use wheelchairs and other mobility devices." *Id.* at 3. Sardi's agreed to install a unisex accessible restroom and to install appropriate signage indicating the restroom's location. *Id.*

79. ENFORCEMENT REPORT, *supra* note 28, at 6. For example, a private school made changes to the buildings where its high school graduation ceremony and reception were being held. *Id.* Changes included providing a ramp and modifying its restrooms. *Id.* These actions were taken after a complaint was filed by a person who uses a wheelchair and wanted to attend a relative's graduation from the school. *Id.*

80. Interview with Elin Ohlsson, Metropolitan Center for Independent Living (Nov. 16, 1993). For example, Ms. Ohlsson has noticed that more bathrooms now meet the requirements of the ADA. *Id.*

81. Peter S. Greenburg, *Disabilities Act Still Virtually Toothless*, THE PLAIN DEALER, May 16, 1993, at 81; See also Laura Duncan, *ADA Enters Era of Enforcement*, CHI. DAILY L. BULL., August 19, 1993, at 1 (Utah Assistant Attorney General Stephen Mikata speaks about how many companies have failed to put the ADA's words of integration, inclusion, and accommodation into action); Alexander Reid, *Disabilities Act Widely Ignored, Many Communities Reported Not Complying*, BOSTON GLOBE, Feb. 21, 1993, at 1.

82. Duncan, *supra* note 81.

chair.<sup>83</sup> Dennis Cannon of the federal Architectural and Transportation Barriers Compliance Review Board must still tell people "[not to] assume when you go to a new city that you're going to be able to get around."<sup>84</sup> In addition, even though a public place claims to be accessible, a person with a disability can never be certain what that means. For example, to a person who uses a wheelchair, an entrance ramp does not guarantee access once he/she are inside.<sup>85</sup> To meet this concern, a 24-hour Barrier Awareness special-events hotline was set up in the Philadelphia area to let people know whether they can *really* get in and around certain establishments.<sup>86</sup>

Several possible reasons exist which may explain why business and public places are not complying with the ADA and removing barriers to their facilities. Since removal of barriers in existing facilities is only a small part of the ADA, and even of Title III,<sup>87</sup> these requirements can easily be overlooked. Also, many businesses are ignorant of what the ADA requires and whether it applies to them.<sup>88</sup> Other businesses are waiting to see what the courts require before they make changes.<sup>89</sup> Still others will not make changes until they are forced.<sup>90</sup> In addition, the ADA lacks an organized strict enforcement mechanism to police compliance of businesses or communities. Consequently, to a great extent compliance must be voluntary.<sup>91</sup>

Furthermore, although the director of the DOJ's ADA office stated that the department is going to become more proactive, the DOJ has nonetheless functioned as a complaint-driven enforcement

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83. See *supra* note 3; see also Stephanie Grace, *Despite Disability Act, Some Doors Still Closed*, PHILADELPHIA INQUIRER, Jan. 24, 1993, at G1; Greenburg, *supra* note 81.

84. Hall, *supra* note 24.

85. Many questions are left unanswered, such as: Are the interior doors and aisles or walkways wide enough? Are the aisles or walkways clear or are they blocked by obstacles, i.e., boxes or display racks? Is there enough space to turn around? Is there access to the bathroom? If so, is there enough room to use the facilities once they are inside?

86. Gloria A. Hoffman, *Disabled Can Dial for Info on Access: Does a Building Have Ramps? Are All Areas Accessible? A 24-Hour Hotline Can Tell You*, PHILADELPHIA INQUIRER, Oct. 3, 1993, at MD1.

87. Title III also encompasses requirements applicable to the design, construction, and alteration of buildings and facilities. See *supra* note 33 and accompanying text. In addition, Title III also regulates professional and trade examinations and courses. See *supra* note 34 and accompanying text.

88. Grace, *supra* note 83.

89. *Id.*

90. T.J. Howard, *Fear Over Disability Law Eases, But Work Remains*, CHI. TRIB., July 11, 1993, at 1C (quoting John Wodatch, director of the DOJ's ADA office).

