

Another Alternative: The Use of Moderated Settlement Conferences to Resolve ADA Disputes Involving Persons with Mental Disabilities

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The Americans with Disabilities Act of 1990 (ADA)¹ authorizes and encourages the use of alternative dispute resolution (ADR) procedures to resolve disputes arising under the Act.² Consistent with that statutory guidance, there has been a spate of activity relating to the use and potential use of ADR to resolve ADA disputes on an informal basis. For example, in 1995 the Equal Employment Opportunity Commission (EEOC), one of the chief ADA enforcement agencies, adopted the recommendations of its task force on ADR to establish an ADR program as part of its dispute resolution process.³ Similarly, the Administrative Conference of the United States (ACUS) has issued a detailed set of recommendations regarding agency use of ADR procedures in ADA disputes.⁴ Also, several commentators have strongly advocated the use of ADR processes to address ADA issues.⁵

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¹ Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. (1990)).

² See 42 U.S.C. § 513 (1990); 42 U.S.C. § 12212 (Supp. IV 1992).

³ See Paul S. Miller, *EEOC Adopts ADR Methods*, DISP. RESOL. J., Oct.-Dec. 1995, at 17.

⁴ See Administrative Conference of the United States, Recommendation 95-7, *Use of Mediation Under the Americans with Disabilities Act*, in RECOMMENDATIONS AND REPORTS 49-53 (1994-1995) [hereinafter ACUS Recommendation 95-7].

⁵ See, e.g., Peter D. Blanck et al., *Implementing Reasonable Accommodations Using ADR Under the ADA: The Case of a White-Collar Employee with Bipolar Mental Illness*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 458 (1994); Linda S. Crawford, *The Americans with Disabilities Act, ADR: A Problem-Solving Approach for Business*, DISP. RESOL. J., Apr.-June 1995, at 55, 58; Ronald F. Hanson, *Rights & Relief Under the Disabilities Act*, DISP. RESOL. J., Apr.-June 1995, at 63, 64; James H. Keil, *Using ADR to Satisfy ADA Compliance Issues*, DISP. RESOL. J., Apr.-June 1995, at 61, 62; Cary R. Singletary & Robert A. Shearer, *Mediation of Employment Discrimination Claims: The Win-Win ADA Option*, 45 LAB. L.J. 338 (1994).

Indeed, some employers have been taking advantage of ADR methods to try to defuse potential employment litigation and comply with ADA requirements.⁶ Moreover, a number of training conferences and written guides are being devoted to the use of ADR for resolving ADA disputes.⁷

In general, the available recommendations, materials and scholarly analysis have tended to focus primarily on ADR processes such as mediation and binding arbitration for employment in ADA disputes. And, by and large, mediation has been the process of choice. For example, the EEOC's task force on ADR "proposed a classic mediation model of ADR in which the charging party and respondent meet with a neutral third party and attempt to resolve their differences before resorting to the administrative or litigation process."⁸ The bulk of the ACUS recommendations relate to the use of mediation as well.⁹ Mediation and arbitration are excellent processes that can, and do, lead to the peaceable resolution of many disputes. They are *not*, however, the only proceedings that may be appropriate in particular disputes. Indeed, although the ACUS recommendations focused chiefly on the use of mediation to resolve ADA disputes, that agency also recommended that "[t]he ADA enforcement agencies should jointly continue to study and evaluate *other* alternative dispute resolution techniques for disputes arising under the ADA."¹⁰

In recent years, Texas ADR advocates have developed a type of ADR process, entitled a Moderated Settlement Conference (MSC), that could be very beneficial in certain types of ADA disputes. Because of the myths, stigma and ignorance often faced by persons with mental disabilities, the MSC may be particularly useful in resolving ADA disputes involving persons with mental disabilities. This paper examines the possibility of using the MSC as *another* alternative dispute resolution technique for disputes arising under the ADA.

⁶ See Blanck et al., *supra* note 5, at 458.

⁷ See, e.g., *ADA-Mediation Workshop: Selecting, Training, & Monitoring Professional Mediators for ADA Complaint Referral* (Key Bridge Foundation, Arlington, Va.); *Collaborative Approaches: A Conference on Disability, Aging, & Dispute Resolution* (Sponsored by various entities including the ABA's Section of Dispute Resolution and Commission on Mental & Physical Disability Law, Washington, D.C., Mar. 30-Apr. 1, 1995); ERICA F. WOOD & JEANNE DOOLEY, *TARGETING DISABILITY NEEDS: A GUIDE TO THE AMERICANS WITH DISABILITIES ACT FOR DISPUTE RESOLUTION PROGRAMS* (1994).

