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Dispute Resolution Under the Americans with Disabilities Act: A Report to The Administrative Conference of the United States

Ann C. Hodges

University of Richmond, ahodges@richmond.edu

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DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ANN C. HODGES*

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* Professor of Law, University of Richmond. This report was prepared for the consideration of the Administrative Conference of the United States (ACUS). The report benefited significantly from discussions with the ACUS staff, officials from the Equal Employment Opportunity Commission, the Department of Justice, Disability Rights Section, the Federal Transit Administration, the Federal Highway Administration and the Federal Communications Commission, representatives of various disability groups, attorneys practicing disability law, staff of 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 the report are those of the author and do not necessarily reflect those of the members of the Conference or its committees except where formal recommendations of the Conference are cited, or of anyone consulted in connection with the report. Recommendation 95-7, based on this report, was adopted on June 16, 1995, and published at 50 Fed. Reg. 43,115 (1995). Research assistance from Nicole Rovner Beyer, Tenley Carroll, Penny Elaine Nimmo, Jeffrey Shapiro, Margaret Smither and Tu-Quynh Vu was invaluable in preparation of the report.

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INTRODUCTION

Congress passed the Americans With Disabilities Act ("ADA") in 1990 and it became effective in 1992.¹ The statute prohibits discrimination against individuals with disabilities by employers, state and local governments, and public accommodations. With more than two years experience under the statute, an assessment of the effectiveness of the dispute resolution procedures is appropriate. This Article begins with a brief overview of the statute, including an analysis of the dispute resolution procedure under each title.² The report then discusses the effectiveness of existing dispute resolution procedures.³ Finally the report makes recommendations for improving the dispute resolution procedures, including a specific recommendation for adoption of a mediation program,⁴ in order to effectuate the purposes of the statute.⁵

I. THE AMERICANS WITH DISABILITIES ACT

With the passage of the Americans with Disabilities Act, Congress extended protection against disability discrimination to large segments of the population not previously protected. The preexisting Rehabilitation Act of 1973 banned disability discrimination by the federal government, government contractors, and recipients of federal funds.⁶ The reach of that

1. President Bush signed the ADA, Pub. L. No. 101-336, 104 Stat. 327-378 (1990) on July 26, 1990. Title I became effective July 26, 1992 for employers with 25 or more employees and two years later for employers with 15 or more employees. S. REP. NO. 116, 101st Cong., 1st Sess., 2 (1989). Titles II and III became effective 18 months after enactment. *Id.* at 3.

2. *See infra* Sections I and II.

3. *See infra* Section III.

4. *See infra* Sections IV and V.

5. As specifically set forth in the statute, the ADA's purpose is as follows:

(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 [f]ederal [g]overnment plays a central role in enforcing the standards established in this chapter 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) (Supp. V 1993).

6. 29 U.S.C. §§ 791, 793-95 (1994).

statute, however, left much disability discrimination untouched by federal law. Congress determined that additional federal legislation was necessary to eliminate discrimination against the estimated 43 million Americans with disabilities, discrimination which costs billions of dollars by fostering unnecessary dependency and nonproductivity.⁷ Much of the statutory language in the ADA is based on the Rehabilitation Act and the regulations issued pursuant to that Act.

Disability under the ADA is defined as "a physical or mental impairment that substantially limits one or more of [an individual's] major life activities"⁸ Major life activities are those that the average person can perform with little or no difficulty.⁹ Individuals who have a history of disability or are perceived to have a disability, even if they do not, also meet the statutory definition of disability.¹⁰

The ADA contains five titles, the first four dealing with specific aspects of discrimination and the fifth containing miscellaneous provisions.¹¹ Title I covers employment discrimination, Title II covers discrimination in public services, Title III covers discrimination in public accommodations and services operated by private entities, and Title IV covers telecommunications services for individuals with hearing and speech impairments.

7. See 42 U.S.C. § 12101(a)(9) (Supp. V 1993); S. REP. NO. 116, *supra* note 1, at 16-18 (noting that discrimination is costly to society because disabled individuals must rely on social welfare programs for economic survival rather than contributing to the economy through productivity).

8. 42 U.S.C. § 12102(2)(A) (Supp. V 1993). While the term physical or mental impairment is not defined in the statute, the legislative history indicates that the term includes:

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; neuromuscular; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989). 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, gender identity disorders not resulting from physical impairments or other sexual behavior disorders . . ." 42 U.S.C. § 12211(b)(1) (Supp. V 1993).

9. These include walking, seeing, hearing, breathing, learning, working, caring for oneself, and participating in community activities. 29 C.F.R. § 1630.2(i) (1995).

10. 42 U.S.C. §§ 12102(2)(B)-(C) (Supp. V 1993).

11. 42 U.S.C. §§ 12111-12117; 42 U.S.C. §§ 12131-12165; 42 U.S.C. §§ 12101-12189 (Supp. V 1993).

Notable among the provisions of Title V are section 506, which requires the agencies primarily responsible for administration of the statute to provide technical assistance to covered entities, individuals with rights under the statute, and other federal agencies,¹² and section 513, which encourages the use of alternative dispute resolution (“ADR”) where appropriate and authorized by law.¹³

A. Title I - Employment

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.”¹⁴ This provision covers employers with fifteen or more employees.¹⁵

Three key concepts in the employment provisions are: (1) what constitutes a disability; (2) who is a qualified individual with a disability; and (3) what is discrimination.¹⁶ First, the determination of disability as discussed above is the same for all titles of the ADA. Second, to bring a claim of discrimination, an individual must establish that she is a qualified individual with a disability, i.e., she can perform the essential functions of the job with or without reasonable accommodation.¹⁷

“Essential functions of the job” and “reasonable accommodation” are both terms of art under the statute. The essential functions of the job are those duties that are fundamental rather than marginal.¹⁸ Reasonable accommodations may include, but are not limited to, making facilities accessible, job restructuring, modifying work schedules, reassigning the employee to a vacant position, acquiring or modifying equipment or

12. 42 U.S.C. § 12206(c)(1) (Supp. V 1993).

13. 42 U.S.C. § 12212 (Supp. V 1993).

14. 42 U.S.C. § 12112(a) (Supp. V 1993).

15. 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

16. See 42 U.S.C. § 12102(2) (Supp. V 1993) (defining disability); 42 U.S.C. § 12111(8) (Supp. V 1993) (defining qualified individual with a disability); 42 U.S.C. § 12112 (Supp. V 1993) (specifying unlawful discrimination).

17. 42 U.S.C. § 12111(8) (Supp. V 1993).

