Winter 1996

Mediation and the Americans with Disabilities Act

Ann C. Hodges
University of Richmond, ahodges@richmond.edu

MEDIATION AND THE AMERICANS WITH DISABILITIES ACT

*Ann C. Hodges**

I. INTRODUCTION

The Americans with Disabilities Act[1] (ADA), which prohibits discrimination against individuals with disabilities by employers, by state and local governments, and in public accommodations, expressly encourages the use of alternative dispute resolution (ADR) to resolve disputes under the Act. The use of ADR to resolve ADA disputes is growing. Both the agencies charged with ADA enforcement and private organizations are experimenting with ADR. While arbitration of ADA disputes is controversial, enthusiasm for the use of mediation generally is widespread.

---

* Professor of Law, University of Richmond. This Article is based in part on research conducted for and resulting in a recommendation adopted by the Administrative Conference of the United States (ACUS). ANN C. HODGES, ADMINISTRATIVE CONF. U.S., RECOMMENDATIONS AND REP. 1994-1995: DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT 581 [hereinafter DISPUTE RESOLUTION UNDER THE ADA]. The report also is to be published at 9 ADMIN. L.J. No. 4 (forthcoming 1996). This Article and related report would not have been possible without the assistance of people far too numerous to thank individually. This Article benefitted significantly from discussions with the staff and members of ACUS; officials from the Equal Employment Opportunity Commission, the Disability Rights Section of the Department of Justice, the Federal Transit Administration, the Federal Highway Administration, and the Federal Communications Commission; representatives of various disability groups; attorneys practicing disability law; staff of both the American Association of Retired Persons and the ABA Commission on Physical and Mental Disabilities; members of the ADA/ADR Working Group of the Dispute Resolution Coalition on Aging and Disability; representatives of the Better Business Bureau; staff members of various state and local anti-discrimination agencies; and a number of dispute resolution professionals. I particularly want to thank Professor Stephen B. Goldberg, who initially sparked my interest in mediation when I was his research assistant at Northwestern University School of Law, for his insightful comments on the report. The views expressed in this Article are those of the author and do not necessarily reflect those of the members of the Administrative Conference or its committees except where formal recommendations of the Conference are cited, or of anyone consulted in connection with the Article. Finally, I received invaluable research assistance from Margaret Smither, J.D., 1992; Nicole Rovner Beyer, J.D., 1994; Tenley Carroll, J.D., 1995; Penny Elaine Nimmo, J.D., 1994; Jeffrey Shapiro, J.D., 1994; Tu-Quynh Vu, J.D., 1995; Mark Andrade, J.D. 1995; and Alissa J. Altongy, Class of 1997, all of the University of Richmond.

[1] 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

This Article will analyze the potential uses of mediation in ADA disputes, focusing primarily on employment issues. Part II of the Article provides a description and analysis of the mediation process. Part III provides an overview of the ADA.[2] Part IV examines the dispute resolution provisions of the ADA and both the current and proposed uses of alternative dispute resolution. Finally, Part V analyzes the use of mediation in ADA cases and recommends appropriate uses of mediation that will effectuate the purpose of the statute.[3]

II. THE MEDIATION PROCESS

In essence, mediation is settlement negotiation assisted by a trained, neutral third party.[4] The mediator has no power to compel a resolution of the dispute; rather, the mediator helps the parties develop options and explore acceptable resolutions of the dispute.[5] Introducing a neutral third party into settlement negotiations can help the parties overcome obstacles to settlement.[6]

---

[2] Although the Article concentrates on mediation of ADA employment discrimination cases, Parts III and IV discuss the other titles of the Act, both because of the ACUS recommendation for joint mediation of ADA cases under all titles, *see infra* notes 151-158 and accompanying text, and because ADR efforts under other titles are relevant to mediation of employment cases.

[3] The ADA's purpose is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

[4] ADMINISTRATIVE CONF. U.S., IMPLEMENTING THE ADR ACT: GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS 5 (Feb. 1992).

[5] *Id.*

[6] *Id.*

The mediator may assist the parties in a number of ways. The mediator may help the parties communicate with one another more effectively,[7] including dealing with emotions which otherwise may interfere with settlement possibilities.[8] Additionally, the mediator helps the parties develop a process for negotiations.[9] After gathering facts from the parties, the mediator aids the parties in generating settlement options by assisting them in defining and critically analyzing the problem and by helping them to identify their basic interests.[10] Furthermore, the mediator serves as a reality check, alerting parties to unrealistic expectations or overly optimistic views of their prospects for success in other forums.[11]

The mediator uses various tactics to accomplish these tasks, including joint meetings with the parties, private meetings with the individual parties, and strategic breaks in negotiation. Separate meetings enable a party to disclose candidly its facts and interests, assisting the mediator in shaping negotiations without inappropriately revealing confidential information.[12] Throughout the process, it is important for the mediator both to build trust between the parties and the mediator and to promote cooperative, problem-solving behavior.[13] Through mediation, the parties may reach a settlement that meets their needs and which they could not, or did not, reach in the absence of mediator intervention. To determine whether mediation can play an effective role in dispute settlement under the ADA, it is important to analyze the statute and its dispute settlement processes.

---

[7] CHRISTOPHER W. MOORE, THE MEDIATION PROCESS 18 (1986).

[8] *Id.* at 125-37; *see also* Stuart H. Bompey & Gary R. Siniscalco, *The Settlement Process in Employment Discrimination Litigation: A New Perspective*, *in* LITIGATING EMPLOYMENT DISCRIMINATION CASES 329 (PLI Litig. & Admin. Practice Course Handbook Series No. H-522, 1995) (noting that mediators are skilled at separating emotional issues from substantive issues and that allowing both parties to ventilate their feelings often frees parties to deal with substantive issues in dispute).

[9] MOORE, *supra* note 7, at 103-05.

[10] *Id.*

[11] *Id.*; JAY FOLBERG & ALISON TAYLOR, MEDIATION 55 (1984).

[12] Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 318 (1971).

[13] MOORE, *supra* note 7, at 124.

III. OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT

The Rehabilitation Act of 1973 banned disability discrimination by the federal government, government contractors, and recipients of federal funds.[14] That statute left much disability discrimination untouched by federal law. Congress determined that additional federal legislation was necessary to eliminate discrimination against the estimated forty-three million Americans with disabilities[15] and, with passage of the Americans with Disabilities Act, extended the federal prohibition against disability discrimination to large segments of the population previously unprotected. Much of the ADA's language is based on the Rehabilitation Act and its regulations.

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the [individual's] major life activities . . . ."[16] Major life activities are those that the average person can perform with little or no difficulty, including walking, seeing, hearing, breathing, learning, working, caring for oneself, and participating in community activities.[17] Moreover, individuals who have a history of disability or who are perceived to have a disability, even if they do not, also meet the statutory definition of disability.[18]

The ADA contains five titles: Title I addresses discrimination in employment; Title II covers discrimination in public services; Title III covers discrimination in public accommodations; and Title IV addresses telecommunications services for individuals with hearing and speech impairments. Title V contains several miscellaneous

---

[14] 29 U.S.C. §§ 791, 793-95 (1988).

[15] 42 U.S.C. § 12101 (Supp. V 1993).

[16] 42 U.S.C. § 12102(2)(a). While the term physical or mental impairment is not defined in the statute, the Equal Employment Opportunity Commission (EEOC) has recently issued extensive guidelines identifying those conditions that do qualify as disabilities, those that may qualify, and those that do not. 2 EEOC COMPLIANCE MANUAL § 902 (1995). Moreover, the statute expressly eliminates certain conditions from the definition of disability, including homosexuality, bisexuality, compulsive gambling, kleptomania, pyromania, disorders resulting from current illegal drug use, "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, [and] gender identity disorders not resulting from physical impairments or other sexual behavior disorders." 42 U.S.C. § 12211.

[17] 29 C.F.R. § 1630.2(i) (1995).

[18] 42 U.S.C. § 12102(2)(B)-(C).

provisions, notably sections 506 and 513. Section 506 requires the agencies primarily responsible for administration of the ADA to provide technical assistance to covered entities, individuals with rights under the statute, and other federal agencies.[19] Section 513 encourages the use of alternative dispute resolution where appropriate and authorized by law.[20]

A. TITLE I—EMPLOYMENT

The employment provisions of the ADA apply to employers with fifteen or more employees.[21] Title I prohibits discrimination against "a qualified individual with a disability because of the disability . . . 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."[22] Title I involves three key issues: (1) what constitutes a disability; (2) who is a qualified individual with a disability; and (3) what is discrimination.

The definition of "disability" applies equally to all titles under the ADA.[23] With respect to the second issue, an individual must establish that she is a qualified individual with a disability, that is, with or without reasonable accommodation she can perform the essential functions of the job.[24] "Essential functions" of the job and "reasonable accommodation" are both terms of art under the Act. Essential functions are those that are fundamental rather than marginal[25] and are determined by the employer's judgment, written job descriptions, the amount of time spent on the function, the experience of employees in the same or similar jobs, the terms of any collective bargaining agreement, and the consequences of not requiring the employee to perform the functions.[26]

---

[19] *Id.* § 12206.
[20] *Id.* § 12212.
[21] *Id.* § 12111(5)(A).
[22] *Id.* § 12112(a).
[23] *See supra* notes 16-18 and accompanying text (discussing definition of disability).
[24] *Id.* § 12111(8).
[25] 29 C.F.R. § 1630.2(n) (1995).
[26] *Id.*; 42 U.S.C. § 12111(8).

Reasonable accommodation is a critical aspect of the ADA. Unlike most civil rights statutes, which require only equal treatment of similarly situated persons, the ADA mandates an affirmative employer effort to assist individuals with disabilities in their efforts to work. The statute specifies a nonexclusive list of reasonable accommodations, including making facilities accessible, restructuring jobs, modifying work schedules, reassigning employees to vacant positions, acquiring or modifying equipment or devices, and providing readers or interpreters.[27] An employer must make reasonable accommodations that enable the employee to perform the job unless they create an undue hardship on the employer.[28] The employer may establish undue hardship by demonstrating that making the accommodation would require significant difficulty or expense.[29]

Title I prohibits various forms of discrimination, including intentional discrimination; the use of standards, criteria, methods of administration, or tests that have the effect of discrimination; participation in a relationship that causes employees or applicants to be subjected to discrimination; discrimination based on an employee's or applicant's relationship with an individual with a disability; and failure to reasonably accommodate a qualified individual with a disability.[30] The Title provides several defenses to a claim of discrimination in addition to undue hardship. An employer may justify the use of its job qualifications, selection criteria, or tests that have a discriminatory impact by establishing that they are job related and consistent with business necessity.[31] It may exclude individuals who pose a direct threat to the health or safety of others in the workplace.[32] Finally, an employer may challenge a claim on the grounds that an individual is not disabled, is not qualified for the position, or was not discriminated against on the basis of the disability.

In addition to its other prohibitions, the ADA directly limits both inquiries about disability and medical examinations. An employer may inquire into an applicant's ability to perform the job, but not

---

[27] 42 U.S.C. § 12111(9).
[28] *Id.* § 12112(b)(5)(A).
[29] *Id.* § 12111(10)(A).
[30] *Id.* § 12112.
[31] *Id.* § 12113(a).
[32] *Id.* § 12113(b).

into the applicant's disability.[33] Moreover, the employer can require an applicant to take a medical exam only after an offer of employment is made.[34] The offer may be conditioned on the results of the exam only if all new employees in the same job category are subjected to the exam, the medical information is kept confidential, and any disqualification resulting from the exam is based on criteria that are job related and consistent with business necessity.[35] Similarly, an employer may make such inquiries of or require medical exams from *employees* only if the inquiries or exams are "job related and consistent with business necessity."[36]

Title I adopts the enforcement mechanisms of Title VII of the Civil Rights Act of 1964.[37] Accordingly, exhaustion of administrative remedies is a prerequisite to filing a suit alleging a Title I violation. A complainant must file a charge with the Equal Employment Opportunity Commission (EEOC), which investigates to determine "whether there is reasonable cause to believe that the charge is true."[38] If so, the EEOC is required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."[39] If conciliation efforts fail, the EEOC may file suit[40] or may decline to do so and will notify the complainant of its determination.[41] Regardless of whether the EEOC finds reasonable cause, the complainant may file a judicial action within ninety days from receipt of the EEOC's notice of the right to sue.[42] Pursuant to its enforcement authority, the EEOC has issued regulations to carry out Title I.[43]

---

[33] *Id.* § 12112(c)(2). The EEOC has issued administrative guidance regarding pre-employment exams and inquiries. *See EEOC Guidance on Pre-employment Inquiries Under the Americans with Disabilities Act*, DAILY LAB. REP., Oct. 11, 1995, at E-4.

[34] 42 U.S.C. § 12112(c).

[35] *Id.* § 12112(c)(3).

[36] *Id.* § 12112(c)(4)(A).

[37] *Id.* § 12117(a).

[38] 42 U.S.C. § 2000e-5 (1988).

[39] *Id.*

[40] In the case of a governmental respondent, the EEOC must refer the case to the Attorney General for filing of the civil suit. *Id.*

[41] Conciliation is a prerequisite to a suit filed by the Commission or Attorney General, but a suit by the charging party is not barred by the EEOC's failure to conciliate. MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS 729 (1995).

[42] 42 U.S.C. § 2000e-5(f).

[43] 42 U.S.C. § 12116; 29 C.F.R. §§ 1630.1-1630.16 (1995).

B. TITLE II—PUBLIC ENTITIES

Title II of the ADA proscribes discrimination by public entities against qualified individuals with disabilities. Public entities include state and local governments; departments, agencies, special purpose districts or other "instrumentalit[ies] of a State or States or local government[s]"; and passenger railroads.[44] In addition to a broad prohibition against discrimination, Title II specifies that qualified individuals with disabilities cannot "be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity."[45] Employment discrimination actions against public entities may be brought under either Title I or Title II.[46] Title II adopts the enforcement procedures of section 505 of the Rehabilitation Act.[47] The Department of Justice is authorized to file suits for enforcement of Title II.[48] As with Title I, individuals with disabilities have a private right of action under Title II; however, such individuals need not exhaust federal administrative remedies as a prerequisite to suit.[49]

Should an individual choose to file a complaint, investigation is handled by one of a variety of agencies designated in the regulations.[50] All complaints must be filed within 180 days from the

---

[44] 42 U.S.C. § 12131 (Supp. V 1993).

[45] *Id.* § 12132.

[46] 28 C.F.R. § 35.140 (1995); Petersen v. University of Wis., 818 F. Supp. 1276, 1278-79 (W.D. Wis. 1993). Title II further contains detailed requirements that public transportation systems must meet to avoid a violation of the Act. 42 U.S.C. §§ 12141-12150, 12161-12165.

[47] 42 U.S.C. § 12133. The Act's legislative history indicates that enforcement should follow the model established under § 504 of the Rehabilitation Act. H.R. REP. NO. 485, 101st Cong., 2d Sess. 98 (1990). Section 505 contains enforcement procedures for both § 504 actions and § 501 actions. 29 U.S.C. § 794a (1994). Section 501 covers employees of the federal government. *Id.* § 791.

[48] H.R. REP. NO. 485, *supra* note 47, at 98.

[49] *Id.*

[50] *See* 28 C.F.R. §§ 35.170-35.178, 35.190 (1995) (containing complaint procedure and designating appropriate agencies for filing of complaints). The Department of Transportation handles complaints relating to transportation, including highways, public transportation, traffic management, automobile licensing and inspection, and driver licensing. *Id.* § 35.190(b)(8). The Agency's authority as an investigating agency under the regulations is identical to that of the other seven designated agencies and is distinct from its regulatory and enforcement responsibility under Title II, Part B, which deals with public transportation by public entities. 42 U.S.C. §§ 12141-12161. The other investigating agencies are the Departments of Agriculture, Education, Health and Human Services, Housing and Urban

date of the alleged discrimination.[51] The appropriate agency must investigate the complaint and attempt informal resolution.[52] If no resolution is reached, a Letter of Findings is issued to both the complainant and the public entity. When the agency finds noncompliance with the statute, it will attempt to negotiate an agreement for voluntary compliance.[53] If no agreement is reached, the case is referred to the Attorney General for "appropriate action."[54]

If the public entity receives federal funds (as most do), it is also susceptible to termination and suspension of funding under section 504 of the Rehabilitation Act.[55] Prior to termination or suspension of funding, however, the entity is entitled to a hearing.[56] Both the Secretary of Transportation and the Attorney General have issued regulations pursuant to Title II.[57]

C. TITLE III—PUBLIC ACCOMMODATIONS

Title III of the ADA bans discrimination in any public accommodation affecting commerce.[58] Public accommodation is defined

---

Development, Interior, and Labor. 28 C.F.R. § 35.190.

[51] 28 C.F.R. § 35.170(b).

[52] *Id.* § 35.172.

[53] *Id.* § 35.173.

[54] *Id.* § 35.174.

[55] 29 U.S.C. § 794(a)(2) (1994).

[56] *See, e.g.*, 28 C.F.R. § 41.5 (1995) (requiring each enforcement agency under Rehabilitation Act to establish system including enforcement and hearing procedures adopted for Title VI); 34 C.F.R. § 100.8 (1995) (setting forth Department of Education regulations requiring hearing under Title VI); 49 C.F.R. §§ 27.125, 27.127 (1995) (setting forth Department of Transportation regulations requiring hearing under Rehabilitation Act).

[57] The Secretary of Transportation has the authority to issue regulations to carry out the sections of Title II dealing with public transportation by public entities. 42 U.S.C. §§ 12149, 12164; *see also* 49 C.F.R. §§ 37.1-37.169, 38.1-38.179 (setting forth Department of Transportation regulations implementing Titles II and III of ADA). The regulations must be consistent with accessibility guidelines promulgated by the Architectural and Transportation Barriers Compliance Board in accordance with Title V, § 504 of the ADA. 42 U.S.C. §§ 12149(b), 12163, 12204. The Attorney General has the authority to issue regulations to carry out the remainder of Title II. *Id.* § 12134; *see also* 28 C.F.R. §§ 35.101-35.190 (setting forth Department of Justice regulations). The ADA requires the regulations to be consistent with those issued pursuant to the Rehabilitation Act § 504. 42 U.S.C. § 12134(b)-(c).

[58] 42 U.S.C. §§ 12181(7), 12182(a). Title III's new construction and alterations provisions, *see infra* note 65 and accompanying text, apply to commercial facilities as well as places of public accommodation. *Id.* § 12183. Commercial facilities are those intended for nonresidential use whose operations affect commerce. *Id.* § 12181(2).

quite broadly and includes restaurants, hotels, theaters, retail establishments, auditoriums, schools, museums, libraries, public transportation stations, service establishments, social service agencies, and recreational establishments.[59] A public accommodation, including the owner, lessor, lessee, or operator, cannot discriminate by denying persons with disabilities the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations."[60]

Title III requires both access to an establishment and to services and facilities in an integrated setting.[61] The Title mandates that a public accommodation modify its practices and procedures to ensure access for individuals with disabilities unless the changes would fundamentally alter the nature of the services or facilities.[62]

A public accommodation must remove architectural and communication barriers where removal is "readily achievable," defined as "easily accomplishable and able to be carried out without much difficulty or expense."[63] Otherwise, access to the services or facility must be made available through readily achievable alternative means.[64] Additionally, Title III imposes specific accessibility guidelines for newly constructed facilities and existing facilities which undergo substantial alterations.[65]

---

[59] *Id.* § 12181(7).

[60] *Id.* § 12182. As with Title I, Title III prohibits discrimination against persons based on their association with an individual with a disability. *Id.* § 12182(b)(1)(E).

[61] *See id.* § 12182(b)(2)(A)(iv) (requiring removal of architectural barriers); *id.* § 12182(b)(1)(B) (requiring that goods and services be provided in most integrated settings appropriate to individual's needs).

[62] *Id.* § 12182(b)(2)(A)(ii). Moreover, disabled persons cannot be denied services because of the absence of "auxiliary aids or services," such as interpreters, readers, or other devices that would enable communication with the hearing or visually impaired, unless the use of such aids would fundamentally alter the nature of the services or would impose an undue burden on the accommodation. *Id.* §§ 12182(b)(2)(A)(iii), 12102(1). Additionally, a public accommodation cannot use eligibility criteria that bar disabled individuals from full and equal enjoyment of goods, services, or facilities unless such criteria are necessary to the provision of the goods, services, or facilities. *Id.* § 12182(2)(A)(i).

[63] *Id.* §§ 12182(b)(2)(A)(iv), 12181(9). Readily achievable alterations include, for example, small ramps, raised-letter and braille markings on signs and elevator controls, grab bars, flashing alarm lights, and telephones placed at a lower height. S. REP. NO. 116, *supra* note 16, at 66.

[64] 42 U.S.C. § 12182(b)(2)(A)(v).

[65] *Id.* §§ 12183(a)(1)-(2). Title III contains additional provisions specifically directed at public transportation supplied by private entities. *Id.* §§ 12182(b)(2)(B)-(D), 12184.

Private claimants under Title III can sue only for injunctive relief,[66] and they are not required to exhaust administrative remedies. Possible injunctive relief includes orders to alter facilities, to provide auxiliary aids, to modify policies, or to provide services or goods by alternative methods.[67] Title III authorizes the Attorney General to file a civil action when discrimination raises an issue of "general public importance" or when reasonable cause exists to believe that a person "is engaged in a pattern or practice of discrimination."[68] Unlike private actions, compensatory damages and civil penalties are available in cases brought by the Attorney General.[69] The Attorney General is responsible for investigating alleged violations of Title III and conducting periodic compliance reviews[70] and has issued regulations under the Title.[71]

D. TITLE IV—TELECOMMUNICATIONS

Title IV amends the Federal Communications Act to make communication by wire or radio available to individuals with a

---

[66] *Id.* § 12188(a).

[67] *Id.*

[68] *Id.* § 12188(b)(1)(B).

