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Information, Guidance, and Training on the Americans with Disabilities Act

What is a Public Accommodation Under the ADA?

By George M. Powers, J.D.
and
Sashi Nisankarao, J.D.

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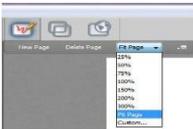
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What is a Public Accommodation?



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What is a Public Accommodation?

Private entities are considered public accommodations "if the operations of such entities affect commerce" and fall into one of the twelve categories:

1. An inn, hotel, motel, or other place of lodging, **except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;**
2. A restaurant, bar, or other establishment serving food or drink;
3. A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
4. An auditorium, convention center, lecture hall, or other place of public gathering;

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What is a Public Accommodation?

5. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
6. A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
7. A terminal, depot, or other station used for specified public transportation;
8. A museum, library, gallery, or other place of public display or collection;

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What is a Public Accommodation?

9. A park, zoo, amusement park, or other place of recreation;
10. A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
11. A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
12. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

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What is NOT a Public Accommodation?



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Two Exemptions



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I. Religious Organizations

- A religious organization or an entity controlled by a religious organization.
- All of the activities.
 - Whether religious or secular.

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I. Religious Organizations

- Day Care Example



IN THEATERS SOON

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I. Religious Organizations

- As a Landlord



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II. Private Clubs

- Factors
 - Members exercise a high degree of control over club operations.
 - The membership selection process is highly selective.
 - Substantial membership fees are charged.
 - The entity is operated on a nonprofit basis.
 - The club was not founded specifically to avoid compliance with Federal civil rights laws.

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II. Private Clubs

- Facilities of a private club lose their exemption to the extent that they are made available for use by nonmembers as places of public accommodation.

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Early Cases

- PGA Tour, Inc. v. Martin
 - Casey Martin is a talented golfer
 - He has Klippel-TrenaunayWeber Syndrome
 - A circulatory disorder that obstructs the flow of blood from his right leg back to his heart
 - It causes severe pain and has atrophied his right leg
 - Martin cannot walk an 18-hole golf course

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Early Cases

- PGA Tour, Inc. v. Martin
 - Martin entered a professional golf tournament
 - He used a golf cart for the first two stages of the tournament
 - He was denied permission to use a cart for the third stage

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Early Cases

- PGA Tour, Inc. v. Martin
 - The PGA argued that it was exempt from Title III because it is a private club
 - And that the play areas are not public accommodations
 - “during a tournament the portion of the golf course ‘behind the ropes’ is not a public accommodation because the public has no right to enter it.”

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Early Cases

- PGA Tour, Inc. v. Martin
 - Court stated:
 - “Golf Course” specified in statute
 - Participants are not very exclusive since they only have to pay \$3,000 to enter the tournament

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Early Cases

- PGA Tour, Inc. v. Martin
 - Back up argument
 - Golfers are not members of the class protected by Title III
 - Martin is not a “client and customer” seeking to obtain “goods and services” at places of public accommodation
 - He is more like an independent contractor (provider)

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Early Cases

- PGA Tour, Inc. v. Martin
 - Court stated:
 - Purpose of the tournament is to watch it and to compete in it
 - Those who pay a fee to compete in the tournament are “clients and consumers”
 - Did not address construction of statute – “client and consumers”

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Early Cases

- Weyer v. Twentieth Century Fox Film Corp.
 - Suit against an insurance company administering an employer-provided disability policy
 - Psychiatric disabilities were only covered for 24 months. Physical disabilities were covered until the age of 65.

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Early Cases

- Weyer v. Twentieth Century Fox Film Corp.
 - Is UNUM (the insurance company) a public accommodation?
 - Court stated: An insurance company administering an employer-provided disability policy is not a "place of public accommodation" under Title III.