18. 29 C.F.R. § 1630.2(n) (1995). The determination of whether a function is essential is based on the employer’s judgment, written job descriptions, the amount of time spent on the function, the experience of the 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. *Id.*; 42 U.S.C. § 12111(8).

devices, or providing readers or interpreters.¹⁹ The employer must make the accommodation(s) necessary to allow a disabled employee or applicant to perform the essential functions of a job, unless the accommodation(s) would create undue hardship.²⁰ Undue hardship is established by demonstrating that making the accommodation(s) would require significant difficulty or expense.²¹

Discrimination barred by Title I includes: (1) intentional discrimination; (2) use of standards, criteria, methods of administration, or tests that have the effect of discrimination; (3) participating in a relationship that causes employees or applicants to be subjected to discrimination; (4) discrimination based on an employee or applicant's relationship with an individual with a disability; and (5) failure to reasonably accommodate a qualified individual with a disability.²² Title I provides several defenses to a claim of discrimination. An employer may justify the use of job qualifications, selection criteria, or tests that have a discriminatory impact by establishing that they are job-related and consistent with business necessity.²³ In addition, an employer may require that an individual not "pose a direct threat to the health or safety" of others in the workplace.²⁴ As noted above, an employer may refuse to reasonably accommodate a disabled individual if the accommodation would impose undue hardship. Additionally, an employer may defend against an ADA claim by proving that an individual is not disabled, not qualified for the position, or not discriminated against because of the disability.²⁵

Along with the other prohibitions on discrimination, the ADA directly limits inquiries by a covered entity about disability and medical examinations. An employer may make inquiries about an applicant's ability to perform the job, but not about the applicant's disability.²⁶ The employer can require an applicant to take a medical exam only after an offer of employment is made.²⁷ 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 disqualifica-

19. 42 U.S.C. § 12111(9) (Supp. V 1993).

20. 42 U.S.C. § 12111(10) (Supp. V 1993).

21. 42 U.S.C. § 12111(10)(A) (Supp. V 1993).

22. 42 U.S.C. § 12112(b)(1)-(7).

23. 42 U.S.C. § 12113(a) (Supp. V 1993).

24. 42 U.S.C. § 12113(b).

25. See 42 U.S.C. § 12112(a) (Supp. V 1993) (barring discrimination against qualified individuals with disabilities because of disability).

26. 42 U.S.C. § 12112(d) (Supp. V 1993).

27. *Id.*

tion resulting from the exam is based on criteria that are job-related and consistent with business necessity.²⁸ Employers may make inquiries of employees about disabilities and require medical exams of employees only if the inquiries and exams are "job-related and consistent with business necessity."²⁹

B. Title II - Public Entities

Title II of the ADA proscribes discrimination against qualified individuals with disabilities by public entities.³⁰ In addition to the 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."³¹ Employment discrimination actions against public entities may be brought under Title I or Title II.³²

C. Title III - Public Accommodations

Title III of the ADA bans discrimination by public accommodations if their operations affect commerce.³³ The definition of public accommodation is quite broad, including restaurants, hotels, theaters, retail establishments, auditoriums, schools, museums, libraries, public transportation stations, service establishments, social service agencies, and recreational

28. 42 U.S.C. §§ 12112(d)(3)(A)-(C) (Supp. V 1993).

29. 42 U.S.C. § 12112(d)(4) (Supp. V 1993).

30. Public entities include: (1) state and local governments; (2) departments, agencies, special purpose districts or other "instrumentalities of a State or States or local government[s];" and (3) passenger railroads. 42 U.S.C. §§ 12131(1)(A)-(C) (Supp. V 1993).

31. 42 U.S.C. § 12132 (Supp. V 1993). Title II also contains detailed requirements that public transportation systems must meet to avoid violation of the discrimination prohibitions. 42 U.S.C. §§ 12141-12150, §§ 12161-12165 (Supp. V 1993).

32. See 28 C.F.R. § 35.140 (1995); *Petersen v. University of Wis. Bd. of Regents*, 818 F. Supp. 1276, 1278-79 (W.D. Wis. 1993) (finding that employment discrimination against public entity may be brought under Title I or Title II).

33. 42 U.S.C. §§ 12181(7), 12182(a). The new construction and alterations provisions of Title III, see *infra* note 41 and accompanying text, apply to commercial facilities as well as places of public accommodation. 42 U.S.C. § 12183 (Supp. V 1993). Commercial facilities are facilities intended for nonresidential use with operations that affect commerce. 42 U.S.C. § 12181(2) (Supp. V 1993). Additionally, Title III contains specific provisions directed at public transportation supplied by private entities. 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12181(10) (Supp. V 1993). See 42 U.S.C. §§ 12182(b)(2)(B)-(D); 12184 (Supp. V 1993) (barring discrimination on fixed route transportation systems, demand responsive transportation systems and over-the-road bus systems, and specifying what constitutes such discrimination).

establishments.³⁴ A public accommodation, which includes the owner, lessor, lessee, or operator, cannot discriminate on the basis of an individual's disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.³⁵ Title III not only requires that an establishment be accessible, but also requires access to services and facilities in an integrated setting.³⁶ The ADA requires that public accommodations modify practices and procedures to ensure access for individuals with disabilities, unless the changes would fundamentally alter the nature of the services or facilities.³⁷ Also, a person with a disability cannot be denied services because of the absence of "auxiliary aids or services," including interpreters, readers, or equipment or devices that would enable communication with those who are hearing or visually impaired, unless use of such aids would fundamentally alter the nature of the services or impose an undue burden.³⁸

Public accommodations must remove architectural and communication barriers where removal is "readily achievable."³⁹ If removal of a barrier is not readily achievable, access to the services or facility must be made available through readily achievable alternative means.⁴⁰ In addition to the barrier removal requirements, the statute specifies that new construction and

34. 42 U.S.C. § 12181(7) (Supp. V 1993). Prohibited discrimination includes the use of eligibility criteria that screen out individuals with disabilities from full and equal enjoyment of goods, services, or facilities unless such criteria are necessary to the provision of the goods, services, or facilities. 42 U.S.C. § 12182(b)(2)(A)(iii) (Supp. V 1993).

35. 42 U.S.C. § 12182(b)(2)(A)(i) (Supp. V 1993).

36. 42 U.S.C. § 12182(b)(1)(B) (Supp. V 1993). This requirement would prevent a public accommodation from isolating individuals with disabilities in separate accommodations. See 28 C.F.R. §§ 36.203(a)-(b) (1995).

37. 42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. V 1993).

38. 42 U.S.C. §§ 12182(b)(2)(A)(iii), 12102(1) (Supp. V 1993).

39. This is defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv) (Supp. V 1993). The legislative history of these provisions suggests that accessibility of every part of every facility is not necessarily required, but the ADA "contemplates a high degree of convenient accessibility" of parking, routes to and from the facility, entrances, restrooms, water fountains, public areas, work areas and service areas. S. REP. NO. 116, *supra* note 1, at 69. Readily achievable alterations would include, for example, small ramps, raised letter and braille markings on signs and elevator controls, grab bars, flashing alarm lights, and lower telephones. *Id.* at 66.