[69] *Id.* § 12188(b)(2).

[70] *Id.* § 12188(b)(1)(A)(i). While the statutory language states that the Attorney General "shall investigate" alleged violations of Title III, *id.*, the Department of Justice has taken the position that, unlike Title II claims, investigation of Title III cases is discretionary. Meeting with representatives of the Department of Justice, Disability Rights Section (Mar. 28, 1994).

Also, after public hearing and in consultation with the Architectural and Transportation Barriers Compliance Board, the Attorney General is authorized to certify that state laws, local building codes, or other ordinances establishing accessibility mandates meet Title III's requirements. 42 U.S.C. § 12188(b)(1)(A)(ii). Evidence of compliance with a certified law provides rebuttable evidence of compliance with the Act. *Id.*

Effective March 1, 1995, the ADA functions of the Department of Justice were reorganized and centralized into the Disability Rights Section. Letter from John L. Wodatch, Chief, Public Access Section, Civil Rights Division, Department of Justice (Feb. 22, 1995) [hereinafter Letter from John L. Wodatch] (on file with author); Telephone Interview with Eve Hill, Attorney, Disability Rights Section, Department of Justice (Mar. 9, 1995). Accordingly, further reference in the Article will be to the Disability Rights Section.

[71] 42 U.S.C. § 12186(b); *see also* 28 C.F.R. §§ 36.101-36.608 (1995) (setting forth regulations promulgated by Attorney General). Regulations for the transportation provisions of Title III were issued by the Secretary of Transportation. 42 U.S.C. § 12186(a); *see also* 49 C.F.R. §§ 37.1-37.179, 38.1-38.179 (setting forth regulations issued by Secretary of Transportation).

speech or hearing impairment in a manner "functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment."[72] Congress authorized the Federal Communications Commission (FCC) to use its enforcement authority under the Communications Act to ensure that both interstate and intrastate communication services were available within three years of enactment of Title IV.[73] Pursuant to this authority, the FCC mandated that "[e]ach common carrier providing telephone voice transmission services" provide telecommunications relay services for intrastate and interstate communications.[74]

The FCC has issued regulations to ensure compliance with Title IV's requirements.[75] Complaints alleging violation of Title IV are filed with the FCC or with a certified state program—if the violation involves intrastate services.[76] The FCC must resolve complaints by final order within 180 days of filing.[77]

IV. DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT

A. TITLE I

The EEOC has faced an increasing backlog of cases, reaching 108,106 cases as of mid-1995.[78] That the ADA was enacted without any corresponding increase in EEOC staff only exacerbated the backlog.[79] In fact, the number of investigators *decreased* during the years 1990 to 1994, resulting in an increase in the average investigator caseload from 51 cases to 122 cases during

---

[72] 47 U.S.C. §§ 225(a)(3), 225(b) (Supp. V 1993).

[73] *Id.* § 225(b).

[74] 47 C.F.R. § 64.603 (1995). These services must be provided at rates no greater than those paid for comparable voice communication services. *Id.* § 64.604.

[75] 47 U.S.C. § 225(d); 47 C.F.R. §§ 64.601-64.608.

[76] 47 C.F.R. § 64.604(c)(5). The FCC is authorized to certify state compliance programs meeting the requirements for federal certification. 47 U.S.C. § 225(f).

[77] 47 U.S.C. § 225(e). If a state does not timely resolve a complaint, jurisdiction reverts to the FCC. 47 C.F.R. § 47.604(c)(5).

[78] *Statement of EEOC Chairman Casellas Before Senate Labor and Human Resources Committee May 23, 1995*, DAILY LAB. REP., May 24, 1995, at E-6.

[79] *Id.*

that period.[80] Not surprisingly, the average time to process a charge grew from 284 days to 328 days over that span,[81] resulting in great frustration among parties dealing with the Agency.[82] Immense caseloads and inability to achieve prompt case resolution also frustrate Agency personnel.[83] Despite the increasing backlog, increased funding for the Agency seems unlikely.[84]

Although the complaining party must file a charge with the EEOC, he or she may ask the EEOC to issue a right-to-sue notice if 180 days have passed since the filing of the charge, regardless of the status of the investigation.[85] Less-sophisticated individuals,

---

[80] *Id.*

[81] *Id.*

[82] *See EEOC Official and Attorneys Discuss Challenges Posed by Record Charge Rate*, DAILY LAB. REP., Mar. 22, 1994, at A-13 (expressing concern over growing caseload); Letter from Jeffrey A. Norris, Equal Employment Advisory Council, to Frances M. Hart, Executive Officer, Equal Employment Opportunity Commission 2 (Sept. 16, 1993) (on file with author) (expressing concern over impossible task created for EEOC by burgeoning caseload).

[83] *See EEOC Official Discusses Record Charge Rate*, 145 Lab. Rel. Rep. (BNA) No. 112, at 381 (Mar. 28, 1994) (discussing Agency frustration over caseload); *Latest EEOC Data Show Record Charges, Sharp Increase in Inventory of Pending Cases*, DAILY LAB. REP., Aug. 10, 1993, at A-2 (noting although Agency increased its resolution of charges in 1993, number of charges awaiting resolution increased by nearly 32%, generating significant Agency concern).

[84] Although President Clinton requested a 15% increase in the EEOC's 1996 budget, it is unlikely that the request will survive the congressional budget process. *EEOC: Substantial Increase in EEOC Budget is Unlikely to Survive GOP Congress*, DAILY LAB. REP., Feb. 7, 1995, at B-2. Following the EEOC's adoption of backlog-reducing measures, *see infra* notes 113-125 and accompanying text, Representative Fawell stated during congressional hearings that "he hoped that the [EEOC's] funds [would] not be cut but warned that any substantial increase in [the] budget [was] unlikely." *House Panel Elicits Details on Changes Under Way at EEOC*, DAILY LAB. REP., May 24, 1995, at A-9.

The EEOC received virtually no increase in funding or staffing when ADA cases were added to its enforcement responsibilities, yet ADA cases now constitute about 20% of the Agency's caseload. David R. Sands, *Charges of Bias on the Job Rising Fast*, WASH. TIMES, Apr. 2, 1994, at D5; *EEOC Must Begin to Deal with its Growing Workload*, 143 Lab. Rel. Rep. (BNA) No. 16, at 495 (Aug. 16, 1993). Despite the additional workload generated by the ADA and the Civil Rights Act of 1991, the EEOC has 559 fewer staff members than it had in 1980. *EEOC, Civil Rights Commission Chiefs Make Case to Congress For Budget Increases*, DAILY LAB. REP., Mar. 25, 1994, at A-17. As of this Article, the EEOC was operating under a continuing resolution allowing the Agency to operate at the same level of spending authorized in fiscal year 1995. Telephone interview with Kassie A. Billingsley, Director of Fin. and Resource Management, Equal Employment Opportunity Commission (Oct. 9, 1995).

[85] 42 U.S.C. § 2000e-5(f) (1988); 29 C.F.R. § 1601.28 (1995). If the Agency determines its investigation will not be completed within 180 days, the complainant may request and receive a right-to-sue letter before 180 days have passed. *See House Panel Elicits Details on Changes Under Way at EEOC*, *supra* note 84, at A-9.

individuals without lawyers,[86] and those hoping for Agency litigation of the charge are unaided by this provision, however. Moreover, the congressional goal of encouraging informal resolution of charges through the conciliation process is frustrated.[87]

In part because of the tremendous backlog, the number of cases litigated under Title I of the ADA has been extremely small relative to the number of charges filed: From July 26, 1992 (the Act's effective date) through the end of 1994, 39,927 charges were filed,[88] yet the EEOC filed only 48 court cases alleging ADA violations.[89] In addition, some private litigants have filed suit. Of the 154 ADA cases published from 1993 through mid-1994,[90] 58 were Title I cases.[91] Additionally, the EEOC settled nearly ten percent of the approximately 50,000 ADA charges filed through June 30, 1995.[92] Despite the number of cases settled and the expected increase in litigated cases, these figures dramatically illustrate the significance of the backlog and demonstrate that the availability of a private right of action is not reducing the backlog. Meanwhile, the number of ADA charges filed is expected to increase: it is anticipated that 32,000 charges will be filed in fiscal year 1996 alone.[93] Thus, the overwhelming majority of ADA

---

[86] *See House Panel Elicits Details on Changes Under Way at EEOC*, *supra* note 84, at A-9 (indicating that although EEOC notifies individuals represented by counsel of right to request right-to-sue letter when investigation will not be completed within 180 days, letter is of little benefit to parties without legal representation).

[87] *See Departing EEOC General Counsel Sees Need for New Direction at Overwhelmed Agency*, DAILY LAB. REP., June 11, 1993, at AA-1 (noting backlog of charges and failure to fund Agency provisions for voluntary dispute resolution have intensified problems in administering Title VII).

[88] Telephone Interview with Peggy Mastroianni, Director of ADA Policy, Equal Employment Opportunity Commission (Jan. 23, 1995).

[89] *Id.*

[90] As published in the ADA Cases (BNA) Reporter.

[91] *ADA: Americans with Disabilities Act of 1990 Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, at 8 (Aug. 1, 1994). Because the BNA data include all cases, there is some overlap between the 48 EEOC cases and the 58 cases in the BNA data.

[92] *Disabilities Act: Disabilities Law Viewed Positively but Also as Cause of Frivolous Suits*, DAILY LAB. REP., July 27, 1995, at A-8. Over 10,000 additional cases were closed administratively, including those in which a requested right-to-sue letter was issued prior to completion of an investigation. *Id.* After full investigation, the EEOC found merit in 822 cases. *Id.*

[93] *EEOC: Substantial Increase in EEOC Budget is Unlikely to Survive GOP Congress*, *supra* note 84, at B-2.

employment cases are simply awaiting investigatory action and few of them will ever be litigated by the Agency regardless of the investigation's outcome, a situation not expected to change in the foreseeable future.

Consideration of how to resolve the EEOC's tremendous backlog problem is ongoing. Proposals have included changes in the Agency's structure, its priorities, its funding, and its dispute resolution mechanisms.[94] This consideration has not been limited to ADA cases but instead relates to all of the Agency's statutory responsibilities.

Alternative dispute resolution (ADR) is one potential weapon for attacking the backlog and preventing its growth. Recognizing this, the EEOC has begun to experiment with ADR.[95] For many years the Agency has attempted to settle cases through negotiation whenever possible.[96] In cases in which it finds reasonable cause, the EEOC is statutorily required to conciliate prior to litigation.[97] Unfortunately, these efforts have been insufficient to prevent continuing growth of the backlog.

In an initial effort to promote the use of ADR in ADA cases, the

---

[94] *See EEOC Chair to Address Agency Problems*, 147 Lab. Rel. Rep. (BNA) No. 13, at 404 (Nov. 28, 1994) (discussing ideas of new EEOC Chair to improve effectiveness and efficiency of Agency); *Owens Holds Hearing on Reforming EEOC Organizational Structure and Enforcement Authority, Subcommittee on Select Education and Civil Rights, House of Representatives*, 1994 WL 386268 (F.D.C.H.) (July 26, 1994) [hereinafter *Oversight Hearing*] (discussing various proposals to improve effectiveness of EEOC); *Senate Hearing Eyes EEOC Reforms, Backlog*, 149 Lab. Rel. Rep. (BNA) No. 5, at 154 (May 29, 1995) (discussing proposed reforms to relieve Agency backlog); *Government Reorganization: Reich, Casellas Oppose Merging Labor, Education, EEOC; GOP Vows to Move Ahead*, DAILY LAB. REP., July 26, 1995, at AA-1 (discussing proposal to merge EEOC with Departments of Labor and Education); *see also Fact Finding Report Issued by the Commission on the Future of Worker-Management Relations*, DAILY LAB. REP., June 3, 1994 (special supp.) (discussing current system of employment regulation, litigation, and dispute resolution; and considering alternative methods of handling employment-related disputes, including alternative dispute resolution, unified administrative agency, and unified labor court).

[95] In July 1993, the EEOC requested comments from the public concerning its intent to develop a policy statement regarding the use of alternative dispute resolution. *EEOC Request for Comments on Alternative Dispute Resolution*, DAILY LAB. REP., July 15, 1993, at G-1. The comments received generally reflected support for ADR, although many expressed reservations with respect to the particular uses or methods of implementation of ADR. A copy of the comments is on file with the author.

[96] *See* 29 C.F.R. § 1601.20 (1995) (authorizing EEOC to encourage settlement and establishing procedures to be followed in event of settlement).

[97] 42 U.S.C. § 2000e-5 (1988).

EEOC and the Department of Justice funded training in both the ADA and ADR for individuals with disabilities.[98] As a result of the training, twenty-five individuals were certified as trained mediators. In 1994, the EEOC completed a pilot mediation program in which 267 of a contemplated 300 mediations were conducted.[99] The program included Title I ADA cases, but was limited to cases involving discharge, discipline, or alleged discrimination in terms and conditions of employment.[100] Although reasonable accommodation cases seem appropriate for mediation, the pilot project did not include them.[101]

The Agency contracted with the Center for Dispute Settlement to conduct mediation upon agreement of both parties.[102] A mediator unconnected to the Agency was assigned a case for sixty days.[103] While 87% of the charging parties opted for mediation, only 43% of

---

[98] Information regarding these training sessions was obtained from representatives of the EEOC; the Department of Justice, Disability Rights Section; and the Disability Rights Education and Defense Fund (DREDF). *See also* ABA COMM'N ON MENTAL AND PHYSICAL DISABILITY LAW AND COMM'N ON LEGAL PROBLEMS OF ELDERLY, TARGETING DISABILITY NEEDS: A GUIDE TO THE AMERICANS WITH DISABILITIES ACT FOR DISPUTE RESOLUTION PROGRAMS 9 (American Ass'n of Retired Persons for Nat'l Inst. for Disp. Resol., 1994) [hereinafter TARGETING DISABILITY NEEDS] (discussing training); Request for Comments on the Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures, 58 Fed. Reg. 39,023 (EEOC 1993) (same).

[99] EEOC, Alternative Dispute Resolution (ADR) Pilot Program 1-3 (1994) [hereinafter EEOC Report on ADR Pilot Program]; *EEOC Official Discusses Record Charge Rate*, 145 Lab. Rel. Rep. (BNA) No. 12, at 381 (Mar. 28, 1994).

[100] *See* EEOC Report on ADR Pilot Program, *supra* note 99, at 2. Fourteen percent of the total cases entering the pilot project for assignment to mediation or the control group were disability cases. Craig A. McEwen, An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program 21 (Mar. 1994) (Center for Disp. Settlement) [hereinafter EEOC Mediation Program Evaluation].

[101] *See* EEOC Report on ADR Pilot Program, *supra* note 99, at 2. The EEOC decided to exclude reasonable accommodation cases for several reasons. First, the Agency had a strong interest in reducing the backlog of discharge cases, its largest category. Second, the Agency had limited experience with reasonable accommodation issues under the other statutes it administers, and Congress indicated it did not intend for the interpretation of Title VII's requirement of reasonable accommodation for religion, *see* Trans World Airlines v. Hardison, 432 U.S. 81 (1977), to govern the ADA. H.R. REP. NO. 485, *supra* note 47, at 68; S. REP. NO. 116, *supra* note 16, at 36. Finally, the ADA was a new statute without existing precedent regarding remedies. Given these factors, there was concern for setting a settlement standard in reasonable accommodation cases through outside mediation. Information from Representatives of EEOC and of the Center for Dispute Settlement.

[102] EEOC Report on ADR Pilot Program, *supra* note 99, at 1-2.

[103] *EEOC Official Discusses Record Charge Rate*, *supra* note 99, at 381.

employers agreed to mediate.[104] Employers were particularly reluctant to mediate discharge cases perhaps because they saw no ground for compromise.[105] Settlement was reached in 52% of the mediated cases.[106]

The parties to mediation in the pilot project reflected generally high satisfaction levels: 92% believed the mediation was fair and 80% would try it again.[107] Reviews by the Agency's supervisory personnel were mixed. Some were concerned that mediation would weaken the Agency's law-enforcement image; others felt that mediation added time to case processing.[108] While the mediation process took far less time than a full investigation,[109] cases that were not settled moved back into the investigation process, perhaps adding to overall processing time.[110] A comparison of mediated settlement agreements with those reached through normal Agency resolution techniques found no major differences in the remedies, although plaintiffs received slightly higher monetary payments in Agency-settled cases.[111] However, when mediators believed that

---

[104] EEOC Report on ADR Pilot Program, *supra* note 99, at 3.

[105] Information from Representatives of the Equal Employment Opportunity Commission. The final report indicated that only 39% of employers agreed to mediate in the cases when the employee was terminated, and 48% agreed when the employee remained employed, yet 70% agreed when the employee had resigned. EEOC Report on ADR Pilot Program, *supra* note 99, at 4.

[106] EEOC Report on ADR Pilot Program, *supra* note 99, at 4.

[107] *Id.* at 5. One fairness concern was expressed by both sides: When either party appeared with unexpected representatives, its good faith was questioned. *Id.*

[108] *Id.* at 6-7. A further concern addressed the availability of resources for expanded or continued use of mediation. *Id.* at 7-8.

[109] The average time for completion of the mediation process was 67 days, *id.* at 4, while in 1994 the average processing time for cases outside the mediation project was 293 days. *EEOC Struggles with Caseload*, 45 LAB. L.J. 432 (1994).

[110] Supervisors believed that the pilot project added time to the process. EEOC Report on ADR Pilot Program, *supra* note 99, at 6. The report did not recite data enabling any definitive conclusion on the issue, however. The difference in resolution time between mediated and non-mediated cases may be at least partly attributable to the fact that while mediated cases were immediately processed, settlement negotiations outside the pilot project "proceeded in accordance with docket order scheduling." *Id.* at 6.

[111] *Id.* at 6. Note, however, that earlier settlement in mediation results in a lower amount of lost wages and benefits. EEOC Mediation Program Evaluation, *supra* note 100, at 52. Furthermore, many of the mediation-eligible cases that continued in the EEOC process displayed greater potential for a finding of discrimination, according to the mediators' evaluations. *Id.* at 53. Finally, the number of merit resolutions—resolutions that result in some benefit for the charging party—was increased by mediation. *Id.* at 54-55. In addition to financial settlements and promised changes in job status, 21% of the mediated settlements

discrimination had occurred, few settlements were reached.[112]

In December 1994, newly-appointed EEOC Chair Gilbert Casellas announced formation of an ADR Task Force to study and recommend to the Commission appropriate uses of ADR.[113] The task force report led to the adoption of four ADR-related motions.[114] The first motion directed the Chair to take actions necessary to develop an ADR program with the following elements: (1) informed and voluntary participation; (2) confidential deliberations in the ADR process; and (3) the use of neutral facilitators.[115] The motion directed the EEOC's Office of Legal Counsel to draft a proposed policy statement on ADR by May 30, 1995, reflecting the "basic principles and conclusions of the ADR Task Force Report: that ADR furthers the EEOC's dual mission of vigorously enforcing federal laws prohibiting employment discrimination and resolving employment discrimination disputes."[116] Upon approval of the policy statement, the Commission Chair is to request proposals from EEOC district offices desiring to participate in the ADR program and to select proposals for implementation, giving priority to mediation proposals.[117] The target date for implementation is fiscal year 1996.[118]

While the EEOC also is encouraging internal ADR efforts by employers, the Agency's concern over the growing use of employer-sponsored arbitration is reflected in the fourth motion. It directs the EEOC's Legal Counsel to prepare and submit a proposed policy statement supporting employer efforts to develop voluntary internal ADR programs, while reiterating the Agency's opposition to

---

included promises to change management practices and procedures. *Id.*

[112] EEOC Report on ADR Pilot Program, *supra* note 99, at 5. While this finding might be cause for concern, it may instead suggest that the EEOC's enforcement role is not being undermined by mediation. EEOC Mediation Program Evaluation, *supra* note 100, at 47. Charging parties having strong cases are less willing to compromise their claims. *Id.* at 45.

[113] *Report and Recommendations of the Commission on the Future of Worker-Management Relations, reprinted in* DAILY LAB. REP., Jan. 10, 1995 (special supp.).

[114] Kevin P. McGowan, *EEOC Votes to Offer Voluntary Mediation as Option in Job Discrimination Claims*, DAILY LAB. REP., Apr. 26, 1995, at AA-1.

[115] Motions Proposed by the ADR Task Force, Commission Meeting of the Task Force on Alternative Dispute Resolution, Mot. 1 (Apr. 25, 1995) [hereinafter Motions] (on file with author).

[116] *Id.* Mot. 2.

[117] McGowan, *supra* note 114, at AA-1.

[118] *Id.*

conditioning employment on agreement to mandatory, binding arbitration of discrimination disputes and confirming the Agency's determination to accept and process charges regardless of a preexisting employer-sponsored ADR program.[119]

The contemplated EEOC ADR program includes monitoring and enforcement by the EEOC and applies broadly to cases within the Agency's jurisdiction, including ADA cases.[120] Chairman Casellas has begun implementation, directing consultation with stakeholders regarding program development, efforts to identify pro bono and low cost mediators, plans for training agency personnel and outside mediators, and development of educational materials.[121] Thus, the EEOC is now moving rapidly to institute a voluntary ADR program.[122]

In addition to its ADR recommendations, the EEOC adopted other recommendations to improve its charge processing system.[123] These recommendations include adopting a more flexible approach to charge processing; prioritizing charges based on the level of investigation necessary; developing a National Enforcement Plan to identify priority issues and guide enforcement; eliminating detailed "no cause" letters when no discrimination is found;

---

[119] Motions, *supra* note 115, Mot. 4. The EEOC recently acted on its opposition to pre-offer mandatory agreements to arbitrate, obtaining a preliminary injunction barring an employer from requiring its employees to use the employer's ADR Policy. EEOC v. River Oaks Imaging & Diagnostic, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995). The employer subsequently entered into a consent order making the preliminary injunction permanent. *Alternative Dispute Resolution: EEOC Agrees with Houston Medical Firm on Permanent Halt to Mandatory ADR Plan*, DAILY LAB. REP., July 3, 1995, at A-2.

