

ARCHITECTS, THE LAW, AND ACCESSIBILITY: ARCHITECTS' APPROACHES TO THE ADA IN ARENAS

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The United States Congress passed a federal law called the Americans with Disabilities Act in 1990 that took effect for new construction on 26 January 1993. The purpose of this law was to ensure that persons with disabilities will have access to and will be able to enjoy the facilities of new constructions, especially buildings of public assembly. Even so, designs of many new public assembly places have not met the standards of the statute. Persons with disabilities have attempted to compel compliance by filing lawsuits. Among many complaints, the failure to provide unobstructable lines of sight for wheelchair patrons has been particularly prominent. But the architects sought to hold on to their view of the law and have fought to avoid accepting legal and social responsibility. Taking a case study approach, we analyze court case materials to understand how architects approached the law, how they viewed cases of accessibility in regard to the law, and why they ignored the law and tried to avoid legal responsibility. The core of the defendants' rationale clearly was money. It lay in their desire not to have to spend more money (and whose money was it to be?) in order to meet the requirements of the law. Loss of anticipated revenue was also a primary factor in the litigation.

INTRODUCTION

Architects have long known that their building designs must provide for the needs of people. Writing at about the time of Christ, Vitruvius "makes it clear persistently that architecture and the work of architects is for the welfare of society in general and for the health, security and enjoyment of individuals in particular" (Esherick, 1984:26). Later writers such as Scott (1974/1914), and more recent writers such as Creighton (1949), Rasmussen (1962/1959), Danby (1963), and others, while focusing on the physical dimension of architecture, have also emphasized the need for architecture to respond to people's requirements. The field of environmental design research was developed to make people and environmental concerns central to the process of design (see Zeisel, 1975; Lang, *et al.*, 1974; Moore, *et al.*, 1985). By 1967, some authors were urging elimination of architectural barriers that precluded some people from using and enjoying the facilities (Goldsmith, 1967; Gutman and Gutman, 1968; Harkness and Groom, 1976). Little effort was devoted to adjusting the world around persons with disabilities to better suit their needs.

Until relatively recently, persons with disabilities faced numerous physical barriers that excluded them from participating fully in ordinary activities of human existence — working, attending concerts and sporting events, shopping, and using public transportation, among others. Their condition was medicalized and controlled by physician judgments that usually focused on treatments to ameliorate their disabilities. Persons with disabilities were relegated to institutions and back bedrooms and became the objects of pity, condescension, and fear (see e.g., Altman, 1981; Scotch, 1984). One author explained:

We are the subverters of the American Ideal, just as the poor are betrayers of the American Dream The disabled serve as constant, visible reminders to the able-bodied that the society they live in is shot through with inequity and suffering, that they live a counterfeit paradise, that they too are vulnerable. We represent a fearsome possibility.

(Murphy, 1987:116-117; see also Shapiro, 1993)

Inventions, such as the wheelchair, provided persons with disabilities the confidence that their social problems inhered not in themselves but in the failure of others to provide adequate arrangements so that they could take part in everyday activities. Many war veterans returning from combat with disabilities had experienced life as able-bodied before they were injured; they played a significant role in the campaign to free themselves from unreasonable external shackles and the fight for equal treatment.

It was becoming clear that persons with disabilities could be enabled in their endeavors if, among other things, designs of buildings could be made more friendly and accommodating of their needs. The contrary was also true: environments that presented barriers to persons with disabilities effectively stymied their full participation.

Since the 1960s in the USA, guidelines and laws have been promulgated to ensure accessibility to buildings. The Architectural and Transportation Barriers Compliance Board (ATBCB) has publicized the issue and the Architectural Barriers Act of 1968 provided guidelines (42 U.S.C. §§4151-4157). In 1990 the United States Congress passed the Americans with Disabilities Act (ADA). Title III of this federal law specifically requires accessibility of persons with disabilities to facilities of public accommodation, public assembly buildings, such as sports arenas, and mandates that builders cannot discriminate against persons with disabilities by obstructing their "full and equal" enjoyment of the facilities. The ADA mapped out ways persons with disabilities would be enabled to join the mainstream.

How did architects view the ADA requirements? Did architects take special care to voluntarily comply with the ADA requirements and find creative solutions to design challenges posed by the access and enjoyment needs of persons with disabilities? In spite of the laws, even in the late 1990s, as our study reveals and several court rulings indicate, architectural designers, nevertheless, continued to overlook the needs of persons with disabilities and design facilities that failed to meet the spirit and

the letter of the ADA (Hagel, n.d.; Dole, 1994). As a result, numerous buildings, including many considered fine examples of architecture, have been inaccessible to many persons with disabilities. Why were the architects reluctant to follow the ADA and to accommodate persons with disabilities? Why did architects design in ways that led persons with disabilities, social watchdog groups, and government organizations to not only press for and enact laws, but also to file lawsuits to compel compliance?

In this paper, we focus on arenas and on persons with disabilities using wheelchairs. This leaves out of consideration other facilities and many kinds of disabilities, such as those related to hearing, sight, and more. We do not specifically address multiple disabilities and their, at times, conflicting requirements. Nor do we take up mixed categories, such as architects with disabilities. In examining court cases, we have not addressed a number of considerations, such as politics (Perl, 1996) and design constraints. Sports arenas, it should be remembered, are complex structures, made even more complex by the need to change slopes to accommodate unobstructable lines of sight (ULOS) accessible seats. And, we study the architects and describe their views and tactics as they sought to avoid being held legally responsible for designing sports arenas that violated the ADA. Not all errors, omissions, and obfuscations, however, can be attributed to the architects. The architects in this case have maintained throughout that they did not break any law (U.S. v. EBI 1998 Consent Order; Dunlap, 1997:4).¹ Other studies have concentrated on other actors in these cases (see Mazumdar and Geis, 2000, 2001a, 2002; Conrad, 1997a,b). Although this paper details what one architectural firm did and provides an indication of the way many in the profession view accessibility, we are sure there are many architects who treat this matter of accessibility with great earnestness and creativity, as Ronald Mace did. Our hope is that this piece will provide a better understanding of architects' approaches, will assist in the formulation of better policies, and will lead architects to take more seriously the designing of buildings for access to all.