40. See 42 U.S.C. § 12182(b)(2)(A)(v) (Supp. V 1993). Readily achievable alternative means would include such change as curb service or assistance to retrieve items in an inaccessible location where access is not readily achievable. S. REP. NO. 116, *supra* note 1, at 66.

substantial alterations to existing facilities must comply with distinct specific guidelines for accessibility.⁴¹

D. Title IV - Telecommunications

Title IV amends Title II of the Communications Act⁴² and is designed to ensure the availability of communication by wire or radio for individuals with 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"⁴³ The Federal Communications Commission ("FCC") was authorized to use its enforcement authority under the Communications Act to ensure that both interstate and intrastate communication services are available within three years of enactment of Title IV.⁴⁴ Pursuant to this authority the FCC has mandated that "each common carrier providing telephone voice transmission services" provide telecommunications relay services for intrastate and interstate communications.⁴⁵ These services must be provided at rates no greater than those paid for comparable voice communication services.⁴⁶

II. ADA ENFORCEMENT PROCEDURES

A. Title I

Title I, banning employment discrimination, adopts the enforcement mechanisms of Title VII of the Civil Rights Act of 1964.⁴⁷ Accordingly, exhaustion of administrative remedies through the Equal Employment Opportunity Commission (EEOC) is required as a prerequisite to filing suit alleging a violation of Title I. First, a charge must be filed with the EEOC, which investigates to determine whether "there is reasonable cause to

41. See 42 U.S.C. § 12183(a)(1) (stating newly constructed facilities must be readily accessible in accordance with regulations issued under Title III); 42 U.S.C. § 12183(a)(2) (specifying that substantially altered facilities or portions of facilities must be readily accessible to the maximum extent feasible). As noted earlier, *see supra* note 33, these requirements apply to commercial facilities as well as public accommodations.

42. 47 U.S.C. § 201 (Supp. V 1993).

43. 47 U.S.C. § 225(a)(3) (Supp. V 1993).

44. 47 U.S.C. § 225(c) (Supp. V 1993).

45. 47 C.F.R. § 64.603 (1995).

46. 47 C.F.R. § 64.604(c)(3) (1995).

47. 42 U.S.C. § 12117(a); 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (1994).

believe that the charge is true."⁴⁸ If the EEOC finds cause, then the agency is required to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁴⁹ The EEOC may file suit based on the charge, if conciliation efforts fail,⁵⁰ or alternatively, the EEOC may decline to do so, notifying the complainant of its determination.⁵¹ If the EEOC finds no reasonable cause, it also notifies the complainant of its determination.⁵² Regardless of the cause finding, the complainant has ninety days from receipt of the EEOC's notice to file a judicial action.⁵³ In addition to its enforcement authority, the EEOC has authority to issue regulations to carry out Title I and has done so.⁵⁴

B. Title II

Title II, barring discrimination by public entities, adopts the procedures of section 505 of the Rehabilitation Act for enforcement.⁵⁵ The legislative history indicates Congress's intent that enforcement follow the model under section 504 of the Rehabilitation Act, which applies to federal fund recipients.⁵⁶ The Department of Justice is authorized to file suits for enforcement of Title II.⁵⁷ In addition, individuals with disabilities have a private right of action under Title II and need not exhaust federal administrative remedies as a prerequisite to suit.⁵⁸

48. 42 U.S.C. § 2000e-5(b) (1994).

49. *Id.*

50. In the case of a governmental respondent, the Commission must refer the case to the Attorney General for filing of a civil suit. *Id.*

51. 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 Commission's failure to conciliate. MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 667 (1990).

52. 42 U.S.C. §§ 2000e-5(b),(f).

53. 42 U.S.C. § 2000e-5(f). The complainant may file suit after receipt of the notice regardless of whether the Commission found reasonable cause or no reasonable cause. *Id.*

54. 42 U.S.C. § 12116; 29 C.F.R. §§ 1630.1-1630.16 (1995). Effective July 26, 1992, the EEOC issued substantive regulations to carry out the ADA, accompanied by interpretive guidance. 29 C.F.R. § 1630.1-1630.16 (1995).

55. See 42 U.S.C. § 12133 (Supp. V 1993); 29 U.S.C. § 794(a) (1994).

56. See H.R. REP. NO. 485, 101st Cong., 2d Sess. 98 (1990) (stating that administrative enforcement should parallel section 504). Section 505 contains enforcement procedures for both section 504 actions and section 501 actions. See 29 U.S.C. § 794a (1994) (containing enforcement procedures for sections 501 and 504). Section 501 covers employees of the federal government. See 29 U.S.C. § 791 (requiring affirmative action by federal agencies).

57. H.R. REP. NO. 485, *supra* note 56, at 98.

58. *Id.*

Although filing a complaint with the enforcement agency is not a prerequisite to suit, an individual may file a complaint alleging a violation of Title II. Investigation of complaints is handled by various agencies, including the Department of Justice, as designated in the regulations.⁵⁹ All complaints must be filed within 180 days from the date of the alleged discrimination.⁶⁰ The regulations require the appropriate agency to investigate the complaint and attempt informal resolution.⁶¹ If no informal resolution is reached, a Letter of Findings is issued to the complainant and the public entity. When the agency finds that the entity is not in compliance with the statute, the agency attempts to negotiate an agreement for voluntary compliance.⁶² If no agreement is reached, the case is referred to the Attorney General for "appropriate action."⁶³

If the public entity is a federal fund recipient, which is probable, it is also covered by section 504 of the Rehabilitation Act.⁶⁴ Termination and suspension of funding are available remedies under section 504.⁶⁵ Prior

59. See 28 C.F.R. §§ 35.170 - 35.178, 35.190 (1995) (setting forth complaint procedures under Title II and designating agencies for investigation of particular types 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) (1995). The agency's authority as an investigating agency under the regulations is identical to that of the other seven agencies designated to handle specific types of complaints, and distinct from its regulatory and enforcement responsibility under Title II, Part B dealing with public transportation by public entities. See 28 C.F.R. § 35.190 (1995) (designating investigation agencies); 42 U.S.C. §§ 12141-12165 (Supp. V 1993) (establishing statutory nondiscrimination requirements for public transportation).

60. 28 C.F.R. § 35.170(b) (1995).

61. 28 C.F.R. § 35.172 (1995). The appropriate agencies are the Department of Agriculture for programs and services related to farming; the Department of Education for programs and services related to education; the Department of Health and Human Services for programs and services related to health care and social services; the Department of Housing and Urban Development for programs and services related to housing; the Department of the Interior for programs and services related to lands and natural resources; the Department of Justice for programs and services related to law enforcement, public safety, and administration of justice; the Department of Labor for programs and services related to the work force; and the Department of Transportation for programs and services related to transportation. 28 C.F.R. § 35.190 (1995).

62. 28 C.F.R. § 35.173 (1995).

63. 28 C.F.R. § 35.174 (1995).