[120] McGowan, *supra* note 114, at AA-1.

[121] *See Motions on Alternative Dispute Resolution Adopted by EEOC April 25, 1995*, DAILY LAB. REP., Apr. 26, 1995, at E-1 (discussing actions taken by Chairman Casellas).

[122] The EEOC also has directed consultation with the state and local fair employment practice agencies (FEPAs) with whom it has worksharing agreements, seeking to explore ways that ADR Task Force recommendations might further the joint EEOC-FEPA mission. *Motions and Recommendations of EEOC Task Force on State and Local FEP Agencies Adopted May 22, 1995*, DAILY LAB. REP., May 23, 1995, at E-18. Some state and local agencies have begun using mediation already. *See, e.g.*, *infra* notes 247-252 and accompanying text (describing mediation by Chicago Commission on Human Relations); *infra* note 253 and accompanying text (describing mediation by Connecticut Council on Human Rights and Opportunities).

[123] News Release: EEOC Commissioners Adopt Task Force Recommendations to Strengthen and Streamline Agency Charge Processing Systems 1 (Apr. 21, 1995) (EEOC) (on file with author).

encouraging settlement at all stages of the process; and delegating to the General Counsel litigation decisions in individual disparate treatment cases under Title VII and the ADEA.[124] Decisions to litigate ADA cases will continue to be made by the Commission.[125] As with the ADR procedures, these changes are designed to expedite case processing and to reduce the existing backlog.

As previously noted, employers are increasingly experimenting with ADR programs.[126] Internal ADR programs typically incorporate one or more ADR methods, including open-door policies, ombudspersons, factfinding, peer review, negotiation, company or outside mediators, and binding arbitration.[127] While mandatory, binding arbitration of statutory discrimination claims remains controversial,[128] mediation has raised far fewer concerns because

---

[124] *Id.*

[125] *Disabilities Discrimination: ADA Cases Will Still Go to Commission Under Newly Adopted EEOC Procedures*, DAILY LAB. REP., May 11, 1995, at A-4.

[126] *See* U.S. GEN. ACCT. OFF., REP. TO CONG. REQUESTERS, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 3, 7 (July 1995) [hereinafter GAO REPORT] (finding nearly 90% of employers with more than 100 employees who filed EEO reports in 1992 use at least one ADR method to resolve discrimination complaints); *see also* Howard A. Simon & Yaroslav Sochynsky, *In-House Mediation of Employment Disputes: ADR for the 1990s*, 21 EMPL. REL. L.J. 29, 29 (1995) (noting employers traditionally have used neutral external mediators in ADR but are increasingly using in-house ADR programs). The Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.* that an employee was bound to arbitrate his age discrimination claim where his application for registration as a securities representative contained a form arbitration agreement, encouraged the trend toward arbitration of employment disputes. 500 U.S. 20, 23 (1990).

[127] *See* GAO REPORT, *supra* note 126, at 1-2 (listing ADR approaches commonly used by employers).

[128] *See Panelists Say No to Mandatory Arbitration*, 149 Lab. Rel. Rep. (BNA) No. 16, at 496-97 (Aug. 14, 1995) (noting both plaintiff and defense attorneys on ABA panel recommend rejection of mandatory arbitration). Although *Gilmer* required arbitration of an age discrimination claim, courts have not agreed on whether contractual arbitration provisions preclude judicial litigation of ADA claims. *Compare* Block v. Art Iron, Inc., 866 F. Supp. 380, 385-86 (N.D. Ind. 1994) (holding employee's ADA claim was not subject to mandatory arbitration clause of collective bargaining agreement when clause did not specifically state such claims were included) *and* Bruton v. Southeastern Pa. Transp. Auth., 147 L.R.R.M. 2167, 2168-69 (E.D. Pa. 1994) (holding arbitration clause in collective bargaining agreement did not preclude statutory ADA claim) *with* Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103, 1106-07 (W.D. Va. 1994) (holding employee was estopped from bringing ADA discrimination claim when alleged discrimination occurred while binding arbitration provision of collective bargaining agreement was in effect). Unlike these cases, *Gilmer* did not involve an arbitration clause in a collective bargaining agreement, and in fact, the Court distinguished the case from Alexander v. Gardner-Denver, 415 U.S. 36 (1974), where it had

it seeks a mutually agreeable, rather than a mandatorily imposed, solution to the dispute. Thus, the use of both external and internal mediation to resolve employment disputes is growing.[129]

B. TITLES II AND III

Like the EEOC, the Department of Justice (DOJ) is overwhelmed with ADA cases and has only seventy-five staff members to handle its ADA enforcement responsibilities under Titles I, II and III.[130] As of September 1994, the DOJ was the investigating agency for nearly one half of the 2902 complaints filed under Title II and had opened an investigation in more than one half of the 2796 complaints alleging violations of Title III.[131] Through September 1994, the Department had resolved 100 Title II cases informally, 22 cases through formal settlement agreements, and had issued 33 letters of findings, 4 of which found noncompliance.[132] Through the same time period, the Department had completed 300 investigations of Title III cases, 177 resulting in increased accessibility of

---

held that an employee was entitled to pursue a judicial action under Title VII despite a prior arbitration decision under the collective bargaining agreement. *Gilmer*, 500 U.S. at 33-35.

In the unionized workplace, arbitration of disability issues was common prior to enactment of the ADA and remains common today. *E.g.*, Waterous Co., 100 Lab. Arb. (BNA) 278 (1993) (Reynolds, Arb.); Iowa Elec. Light & Power Co., 100 Lab. Arb. (BNA) 393 (1993) (Pelofsky, Arb.); Madison Adult Educ. Dist., 100 Lab. Arb. (BNA) 450 (1993) (Johnson, Arb.); Cleveland Elec. Illuminating Co., 100 Lab. Arb. (BNA) 1039 (1993) (Lipson, Arb.); Cessna Aircraft Co., 104 Lab. Arb. (BNA) 985 (1995) (Thornell, Arb.).

[129] *See* GAO REPORT, *supra* note 126, at 7 (finding that of employers reporting use of ADR, 38.2% used internal mediation and 8.6% used external mediation); *see also* Simon & Sochynsky, *supra* note 126, at 33 (noting that many employers have begun to craft in-house mediation programs); *cf.* BARBARA A. PHILLIPS, FINDING COMMON GROUND: A FIELD GUIDE TO MEDIATION 155-65 (1994) (recommending mediation of employment disputes); Bompey & Siniscalco, *supra* note 8, at 398 (same); Robert B. Fitzpatrick, *Nonbinding Mediation of Employment Disputes*, TRIAL, June 1994, at 40 (same).

[130] Meeting with Representatives, Department of Justice, Disability Rights Section (Mar. 28, 1994). President Clinton's 1995 budget provides for 21 additional staff members. The scope of the DOJ's responsibilities is immense: approximately 30,000 governmental bodies are covered by Title II alone. *Id.*

[131] Information from Department of Justice, Disability Rights Section. In fiscal year 1995, approximately 800 additional Title II and 800 additional Title III complaints were filed with the DOJ. *Id.*

[132] *Id.*

the public accommodation.[133] Through mid-1994, 37 Title II and 25 Title III judicial decisions were published.[134]

As previously noted, individuals are not required to exhaust administrative remedies under these Titles; thus, any investigatory delays caused by a case backlog do not preclude a complaining party from filing suit. Nevertheless, when parties wait long periods of time for agency action, even when not required to do so, the effectiveness of the statute is reduced. Moreover, respondents are not relieved of the threat of litigation when cases are not meritorious, nor is rapid resolution of meritorious cases achieved. Furthermore, individuals who do not have the resources to undertake private actions are injured by the delay. Finally, a claimant under Title III may forego the opportunity for compensatory damages if she initiates a private action and the DOJ decides to allocate its resources to other cases.[135]

As with the EEOC, the DOJ attempts to settle cases informally through negotiation. The Department has funded a pilot mediation project through a grant to the Community Board Program in San Francisco.[136] The project utilizes private mediators trained in ADA mediation in five targeted cities and anticipates mediation of 200 cases.[137] Cases are referred to the mediators by the DOJ upon agreement of the parties. Upon completion of the project, the contractor will perform an analysis to determine whether mediation is an appropriate tool for resolution of cases under Title III. In so doing, the contractor will focus on successful resolution of cases mediated, the maintenance of the mediated agreements, and qualitative assessments of both the process and outcomes, based on

---

[133] *Id.* The resolutions include formal and informal settlements, consent decrees, and litigation. *Id.*

[134] As reported in ADA Cases (BNA) Reporter. *ADA: Americans with Disabilities Act of 1990 Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, at 10 (Aug. 1, 1994).

[135] *See* 42 U.S.C. § 12188(a) (Supp. V 1993) (limiting private claimants to injunctive relief under Title III); *cf. id.* § 12188(b) (authorizing compensatory damages for aggrieved persons in actions brought by Attorney General).

[136] Proposal to Demonstrate the Application of Mediation to Achieve Voluntary Compliance with the Americans with Disabilities Act: A National Model 4, 6 (Community Board Program, May 7, 1993) [hereinafter Community Board Proposal] (on file with author); TARGETING DISABILITY NEEDS, *supra* note 98, at 42.

[137] Community Board Proposal, *supra* note 136, at 2-4; TARGETING DISABILITY NEEDS, *supra* note 98, at 42.

information supplied by DOJ personnel, mediation program directors, and mediation participants.[138]

Interim analysis of the project revealed some difficulties in execution.[139] As a result of geographic limitations on referrals and failure of many referred parties to agree to mediate, few mediations had taken place as of mid-1994. By appearing to remove the threat of government action, the Department's initial practice of closing cases referred to mediation may have contributed to the reluctance of respondents to agree to mediation.[140] Moreover, some complainants are reluctant to mediate, preferring to have the Department handle the case. The Community Board has been unable to educate potential parties about the benefits of mediation because of Privacy Act limitations on releasing the parties' identities.[141]

The Department of Justice awarded an additional grant in 1994 for an ADA education and pilot project for professional mediators.[142] The goal of the program is

> to train a select number of professional mediators nationwide about Title III of the ADA, refer Title III cases to these mediators for mediation, monitor the outcome of mediation efforts, and evaluate and disseminate the evaluation of the project to mediators and other interested parties nationwide, so that

---

[138] Community Board Proposal, *supra* note 136, at 7-8. The DOJ decided to limit mediation under the grant to Title III cases because it would be easier to evaluate a limited pilot program. Additionally, Title II cases frequently are more complex and often more expensive because the defendant is an entire government entity. Meeting with Representatives, Department of Justice, Disability Rights Section (Sept. 27, 1994) and Telephone Conversation with Eve Hill, Attorney, Department of Justice (March 9, 1995).

[139] Meeting with Representatives, Department of Justice, Disability Rights Section (Sept. 27, 1994).

[140] *Id.* The Department, which always retained the ability to open a case for investigation if mediation failed has ceased closing cases referred to mediation. Letter from John L. Wodatch, *supra* note 70.

[141] Meeting with Representatives, Department of Justice, Disability Rights Section (Mar. 28, 1994); *see also* 5 U.S.C. § 552a (1994) (preventing generally disclosure of records without written consent of person to whom record pertains).

[142] 59 Fed. Reg. 29,160, 29,165 (1994); *see also* Press Release: Justice Department Awards 10 Grants to Promote the Americans with Disabilities Act 3 (Dep't of Justice, Oct. 5, 1994) [hereinafter Press Release: Justice Department Awards 10 Grants] (announcing grant award to Key Bridge Foundation) (on file with author).

> the project can be effectively replicated in other areas of the country.[143]

The project will train ninety professional mediators about the ADA and develop a procedure for referring ADA complaints to the mediators.[144] In addition, the grantee will produce a consumer guide to mediation services and a mediator's guide to mediating ADA complaints. The grantee anticipates mediating 650 complaints.

As of September 1995, fifty-two cases had been referred to the two pilot mediation projects.[145] Of those, twelve were resolved through mediation and twenty-one remained pending with the mediation agencies. In the remaining cases, the respondent refused to participate in mediation; the Department of Justice is reevaluating these cases.

In April 1995, the Attorney General established a formal program in the DOJ to promote greater use of ADR.[146] The program will establish criteria and methodologies for various types of ADR and for identifying ADR methods to resolve categories of cases.[147] The Order also requires comprehensive ADR training for civil attorneys, creates the position of Senior Counsel for Alternative Dispute Resolution, and mandates cooperation with court-sponsored ADR.[148]

C. TITLE IV

The Federal Communications Commission (FCC) had received only six complaints of ADA violations as of September 1, 1994, five

---

[143] 59 Fed. Reg. 29,165. The DOJ has not ruled out mediation of Title II cases under this grant and may refer some Title II cases to mediation. Telephone Conversation with Eve Hill, Department of Justice, Disability Rights Section (Mar. 9, 1995).

[144] Press Release: Justice Department Awards 10 Grants, *supra* note 142, at 3.

[145] Telephone Conversation with Eve Hill, Attorney, Department of Justice, Disability Rights Section (Oct. 5, 1995).

[146] U.S. Dep't of Justice Order No. OBD 1160.1 (Apr. 6, 1995) [hereinafter Attorney General's Order]; *ADR Ordered for the Department of Justice*, ADR NETWORK, June 1995, at 1. The Order contemplated dissemination of ADR guidance by each litigating division in the agency by September 11, 1995. Attorney General's Order, at 2.

[147] Attorney General's Order, *supra* note 146, at 2.

[148] *Id.* at 1-2.

of which were resolved.[149] While the FCC has not used ADR in ADA cases to date, the Commission has adopted an "Initial Policy Statement and Order" encouraging the use of ADR[150] and has used negotiated rulemaking with some success in other areas.

D. JOINT ADR

In June 1995, the Administrative Conference of the United States[151] (ACUS) adopted a recommendation for voluntary mediation of ADA cases under all four titles.[152] The recommendation proposed a joint committee of agency representatives to develop an ADA mediation program, with assistance from an advisory committee of representatives from potential program participants, such as businesses, state and local governments, disability rights organizations, and labor organizations.[153] The recommendation suggests that the agencies determine the selection criteria for referral of cases to mediation.[154] Further, the recommendation urges the committee to establish a thorough evaluation process to enable assessment of mediation's effectiveness in resolving ADA cases in accordance with the ADA's statutory goals.[155] Finally, the recommendation encourages enforcement agencies to continue joint exploration of other ADR techniques for use in ADA disputes.[156] The agencies have taken initial steps to implement a

---

[149] Telephone Interview with Linda Dubroof, Senior Staff Attorney, Federal Communications Commission, Common Carrier Bureau (Sept. 6, 1994).

[150] 47 C.F.R. § 1.18 (1994).

[151] The ACUS is an independent federal agency whose responsibility is to make federal programs more effective, fair, and efficient. ADMIN. CONF. U.S., ARBITRATION 6 (1988). To accomplish this task, the Conference brings together experts from the public and private sectors to research, recommend, and assist in implementation of improvements in administrative law and agency procedures. *Id.* Effective October 31, 1995, Congress terminated funding for ACUS; the impact of this termination on the various programs discussed throughout this Article is unknown. Nevertheless, administrative agencies may still implement ACUS recommendations.

[152] Use of Mediation Under the Americans with Disabilities Act, 60 Fed. Reg. 43,115 (1995) [hereinafter Recommendation].

[153] *Id.* at 43,116.

[154] *Id.*

[155] *Id.* at 43,117.

[156] *Id.*

joint mediation program as recommended.[157] In addition to the ACUS Recommendation, several organizations having ADA dispute-resolution programs also handle or contemplate handling a variety of ADA disputes.[158]

V. THE ADA AND MEDIATION

In light of the statutory encouragement of ADR and the move toward use of mediation in ADA cases, evaluation of whether mediation is an effective enforcement tool consistent with statutory goals is appropriate. One must keep in mind, however, that "[i]f . . . reform benefits only judges, then it isn't worth pursuing. If it holds out progress only for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America."[159] Part V of this Article will evaluate the use of mediation in ADA cases and then analyze mediation as an ADA dispute resolution technique, making recommendations for establishment of effective programs consistent with the statutory mandate of eliminating disability discrimination.

Despite the ADA's support of ADR, there is room for debate about whether ADR has a role to play in ADA disputes, particularly given the nature of the public rights involved.[160] Critics of ADR

---

[157] Letter from John R. Schmidt, Dep't of Justice, Office of Associate Att'y Gen., to Thomasina Rogers, Chair, ACUS (Oct. 25, 1995) (on file with author).

[158] *E.g.*, Trade Winds Rehab. Ctr., Inc., Northwest Indiana Americans with Disabilities Act Mediation Project (Mar. 31, 1995) (on file with author); Telephone Interview with Suzanne Schmitz, Coordinator, ADR Clinic, Southern Illinois University (July 12, 1995). The Michigan Commission on Handicapper Concerns and the Michigan Supreme Court have implemented a pilot mediation project for disability discrimination cases using community dispute resolution centers. Telephone Interview with Doug Van Epps, State Court Administrative Office (Oct. 1995). Each project has had limited success in obtaining agreements to mediate.

[159] A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134, 138 (1976), *quoted in* Fitzpatrick, *supra* note 129, at 40. Benefits for the administrative enforcement agencies are comparable to those for judges and lawyers. While important, the reform is of value only if it serves the ADA's purpose of eliminating discrimination against individuals with disabilities.

[160] Some commentators have argued that ADR is inappropriate in cases involving significant public rights. *E.g.*, HENRY J. BROWN & ARTHUR L. MARRIOTT, ADR PRINCIPLES AND PRACTICE 396 (1993); Irving R. Kaufman, *Reform for A System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 29 (1990); *see also* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L. J. 1187, 1238 (1993) (arguing public justice values underlying discrimination statutes are best

argue that it limits courts' role in establishing norms,[161] a process of giving "meaning to our public values."[162] Because the ADA became effective only three years ago, much of the Act remains to be developed through judicial decisions. While this is a persuasive reason to maintain litigation as a primary enforcement strategy, it does not justify preclusion of ADR in ADA cases. A large number of ADA cases are backlogged at the investigation stage and, in light of crowded court dockets, likely will become backlogged at the litigation stage as well. The agencies have resources to litigate only a small number of cases and obtaining counsel for litigation is difficult for many complainants in employment discrimination cases.[163] ADR, particularly mediation, offers some promise of quicker, less expensive disposition of cases with greater litigant satisfaction. As convincingly noted by the Pound Conference Report:

> The ultimate goal is to make it possible for our system to provide justice for all. Constitutional guarantees of human rights ring hollow if there is no forum available in fact for their vindication. Statutory rights become empty promises if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting it.[164]

---

preserved by de novo review of arbitral determinations of law in discrimination cases).

[161] *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72 (1986) (discussing importance of ensuring that resolution of public rights and duties through ADR will not result in abandoning constitutional system); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing settlement deprives courts of occasions to interpret laws); Kaufman, *supra* note 160, at 30 (stating trials enforce public norms while settlements evade them). However, as Kaufman suggests, resolutions through ADR have no greater impact on this function than settlements reached through other mechanisms. *Id.* at 29-30.

[162] Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 31 (1979); *see also* Daniel Misteravich, *The Limits of Alternative Dispute Resolution: Preserving the Judicial Function*, 70 U. DET. MERCY L. REV. 37, 39-40 (1992) (arguing courts serve a greater function than merely dispute resolution).

[163] William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have to? Do You Really Want to?*, 43 DRAKE L. REV. 256, 288 (1994).

[164] NATIONAL CONF. ON CAUSES OF POPULAR DISSATISFACTION WITH ADMIN. OF JUST., THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 300 (1979), *quoted in* Kaufman, *supra* note 160, at 38.

The delays in investigation and adjudication of ADA cases and the number of cases where litigation costs outweigh the value of the claim argue for the use of ADR in appropriate cases.

A. IS MEDIATION APPROPRIATE UNDER THE ADA?

Mediation has significant potential for effective resolution of ADA disputes.[165] In view of the large number of complaints, settlement, accomplished with or without mediation, is essential to effective enforcement of the statute.[166] Nevertheless, caution must be used in adopting ADR because of the need for judicial development of the law. In adopting a mediation policy, administrative agencies must balance the interest of establishing the law with the interest of achieving benefits for discrimination victims. An agency mediation program can be designed that will not interfere with the function of developing judicially created law. First, if mediation is voluntary, many cases will not be mediated due to the absence of an agreement to mediate.[167] Second, many cases will not settle in mediation, leaving them available for litigation.[168] Finally, enforcement agencies can and should screen

---

[165] Sander and Goldberg suggest a rule of presumptive mediation, *i.e.*, that mediation should be the first ADR method of choice to promote settlement because of its great potential for resolving disputes. Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 59 (1994).

[166] Professor Alfred Blumrosen has stated, "Settlements are the lifeblood of equal opportunity law." *Oversight Hearing*, *supra* note 94, at *4.

[167] Indeed, in most civil rights mediation programs, the problem has been achieving the agreement to mediate, not the mediation of inappropriate cases. For example, in the EEOC pilot project, while 87% of charging parties agreed to mediate, only 43% of respondents agreed, which would leave for litigation more than half of the cases in which mediation was offered. *See* EEOC Report on ADR Pilot Program, *supra* note 99, at 3. Of mediation-eligible cases in the program, only 29% were actually mediated. EEOC Mediation Program Evaluation, *supra* note 100, at 76. In the District of Columbia Department of Human Rights and Minority Business Development mediation program, only about one third of respondents agree to mediate. Telephone interview with LaVerne Fletcher, Acting Supervisor, Mediation (Nov. 10, 1994). In a mediation pilot project at the Illinois Department of Human Rights, only 11% of respondents agreed to mediate. Carol McHugh Sanders, *Summer to Spell Relief for Rights Agency*, CHICAGO DAILY L. BULL., June 23, 1995, at 1.