Methods

Some insight into these questions can be gained by examining court cases, written position statements, arguments, and other evidence presented to the courts, as well as the rulings and opinions expressed by judges. We shall use a case study methodology. Although it has been criticized for lack of generalizability, external validity, and other reasons (Long and Hollin, 1995; Stoecker, 1991:90-91; Miles, 1979), it has a number of strengths (Mazumdar and Geis, 2001b). Case studies enable the examination of details of events and the search for understanding and explanations. They allow testing of speculative ideas against grounded data, refutation of extant theories, and sharper formulations of empirically based theoretical concepts (Eckstein, 1975; Orum, *et al.*, 1991; Ragin and Becker, 1992; Glaser and Strauss, 1967).

Specifically, we will examine the MCI Sports Arena case in detail. The MCI Center litigation represented an attempt to make certain that both the letter and the spirit of the ADA were honored. It addressed specific issues in terms that had broader implications. Information from other lawsuits will be used to augment the MCI litigation record.

The effort to bring together the fields of design and law and the study of design-related court cases is unusual in urban design, architectural design, and environmental design research. Yet, we find that they provide a window into how they interface and how well the law works with respect to architecture. Legal cases enable us to examine the verbalizations related to design provided by the parties and the nature and functioning of the law governing buildings. It allows us to highlight important ethical issues regarding the practice of architecture and design, and raise fundamental questions about the purpose of design, the use of legal mechanisms for environmental design, and the commitment by designers to the spirit of the law.

THE MCI CENTER LAWSUIT (1996)

The MCI Center sports arena was to be constructed in downtown Washington, D.C., for \$170-million. It would serve as a multi-purpose facility for the Washington Wizards in the National Basketball Association, the Washington Capitals in the National Hockey League, and other sports and entertainment events. Plans indicated that the MCI Center could accommodate a maximum of 18,468 persons including 3,045 club seats (Forgey, 1997:82). Ticket prices would vary for regular, club, VIP, and Gold VIP seats, ranging from \$19 to \$85. The MCI Center lawsuit was the first major case related to Title III of the ADA in sports arenas.

The Parties

The Paralyzed Veterans of America (PVA) and four individuals with disabilities who used wheelchairs, three of whom were associated with the PVA, together as plaintiffs filed the MCI Center lawsuit in U.S. District Court, Washington, D.C., on 14 June 1996. The PVA was chartered by Congress soon after World War II (36 U.S.C. §1151 *et seq*). It has 34 chapters in the USA with approximately 17,000 members who are almost all war veterans whose disabilities are due to injuries or disease to their spinal cord suffered during their military service. One aim of PVA is to end discrimination against persons with disabilities and to facilitate access to places of public assembly (PVA v. EBAE 1996a:4 Plaintiff's Complaint). The plaintiffs alleged that the defendants had designed and planned to construct the MCI Center in violation of the ADA (Paralyzed Veterans of America v. Ellerbe Becket Architects and Engineers 1996a).

Ellerbe Becket Architects & Engineers P.C. (EBAE) and Ellerbe Becket Inc. (EBI), on whom we will focus most of our attention, were the first-named defendants. Others against whom an injunction was sought were the builder and the owners of the Center. EBI, the parent company, is an architectural and engineering firm incorporated in Delaware and headquartered in Minneapolis. It has been a successful enterprise that grew to be one of the biggest architectural firms in the USA. The company employs more than 1,000 persons spread among five sites in the USA.² Its major projects include health care buildings, corporate headquarters, and educational facilities. The firm's projects and renovations are said to total over \$1 billion (Gunts, 1992:90). Highly regarded in its field, EBI could derive satisfaction from the generally laudatory reviews of their designs and commendations in architectural and other publications (see Gunts, 1992; Dunlap, 1997). One reviewer described the MCI Center as "an unusually attractive, welcoming sports arena" (Forgey, 1997). EBAE's Kansas City office, formed in 1988, has primary responsibility for sports arena projects, which amount to more than 90 percent of the work of that branch. Ellerbe Becket was also responsible for designs of over a dozen arenas, including the America West Arena in Phoenix, the HSBC Arena in Buffalo, the CoreStates Center in Philadelphia, the Gund Arena in Cleveland, and the Fleet Center in Boston. Kansas City has now become the sports design capital of the world, being the location of, besides Ellerbe Becket, HOK Sports, Howard Needles Tammen, and Bergendoff's Sports Architecture Group (Gunts, 1992).

The Legal Contestations

An Uncontroverted Point. The law at §302(a) unequivocally states:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(42 U.S.C. §12182(a) §302(a))

This statement of the law's general intent was followed by a set of regulations promulgated by the Attorney General and the United States Department of Justice (DOJ) called "Standards for New Construction and Alterations" or ADA Accessibility Guidelines or ADAAG (USDOJ, 1994a). Both parties agreed that ADA requires that assembly facilities provide wheelchair accessible locations.

The Plaintiff's Allegations. The complainants raised several issues. Their core contention was that, at the MCI Center, the architects, builders, and owners "will fail to provide unobstructed lines of sight at the vast majority of wheelchair locations" (PVA v. EBAE 1996a:11). To support their case the defendants relied on a recently promulgated interpretation of ADAAG §4.33.3 that clearly stated the necessity for lines of sight over standing spectators for wheelchair users. This mandate, based solely on an in-house decision, had been added to the regulations in December 1994 by the DOJ in a supplement to its *Americans with Disabilities Act Title III Technical Assistance Manual* (Dec 1994; PVA v. DCA 1997c:581; see also USDOJ, 1991a, 1991b, 1993, 1994b). The plaintiffs claimed that the arena design did not provide the required number of accessible locations (in their count they did not include the locations whose line of sight would be obstructed if spectators in front stood up). They alleged that the defendants had not integrated in the overall seating plan the few locations that provided unobstructed viewing. They argued that the designed seating arrangement segregated and isolated many wheelchair users from other spectators, especially at "in-fill" locations. They stated that the accessible locations were not dispersed throughout the facility, thus not providing a variety of viewpoints and prices.