⁸ Miller, *supra* note 3, at 17.

⁹ See ACUS Recommendation 95-7, *supra* note 4, at 49 (observing that "[t]his recommendation is intended to encourage additional efforts to implement the use of mediation").

¹⁰ *Id.* at 53 (emphasis added).

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An MSC is a type of alternative dispute resolution process that provides for case evaluation as a means to encourage settlement.¹¹ The Texas Alternative Dispute Resolution Procedures Act defines an MSC as “a forum for case evaluation and realistic settlement negotiations.”¹² Professor Kovach has described the MSC as a form of case assessment in which “litigants and their attorneys meet with a panel of three trained, neutral, experienced attorneys; the case is presented, discussed, and, as a result, the panel presents an objective case evaluation.”¹³ Tom Arnold, another ADR expert, has observed that “[m]oderated settlement conferences before lawyer panels are advantageous in cases heavy in application-of-law content where the reaction of lawyers/judges may dominate any court decision.”¹⁴

The MSC is a flexible process, however, and the panel need not be comprised strictly of attorneys. In fact, the Texas ADR statute instructs that in an MSC “[e]ach party and counsel for the party [will] present the position of the party before a panel of impartial third parties.”¹⁵ One need not be an attorney to qualify as an “impartial third party.” Primarily, the MSC is a hybrid process intended to provide neutral case evaluation as a predicate to further settlement negotiation. The process contemplates that the panel of neutrals will hear a presentation of the case from both sides and then provide a nonbinding, advisory opinion regarding the merits of the case.¹⁶ Any argument or evidence is generally presented in a summarized

¹¹ See Kimberlee K. Kovach, *Moderated Settlement Conference*, in HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 101 (Amy L. Greenspan ed., 2d ed. 1990).

¹² TEX. CIV. PRAC. & REM. CODE ANN. § 154.025(a) (Vernon Supp. 1996). Harry Mazdoorian, who is chair of the mediation committee of the American Bar Association's ADR section, has described the 1987 Texas ADR Procedures Act as “one of the most progressive in the country because it is one of the most comprehensive.” Kate Thomas, *Mediation Boomtown Rises on Shaky Foundation*, TEX. LAW., July 10, 1995, Special § 3, at 5. By and large, mediation is the ADR procedure of choice in Texas. The Texas courts are ordering mediation in many civil cases. See *id.* (discussing a “frenzy of activity”). Indeed, the state trial judges in Travis County, Texas (which primarily includes the city of Austin) have mandated that all civil jury cases and all civil non-jury trials scheduled for greater than a half-day be referred automatically for mediation. Bruce Vincent, *Swamped Travis Judges Plan to Mandate Mediation*, TEX. LAW., May 29, 1995, at 1. Use of the MSC is less broad, and the MSC has primarily been employed in civil cases in the cities of Houston, Lubbock and El Paso. See Interview with Gene Valentini, Director of the South Plains Dispute Resolution Center, in Lubbock, Texas (March 5, 1996).

¹³ Kovach, *supra* note 11, at 101.

¹⁴ Tom Arnold, *Vocabulary of ADR Procedures*, DISP. RESOL. J., Oct.-Dec. 1995, at 69, 72.

¹⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 154.025(b) (Vernon Supp. 1996).

¹⁶ See *id.* § 154.025(c)-(d).

form and is commonly presented by counsel rather than the client.¹⁷ After the settlement panel has set forth its assessment of the pending dispute to the parties, one or more of the third-party neutrals can then offer to mediate the dispute or otherwise facilitate further negotiations. In some ways, the MSC is like the process known as "Early Neutral Evaluation," which is also a process in which one or more neutrals provides an advisory opinion after hearing a brief summary of the case.¹⁸ Unlike early neutral evaluation, however, the MSC can be employed early or late in a proceeding and often has a larger panel of neutrals.

