



Mediation and Title I of the ADA

What is Mediation?

Mediation, a form of Alternative Dispute Resolution (ADR), is a process in which a neutral third party (the mediator) 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 Title I of the Americans with Disabilities Act (ADA). Title I of the ADA prohibits discrimination in employment against a qualified individual with a disability.

¹ The individual must bear in mind, however, that the period of time within which a legal claim must be initiated – the statute of limitations – will not stop running during mediation in circumstances where there is no legal claim pending. In other words, the commencement of mediation does not preserve an individual's right to bring a legal claim against the opposing party should the mediation fail or the outcome be undesirable.

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 whose role is similar to that of a judge. Private judging is identical to standard litigation except that it uses former judges to hear cases in private courtrooms. In arbitration, the arbitrator hears evidence from both sides and renders a decision that is often binding on those parties. In neutral expert evaluation, the attorneys for each party present their cases to a third attorney who has many years of experience in the area of law at issue. This expert attorney renders an informal opinion, rather than a binding arbitration decision, that emphasizes the strengths and weaknesses of each party's case with the purpose of giving the parties a realistic basis for out-of-court settlement. Similarly, when parties choose to turn their case over to a screening panel, they allow that panel to evaluate their case at an early stage in the litigation process with the goal of reaching a settlement.

Many courts encourage ADR (including mediation), because it can save the parties both time and money. In some jurisdictions, attorneys are ethically required to inform their clients about ADR options.

Why is Mediation Becoming So Popular?

Mediation's growing popularity can be attributed, in part, to the fact that it is voluntary, confidential, expeditious, and far less costly than litigation. The process also leaves the parties in control of the outcome. Further-

more, participating in mediation does not require the parties to waive 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.

Many organizations are implementing mediation or mediation techniques in-house to resolve employment disputes at the earliest possible point. Through mediation, problems often are resolved before they negatively impact office peace and the productive functioning of employees. As noted above, 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 or 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 any one side, nor is the mediator acting as a therapist or counselor (although the parties may perceive the mediation process to 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 regarding whether to reach an agreement or pursue a legal claim.
- Assist, if requested, in drafting a memorandum of understanding containing 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?

Although some organizations 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 are trained to use mediation techniques in the every day course of dealing with conflicts among 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.

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 would be available in court as well as to a solution 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 or front pay
- Attorney's fees
- Compensatory and/or punitive damages
- Injunctive relief, including reinstatement, promotion, transfer, etc.
- Posting notices

By contrast, 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 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 ADA Mediation Guidelines?

In 2000, a National Work Group comprised of 12 mediation practitioners, trainers, and administrators developed ADA Mediation Guidelines.² 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.

² A copy of the ADA Mediation Guidelines is available at <http://www.cardozo.jcr.com/ada.html>

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 ADA 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 must 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.

Regarding accessibility, every aspect of mediation, from training sessions to mediation sessions, should be accessible to all participants, including the parties, staff volunteers, and the mediators themselves. For these purposes,

the broadest definition of disability should be applied so as to include even those individuals with temporary disabilities who might not otherwise be considered disabled under the ADA. This is in keeping with the generally accepted mediation principle that all parties be able to participate fully in the process. Mediation programs should have a procedure in place by which individuals may request needed accommodations, and 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 will not go forward.

Capacity Issues

In order for a mediation to succeed, all parties must have the capacity to (a) understand the mediation process, (b) understand the options available to resolve the conflict, and (c) give informed consent to an acceptable resolution. Parties who do not possess these capacities are referred to as having “diminished capacity” under the law.

The vast majority of ADA employment mediations will not raise the issue of party capacity. Where party capacity is questioned, the Guidelines state that the mediator shall determine whether the party at issue understands the nature of the mediation process, the role of the mediator, the parties’ relationship to the mediator, and the issues raised in the mediation. When determining whether the parties can understand options and enter into an agreement, the mediator is not obligated to rely solely on that party’s medical condition or diagnosis.

