



**Jeffer, Mangels, Butler & Marmaro LLP**

The premier hospitality practice in a full-service law firm™

## **CONDO HOTELS AND THE AMERICANS WITH DISABILITIES ACT: A CASE OF MISTAKEN IDENTITY?**

*Is your condo hotel a "residence" or a "place of public accommodation"?*

by Martin H. Orlick

This article was published in *Hotel Online*, February 2006

---

Condo hotels are not expressly mentioned in the Americans with Disabilities Act (ADA) nor are they specifically included in the Americans with Disabilities Act Architectural Guidelines (ADAAG). This is not surprising. In 1990—the year the ADA was enacted by Congress—there were relatively few condo hotels in existence, and they had not become a phenomenon.

Despite the current proliferation of condo hotels, the Access Board's newly proposed ADAAG technical requirements still include no specific mention of condo hotels, nor have we seen any state law that includes requirements for condo hotel accessibility. There is very limited judicial direction, as legal precedents regarding the ADA and condo hotels have not yet been clearly established. Consequently, developers of condo hotels are left largely on their own to interpret how and when the ADA applies to their projects.

### **IS THE CONDO HOTEL PRIMARILTY A DWELLING?**

In 1998, a Florida court addressed the specific issue of whether a residential condominium—not a condo hotel—was subject to Title III of the ADA's "public accommodation" requirements because of the existence of a rental program. The judge determined that because the condominium was primarily residential in nature, it was not a "place of public accommodation" and did not fall under the requirements of the ADA.

The judge noted that each condo unit was furnished with the individual owner's personal

property and maintained, repaired, and cleaned by the unit owner. Although units were rented out to guests on occasion, the property was not considered to be a "place of lodging." (This was a lower court opinion and is not binding legal precedent.)

### **IS THE CONDO HOTEL PRIMARILY FOR LODGING?**

In contrast, we can assume that where condo hotel units are needed or are expected to be used in the rooms inventory for a viable hotel operation, they will be subject to the requirements of the ADA. Additionally, local building departments will likely require compliance with both state and federal accessibility standards, and will require the project's developer to set aside the required number of fully accessible hotel rooms—including visual and auditory accessibility—across the room types, according to the formula set forth in ADAAG and state building codes. Currently, our condo hotel lawyers are involved in many California developments where accessibility requirements have been designated as specific development conditions. We expect to see this trend in other states, as well.

### **WHAT ELSE CONTROLS THE CONDO'S CHARACTERIZATION?**

Many factors could affect the characterization of a condo as primarily for residential or "public accommodation" purposes. If a property is operating as a hotel but has no dedicated room

1900 Avenue of the Stars, 7<sup>th</sup> Floor  
Los Angeles, California 90067  
310.203.8080—(fax) 310.203.0567

Two Embarcadero Center, 5<sup>th</sup> Floor  
San Francisco, California 94111  
415.398.8080—(fax) 415.398.5584

3 Park Plaza, Suite 1100  
Irvine, California 92614  
949.623.7200—(fax) 949.623.7202

inventory and must rely on rental agreements with unit owners, it “feels” like a hotel. A lodging facility is also indicated when the hotel operator furnishes, repairs and controls the unit. The same is true when the unit owner’s rental agreement with the hotel operator limits the number of days that the owner can occupy the condo, because the manager is counting on the availability of condo units for hotel room inventory. Similarly, if the “condo” is only 400 square feet in size and has no kitchenette, it is likely to be deemed a lodging facility or “public accommodation.”

If a condo hotel is judged to be “public accommodation,” it must comply with all ADA-related requirements.

### **NEW BUILDS VS. CONVERSIONS**

Condo hotel developers whose new projects include a substantial lodging component must follow the ADA guidelines set forth in the ADAAG for new construction. (The ADA requires that newly constructed hotels built after January 1993 must be completely “access barrier-free.”)

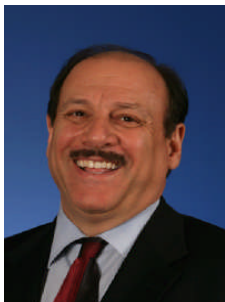
Conversions may be treated differently. Existing buildings that are altered must be barrier free in the areas that are altered and in the path of travel leading to the altered area. Additionally, public restrooms, water fountains, public

telephones and other facilities for the general public that serve the altered areas must be barrier-free. Developers converting existing properties to condo hotels will want to get knowledgeable advice on the ADA requirements for their specific property. ADA violations—even for minor infractions—can be costly.

### **BEWARE OF ADA LAWSUITS**

In both California and Florida—which together account for more than one-third of the nation’s condo hotel rooms—state laws allow for private individuals to sue under the ADA to force modifications. California allows plaintiffs to also recover actual, punitive and statutory damages, in addition to attorneys’ fees. This lucrative litigation has given rise to a proliferation of ADA suits in those states, and hotels continue to be a major target for such litigation.

No ADA standard has yet been tested for condo hotels in particular. The “condo hotel” label encompasses a wide range of multi-use projects with lodging and residential components. These hybrid developments allow for creativity and profitability in ways not seen before in the industry. For the uninitiated, they can also trigger governmental roadblocks and private lawsuits. As developers and operators move forward into this new arena, expert advice and a dose of common sense are recommended.



Martin H. Orlick is a transactional and trial partner in the Real Estate Department of Jeffer, Mangels, Butler & Marmaro’s San Francisco office. Mr. Orlick is a member of the American College of Real Estate Lawyers (ACREL) and has been a member of the International Council of Shopping Centers (ICSC) for nearly 20 years. He has handled more than 175 ADA cases for hotels, restaurants, developers, retailers and other commercial businesses. He can be reached at 415.984.9667 or [morlick@jmbm.com](mailto:morlick@jmbm.com).

1900 Avenue of the Stars, 7<sup>th</sup> Floor  
Los Angeles, California 90067  
310.203.8080—(fax) 310.203.0567

Two Embarcadero Center, 5<sup>th</sup> Floor  
San Francisco, California 94111  
415.398.8080—(fax) 415.398.5584

3 Park Plaza, Suite 1100  
Irvine, California 92614  
949.623.7200—(fax) 949.623.7202