They appealed to the judge that unless enjoined, Ellerbe Becket would use similar design concepts in subsequent projects elsewhere and thus would be continually discriminating against wheelchair users nationwide. The plaintiffs also maintained that the arena violated the District of Columbia Human Rights Act. To allow the MCI Center construction or other Ellerbe Becket projects to go forward, the plaintiffs pleaded, would impose immediate and irreparable injury on the PVA and its members. The plaintiffs sought preliminary injunctive relief to restrain the defendants from proceeding with the MCI Center project and from undertaking any similar projects in the future until they came into conformity with ADA standards. They also sought attorneys' fees and litigation expenses (PVA v. EBAE 1996a).

The major contested issue remained unobstructed lines of sight (ULOS), as the other matters, after some sparring, were settled by the court. There was no disagreement about the precise number of required wheelchair spaces specified by the regulations, though there was some contention regarding which seats could be counted.

Ellerbe Becket's Response. Ellerbe Becket's attorneys filed a motion to dismiss all allegations concerning the company on 28 June 1996 (PVA v. EBAE 1996b). They insisted that the plaintiffs had failed to state claims upon which relief could be granted and claimed that they had followed the law. They argued that, as architects, they were not subject to liability under the ADA. EBI maintained that Congress's intent in not including entities such as architects and engineers in the list of those liable was to protect them from possible liability. The Ellerbe Becket lawyers insisted that the phrasing of §302(a) (quoted earlier) outlawed specified acts "by any person who owns, leases (or leases to), or operates a place of public accommodation" and that these words self-evidently could not reasonably be applied to the architect.

EBI cited the ADA wording in regard to public accommodations and commercial facilities, which defined discrimination as:

(1) a failure to design and construct facilities for the first occupancy later than 30 months after July 26, 1990 [i.e., 26 Jan 1993], that are readily accessible to and usable by individuals with disabilities ...
(42 U.S.C §12183(a) §303(a))

They declared that the phrase "design and construct" in §303 of the ADA had to be interpreted so that it would accord with, rather than expand on, §302, which mentioned only those who own or lease a public accommodation. They claimed that the phrase had to be read conjunctively rather than with an unreasonable assumption that "and" meant the same as "or." Ellerbe Becket maintained that the phrase applied only to entities that *both* design and construct the facility, not to those which do only one (design *or* construct), and that, therefore, it did not implicate architects who only design.

But this reasoning was arguable. Who would be responsible when the designer is a separate entity from the constructor? If the focus was to be on constructors, not designers, the law could have merely mentioned those who construct. Could the regulation really have meant to exempt architects and engineers who pursue only their basic trade but to single out for liability for compliance with the law only that segment that both design and construct? Why would the rule-makers hold such a small segment liable? To take such a position would seem to represent a considerable stretch, one that the DOJ was not inclined to concede. Why would Congress include the word "design" in the law, the DOJ attorneys countered, unless they intended to subject designers to liability (Winston, 1997c).

Ellerbe Becket, besides basing its case on its interpretation of the language of the regulation, further emphasized its lack of legal responsibility due to its inability to ultimately control the project. It claimed that it did "not possess final 'authority regarding the design of the facility,' nor did it possess the ultimate 'power and discretion' to fully design the facility" (PVA v. EBAE 1996b:2). Owners, EBI pointed out, retain a contractual right to reject all plans and drawings. The firm insisted that it did not bear any responsibility for the construction of the arena, arguing that its contract with D.C. Arena Associates was "strictly for *design* of the MCI Center." To buttress his company's position, Rick A. Lincicome, president of EBAE, in a declaration attached to the motion to dismiss, stated:

Ellerbe Becket Architects and Engineers, P.C. is not and never has been in any way responsible for or in control of the construction of the MCI Center.
(PVA v. EBAE 1996b Declaration:1)

Neither it nor the engineers, EBAE claimed, should be held liable.

In general, an architect or engineer does not have ultimate control over design and construction unless it explicitly is provided by his contract All decisions are subject to an owner's taste, vision, and pocketbook.
(PVA v. EBAE 1996b:8)

Engineers, constructors, and subcontractors were closely watching this and other lawsuits to find whom the courts would hold liable (Winston, 1997b:9).

The DOJ had the authority to add regulations. When it issued regulations for new construction recently, it had broadened the roster of parties coming under its mandate, stating:

The Department will interpret this section in a manner consistent with the intent of the statute and with the nature of the responsibilities of the various entities for design, for construction, or for both.
(28 CFR Pt. 36, App. B. (rev. 01 July 1994) §36.401 p. 619)

But Ellerbe Becket claimed that these regulations were not promulgated according to the Administrative Procedures Act, and, therefore, they were not required to follow them. They argued that even if the regulations required ULOS, they were not legally required to adhere to that mandate. They also claimed that accessible seats with ULOS or enhanced views amounted to more than equal or preferential treatment since others, too, would not be able to view the action while seated when spectators in front stood up. The architects were aware that there were reasons to believe that ULOS sightlines *might* apply at the moment, or more assuredly, would in the near future. Ellerbe Becket, nonetheless, could offer a strong case that satisfactory unobstructable sightlines did not then constitute a legal requirement and that, therefore, it was under no obligation to design with such sightlines.

They further maintained that to suggest that what they were doing in regard to the MCI Center could have nationwide repercussions because of future contracts was hypothetical and speculative and, therefore, beyond the jurisdiction of the court (PVA v. EBAE 1996b).

The company chose to press for dismissal from the litigation and to leave the job of disputing the wheelchair provision to the arena owners. A dispassionate onlooker might well find the Ellerbe Becket response a self-serving stance rather than one guided by the spirit or the letter of the statute and the regulations or a sense of social responsibility.

The architects receive support as the AIA enters the fray. So far, it was one firm trying to defend itself in whatever way it could. But, then, the professional association of architects, the American Institute of Architects (AIA), felt the need to voluntarily enter the debate in order to influence the court. The AIA filed, on 10 July 1996, an amicus curiae (friend of the court) brief fully in support of Ellerbe Becket's position (PVA v. EBAE 1996e). It mostly echoed the points the architectural firm had raised (AIA, 1998). The AIA claimed that "[a]rchitects and other design professionals have by their words and acts supported and implemented the spirit and requirements of the ADA" (PVA v. EBAE 1996e Amicus Curiae:3), that "[a]n architect (and AIA member) serves on the Architectural & Transportation Compliance Board," which has 24 members, and "[t]hree AIA members serve on an Advisory Committee appointed by the Access Board" (PVA v. EBAE 1996e Amicus Curiae:5; AIA, 1999). In spite of this claim of architects being in favor of accessibility, the AIA was filing this brief in support of an architectural firm whose design allegedly failed to meet the requirements of the ADA. Further, the AIA was recommending dismissal of the architects from any legal liability related to the ADA.