[168] Settlement rates for most civil rights mediation programs have ranged from 40% to 70%. In the EEOC pilot program, 52% of mediated cases settled. EEOC Report on ADR Pilot Program, *supra* note 99, at 3. Thus, only 15% of the charges originally eligible for mediation settled. EEOC Mediation Program Evaluation, *supra* note 100, at 76. The

cases at their intake, identifying those raising issues the agency has targeted for law development. Such cases should not be referred for mediation, but rather investigated for litigation.[169] Thus, the law-development function can be preserved while making quicker dispute resolution available to parties with routine cases.

1. The Advantages of ADA Mediation. Mediation is appropriate in ADA cases for many of the same reasons it is generally attractive.[170] First, settlement of cases is an essential part of the enforcement effort, as resources for litigation of all cases are simply unavailable. Mediation offers the promise of settlement with the assistance of a neutral party trained to help the parties resolve their disputes. It is a low-cost alternative to litigation, with potential for resolving disputes more quickly.[171] Where the cost of litigation exceeds the value of the claim, mediation can achieve cost-effective relief for the charging party and resolution for the respondent.[172] Second, mediation may reduce agency backlogs if

---

settlement rate at the D.C. Department of Human Rights has been 40-50%. Telephone interview with LaVerne Fletcher, Acting Supervisor, Mediation (Nov. 10, 1994).

[169] Letter from Richard T. Seymour, Lawyers Committee for Civil Rights Under Law, to Frances M. Hart, Executive Officer, Equal Employment Opportunity Commission 5-6 (Sept. 20, 1993) [hereinafter Lawyers Committee Comments] (on file with author).

[170] The Administrative Dispute Resolution Act, 5 U.S.C. § 572 (1994), provides the necessary authority for enforcement agency use of voluntary mediation. Companion bills were introduced in the 103d Congress to encourage mediation of ADA Title I cases along with other discrimination cases. S. 2327, 103d Cong., 2d Sess. (1994); H.R. 2016, 103d Cong., 1st Sess. (1993). These bills contemplated mediation after the EEOC has found reasonable cause and after it issues a right-to-sue letter to the charging party. No legislation was enacted, however.

[171] Speedy resolution benefits both the parties and the agency. Mediation can reduce staff time required for each case. *See* Project on Equal Educ. Rights, NOW Legal Defense and Educ. Fund & SRI Int'l, An Analysis of Using Mediation to Resolve Civil Rights Complaints 105-06 (1980) [hereinafter PEER Study]. The EEOC study was unable to determine whether staff time was reduced because of lack of comparative data available at the time of the report. EEOC Mediation Program Evaluation, *supra* note 100, at 47-48, 78-79, v. A potential benefit to charging parties is that mediation may result in more merit resolutions than the regular charge process. *Id.* at 56. Such resolutions may benefit employers by improving communication, procedures, efficiency, and morale. *Id.*

[172] While obtaining legal representation in employment discrimination cases is difficult for complainants, it might be easier to obtain counsel for mediation because of the limited investment of time and money required. Howard, *supra* note 163, at 288.

it is utilized during, or prior to, the investigative process.[173] Reduction of backlogs will benefit ADA complainants and respondents by decreasing processing time for all complaints.

Furthermore, mediation focuses on the underlying interests of the parties and accommodates those interests in a resolution agreeable to the parties.[174] Compliance with a negotiated resolution of the dispute is more likely because the solution was devised and agreed to by the parties.[175]

Mediation may be effective in preserving relationships which otherwise might be destroyed or at least severely damaged by the adversary process.[176] This is particularly important in non-discharge employment cases. Mediation increases the control of the parties over the dispute resolution process, which many mediation

---

[173] Empirical evidence regarding the efficiency of mediation is mixed. Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, *in* MEDIATION RESEARCH 398-99 (Kenneth Kressel et al. eds., 1989). Kressel and Pruitt note there is "little evidence that mediation has had any appreciable effect in reducing court backlogs." *Id.* at 398. The PEER Study found that the EEOC substantially decreased its backlog during the time period in which Rapid Charge Processing was used, *see infra* notes 243-244 and accompanying text (discussing processing system), but noted that a number of other reforms contributed to the reduction. PEER Study, *supra* note 171, at 100-04. The PEER Study concluded that mediation was not a major factor in reduction of the backlog, but did contribute to expedited processing of new charges. *Id.* at 102. The evaluation of the EEOC pilot project was unable to determine the impact on case-processing speed because of the timing of the evaluation. EEOC Mediation Program Evaluation, *supra* note 100, at 76, v. Additional study by the agency may enable such a determination. *Id.*

[174] *See* Stephen B. Goldberg, *Meditations of a Mediator*, 2 NEGOTIATION J. 345, 348 (1986) (noting benefits of mediator focus on clients' interests rather than legal issues); Craig A. McEwen, *Note on Mediation Research*, *in* DISPUTE RESOLUTION 155, 156 (Stephen B. Goldberg et al. eds., 2d ed. 1992). Ury, Brett, and Goldberg identify three approaches to resolving disputes. The disputing parties may "seek to (1) reconcile their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful." WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED 4-5 (1988). Reconciling interests generally results in "lower transaction costs, greater satisfaction with outcomes, less strain on the relationship, and less recurrence of disputes." *Id.* at 15. However, "[t]he reconciliation of interests takes place within the context of the parties' rights and power." *Id.* at 9. Nevertheless, interests may be reconciled without determining who is right or who is more powerful. Sander & Goldberg, *supra* note 165, at 56.

[175] Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S12 (1989); Folberg & Taylor, *supra* note 11, at 36; Kressel & Pruitt, *supra* note 173, at 396-97; Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981); Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes*, *in* MEDIATION RESEARCH, *supra* note 173, at 31, 34-35.

[176] Feinberg, *supra* note 175, at S11; Folberg & Taylor, *supra* note 11, at 10-11.

experts believe increases self-esteem and competence.[177] Most mediation studies reflect high levels of participant satisfaction.[178] Finally, in an ongoing relationship such as that between employer and employee, mediation may improve the conflict resolution skills of the parties, thus reducing the number and intensity of future disputes.[179]

2. The Disadvantages of ADA Mediation. Despite these advantages, mediation of ADA disputes raises concerns as well. Resolution of disputes through mediation may result in a diminished ability to identify and resolve systemic discrimination problems.[180] Mediation may tend to focus on individual issues to facilitate the process,[181] and the enforcement agency or the mediator typically will not have the means to identify and notify potential class members, thereby making it difficult to mediate class cases at the pre-litigation stage.[182] As a result, respondents have little incentive to mediate class cases because any settlement

---

[177] Folberg & Taylor, *supra* note 11, at 11, 35; *see also* Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253, 266-73 (1989) (contending primary benefit of mediation process is self-determination).

[178] Stephen B. Goldberg & Jeanne M. Brett, *Disputants Perspectives on the Differences Between Mediation and Arbitration*, 6 NEGOTIATION J. 249, 250-52 (1990); Kaufman, *supra* note 160, at 22-23; Kressel & Pruitt, *supra* note 173, at 395-96; McEwen & Maiman, *supra* note 175, at 254-60. Among factors influencing participant satisfaction are the level of control and privacy, Kressel & Pruitt, *supra* note 173, at 396, the belief that the mediator understood the dispute, the lack of formality, and the belief that important facts were heard, Goldberg & Brett, *supra*, at 251-52. Data suggest that satisfaction level is not dependent on outcome. *Id.*; Kaufman, *supra* note 160, at 23.

[179] Mediation may also promote "cooperative problem-solving behavior that would make future disputes easier to resolve." Goldberg & Brett, *supra* note 178, at 253. Improvement of conflict-resolution skills is similarly valuable in contexts other than the employer-employee relationship—for example, public accommodation cases involving regular customers, such as doctors and patients, and public entity cases involving regular consumers of government services, such as a dispute between a city transportation agency and a group of disabled commuters. Where disability-rights advocates are involved in a dispute, use of mediation may improve the ability of the defendant and the disability community to resolve future disputes.

[180] Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 540 (1987).

[181] PEER Study, *supra* note 171, at 127. Nevertheless, in the EEOC pilot project, 21% of the cases settled involved an agreement to change some management practice or procedure, potentially having systemic benefit beyond the charging party. EEOC Mediation Program Evaluation, *supra* note 100, at 55.

[182] PEER Study, *supra* note 171, at 127.

will not bind the class members.[183] Moreover, there may be little incentive for an enforcement agency to raise class issues, as they might jeopardize a mediated settlement.[184]

Furthermore, weaker parties may be disadvantaged by the less formal procedures of mediation.[185] Of course, those most likely to be less powerful in an employment dispute, or even in a public accommodation or services dispute, are individuals with disabilities. If mediation disadvantages these individuals relative to litigation, then it is incompatible with the entire purpose of the ADA.[186] Similarly, an individual's disability may preclude effective partici-

---

[183] *Id.*

[184] *Id.* at 128.

[185] *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1398-99 (arguing less formal procedures of ADR do not contain protections against prejudice existing in judicial forums); *see also* Richard Abel, *Informalism: A Tactical Equivalent to Law?*, 19 CLEARINGHOUSE REV. 375, 383 (1985) (noting "[n]othing could be more unbalanced than a confrontation between the mammoth corporation and the individual worker"); *cf.* William Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 386, 388 (1985) (noting "[f]ormal systems tend to be more difficult for people without special training or experience" and "can also subvert conflict and induce acquiescence"). There is some evidence that mediation is more likely to result in agreement when the parties are of relatively equal power. Kressel & Pruitt, *supra* note 173, at 404-05. A study of 600 cases in a New Mexico small claims court evaluated the outcome of cases randomly assigned to mediation and adjudication. Women fared better in mediation than in adjudication, although their subjective evaluation of mediation was more negative than their evaluation of adjudication. Minorities, who were predominantly Hispanic, fared worse in mediation than in adjudication. Moreover, minority disputants fared worse than whites in mediation, although the differences disappeared when both mediators were of color. However, minority disputants were more enthusiastic about mediation than white disputants, despite an objective monetary disadvantage. James Alfini et al., *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions?*, 9 OHIO ST. J. ON DISP. RESOL. 307, 316-17 (1994) (comments of Professor Michele Hermann). One explanation of these differences may be that the parties are more interested in process than outcome. *Id.* at 322 (comments of Robert Baruch Bush).

This disadvantage, if true, may contradict one of the perceived advantages of mediation: the empowerment of the parties. *See* McEwen, *supra* note 174, at 156 ("No compelling evidence exists to resolve the debate between those who argue that mediation empowers disputants and those who argue that it harms disadvantaged parties."). It is possible that both positions are valid. A party may be empowered (or feel empowered) by the process yet objectively receive less relief than he or she would have received in litigation. As McEwen notes, definitions of empowerment may vary as well: one may view empowerment as coming only with legal advocacy, while another may view it as coming from more direct involvement in the dispute and its resolution. *Id.*

[186] In determining any disadvantage, however, the empowerment potential of mediation should be considered and valued. Additionally, when balancing the benefits of litigation and settlement, the psychological costs of lengthy litigation should not be undervalued.

pation in mediation which, unlike litigation, typically requires more direct involvement by the parties.[187] Finally, the primary function of agencies utilizing ADR may change from law enforcement to conflict resolution.[188] Any mediation procedure used in ADA cases must account for these important concerns.

3. Administrative Responses. Both the EEOC's proposed ADR program and the ACUS-recommended joint program recognize and attempt to deal with these issues. As the EEOC noted in its recent Policy Statement on ADR, the Agency has a dual mission: enforcing federal anti-discrimination laws and resolving employment disputes.[189] The ADR program must further this dual mission, ensuring that neither part of the mission suffers from overemphasis on the other.[190] The Agency also recognizes that the ADR program must be fair to participants. According to the EEOC, fairness requires (1) providing as much information as possible about the ADR proceeding to the parties as soon as possible; (2) providing the opportunity for assistance during the proceeding to any unrepresented party; (3) knowing, willing, and voluntary participation at all times during the ADR proceeding; (4) using a neutral third-party facilitator knowledgeable in equal employment opportunity law and trained in mediation theory and techniques; (5) maintaining the confidentiality of the proceeding, including insulating the neutral from the investigation and compliance process; and (6) ensuring the enforceability of any agreement reached.[191] Finally, the EEOC policy establishes that its ADR programs should include training of EEOC employees, the public, persons protected under the laws, employers, and neutrals, as well as evaluation of the program to determine whether it has achieved its goals, whether it needs improvement, and how that might be accomplished.[192]

The ACUS-recommended program contains many of these same

---

[187] *See* TARGETING DISABILITY NEEDS, *supra* note 98, at 35-37.

[188] *See* PEER Study, *supra* note 171, at 9-10.

[189] *EEOC Policy Statement on Alternative Dispute Resolution*, DAILY LAB. REP., July 18, 1995, at E-13 [hereinafter *EEOC Policy Statement*].

[190] *Id.*

[191] *Id.*

[192] *Id.*

important elements.[193] Mediation is voluntary and confidential.[194] If adopted by the agencies, the program will utilize a common group of trained mediators with knowledge of the statute, familiarity with resources for ADA compliance, and knowledge about the impact of various disabilities.[195] The recommendation urges the joint committee designing the program to identify sources of technical expertise to assist in resolving disputes, such as architects, engineers, and vocational rehabilitation experts, who may be able to suggest reasonable accommodations for employees or alterations for public accommodations accessibility.[196]

Like the EEOC program, the ACUS Recommendation contemplates extensive educational efforts to inform the parties about the process.[197] Such education can improve both the process and its effectiveness, particularly for unrepresented parties.[198] The program incorporates agency review of settlements to insure enforceability and consistency with the ADA.[199] Further, the recommendation urges an extensive evaluation process to insure that the mediation program is operating consistently with statutory goals.[200] The evaluation process would include analysis of whether systemic problems exist which are not being addressed by mediated settlements and whether individuals with disabilities or unrepresented parties (often one and the same) are disadvantaged by mediation relative to litigation.[201]

Recently, the Task Force on Alternative Dispute Resolution in Employment (Task Force), a group of individuals from diverse organizations involved in labor and employment law, established a "Due Process Protocol for Mediation and Arbitration of Statutory

---

[193] Given the consistency of the two proposals, they could be implemented in conjunction with one another, with appropriate planning and consideration by the proposed joint committee recommended by ACUS.

[194] Recommendation, *supra* note 152, at 43,116-43,117.

[195] *Id.*

[196] *Id.* at 43,116 n.5.

[197] *Id.*

[198] *Id.*

[199] *Id.* The review is not intended to overturn individual settlements, however. *Id.*

[200] *Id.* at 43,116-43,117.

[201] *Id.* at 43,117.

Disputes Arising out of the Employment Relationship."[202] The Protocol was designed to ensure due process in employment mediation and arbitration to encourage expeditious, accessible, inexpensive, and fair private enforcement of statutory claims.[203] The goal of the Task Force was to encourage a system to reduce resolution delays created by backlogs in the administrative agencies and the courts.[204] Although directed at private dispute resolution, the Task Force recommendations include many of the same components as the EEOC and ACUS-recommended programs, including employee representation with potential partial employer reimbursement of the cost; access to information about both the process and the substance of the dispute; and use of qualified, trained neutrals whose cost is to be shared equally when possible.[205] Further analysis of these important components illuminates how to structure a mediation program for ADA cases which is consistent with statutory goals while resolving disputes in a timely, mutually agreeable manner.

B. THE ELEMENTS OF ADA MEDIATION

1. Design Input from Stakeholders. Both the EEOC program and the ACUS Recommendation wisely contemplate significant input from potential participants in the mediation program. The ACUS Recommendation endorses the use of an advisory committee, composed of representatives from potential participants such as businesses, state and local government bodies, individuals with disabilities, and labor organizations, to provide advice in program design.[206] The EEOC program asks its district offices, responsible

---

[202] *Prototype Agreement on Job Bias Dispute Resolution*, DAILY LAB. REP., May 11, 1995, at E-11 [hereinafter *Due Process Protocol*]. The Protocol has been endorsed by the National Academy of Arbitrators Board of Governors and by union and management representatives of the Employment and Labor Law Section of the American Bar Association. *Academy Board Endorses ADR Task Force Protocol*, 149 Lab. Rel. Rep. (BNA) No. 6, at 176 (June 5, 1995).

[203] *Due Process Protocol*, *supra* note 202, at E-11.

[204] *Id.*

[205] *Id.*

[206] Recommendation, *supra* note 152, at 43,116. In Title I cases where employees are represented by a union, unique issues arise which must be accounted for during program design and settlement. Nancy Segal, The Use of Alternative Dispute Resolution to Resolve ADA Issues in the Unionized Workplace 2-3 (21st Ann. Conf. of Soc'y of Profs. in Disp. Resol.,

for proposing specific ADR programs consistent with the national policy, to consult with both "internal and external stakeholders to assist them in the development and implementation" of their ADR programs.[207]

Input from potential participants is essential. For a mediation program to be effective, it must meet the needs of the parties.[208] Disputants are more likely to use the procedures if they are involved in the design process.[209] Involvement by representatives of likely program participants will enable them to educate and motivate their constituents to participate in mediation, enhancing the likelihood of the program's success.[210] Additionally, representatives from the disability community and small employers can help to design a program that deals effectively with the concern that less powerful participants may be disadvantaged by mediation.

Agency mediation programs also should solicit input from agency personnel who will come in contact with the process in any way. Like potential participants, these individuals will have insights into ADA cases from their involvement in the investigation and litigation systems that will inform the process design. In addition, agency personnel must be committed to the success of the program. Agency personnel who deal regularly with charging parties and respondents can educate them about the mediation program, improving both the likelihood of participation and the effectiveness of participation. Such education is more likely to occur and will be more effective if agency personnel are consulted on program design and are therefore presumptively committed to the program's success.

The ACUS Recommendation endorses use of the Federal Advisory Committee Act (FACA)[211] to provide a mechanism for incorporat-

---

Oct. 20-23, 1993) (on file with author); *see also* Ann C. Hodges, *The ADA in the Unionized Workplace*, 48 U. MIAMI L. REV. 567 (1994) (reviewing applicability of ADA to unions and employers and proposing several context-specific interpretations of Act). Accordingly, involvement of labor organizations in the program design process is essential.

[207] *Motions on Alternative Dispute Resolution Adopted by EEOC April 25, 1995*, *supra* note 121, at E-1.

[208] URY ET AL., *supra* note 174, at 65.

[209] *Id.*; Operational Aspects of Designing Dispute Resolution Systems § I, at 4 (Admin. Conf. U.S., Feb. 1994) [hereinafter Designing Systems].

[210] URY ET AL., *supra* note 174, at 76.

[211] *See* 5 U.S.C. app. I (1994) (setting forth FACA).

ing the input of representatives in the design of the mediation program.[212] FACA permits establishment of an advisory committee when the head of the involved agency determines it is in the public interest to do so in connection with the performance of the agency's duties.[213] FACA establishes the procedure for creation and operation of the committees,[214] and although FACA's requirements may appear cumbersome, appointment of such a committee will insure effective input into the design process through the exchange of ideas among the participating representatives. The communication and commitment inherent in the advisory committee process provide distinct advantages over mere solicitation of written comments and should enhance both the development of the mediation program and subsequent participation in the process.

Even if a formal advisory committee is not utilized, solicitation of input from "stakeholders" is necessary to the success of a mediation program. Using a format similar to that of FACA will provide some of the advantages of that process. Private mediation agencies and employers considering creation of an ADA mediation program should follow the example of government agencies, carefully developing it with advice from representatives of potential participants.[215]

2. Case Selection and Timing. The conventional wisdom on mediation suggests it is most appropriate for cases having a range of possible solutions, where the dispute is fact-based and where preservation of continuing relationships is important. Reasonable accommodation cases fit neatly within this description.[216] In such

---

[212] Recommendation, *supra* note 152, at 43,116.

[213] 5 U.S.C. app. II, § 9(a)(2).

[214] *Id.* §§ 7-13.

[215] The ADR Clinic at Southern Illinois University has followed this model in establishing its ADR mediation program. Information from Suzanne Schmitz, ADR Project Coordinator, Southern Illinois University.

Employers establishing mediation programs also should solicit input from employees. The Hughes Aircraft ADR program, often cited as a model of a successful program, has incorporated substantial employee input. *See* Simon & Sochynsky, *supra* note 126, at 41 (discussing Hughes's program).

[216] The EEOC's regulations suggest that the process of determining a reasonable accommodation is an informal, interactive process designed to identify the precise limitations caused by the employee's disability and reasonable accommodations that would permit the employee to perform the job. 29 C.F.R. § 1630.2(o)(3) (1995). The appropriate accommodation must be determined on a case-by-case basis. *Id.* pt. 1630, app. The EEOC recommends

cases, the employee is seeking an accommodation from the employer to enable the employee to work. Frequently, a range of possible accommodations exists, varying in cost, difficulty, and effectiveness. The employee and the employer would be well served by attempting to reach a mediated solution to the problem, minimizing hostility and finding an accommodation best satisfying both parties.[217]

Although reasonable accommodation cases may seem most appropriate for mediation, mediation potential is not limited to such cases. Some mediation scholars have suggested that, based on mediation's potential for resolving disputes, it should be the ADR method of first choice.[218] Two obstacles may impede the success of mediation: differing views of the facts or the law and a claimant's desire for a jackpot recovery.[219] Nevertheless, an effective mediator may be able to assist the parties in reaching a solution without resolving the factual and legal disputes.[220] Although mediation may be less successful when the facts favor one side, where precedent needs to be formalized, where one party wants retribution rather than resolution, where the conflicts of interest are too great, or where power is exceedingly unequal,[221] none of these factors render ADA cases inappropriate for mediation. However, these indicators should be used in screening cases for

---

consultation with the employee and use of technical assistance to determine the appropriate accommodation. *Id.* pt. 1630, app.; § 1630.9. The process is one of problem-solving, precisely the sort of dispute for which mediation is designed. *Id.*; *see also* Karen Roberts & M. Catherine Lundy, *The ADA and the NLRA: Resolving Accommodation Disputes in Unionized Workplaces*, 11 NEGOTIATION J. 29, 36-39 (1995) (suggesting mediation process for resolving reasonable accommodation disputes in unionized settings where issues may additionally involve other employees and collective bargaining agreement).

