



Recommendation 95-7

Use of Mediation under the Americans with Disabilities Act

(Adopted June 16, 1995)

Despite the efforts of the agencies charged with enforcing the Americans with Disabilities Act (ADA), there are substantial backlogs of cases at the investigation stage at many agencies, creating unusually lengthy delays in enforcement. Because of enforcement delays, many individuals are not obtaining needed relief in a timely manner and respondents are not relieved of the burden of pending non-meritorious charges. In this era of shrinking government, an influx of significant additional public resources for investigation and litigation seems unlikely. The Equal Employment Opportunity Commission (EEOC) and the Department of Justice have each begun to experiment with alternative dispute resolution (ADR) as one approach to reducing backlogs and achieving compliance with the statute.¹ The Conference believes mediation is the ADR technique that offers greatest immediate promise for resolving ADA cases more quickly and to the satisfaction of the parties involved, and that agencies with enforcement responsibilities under the ADA should offer the opportunity for mediation in appropriate cases. Mediation has the potential to preserve relationships between the parties and to empower them to take greater responsibility in resolving their disputes. In addition compliance with mediated settlements is generally high because of the parties' participation in developing the solution.

This recommendation is intended to encourage additional efforts to implement the use of mediation and to provide guidance on undertaking and evaluating a joint program.² The mediation program proposed in this recommendation expands on prior agency pilot mediation programs by including additional types of cases, and also provides a coordinated framework for mediation of ADA cases under all four titles of the statute.

Because several agencies are charged with enforcement of the various titles of the ADA (EEOC, Department of Justice, Department of Transportation, and Federal Communications

¹ The ADA, 42 U.S.C. § 12212, explicitly encourages the use of ADR, where appropriate and authorized by law, to resolve disputes arising under its provisions. General authority for use of ADR may also be found in the Administrative Dispute Resolution Act, 5 U.S.C. §572.

² Though mediation currently appears to be the most promising ADR technique for disputes arising under the ADA, the Conference encourages examination and experimentation with other ADR techniques. See Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution."



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Commission), it is important that they jointly participate in designing the recommended mediation program. This collaborative effort will minimize costs and maximize benefits by using a common group of trained mediators to mediate a variety of ADA cases, selected for referral to mediation based on criteria established by the agencies. The joint effort should also develop sources of mediators who can serve at low cost or pro bono, at least at the inception of the program, and should consider ways to finance the costs of using mediators where such arrangements cannot be made.

Extensive evaluation of the program pursuant to criteria established as part of the program design will enable the agencies to gather the information necessary to refine the program so that it is used most effectively to resolve disputes at a low cost, in a manner that is fair to the parties and consistent with the statute. The evaluation should include analysis of the comparative costs of mediation, the effectiveness of mediation for different types of disputes, the satisfaction level of the participants, the impact on the case backlog, the effect on processing time of cases, the impact on systemic litigation, consistency of mediated results with the statute, and whether mediation disadvantages individuals with disabilities or other historically disadvantaged groups.

Analysis of the program results, along with the results of EEOC and Department of Justice pilot mediation programs, should provide the information necessary to ensure that mediation is furthering the goal of elimination of discrimination against the individuals with disabilities. The contemplated evaluation will permit the agencies to focus future mediation efforts on those cases where mediation is most effective. Additionally, successful experience with agency-sponsored mediation may encourage and empower actual or potential parties to use private mediation or even negotiation without neutral assistance to resolve future disputes, further conserving government and private resources.

Recommendation

Coordinated Mediation Program

1. The Americans with Disabilities Act (ADA) enforcement agencies³ should establish a joint committee composed of representatives of each of the agencies to develop a program for

³ The primary enforcement agencies should be involved in establishing the program. These include the Department of Justice, Equal Employment Opportunity Commission, Department of Transportation, and Federal



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

voluntary mediation of ADA cases under all titles, in order to achieve the rapid, mutually agreeable resolution of disputes over compliance with the requirements of the ADA.⁴ This committee also could serve the purpose of improving consistency in enforcement of the statute among the agencies. To assist the joint committee in creating a mediation program that will attract participants and meet their needs, the agencies should appoint an advisory committee pursuant to the Federal Advisory Committee Act, composed of representatives of potential participants, such as businesses, state and local government entities, representatives of organizations whose purpose is to represent persons with disabilities, and civil rights and labor organizations, to provide advice in program design.

