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Mediation and Title I of the ADA

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Mediation and Title I of the ADA

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, SPHR, Director, Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University. This publication was created in July, 2000 by Sheila D. Duston, an attorney/mediator practicing in the Washington, D.C. metropolitan area.

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The full text of this brochure, and others in this series, can be found at: www.ilr.cornell.edu/ped/ada. Research reports relating to employment practices and policies on disability civil rights legislation, are available at: www.ilr.cornell.edu/ped/surveyresults.html

For further information, contact the Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; 607/255-2906 (Voice), 607/255-2891 (TDD), or 607/255-2763 (Fax).

More information is also available from the ADA Technical Assistance Program and Regional Disability and Business Technical Assistance Centers, (800) 949-4232 (voice/TTY), www.adata.org

What is Mediation?

Mediation is a unique form of Alternative Dispute Resolution (ADR). Mediation is a process in which a neutral third party assists two or more disputants in finding a mutually acceptable solution to their conflict. The mediator facilitates discussions, enhances communications, and uses a variety of other skills and techniques to help the parties reach a settlement, but has no power to make a decision. The process is voluntary and confidential.

While many people think of using mediation only after a formal complaint or lawsuit has been filed, mediation techniques can also be appropriately and effectively applied at the first hint of a problem or dispute that may not yet even rise to the level of a legal claim.¹ This article will explore the techniques and process of mediation, as well as discuss some special considerations involving the mediation of cases that arise under the Americans with Disabilities Act (ADA).

Title I of the ADA prohibits discrimination in employment against a qualified individual with a disability.

What Are the Other Kinds of ADR?

In addition to mediation, other forms of ADR include arbitration, mini-trials, early neutral evaluation, private judging, and screening panels. With the exception of mediation, all of these forms of ADR are similar to the litigation model. That is, they all use a system of advocates (lawyers) who represent their respective clients' cases to a third-party decision-maker similar to a judge. Arbitration is often a binding decision-making process in which the arbitrator hears evidence and renders a decision. In neutral expert evaluation, the attorneys present their cases to a third attorney who has many years of experience. This expert renders an

¹The individual must bear in mind, however, that the period within which a legal claim must be initiated – the statute of limitations – will not stop running during pre-charge or complaint mediation.

informal opinion emphasizing the strengths and weaknesses of their cases, with the purpose of giving the parties a more realistic basis for out-of-court settlement. Private judging is identical to standard litigation but uses former judges to hear cases in private courtrooms. Screening panels are used like neutral experts to evaluate cases at an early stage and encourage settlement or dismissal of cases unlikely to be successful. ADR, including mediation, is encouraged by many courts. In some jurisdictions, attorneys are ethically required to inform their clients about ADR options.

Why is Mediation Becoming So Popular?

Mediation is the fastest growing form of ADR. Mediation is being used more and more in the employment context, including ADA Title I cases. It is also being used to resolve Title II (transportation) and Title III disputes (public accommodation).

Mediation has become a popular form of ADR because the mediation process is voluntary, confidential, expeditious, and far less costly than litigation. The process also leaves the parties in control of the outcome. Furthermore, participating in mediation does not require a waiver of statutory or due process rights, and an agreement to mediate leaves the parties free to pursue other courses of action at any time they wish. Mediation also allows people to be heard and permits the parties to be as creative as they wish in formulating an agreement that will work for them.

In addition, many organizations are using mediation or mediation techniques in-house to resolve employment disputes at the earliest possible point. Through mediation, problems often are resolved before they impact on office peace and productive functioning of employees. It also helps to avoid litigation and its associated costs.

How Does Mediation Differ from Litigation?

Mediation sharply contrasts with the adversarial processes of litigation or arbitration and, at least

theoretically, decreases the hostility that can result from both. Mediation neither judges guilt nor innocence, nor decides who is right or wrong. Rather, its goal is to give the parties the opportunity to:

- (1) vent and defuse feelings,
- (2) clear up misunderstandings,
- (3) determine underlying interests or concerns,
- (4) find areas of agreement and ultimately,
- (5) incorporate these areas into solutions devised by the parties themselves.

Litigation usually asks the question: "Who is most at fault and how much should s/he lose?" Mediation asks much different types of questions, such as: "We're getting a divorce, how shall we continue to parent our children?" Or, "The car that was sold was defective, what will we do about this transportation problem?" Or, "What needs to be done to improve our working relationship or correct the work environment (e.g., when impaired by discriminatory comments or actions)?"