64. See 29 U.S.C. § 794 (1994) (barring discrimination by programs receiving federal financial assistance).

65. See 29 U.S.C. § 794(a)(2) (1994) (adopting remedies of Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d)(1)); MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 609 (1988) (stating statutory remedy under section 504 is found in Title VI—withdrawal of

to termination or suspension of funding, the entity is entitled to a hearing.⁶⁶

The Secretary of Transportation has the authority to issue regulations to carry out Parts I and II of Subtitle B of Title II, which deal with public transportation provided by public entities.⁶⁷ The Attorney General has the authority to issue regulations to carry out the remainder of Title II.⁶⁸ The regulations must be consistent with those issued pursuant to section 504 of the Rehabilitation Act.⁶⁹ Regulations under both subtitles have been promulgated.⁷⁰

C. Title III

Individuals subject to discrimination under Title III prohibiting discrimination by public accommodations can sue for injunctive relief, but not damages.⁷¹ Exhaustion of administrative remedies is not required. Available injunctive relief includes orders to alter facilities, provide auxiliary aids, modify policies, or provide services or goods by alternative methods.⁷²

Title III authorizes the Attorney General to file a civil action when discrimination raises an issue of "general public importance" or where there is reasonable cause to believe that a person "is engaged in a pattern or practice of discrimination."⁷³ In cases brought by the Attorney General,

federal financial assistance).

66. See 28 C.F.R. § 41.5 (1995) (requiring each enforcement agency under the Rehabilitation Act to establish an enforcement system which includes the enforcement and hearing procedures adopted for Title VI); 34 C.F.R. § 100.8 (1995) (Department of Education regulations under Title VI requiring hearing); 49 C.F.R. §§ 27.125, 27.127 (1995) (Department of Transportation regulations requiring hearing under the Rehabilitation Act).

67. See 42 U.S.C. §§ 12149, 12164 (Supp. V 1993). The regulations must be consistent with accessibility guidelines promulgated by the Architectural and Transportation Barriers Compliance Board in accordance with section 504 of Title V of the ADA. See 42 U.S.C. §§ 12149(b), 12163 (requiring consistency) and 42 U.S.C. § 12204 (requiring Architectural and Transportation Barriers Compliance Board to issue guidelines for accessibility).

68. 42 U.S.C. § 12134.

69. 42 U.S.C. § 12134(b),(c).

70. See 28 C.F.R. §§ 35.101-35.190 (Department of Justice regulations implementing Title II of ADA); 49 C.F.R. §§ 37.1-37.169, 38.1-38.179 (Department of Transportation regulations implementing Titles II and III of ADA).

71. 42 U.S.C. § 12188(a) (Supp. V 1993).

72. *Id.*

73. 42 U.S.C. § 12188(b)(1)(B).

compensatory damages and civil penalties are available.⁷⁴ The Attorney General has investigation responsibility for alleged violations of Title III as well as responsibility for periodic compliance reviews.⁷⁵ Finally, 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 that establish accessibility mandates meet the requirements of Title III.⁷⁶ The certification provides rebuttable evidence of compliance with the Act.⁷⁷

The Secretary of Transportation issued regulations for the transportation provisions of Title III.⁷⁸ The Attorney General issued regulations for the remaining provisions of Title III.⁷⁹ Congress specified that the regulations must be consistent with accessibility guidelines promulgated by the Architectural and Transportation Barriers Compliance Board in accordance with Title V of the ADA.⁸⁰

D. Title IV

The FCC issued regulations for implementation of Title IV, dealing with telecommunications, to ensure compliance with the requirements of the statute.⁸¹ The Commission is authorized to certify state compliance programs which meet the requirements for federal certification.⁸² Complaints alleging violation of Title IV are filed with the FCC or with a

74. 42 U.S.C. § 12188(b)(2).

75. 42 U.S.C. § 12188(b)(1)(A)(i). While the statutory language states that the Attorney General "shall investigate" alleged violations of Title III, the Department of Justice has taken the position that investigation of Title III cases is discretionary, while investigation of Title II cases is mandatory. Meeting with representatives of the Department of Justice, Public Access Section, March 28, 1994.

76. 42 U.S.C. § 12188(b)(1)(A)(ii).

77. *Id.*

78. See 42 U.S.C. § 12186(a) (Supp. V 1993) (authorizing Secretary of Transportation to issue regulations); 49 C.F.R. §§ 37.1-37.179, 38.1-38.179 (regulations issued by Secretary).

79. See 42 U.S.C. § 12186(b) (authorizing Attorney General to issue regulations); 28 C.F.R. §§ 36.101-36.608 (regulations issued by Attorney General).

80. See 42 U.S.C. § 12186(c) (Supp. V 1993) (requiring consistency); 42 U.S.C. § 12204 (requiring the Architectural and Transportation Barriers Compliance Board to issue guidelines for accessibility); 28 C.F.R. Part 36, Appendix (accessibility guidelines issued by Architectural and Transportation Barriers Compliance Board).

81. See 47 U.S.C. § 225(d) (Supp. V 1993) (authorizing FCC to issue regulations); 47 C.F.R. §§ 64.601-64.608 (regulations issued by FCC).

82. 47 U.S.C. § 225(f).

certified state program if it involves intrastate services in such a state.⁸³ The Commission must resolve complaints of violations of Title IV by final order within 180 days of filing.⁸⁴ If a state does not resolve a complaint within 180 days, jurisdiction over the complaint reverts to the FCC.⁸⁵

E. Title V

Title V contains a number of miscellaneous provisions. Section 513, which deals with alternative dispute resolution, provides: "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration, is encouraged to resolve disputes arising under this chapter."⁸⁶ Having reviewed the basic anti-discrimination provisions of the statute, this Article's analysis now moves to the current dispute resolution provisions.

III. CURRENT DISPUTE RESOLUTION UNDER THE ADA

A. Title I

The EEOC has an increasing backlog of cases which was only exacerbated by enactment of the ADA.⁸⁷ In the first two quarters of fiscal 1994, 8,669 ADA charges were filed, an increase of 38% from the previous year.⁸⁸ Parties who deal with the agency are increasingly frustrated at the length of time that it takes to investigate complaints and issue determinations.⁸⁹ The immense caseload and the inability to achieve quick resolu-

83. 47 C.F.R. § 64.604(5) (1994).

84. 47 U.S.C. § 225(e) (Supp. V 1993).

85. 47 C.F.R. § 47.604(5) (1994).

86. 42 U.S.C. § 12212 (Supp. V 1993).

87. See *EEOC, Civil Rights Commission Chiefs Make Case to Congress for Budget Increases*, 1994 Daily Lab. Rep. (BNA) 57 d20 (Mar. 25, 1994); *House Labor Subcommittee Approves Bill Consolidating Federal EEO Authority*, 1994 Daily Lab. Rep. (BNA) 17 d6 (Jan. 27, 1994). By the end of the second quarter of fiscal 1994, the number of pending cases was 85,212, an increase of 21,547 cases over the previous year. *EEOC Struggles with Caseload*, 45 LAB. L.J. 432 (1994). By late 1994, the backlog was over 90,000 cases. See *EEOC Chair to Address Agency Problems*, 147 Lab. Rel. Rep. (BNA) 404, 405 (Nov. 28, 1994).