Why consider the use of an MSC to help resolve ADA disputes? First, it is a flexible process that has been successful in all types of cases, including discrimination actions.¹⁹ In addition, the ADA does not limit the types of available ADR processes to mediation or arbitration but lists a variety of ADR procedures, "including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration."²⁰ Although the Act does not specifically mention the MSC as an available technique, the ADR provision's list of processes is clearly intended to be representative and not exclusive.²¹ In discussing the use of ADR in ADA disputes, Professor Hodges has observed that "agencies

¹⁷ See Arnold, *supra* note 14, at 72.

¹⁸ See *id.* at 71-72. Professor Hodges, in her research on behalf of the ACUS, has suggested that the early neutral evaluation process is appropriate for ADA cases. See Ann C. Hodges, *Dispute Resolution Under the Americans with Disabilities Act*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 581, 660-661 (1994-1995).

¹⁹ See Kovach, *supra* note 11, at 103.

²⁰ 42 U.S.C. § 12212 (Supp. IV 1992).

²¹ The operative language of the provision states, "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution . . . is encouraged to resolve disputes arising under this chapter." *Id.* Professor Abrams has commented that "[e]ncouragement" connotes "permission." Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 552 (1994). In addition, the MSC is also somewhat similar to a mini-trial. For example, the Texas ADR Procedures Act defines a "mini-trial" as a process in which the parties and counsel present their respective positions "either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations." TEX. CIV. PRAC. & REM. CODE ANN. § 154.024 (Vernon Supp. 1996). The mini-trial is often employed in litigation between large business entities before company executives. One would not ordinarily expect high-level executives to need to be present at an MSC, but for the process to be successful, each corporate or business party should have a representative with full settlement authority in attendance.

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should remain alert to other opportunities to use ADR,²² and that “[t]he potential for ADR is limited only by lack of creativity in its use and consistency with statutory goals.”²³

Indeed, the ADR process that one employs in a particular case should be tailored to that dispute. Professor Blanck has observed that “[n]egotiation and mediation techniques that allow employer and employee to meet face-to-face will help enable the development of flexible models to settle disputes.”²⁴ Although a hybrid process, the MSC requires the presence of all parties to the dispute in a face-to-face process. Also, the MSC is premised on the use of neutral third parties to provide evaluation and guidance.²⁵

The chief reason for considering the use of an MSC in a disabilities dispute, however, relates to expertise. One criticism of recent training efforts in the area of mediation and the ADA relates to questions about many mediators’ disability awareness.²⁶ The success or failure of a process such as mediation will often turn on the skills and knowledge of the third-party neutral serving as the mediator.²⁷ Although mediators who receive ADA training may be excellent mediators and may become very adept with regard to the intricacies and requirements of the ADA, those skills by themselves may not be adequate. A certain degree of knowledge and familiarity with the disputant’s underlying disability is also helpful, if not imperative, to facilitate negotiations relating to the ADA claims in issue. As part of her study on behalf of the ACUS, Professor Hodges explained:

²² Hodges, *supra* note 18, at 660.

²³ *Id.* at 661.

²⁴ Peter D. Blanck, *On Integrating Persons with Mental Retardation: The ADA and ADR*, 22 N.M. L. REV. 259, 275-276 (1992).

²⁵ Professor Blanck has observed that neutral third parties can “facilitate dialogue between the parties.” *Id.* at 276.

²⁶ Gene Valentini, a provider of ADR services who has been a participant in many of the recent training efforts, has expressed concern that although many of the mediators have excellent credentials and skills in mediation and are being well informed about requirements under the ADA, in general they often lack knowledge about disabilities. *See* Interview with Gene Valentini, Director of the South Plains Dispute Resolution Center, in Lubbock, Texas (March 5, 1996). In a similar respect, because of concerns about the need for training of EEOC investigators regarding mental disabilities, the EEOC has explored whether training could be provided by state chapters of the National Alliance for the Mentally Ill. *See* Telephone Interview with Carol Miaskoff, Office of Legal Counsel, EEOC (March 1995).

²⁷ As Professor Hodges has observed, “It goes without saying that the mediators [in ADA disputes] should be trained in mediation skills.” Hodges, *supra* note 18, at 643.

The mediator must have a general understanding of various types of disabilities and the impact that such disabilities have on the lives of individuals. In particular, the mediator must understand the impact of disabilities on the dispute resolution process and the ways to make the mediation accessible to individuals with disabilities. The mediator should have an understanding of the ADA.²⁸

If the mediator lacks this level of knowledge and understanding, mediation of an ADA dispute may be unwise.²⁹ Because of myths, negative stereotypes and general ignorance about mental disabilities, the need for disability awareness on the part of the third-party neutral is perhaps even more critical in disputes involving persons with mental disabilities.³⁰ As an alternative, the employment of an MSC can serve to assure the presence of one or more third-party neutrals in the ADR proceeding who have some degree of expertise concerning the affected party's disability.