By focusing on both parties' interests, rather than just their stated positions, mediation can often lead to win/win solutions, where both parties are satisfied with the settlement that they have personally helped to craft.

What Does the Mediator Do?

A mediator, unlike a judge, a hearing examiner, or an arbitrator, has no legal power to render a judgment or award. The mediator is also not an advocate for one side. Nor is the mediator acting as a therapist or counselor, although the mediation process can be therapeutic. Rather, a mediator is a neutral third party who helps the parties talk out their problems by facilitating discussions and enhancing communications. Both parties must have trust in the mediator's neutrality; a mediator's effectiveness depends on the parties' trust.

The best mediators have good common sense, the power of persuasion, and skills to facilitate problem solving. A facilitative mediator remains totally neutral and rarely makes recommendations that reveal how s/he feels about a dispute. Instead, the mediator tries to

reconcile opposing points of view by searching for common ground. While mediator styles vary tremendously, in any mediation, a mediator will typically:

- Explain the process and develop an atmosphere conducive to problem-solving negotiations.
- Give each party a chance to tell its side of the story, to vent emotions, and to feel like it has been heard by both the mediator and the other side.
- Gather all the information available about issues and the interests of both parties by listening and asking questions in both joint and separate sessions,
- Help identify issues and find common ground.
- Encourage the parties to brainstorm and create options.
- Help the parties evaluate and narrow the options, including helping the parties make rational decisions between reaching an agreement and pursuing a claim.
- Assist, if requested, in drafting a memorandum of understanding with the major points of agreement (final agreements typically would be handled by counsel in complex cases; in simple cases, such as small claims court disputes, the mediator may draft the final agreement).

How Can My Business Use Mediation to Prevent Litigation?

Some organizations actually employ in-house mediators or conflict resolution specialists to whom employees can turn for help in resolving disputes. More commonly, human resources (H.R.) professionals have been trained to use mediation techniques in the every day course of dealing with conflicts between employees or between supervisors and employees. Many of the mediation techniques discussed in the preceding section are used by in-house conflict resolution specialists and H.R.

professionals (sometimes one and the same) as they assist employees and/or supervisors in trying to resolve disputes.

Mediation techniques may be used in an informal, non-structured way that is simply termed a discussion or series of discussions. Alternatively, the parties may be invited to sit down and mediate their dispute with an in-house person serving as the mediator. When no in-house person with mediation skills is available, the employer sometimes will contract with an outside mediator to sit down and work with the parties to resolve their disputes.

Issues appropriate for mediation may range from an interpersonal dispute that is not legally cognizable (two employees who just don't get along and are disturbing office peace), to a clear cut legal claim that has not yet been filed. In general, it is advisable to discuss and mediate problems as soon as possible before they intensify or escalate to the point of litigation.

In cases where there has been a legal violation, a written mediation agreement with relief would typically be drafted and signed (see discussion below). In other cases, the most important part of the mediation is to air the issues. Sometimes an apology and an oral commitment to do things differently are all that is needed. Sometimes the parties may want a written commitment.

What Can Be Agreed to in a Mediated Settlement?

Creative resolution is a hallmark of mediation. In a mediated agreement involving a legal claim, the parties can agree to a solution that is available in court as well as to those that go beyond what a judge could order.

In an employment discrimination case, the following remedies typically are obtained by going to court (depending on the issues in the case):

- Back pay, front pay
- Attorney's fees

- Compensatory and punitive damages
- Injunctive relief, including reinstatement, promotion, transfer, etc.
- Posting notices

In addition the following solutions are not common to litigation but are available through mediation:

- Structured payments, annuities
- Confidentiality
- Outplacement services
- Training program at workplace
- Apology
- Revision of employment records
- Publicity releases
- Employment references
- Health care and benefits continuation
- Stock options
- Donations to charity
- No reapplication provision/rehire agreement in the event of breach of settlement

What is Different About ADA Mediations?

All of the basic principles and advantages of mediation apply equally to ADA mediations. There are also a number of additional considerations with ADA mediations, however, starting with ensuring that an individual with a disability is provided with any accommodation necessary for him/her to participate in the mediation. Some of the special considerations that may come into play during ADA mediations will be discussed below.