91. Reid, *supra* note 81.

agency.<sup>92</sup> Reliance on complaints hinders compliance enforcement because many people with disabilities do not complain. In 1990 there were 1,411,000 people in the United States using wheelchairs.<sup>93</sup> Note that people with other mobility impairments, such as arthritis, who encounter the same or similar inaccessibility problems are not included in this figure. That only 1,727 Title III complaints have been filed<sup>94</sup> does not signify that only these people suffered discrimination. Many people with disabilities are so used to discrimination in the form of inaccessibility that they just accept it or believe they deserve no better.<sup>95</sup>

The acceptance of inaccessibility can easily go unnoticed to an unaffected observer. The disabled community quickly discovers and seeks out establishments that are accessible, confining their activities to only those places where they know they can get in and be served.<sup>96</sup> Thus, people unaffected by inaccessibility remain unaware of the scope and consequences of inaccessibility. One can argue that this is not a pressing problem: if one store<sup>97</sup> is inaccessible, another one will be accessible and the disabled can go there. However, the "other" store may be farther away and thus more difficult to reach,<sup>98</sup> and the goods may be more expensive or of lesser quality. As a result, people with disabilities have fewer available choices than do people without physical disabilities. This is segregation and our society should not approve or accept it.

For those people not able to quietly accept inaccessibility, the enforcement process itself often prevents them from filing a complaint. To file a complaint one must find the address of the Public Access Section of the DOJ and then write a letter.<sup>99</sup> This may seem

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92. Howard, *supra* note 90.

93. Telephone interview with Sharon Ramirez, Public Affairs Specialist, National Center for Health Statistics, Hyattsville, MD (Nov. 15, 1993).

94. See *supra* note 72 and accompanying text.

95. See *supra* note 4.

96. Interview with Elin Ohlsson, Metropolitan Center for Independent Living (Nov. 16, 1993). Ms. Ohlsson notes that because there are so many discrimination issues — a person could fight full-time and never get anywhere — one must conserve energy and choose one's battles. *Id.* Continuously breaking access barriers gets tiring. *Id.*

97. Besides a store selling goods, this analogy also applies to service providers such as hair salons, automotive repair shops, and comedy clubs.

98. Recall Bill's transportation difficulties, *supra* § 1. Also, if one has no transportation besides using their wheelchair (which is like walking), and the neighborhood market is inaccessible they are essentially left with no market. Even if one drives one's own vehicle, the "other" store may be farther and thus more difficult to reach.

99. ENFORCEMENT REPORT, *supra* note 28, at 3; See also 28 C.F.R. 36.502 (1993). The letter must contain the complainant's full name and address, the full name and address of the place of accommodation that allegedly discriminated, a description of the discriminatory act(s), and the dates. ADA Information Line (202) 514-0301 (re-

relatively easy, but when a person has been victimized even the most simple process can be overwhelming.<sup>100</sup> Alternatively, an aggrieved party has the option to file a private lawsuit against the public accommodation.<sup>101</sup> This is a lengthy and formal procedure. Furthermore, a person needs money to obtain<sup>102</sup> and hire a lawyer. Legal aid services do not necessarily offer a viable solution. Since the ADA provides for attorney's fees, ADA cases are referred to private attorneys.<sup>103</sup>

The DOJ is trying to solve the problem of inaccessibility. For example, the DOJ's ADA office grew from one attorney to a staff of ten by July 1993, and the office is expected to hire five more attorneys in the fall of 1994.<sup>104</sup> Enforcement efforts are being increased.<sup>105</sup> However, the large and important task of making the millions of existing public accommodations accessible to all people can be done faster and more efficiently if community dispute resolution processes are utilized on a regular and organized basis.