88. *EEOC Struggles with Caseload*, *supra* note 87, at 432. This increase occurred before July 26, 1994, when the threshold for ADA coverage dropped from 25 employees to 15 employees, which is expected to generate significant additional ADA cases. *Id.*

89. See *EEOC Official and Attorneys Discuss Challenges Posed by Record Charge Rate*, 1994 Daily Lab. Rep. (BNA) 54 d16 (March 22, 1994); Letter to Frances M. Hart

tions of cases frustrate agency personnel.⁹⁰ Despite the increasing backlog, Congress recently voted to reduce the EEOC's budget, which will further exacerbate the problem.⁹¹

The backlog problem is somewhat mitigated by the procedure that permits a charging party⁹² to request the EEOC to issue a notice of right to sue if 180 days have passed since the filing of a charge without completion of the investigation.⁹³ An individual who desires to litigate can wait the 180 days, request the notice, and file suit. This provision does not aid less sophisticated individuals, those without lawyers, or those who hope for agency action on the charge, however.⁹⁴ In addition, the congressional goal of encouraging informal resolution of the charge through the conciliation process is frustrated.⁹⁵

from Jeffrey A. Norris, *Comments of Equal Employment Advisory Council in Response to EEOC's Request for Comments on Alternative Dispute Resolution 2* (Sept. 16, 1993).

90. See *EEOC Official Discusses Record Charge Rate*, 145 Lab. Rel. Rep. (BNA) 381 (Mar. 28, 1994); *Latest EEOC Data Show Record Charges, Sharp Increase in Inventory of Pending Cases*, 1993 Daily Lab. Rep. (BNA) 152, d5 (Aug. 10, 1993) (Although the agency increased its resolution of charges in 1993, the number of charges awaiting resolution also increased by almost 32% generating significant concern on the part of the agency).

91. *Congress Approves Legislation Cutting EEOC Budget*, 146 Lab. Rel. Rep. (BNA) 558 (Aug. 29, 1994). The EEOC received virtually no increase in funding or staffing when ADA cases were added to its enforcement responsibilities, despite the fact that ADA cases now constitute about 20% of the agency's caseload. David R. Sands, *Charges of Bias on the Job Rising Fast*, THE WASH. TIMES at D5 (Apr. 2, 1994); *EEOC Must Begin to Deal With its Growing Workload*, 143 Lab. Rel. Rep. (BNA) 495 (Aug. 16, 1993). The EEOC has 559 fewer staff members than in 1980 despite the additional workload generated by the ADA and the Civil Rights Act of 1991. *EEOC, Civil Rights Commission Chiefs Make Case to Congress For Budget Increases*, 1994 Daily Lab. Rep. (BNA) 57, d20 (Mar. 25, 1994).

92. The terms charging party and complainant are used interchangeably throughout the report for individuals who file charges with the various agencies alleging violations of the ADA. The party charged with the violation is referred to as the respondent.

93. See 42 U.S.C. § 2000e-5(f)(1) (stating if no civil action filed or conciliation agreement reached within 180 days the Commission shall notify the charging party who can file a law suit); 29 C.F.R. § 1601.28(a) (1995) (stating that right to sue letter will be issued upon request after 180 days or if investigation cannot be completed within 180 days).

94. These individuals do not take advantage of the opportunity to litigate either because of lack of knowledge, lack of representation, or lack of resources.

95. See 42 U.S.C. § 2000e-5(b) (requiring the Commission to attempt to eliminate unlawful practices by conciliation); 29 C.F.R. § 1601.24 (describing the conciliation procedure). See also *Departing EEOC General Counsel Sees Need for New Direction at Overwhelmed Agency*, 1993 Daily Lab. Rep. (BNA) 111 d3 (June 11, 1993) (Departing General Counsel noted that backlog of charges and failure to fund agency to provide for voluntary resolution of disputes as contemplated under Title VII have intensified problems in administering Title VII).

Because of the backlog, among other factors, the number of cases litigated under the employment provisions of the ADA is extremely small in relation to the number of charges filed. From the effective date of the statute through December 31, 1994, the total number of ADA charges filed was 39,927.⁹⁶ As of that date, the EEOC had filed 48 cases in court alleging ADA violations.⁹⁷ In addition to EEOC lawsuits, suits have been filed by employees or applicants. Of the 154 ADA cases published in BNA's *Americans with Disabilities Act Cases* in 1993 and the first half of 1994, 58 were employment cases.⁹⁸ While the number of cases litigated increased in 1994 and can be expected to increase further as more cases are investigated and knowledge about the statute expands, these figures illustrate the significance of the backlog, and demonstrate that the private right of action for plaintiffs is not moving many cases from the investigation backlog to the courts. The overwhelming majority of ADA employment cases are simply awaiting investigatory action, and few of them will ever be litigated by the agency regardless of the outcome of the investigation.

There is ongoing consideration of how to resolve the EEOC's tremendous backlog problem, including changes in the agency's structure, priorities, funding, dispute resolution mechanisms and the use of ADR.⁹⁹

96. Telephone Conversation with Peggy Mastroianni, Director of ADA Policy, Equal Employment Opportunity Commission (Jan. 23, 1995).

97. *Id.* In the first two years under the statute, the EEOC filed 23 cases, while the number of charges filed was 29,720, a litigation rate of less than one tenth of one percent. *EEOC Has 23 Pending ADA Complaints; Many Involve Charges of AIDS Bias*, 1994 Daily Lab. Rep. (BNA) 133 d11 (July 14, 1994). The litigation rate increased slightly in the later half of 1994.

98. *ADA: Americans with Disabilities Act of 1990 Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, at 8 (Aug. 1, 1994). Fourteen of the 45 cases in 1993 were employment cases and 44 of the 79 cases in the first half of 1994 were employment cases. *Id.* Thus, employment cases increased as a percentage of reported cases. Because the BNA data included all cases, there may be some overlap between the 48 EEOC cases and the 58 employment cases in the BNA sample.

99. See *EEOC Chair to Address Agency Problems*, 147 Lab. Rel. Rep. (BNA) 404 (Nov. 28, 1994) (discussing new EEOC Chair's ideas to improve the efficiency and effectiveness of the agency); *Oversight Hearing on the Equal Employment Opportunity Commission Before the Subcomm. on Select Education and Labor of the House Committee on Education and Labor*, 103d Cong., 2d Sess. 1-7 (July 26, 1994) (hereinafter *Oversight Hearing*) (discussing various proposals to improve the effectiveness of the EEOC). See also *Fact Finding Report Issued by the Commission on the Future of Worker-Management Relations*, 1994 Daily Lab. Rep. (BNA) 105, d34 at 97-118 (June 3, 1994) (hereinafter *Dunlop Commission Fact Finding Report*) (discussing the current system of employment regulation, litigation and dispute resolution, and considering alternative methods of handling

This consideration is not limited to the ADA, but concerns all of the statutory responsibilities of the agency.