Digging deep into legislative history of the ADA, the AIA claimed that Congress never intended to hold architects liable because during discussion in the U.S. House of Representatives Committee on the Judiciary, it had been said that "the owner or operator of the public accommodation is liable for discriminatory policies" (PVA v. EBAE 1996e Amicus Curiae: 7-8 citing H.R. Rep. No 101-485{III}, 101st Cong., 2d. Sess. May 15, 1990).

Most prominently, the AIA insisted that "the ADA specifically omits architects or other design professionals as potentially liable parties responsible for violations of the ADA" (PVA v. EBAE 1996e Amicus Curiae:3-4). Not to completely surrender their professional duties, they clarified: "This is not to say that architects or design professionals are immune from liability for designs which result in violations of the ADA" (PVA v. EBAE 1996e Amicus Curiae:4). But in this context, though they granted that "architects and design professionals have influence over the design of most commercial facilities and public accommodations," they did not explain the reason for their Amicus Curiae filing (PVA v. EBAE 1996e Amicus Curiae:3).

The AIA brief suggested that the phrase "design and construct" most sensibly has to be regarded as identifying only "the architect's client" since the clients are the ones who "cause" sites to be designed and constructed and who, therefore, should be "ultimately responsible for the creation of a public facility" (PVA v. EBAE 1996e Amicus Curiae:3). Architects, the AIA brief maintained, cannot be in a position to enforce the ADA requirements completely and comprehensively (PVA v. EBAE 1996e). They suggested that "by dismissing architects from action by plaintiffs who file suit under the ADA, courts will not diminish a claimant's ADA rights or eliminate a design professional's responsibilities for accessible designs under the ADA" (PVA v. EBAE 1996e Amicus Curiae:4). But they neglected to clarify how a person with a disability or a client of an architect may seek legal action if architects were deemed not liable under the ADA.

In short, the AIA was telling the court to look elsewhere for a responsible party. Professionals we may be when it suits our interests, they seemed to be declaring. Otherwise, we are merely innocent subservient agents of all-powerful employers who enter into contracts with us but who themselves ought to obey all the rules that should be followed when their buildings are designed. These other parties should be held liable for the failure of designers to follow laws. The recent owner-architect contract form published by the AIA contains an express disclaimer stating that the architect is not responsible for construction methods, techniques, or safety precautions (Nischwitz, 1984). "The effectiveness of these [contract forms]," Nischwitz (1984:245) observes, "is uncertain." And so it would prove as the sports arena cases unfolded (see further, Sweet, 1991).

The Court's Rulings in Brief

The arguments by Ellerbe Becket and AIA's supporting amicus curiae brief persuaded District Court Judge Thomas F. Hogan in the MCI Center case. He surmised that the architects were acting in good

faith and commended them for their design and for providing several alternative designs (PVA v. EBAE 1996h). On 19 July 1996, he dismissed Ellerbe Becket from the case (PVA v. EBAE 1996e; Winston, 1996a). But this would prove to be only a temporary respite. He ruled, nonetheless, that Ellerbe Becket's design for the MCI Center did not meet ADA requirements or provide at all locations satisfactory view lines for persons who use wheelchairs. The judge denied the other defendants' motion for a summary judgment and ordered them to submit within thirty days a plan to rectify the failures in the MCI design. Judge Hogan was not impressed with the defendants' argument that in seeking integration, dispersal, and enhanced sightlines, they inevitably had to sacrifice one goal to achieve another, though he granted that "a design cannot fully pursue each of the three features" (PVA v. EBAE 1996h:398).

The judge ultimately approved as an adequate measure of what he called "substantial compliance" a revised design with 78 percent of the stipulated number of wheelchair sites having ULOS (PVA v. EBAE 1996i:392 MO TFH:6; also PVA v. EBAE 1996k:396, 402, 403 MO TFH:6, 17, 23; PVA v. EBAE 1997c:588, Silberman:18; Fritts, 1998; Mazumdar and Geis, 2000, 2002).

OTHER LAWSUITS INVOLVING ELLERBE BECKET

So far our discussion has been of one lawsuit. But legal pressure continued to be exerted on Ellerbe Becket by injured parties to rectify recent situations where they had failed to provide adequate sightlines. There were lawsuits regarding the Fleet Center in Boston, the Spectrum Arena in Philadelphia, and the HSBC Arena in Buffalo (PVA v. EBAE 1996c Plaintiffs Opposition 08 Jul 1996:14). The Ellerbe Becket and AIA position of lack of liability would be rejected in decisions in several subsequent cases.

In Florida

In a suit concerning the design for the Broward Arena, the future home of the Florida Panthers ice hockey team, Ellerbe Becket urged the Florida district court to follow the MCI Center decision and dismiss the architects from the lawsuit.

The DOJ Amicus Curiae brief in that case noted that a restricted interpretation of the scope of liability would impermissibly limit the ADA's ability to ensure satisfactory conditions, such as adequate sightlines, and thereby would "do violence to the statutory theme" (Johanson v. HHI 1996 Amicus Curiae DOJ:5). Parties who lease or operate a facility, the government attorneys stressed, frequently will have had nothing whatever to do with the initial design and construction. Ellerbe, they said, "does not explain why Congress would choose to impose new construction obligations on those parties" (Johanson v. HHI 1996 Amicus Curiae DOJ:7). "Under Ellerbe's reading of §303," the DOJ claimed, "so long as a facility is designed to be in compliance with the ADA, the owner and contractor can freely depart from designs during construction and eliminate accessible features without violating the ADA, because the building is not both designed and constructed in violation." The DOJ continued: "Such an absurd result would effectively nullify §303.9" (Johanson v. HHI 1997 Amicus Curiae DOJ:9). "Ellerbe's parsing of the language [of the statute] creates a large loophole" (Johanson v. HHI 1997 Amicus Curiae DOJ:9) through which it, in particular, hoped to dodge responsibility for following the dictates of the ADA law and regulations. Government attorneys also pointed out that by not being responsible under the law, unscrupulous architects could secure an advantage over other bidders by not adhering to ADA requirements. Finally, the DOJ scoffed at Ellerbe Becket's lament that the government's interpretation of the ADA would set it up as a kind of "design police" (Johanson v. HHI 1996 Amicus Curiae DOJ:12). Its attorneys noted that the law does not vest the Attorney General with power to issue subpoenas or to employ other compulsory process in order to enforce ADA provisions, and that federal agents had not seized plans for any facility, nor had they otherwise intruded on the conduct of Ellerbe Becket's business affairs.