#### IV. Mediation: Strategy for More Efficient and Effective Use of Title III

The ADA is a civil rights law not a building code.<sup>106</sup> Therefore, it does not provide guidelines that are as definitive as those used in building codes.<sup>107</sup> The ADA uses the terms "readily achievable" and "undue burden" to tell building owners what modifica-

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cording) (Sep. 24, 1993). See also text on pp. 609-611 for discussion of the ADA's enforcement procedures.

100. See *supra* note 3.

101. 28 C.F.R. § 36.503 (1993). See also *supra* text accompanying notes 53-73 for discussion of the ADA's enforcement procedures.

102. In reality, since people with disabilities often receive low or fixed incomes, they do not have the economic power to "shop" the legal marketplace to find an able and willing attorney. See Norman K. Janes, *The Role of Legal Services Programs in Establishing and Operating Mediation Programs for Poor People*, 18 CLEARINGHOUSE REV. 520, 522 (Oct. 1984).

103. Luther Grandquist, from Minneapolis Legal Aid, told me this was the procedure. However, he recalled only one physical accessibility issue coming to his attention in the last two years. Telephone interview (Oct. 1, 1993).

104. Howard, *supra* note 90.

105. *Id.* The DOJ stressed education and technical assistance efforts during the first year. *Id.* See also Janet Reno, *Reno: Disability Law Will Be Enforced*, USA TODAY, July 26, 1993, at 9A.

106. Howard, *supra* note 90.

107. The Architectural and Transportation Barriers Compliance Board (ATBCB) has developed ADA Accessibility Guidelines (commonly referred to as ADAAG) which are the DOJ's standards for determining accessibility to buildings and facilities. Bill Conner, *The ADA is a building code*, TCI, Mar. 1993, at 59. The guidelines are applicable to the design, construction, and alteration of such buildings as required by regulations issued under the ADA. ADA ACCESSIBILITY GUIDELINES, reprinted in HANDBOOK, *supra* note 1, at 1 of Appendix B.

tions they must make.<sup>108</sup> Thus, while it may be clear that modifications have to be made, what is readily achievable is subject to interpretation in each individual case. Certainty is sacrificed for a flexible standard.

The language of the ADA and its regulations "encourage" the use of alternative means of dispute resolution.<sup>109</sup> The DOJ does negotiate with disputants first, hoping to avoid litigation and obtain an informal agreement.<sup>110</sup> For the most part, however, this is where the encouragement ends. As a result, alternative dispute resolution mechanisms are not currently being utilized effectively because they are not available on a widespread basis to people with inaccessibility problems.

In July 1993, the DOJ awarded a grant to the Community Board Program to "oversee a model project designed to develop effective mediation techniques to resolve ADA complaints."<sup>111</sup> Experienced volunteer mediators will be trained in the ADA and will handle Title III ADA cases in San Francisco, Chicago, Boulder, Boston, and Atlanta.<sup>112</sup> These cities were chosen for the project because they each have well-established mediation programs in operation.<sup>113</sup> The Community Board Program will document the effectiveness of the ADA trained mediators in helping businesses and persons with disabilities resolve complaints.<sup>114</sup>

One difficulty with this ADA project is that currently it is only at an organizational stage. It takes a great deal of time to simultaneously create and coordinate five programs that are scattered across the country. As of January 5, 1993, trained mediators were expected to start providing services in Atlanta and Chicago.<sup>115</sup> Mediators for the other cities will be trained in late January and

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108. Howard, *supra* note 90. A wide range of factors are relevant when determining what is readily achievable. See *supra* note 44 and accompanying text. See *supra* notes 38-44 and accompanying text for further discussion defining what is readily achievable.

109. See, The Americans with Disabilities Act of 1990 § 513 (codified as 42 U.S.C. § 12212 (1990) and 28 C.F.R. 36.506 (1990)).

110. ENFORCEMENT REPORT, *supra* note 28, at 4.

111. DEPARTMENT OF JUSTICE, PRESS RELEASE, July 26, 1993.

112. Telephone Interview, Terry Amsler, Executive Director of the Community Board Program and coordinator of the ADA model project (January 6, 1994) [hereinafter Amsler].