Although the EEOC pilot program did not include reasonable accommodation cases, the data showed that cases in which a continuing employment relationship existed were both more likely to be mediated and more likely to settle. EEOC Mediation Program Evaluation, *supra* note 100, at 29, 33, 44-45.

[217] Public accommodation barrier-removal cases might be successfully mediated for the same reasons.

[218] *E.g.*, Sander & Goldberg, *supra* note 165, at 59. Even when parties think no possibility of settlement exists, they may be surprised to find that mediation works. Lex K. Larson, *Mediation of Industrial Commission Cases*, 17 CAMPBELL L. REV. 395, 406 (1995).

[219] Sander & Goldberg, *supra* note 165, at 59.

[220] *Id.*

[221] Linda deLeon, *Using Mediation to Resolve Personnel Disputes in a State Bureaucracy*, 10 NEGOTIATION J. 69, 69-70 (1994).

mediation where resources are limited.

Generally, one would expect mediation to be more difficult in cases involving issues such as discharge or whether an individual is disabled within the meaning of the ADA. However, an employer who adamantly refuses to reemploy a discharged individual might be willing to provide backpay and a positive reference in order to avoid litigation.[222] Similarly, a dispute over whether an individual is disabled can be resolved by settling the underlying problem—for example, the provision of a reasonable accommodation—without determining whether a statutory disability exists. Furthermore, the success of negotiated rulemaking and mediation of environmental disputes has demonstrated that even large, multiparty disputes can be resolved through alternative processes.[223]

In a voluntary system, mediation generally should not be denied to parties who desire to mediate. Nevertheless, in a government-sponsored system with limited resources, some screening may be necessary. The ACUS Recommendation suggests that agencies establish criteria for referral of cases to mediation.[224] The EEOC policy merely indicates that flexibility to adjust to program needs and workloads is essential.[225] When mediation is first imple-

---

[222] *See* EEOC's Report on ADR Pilot Program, *supra* note 99, at 4 (describing types of relief negotiated in mediated settlements).

[223] *See* ADMIN. CONF. OF U.S., NEGOTIATED RULEMAKING SOURCEBOOK 330-36 (David M. Pritzker & Deborah S. Dalton eds., 1990) (describing EPA's experience with negotiated rulemaking); LINDA R. SINGER, SETTLING DISPUTES 140-50 (1990) (discussing mediation of environmental issues and negotiation of government regulations); DISPUTE RESOLUTION, *supra* note 174, at 345-56 (discussing negotiated rulemaking generally).

Disputes regarding the ADA's transportation provisions, however, may be less susceptible to mediation for reasons other than the complexity of the dispute and the number of interested parties. Many of the statutory requirements are quite specific, leaving less room for the flexibility of mediated solutions. *See, e.g.*, 42 U.S.C. § 12162 (Supp. V 1993) (prohibiting as discriminatory purchase of new rail passenger cars unless they are accessible to individuals with disabilities). Nevertheless, these disputes should not be excluded from mediation. Even when the statutory requirements have not been complied with, a mediated solution including a timetable for compliance may be preferable to litigation. The Federal Transit Administration has taken a similar approach in negotiating compliance agreements for ADA requirements relating to complementary paratransit and key station accessibility. Federal Transit Administration, Office of Civil Rights, Informal Compliance Process (July 1, 1993). However, it is questionable whether an agency-approved mediation agreement that conflicted with specific statutory requirements would be legal.

[224] Recommendation, *supra* note 152, at 43,116.

[225] *See EEOC Policy Statement*, *supra* note 189, at 3.

mented, no category of cases should be expressly excluded. Careful data should be collected, however, to ascertain the types of cases for which mediation is more effective and to determine the reasons for its greater effectiveness in those cases.[226] Accordingly, future mediation resources can be targeted where most effective.

As to the timing of mediation, there is little reason to deny mediation at any point in the investigation or litigation if both parties desire to mediate, unless mediation is being used to delay the proceedings or to impose costs on the party with fewer resources. Preferably, however, a mediation program should be designed so that referral occurs at a specific point in the case process. If mediation takes place early in the investigative process, before positions harden, settlement may be more likely.[227] In agency-sponsored mediation, early mediation also has the advantage of limiting the expenditure of investigative resources, thus enabling backlog reduction and speedier case processing, both of which benefit the parties and the government. On the other hand, early in the investigation process, parties may be less motivated to settle because they are insufficiently aware of the strengths and weaknesses of their own position as well as that of the other party.[228]

Because the EEOC has adopted both an early assessment program and an ADR program, the two may work together to achieve the benefits of rapid complaint resolution.[229] An effective

---

[226] Employers and private mediation agencies instituting ADA mediation programs should also monitor and evaluate their programs for these same reasons, thereby enabling mediation efforts to be focused where most effective.

[227] MOORE, *supra* note 7, at 57. In the EEOC pilot project, employers were more willing to mediate if they had not yet responded to the Agency's investigation. EEOC Mediation Program Evaluation, *supra* note 100, at 33.

[228] EEOC Mediation Program Evaluation, *supra* note 100, at 33. This may create particular problems for complainants having insufficient access to information to evaluate the strength of their case. For this reason, the Lawyers Committee suggests that some investigation take place prior to referral to ADR. *See* Lawyers Committee Comments, *supra* note 169, at 2. An information exchange also would address this concern. *See infra* notes 277-281 and accompanying text.

[229] The EEOC program classifies new charges into three categories, based on information provided by the charging party. "A" cases are those which the Commission will definitely investigate, such as cases involving alleged egregious violations, novel questions of law or areas of the law requiring development in the courts. "C" cases are those in which no information exists to suggest a violation of the law and for which a full investigation will not be undertaken. *EEOC: House Panel Elicits Details on Changes Under Way at EEOC*, DAILY LAB. REP., May 24, 1995, at A-9. A similar pilot program has been operating in the

early resolution program requires careful and thorough training of the staff members responsible for assigning a priority to investigation of a case.[230] Training particular employees to perform this function, rather than using the case investigator or intake officer, has substantial benefits. Intensive training of a few people will make the system function more efficiently than limited training of the entire staff. Moreover, if the assessing employee were also the investigator, he or she may be motivated to ignore information that casts doubt on the accuracy of the initial assessment. Finally, an investigator may be reluctant to refer to mediation those cases that appear likely to settle, desiring instead to retain credit for the settlement.[231]

The initial assessment interview, whether done in person or by telephone, should reveal the nature of the dispute: whether the dispute turns primarily on factual issues, legal issues, or both; whether it involves novel legal questions; whether technical expertise might be useful; whether systemic problems may exist;[232] and whether the case appears frivolous or unsupported by any evidence.

Great care should be taken in developing the questions to be asked in the initial interview and in training the staff to ensure that cases are initially correctly classified, because correct classifi-

---

Washington, D.C., Field Office of the EEOC since 1991.

[230] The EEOC has requested additional funds for training "front line field staff" about the new charge processing procedures. *Statement of EEOC Chairman Casellas*, *supra* note 78, at E-6.

[231] EEOC Report on ADR Pilot Program, *supra* note 99, at 7. Of course, if the ultimate goal is fair settlement of cases whenever possible, credit for the settlement is irrelevant. If mediation is a better vehicle for achieving a fair, mutually agreeable settlement it should be encouraged.

[232] If class or systemic issues are apparent in the initial assessment interview, the agency should consider whether referral to mediation is appropriate. *See* PEER Study, *supra* note 171, at 126-34 (discussing class issues in agency mediation).

Also significant at this point is whether the complainant can effectively participate in mediation. To avoid the very stereotyping the ADA was designed to eliminate, an agency should be extremely cautious when determining that an individual does not have the capacity to participate in mediation. Rather, the agency should explore alternative ways to mediate effectively with the individual before concluding that mediation will not be effective. TARGETING DISABILITY NEEDS, *supra* note 98, at 35-36; *see also* Segal, *supra* note 206 (discussing unique issues in mediation when collective bargaining agreements are involved).

cation will determine the success of the system.[233] Still, initial classification should not be determinative if later investigation reveals additional information. After the initial assessment, mediation should be offered to the parties in appropriate cases. The time period for mediation should be limited,[234] and absent settlement, the case should be returned to its place in the investigation queue.[235]

Unlike agency programs, private mediation programs, unless they receive referrals from government agencies or employers, have little control over the timing of mediation. An employer instituting a program would be wise to encourage early mediation, with an exchange of information to insure fairness.[236] Employment problems can quickly escalate to complex disputes, which impose significant costs on the employer and the employee.[237] Thus, early identification of problems with a mediation option may provide benefits to the employer and employee alike.[238]

3. Fairness. Both actual and perceived fairness are crucial to any ADA mediation program. If mediation is not fair, particularly to individuals with disabilities, it frustrates rather than furthers the statutory goal of eliminating discrimination. Moreover,

---

[233] Staff members must be particularly cautious when dealing with unsophisticated or inarticulate complainants who may be unaware of the evidence relevant to establishing a violation of the law.

[234] Time limits will discourage parties from using mediation for delay purposes and will further the goal of speedy case processing. The time period for mediation must be adequate to allow for scheduling the mediation and for thoroughly exploring settlement possibilities through the mediator. The EEOC pilot project used a 60-day period.

[235] Agency employees should not be penalized for investigation delays resulting from a "time out" for mediation. To avoid discouraging mediation, however, such cases should be given the same investigation priority they had before the parties opted for mediation. Furthermore, to encourage participation in mediation, the classification for further investigation purposes should not be revealed to the parties. Moreover, agencies should not deny mediation based on their views of the merits at the intake interview unless evaluation of the mediation program results suggests that the effectiveness of mediation is related to the initial assessment of the merits.

[236] A program that is fair to employees not only benefits the employer through improved morale, but also aids the employer should the employee later attempt to challenge the agreement either by filing a charge with an agency or by filing a lawsuit. Simon & Sochynsky, *supra* note 126, at 34.

[237] PHILLIPS, *supra* note 129, at 155-57.

[238] *See* PHILLIPS, *supra* note 129, at 155-63 (discussing reasons employer should consider mediation); Bompey & Siniscalco, *supra* note 8, at 34-36 (same); Simon & Sochynsky, *supra* note 126, at 30 (same).

perceived fairness is necessary to induce both participation and settlement. The EEOC has recognized that fairness requires adequate information, the opportunity for assistance, knowing and voluntary participation, neutrality, confidentiality and enforceability; the Agency's ADR programs will be developed in accordance with these principles. The ACUS Recommendation contains similar elements.[239]

a. Voluntary Participation. Both the EEOC program and the ACUS Recommendation provide for voluntary mediation. Private mediations of ADA claims also will be voluntary, except when an employer mandates mediation of statutory claims as a condition of employment.[240] Arguably, mandatory mediation is inappropriate because mediation requires an openness to settlement found only in voluntary participants.[241] On the other hand, mediation advocates argue that mediation is so effective that even involuntary participants can reach a satisfactory agreement.[242]

The latter proposition in fact may argue against involuntary mediation for statutory claims because parties unwittingly may sacrifice legal rights in mandatory mediation. Mandatory mediation in civil rights claims is not without precedent, however. In the late 1970s, the EEOC's rapid charge process (RCP) system required Commission staff to conduct a limited preliminary investigation of charges filed and schedule a factfinding conference with both parties.[243] The EEOC representative served as a moderator/advisor, with the goal of encouraging settlement. Any settlement reached was embodied in an agreement signed by the parties and the EEOC. If the parties did not settle, the evidence from the investigation and the conference was used to make a determination of cause. In effect, this process became nonconfidential mediation using an internal agency mediator. A General

---

[239] Information, the opportunity for assistance, and neutrality are also elements of the Due Process Protocol. *Due Process Protocol, supra* note 202, at E-11.

[240] Because the Task Force members failed to agree, the Due Process Protocol did not take a position on whether private arbitration and mediation should be voluntary or mandatory. *Due Process Protocol, supra* note 202, at E-11. However, the Task Force agreed that consent to arbitrate or mediate should be made knowingly. *Id.*

[241] MOORE, *supra* note 7, at 19; Kressel & Pruitt, *supra* note 173, at 403.

[242] PHILLIPS, *supra* note 129, at 33 n.4.

[243] *See EEOC Request for Comments on Alternative Dispute Resolution, supra* note 95, at G-1 (describing rapid charge processing system).

Accounting Office report found that the system improved charge processing by resolving complaints more quickly.[244] Nevertheless, the report criticized the EEOC both for obtaining settlements in cases without a reasonable basis to believe the charge was meritorious and for accepting settlements with little substance.[245] This report raised a concern as to whether rapid resolution sacrifices equitable resolution, a particular problem when the parties have unequal bargaining power.[246]

Moreover, the Chicago Commission on Human Relations also uses mandatory mediation for all cases in which it has found substantial evidence of a violation.[247] The mediators, attorneys with experience in discrimination law and training in mediation, are paid by the Commission and no fee is charged to the parties for mediation. From September 1993 through September 1994, approximately 50% of all mediated cases settled, while 77% of the disability cases settled.[248] Absent settlement, a case is scheduled for an administrative hearing.

In disability cases, the Commission also employs a disability evidentiary conference.[249] This mandatory conference, which serves both factfinding and settlement purposes, is employed when the Commission determines, based on a preliminary investigation, that the respondent's facilities are not fully accessible to the

---

[244] PEER Study, *supra* note 171, at 7-8.

[245] Silver, *supra* note 180, at 543 (citing COMPTROLLER GENERAL, FURTHER IMPROVEMENTS NEEDED IN EEOC ENFORCEMENT ACTIVITIES 12-15 (1981)).

[246] *Id.* at 542.

[247] Letter from Miriam I. Pickus, Deputy Commissioner, Chicago Commission on Human Relations, to Ann C. Hodges 1 (Sept. 13, 1994) (on file with author); Rules and Regulations Governing the Chicago Human Rights Ordinance, the Chicago Fair Housing Ordinance, and the Chicago Comm'n on Human Relations Enabling Ordinance (City of Chicago Commission on Human Relations 1992) [hereinafter Chicago Rules]. The Commission has jurisdiction in the City of Chicago over discrimination in employment, public accommodation, and housing, including discrimination based on disability. *Id.* § 210.110 (establishing jurisdiction); *id.* pt. 300 (covering employment discrimination), *id.* pt. 400 (covering housing discrimination); *id.* pt. 500 (covering discrimination in public accommodations).

[248] The actual number of disability cases has been small. From 1991 to 1993, the Commission found substantial evidence in 36 disability cases involving employment and public accommodation. Twenty-eight were settled, with four cases still pending as of September 1994. Letter from Miriam I. Pickus, *supra* note 247, at 1-2. When all disability cases are considered, 57% of employment cases settled as did 66% of accommodation cases. *Id.* These settlements include those reached at disability evidentiary conferences.

[249] *See* Chicago Rules, *supra* note 247, at subpt. 525.

complainant.[250] Prior to the conference, the respondent files an affidavit evidencing undue hardship, and the complainant files a responsive affidavit.[251] At the conference, a conciliator attempts to resolve the dispute; if no settlement is reached, the conciliator submits to the Commission's compliance staff a recommendation of whether substantial evidence of a violation should be found.[252]

While the actual number of disability cases settled by the Chicago Commission has been relatively small, the procedure demonstrates that mandatory mediation can result in settlement. In each of the cases, however, the Commission had already found either substantial evidence of a violation or a lack of fully accessible facilities. Accordingly, the incentive for respondents to settle would seem to be greater than at the preliminary investigation stage. Similarly, Connecticut's anti-discrimination statute recently was amended to authorize the Connecticut Commission on Human Rights and Opportunities to conduct mandatory mediation of discrimination claims at the investigation stage.[253] No evidence of the amendment's effectiveness is yet available.

Neither the ADA nor the Administrative Dispute Resolution Act clearly authorizes mandatory mediation, but the ADA expressly authorizes voluntary mediation.[254] The legislative history of the ADA indicates that the encouragement of alternative dispute resolution was not intended "to preclude rights and remedies that would otherwise be available to persons with disabilities."[255] Further, the conference report on the ADA states that "it is the intent of the conferees that the use of . . . alternative dispute

---

[250] *Id.*

[251] *Id.* As with the ADA, proof of undue hardship eliminates the respondent's obligation to accommodate. *Id.* § 520.100.

[252] *Id.* § 525.115. If the staff finds substantial evidence, it may waive the normal conciliation conference and proceed directly to an administrative hearing. *Id.* § 525.120.

[253] 1994 Conn. Acts 238 (Reg. Sess.). The statute permits dismissal of the complaint if the complainant fails to attend mediation without good cause and entry of an order of default against a respondent for the same conduct. *Id.*

Some states have begun to use mandatory mediation of workers' compensation claims. *See generally* Larson, *supra* note 218 (discussing mediation of workers' compensation cases in North Carolina and comparing process with that in other states using mediation).

[254] 42 U.S.C. § 12212 (Supp. V 1993).

[255] 2 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT 516-17 (Comm. Print 1990).

resolution is completely voluntary."[256] This legislative history supports the conclusion that ADR should be voluntary.[257] Mediation does not preclude any rights and remedies, however, for if no agreement is reached in mediation, all other rights and remedies are still available. In addition, both congressional statements reference arbitration, directly or indirectly, suggesting congressional concern with compulsory arbitration rather than mediation. Accordingly, it might be argued that mandatory mediation is permissible under the statute.

While the lack of an exhaustion requirement under either Title II or Title III suggests plaintiffs cannot be compelled by the administrative agency to mediate cases under those Titles,[258] mandated mediation may be an option under Titles I and IV, which do include such a requirement. The EEOC's rapid charge processing system mandated participation in a mediation conference in Title VII cases, and because Title I adopts Title VII's procedures, mandatory mediation may be available.

As previously noted, the argument for mandatory mediation is based on a belief in the value of the process: parties that would not voluntarily mediate may settle in mandatory mediation and be satisfied with the process.[259] Mandatory mediation may be more efficient and therefore may reduce an agency's investigation backlog more quickly.[260] On the other hand, if settlement is not reached or would have been reached without mediation, mediation may simply increase the costs to the parties and the govern-

---

[256] H.R. CONF. REP. No. 596, 101st Cong., 2d Sess. 89 (1990), *quoted in* Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, 48 ARB. J. 8, 16 (1993).

[257] 42 U.S.C. § 12212. The Administrative Dispute Resolution Act also authorizes administrative agencies to use voluntary dispute resolution proceedings. 5 U.S.C. § 572 (1994).

[258] Because there is no requirement to file an administrative complaint or to wait for administrative action, the plaintiff could not be compelled to delay judicial action pending mediation.

[259] *See* Society of Professionals in Dispute Resolution, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts 12-13 (1991) (hereinafter SPIDR Report). Reluctance to mediate may result from lack of knowledge about the process or fear of appearing weak. *Id.* If the parties truly have no interest in settlement, however, mandatory mediation wastes the time and resources of the parties, the mediator, and the agency.

[260] *Id.* at 2, 12-13.

ment.[261] Furthermore, disabled individuals who would be disadvantaged by mediation[262] would necessarily suffer if compelled to mediate.[263] Finally, a large-scale mediation program may become so mechanical that the benefits of mediation are lost.[264] Given these concerns, and the cost of establishing a program requiring mediation in every case,[265] the EEOC has wisely chosen to begin with voluntary mediation. Ongoing assessment of voluntary mediation efforts should reveal whether mandatory mediation might be effective.[266]

Employer-mandated mediation raises slightly different issues.

---

[261] *Id.* at 1, 13. The emotional costs to the parties also may be increased. *Id.* at 1.

[262] *See supra* notes 185-186 and accompanying text (discussing potential drawbacks of mediation for some individuals).

[263] PEER Study, *supra* note 171, at 151; SPIDR Report, *supra* note 259, at 1-2.

[264] SPIDR Report, *supra* note 259, at 13-14; *see also* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262-63 (1995) (noting institutionalization of ADR may transform it into adversarial process it was attempting to avoid).

[265] Moreover, statutory amendments would be necessary to authorize agencies to impose effective penalties for a respondent's failure to participate, as the ADA currently does not permit enforcement agencies to impose penalties for noncompliance.

[266] Should mandatory mediation be considered, the SPIDR Report's criteria for mandatory mediation, *see* SPIDR Report, *supra* note 259, should be followed.

Another option is to mandate participation for respondents when the complainant agrees to mediation. This approach would avoid compelling participation by individuals with disabilities who feel they would be disadvantaged in mediation, while providing the benefits of increased use of mediation. For example, in farmer-creditor disputes, mediation is rarely used unless the lender is required to mediate at the farmer's request. PHILLIPS, *supra* note 129, at 34 n.4; SINGER, *supra* note 223, at 95-98. Many of the mediation projects discussed herein also show that while a large number of complainants agree to mediate, far fewer respondents do so. *E.g.*, EEOC Report on ADR Pilot Program, *supra* note 99, at 3. Requiring respondents to mediate would increase participation in the program and should be considered if participation in voluntary mediation is limited.

However, agencies should recognize that if most complainants agree to mediate, project costs will increase. If necessary, this could be offset by fewer referrals to mediation. For example, if analysis of project results demonstrates that particular cases are more likely to settle in mediation, a program might only compel respondents in those cases to mediate.

This option might be criticized as unfair because it compels only one party to mediate. Given the inherent imbalance of power between individuals and institutions, however, such compulsion might be justified. Moreover, individuals may be compelled by factors other than an agency mandate to try mediation, such as a desire to get the case resolved for economic reasons, particularly when investigations and litigation typically take years longer than mediation. Thus, compulsion may be less one-sided than initially apparent. Furthermore, because mediation actually may be in an institution's long-term interest, mandatory mediation may benefit the organization despite its management, which may be "stuck in a short-term perspective." PHILLIPS, *supra* note 129, at 34 n.4.