U.S. District Court Judge Jose A. Gonzalez, Jr., unpersuaded by EBAE's argument, relied heavily on an amicus curiae brief filed by the DOJ, whose earlier reticence in entering the fray in the MCI Center case had considerably irked the District of Columbia judge. In a January 1997 ruling, Gonzalez was convinced by the plaintiff's argument that if architects were not liable under the ADA, it was conceivable that no party whatsoever could be held responsible for a new commercial facility that violated ADA provisions (*Johanson v. HHI* 1996; *Winston*, 1997a).

In court decisions elsewhere, the view of the DOJ and the opinion of Judge Gonzalez in Florida were seconded. In an early 1998 Illinois case, another judge found the MCI Center decision "a narrow, literal reading of the statute inappropriate to carry out the intent of the ADA" (*U.S. v. Days Inn of America, Inc.* 1998:1083). Though the judge agreed that the "and" in the "design and construct" phrase was conjunctive, he asked: "[B]ut does this obvious grammatical truth necessarily require a narrow reading of liability?" (*U.S. v. Days Inn* 1998:1083). Similarly, in a case involving the Fair Housing Amendments Act of 1988 that also used the "design and construct" term, the court decreed that it should be read "broadly" and that it called for imposing liability on architects (*Baltimore Neighborhoods, Inc. v. Rommel Builders* 1998:665; see also *Caruso v. Blockbuster Sony* 1999).

In Oregon

In the *Independent Living Resources v. Oregon Arena Corporation* lawsuit over the Rose Garden in Portland, Oregon, the complaint named only the owner as the party at fault, but raised, among many others, issues that had been litigated in Washington, D.C., and Broward County, Florida (*ILR v. OAC* 1997a). Special attention in the Portland case focused on the dispersal of wheelchair seating and companion seating for wheelchair patrons.

Realizing that the design had not come close to meeting ADA requirements, the owners and the architects had decided, out of "desperation" (Judge Ashmanskas's term), to place 33 wheelchair spaces on Level 7, the "nosebleed" location, where there was no other fixed seating and only 16 ambulatory seats (*ILR v. OAC* 1997f:712; *Opinion-Ashmanskas* 20 Nov 1997:9, 13-14). Employees of the owner deposed under oath that the seats had been so placed to avoid putting wheelchairs in more desirable locations.

Additionally, in direct violation of the ADA demand that wheelchair patrons be provided with an ambulatory companion seat "next to" them, EBAE's design of 5 February 1992 called for wheelchair spaces in one row and ambulatory companion seats in the row in front or behind. EBAE had determined that side-by-side companion seats would require significantly increased space, and would result in a loss of 790 ambulatory seats (*ILR v. OAC* 1997f:710 *Opinion-Ashmanskas*:10) (see *Sanford and Connell*, 1998 for comparison of space usage).

The record illustrates the sparring between EBAE and the arena owner about ADA regulations. During the design phase EBAE assured the owners that side-by-side seating was something "that the disabled community always asks for but does not get" (*ILR v. OAC* 1997f:710 *Opinion-Ashmanskas*: 10). At the same time, when four DOJ officials offered their opinion that side-by-side seating was required, EBAE did not change its design, but sent a letter to their clients saying that it might be "prudent" to respect this opinion until a court decided otherwise, and "recommend[ed] that you have legal counsel review the law and the approach to compliance followed on the project" (*ILR v. OAC*, 1997f:711 *Opinion-Ashmanskas*:11, citing letter by Gordon Wood, project manager of EBAE). Eight months later, in several angry letters to EBAE, the Rose Garden owners asserted that they had been informed of the DOJ's interpretation of the rule very late and accused the architects of concealing this information. EBAE then responded that the interpretation of the ADA given to it by a DOJ official was confidential information, a view about which the judge was quite skeptical (*ILR v. OAC* 1997f:711 *Opinion-Ashmanskas* 12 Nov 1997:12). The architects were not demonstrating leadership or initiative in implementing the spirit of the ADA.

There is evidence that the architects were willing to follow their client's suggestions even when that jeopardized implementation of the ADA. For example, when the Rose Garden owners had objected to plans to place wheelchair seats in prime locations, Ellerbe Becket had complied but had written to their clients:

At your direction, we have not included the previously suggested revisions to seating areas on the west side of the court at Level Two. This decision tends to locate a greater majority of wheelchair positions in "end zones," which may not be viewed favorably by some interpreters of ADA.

(ILR v. OAC 1997f:715 Opinion-Ashmanskas:20)

This interchange can be looked at in different ways. Perhaps it offers strong support to Ellerbe Becket's constant plaint that it does not have the ultimate say on how projects turn out and, therefore, ought not to be held liable for inadequacies. But it also forcefully suggests that were architects to be liable for inadequacies of their designs, they would have compelling reasons to insist to their clients that the design *must* meet ADA standards.³

Judge Donald C. Ashmanskas declared that the new wheelchair sightline regulations had not been established properly but, nonetheless, required the design of the stadium altered to provide ULOS for accessible seats. Meanwhile, in several later decisions coming to nearly 50 double-columned pages, the judge painstakingly looked at each of nearly a hundred specific complaints of architectural failure and rendered an opinion on each of them (ILR v. OAC 1998a,b). The case was later settled by mediation. The owners agreed to provide adequate sightlines for all wheelchair patrons, while the plaintiffs abandoned their quest to have the suites retrofitted to provide satisfactory wheelchair accommodations (Ciesielski, 1998).