If a mediator is knowledgeable about both ADA issues and the pertinent disability in a given dispute, then mediation may well be the ADR process of first choice. Indeed, mediation in many ADA disputes has been successful.³¹ The chief reason for selecting an MSC over mediation, however, is when disability awareness is lacking on the part of available mediators. The structure of the panel of neutrals in an MSC can be varied to suit the specific case. For example, in an ADA employment dispute involving a person with bipolar disorder, an appropriate panel might include an attorney with experience in disability rights litigation, a corporate labor lawyer and a person knowledgeable about serious mental illness such as a psychiatrist, a psychologist, a psychiatric nurse or some other mental health professional. Although panelists should have some training in conducting and participating in a nonbinding process such as an MSC, it is not necessary that all the panelists be trained mediators. The point is to include

²⁸ *Id.* (citations omitted).

²⁹ In a similar vein, Patrisha Wright of the Disability Rights, Education and Defense Fund has stated, "A mediator's lack of knowledge regarding the ADA and the nature of reasonable accommodation could be problems [sic]." *EEOC Official Discusses Record Charge Rate*, 145 Lab. Rel. Rep. (BNA) 381 (1994).

³⁰ At least one of the current resources regarding the use of ADR for ADA disputes includes some helpful information about various types of disabilities, including mental disabilities. See WOOD & DOOLEY, *supra* note 7, at 24-28.

³¹ See Miller, *supra* note 3, at 17 (discussing the success rate of mediation in an EEOC pilot program); Hodges, *supra* note 18, at 597 (discussing same).

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among the neutral case evaluators at least one member with a high level of expertise regarding the particular disability.³²

An MSC is a relatively structured proceeding. In some ways, it is like a condensed, nonbinding arbitration.³³ Generally, the panel first provides an introductory statement regarding the process then allows time for presentations by each party, a period for questions and answers by the panel and brief summations by the parties.³⁴ Upon the conclusion of the parties' presentations, the panel members then leave the hearing room to deliberate and prepare a written, nonbinding assessment of the dispute. It is also entirely appropriate for the panel to request that the parties remain in the hearing room during the panel's absence as a means of encouraging the disputants either to begin or continue possible negotiations. Subsequent to the panel's deliberations, the panel members should return to the hearing room and convey their assessment of the case. The panel should then encourage the disputants to ask questions and subsequently offer to have one or more of the panelists remain behind to facilitate negotiations or engage in mediation.

The MSC process should be informal with no application of the usual rules of evidence or civil procedure. Counsel for the parties should endeavor to make presentations in a narrative format and not through the use of witnesses.³⁵ In addition, under Texas law, MSC proceedings are generally confidential, and the same confidentiality provisions of state law that apply to mediations apply with equal force to the MSC and its participants.³⁶ The assurance of confidentiality protection fosters greater

³² Similarly, in an ADA dispute involving a person with a physical disability, an MSC panel might be comprised of a lawyer-mediator, an individual with expertise in the individual's disability and an architect or engineer with expertise concerning architectural barriers. *Cf. Hodges, supra* note 18, at 651 (discussing the use of technical experts to facilitate settlement in ADA mediation).

³³ Tom Arnold has stated, "This procedure is similar to non-binding arbitration, but with no evidence rules or consideration, no cross examination, attorneys and clients communicating (unlike litigation), and often with no formality in the neutral's conclusion or 'award' or its communication." Arnold, *supra* note 14, at 72.

³⁴ See Kovach, *supra* note 11, at 111. The presentation times can vary, but something in the range of 15-30 minutes per side is typical, with 5-10 minute closing remarks. The panel may, of course, encourage the clients to participate in the process.

³⁵ See *id.* at 112. By local rules in Lubbock County, Texas, however, a party can present up to two witnesses or witness affidavits. If live witnesses are presented, cross-examination is permitted. See SOUTH PLAINS DISP. RESOL. CTR. (Texas), HANDOUT MATERIALS—MODERATED SETTLEMENT WORKSHOP (1991) (on file with author).