113. *Id.*

114. DEPARTMENT OF JUSTICE, PRESS RELEASE, July 26, 1993.

115. Amsler, *supra* note 112. In Chicago, 10 mediators were trained. Since each person was already an experienced mediator, the one day training focused on the provisions of the ADA and the issues that surround it. Telephone interview with Jon Weiss, Executive Director of the Center for Conflict Resolution, Chicago, Illinois (January 7, 1994).



February.<sup>116</sup> Since no ADA cases have yet been mediated under this project, specific policies and practices have not been formalized. For example, the DOJ is expected to start referring cases to Chicago sometime in February, 1994.<sup>117</sup> It is presently unknown whether this will be the sole method of acquiring cases.<sup>118</sup> If this project succeeds, it is likely that, in the future, local disability service organizations will refer cases to the program or people will bring their disputes to the program directly.<sup>119</sup>

Another difficulty with this ADA project is its narrow scope. While the project is innovative and has a high potential for successfully resolving inaccessibility disputes, only five cities will reap its benefits. While this project develops, other areas of the nation will lay idle. For example, there are many available mediation resources in the Minneapolis, Minnesota area.<sup>120</sup> These centers have not been called upon to resolve barrier removal disputes.<sup>121</sup>

Failure to take widespread action in this area threatens the goals of the ADA. The positive efforts of the DOJ and the successful outcomes reached thus far have not had wide reaching effects on the majority of people with disabilities who still repeatedly confront inaccessibility. Since inaccessibility is a national and local problem, action needs to be taken at both levels.

Title III would better address issues concerning barrier removal in existing facilities if, in conjunction with the DOJ's current enforcement activities, local community mediation dispute resolution programs are expanded<sup>122</sup> to handle and solicit disputes aris-

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. I received a listing of 29 different mediation resources that exist in Minnesota. Of those programs, 10 were located in St. Paul or Minneapolis. Included in this list were community mediation programs, victim-offender mediation programs, government agencies/university programs, divorce and child custody mediation programs, and business alternative dispute resolution programs. The list expressly stated that it was not a complete listing of all Minnesota alternative dispute resolution programs. My research revealed three other mediation resources in St. Paul and Minneapolis; Dispute Resolution Services, Mediation Associates, and Peacemaker.

121. I spoke with 8 of the 13 previously mentioned programs, *supra* note 120, which were subject matter appropriate and located in St. Paul or Minneapolis. Of those programs, none had handled any disputes, involving removal of barriers in existing facilities, which would be regulated under Title III of the ADA. However, 6 expressed an interest and willingness to enter this area.

122. Availability of mediation for Title III complaints, specifically those involving the removal of barriers in existing facilities, should mean an *expansion* of resources for clients. See Janes, *supra* note 102, at 524. Resources will not be expanded if energies and financial resources now going toward legal advocacy are *converted* into resources for mediation. *Id.*

ing under the ADA. Essentially, what is now missing is an understanding of the ADA's requirements and the depth and effect of inaccessibility on people with disabilities. The DOJ could *effectively* encourage the use of alternative dispute resolution mechanisms by simply informing community mediation programs that the education necessary to implement an ADA Title III dispute resolution program is available. The DOJ could then supply interested community mediation programs with materials regarding ADA requirements. Information about the impact of inaccessibility could be provided by the disabled community. Once people with disabilities are offered an easily accessed resolution process more accessibility problems will be identified and resolved.