In Minnesota: A Resolution

The question of wheelchair sightlines — with the different federal court decisions — neared a definitive resolution when the U.S. Attorney's Office in Minneapolis filed a lawsuit on 10 October 1996 against Ellerbe Becket Inc. (42 U.S.C. §12188(b)(1)(B); see also Hodges, 1996; Winston, 1996b). Its complaint was that EBI "repeatedly designed arenas and stadiums with wheelchair seating locations that do not provide wheelchair users with lines of sight to the floor or field that are comparable to those of other spectators" (U.S. v. Ellerbe Becket 1997a:1264). The bell had begun to toll.

Again in the Minnesota case, the AIA sought to forestall, or at least delay, what increasingly appeared to be a foregone conclusion (U.S. v. EBI 1997a AIA Amicus Curiae 20 Jan 1997). This time it was joined in its amicus filing by the 33,000-member Associated General Contractors of America. Most of the pair's arguments were by now familiar repetitions of what the DOJ had deemed to be idiosyncratic parsing of language, though the failure of the Congress to be more specific certainly has to be seen as less than admirable (see Mazumdar and Geis, 2000, 2002). The AIA noted that it represented 58,000 persons, including 45,000 architects, or more than half of those licensed in the United States and its territories. It argued that architects and contractors were merely agents of those who employed them. Judge Tunheim ruled that the ADA applied to architects also (U.S. v. EBI 1997b).

After two years of negotiating, a consent decree ended the Minnesota case. Included in the consent order were diagrams (Figure 1) and detailed dimensions designers must adhere to for figuring ULOS configurations. Ellerbe Becket did not concede that it bore responsibility for designing stadiums that breached ADA mandates but, nonetheless, agreed that it would include adequate wheelchair seating and satisfactory lines of sight for all fixed seating facilities that it designed subsequent to the 1998 date of the consent order (U.S. v. EBI 1998 Consent Order). In exchange, the government agreed not to take any action against Ellerbe Becket for projects designed prior to 1998. "We are not trying to get them to redesign the stadiums," a DOJ spokesperson noted, "we're trying to ensure they no longer build stadiums that are inaccessible to the handicapped" (Bowles, 1996).

FIGURE 1. Lines of sight for wheelchair seating.

Source: U.S. Department of Justice; Accessible Stadiums, p.2. exhibit, U.S. v. Ellerbe Becket, Inc. USDC DMN 4-96-996.

For an attorney working with the PVA, this agreement marked "a sea change in focus and attitude of the firm," though he cautioned: "whether that permeates [the architectural world] is an open question" (Conrad, 1998a). The president of the Building Owners and Managers Association praised the Minnesota ruling, insisting that architects are in the best position to make certain that laws pertaining to construction are obeyed (Winston, 1997c).

DISCUSSION

Based on this case study, we cannot state whether this behavior on the part of the architects was usual or widespread. The U.S. Attorney General charged, however, that EBI had designed at least five other arenas that failed to meet ADA regulations (U.S. v. EBI 1996a Complaint:3, 5). Judges ruled that Ellerbe Becket's design of the MCI Center and other sports arenas did not meet ADA requirements or provide at all locations satisfactory view lines for persons who use wheelchairs. If there were a legal requirement for wheelchair-accessible seats to have ULOS, the responsibility to design accordingly would belong to the architects, the other courts felt.⁴ Indications are that other firms also neglected to follow ADA directives (see for e.g., U.S. v. Physorthorad 1996; U.S. v. Days Inn 1998; Dunlap, 1997).

It is important now to return to the questions with which we began this study. What insights can be gleaned from the court cases we examined about how architects approached accessibility, the ADA, and "full and equal enjoyment" of facilities by persons with disabilities? Below, we offer several possibilities that might explain why the architects chose not to follow ADA requirements.

From a design perspective, architects might view the ADA as an obstruction if particularly pesky, irresolvable, or difficult to resolve design problems; irreconcilable design constraints (e.g., tightness of space); or conflicting design requirements (e.g., local building regulations) make it impossible to address ADA concerns. In one case EBAE claimed "structural impracticability" (an exception permitted by the ADA), but Judge Ashmanskas ruled it inapplicable (ILR v. OAC 1997f:747 Opinion-Ashmanskas 20 Nov 1997:81). They also protested that invariably one of the goals of integration, dispersal, and enhanced sightlines had to be sacrificed, but this argument did not move the judge (PVA v. EBAE 1996b:398). Following the ADA might negatively affect the form, beauty, or appearance of the building; but architects might hesitate to make these claims because the profession is known to be very creative about finding solutions to design problems, and it is doubtful that such arguments would receive sympathy from the courts.

Architects may not follow ADA guidelines if clients resort to power, influence, and arm-twisting. The record indicates that under pressure from the owners, EBAE located accessible seats in end sections instead of better view locations (ILR v. OAC 1997 Opinion Ashmanskas). Perhaps the ar-

chitects felt that they needed to have a court mandate to convince their clients to accept designs meeting ADA requirements. But this rationale runs contrary to their persistent claim that the law did not require this. The clients, in contrast, blamed the architects for failing to appropriately inform them about requirements and interpretations of the ADA. If an architect's design satisfies ADA requirements, there is little likelihood that owners would nullify it due to their "taste, vision, or pocketbook." But, if a design fails to satisfactorily meet ADA requirements, it is unlikely that the owner would notice the omission or demand compliance.

Architects may have financial or economic reasons for neglecting ADA mandates. The ADA does not provide financial or other incentives or compensation for compliance except some tax incentives (see Mazumdar and Geis, 2000), nor does it permit owners to levy extra charges on persons with disabilities.

Ellerbe Becket attempted to increase revenues and control cost. Their architectural designs for new sports arenas contained "a higher total number of seats — from 12,000 to 19,000 — than the facilities they replace" (Gunts, 1992:90; Walker, 1999), and tended to be "luxurious" and "upscale," containing "a higher percentage than usual in more recent times, of premium seats; more posh lounges and first-class restaurants; concession areas that feature gourmet foods; and luxury suites or 'superboxes'" (Gunts, 1992:90; Forgey, 1997). These "superboxes" provide "catering, wet bars, private bathrooms, refrigerators, televisions, and private phones" (Gunts, 1992:90). The MCI Center had 109 "superboxes," each leasing for 3 to 10 years at \$100,000 to \$175,000 a year (PVA v. EBAE 1996j:397 TFH MO 20 Dec 1996:8-9). "Today's suites can easily represent half a team's profit," said one commentator pointing out that corporations have paid as much as \$350,000 for access to such an elegant, thickly-carpeted booth (Walker, 1998:W1). Provision of commercial spaces can generate revenue; in the MCI Center, 25,000 square feet of space was rented to the Discovery Channel Store (Haggerty, 1996).