While the arguments supporting mandatory mediation above apply equally to employer-mandated mediation, such mediation may deprive an individual of the statutorily created forum for relief from discrimination. While mediation is less risky than arbitration in this respect because it does not impose a binding solution, the employer's inherently superior power may nonetheless coerce an employee into a "voluntary" settlement having the same preclusive effect.[267] If the mediation follows the Due Process Protocol, the risk of an employee waiving her statutory rights is reduced, but is not eliminated.

An employee dissatisfied with a mediated settlement still may file a charge with the EEOC. The Agency has indicated it will process charges regardless of the existence of an employer-sponsored ADR program.[268] Where a mediation agreement has been reached, but the employee is dissatisfied, the EEOC should investigate to determine whether to proceed. If it determines that reasonable cause exists, it must decide whether to litigate. If the EEOC does not feel the settlement adequately remedied the discrimination, it should litigate the case absent an adequate conciliation agreement.[269] Regardless, the Agency should issue a right-to-sue letter, providing the employee with an opportunity to convince the court that the mediated agreement should not bar his

---

[267] *See supra* note 128 and accompanying text (discussing implications of employer-mandated binding arbitration); Alexander v. Gardner-Denver, 415 U.S. 36, 52 n.15 (1974) (holding individual can waive Title VII rights through voluntary and knowing settlement); *see also SPIDR Meeting Highlights Arbitration Issues*, 150 Lab. Rel. Rep. (BNA) No. 4, at 112, 115 (Sept. 25, 1995) (noting argument of ACLU attorney that employees without counsel are significantly disadvantaged in mediation and arbitration because they negotiate without knowing what their claim is worth); Howard, *supra* note 163, at 285-87 (discussing waiver of statutory forum).

[268] *See supra* note 119 and accompanying text (discussing Motion 4 and EEOC's concern with voluntary internal ADR programs). Of course, the charge must be timely unless a basis exists to assert either that the statute of limitations was tolled by the mediation process or that the employer is estopped from asserting the statute of limitations defense. The Supreme Court has held that Title VII's time limits are not jurisdictional, Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982), and are subject to the equitable doctrines of tolling, waiver, and estoppel. Crown Cork & Seal Co. v. Parker, 462 U.S. 345 (1983). Because the ADA adopts Title VII's procedural requirements, this doctrine should equally apply. Nevertheless, the EEOC should be careful to ensure that private or employer-sponsored mediation does not become a vehicle for avoiding statutory liability.

[269] The need for injunctive relief should be an important consideration in the Agency's decision. A private mediation agreement may fail to provide appropriate injunctive relief.

judicial action.

To encourage creation of fair and equitable private dispute-resolution procedures, the EEOC should formally publish guidelines indicating the circumstances under which the Agency will defer to private dispute resolution procedures.[270] Employers and private dispute resolution agencies should follow the guidelines when establishing their ADR programs. Such guidelines will further the goal of government efficiency by increasing the number of cases in which governmental enforcement is unnecessary. In the absence of formal guidelines, both the EEOC's own policy for ADR programs and the Due Process Protocol provide useful guides.

b. Knowing Participation. Information about mediation is both an element of fairness and a prerequisite to eliciting effective participation in any mediation program. In order to make an informed choice about whether to participate in mediation, the potential parties need information about the mediation process, statutory rights and remedies, and the advantages and disadvantages of both mediation and litigation. Availability of information to both parties will help to offset power differentials and to insure that participation is informed and effective.

Administrative agencies can provide such information in both written and oral form. Written material setting forth the above information should be prepared and distributed to the parties for consideration in deciding whether to mediate.[271] In addition, agency personnel should clearly understand the process and be committed to its use so that, when appropriate, they can provide information to the parties orally to supplement or confirm the written information.[272]

In addition to assisting parties in the decisionmaking process, providing information will promote satisfaction by creating realistic

---

[270] *See* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 790 (1990) (suggesting that EEOC issue regulations containing minimum procedural safeguards for arbitration of statutory claims).

[271] The Department of Justice has begun this process through its mediator training grant, which includes production of a consumer guide to mediation services. Many private mediation agencies also have prepared written information about the process.

[272] EEOC Report on ADR Pilot Program, *supra* note 99, at 4-5; Designing Systems, *supra* note 209, § III, at 1, 4; EEOC Mediation Program Evaluation, *supra* note 100, at 12-13, 25-26.

expectations about the mediation process and its potential results.[273] This educative process is appropriate for private mediation agencies and employers as well, although internal education on mediation presumably is not necessary for mediation agencies.

Further, the administrative agencies and private agencies adopting ADR programs can make potential users of mediation aware of its benefits by making presentations to groups, such as disability organizations, employer organizations, government agencies, and business groups. Persons who have used the procedure successfully also may become its proponents.[274] Successful mediations should be publicized to the extent possible to encourage further use.[275] Finally, if the potential disputants themselves are trained in mediation matters, not only will they better understand the system, but they are more likely to advocate its use.[276]

In addition to information about the mediation process itself, the receipt and timing of information exchanges between the parties prior to and during mediation are critical issues. Neither the EEOC program nor the ACUS Recommendation addresses this issue directly. The Due Process Protocol, however, recommends that employees and their representatives should have access to all information and documentation "reasonably relevant to mediation . . . of their claims."[277]

Depending on the timing of the mediation, the exchange of information may dramatically impact the chances for settlement.[278] For example, a complainant may not have access to information about treatment of similarly situated individuals without disabilities, which may help prove or disprove the claim of

---

[273] EEOC Report on ADR Pilot Program, *supra* note 99, at 5; PEER Study, *supra* note 171, at 152-53; Designing Systems, *supra* note 209, § III, at 1.

[274] URY ET AL., *supra* note 174, at 76. For example, businesses successfully involved in mediation might be willing to speak about their experience to business organizations. A potential source of support is the Better Business Bureau, which has been a leader in establishing ADR programs and also has been working in ADA education.

[275] *Id.* at 77.

[276] *Id.* at 78-79.

[277] *Due Process Protocol*, *supra* note 202, at E-11.

[278] *See supra* notes 227-228 and accompanying text (discussing effects of timing on information exchange in mediation).

discrimination. Similarly, management personnel involved in mediation may be unaware of negative statements made by a supervisor about an employee's disability, suggesting an improper motive in the supervisor's termination recommendation. A knowledgeable and effective mediator should be able to elicit this information and use it to craft a settlement which is fair to both parties. If the mediator fails to do so, not only is settlement less likely, but any settlement that is reached is less likely to be fair to both parties and consistent with the ADA,[279] thus reducing the value of the mediation program for both the government and the parties.

If agency-sponsored mediation occurs early in the investigative process, an exchange of relevant information designed to facilitate mediation should be required. Alternatively, the agency could leave the issue of information exchange to the mediator, who can determine what information is necessary on a case-by-case basis.[280] Requiring an information exchange removes a disadvantage of mediation relative to litigation, where discovery is available, and may be necessary for truly effective bargaining. Regardless of which approach to information is taken, this issue should be addressed in evaluation of the program, and the design of the program should be altered if necessary to increase the probability and fairness of settlement.[281]

---

[279] Like procedural information, availability of substantive information about the facts of the case serves to balance power.

[280] The mediator must be aware of information relevant to an ADA discrimination claim, thus underscoring the need for ADA training for mediators. *See infra* notes 295-302 and accompanying text (further discussing mediator training). The drawback of leaving the information exchange to the mediator is that if the parties refuse, the mediation may be futile. On the other hand, the mediator can tailor the exchange to the issues that arise in the case. An option to an all-or-nothing mediator determination is an agency-mandated exchange of certain information, such as the charging party's statement, the employee's personnel file, and other typically relevant data, while leaving supplemental information-exchange decisions to the mediator.

[281] The same concerns about information generally apply to private and employer-sponsored mediation programs. While an employer might be tempted, for self-protection purposes, to avoid exchanges of information, a program that includes information exchange is better for employee morale, more likely to be utilized, and more likely to withstand legal challenge by an employee who files an EEOC charge or a lawsuit in spite of a mediated agreement. Moreover, because the information will be discoverable in any subsequent litigation, providing it early may lead to quicker settlement, thereby minimizing litigation costs.

c. The Opportunity for Assistance. Like information, representation for both parties may serve to balance power. In many cases, the employer will be represented by legal counsel while the employee will not.[282] Even where legal counsel is not involved, the employer may bring a group of high-level executives and supervisors to the mediation while the employee appears alone. Alternatively, a small, unrepresented employer might be faced with a disability rights organization having expert legal counsel.[283] In either case, the unrepresented party is likely to be, or at least to feel, disadvantaged.[284] That actuality or feeling may either reduce the probability of reaching an agreement or increase the probability that an agreement either sacrifices legal rights without effective compensation or is, upon reflection, unsatisfactory to the unrepresented party.[285] In either case, effective dispute resolution has not occurred.

The EEOC policy states that fairness requires providing the "opportunity for assistance during the proceeding to any party who is not represented."[286] The meaning of this statement is unclear: Will the EEOC provide advice or information? Will it appoint a representative for unrepresented parties? Will it provide a list of possible representatives to parties? Or will the Agency merely suggest that parties bring their own representation?

---

[282] Comments Regarding Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures 2 (Eastern Paralyzed Veterans Ass'n, Sept. 10, 1993) (on file with author). Interestingly, in 45% of the mediations in the EEOC Pilot Project, neither party was represented by an advocate. EEOC Mediation Program Evaluation, *supra* note 100, at 43. Thus, the imbalance of representation may be a concern in fewer cases than might initially be expected.

[283] Letter from John J. Motley III, Vice President, Federal Governmental Relations, National Federation of Independent Business, to Office of the Executive Secretariat, Equal Employment Opportunity Commission 1 (Sept. 22, 1993) (on file with author).

[284] For a discussion of the numerous issues to be considered in negotiating the settlement of a complex employment dispute illustrating the need for representation, see Cary R. Singletary et al., *Securing a Durable Mediation Agreement to Settle Complex Employment Disputes*, 46 LAB. L.J. 223 (1995).

[285] For example, one party may be intimidated into an agreement it later regrets; consequently, that party may refuse to comply or may renew efforts to pursue its claim, thus magnifying the dispute rather than resolving it.

[286] *EEOC Policy Statement*, *supra* note 189, at E-13. The Due Process Protocol also sets forth a right to representation. *Due Process Protocol*, *supra* note 202, at E-11.

At a minimum, both government and private mediation agencies should encourage the parties to bring a knowledgeable representative to mediation. Such a representative need not be an attorney. For example, the group trained through the joint EEOC-DOJ program may provide potential advocates for complainants. Such training could be repeated or expanded, and technical assistance grants could be used to encourage disability and business organizations to provide such training as well.[287] Additionally, the agencies should consider maintaining lists of organizations providing advocacy services for use by parties seeking representation.[288]

Alternatively, an agency staff person knowledgeable about the ADA could serve as a resource for unrepresented parties. This person should have no role in the mediation, investigation, or litigation of the case. Moreover, she should provide only information, not legal advice. An individual performing initial case screening could serve this function.[289]

An alternative to use of legal representation to balance power, which will also minimize legalization of the mediation process, is

---

[287] Some training efforts have been initiated already. For example, in February 1995, the Department of Rights of Virginians with Disabilities presented a self-advocacy workshop on Titles II and III of the ADA, designed to teach individuals with disabilities, family members, and advocates about ADA rights and responsibilities, so they might achieve compliance for themselves and others with disabilities. Access to Programs and Services: A Self Advocacy Workshop on Titles II & III of the Americans with Disabilities Act (ADA) (Dep't of Rights of Virginians With Disabilities, Feb. 1995) (on file with author).

[288] PEER Study, *supra* note 171, at 184. At one time, the EEOC maintained attorney referral lists for charging parties. One of the EEOC offices in the pilot mediation program compiled a list of volunteer labor lawyers to consult with unrepresented charging parties who desired advice during adjournments of mediation. EEOC Mediation Program Evaluation, *supra* note 100, at 11. Any list should be carefully maintained, however, to ensure it contains only those currently interested in representation; otherwise, it will act only to frustrate the person seeking representation.

The Due Process Protocol recommends that the mediation procedure should include reference to organizations that might provide assistance, such as bar associations, legal services organizations, civil rights organizations, and labor unions. *Due Process Protocol*, *supra* note 202, at E-11.

[289] Alternatively, this function could be undertaken by technical assistance staff. This might generate accusations of agency bias, however. One EEOC office in the pilot mediation program made staff personnel available to answer questions from either party both during and before mediation. EEOC Mediation Program Evaluation, *supra* note 100, at 11.

to limit the role of attorneys.[290] Parties normally having legal representation, however, might be reluctant to mediate without counsel, and although lawyers generally are becoming more receptive to ADR, counsel might advise clients to avoid mediation when they are not permitted to participate. In fact, having lawyers in mediation may serve to protect parties' rights and to provide a buffer between adverse parties.[291] Better approaches would be (1) to allow counsel to participate but to strongly encourage the unrepresented party to obtain representation and (2) to use mediation techniques to balance the power differentials.[292]

Analysis of the EEOC Pilot Program confirmed that when one party appeared with an unanticipated representative, the other party was concerned about the fairness of the process. The evaluator recommended that the Agency develop criteria specifying who may participate in a mediation session and at what point such decisions must be made.[293] Accordingly, administrative agencies using mediation should establish guidelines as to the number of representatives permitted and time limits for notifying the mediator of the identity of the representatives. To avoid surprises and concerns about fairness, each party should then be notified as to who will be representing the other party. If one party identifies counsel, the other party should be permitted a short period of time to add an advocate to the list of identified representatives.[294]

The same considerations that encourage representation in

---

[290] MOORE, *supra* note 7, at 107-08; PEER Study, *supra* note 171, at 36. Insufficient research exists to indicate whether lawyers help or hinder settlement prospects. MOORE, *supra* note 7, at 108.

[291] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1597-1600 (1991).

[292] Because it is often difficult for complainants to obtain counsel, *see* Howard, *supra* note 163, at 288, barring counsel might benefit some complainants. However, such a ban would not balance the power between employers and employees. On the whole, banning lawyers is not recommended. Some employer-created systems provide employer reimbursement for at least a portion of employee legal expenses, particularly for lower paid employees. *Due Process Protocol*, *supra* note 202, at E-11. Such systems at least assist an employee in obtaining representation to review any agreement reached and likely lead to more satisfactory, enduring settlements.

[293] EEOC Report on ADR Pilot Program, *supra* note 99, at 5.

[294] Restrictions on representation are more problematic for private mediation agencies. Any such requirements should be established and communicated in advance, preferably with the parties' agreement.

government-sponsored mediation support the same approach for private agencies. In lieu of an agency staff person, private agencies should equip mediators with lists of referral resources to provide to the parties. These resources should include the appropriate government agency, as well as business and disability rights organizations.

d. Neutrality. Fairness, according to the EEOC, requires use of a third party neutral having thorough knowledge of the law and training in mediation theory and techniques. The Due Process Protocol and the ACUS Recommendation adopt similar requirements. Private mediation agencies need only ensure their mediators are thoroughly trained in the ADA. Government agencies additionally must determine the source of their mediators. The mediators must be trained in traditional mediation skills[295] and in dealing with the power imbalances common to ADA claims.[296]

Furthermore, ADA mediators must have a general understanding of various types of disabilities and the impact that such disabilities have on the lives of individuals.[297] In particular, the mediator must understand the effect such disabilities may have on the dispute resolution process and the ways mediation may be made accessible to individuals with disabilities.[298] Such training will minimize mediator bias resulting from fear of and ignorance about individuals with disabilities. Furthermore, such training will assist mediators in ensuring that individuals with disabilities can

---

[295] Qualifying Neutrals: The Basic Principles, Report of the SPIDR Commission on Qualifications 17-19 (Society for Profs. in Disp. Resol., Apr. 1989) [hereinafter SPIDR Commission on Qualifications Report] (on file with author).

[296] Mediation techniques exist to deal with power imbalances without compromising neutrality. MOORE, *supra* note 7, at 180-82. For example, the mediator can create doubts about actual power of the parties, assist the weaker party to mobilize the power that he possesses, or focus the mediation on interests rather than power. *Id.* at 280-82. The mediator can only attempt to balance the power to negotiate, however, not the inherent power differentials between employers and employees that exist regardless of forum. PHILLIPS, *supra* note 129, at 146; *see* David E. Matz, *Mediator Pressure and Party Autonomy: Are They Consistent with Each Other?*, 10 NEGOTIATION J. 359, 360 (1994) (noting that while mediation properly emphasizes autonomy, every party has limited time, energy, money, imagination and intelligence, as well as relationships with others, all of which constrain decisions).

[297] TARGETING DISABILITY NEEDS, *supra* note 98, at 20-28; SPIDR Commission on Qualifications Report, *supra* note 295, at 2-3.

[298] TARGETING DISABILITY NEEDS, *supra* note 98, at 22-37.

effectively participate in mediation and in finding solutions to the problems of accommodation and access.[299]

The mediator also must have an understanding of the legal ramifications of the ADA.[300] While the mediator is not a legal advisor to the parties, he must be aware of the legal context in which the dispute arises and the standards that would be applicable if the case were litigated.[301] The mediator also must be

---

[299] *See* Delgado et al., *supra* note 185, at 1361 (noting ADR is designed to serve groups whose members are particularly vulnerable to prejudice); 136 CONG. REC. H4627 (daily ed. July 12, 1990) (statement of Rep. Oberstar) (noting much discrimination against individuals with disabilities is based on ignorance and fear); 136 CONG. REC. H4624 (July 12, 1990) (statement of Rep. Edwards) (same); 136 CONG. REC. H2444 (May 17, 1990) (statement of Rep. Rangel) (stating ignorance leads to closed doors for individuals with disabilities). Such education also can aid the mediator in learning to communicate with individuals with communication-based disabilities. If the mediator is unable to effectively and impartially deal with a particular disabled individual, she should decline to mediate. MOORE, *supra* note 7, at 300.

[300] SPIDR Commission on Qualifications Report, *supra* note 295, at 19 (recommending use of mediators with expertise in statutory requirements and noting that special training would be required for the existing cadre of labor and employment mediators to enable effective and fair mediation of statutory disputes in the workplace); Lawyers Committee Comments, *supra* note 169, at 3 (same); *Due Process Protocol*, *supra* note 202, at E-11.

[301] Some mediation scholars argue that subject matter expertise is irrelevant. *E.g.*, Stephen B. Goldberg, *A Qualified Mediator's Skills Don't Depend on Experience*, NAT'L L.J., Apr. 11, 1994, at C14. An expert mediator certainly could resolve an ADA dispute without ADA expertise. Nevertheless, training in the ADA should be required. Where mediation is occurring pursuant to a referral from the enforcement agency, the mediated agreements should be reviewed by the agency for consistency with the statute. Therefore, the mediator must be sufficiently knowledgeable to ensure such consistency. Moreover, a knowledgeable mediator can assist in settlement by previewing the possible outcomes of a trial, enabling the parties to view their positions more realistically. Finally, because statutory rights are involved, the mediator should be sufficiently knowledgeable to alert unsophisticated parties to statutory issues. *But see* Leda M. Cooks, *Putting Mediation in Context*, 11 NEGOTIATION J. 91, 96 (1995) (noting emphasis on rights in mediation relies on mediators who are experts in system that mediation is designed to replace).

However, members of the dispute resolution community disagree about the role of the mediator in this respect. *See, e.g.*, MOORE, *supra* note 7, at 34-35, 40-42 (discussing various conceptions of role of mediator); James B. Boskey, *The Proper Role of the Mediator: Rational Assessment, Not Pressure*, 10 NEGOTIATION J. 367, 367-70 (1994) (same); Bush, *supra* note 177, at 259-62 (same). One view of mediation limits the role of the mediator to obtaining a settlement on any terms agreeable to the parties. Under this view, the mediator should not impose upon the parties her own assessment of the merits of the case, the merits of any proposals offered, or the merits of the settlement reached. Under an alternative view, the mediator plays a more active role in informing the parties of the applicable law and attempts to settle the dispute in light of the legal rights of the parties. This view, known as "rights-based mediation," has been suggested as most appropriate for ADA mediation. *E.g.*, TARGETING DISABILITY NEEDS, *supra* note 98, at 9-10. A third view is that mediation is

knowledgeable about available resources in the community at the national, state, and local levels which can aid in reaching a satisfactory settlement.[302] These resources may be able to provide solutions to accessibility and accommodation problems or may offer services that will assist in determining or providing such solutions. Use of such resources may determine the outcome of the mediation.

Several other factors must be considered by ADA enforcement agencies in determining the best source or sources of mediators. Mediation should be provided cost-free to the parties, as any charge might discourage its use.[303] Mediator cost to the agency, train-

---

appropriate where empowerment is the goal, but not where efficiency or protection of rights is the objective. *E.g.*, Bush, *supra* note 177, at 235-238. This Article does not attempt to enter this debate; as proposed here, mediation attempts to further all three goals. The mediator should be aware of the statutory rights and remedies, however, and should ensure that the parties have the necessary statutory information to make mediation effective. Of course, an effective agency education program will limit the need for a mediator to educate parties in this area. If the education and information are provided, each party will be able to determine its own interests, including both the direct and transactional costs of failure to agree. Boskey, *supra*, at 324.

[302] *See* TARGETING DISABILITY NEEDS, *supra* note 98, at 38-49 (listing resources and offering suggestions on use of such resources). Through the technical assistance programs, the agencies have identified resources as well. *E.g.*, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT, RESOURCE DIRECTORY (EEOC 1992). The information should be updated on a continual basis. Local area disability rights organizations or government agencies dealing with civil rights or disability issues might have, or be willing to compile, information about local resources for use in mediation. Furthermore, business groups may provide such resources. For example, a group of national companies have formed Project Access, which provides to businesses information on compliance with the ADA and resources for issues relating to employment of individuals with disabilities. PETER D. BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT, TRANSCENDING COMPLIANCE: A CASE REPORT ON SEARS, ROEBUCK AND CO. 21 (The Annenberg Washington Program, Communications Policy Studies of Northwestern University, 1994) (on file with author).