Early Mediation When Agreement Cannot Be Reached On Accommodation Issues

The Equal Employment Opportunity Commission (EEOC), which enforces ADA Title I, strongly encourages the parties to engage in an “interactive process” when determining whether and what reasonable accommodation is required to enable an applicant or employee to perform the essential functions of a job held or desired. This interactive process often results in the parties agreeing on an effective

accommodation, perhaps with the help of an outside expert. When the parties cannot reach agreement, mediation may be a beneficial next step. An in-house conflict resolution specialist or H.R. person with mediation skills may be able to help facilitate discussions, either informally or by conducting a full mediation with the applicant or employee and the employer representative responsible for the accommodation decision. At times, it may be necessary to turn to an outside mediator if the in-house person is not considered to be sufficiently neutral.

What Are the New ADA Mediation Guidelines?

Recently, a National Work Group, comprised of 12 mediation practitioners, trainers, and administrators, developed ADA Mediation Guidelines. These guidelines set forth valuable information and guidance on the mediation of cases arising under the ADA, as well as under other disability civil rights statutes, such as the Rehabilitation Act of 1973, the Fair Housing Act Amendments of 1988, and comparable state and local civil rights laws. The guidelines can also be applied to the mediation of non-ADA cases, such as commercial or family disputes, that involve a party with a disability.

How Do I Choose A Mediator for an ADA Case?

You want to choose a mediator who is competent to mediate the type of workplace problem at issue. The Guidelines take the position that the mediator not only should be knowledgeable about the mediation process but also about the subject matter of the dispute. In general, mediators should have knowledge of disabilities, disability access, and disability law, including general ADA case law developments and guidance documents issued by the regulatory agencies. A mediator knowledgeable about the status of the law will be able to work with the parties effectively in exploring the range of settlement options and will know if the parties are making informed decisions and enforceable agreements. A mediator may be competent to mediate ADA cases as a result of ADA mediation training, experience doing ADA mediations, legal knowledge of the ADA, or some combination of all of these factors.

Keep in mind that Title I (employment) issues are different than ADA Title III issues (public accommodations), and a particular mediator may be competent to mediate a case arising under one but not both of these titles.

Making Mediations Accessible

The Guidelines make clear that mediation providers have an obligation to make their services accessible to persons with disabilities. If the employer is running an internal mediation program, the employer must also ensure that the mediation is accessible.

ADA mediation providers should make all aspects of mediation, ranging from training sessions to mediation sessions, accessible to persons with disabilities, including parties and other mediation participants, staff volunteers, and mediators. For these purposes, the broadest definition of disability should be applied, including chronic conditions, episodic symptoms, and temporary disabilities. This is in keeping with the generally accepted mediation principles that the parties be able to participate fully in the process. Mediation programs should have a process allowing individuals to request needed accommodations. The mediator should be informed of any disability accommodation that is required. (Simply stated, for a mediation to be successful, all parties must be able to attend. If one party is unable to attend because a needed accommodation is not provided, the mediation is unlikely to go forward.)

Capacity Issues

The vast majority of ADA employment mediations will not raise the issue of party capacity. Where there may be an issue of capacity, the Guidelines state that the mediator should ascertain who the parties are and whether a party understands the nature of the mediation process, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.

If a party appears to have diminished capacity, or capacity is unclear, the mediator should determine whether an accommodation would enable the party to participate effectively. If not, the mediator should determine if the person could mediate with support, such as with an attorney or with another supporting person. If despite support, a party lacks capacity to mediate, the mediation cannot proceed unless a surrogate participates in the process to represent the interests of the party and make decisions on behalf of the party. The Guidelines state that the issue of who can act as a surrogate is defined by state law, and might include agents with powers of attorney, guardians, or family members

The Guidelines point out that an adjudication of legal incapacity is not necessarily determinative of the capacity to mediate, depending on what issue is being mediated. For example, a person might have a guardian for financial matters, but not for personal or healthcare decisions. This person could participate in a mediation about his/her medical treatment, but would need to be represented by a guardian in a mediation involving financial issues. A mediation agreement signed by a person without legal capacity may require co-signing by a surrogate to ensure its enforceability.

Who Will Attend the ADA Mediation?

As in any mediation, the two parties will attend. If one of the parties is a corporation or large organization, it may be represented by one or more individuals, including managers, human resource representatives, or counsel. An individual with settlement authority should be present.

