

Are You Complying with the Americans With Disabilities Act?

By Barry S. Goodman, Esq.

Has one of your sellers ever said to you that his vision is so bad that he could not read the listing agreement? Maybe one of your buyers has said that she is hard of hearing and could not understand what you were saying about the offer that you were about to submit to the seller. What obligation do you have if a person in a wheelchair is unable to get into your office because there is a small step at the front door? Does the number of people working in your office affect how you must deal with these issues?

The United States Department of Justice recently revised its regulations implementing the Americans With Disabilities Act ("ADA") dealing with such issues¹. The new regulations took effect on March 15, 2011, except with regard to the new standards for access to buildings that will take effect March 15, 2012. All real estate brokers and salespersons therefore must know what their obligations are when dealing with somebody who has a covered disability.

BACKGROUND OF THE ADA

Title III of the ADA prohibits discrimination against any person with a disability by businesses that provide goods or services to the public, which are called places of "public accommodation" in the ADA². Such places of public accommodation include a "sales or rental establishment," which encompasses a real estate brokerage office. A person is considered to have a "disability" under the ADA if he or she has any physical or mental impairment that substantially limits one or more of the person's major life activities or has a record of or can be regarded as having such an impairment³. Although this is a very broad definition, the most common issues in places of public accommodations are a person's vision or hearing, or a person being in a wheelchair.

Under the ADA, a real estate brokerage office is required to take "steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."⁴ The only exception would be if the brokerage office can demonstrate that "taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."⁵ The ADA applies to places of public accommodation regardless of the number of employees or salespersons in the office.

APPLYING THE ADA TO REAL ESTATE TRANSACTIONS

Real estate licensees are required to provide people who are blind or have low vision with all relevant documents in a format that the person can use, such as on a computer disk or audio cassette. As explained by the Department of Justice, "[i]t may be effective to e-mail an electronic version of the documents so the client can use his or her screen-reading technology to read them before making a decision or signing a contract. In this situation, since complex financial information is involved, simply reading the documents to the client will most likely not be effective. Usually a customer will tell you which format he or she needs. If not, it is appropriate to ask."⁶ The bottom line is that the auxiliary aids and services that the broker provides must ensure effective communications with the person who has the disability.

Similarly, if a person is deaf or has some other hearing impairment, a real estate licensee likely will have to arrange for someone to provide sign language or for an oral interpreter because of the complexity of the issues involved in a real estate contract. The new regulations specifically permit the use of new technology, which could include video remote interpreting (often called "VRI"), which is a service that allows for video conferencing of an interpreter who is at another location. Exchanging written notes with a person who has a hearing impairment may be sufficient if the communications are less complex than reviewing a sales contract or lease.

ADA OFFICE ACCESSIBILITY REQUIREMENTS

The new ADA regulations revise the 1991 standards covering architectural barriers in existing buildings. If a building complies with the 1991 standards, then no modification will be required unless there are renovations to the building that alter any of the elements.

However, if the building has architectural barriers that do not comply with the 1991 standards, then the broker will have the choice of complying with the 1991 or 2010 standards if the renovation is done before March 15, 2012. After March 15, the building will have to be brought up to the 2010 standards if they are "readily achievable."

Some examples of architectural barriers that must be removed or remediated are replacing an entrance that has a step or steps with a ramp or providing an alternate accessible entrance, widening doorways to accommodate wheelchairs, installing accessible door hardware, creating access from parking areas, making bathrooms accessible, and widening aisles throughout the office so that persons in wheelchairs can move around the office.

The regulations specifically provide that "grandfather provisions" that often are found in local building codes do not exempt businesses from their obligations under the ADA. It therefore is recommended that brokers consult with an architect or some other professional far in advance of March 15, 2012 to ensure that their offices comply with these standards.

ADA COMPLIANCE FOR COURSE WORK

Any private entity that offers examinations or courses for real estate licenses must comply with the ADA not only in providing the courses but also with regard to access to and within the school. This would include providing auxiliary aids and services where applicable, such as for blind, deaf or speech impaired persons. However, the ADA specifies that the school is not required to provide students "with personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses, or hearing aids; or services of a personal nature including assistance in eating, toileting, or dressing."⁷

CONCLUSION

Any time that you, as a real estate licensee, become aware that a person has a covered disability that would effect that person's ability to understand documents or what is being discussed, it is important for you to ask the person what can be done to allow the person to more fully participate. Often, the person will be able to take care of the issue him or herself, even though you cannot require the person to do so.

You have an obligation to comply with the ADA to ensure that person's participation unless compliance would create an undue burden for you. As a result, you have to provide necessary auxiliary services and aids, as well as have accessible offices, so that persons with covered disabilities can fully participate in and understand all necessary aspects of a real estate transaction that you are handling. ■

Barry S. Goodman, Esq., a partner in the law firm of Greenbaum, Rowe, Smith, & Davis LLP, focuses his practice on real estate brokerage and other real estate-related matters, as well as antitrust suits and corporate shareholders' and partnership disputes. He is the General Counsel for the New Jersey Association of REALTORS®.



Barry S. Goodman, Esq.

1. The Department of Justice has put out a booklet entitled "ADA Update: A Primer For Small Business" summarizing the new regulations, which can be found at <http://www.doj.gov/regs/2011/03/smallbusiness/ada/bsbprime20110.htm>.
2. 42 U.S.C. § 12181, et seq. There are five sections in the ADA: (1) Title I prohibits discrimination by employers who have 15 or more employees; (2) Title II prohibits discrimination by state and local governments and transportation authorities; (3) Title III prohibits discrimination in places of public accommodation; (4) Title IV covers telecommunications; and (5) Title V includes miscellaneous provisions. A real estate broker who has 15 or more employees, including salespersons, should consult an attorney about Title I since employment law under the ADA is beyond the scope of this article.
3. (1) The phrase *physical or mental impairment* means—
 - (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;
 - (ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;
 - (iii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;
 - (iv) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.
- (2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- (3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
- (4) The phrase is regarded as having an impairment means—
 - (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;
 - (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
 - (iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.
- (5) The term *disability* does not include—
 - (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
 - (ii) Compulsive gambling, kleptomania, or pyromania; or
 - (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.
4. 36 C.F.R. § 36.303(a). Examples of auxiliary aids and services include the following:
 - (1) Qualified interpreters; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; on-site or through video remote interpreting (VRI) services; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;
 - (2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;
 - (3) Acquisition or modification of equipment or devices; and
 - (4) Other similar services and actions.
36 C.F.R. § 36.303(b).
5. 36 C.F.R. § 36.303(a). A business's overall resources (rather than a comparison to the fees paid by the customer meaning the interpreter) determine what constitutes an undue burden. If a specific communications method would be an undue burden, a business must provide an effective alternative if there is one."
6. The United States Department Justice, "ADA Update: A Primer For Small Business," at p. 7.
7. 36 C.F.R. § 36.306.