With respect to the use of alternative dispute resolution, the EEOC attempts to settle cases through negotiation whenever possible.¹⁰⁰ In cases in which the EEOC finds reasonable cause, the statute expressly requires the EEOC to conciliate prior to litigation.¹⁰¹

In addition, the EEOC recently completed a pilot mediation program in which 267 of a contemplated 300 meditations were conducted.¹⁰² The program included Title I ADA cases, among others, but was limited to cases involving discharge, discipline, or alleged discrimination in terms and conditions of employment.¹⁰³ The agency contracted with the Center for Dispute Settlement to conduct mediation upon agreement of the parties.¹⁰⁴ The cases were assigned for sixty days to a mediator, who was unconnected with the agency.¹⁰⁵ Eighty-seven percent of the charging parties agreed to mediation, but only forty-three percent of employers agreed.¹⁰⁶ Assessments of the pilot project indicated that employers were reluctant to mediate discharge cases, perhaps because they saw no ground for compromise.¹⁰⁷ Agreement was reached in 52% of the mediated cases.¹⁰⁸

The pilot project did not include reasonable accommodation cases under the ADA.¹⁰⁹ Nevertheless, agency representatives and others have

employment-related disputes including alternative dispute resolution, a unified administrative agency, and a unified labor court). *See also infra* notes 124-39 and accompanying text (discussing EEOC's most recent efforts to address the backlog).

100. 29 C.F.R. § 1601.20. The EEOC considers its normal efforts to settle cases as a form of ADR.

101. 42 U.S.C. § 2000e-5(b) (1994).

102. Equal Employment Opportunity Commission, *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) 381 (Mar. 28, 1994).

103. *EEOC Report on ADR Pilot Program*, *supra* note 102, at 2.

104. *See id.* at 1-2.

105. *EEOC Official Discusses Record Charge Rate*, *supra* note 102, at 381.

106. *EEOC Report on ADR Pilot Program*, *supra* note 102, at 3.

107. Information from representatives of the Equal Employment Opportunity Commission. The final report indicated that only 39% of respondents agreed to mediate in the cases where the employee was terminated, but 70% agreed where the employee had resigned and 48% agreed where the employee remained employed. *See EEOC Report on ADR Pilot Project*, *supra* note 102, at 4.

108. *Id.*

109. *Id.* at 2. The EEOC decided to exclude reasonable accommodation cases for several reasons. The agency had a strong interest in reducing the backlog of discharge cases, the largest category of cases at the EEOC. Also, the ADA was a new statute with no existing precedent regarding remedies. Unlike discharge cases, the EEOC did not have experience

suggested that reasonable accommodation cases are precisely the type of cases that should be mediated. One of the benefits of mediation is that it enables parties to resolve disputes and maintain continuing relationships.¹¹⁰ In reasonable accommodation cases, the parties can work out an accommodation that enables the employee to retain employment, thus preserving the relationship.

The parties to meditations in the pilot project reflected generally high satisfaction levels—ninety-two percent believed that the mediation was fair and eighty percent would try it again.¹¹¹ Reviews given by the agency's supervisory personnel were mixed, with the negative assessments reflecting both a concern that mediation would weaken the agency's law enforcement image and a concern for the time taken by the program.¹¹² The mediation process took far less time than a full investigation,¹¹³ but those cases that were not settled moved back into the investigation process, perhaps adding to overall processing time.¹¹⁴ The agency compared settlement agreements reached in mediation and those reached through the normal agency resolution techniques, and found no major differences in the remedies

with reasonable accommodation issues under other statutes. While there are reasonable accommodation requirements for religion under Title VII, *see* TWA Inc. v. Hardison, 432 U.S. 63, 81 (1977), and for employees with disabilities under the Rehabilitation Act, most of the statutory claims within EEOC's administrative responsibility have no such requirement. Furthermore, Congress indicated that it did not intend for the interpretation of Title VII's reasonable accommodation requirement for religion to govern the ADA. *See* H.R. REP. NO. 485, *supra* note 67, at 68; S. REP. NO. 116, *supra* note 1, at 36. Given these factors, there was concern about setting a standard for settlements in reasonable accommodation cases through outside mediation. Information from Peggy Mastroianni, Director of Policy EEOC, Donna Swanson, EEOC and Edna Povich, Center for Dispute Settlement.

110. *See infra* note 274 and accompanying text.

111. *EEOC Report on ADR Pilot Program, supra* note 102, at 5. One fairness concern was expressed by both parties. When either party appeared with unexpected representatives, the good faith of that party was questioned. *Id.*

112. *See id.* at 6-7.

113. The average time for completion of the mediation process was 67 days, *id.* at 4, while the average processing time for cases outside the mediation project was 293 days in 1994. *EEOC Struggles with Caseload, supra* note 87.

114. Supervisors believed that the pilot project added time to the process. *EEOC Report on ADR Pilot Program, supra* note 102, at 6. The report did not recite data that would enable any definitive conclusion on the issue, however. Also, the time from filing to resolution was far shorter for mediated cases, 67 days, than for cases settled outside the pilot project, 247 days. *Id.* This difference may be attributable, in whole or in part, to the fact that mediated cases were forwarded to mediation immediately upon agreement of the parties, while the settlement negotiations outside the pilot project "proceeded in accordance with docket order scheduling." *Id.* at 6.

achieved except for slightly higher monetary benefits in the agency-settled cases.¹¹⁵ The outside evaluator of the project found that in situations where the mediators believed that discrimination occurred, few settlements were reached—a finding that warrants some concern.¹¹⁶

In addition to the pilot project, the EEOC and the Department of Justice funded training in both the ADA and the use of ADR for four hundred individuals with disabilities who were associated with disability groups.¹¹⁷ In the second phase, one hundred people received advanced training, which included intensive training in ADA and ADR. Twenty-five of the individuals were invited to Washington for a one week mediation training session, at the end of which they were certified as trained mediators.¹¹⁸ Some of these individuals have been involved in training mediators who will be participating in the Department of Justice pilot mediation project discussed below.¹¹⁹ Others have conducted training in their communities which has led to voluntary compliance by some businesses.¹²⁰

In July 1993, in order to develop a policy statement on ADR, the EEOC requested comments from the public about the use of alternative dispute resolution in “1) formal and informal adjudications, 2) rulemakings, 3) enforcement actions, 4) contract administration, and 5) litigation brought by or against the Commission.”¹²¹ The comments generally reflect support

115. *See id.* at 6.

116. *See id.* at 5. This raises a question about the value of mediation which will be addressed later in this Article.

117. Information regarding these training sessions was obtained from representatives of the EEOC, Department of Justice, Disability Rights Section, and the Disability Rights Education and Defense Fund (DREDF). *See also* American Bar Association Commission on Mental and Physical Disability Law and Commission on Legal Problems of the Elderly, *Targeting Disability Needs: A Guide to the ADA Dispute Resolution Programs* 9 (published by The American Association of Retired Persons for the National Institute for Dispute Resolution Dec. 1994) (hereinafter *Targeting Disability Needs*) (describing training); Equal Employment Opportunity Commission, *Request for Comments on the Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures*, 58 Fed. Reg. 39023 (July 21, 1993) (describing training).

118. Information from Peggy Mastroianni, ADA Policy Director, EEOC.

119. The Community Board Program, *Proposal to Demonstrate the Application of Mediation to Achieve Voluntary Compliance with the Americans with Disabilities Act: A National Model* (submitted to the Department of Justice, Civil Rights Division May 7, 1993) (hereinafter *Community Board Proposal*).