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Early Cases

- **Weyer v. Twentieth Century Fox Film Corp.**
 - There needs to be a nexus: some connection between the good or service complained of and an actual physical place is required.
 - Even though insurance office is in the statute.
 - Intent to have access to office
 - Does not require provision of different goods or services
 - Insurance contract

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Early Cases

- **Ford v. Schering-Plough Corp.**
 - Argued the disparity in benefits for mental and physical disabilities violates Title III of the ADA.
- See also
 - **Parker v. Metropolitan Life Ins. Co.**
 - No nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office.

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Early Cases

- **Rendon v. Valleycrest Productions, Ltd.**



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Early Cases

- Rendon v. Valleycrest Productions, Ltd.
 - Telephone selection process that screened out individuals with disabilities who wished to be contestants
 - Deaf and mobility barriers

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Early Cases

- Rendon v. Valleycrest Productions, Ltd.
 - Argument: because the automated telephone contestant selection process was not conducted at a physical location, it was not a place of "public accommodation" under the ADA.

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Early Cases

- Rendon v. Valleycrest Productions, Ltd.
 - Issue: Does Title III encompass a claim involving telephonic procedures that, in this case, tend to screen out disabled persons from participation in a competition held in a tangible public accommodation.

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Early Cases

- Rendon v. Valleycrest Productions, Ltd.
 - Argument: because the automated telephone contestant selection process was not conducted at a physical location, it was not a place of "public accommodation" under the ADA.
 - The hotline may not serve as the basis for a Title III claim because it is not itself a physical barrier to entry erected at a public accommodation.

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Early Cases

- Rendon v. Valleycrest Productions, Ltd.
 - Court stated: Intangible barriers can be a claim
 - Such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges.
 - Plaintiffs seek the privilege of competing in a contest held in a concrete space.

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Out of the Nexus

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Early Cases

- Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England
 - Insurance plan
 - Limit benefits for AIDS-related illnesses to \$25,000
 - Otherwise \$1 million

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Early Cases

- Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England
 - Lower Court
 - Limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein.

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Early Cases

- Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England
 - Circuit Court
 - Not limited to actual physical structures
 - Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services.

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Early Cases

- Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England
 - Circuit Court
 - It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.
 - Legislative intent

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Early Cases

- Doe v. Mutual Omaha Ins. Co.
 - AIDS caps on health insurance policies
 - A physical space or an electronic space that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

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The Internet



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Video Streaming

- In 2020, there will be approximately 236 million digital video users in the United States
- Content is viewed across various platforms, i.e. smartphones, tablets, computers, Internet-connected TVs, etc.

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The Internet

- National Federation of the Blind v. Target Corp.
 - Target’s website inaccessible to individuals who are blind

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The Internet

- National Federation of the Blind v. Target Corp.
 - Argument: Title III covers only access to physical spaces.
 - Plaintiffs’ legal theory is that unequal access to Target.com denies the blind the full enjoyment of the goods and services offered at Target stores, which are places of public accommodation.

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The Internet

- National Federation of the Blind v. Target Corp.
 - Court stated:
 - The statute applies to the services OF a place of public accommodation, not services IN a place of public accommodation.

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The Internet

- National Federation of the Blind v. Target Corp.
 - “In sum, the court finds that to the extent that plaintiffs allege that the inaccessibility of Target.com impedes the full and equal enjoyment of goods and services offered in Target stores, the plaintiffs state a claim, and the motion to dismiss is denied. To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.”
 - The NEXUS

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The Internet

- Cullen v. Netflix
 - Lack of captioning for streaming service

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The Internet

- Cullen v. Netflix
 - Court stated:
 - Netflix's streaming library is not a place of public accommodation.
 - Netflix's streaming video library is a website where consumers can access videos with an internet connection. The Netflix website is not "an actual physical place."
 - THE NEXUS

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NAD v Netflix- Close Captioning

- District court concluded there need not be a nexus between a website and a physical place
- Settlement with National Association of the Deaf
- 100% of programming was eventually captioned or subtitled as a result

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National Federation of the Blind v. Scribd Inc.