2. The mediation program should follow the broad outlines set forth herein, as refined by the agencies' joint committee after consultation with the advisory committee. The program should utilize a common group of trained mediators to mediate a variety of disputes arising under the ADA. The joint committee should determine the criteria for mediator participation in the program, considering the pilot projects already established, which include mediator training, and the training previously conducted by the EEOC and the Department of Justice. If the number of trained mediators is insufficient, the agencies should jointly conduct or sponsor any necessary training. Mediators must also have sufficient knowledge of the various titles of the ADA, familiarity with resources for ADA compliance, and knowledge of the impact of various disabilities. The joint committee should identify potential sources of mediators who are willing to serve pro bono or at low cost, at least at the inception of the program, as well as sources of technical expertise⁵ to assist in mediation.

3. The agencies should engage in extensive educational efforts to encourage use of the mediation process in a variety of cases and to enable unrepresented parties to participate

Communications Commission. Other agencies that could provide input into the process, refer cases to the program, and participate in the educational effort are the Federal Mediation and Conciliation Service and the Title II investigative agencies designated in 28 C.F.R. § 35.190: the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, the Interior, and Labor.

⁴ Since there have been few cases under Title IV, which amends the Communications Act to ensure the availability of communication by wire or radio for individuals with speech or hearing disabilities, there may also be less opportunity to use mediation. Also, the FCC's enforcement process differs from those of the other ADA enforcement agencies. Nevertheless, efforts should be made to include appropriate Title IV cases in the mediation program to enable the best possible assessment of mediation's effectiveness.

⁵ For example, architects, engineers, or vocational rehabilitation experts may be able to serve as mediators, or to act as advisers to inform parties of available technical options to help resolve disputes.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

effectively. The educational efforts should focus on informing parties and potential parties about the process to increase both participation rates and the effectiveness of participation.

4. The agencies should determine the selection criteria for referral of cases to mediation, refining and modifying the criteria based on evaluation of effectiveness. The agencies should consider combining mediation with an early assessment program which will assist in determining allocation of resources for investigative processes.

Review and Evaluation

5. The mediation program should incorporate an after-the-fact agency review of settlements reached in mediation to examine their enforceability, consistency with the ADA, and whether the process reduces the time needed to resolve individual cases (both elapsed time and person-hours). This review should not result in overturning individual mediated settlements, nor should it impair the confidentiality of the mediation process or otherwise discourage participation in it.

6. In designing the program, the joint committee should establish program objectives, evaluation criteria, and a system for collecting the data necessary for evaluation. The evaluation process should be designed to provide data and analysis that will enable (i) a determination of the circumstances under which mediation is appropriate and effective for resolving ADA cases and (ii) the identification of any systemic problems that are not addressed by mediated settlements. The following issues should be included in the evaluation:

- (a) In what types of cases is mediation most effective?
- (b) At what point in the investigative process is mediation most effective, taking into account the costs of any investigation that precedes mediation?
- (c) Does mediation reduce the cost of processing cases for the parties and/or the government?
- (d) What is the effect of mediation on processing time of cases, including whether mediation adds to processing time where it is unsuccessful?
- (e) What is the impact of mediation on the investigation and case backlog?
- (f) What is the satisfaction level of the participants in mediation, including separate measures of satisfaction for complainants (charging parties) and respondents?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- (g) What are the best sources of qualified mediators?
- (h) Is the use of a common group of mediators for various types of cases effective, taking into account costs, settlement rates, settlement results, and mediator performance?
- (i) How are the costs of using mediators to be financed?
- (j) Are the results of mediated settlements, settlements reached through other processes, and litigation in similar cases comparable?
- (k) Does the mediation program impact systemic litigation?
- (l) Is agency review of mediated settlements effective and necessary?
- (m) Is the process equally fair and effective for represented and unrepresented parties?
- (n) Are individuals with disabilities disadvantaged in mediation?
- (o) Does availability of technical expertise affect settlement rates?
- (p) What is the rate of compliance with mediated settlements?

Additional criteria deemed necessary and appropriate should be added by the joint committee designing the program.

7. The joint committee should review the mediation program regularly pursuant to the evaluation criteria and in consultation with the advisory committee, modifying the program as suggested by the results of the evaluation to ensure its continued effectiveness and consistency with statutory goals.

Consideration of Other ADR Techniques

8. The ADA enforcement agencies should jointly continue to study and evaluate other alternative dispute resolution techniques for disputes arising under the ADA.⁶

⁶ See Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," and the ADA, 42 U.S.C. Sec. 12212.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Citations:

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