[303] Of course, the parties pay their own costs. Attorney's fees for mediation should be treated as any other administrative cost, and should be recoverable by a prevailing plaintiff if the case is eventually litigated. *Cf.* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61 (1980) (stating Civil Rights Act authorizes awarding of attorney's fees in proceedings other than court actions). Mandatory mediation, if adopted, also should include costs to parties equivalent to those in regular case processing. SPIDR Report, *supra* note 259, at 16. A minimal charge for mediation might elicit more commitment to the process. *See* Bompey & Siniscalco, *supra* note 8, at 31 (noting employee has no stake in mediation proceeding if employer pays entire fee for mediation). On the other hand, any fee might discourage participation. In the EEOC Pilot Project, some respondents were asked to pay $300.00 for mediation. EEOC Mediation Program Evaluation, *supra* note 100, at 28. The respondents

ing costs, and availability for timely mediation also are essential in determining the best source of mediators.

Agencies have four potential sources for obtaining mediators:[304] agency employees trained in mediation; trained employees from other agencies;[305] mediators from the Federal Mediation and Conciliation Service (FMCS), which currently mediates labor disputes and cases under the Age Discrimination Act;[306] and external, private mediators.[307] Agency employees are familiar with the law and with the remedies that would result were the case to be litigated. Moreover, use of agency employees would facilitate agency control over the process. Most agency employees are not trained in mediation, however, and some may not be well-suited for such a role. Furthermore, employees at most ADA enforcement agencies are stretched to the limit, and imposition of additional duties would require additional staffing.[308] Finally, some parties (particularly respondents) may be wary of revealing information to the very agency responsible for investigating statutory violations.[309] Thus, use of agency mediators might result in lower

---

were twice as likely to mediate when there was no charge. *Id.*

[304] Regardless of the source of mediators, efforts should be made to include mediators with disabilities, thus furthering the ADA's goal of inclusion. In a comparable context, the use of arbitration to decide statutory race and gender discrimination cases has been criticized for the demographic makeup of the available arbitrators, typically white and male. Howard, *supra* note 163, at 172. *But see SPIDR Meeting Highlights Arbitration Issues*, *supra* note 267, at 112 (noting argument of ACLU attorney that diversity is not crucial in choosing mediators because individuals are not necessarily sympathetic to others from their own background).

[305] Inter-agency Pilot Project on Sharing Neutrals (Admin. Conf. U.S. 1994) [hereinafter Inter-agency Pilot Project] (on file with author); *see also infra* notes 311-314 and accompanying text (discussing project).

[306] 29 U.S.C. §§ 172, 173 (1988); 42 U.S.C. § 6103 (1988); 5 U.S.C. § 7119 (1994); 34 C.F.R. § 110.32 (1995).

[307] *See supra* notes 103, 137, 144 and accompanying text (describing pilot projects using external mediators).

[308] Additionally, many agency personnel currently having ADA expertise are located in Washington, D.C., perhaps requiring additional expense for training or travel for face-to-face mediation. Mediation by telephone, while feasible, would likely be less effective. PEER Study, *supra* note 171, at 157; EEOC Mediation Program Evaluation, *supra* note 100, at 69, 71.

[309] Letter from Jeffrey A. Norris, President, Equal Employment Advisory Council, to Frances M. Hart, Executive Officer, Equal Employment Opportunity Commission 4 (Sept. 16, 1993) (on file with author) (suggesting respondents would not be candid with agency officials who might ultimately sue the respondent).

participation rates, lower settlement rates, or settlements without full information. This is a greater concern when mediation is part of the investigatory process than when it is separate and confidential.[310]

The ACUS and a number of federal agencies have initiated a pilot project to promote sharing of mediators among federal agencies.[311] The mediators in the project are trained federal employees who will mediate internal or external disputes for their own or other agencies on a collateral duty basis.[312] This project offers trained and experienced mediators at low cost.[313] However, at present, the mediators are located in the Washington, D.C. metropolitan area only,[314] and they are not specifically trained in the ADA. While the training concern is remediable, the geographic limitations would require either the mediator or the parties to travel for face-to-face mediation.

FMCA mediators, the third option, are stationed around the country, thus avoiding the geographical problems of using other agency personnel. There is, however, some debate among mediation scholars as to whether the approach to mediation used by the FMCS in labor disputes is appropriate in civil rights disputes.[315] In labor disputes, settlements reflect the power of the parties. A labor contract negotiation is, in essence, a power contest. Mediation of a civil rights dispute, however, involves the external

---

[310] Even when mediation is confidential, the parties may not be convinced that information disclosed in mediation will not be revealed to agency investigators or attorneys. Moreover, with certain exceptions, agency records are subject to the Freedom of Information Act, 5 U.S.C. § 552 (1994) (FOIA). *See* Philip J. Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 338-41 (1989) (discussing mediation and FOIA).

[311] *See* Inter-Agency Pilot Project, *supra* note 305, at 1. The fate of this project is uncertain in light of the termination of ACUS.

[312] *Id.*; *Pilot Project on Sharing Neutrals*, ADR NETWORK, June 1994, at 1, 12 (on file with author).

[313] Inter-agency Pilot Project, *supra* note 305, at 2. Because the mediators are expected to mediate internal EEO complaints, their experience will be somewhat relevant to ADA disputes. *Pilot Project on Sharing Neutrals*, *supra* note 312, at 12. The Pilot Project anticipates expanding the corps of available neutrals by using less-experienced mediators as co-mediators, enabling them to gain experience to mediate alone. Inter-agency Pilot Project, *supra* note 305, at 2.

[314] Inter-agency Pilot Project, *supra* note 305, at 1. The mediators in the Pilot Project will work within a sixty-mile radius of Washington, D.C. *Id.*

[315] MOORE, *supra* note 7, at 40-42.

standards of the statute. On that basis, FMCS mediators arguably are inappropriate for the task of mediation in the context of statutory rights, at least without some assurance that the mediators could make the transition in mediation approach. Although FMCS mediators do have some experience in mediating statutory civil rights cases under the Age Discrimination Act,[316] they would still require ADA training.

Moreover, FMCS mediators may not be readily available. Currently, the first priority of the FMCS is mediation of labor disputes. These disputes are likely to receive first priority absent contrary congressional direction because a great number of people are impacted by such disputes, timeliness is critical, and the mediators will likely be more inclined to mediate the types of disputes for which they joined the Agency and in which they are experienced. Accordingly, without a significant infusion of additional mediators, timely mediation of ADA cases by the FMCS is unlikely.

The final option is the use of outside mediators. The two pilot projects have trained a group of mediators in ADA issues and the 1994 DOJ grant contemplates training an additional ninety mediators. Thus, a group of mediators trained in both mediation and the ADA exists and will soon increase in size.[317] Accordingly, use of outside mediators would minimize training costs[318] and avoid increasing government employment, furthering the current

---

[316] 42 U.S.C. § 6103; 34 C.F.R. § 110.32. A study of the mediation program found it difficult to evaluate because of the unavailability of data. Linda R. Singer & Ronald A. Schechter, *Mediating Civil Rights: The Age Discrimination Act*, 4 NAT'L INST. DISP. RESOL. 11, 16, 19 (1986).

[317] The private agencies beginning mediation programs also will increase the pool of mediators. In addition, some of the mediators who have been working with state and local anti-discrimination agencies may be available.

[318] Training of additional mediators might be necessary if the volume of cases is large or if trained mediators are not available in all relevant geographic areas. The EEOC and DOJ Pilot Projects each were limited geographically to several large cities, but the forthcoming training project is expected to be more national in scope. In addition, each group of mediators would require some additional training to be able to handle disability cases under other titles. However, some issues are common to two or more titles. For example, a ramp may be necessary for both employees and customers. *See* 29 C.F.R. § 1630.2(o), app. (1995) (noting accessibility to both work and nonwork areas is reasonable accommodation). Similarly, employment cases may arise under both Titles I and II, and information about resources will be useful for cases under Titles I, II, and III.

objective of limiting government bureaucracy through use of the private sector. Moreover, while outside mediators trained in the ADA are not yet available nationwide, there are mediators in many areas of the country who might be trained in ADA mediation.[319]

However, the use of outside mediators relinquishes some governmental control over the process and requires agency monitoring of nonemployees to ensure quality work. While an agency's employee performance controls do not affect outside mediators, a mediator's desire to remain active in the ADR community may provide sufficient incentive for compliance with quality standards.

Moreover, unless a sufficient number of mediators are willing to work for free, they must be paid with government funds. Because local civil rights agencies have had some success in acquiring pro bono mediators, the possibility should not be overlooked.[320] Private mediators may see mediation of ADA cases pro bono or at low cost as a way to increase their experience and expand their client base. Agencies also should consider granting funds to existing mediation agencies.[321] Moreover, these agencies often

---

[319] *See* Amy Hermanek, *Title III of the Americans with Disabilities Act: Implementation of Mediation Programs for More Effective Use of the Act*, 12 LAW & INEQ. J. 457, 473-80 (1994) (recommending use of community mediation dispute-resolution programs for Title III disputes); Letter from D. Gene Valentini, Director, Dispute Resolution Center, South Plains Ass'n of Govts., to Office of Executive Secretariat, Equal Employment Opportunity Commission 1 (Sept. 17, 1993) (on file with author) (suggesting use of mediators from federal and local government agencies as means of handling more cases and fostering accessibility to mediation). Such mediators could be accessed through a contractual arrangement with one or more dispute resolution agencies or by maintaining a roster of trained mediators. In addition, the ACUS maintains a roster of neutrals available for use in agency disputes. Thomas R. Colosi & Christopher G. Colosi, *Managing Conflict with Mediation*, *in* MEDIATION: A PRIMER FOR FEDERAL AGENCIES 12. Finally, the American Arbitration Association will be providing training for neutrals on statutory issues in the spring of 1996. *EEOC Commissioner Criticizes Mandatory Arbitration*, 10 Ind. Emp. Rights (BNA) No. 22, at 1 (Oct. 10, 1995).

[320] The D.C. Department of Human Rights uses volunteer mediators. Community dispute resolution centers frequently use volunteer mediators quite successfully. *See* Susan J. Rogers, *Ten Ways to Work More Effectively with Volunteer Mediators*, 7 NEGOTIATION J. 201 (1991) (offering useful suggestions for effective use and motivation of volunteer mediators). Professor Lamont Stallworth, a dispute resolution professional from the Chicago Center for Employment Dispute Resolution, suggests that neutrals may have a professional obligation to take several cases each year pro bono. *ADR Needed for Civil Rights Enforcement*, 144 Lab. Rel. Rep. (BNA) No. 9, at 284 (Nov. 1, 1993). Lawyers trained in mediation might fulfill pro bono obligations by mediating cases.

[321] Such grants were used for the pilot projects.

are aware of sources of volunteer or low-cost mediators.[322]

None of the above sources of mediators is unquestionably superior to the others, assuming the mediators involved are adequately trained and a sufficient number of mediators exists to handle the cases in a timely fashion. However, use of outside mediators may enhance the acceptability of the mediation process to the parties, require less training, and provide necessary geographical diversity. Furthermore, development of a cadre of experienced private ADA mediators may encourage disputants to use mediation without filing charges with the agency, freeing agency resources and reducing governmental enforcement expenditures.

While the mediator in government-sponsored mediation presumably will be assigned by the agency or the contractor operating the program,[323] in private mediation, selection of the mediator or mediation agency is potentially problematic. To ensure neutrality, the mediator should be selected jointly through a specified procedure known to both parties.[324] Both parties should have information regarding available mediators, including their training and experience. Additionally, employers beginning mediation programs must decide whether to use internal or external mediators and should consider the issues discussed above for government-sponsored programs. Although many companies use internal mediators,[325] employees undoubtedly will be more likely to question the neutrality of a company employee.

As noted in the Due Process Protocol, "impartiality is best assured by the parties sharing the fees and expenses of the

---

[322] *See also* George D. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking*, *in* ADMINISTRATIVE CONF. OF U.S., RECOMMENDATIONS AND REPORTS 1986, at 877-902 (Nov. 19, 1986) (identifying alternative means of funding mediation).

[323] Of course, no mediator should accept the appointment if he or she has any conflict of interest. *See, e.g.*, MOORE, *supra* note 7, at 302 (indicating mediator should disclose all information relevant to actual or perceived conflict of interest and if bias may affect performance, mediator should decline to serve).

[324] *See Due Process Protocol*, *supra* note 202, at E-11 (recommending process used by American Arbitration Association or process using alternate strikes from list containing odd number of mediators). Alternatively, once the mediation agency is selected, it could be empowered to assign a mediator.

[325] GAO REPORT, *supra* note 126, at 3.

mediator."[326] The Protocol recommends that when the goal of equal sharing is not possible, some arrangement should be made to achieve the goal as nearly as possible.[327] For example, if a private agency arranges for the mediator, it could collect the payments and forward the fee to the mediator without disclosing the parties' shares.[328] While the concern for equal responsibility for costs is legitimate, mediator bias stemming from unequal sharing is a lesser risk than it would be in arbitration because the mediator cannot impose a decision on the parties.[329] Nevertheless, every effort should be made in the selection process to ensure the fairness and impartiality of the mediator.

e. Confidentiality. Confidentiality, a primary advantage of mediation, may motivate one or both parties to choose mediation over litigation.[330] However, an enforcement agency using mediation might opt to make mediation a part of the investigation process, thereby eschewing confidentiality for efficiency. For example, in the EEOC's rapid charge process, the factfinding conference served both investigatory and settlement purposes, with the Agency facilitator acting as both investigator and mediator. The advantage of such an approach is that it avoids the duplication of effort required when mediation fails and the investigation must proceed. Despite this advantage, both the EEOC and the ACUS

---

[326] *Due Process Protocol*, *supra* note 202, at E-11.

[327] Presumably, this suggestion means allowing the employee to pay his or her share from any back pay received, through a no-interest loan from the employer, or through some other method. In some employer-sponsored programs, the employee is entitled to reimbursement for legal fees up to a specified amount. *See Operation of Internal ADR Programs is Discussed*, 150 Lab. Rel. Rep. (BNA) No. 6, at 174-75 (Oct. 9, 1995) (describing Brown and Root program allowing employees to spend up to $2500 of company money for legal fees and noting that, of approximately 500 claims per year, only 55 employees have requested legal fees). In the Brown and Root system, employees who choose not to use lawyers preempt the use of company lawyers in arbitration and generally have prevailed. *Id.* Conversely, when employees obtained legal representation and were opposed by company lawyers, the employees generally lost. *Id.*

[328] *Due Process Protocol*, *supra* note 202, at E-11.

[329] The mediator can influence a party to accept a settlement, however, so every possible effort should be made to ensure impartiality. A similar concern is that the employer is more likely than the employee to be a repeat customer of the mediator. Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90s*, C779 ALI-ABA 63, 72 (1992). For the same reason, this is a greater concern in arbitration than in mediation.

[330] FOLBERG & TAYLOR, *supra* note 11, at 35; SINGER, *supra* note 223, at 172.

Recommendation opt for confidentiality, insulating the mediator from the investigation and compliance process.[331]

Several factors support this decision. As noted, confidentiality may be an incentive to choose mediation. Moreover, candid participation in mediation increases the probability of settlement.[332] A party may be unwilling to reveal information beneficial to settlement if that information can later be used in the investigation to the party's detriment.[333] Maintaining confidentiality also minimizes the possibility that a party will participate in mediation only as a form of discovery.[334] Furthermore, the Administrative Dispute Resolution Act (ADRA) generally requires confidentiality in dispute resolution proceedings.[335] Arguably, mediation still in the investigative stage is not a dispute resolution proceeding covered by the Act; nevertheless, the rationale supporting the Act's confidentiality provisions is persuasive and should be followed in ADA mediation.[336] Confidentiality involves two other important aspects: protection from public disclosure and protection in later litigation from use of mediation-related information by the other party. Both are important to encouraging both participation in mediation and the openness and willingness to compromise necessary for successful mediation.[337]

There are limits to confidentiality, however, and both government agencies and private mediation agencies should make these limits clear to the parties prior to the decision to mediate. Notably, the use of information disclosed in mediation in judicial proceedings is governed by the law of the relevant jurisdiction; thus, confidentiali-

---

[331] *But see* 29 C.F.R. § 1601.26(b) (1995) (allowing EEOC to use as evidence in subsequent proceedings factual information otherwise obtainable).

[332] MOORE, *supra* note 7, at 160; SINGER, *supra* note 223, at 171-72. The parties need to know that information disclosed to the mediator in caucus sessions will not be disclosed to the other party absent authorization. *Recommendation 88-11 of the Administrative Conference of the United States*, 41 ADMIN. L. REV. 357, 357-58 (1989) [hereinafter *Recommendation 88-11*].

[333] Harter, *supra* note 310, at 324.

[334] *Recommendation 88-11*, *supra* note 332, at 358.

[335] 5 U.S.C. § 574 (1994).

[336] *See generally* Harter, *supra* note 310 (discussing confidentiality issues thoroughly).

[337] FOLBERG & TAYLOR, *supra* note 11, at 264-65; SINGER, *supra* note 223, at 171-72. In these two respects, the EEOC's regulations preserve the confidentiality of statements made and actions taken during informal efforts to eliminate unlawful employment practices. 29 C.F.R. § 1601.26(a) (1995).

ty may not be assured,[338] and in fact, complete confidentiality may not be desirable.[339] Accordingly, while confidentiality should be the goal whether mediation is private or government-sponsored, the scope and limits of confidentiality should be clear to the mediating parties. Should the parties desire, they may make a specific agreement regarding confidentiality, taking into account the possible need for evidence in any subsequent enforcement proceeding.[340]

f. Enforceability of Mediated Agreements. The goal of mediation is to settle cases; settlements are an effective method of statutory enforcement only if they are enforceable. While studies of mediation indicate that compliance with mediated agreements is widespread, a successful mediation program should result in legally enforceable agreements to better ensure such compliance. Judicial decisions involving enforcement of settlement agreements under Title VII, on which the enforcement provisions of Title I of the ADA are based, have reached varying results. Generally, courts have found federal jurisdiction to enforce predetermination settlement

---

[338] *See* FOLBERG & TAYLOR, *supra* note 11, at 267-80 (discussing legal issues relating to confidentiality); SINGER, *supra* note 223, 172-73 (same); DISPUTE RESOLUTION, *supra* note 174, at 179-90 (same).

Rule 408 of the Federal Rules of Evidence provides some protection for mediation communications. It bars evidence of settlement offers and statements made during settlement negotiations to prove liability or invalidity of claims or to prove the amount of loss. FED. R. EVID. 408. For a discussion of Rule 408's limitations, as well as other protections of and limitations on confidentiality, see Harter, *supra* note 310, at 328-48. *See also* 5 U.S.C. § 574 (1994) (providing ADRA's requirements for confidentiality of dispute resolution communications and making communications disclosed in violation of provisions inadmissible in any proceeding relating to issues mediated); 29 C.F.R. § 1601.26 (1995) (preserving generally confidentiality of communications in informal EEOC settlement processes); Harter, *supra* note 310, at 335-41 (discussing Freedom of Information Act (FOIA) and confidentiality of mediation); Mark H. Grunewald, The Freedom of Information Act and Confidentiality Under the Administrative Dispute Resolution Act 12 (Admin. Conf. U.S., Apr. 1995) (on file with author) (recommending Act be amended to provide that Act's confidentiality section be deemed to specifically exempt records from disclosure under Exemption 3 of FOIA); *Confidential Codification*, NAT'L L.J., June 12, 1995, at B11 (summarizing state legislation regarding confidentiality of mediation).

[339] Complete confidentiality may impair enforcement of agreements. *Cf.* D. Alan Rudlin & Kelly L. Faglioni, *Confidentiality Comes at a Cost*, NAT'L L.J., June 12, 1995, at B9-B10 (discussing Snyder-Falkinham v. Stockburger, 457 S.E.2d 36 (Va. 1995), which raised, but did not resolve, issue of impact of confidentiality on enforcement of agreements).

[340] Rudlin & Faglioni, *supra* note 339, at B11; *see also* 5 U.S.C. § 574(d) (1994) (providing under ADRA parties may agree to alternative confidentiality procedures).

agreements, such as those negotiated in the rapid charge process, and settlement agreements negotiated in EEOC conciliation proceedings.[341] Even when courts have found federal jurisdiction, however, some have required the plaintiff to have exhausted her administrative remedies before filing a suit to enforce the agreement.[342]

Recently, the Tenth Circuit held that an action to enforce a settlement agreement in a Title VII case was an action for breach of contract under state law, over which the federal court had no jurisdiction.[343] The court distinguished *Morris*, an action to enforce a settlement agreement negotiated after a judicial action under Title VII, from those cases involving enforcement of conciliation agreements or predetermination settlement agreements because federal enforceability under Title VII in such cases was

---

[341] *See, e.g.*, EEOC v. Henry Beck Co., 729 F.2d 301, 305 (4th Cir. 1984) (holding settlement agreement negotiated under rapid charge processing procedure enforceable in federal court); EEOC v. Safeway Stores, 714 F.2d 567, 571-73 (5th Cir. 1983) (holding conciliation agreement enforceable by EEOC in federal court), *cert. denied*, 467 U.S. 1204 (1984); Sherman v. Standard Rate Data Serv., Inc., 709 F. Supp. 1433, 1440 (N.D. Ill. 1989) (holding apparent predetermination settlement agreement enforceable by employee in federal court); Kiper v. Louisiana St. Bd. of Elementary and Secondary Educ., 592 F. Supp. 1343, 1359 (N.D. La. 1984) (holding conciliation agreement enforceable by employee in federal court), *aff'd*, 778 F.2d 789 (5th Cir. 1985).