- Court applied the plain meaning of the phrase "other service establishments" to include websites with no physical place
- Court likened websites to "travel services," which could be sought indirectly
- Court detailed the implications of limiting Title III solely to physical places

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Netflix- Audio Description

- Settlement with American Council of the Blind
- Audio description was made available across streaming and disc rental libraries
- Website and mobile application were made accessible to those who use screen readers

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The Internet

- Zaid v. Smart Fin'l Credit Union
 - The credit union's website was inaccessible to an individual that is blind
 - The Court Stated: "While websites may be affiliated with brick-and-mortar businesses that are places of public accommodation, that does not render the businesses' websites themselves places of public accommodation."
 - NEXUS

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The Internet

- Settlement Agreement: National Federation of the Blind, et. al. v. Law School Admission Council
 - Lsac.org website was inaccessible to individuals who are blind

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The Internet

- The Confusion
 - Based on Split Circuit Court Precedent
 - The Nexus
 - No Supreme Court Decision
 - The Standard
 - WCAG 2.0



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The Internet

- The Confusion
 - The Code vs the Regulation
 - U.S.C.: The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce
 - C.F.R.: Place of public accommodation means a **facility operated** by a private entity whose operations affect commerce and fall within at least one of the following categories

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Transient Lodging- Vacation Rentals

- The average revenue per user from a vacation rental is \$453.00

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Vacation Rentals- Airbnb

- In 2016, Rutgers University researchers conducted study to understand the barriers Airbnb poses to potential guests with disabilities
- Researchers sent 3,800 lodging requests through the website, with and without mention of disability



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Rutgers Airbnb Study

Travelers with disabilities are more likely to be rejected, AND
They are less likely to receive pre-approval and temporary clearance from hosts

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Rutgers Airbnb Study Results

- 75% of travelers who made no mention of disability were pre-approved
- Pre-approvals fall with mention of disability
 - 61% of travelers with dwarfism
 - 50% of travelers with blindness
 - 43% of travelers with cerebral palsy
 - 25% of travelers with spinal cord injuries

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Rutgers Airbnb Study Analysis

- Results could not SOLELY be attributed to hosts' personal biases
- Some hosts sent follow-up questions to travelers with disabilities, which explains the lower pre-approval rates in part
- Lack of physical access to the rental properties explained most rejections

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Transportation Apps

- Both Uber and Lyft have reached settlements with National Federation of the Blind
- The goal was to provide reliable and equal access to transportation for riders with service animals



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Uber and Lyft Settlement Terms

- Train drivers on their obligations to pick up and transport riders with service animals
- Test their knowledge of these obligations
- Incorporate acknowledgement into driver contract

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Uber and Lyft Settlement Terms

- Temporarily suspend drivers with a complaint against them for refusing to pick up a rider using a service dog
- Permanently disable drivers from the app after multiple complaints
- Investigate complaints thoroughly before enabling drivers' access to the app

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Point-of-Sale Terminals and Kiosks

- Point-of-sale settlements with ACB, NFB, etc. to require retailers to have tactile keypads for entering PINs and other personal information
- Walmart settled to make its self-service checkout kiosk accessible to customers who are blind after crime victim sued



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Plasma Donation Centers

- 2009 DOJ settlement with Biomedics to allow individuals with visual and hearing impairments to donate plasma, AND
- To implement policies and procedures to serve individuals with disabilities at Biomedics facilities
- Classified as a "service establishment"

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Silguero v CSL Plasma (5th Circuit)

- Found plasma donation centers (PDCs) NOT to be “service establishments”
- Individuals looking to donate are not customers
- Individuals receive no “detectable benefit” as a result of donating

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Levorsen v Octopharma Plasma (10th Circuit)

- PDCs are “service establishments” because they provide a service and they are establishments
- Court gave ordinary meaning to the phrase “service establishment,” which Congress originally preceded with the word “similar”

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Home Business



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Thank You!
Save the Date
May 22, 2019
**Access to healthcare and the
ADA: A review of the case law**
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73