Such elegance for the elite and introduction of striking architectural social stratification into sites that earlier had (in baseball, for instance) only bleachers and grandstands (see also Forgey, 1997) appears to make a mockery of the common-man themes in public statements by EBAE's senior vice president: "These kinds of buildings bring together a cross-section of America, from the CEO to the little guy with a family. The more entertaining we can make them the more people will want to be there" (Gunts, 1992:91). Yet, these architects fought hard to avoid providing ULOS to persons with disabilities because, they claimed, that amounted to more than equal and preferential treatment.

EBAE attempted to contain cost by locating accessible seats in lower demand areas, avoiding companion seats, and using infill seats. Judge Ashmanskas's assessment was that the architects, through their designs, were looking carefully after financial interests and that, in the Oregon arena, many of the design compromises in regard to wheelchair patrons had been made in terms of calculations of the money that stood to be earned from sales of wheelchair-inaccessible seating rather than regard for either the arguable letter or the unarguable spirit of the ADA law. In this regard, Esherick (1984:28) suggests that: "Architecture ... is as Bob Gutman argues, an entrepreneurial Profession Entrepreneurial instincts in most cases have driven the Profession toward serving developers and often the building industry itself."

From a legal standpoint, if architects believe that the regulations are invalid because of legal issues, such as unconstitutionality, violation of law or procedure, or lack of clarity or enforceability, they may opt to disobey the law and seek clarification of the law in court. EBAE argued that the regulation regarding sightlines was void because its promulgation did not follow required procedures (AIArchitect, 1998:3; Winston, 1997b; AIA, 1998). A favorable finding in this regard would have sent the lawmakers back to the drawing board and shifted the attention from the architects to them. The cases also showed how, despite their standing as professionals, EBAE sought assiduously to preserve the lack of liability that architects have historically enjoyed and to exempt themselves from responsibility for failure of their sports arena designs to meet ADA requirements. The AIA, too, filed

amicus curiae briefs (see also AIA, 2000). Ellerbe Becket even raised its own banner on high in a romantic paean:

EBAE takes great pride in designing innovative seating arrangements which provide excellent views from all seats and which are readily accessible. It would be contrary to their architectural duty and professional goal, as a state of the art and world-renowned architectural firm, to intentionally design a facility, which discriminates against the handicapped.
(PVA v. EBAE 1996b:14)

If satisfactory sightlines were required, its failure to provide them was not deliberate, Ellerbe Becket seems to be saying. But this statement clashes with their efforts to avoid providing ULOS for accessible seats and leaves open the question of whether it might have been an omission chargeable to negligence.

Interestingly, the architects did not challenge one of the more challengeable aspects of the ADA, the formula of 1% + 1 for the number of accessible seats (Sanford and Connell, 1998). Court documents reveal that the Access Board itself was considering revising the formula to 0.5% + 1. Reduction of the formulaic requirement would have put the defendants much closer to meeting the requirements of the law.

In the adversarial judicial system in the U.S.A. (Kagan, 1996:8), although the possibility of admission of fault or guilt exists, defense is an oft-used option as there is the possibility that the defense's arguments may be accepted by the court, as with Judge Hogan's ruling that the architects were not liable. The strategy of fighting a court case has its risks, however. Among other things, it can require attorney fees, characteristically regarded as stunningly exorbitant in the United States, and lost time and opportunity, in addition to the considerable expenses involved in rectifying what are judged to be violations, failures, inactions, or worse, malicious discriminatory intent. The architects could have settled the cases much earlier and thereby avoided the loss of their historical immunity from liability that found its way into the decisions (see also Flatt, 1990; Colgate, 1999). The legal system now operates often to what many architects see as their disadvantage.

The architects' strategy of hiring good lawyers had its payoffs. The arguments made by counsel for the architectural firm persuaded the MCI Center judge that they were not liable and should be dismissed from the case. This was but a temporary respite however, for other courts on other days would decree that architects bear liability. They even came close to convincing him (though in the end they failed to do so) that the regulations were invalid because the DOJ had not followed proper procedures when adopting wheelchair sightline rules.

It is important that architects work closely with their lawyers. Architects may face jeopardy even if they act on the basis of learned and renowned counsel. Lawyers are striving to win a case and in the process may make arguments that can carry that day but may not reflect well on the architects. The claim that the DOJ had not followed APA mandated procedures for rulemaking, though powerful, was essentially a futile argument by the EB lawyers; its only effect would have been a temporary and hollow victory. The DOJ still had the authority to begin another round of proper rulemaking to reach precisely the same result. Taking a more aggressive role, the DOJ subsequently put pressure on EB to enter into a consent agreement that it would abide by the rule in all future stadium construction. It continued this role in 1999, as it brought suits against the owners of the Yankee Stadium and a number of motion picture theaters, seeking to have them provide accessible seating that met ADA requirements.

What might have been the outcome if the judges agreed with the architects?⁵ Most likely, the promulgators of the regulations would have started again, used clearer language, and adhered to stipulated procedures. What the architects sought to obtain was a temporary and transient victory that would have done a significant disservice to those wheelchair spectators seeking pleasure in designed and constructed arenas. It was not an endeavor to be admired.

Architects now have no option but to design according to the ADA requirements, including adequate wheelchair sightlines. They could have chosen to be concerned professionals who design comfortable, inclusive, innovative arenas, done so all along, and avoided the litigation. As Judge Ashmanskas observed:

It is no answer to say this is the way we've always done it — we've always discriminated against persons with disabilities. A prudent designer would have understood that, in enacting the ADA, Congress intended to do more than simply maintain the status quo. Congress intended to establish higher standards for newly constructed structures, and to change the manner in which buildings were designed so that persons with disabilities could more fully share in the benefits that are available from public accommodations.