Mediation is the most appropriate alternative dispute resolution mechanism. Mediation "is the intervention in a conflict by a neutral third party who assists the conflicting parties in managing or resolving their dispute."<sup>123</sup> The third party mediator assists the parties as they arrive at a consensual agreement regarding how the conflict will be resolved.<sup>124</sup> Mediators do not force or coerce settlement, instead they facilitate "face-to-face discussion, problem solving, and the development of alternative solutions."<sup>125</sup> The object of mediation is to find a solution acceptable to all parties, not to assign blame by determining who was right and who was wrong.<sup>126</sup>

Another popular and widely used alternative dispute resolution mechanism is arbitration. Arbitration is defined as the submission of a dispute to one or more impartial persons for a final and binding decision.<sup>127</sup> Compared to mediation, arbitration is a more formal and defined resolution technique. This is demonstrated by the following attributes of arbitration: arbitrators can address only those issues or questions which the parties jointly agree to submit, disputants submit evidence and have witnesses, arbitrators cannot meet privately with a disputant, arbitrators have authority to make decisions that are final, and arbitration determines guilt and innocence.<sup>128</sup> Thus, even though arbitration is less formal than litigation, the informal and mutual participatory nature of mediation makes it the most attractive alternative.

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123. KAREN G. DUFFY ET AL., *COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS* 22 (1991).

124. *Id.*

125. *Id.*

126. Janes, *supra* note 102, at 520.

127. AMERICAN ARBITRATION ASSOCIATION, *A GUIDE TO ARBITRATION*, 4 (1992).

128. Barbara A. Phillips & Anthony C. Piazza, *The Role of Mediation in Public Interest Disputes*, 34 *HASTINGS L.J.* 1231 (1983).

A typical mediation session resembles what follows. Any party involved in the dispute can initiate the mediation process by contacting the other parties themselves or through a mediation center and suggesting the use of a neutral<sup>129</sup> mediator to hear the dispute.<sup>130</sup> The voluntary mediation session is scheduled at a convenient meeting place and time, with a local certified dispute mediator present.<sup>131</sup> Mediators often begin by explaining the process of mediation, which is often a new approach to problem-solving for disputants.<sup>132</sup> Each person involved in the dispute has an opportunity to explain, without interruption, the problem from his/her point of view.<sup>133</sup> The mediator asks probing questions and uses active listening techniques to help define issues and identify underlying interests.<sup>134</sup> Through this process, all facts of the dispute are aired and clarified so the disputants can begin to see the dispute in more than one light, thus increasing the likelihood of a reasonable compromise or plan.<sup>135</sup> The mediator assists the parties toward their own solution and they have the option of requesting suggested solutions from the mediator.<sup>136</sup> After reaching a settlement, the parties participate with the mediator in drafting a settlement agreement which will be signed, witnessed, and dated.<sup>137</sup> Often, the community mediation dispute resolution program will periodically make follow-up telephone calls to check with the disputants and assure compliance.<sup>138</sup>

Community mediation dispute resolution programs are easily accessed. In 1990, there were already over 300 neighborhood and community dispute resolution centers existing throughout the country.<sup>139</sup> Each of these centers has the potential to resolve Title

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129. Mediator neutrality is considered an important component of procedural fairness. DUFFY, *supra* note 123, at 113. The critical component, however, might really be perceived impartially. *Id.* Perceived neutrality may often be beyond the mediator's control because any "neutral action can be perceived by both sides as indicating favor for the other party." *Id.* at 114. Thus, to be effective, a mediator must be concerned about the outcomes to both sides and must demonstrate that concern to the disputants. *Id.*

130. Kenneth R. Feinberg, *A Procedure for the Voluntary Mediation of Disputes*, 455 PLI/LIT 577, 578 (Mar. - Apr. 1993).

131. BUREAU OF NATIONAL AFFAIRS, INC., *RESOLVING DISPUTES WITHOUT LITIGATION* 16 (1985).

132. James R. Coben, *Community-Based Dispute Resolution* 12 HAMLINE J. PUB. L. & POL'Y 13, 17 (1991).

133. BUREAU OF NATIONAL AFFAIRS, *supra* note 131, at 16.

134. Coben, *supra* note 132.

135. BUREAU OF NATIONAL AFFAIRS, *supra* note 131, at 16.

136. *Id.*

137. *Id.*

138. *Id.*

139. Coben, *supra* note 132, at 13. The 1990 ABA program directory lists 354 organizations, but not all are community-based centers. *Id.* at n. 7. Included are 21