The Guidelines take the position that the parties may each bring a representative of their choice to the mediation session. The representative may be a disability rights advocate, expert, vocational rehabilitation counselor, job coach, family member, attorney, union representative, or other person. The representative may advise and present on behalf of the person, but, unlike a surrogate, does not make decisions for the person. A party may bring a support

person, as a representative or in addition to the representative, to assist the person, for example, by providing emotional support.

Persons with disabilities may be accompanied by a personal assistant (PA) who is supervised by the person with the disability and provides physical aid or other assistance. A qualified sign language or oral interpreter has the dual role of being a “disability accommodation” for persons who are hearing-impaired or who have speech disabilities and of facilitating communications between these persons and the other participants in the session.

In addition, the parties may engage experts, or the mediator, with the permission of the parties, may invite a neutral expert, to help educate the mediator and the parties about the disability and to assist in developing options. The mediator should also ascertain whether the parties have considered the impact of any potential agreement on parties who are not at the table, such as other employees or a labor union and its members. The impact of the agreement on other parties may affect the enforceability, successful implementation, or durability of the agreement.

The Reasonable Accommodation Process During Mediation

In ADA Title I cases where reasonable accommodation is an issue, the joint session provides the parties with an opportunity to further engage in the “interactive process” (favored by the EEOC, courts, and commentators) to identify or evaluate accommodation alternatives. Generally, the interactive process will have been attempted prior to the mediation of a reasonable accommodation dispute. The ADA Mediation Guidelines note that when the interactive process is taking place in the context of mediation, it must be clear that anything said or done – even as part of the interactive process – will remain confidential and inadmissible as evidence in any legal proceeding, unless otherwise agreed to by the parties.

Confidentiality

Consistent with general confidentiality obligations, the Guidelines state that mediators should maintain confidentiality of disability-related information when arranging access to and conducting the mediation. While the person with the disability may have disclosed his/her disability, there still may be information that the person does not wish to reveal, such as the diagnosis or the severity of his/her health problems. Where a mediator believes that disclosure of this information would be helpful to the mediation, the mediator should invite disclosure by the person with a disability during a private caucus, but may not disclose this information without permission.

Legal Information and Legal Advice

As is true in any mediation where legal rights are at stake, mediators should encourage the parties to become aware of their legal rights and responsibilities under the ADA prior to the mediation so that the parties can participate meaningfully and make informed decisions. While educational materials, such as ADA booklets, may be helpful, they are not a substitute for legal advice and representation.

The Guidelines note that before the mediation session and at the outset of each session, parties should be advised that they may obtain legal or other representation. Parties in an ADA mediation should be advised of the risks of not being represented by counsel or of not having a potential agreement reviewed by counsel.

The mediator may refer parties to resources to seek representation. Where the mediator believes that a party does not understand the implications of a proposed agreement, the mediator should encourage the party to consult appropriate sources of information and advice.

Resources:

Equal Employment Opportunity Commission (EEOC), www.eeoc.gov, 800-669-EEOC (Voice), 800-800-3302 (TTY). Documents on ADA employment issues, including policy guidance, 800-669-4000 (Voice), 800-669-6820 (TTY).

Association for Conflict Resolution, 1527 New Hampshire Avenue, NW., Third Floor, Washington, D.C. 20036; Phone: 202-667-9700.

The Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law is the institutional home of the ADA Mediation Guidelines. The ADA Mediation Guidelines, with links to other statutes and other resources, is posted on the Cardozo Online Journal of Conflict Resolution (COJCR), the original publisher of the Guidelines at: www.cardozo.yu.edu/cojcr/guidelines.htm.

Disclaimer

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Cornell University is authorized by the National Institute on Disability and Rehabilitation Research (NIDRR) to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). However, you should be aware that NIDRR is not responsible for enforcement of the ADA. The information, materials, and/or technical assistance are intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at: <http://www.eeoc.gov>

Other Brochures on the ADA Produced by the Program on Employment and Disability

Available on-line at www.ilr.cornell.edu/ped/ada

Human Resource Issues Surrounding Implementation of the ADA

The ADA and Collective Bargaining
The ADA and Personnel Training
The ADA and Total Quality Management
The Americans with Disabilities Act of 1990 and Injured Workers
Assistive Technology, Accommodations, and the Americans with Disabilities Act
Definition of Disability under the ADA: A Practical Overview and Update
Diversity and the ADA
Employee Medical Exams and Disability-Related Inquiries under the ADA
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Reasonable Accommodation in the Implementation of the ADA

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Assistive Technology, Accommodations, and the Americans with Disabilities Act
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