(ILR v. OAC 1997f:748 Opinion-Ashmanskas 20 Nov 1997:83)

Architects' professional responsibility and conduct are called into question by this case. The argument by the architects that liability should not rest on their shoulders because they function primarily in a "servant" role (to their clients) suggests an absence of professional responsibility. Certainly, clients can choose not to construct a building as planned or can terminate their arrangement with the architects. But if architects are merely servants, lacking any responsibility, laboring at the whim and command of their client masters, it would not be entirely appropriate for them to claim credit for the designs as they did:

EBAE takes great pride in designing innovative seating arrangements which provide excellent views from all seats and which are easily accessible.

(PVA v EBAE 1996b, USDC DC 96CV01354 TFH Defendants' Motion to Dismiss 28 Jun 1996, p. 14)

If architects perform in the "servant" role, following the dictates of their clients, do they also act as agents doing "dirty work" for their clients in seeking to skirt or ignore the law's dictates? This might be akin to steering, by real estate agents, of people buying property so that some, such as African-Americans, are kept from moving into certain neighborhoods (Pearce, 1979, 1988).

The servant role, with its lack of responsibility, is in contrast to the "professional" role with its duties and responsibilities. It would not be appropriate to claim professional duty and responsibility if adopting the servant role. But the architects' lawyers declared:

It would be contrary to their architectural duty and professional goal, as a state of the art and world renowned architectural firm, to intentionally design a facility which discriminates against the handicapped. Accordingly, this Court should dismiss Claim III.

(PVA v EBAE 1996b, USDC DC 96CV01354 TFH Defendants' Motion to Dismiss 28 Jun 1996, p. 14).

The claim that architects are not responsible for their designs does not reflect well on architects.

In the MCI litigation, the defendants wanted to win to avoid the additional expenditure to redesign the arena or make costly corrections but also to avoid the social stigma associated with losing the case and being seen as at fault. From this point of view, their defensive posture seems reasonable. But it also shows a not-so-proud side of the architectural profession and of the American Institute of Architects. They come uncomfortably close to being unprofessional, if by professional we mean devotion to the service of society, especially those in society who are in particular need of help. Architects may not be required to take a Hippocratic oath, but they are expected to demonstrate a social conscience. Legal considerations should not be paramount in the effort to make the life of persons with disabilities equal to that of their fellows. Powerful and leading architects that they were, they could have taken a trend-setting "socially conscientious" approach of user-friendly design as advocated by architectural writers, such as Vitruvius (1931/1st century) and others.

Let us now shift the focus to persons with disabilities. A person can go from being able-bodied one day to being mobility-impaired the next. This can happen to anyone and without warning (Murphy, 1987). The experience brings with it a different perspective on the world. To reach places and to do

things that once were readily accessible now requires more effort and time, conscious planning, and sometimes assistance from others. Most persons with disabilities prefer to participate as independently as possible in what life has to offer. Technological design and other advances, such as specially outfitted cars, powered wheelchairs, curb cuts, ramps, elevators, lifts, and automatic doors, among others, have made this desire more achievable.

What approaches could architects take toward easing accessibility for persons with disabilities? They could avoid the approach critiqued by architect Ronald Mace: "I've always been annoyed by architects who design buildings with a disregard for people with disabilities and then at the last minute say, 'What we'll have to do to meet the code is go to the back door and stick a ramp on for an extra \$40,000 or \$50,000'" (Dunlap, 1997:4). The architects could have viewed it as a moral issue, taken a "socially conscientious" approach to help the disadvantaged, informed their stakeholders and clients that the costs associated with wheelchair accessibility were a necessary part of the building, and developed innovative designs for persons with disabilities.

Architects could ask themselves: "Have we done everything possible to aid persons with disabilities in living a fuller life?" They could take on the frame of reference of persons with disabilities and further ask: "What is the experience of a person with disabilities who wants to enter the arena, watch the event without standing, get something to eat, go to the restroom, and leave while thousands of other people are pushing their way to the exit?" They might have personalized the issue, asking what kind of seating they would have desired if they had been or in the future might be in a wheelchair. If architects attended carefully to these matters, they would not have taken the position assumed by Ellerbe Becket and the American Institute of Architects, battling to be dismissed from the case. The AIA can promulgate guidelines more sensitive to and respecting of architects' creativity and their needs, yet demonstrating a serious objective of universal design. Architects could push their professional organizations into action and themselves be conscientious, understanding, and caring designers. As Ronald Mace, an architect who used a wheelchair, said before his death in June 1998: "Let's design all things, all the time, for everyone. It's where we're headed. It makes sense. And it is a much more humane design policy" (Dunlap, 1997:1).

The dream of a prominent architect-teacher is particularly useful: "I hope we can find ways to be useful to more people — particularly to those in greatest need" (Esherick, 1984:28).

NOTES

1. For citations to court documents, we have followed a social science system, not a legal one. The letter following the year of a court case refers to significant ruling or filings related to that case. We have referred to typescript documents filed with the court by parties and to published sources. Not all court documents are published, and when published, they may not match the typescript. So, where available, we have provided citations to both published materials in the standard format and to the original typescript version. To enable readers to find materials and to keep to one system and recall details, we have listed all items in the references, even though not all items may be referred to in this paper. For publications on the web, we have given the web address at the time we referred to them.

2. This information about the firm is at the time of writing in August 1999, and is likely to change. On 21 July 2000, Ellerbe Becket's web page reported 800 employees in 6 branches in the USA and 5 international offices and revenues of \$118 million (<http://www.ellerbebeck.com/>).

3. In the event that the clients do not cooperate, they can exercise their options of seeking indemnification, failing which they can discontinue work on and remove themselves from the project.

4. In another case dealing with designer's responsibility, an elderly woman was hurt in a supermarket by a door from the service area opening onto her. Dr. Wolfgang Preiser, who was invited by a corporation to be an expert witness, felt that the architect had not designed the door and interior appropriately.

5. Since this writing, a New Jersey Court of Appeals, agreeing with the architect's argument, has ruled that the regulations were not properly promulgated by the DOJ, but the decision was not reached in time for it to be useful to Ellerbe Beckett (see *Caruso v. Blockbuster Sony Entertainment Center*, 1999).

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