III complaints. Initiative on the part of the aggrieved will still be necessary; however, a local and thus more familiar dispute resolution process will make it less intimidating for people to come forward with complaints. Intimidation will be further decreased because community dispute resolution programs offer disputants convenient and neutral meeting places, flexible meeting times, and low cost or free services.<sup>140</sup> These factors are incredibly important to people with limited mobility and/or low or fixed incomes because such factors affect whether or not these people can or will use the services.<sup>141</sup>

Most community dispute resolution center clients are poor or lower-middle class, and many are from minority groups.<sup>142</sup> For example, in 1990, fifty-five percent of all clients using the Dispute Resolution Center in St. Paul, Minnesota earned annual incomes of \$15,000 or less.<sup>143</sup> Many community dispute resolution centers offer clients free services.<sup>144</sup> These centers rely on state or private foundation funding, volunteer mediators, or affiliations with courts or public agencies.<sup>145</sup>

Increasingly, community dispute resolution centers must rely on user fees.<sup>146</sup> Where user fees are required, parties can decide before or during the mediation how such costs will be allocated.<sup>147</sup> In the context of a dispute regarding barrier removal there will often be a severe economic imbalance between the person with a disability and the business owner. Since the complainant, i.e., the person with a disability, will most often have less economic power,<sup>148</sup> it is critical that fees for barrier removal disputes remain non-existent or very low. Otherwise, potential complainants will not be able to come forward and identify inaccessibility problems because the resolution mechanism will no longer be affordable.

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Better Business Bureau offices (which use mediators to resolve consumer/business disputes), and 34 city, state, and federal agencies which use mediation. *Id.* The vast majority of those remaining organizations rely on volunteer mediators to resolve a wide range of neighborhood disputes. *Id.*

140. BUREAU OF NATIONAL AFFAIRS, *supra* note 131, at 17.

141. See Duffy, *supra* note 123, at 66.

142. Coben, *supra* note 132, at 23.

143. *Id.*

144. *Id.* at 22.

145. *Id.*

146. *Id.*

147. Telephone interview with Terry Vandenhoeck, Dispute Resolution Center, St. Paul, Minnesota (Jan. 13, 1994).

148. The business will likely not be hurt if they lose the business of the individual complainant. However, if the complainant can show the business owner that they will lose or gain the business of a larger group of people who share the same or similar concerns, their argument will gain economic leverage.

Consequently, equal access for all people, including those with disabilities, will still not be accomplished.

Mediation is well-suited for disputes which involve ongoing relationships.<sup>149</sup> Existing barrier problems commonly arise in relationships between a store owner and a customer. Through mediation, as the store owner and customer work together to solve their problem, they will learn about each other in ways that will aid future interactions.<sup>150</sup> As a result, the person with the disability will better understand the business owner's financial constraints and concerns. Business owners in turn will better understand *why* a wheelchair user has difficulty with or is absolutely barred from entry when even a slight step is present at an entrance, doors are positioned at awkward angles, or ramps are made too steep. Often, the barriers that block or hinder equal access to people that use wheelchairs or have other mobility impairments are not obvious. Simply facilitating the process of getting disputing parties to talk to each other may alone result in conflict resolution.<sup>151</sup> In addition, utilizing a non-adversarial process that yields understanding allows relationships to resume more easily once the dispute is resolved.<sup>152</sup> A customer who had to force a business owner to add a ramp through litigation or through filing a complaint with the DOJ may feel too unwelcome to return to the establishment due to that feeling of unwelcomeness.