[342] *Compare* Blank v. Donovan, 780 F.2d 808, 809 (9th Cir. 1986) (holding settlement agreement negotiated pursuant to Title VII complaint not enforceable when Title VII administrative requirements were not exhausted) *and* Parsons v. Yellow Freight Sys., 741 F.2d 871, 874 (6th Cir. 1984) (holding conciliation agreement not enforceable absent exhaustion of administrative remedies) *with* Eatmon v. Bristol Steel & Iron Works, 769 F.2d 1503, 1508-10 (11th Cir. 1985) (holding exhaustion not required prior to enforcement action based on conciliation agreement although plaintiff waived right to file Title VII charges in agreement negotiated by Office of Federal Contract Compliance Programs and no charges were ever filed with EEOC) *and Sherman*, 709 F. Supp. at 1440 (holding exhaustion of administrative remedies not required before action can be brought to enforce Title VII settlement agreement). In each of these cases, the enforcement action was filed by private plaintiffs. In EEOC v. Pierce Packing Co., 669 F.2d 605, 608-09 (9th Cir. 1982), the Ninth Circuit held that the EEOC may not seek enforcement of a predetermination settlement agreement before it investigates and finds reasonable cause. The *Pierce* court distinguished enforcement of agreements negotiated prior to determination, where no cause finding was ever made, from enforcement of conciliated agreements after a cause finding. *Id.* In *Eatmon*, however, the Eleventh Circuit found that preserving the goal of voluntary compliance and conciliation required courts to enforce all Title VII settlements without exhaustion, even when no timely claim of discrimination was—or even could have been—filed at the time of a settlement waiving the right to file such a claim. *Eatmon*, 769 F.2d at 1508-10.

[343] Morris v. City of Hobart, 39 F.3d 1105 (10th Cir. 1994).

necessary to preserve the statutory enforcement scheme.[344]

To ensure enforceability of mediated settlements in federal court, the ADA could be amended to make failure to comply with such settlements expressly illegal. Regardless, in order to make the mediation program a success, the administrative agencies should be willing to seek enforcement of agreements reached in agency-sponsored mediation.[345] EEOC policy recognizes the importance of enforceability, indicating that allegations of breach of a mediated settlement agreement will be investigated and the Agency will determine whether to seek enforcement. If noncompliance is rare, as is typical in most mediation programs, enforcement will not be a strain on agency resources.

As long as mediation occurs prior to a determination of cause or during the conciliation process, federal jurisdiction probably exists. Enforcement agencies should support an individual seeking judicial enforcement of a mediated settlement agreement when requested, even if he has not exhausted the administrative procedures. Lack of enforceability would undermine the statutory scheme, allowing respondents to use conciliation as a delay tactic and possibly making proof of discrimination more difficult, thereby seriously prejudicing the complainants and the agency.[346] Given the ADA's encouragement of ADR, the arguments for federal enforceability of mediated settlement agreements without requiring exhaustion of administrative remedies are compelling and should be made forcefully by the EEOC.

Administrative agencies play two other roles in the enforcement of mediated agreements. First, agencies should review settlement

---

[344] *Id.* at 1111-12 n.4.

[345] *But see Pierce*, 669 F.2d at 608-09 (holding EEOC may not seek enforcement of mediated settlement absent showing of genuine investigation and determination of reasonable cause). The EEOC should assert that exhaustion is not required because such a requirement would allow respondents to use settlement agreements as a delaying tactic, thereby prejudicing complainants in their efforts to remedy discrimination claims. *See Eatmon*, 769 F.2d at 1510 (allowing employee to bring suit so as to preserve congressional intent of Title VII). Notably, *Eatmon* distinguished *Pierce*, arguing that in *Pierce* the EEOC was not merely trying to enforce a settlement agreement, but rather was trying to litigate additional discrimination issues without following administrative prerequisites to judicial action. *Id.* at 1511 n.9.

[346] EEOC v. Safeway Stores, 714 F.2d 567, 573 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

agreements for enforceability. Agencies could draft standard enforcement language as a guide for mediators and parties. Moreover, the initial agreement to mediate should provide that any settlement reached is enforceable by the agency.[347] While such an agreement would not confer jurisdiction on federal courts, at a minimum it would allow the agency to seek enforcement on a contractual basis. Second, agency education on mediation should include information about enforcement of mediated agreements so decisions to mediate will be fully informed.

In private mediations undertaken without filing an agency charge, a state's common law of contracts most likely will determine the enforceability of an agreement.[348] Because the mediation involves statutory rights and obligations, the mediator should, at a minimum, make the parties aware of enforceability issues.

---

[347] The mediated settlement agreements in the EEOC pilot project were enforceable by the agency. R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1557 (1994). Under the Chicago Commission on Human Relations mediation procedure, the Commission requires the parties to acknowledge in the settlement agreement the Commission's jurisdiction to seek judicial enforcement of the agreement. Chicago Rules, *supra* note 247, at § 230.130(b). The D.C. Department of Human Rights settlement form contains language specifying that the Department will determine whether the parties have complied with the terms of the agreement in the event of a dispute. Negotiated Settlement Agreement 1 (Gov't of District of Columbia, Dep't of Human Rights and Minority Business Dev.) (standardized form) (on file with author). To date, no enforcement disputes have been brought to the attention of the Department.

[348] If courts follow the reasoning of *Morris v. City of Hobart*, federal jurisdiction is unlikely simply because a settlement agreement purports to resolve a federal claim when the claim was never filed with an agency or court. While *Hobart* relied in part on the fact that the parties could have provided for continuing federal jurisdiction in the settlement agreement, it found no independent basis for federal jurisdiction. Morris v. City of Hobart, 39 F.3d 1105, 1110-1112 (10th Cir. 1994). *But see Eatmon*, 769 F.2d at 1509-10 (holding federal court had jurisdiction over employee suit for enforcement under Title VII). Recently, the Supreme Court held that enforcement of a settlement agreement requires its own basis for jurisdiction, which must be more than the fact that the settlement produced the dismissal of an earlier federal action. Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1675-76 (1994). If a private settlement agreement is negotiated after the filing of a charge and the charge is withdrawn, the argument for federal jurisdiction is stronger. *See Eatmon*, 769 F.2d at 1509-10 (finding federal jurisdiction for enforcement of settlement agreement negotiated with Office of Federal Contract Compliance Programs and waiving right to file Title VII claim). When a private mediation agency conducts a mediation under contract or grant from the federal investigative agency, the argument for federal jurisdiction is stronger because the mediation has become a part of the statutory enforcement process. *See supra* note 341 (collecting relevant cases).

The agreement should provide for the resolution of disputes about compliance. Indeed, the agreement might require mediation of such disputes, perhaps with the same mediator. It is to the advantage of all parties to settle the dispute completely, including agreement on how to resolve compliance issues.

Instead of filing an enforcement suit, an individual faced with breach of the agreement might simply file a charge of discrimination with the enforcement agency.[349] The EEOC should investigate and consider such cases with great care. Where a respondent's noncompliance was motivated by the claimant's disability or was a continuation of the original discrimination, the Agency should pursue the case actively, in order to encourage private resolution through mediation and discourage respondents attempting to escape the consequences of disability discrimination by negotiating private settlement agreements with which they do not intend to comply.[350]

g. Agency Review and Approval of Settlements. While the EEOC's definition of fairness does not mention agency review and approval of settlements, such review can help to ensure fairness. Agency involvement can range from simply dismissing the charge based on the parties' representation that a settlement agreement has been reached, to formal review and refusal to dismiss the charge unless the agency is satisfied that the settlement represents an adequate remedy for the discrimination. Where the issues involve statutory rights and referral to mediation is part of the agency's process, it should retain a role in settlements. Whether or not the mediator is an agency employee, the referring agency should review mediated settlement agreements for consistency with the statute, approving agreements that meet established criteria

---

[349] Under Titles II and III, an individual may file a discrimination action in court without filing a charge with the agency. However, the individual would have to prove that the defendant's noncompliance constituted discrimination under the statute.

[350] Respondents may attempt to avoid liability by invoking the statute of limitations, which requires a plaintiff to file a charge within 180 days of the discriminatory conduct (300 days in jurisdictions having a state or local deferral agency). 42 U.S.C. § 2000e-5(e) (1988). The EEOC should be prepared to argue that the statute of limitations should be equitably tolled or that the defendant's conduct estopped its use. *See supra* note 268 (discussing tolling of statute of limitations).

and thereby warrant dismissal or withdrawal of charges.[351] The EEOC's current regulations permit the Agency to sign any predetermination settlement agreement agreed to by the parties and to agree not to process the charge further.[352] Alternatively, its regulations authorize facilitation of the settlement by allowing the claimant to withdraw his charge.[353]

The range of acceptable settlement agreements should be broad because cases vary widely in their facts and strength. Nevertheless, to the extent possible, an agency should ensure that charging parties having strong cases are not coerced to settle for little or nothing solely because of their lack of power or money[354] and that respondents are not coerced to pay significant sums to charging parties in frivolous cases merely to avoid prohibitive litigation costs or bad publicity. While an agency cannot prevent a settlement desired by the parties, the agency can continue to process the charge and it can—and should—continue its investigation when it believes the agreement does not effectively remedy discrimination.

Additionally, an agency's review process can be used to identify repeat offenders who may have systemic discrimination problems that are being settled through individual complaints. This will help prevent sacrificing the goal of resolving systemic discrimination to the goal of resolving individual disputes quickly. Should the EEOC or the Department of Justice discover systemic discrimination, they can utilize their litigation authority to redress it.

While review of settlements will add to an agency's workload, the corresponding reduction in investigations should provide adequate compensation. To minimize the added burden, an agency can

---

[351] Lawyers Committee Comments, *supra* note 169, at 3. Because the agencies enforcing Titles I, II, and III have the authority to litigate violations of the statute, either on their own or through the Justice Department, they also have authority to approve or reject settlements of disputes. Similarly, the FCC may accept settlements as final judgments or may take action to enforce the statute despite the settlement.

[352] 29 C.F.R. § 1601.20(a) (1995). The EEOC's regulations also mandate conciliation efforts when reasonable cause is found. *Id.* § 1601.24.

[353] *Id.* 1601.20(b).

[354] The EEOC recently rescinded its policy of seeking a full remedy in every case because the policy tended to impede settlement. *EEOC: House Panel Elicits Details on Changes Under Way at EEOC*, *supra* note 84, at A-9. This change will facilitate settlement, but the Agency should nevertheless exercise its authority in order to avoid coercion of less powerful parties in the settlement process. *Cf.* Larson, *supra* note 218, at 409 (noting that Industrial Commission approval of mediated settlements is safeguard against unfair agreements).

create either guidelines for settlement approval or settlement agreement forms containing standardized language. To avoid significant restrictions on the creativity of the parties or the mediator, however, such guidelines or settlement forms must be flexible. Nevertheless, language regarding enforcement of the settlement should be required.

Development of settlement guidelines may provide other benefits as well. These guidelines can assist the mediator and the parties in determining what an appropriate settlement might contain.[355] Such a guide would be particularly useful in balancing power and promoting fairness when a party is mediating without representation. At a minimum, guidelines should include the full remedies available if the case were successfully litigated.[356] On the downside, individuals with weak cases or no legal advice might rigidly adhere to the guidelines and develop unrealistic expectations of what they will receive in settlement.[357]

As another possible approach to settlement review, an agency could require that the mediator or the parties submit a brief statement to the agency in support of the proposed settlement agreement. Such a statement could summarize the facts and the factual and legal disputes, thereby enabling the agency to determine whether to approve the agreement. Given the confidential nature of mediation, both parties should agree to the statement before it is submitted to the agency. Because such a requirement might hinder negotiations by adding yet another issue to the process of resolution, and because it is unclear whether the statement would truly provide valuable information to the agency, agencies should experiment with this requirement before universal implementation.

Private and employer-sponsored mediation programs do not directly implicate agency review of a settlement. However, an employee dissatisfied with a mediation agreement might file a charge with the EEOC. Where participation in mediation was

---

[355] *See* Larson, *supra* note 218, at 410 (suggesting that to avoid disapproval of mediated agreements, mediators in workers' compensation cases should become familiar with Industrial Commission's standards for approving settlements).

[356] PEER Study, *supra* note 171, at 152-53.

[357] A knowledgeable and skilled mediator should act as a reality check for the complainant.

voluntary, the EEOC should defer to the mediated settlement if it was made both knowingly and truly voluntarily, if the process was fair and regular, and if the result is consistent with the ADA.[358] Should the EEOC decide not to proceed, it nevertheless should issue a right-to-sue letter to the individual.

4. Technical Expertise. The EEOC policy does not mention technical experts, perhaps because the policy applies to all statutes under the Agency's jurisdiction. On the other hand, the ACUS Recommendation encourages exploration of technical expertise sources for assistance in mediation. The importance of such expertise cannot be overemphasized. Because of the often complex nature of ADA claims, technical expertise may be crucial to achieving settlement. Engineers, architects, rehabilitation experts, and experts in the impact of particular disabilities are among those whose input might be required in a given case.

One method of accessing such expertise is to train mediators on the available sources of technical assistance. Another method is to train such experts in mediation skills.[359] Both government agencies and private mediation services should ascertain whether mediators have such expertise and assign cases on that basis. Additionally, they should encourage individuals with the required expertise to participate in mediator training.[360] Such training could be either funded with technical assistance grants or undertaken by the FMCS, which already has resources for mediator training.[361]

If the mediator is not an expert, the cost of obtaining an expert becomes an issue. Although the parties to the dispute could agree to pay for a third-party expert, if agencies provide technical assistance at little or no cost, this will facilitate resolution of

---

[358] *See* DISPUTE RESOLUTION UNDER THE ADA, *supra* note *, at 659-60. These criteria draw upon the NLRB's standards for deferral to arbitration. *Id.* at 659. The agency also can use this review to ensure that there are no systemic discrimination issues which were ignored in mediation.

[359] In labor arbitration, for example, the parties may select an arbitrator with the expertise relevant to the subject matter of the dispute, such as an industrial engineer or doctor. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 142 (4th ed. 1985).

[360] For example, government employees with related training, knowledge, and experience could be encouraged to train as mediators.

[361] Moreover, as a part of training, technical experts can serve as co-mediators, thereby providing their expertise while learning mediation techniques.

disputes.[362] Thus, agencies should attempt to obtain experts willing to work pro bono or at low cost.[363] Alternatively, agencies could set aside funds for technical assistance on an ad hoc basis as deemed necessary by the mediator. Third, agencies could employ one or more trained experts specifically for mediation. The problem with this approach is that it may be difficult to find a few individuals with expertise in the broad range of areas likely to be needed in ADA disputes. Regardless, a mediation program that provides technical expertise will truly further the statutory goal of encouraging voluntary compliance.

5. Monitoring and Evaluation. The key to a successful mediation program is continued monitoring, evaluation, and revision where necessary to accomplish the goals of the program.[364] Agencies adopting an ADA mediation program, whether private or public, should structure the program to enable an empirical evaluation based on specific criteria established prior to the commencement of the program.[365] These criteria should be developed with the assistance of the Advisory Committee or the stakeholders. Employing a professional evaluator will facilitate creation of a system that will provide the data necessary to determine whether a mediation program is meeting its goals.

The evaluation process should include the parties, the mediators,

---

[362] For example, the actual construction cost of making a business accessible might be small, but the business might need an architect to determine how to access the facility most easily and to draw up plans for doing so. Without the architect's expertise, the parties may be unaware of the low-cost accessibility option and might be unwilling to pay for the architect's services without some assurance that the investment will resolve the dispute.

[363] Alternatively, the federal agencies could establish a worksharing arrangement with other federal agencies already employing individuals with relevant technical expertise. Moreover, state rehabilitation agencies or private disability-related organizations may have experts who are available at little or no cost. The Chicago Commission on Human Rights uses experts from the City's Office for People with Disabilities to identify changes that will make a facility accessible and to prepare blueprints for the design change, thereby facilitating settlement by saving money for the affected business. Information from Miriam I. Pickus, Deputy Commissioner, Chicago Commission on Human Relations.

[364] IMPLEMENTING THE ADR ACT, *supra* note 4, at 55-58; Dispute Systems Design Working Group, Performance Indicators for ADR Program Evaluation 1 (Admin. Conf. U.S., Nov. 1993); *see also* Elizabeth Rolph & Erik Moller, *Evaluating Agency Alternative Dispute Resolution Programs: A Users' Guide to Data Collection and Use* (Institute For Civil Justice 1995) (providing guidelines for effective evaluation).

[365] Designing Systems, *supra* note 209, § I, at 8-9.

and any agency personnel involved in the process.[366] Data collected from the program results should include settlement rates, both overall and by type of case, use of party representatives and use of technical expertise; overall party satisfaction, by type of case and by existence or nonexistence of representation; comparison of mediated settlements with settlement guidelines, with settlements reached through other processes, and with litigation results;[367] assessment of mediator quality;[368] impact on systemic litigation; changes in case backlogs; comparative processing time of mediated cases and other cases; rate of party compliance; agency approval rates of mediated settlements; and relative costs and benefits of the mediation project.[369] Collection and analysis of this data should assist in answering the following questions:[370]

> (1) Is the mediation program consistent with statutory goals?
> (2) Does the mediation program adversely impact systemic litigation of ADA issues?
> (3) Does the mediation program reduce case processing time or case backlog?
> (4) Does mediation reduce the cost of case processing for the parties or the government?
> (5) At what point in the investigation process is mediation most effective?
> (6) Is mediation more effective for certain types of cases?

---

[366] EEOC Report on ADR Pilot Program, *supra* note 99, at 5, 6; PEER Study, *supra* note 171, at 13.

[367] This comparison will facilitate the determination of whether particular groups are being disadvantaged by mediation. Precise comparability with litigation results cannot be expected, however, as settlement generally involves compromise.

[368] For useful discussions on selection and evaluation of mediators, see Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOTIATION J. 149 (1988); Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23 (1990); SPIDR Commission on Qualifications Report, *supra* note 295, at 17-18.

[369] Some of these criteria, such as the impact on systemic litigation and changes in case backlogs, will not be relevant in private mediation. Additionally, these criteria should incorporate the question of whether settlements are reached in cases in which mediators believe that discrimination occurred.

[370] Of course, each of these questions will not be relevant to every mediation program.

(7) Does mediation disadvantage individuals with disabilities or other historically disadvantaged groups?[371]
(8) Is the process equally fair and effective for both represented and unrepresented parties?
(9) Are comparable results reached in mediated settlements, in settlements obtained through other processes, and in similar litigation?
(10) What are the best sources of qualified mediators?
(11) Have the parties complied with mediated settlements?
(12) Has a common group of mediators been effective in handling disputes under the various titles of the ADA and have they achieved the promised efficiency?
(13) Has the availability of technical expertise affected settlement?
(14) Is agency approval of mediated settlements effective or necessary?[372]

Program and mediator evaluations must be careful not to overemphasize settlement rates. The goal of statutory enforcement should not be outweighed by the goal of settlement, which is likely if settlement rates become the crucial factor in evaluations. Unfortunately, because settlement is the goal of mediation, mediators will measure their own success by whether settlement has occurred. Agencies should counterbalance the mediator's

---

[371] This is the most important question to be answered because if mediation disadvantages the very individuals that the ADA was designed to protect, it conflicts with the purpose of the statute and should not be used.

[372] In addition, the program can test the effectiveness of some of the specific proposals set forth in this Article, thus providing a basis for retaining or altering them in the future. For example, the program could use several sources of mediators and compare their effectiveness, or evaluate the impact of educational programs on participation rates and power imbalances. Furthermore, the program could analyze the effect of the timing of mediation in the investigation process, or it could examine the impact on settlement of factors such as the characteristics of the parties or the cases. The EEOC pilot project found that the size of the employer, the type of respondent, the type of case (*e.g.*, discharge or accommodation), and the strength of evidence of discrimination were significantly related to settlement. EEOC Mediation Program Evaluation, *supra* note 100, at 42-45.

corresponding tendency to push for settlement at all costs by reassuring them that some cases will not—and should not—settle and by recognizing that fact when evaluating mediators.

Analysis of each ADA mediation program, both public and private, will establish a knowledge base that enables design of the most effective mediation programs in the future. If the programs demonstrate that mediation is a fair and satisfactory method of resolving disputes, more individuals and businesses will be encouraged to participate in mediation. The result may be both expansion of agency-sponsored mediation and growth of private mediation of ADA disputes, thereby reducing agency caseloads without detracting from statutory goals. Assuming that initial evaluation establishes that the program has merit, systematic evaluation should be continued on a regular basis. Continuing evaluation will provide the data needed to alter a program as necessary to ensure successful mediation or to eliminate a program no longer meeting its goals.

VI. CONCLUSION

A mediation program designed in accordance with the guidelines set forth in this Article will further the goal of eliminating discrimination by enabling individuals with disabilities and employers to negotiate agreements for voluntary compliance with the ADA. Speedy, cost-effective resolution of ADA disputes benefits complainants, respondents, and society by efficiently integrating individuals with disabilities into the workplace. Moreover, a program incorporating these guidelines will promote satisfaction and compliance with mediated solutions.

ADA enforcement agencies, private mediation agencies, and employers have begun to implement mediation programs. In developing effective programs to mediate employment disputes, several elements are crucial. Consultation with representatives of the disability community, employers, government entities, and labor organizations will ensure that mediation programs meet their needs. Additionally, such programs must be designed to empower rather than disadvantage the participating parties, particularly the individuals with disabilities the ADA was enacted to protect. Finally, continuing evaluation and revision will ensure that

mediation programs remain effective in accomplishing their goals. Program evaluation may demonstrate that revision of some approaches recommended in this Article is necessary; however, if programs are developed with these principles in mind, mediation should become an additional tool in the ADA enforcement arsenal.