If a party appears to have diminished capacity or if 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. Finally, if a party lacks capacity to mediate even with support, the mediation cannot proceed unless a surrogate represents that party’s interests and makes decisions on his or her behalf. 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.

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 disputing parties must 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. In that circumstance, an individual with the authority to settle a case on behalf of the organization 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 party that they represent, but, unlike a surrogate, the representative does not make decisions for the party. Some parties may choose to bring a representative who provides emotional support rather than or in addition to one who acts as his or her advocate.

Persons with disabilities may be accompanied by a personal assistant (PA) who provides physical aid or other assistance. A qualified sign language or oral interpreter has the dual role of serving as an “accommodation” under the ADA³ and of facilitating communications between the individual with a disability and the other mediation participants.

Finally, the parties may engage experts to educate the mediator and/or the parties about the disability and to assist in developing solutions. At times, the mediator may recommend that a neutral expert participate in the process, with the parties’ permission.

When the parties agree to a resolution, the mediator should ascertain whether the parties have considered the impact of their agreement on people who are not party to the mediation, such as other employees or labor union members. The impact of the agreement on other parties may negatively affect the enforceability, implementation, or durability of the agreement.

³ For more information regarding ADA accommodations, see the brochure from this series entitled “Reasonable Accommodation under the ADA.”

The Reasonable Accommodation Process During Mediation

In ADA Title I cases where reasonable accommodation is an issue, the mediation session provides the parties with an opportunity to further engage in an “interactive process” to identify and/or evaluate accommodation alternatives. Ideally, when the parties’ dispute involves accommodation, they will have commenced the process of determining a reasonable accommodation prior to mediation of their 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 the confidentiality of disability-related information when arranging access to and conducting the mediation. While the person with a disability may have disclosed his/her disability, there still may be information that the person does not wish to reveal, such as 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 and of not having a potential agreement reviewed by counsel.

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

Resources

Equal Employment Opportunity Commission
www.eeoc.gov, 800.669.4000 (Voice),
800.669.6820 (TTY) Documents on ADA em-
ployment issues, including policy guidance,
800.669.3362 (Voice), 800.669.3302 (TTY)

Association for Conflict Resolution,
5151 Wisconsin, NW., Suite 500,
Washington, D.C. 20016; Phone: 202.464.9700
or <http://www.acrnet.org/>

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 resourc-
es, is posted on the Cardozo Online Journal
of Conflict Resolution (COJCR), the original
publisher of the Guidelines at:
[http://www.cardozo.yu.edu/MemberContent-
Display.aspx?ccmd=ContentDisplay&ucmd=U
serDisplay&userid=10398](http://www.cardozo.yu.edu/MemberContent-Display.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10398).

The Conflict Resolution Information Source
provides resources on alternative dispute reso-
lution including mediation and the process
necessary for successful conflict resolution.
Also included is a list of resources specific to
ADA mediation.
<http://www.crinfo.org/>

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The U.S. Equal Employment Opportunity Commission has reviewed it for accuracy. However, opinions about the Americans with Disabilities Act (ADA) expressed in this material are those of the author, and do not necessarily reflect the viewpoint of the Commission or the publisher. EEOC interpretations of the ADA are reflected in its ADA regulations (29 CFR Part 1630), Technical Assistance Manual for Title I of the Act, and Enforcement Guidance.

Cornell University is authorized by NIDRR to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). 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>

About this Brochure

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, Director, Employment and Disability Institute, Cornell University ILR School.

This publication was created in July, 2000 by Sheila D. Duston, an attorney/mediator practicing in the Washington, D.C. metropolitan area. It was updated in 2011 by Elizabeth Reiter, an independent legal consultant in Ithaca, N.Y., with assistance from Sara Ferguson, a Cornell University Employment and Disability Institute ILR student research assistant.

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The full text of this brochure, and others in this series, can be found at www.hrTips.org.

More information on accessibility and accommodation is available from the ADA National Network at 800.949.4232 (voice/ TTY), www.adata.org.

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