The flexibility inherent in the community mediation process has the advantage of getting to the core of the underlying conflict. Adversarial processes, like litigation, generally address only the legal issues in which the suit is framed without getting to the real interests involved.<sup>153</sup> Litigation over environmental impact reports is such an example.<sup>154</sup> Plaintiffs in these cases usually want to stop or force modification of a project because they are concerned about destroying the environment.<sup>155</sup> Rather than address their concern directly, they use the legal issue that the environmental impact report is deficient to achieve their goals.<sup>156</sup> Instead of developing a plan that satisfies all parties, the parties are forced into adversarial roles in a lengthy and costly series of court battles over a legal issue that does not address the real issues involved.<sup>157</sup> Consequently,

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149. Coben, *supra* note 132, at 16.

150. *Id.*

151. *Id.* at 21.

152. *Id.*

153. Phillips & Piazza, *supra* note 128, at 1234.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

while the court battle may come to an end, as a practical matter the real conflict remains intact.<sup>158</sup> Further, since mediation can resolve the core of the dispute, future disputes between the same or similar parties are usually prevented.<sup>159</sup>

Most parties who agree to mediation do reach agreements.<sup>160</sup> After the mediation process is completed, self-enforcement or follow through with the agreement is likely since each party was active in arriving at the settlement agreement.<sup>161</sup> In addition, the parties are motivated to abide by the agreement because it involves personal promises rather than a mandate of a government agency or a court ordered agreement.<sup>162</sup> In the context of Title III barrier removal, self-enforcement is especially important because the obligation to engage in readily achievable barrier removal is a continuing one.<sup>163</sup> Yet the ADA does not explicitly provide procedures for ongoing assessment of ADA compliance.<sup>164</sup> Therefore, because the initial dispute resolution process was peaceful, the settlement agreement was created by the disputing parties themselves, and the process yields understanding between the parties, it is more likely that voluntary ongoing assessment will occur and that it will be done in good faith.

Mediated agreements can be enforceable if they satisfy the requirements of an enforceable contract.<sup>165</sup> The factors to be considered are whether the agreement contains definite and complete terms, consideration, evidence of mutual agreement, parties with legal capacity, and a legal subject matter.<sup>166</sup> Some community programs, however, do not intend their agreements to be legally enforceable.<sup>167</sup> They believe externally enforceable agreements are contrary to the underlying theory of mediation — that people are empowered to decide how to best resolve their disputes.<sup>168</sup> Instead,

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158. *Id.* See also Coben, *supra* note 132, at 19 (when trials focus on a specific complained of behavior rather than a series of events or details of a relationship of which the complained of behavior is a symptom, a court decision may alleviate the symptom but it will rarely cure the underlying conflict).

159. Feinberg, *supra* note 130, at 578.

160. Coben, *supra* note 132, at 23. Some studies indicate that 75% of cases mediated are successfully resolved. *Id.*

161. *Id.* at 25.

162. AMERICAN BAR ASSOCIATION, PROBLEM SOLVING THROUGH MEDIATION, DISPUTE RESOLUTION PAPER SERIES No. 3 (Statement of Adriane Berg).

163. HANDBOOK, *supra* note 1, at III-88 of Title III, Section 36.304, Analysis. See *supra* notes 49-52 and accompanying text.

164. *Id.*

165. Coben, *supra* note 132, at 27.

166. *Id.* Such requirements vary by state. *Id.*

167. *Id.*

168. *Id.*

many programs re-mediate disputes or assure that agreements contain contingencies to cover default.<sup>169</sup>

Community mediation dispute resolution programs resolve disputes quickly. Mediations usually last no longer than two hours.<sup>170</sup> Instead of waiting for the DOJ to complete their investigation, or for the case to be adjudicated by the court system, a dispute can go through a community dispute resolution process in approximately two weeks.<sup>171</sup> The Dispute Resolution Center in St. Paul, Minnesota, generally opens and closes cases within twenty-one days.<sup>172</sup>

Community mediation dispute resolution programs are capable of outreaching their services. A network of organizations, churches, clubs, and small business associations can act as referral sources.<sup>173</sup> Specialized entities that provide services and/or information to people with disabilities can also be used to inform people of the availability of mediation. Thus, more people will become aware of this alternative service and consider utilizing it before they decide to forego action altogether, file a private lawsuit, or go through the DOJ's complaint process. Referral might also identify barrier problems that otherwise would have been ignored.<sup>174</sup>