³⁶ See TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(c), 154.073 (Vernon Supp. 1996).

opportunity for frank discussions during the proceedings, just as in other nonbinding processes. In the absence of statutory confidentiality measures, or if there are concerns about the applicability of state statutory confidentiality provisions to ADR processes relating to federal claims, the parties may also set forth a written confidentiality agreement prior to commencing the proceeding.

As discussed above, the MSC could be a useful alternative process in any ADA dispute, particularly when there is a lack of mediators available who have knowledge about the disability in issue. But, in particular, why consider the employment of an MSC in an ADA dispute involving a person with a mental disability? The answer is tied to the prevalence of ignorance and misconceptions concerning persons with mental illness and mental retardation, in general, and with regard to the scope of the ADA as it pertains to persons with mental disabilities. Most citizens are generally aware that the ADA provides greater legal protections to persons with disabilities. Perhaps less understood, however, is that the Act covers not only persons with physical disabilities but also individuals suffering from an array of mental disabilities.³⁷ Clearly, the scope of the ADA extends far beyond just physical disabilities. Indeed, over 7,000 allegations of employment discrimination based on mental disabilities were filed with the EEOC during the first three and one-half years of the ADA's existence, representing over 12% of all claims filed.³⁸ Only the percentage of claims for back impairments represents a larger segment of all ADA claims filed (18.7%).³⁹

The inclusion of mental disabilities within the ambit of the ADA was intended, in part, to provide greater protections to persons who have traditionally been "victimized by myths, fears, and stereotypes about certain mental or physical conditions."⁴⁰ For example, despite general ignorance and popular misconceptions, recent brain research has revealed that serious

³⁷ Under the ADA, a covered disability may include "a physical or mental impairment that substantially limits one or more of the major life activities of . . . [an] individual." 29 C.F.R. § 1630.2(g)(1) (1995). The ADA also provides protections to persons who have a previous record of impairment or who have been regarded as having an impairment. *See id.* § 1630.2(g)(2)-(3). The implementing regulations for the ADA further define "mental impairment" to include "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." *Id.*

³⁸ *See* EEOC, CUMULATIVE ADA CHARGE DATA (July 26, 1992-December 31, 1995 Reporting Period). ADA charges relating to "emotional/psychiatric impairments" comprised 7,116 complaints out of 58,735 total charges, or 12.1% of the total. *See id.*

³⁹ *See id.*

⁴⁰ John W. Parry, *Mental Disabilities Under the ADA: A Difficult Path to Follow*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 100, 101 (1993).

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mental illnesses such as schizophrenia, bipolar disorder (manic depression) and major depressive illness are organic diseases of the brain. Like other organs of the body, the brain can become ill. Dr. E. Fuller Torrey, a leading research psychiatrist and advocate, has commented that “[t]he evidence that serious mental illnesses are diseases is now overwhelming.”⁴¹ Such mental illnesses are treatable diseases of the brain and are not indicative of flaws or weaknesses in character. But, as consumer advocate Ann Marshall has described, “[s]tigma, fear, misunderstanding and lack of information about people with psychiatric disabilities remains [sic] an invisible barrier denying access to men and women who want to ride a bus to work and punch a time clock like any other American.”⁴² If a mediator, even one who has received training about the ADA, shares that lack of information or degree of misunderstanding about a person’s mental disability, the effectiveness of the ADR process will be suspect. Alternatively, structuring an MSC to include at least one panel member with significant expertise about the individual’s underlying disability can bolster the utility of the case evaluation process as a means of reaching a peaceable resolution of the ADA dispute.

What is the significance of the ADA’s coverage of individuals suffering from a variety of mental disabilities? With respect to employment opportunities, persons with mental disabilities are protected by the ADA if they “can perform the essential functions” of a job. Title I of the Act precludes employers from discriminating against qualified individuals with disabilities “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁴³ In addition, the implementing regulations provide that the ADA protects “an individual with a disability [whether physical or mental] who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or

⁴¹ Erica E. Goode, *When Mental Illness Hits Home*, U.S. NEWS & WORLD REP., Apr. 24, 1989, at 55, 63 (quoting Dr. Torrey). Given the origins of these illnesses, Dr. Torrey has queried, “Why should we treat them [mental illnesses] any differently than Parkinson’s or Alzheimer’s or multiple sclerosis?” *Id.*

⁴² Ann Nelson Marshall, *People with Disabilities & the ADA: A Hope Not Yet Fulfilled*, at 3 (Paper submitted to the Center for Mental Health Services in connection with a Round Table Conference on the ADA & Mental Illness in the Workplace, January 1995) (on file with author).