120. Press Releases from the Department of Justice on the Fourth Anniversary of the ADA detailing voluntary compliance resulting, in part, from ADA training conducted by the Department of Justice and the EEOC.

121. *EEOC Request for Comments on Alternative Dispute Resolution*, 1993 Daily Lab. Rep. (BNA) 134 d27 (July 15, 1993).

for ADR, although many expressed reservations with respect to particular uses of ADR or concerns relating to the way in which ADR might be implemented.¹²² While the EEOC staff considered ADR informally in addition to soliciting comments from the public, the long delay in appointing a Chair for the Commission and other commission members postponed specific consideration and implementation of ADR projects.¹²³

In December 1994, the recently appointed Chair of the Commission, Gilbert Casellas, announced formation of an ADR Task Force to study and recommend to the Commission appropriate uses of ADR.¹²⁴ The task force report led to adoption of four motions relating to ADR on April 25, 1995.¹²⁵ 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) use of neutral facilitators.¹²⁶ The Second Motion directed the Office of Legal Counsel to draft a proposed policy statement on ADR by May 30, 1995 for consideration by the Commission.¹²⁷ The policy

122. See, e.g., Comments on Alternative Dispute Resolution, Letter from Richard T. Seymour to Frances M. Hart, Lawyers' Committee for Civil Rights Under the Law (Sept. 20, 1993) (supporting ADR, but urging that some investigation precede use of ADR); Letter from Jeffrey A. Norris to Frances M. Hart, Equal Opportunity Employment Advisory Council (Sept. 16, 1993) (supporting ADR, but criticizing the EEOC's position that internal ADR procedures must be continued after an employee files an EEOC charge); Women Employed Institute, *Comments in Response to EEOC Request for Comment on Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures* (Sept. 20, 1993) (supporting ADR, while urging training for EEOC staff in ADR and urging renewal of initiation of large class action lawsuits with savings resulting from ADR) (all comments on file with the author).

123. Information from representatives of the Equal Employment Opportunity Commission, Conference Call with Nicholas Inzeo, Associate Legal Counsel for Legal Services, J.C. Thurmond, and Sharon Rennert (Aug. 19, 1994). See *EEOC Chair to Address Agency Problems*, 147 Lab. Rel. Rep. (BNA) 404, 405 (Nov. 28, 1994) (Commission expected to consider expansion of ADR); *EEOC Said to Have to Expand Role of ADR*, 147 Lab. Rel. Rep. (BNA) 214, 215 (Oct. 17, 1994) (EEOC Commissioner Silberman supports expanded ADR); *Casellas Approved As Chairman of EEOC*, 147 Lab. Rel. Rep. (BNA) 174, 175 (Oct. 10, 1994) (Clinton administration took almost two years to make appointments to EEOC).

124. *Report and Recommendations of the Commission on the Future of Worker-Management Relations*, reprinted in 1995 Daily Lab. Rep. (BNA) 6, d55 (Jan. 10, 1995) (hereinafter *Dunlop Commission Final Report*).

125. Kevin P. McGowan, *EEOC Votes to Offer Voluntary Mediation as Option in Job Discrimination Claims*, 1995 Daily Lab. Rep. (BNA) 80 d3 (Apr. 26, 1995).

126. *Motions Proposed by the ADR Task Force*, Commission Meeting of the Task Force on Alternative Dispute Resolution, Motion 1 (Apr. 25, 1995) (hereinafter *Motions*).

127. *Id.*, Motion 1.

statement should reflect 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 disputes."¹²⁸ When the policy statement is approved, the Chair will request proposals from EEOC district offices desiring to participate in the ADR program and will select proposals for implementation, giving priority to mediation proposals.¹²⁹ The target date for implementation is fiscal year 1996.¹³⁰ The contemplated ADR program applies broadly to cases within the EEOC's jurisdiction, including ADA cases, and includes monitoring and enforcement by the EEOC.¹³¹

The fourth motion directed the Legal Counsel to prepare and submit a proposed policy statement supporting employer efforts to develop voluntary internal ADR programs, reiterating the Commission's opposition to conditioning employment on agreement to mandatory binding arbitration of discrimination disputes, and confirming the Commission's determination to accept and process charges regardless of any employer-sponsored ADR program.¹³²

Chairman Casellas has issued various directives pursuant to the Commission's action.¹³³ He directed consultation with "internal and external stakeholders" for assistance in developing and implementing the programs.¹³⁴ Casellas requested that District Directors contact dispute resolutions organizations, bar associations, colleges and universities, and other organizations to determine the availability and cost of qualified mediators, and particularly whether pro bono services are available.¹³⁵ He solicited both plans for training agency personnel and outside mediators, and development of educational materials about ADR for agency personnel, charging parties, respondents and the general public.¹³⁶ Casellas is also exploring the feasibility of hiring ADR coordinators in each district office.¹³⁷ Thus, the EEOC is now moving rapidly to institute an ADR program.

128. *Id.*, Motion 2.

129. McGowan, *supra* note 125, Motion 3.

130. *See Motions, supra* note 126, Motion 3.

131. *Id.*, Motion 4.

132. *See McGowan, supra* note 125.

133. *Motions on Alternative Dispute Resolution Adopted by EEOC April 25, 1995*, 1995 Daily Lab. Rep. (BNA) 80 d28 (Apr. 26, 1995).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

In addition to the ADR recommendations, the EEOC adopted other recommendations to improve the charge processing system in April 1995.¹³⁸ These recommendations include adopting a more flexible approach to charge processing, which prioritizes charges based on the level of investigation necessary; developing a National Enforcement Plan that identifies priority issues and guides enforcement; eliminating detailed "no cause" letters when discrimination is not found; encouraging settlement at all stages of the process; and delegating litigation decisions in individual disparate treatment cases under Title VII and the ADEA to the General Counsel.¹³⁹ Like the ADR procedures, these changes are designed to speed case processing and reduce the existing backlog.

B. Titles II and III

1. Department of Justice

The Department of Justice, which has only seventy-five staff members to handle its ADA enforcement responsibilities under Titles I, II and III,¹⁴⁰ also is overwhelmed with cases.¹⁴¹ As of September 1994, 2,902 complaints alleging violations of Title II had been filed, and for 1,326 of the complaints, the Department of Justice was the investigating agency.¹⁴² For the same time period, 2,796 complaints alleging violations of Title III had been filed, and the Department of Justice opened an investigation in 1,634 of those.¹⁴³ The Department of Justice has resolved 100 Title II

138. Equal Employment Opportunity Commission, *EEOC Commissioners Adopt Task Force Recommendations to Strengthen and Streamline Agency Charge Processing Systems*, News Release, (Apr. 21, 1995).

139. *Id.*

140. Meeting with representatives of the Department of Justice, Public Access Section (Mar. 28, 1994). President Clinton's 1995 budget provides for twenty-one additional staff members. Illustrative of the scope of Justice's responsibilities is that there are approximately 30,000 government bodies covered by Title II alone. Effective March 1, 1995, the ADA functions of the Department of Justice were reorganized and centralized into the Disability Rights Section. Letter from John Wodatch, Chief, Public Access Section, Civil Rights Division, Department of Justice (Feb. 22, 1995); Telephone conversation with Eve Hill, Disability Rights Section, Department of Justice (Mar. 9, 1995).