To assure quality dispute resolution in any community mediation program, mediators need to be trained adequately. Training regimes throughout the country are "remarkably consistent."<sup>175</sup> Most programs require potential mediators to participate in twenty to thirty hours of training which includes lectures and simulations, and sometimes an apprenticeship model.<sup>176</sup> Also, states that fund community programs require specific training minimums.<sup>177</sup> In the realm of barrier removal disputes, mediators should be familiar with the ADA's purposes and Title III. However, it is rarely a problem that a mediator lacks particular expertise in the subject matter of a dispute.<sup>178</sup> In that instance, the mediator must explain that he/she is willing to learn from the parties, and that he/she brings no predispositions or bias concerning the dispute's subject matter.<sup>179</sup>

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169. *Id.*

170. Coben, *supra* note 132, at 18.

171. DANIEL MCGILLIS, *COMMUNITY DISPUTE RESOLUTION PROGRAMS AND PUBLIC POLICY* 76 (1986).

172. Coben, *supra* note 128, at 19.

173. AMERICAN BAR ASSOCIATION, *supra* note 162, at 59 (Statement of Ray Shonholtz).

174. See DUFFY, *supra* note 123, at 67.

175. Coben, *supra* note 132, at 28.

176. *Id.*

177. *Id.*

178. Feinberg, *supra* note 130, at 580.

179. *Id.*

The need for mediation in disputes regarding barrier removal in existing facilities will diminish over time, at least in theory. New constructions and altered buildings must meet a higher accessibility standard under the ADA and the ADA Accessibility Guidelines.<sup>180</sup> After the ADA became effective, access for people with disabilities must be taken into consideration before construction, during the design and planning stage. Therefore, the problem of inaccessibility should get no worse.

Finally, the mediation process itself benefits people with disabilities in ways other than increasing access. Elin Ohlsson of the Metropolitan Center for Independent Living observed that two of the biggest problems faced by people with disabilities in their relations with others are low self-esteem and a difficulty differentiating between assertive behavior and aggressive behavior.<sup>181</sup> Disputants leave the mediation process with a feeling of empowerment because they spoke for themselves about their conflict or problem without having to rely on others to represent them.<sup>182</sup> This can boost a person's self-esteem. In addition, during mediation, problem solving skills can be learned and improved.<sup>183</sup> This can assist people handle future disputes.

## Conclusion

Inaccessibility denies people with disabilities the right to participate equally and independently in society. People with disabilities will continue to be kept poor, unemployed, and welfare dependent if they are denied access to the goods, services, facilities, and jobs society offers. The ADA was passed in 1990 to provide a clear and convincing mandate for the elimination of discrimination against people with disabilities. Title III of the ADA requires the readily achievable removal of all barriers in existing facilities.

Title III of the ADA is currently not being fully utilized to meet the ADA's goals in a timely and effective manner. In addition to the established enforcement procedures of the ADA, local community mediation dispute resolution programs should be implemented on a widespread basis. As a result, more barriers to access will be reported and consequently removed. The mediation process itself will facilitate community understanding of inaccessibility issues, therefore assuring that present access is achieved and future

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180. See *supra* notes 33 and 45-47 and accompanying text.

181. Interview with Elin Ohlsson, Metropolitan Center for Independent Living (Nov. 16, 1993).

182. AMERICAN BAR ASSOCIATION, *supra* note 162, at 59 (Statement of Ray Shonholtz); See also *supra*, at 49 (Statement of Adriane Berg).

183. See Janes, *supra* note 102, at 521.



inaccessibility is prevented. Also, mediation, used in conjunction with the traditional mechanisms of the ADA, will produce far reaching results in a faster, more convenient way. Furthermore, mediation will be more economical, both monetarily and emotionally.