⁴³ 42 U.S.C. § 12112(a) (Supp. IV 1992). Since July 26, 1994, the scope of the ADA has been expanded to apply to employers with 15 or more full or regular, part-time employees. *See id.* § 12111(5)(a). Earlier, the employment sections of the ADA applied only to employers with 25 or more full or regular, part-time employees.

without reasonable accommodation, can perform the essential functions of such position."⁴⁴ With regard to persons suffering from mental illnesses or other mental impairments, John Parry, an expert in mental health law, has suggested that "the primary impediments to performing essential job functions (and thus employment) are characteristics or symptoms that affect the abilities to think, perceive, act, or react."⁴⁵ Persons acting as third-party neutrals in ADR proceedings involving ADA employment complaints would be well served by a good understanding of such characteristics or symptoms.

Also in the employment arena, the ADA requires employers to make individualized determinations about a person's present ability to handle and safely perform the essential functions of a job. Particularly in the case of persons with mental illness, an employer's determination should not be based on preconceived perceptions, fears or stereotypes about the particular disability.⁴⁶ Similarly, a third-party neutral's guidance in an ADR process should not be unduly influenced by comparable ignorance. The same should hold true with regard to expertise about potential accommodations in the workplace.⁴⁷ As delineated by Mr. Parry, examples of reasonable accommodations in the workplace for persons with mental disabilities might include flexible scheduling to accommodate the effects of psychoactive medications, reasonable time off for short-term medical or psychiatric treatment, restructuring of duties or the work environment, the sensitizing of other employees about psychiatric conditions or job assistance and training.⁴⁸ A knowledgeable mediator or panelist in an MSC proceeding

⁴⁴ 29 C.F.R. § 1630.2(m) (1995).

⁴⁵ Parry, *supra* note 40, at 103. For an in-depth analysis of various legal requirements of the ADA as they relate to persons with mental disabilities, see JOHN W. PARRY, *MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT: A PRACTITIONER'S GUIDE TO EMPLOYMENT, INSURANCE, TREATMENT, PUBLIC ACCESS, AND HOUSING* (1994).

⁴⁶ See Deborah Zuckerman, *Reasonable Accommodations for People with Mental Illness Under the ADA*, 17 MENTAL & PHYSICAL DISABILITY L. REP. 311, 312-313 (1993).

⁴⁷ If an individual can perform a job's essential functions, but only with certain accommodations, the employer's failure to provide reasonable accommodations will constitute discrimination unless the employer can show that the accommodations would be an undue hardship or that the employee, even after being accommodated, would still pose a direct threat to the health or safety of that person or others. See Paul F. Mickey, Jr. & Maryelena Pardo, *Dealing with Mental Disabilities Under the ADA*, 9 LAB. LAW. 531, 542 (1993).

⁴⁸ See Parry, *supra* note 40, at 104. Another commentator has added that the actual cost of accommodating employees with mental illness is quite low, particularly given that, in contrast to the case for many physical disabilities, accommodations such as special equipment and architectural changes would likely be unnecessary. See Zuckerman, *supra* note 46, at 314.

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could ably facilitate agreement or compromise regarding these or other appropriate accommodations.

Without doubt, the ADA represents a major change in the legal landscape for persons suffering from mental disabilities. As consumer advocate Ann Marshall has observed, however, "In order for the ADA to be effective, there must be more outreach and training for people with psychiatric disabilities and information and guidance for employers."⁴⁹ Similarly, for ADA claims to be resolved successfully through the use of ADR processes, there must also be a trained corps of neutrals. That training should not be limited to mediation techniques and ADA expertise but should also include disability awareness. A disputant with a disability, particularly in the case of a mental disability, should insist that the neutral party have some concept of the disability involved and some degree of understanding concerning accommodations that may be appropriate. Both the affected individual and opposing parties can benefit from such expertise on the part of the neutral. However, in the absence of the parties' being successful in selecting a mediator with skills relating to the particular disability, or simply as another alternative for trying to resolve a vexatious ADA dispute, the parties may find success through the employment of a different type of ADR process—the Moderated Settlement Conference.

⁴⁹ Marshall, *supra* note 42, at 3.