141. As of April 1994, about 4000 complaints had been filed with the Department of Justice. The MacNeil/Lehrer NewsHour, Transcript #4899 (Apr. 4, 1994), Interview with John Wodatch (available on Lexis). Fifteen lawsuits had been filed and 200 investigations had concluded with voluntary settlements as of that time. *Id.*

142. Information from the Department of Justice, Public Access Section, Meeting (Sept. 27, 1994).

143. *Id.*

cases informally, 22 cases through formal settlement agreements, and issued 33 letters of findings, four of which found noncompliance.¹⁴⁴ As of September, 1994, the department had completed 300 investigations of Title III cases and 177 cases were resolved with increased accessibility.¹⁴⁵ BNA's Americans with Disabilities Act Cases reported 37 judicial decisions in Title II cases and 25 in Title III cases through mid-1994.¹⁴⁶

While there is no specific time period for case processing under Titles II and III, individuals are not required to exhaust administrative remedies under these titles.¹⁴⁷ Thus, any delays in investigation due to the number of cases do not preclude a complaining party from filing suit. Nevertheless, when parties wait long periods of time for agency action, even where not required to do so, the effectiveness of the statute is reduced. Respondents are not relieved of the threat of litigation where cases are not meritorious, nor is rapid resolution of meritorious cases accomplished. Furthermore individuals who do not have the resources to undertake private actions are injured by the delay.

With respect to ADR, the Department of Justice, like the EEOC, attempts to settle cases informally through negotiation. In addition, the Department of Justice has funded a pilot mediation project through a grant to the Community Board Program in San Francisco.¹⁴⁸ The project anticipates mediation of 200 Title III cases utilizing private mediators trained in ADA mediation in five targeted cities.¹⁴⁹ The Community Board Program will perform an analysis to determine whether mediation is an appropriate tool for resolution of cases under Title III.¹⁵⁰

144. Telephone Conversation with Eve Hill, Department of Justice, Public Access Section (Sept. 28, 1994).

145. *Id.* The resolutions include formal and informal settlements, consent decrees, and litigation.

146. *ADA: Americans with Disabilities Act of 1990 Special Report*, 146 Lab. Rel. Rep. (BNA) No. 14, at 10 (Aug. 1, 1994).

147. H.R. REP. NO. 485, *supra* note 56 at 98 (exhaustion not required under Title II); 42 U.S.C. § 12188 (specifying enforcement and remedies under Title III); 28 C.F.R. § 36.501 (1995) (authorizing private suits under Title III).

148. *See Community Board Proposal*, *supra* note 119, at 4, 6; *Targeting Disability Needs*, *supra* note 117, at 42.

149. *See Community Board Proposal*, *supra* note 119, at 2, 3, 4; *Targeting Disability Needs*, *supra* note 117, at 42. Cases are referred to the mediators by the Department of Justice upon agreement of the parties.

150. *See Community Board Proposal*, *supra* note 119, at 7-8. The analysis 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 information supplied by Department of Justice personnel, mediation program directors, and mediation participants.

Interim analysis of the project revealed some difficulties in execution.¹⁵¹ Referrals of cases are limited by the geographic area in which the project is taking place. As a result of the geographic limit and the failure of the parties in many of the referred cases to agree to mediation, few meditations have occurred. The Department's initial practice was to close the cases referred to mediation, indicating to the parties that the Department would take no further action on the case.¹⁵² This practice, which since has been changed, may have contributed to the reluctance of respondents to agree to mediation by appearing to remove the threat of government action.¹⁵³ The contractor has been unable to educate potential parties about the benefits of mediation because of limitations in the Privacy Act on releasing their identities without agreement.

The Department of Justice recently awarded an additional grant for an ADA education and pilot project for professional mediators.¹⁵⁴ The goal of the grant 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 the project can be effectively replicated in other areas of the country.¹⁵⁵

The Department of Justice decided to limit mediation under the grant to Title III cases because it would be easier to evaluate a limited pilot. In addition, Title II cases frequently are more complex, and often more expensive because they involve an entire government entity as the defendant. Meeting with Department of Justice, Public Access Section (Sept. 27, 1994); Telephone conversation with Eve Hill, Attorney, Department of Justice, Disability Rights Section (March 9, 1995).

151. Data regarding the initial results of the mediation project were received from the Department of Justice, Public Access Section, Meeting (Sept. 27, 1994).

152. Meeting with Department of Justice, Public Access, Disability Rights Section (Sept. 27, 1994). The Department did retain the ability to open the case for investigation if mediation failed. Letter from John L. Wodatch (Feb. 22, 1995) (on file with author).

153. As a result of interim analysis of the program, the Department has decided to keep cases open pending mediation and evaluate whether to pursue an investigation after mediation has been completed. Letter from John L. Wodatch (Feb. 22, 1995). Some complainants are also reluctant to mediate, preferring to have the Department handle the case rather than becoming extensively involved in the process. Meeting with Department of Justice, Public Access Section (Sept. 27, 1994).

154. See 59 Fed. Reg. 29160, 29165 (June 3, 1994) (request for proposal); Department of Justice, *Justice Department Awards 10 Grants to Promote the Americans with Disabilities Act 3* (Oct. 5, 1994) (hereinafter *Press Release*) (press release announcing the grant award to the Key Bridge Foundation).

155. 59 Fed. Reg. at 29165. The Department of Justice has not ruled out mediation of Title II cases under this grant, and may refer some Title II cases to mediation. Telephone

The project will train 90 professional mediators on the ADA and develop a procedure for referring ADA complaints to the mediators.¹⁵⁶ In addition, a consumer guide to mediation services and a mediator's guide to mediating ADA complaints will be produced.¹⁵⁷ The grantee anticipates mediating 650 complaints.¹⁵⁸

The Civil Rights Division of the Department of Justice has been reorganized since the appointment of a new Assistant Attorney General for Civil Rights.¹⁵⁹ Further plans regarding ADA enforcement and the use of ADR await completion of a strategic plan for the Division.¹⁶⁰

2. Department of Transportation

In addition to issuing regulations regarding transportation,¹⁶¹ the Department of Transportation handles Title II complaints involving transportation.¹⁶² Complaints regarding transit agencies are handled by the Federal Transit Administration (FTA), while the Federal Highway Administration (FHWA) handles complaints relating to roads and highways.¹⁶³ The agency has limited staff to handle ADA complaints.¹⁶⁴ There are only five professional employees involved in compliance

conversation with Department of Justice attorney Eve Hill (Mar. 9, 1995).

156. *Press Release*, *supra* note 154, at 3.

157. *Id.*

158. *Id.*

159. Information from representatives of the Department of Justice, Public Access Section, Meeting (Sept. 27, 1994); Letter from John L. Wodatch (Feb. 22, 1995).

160. *Id.* On April 6, 1995, Attorney General Janet Reno signed Order OBD 1160, to promote broader use of ADR by the Department of Justice. *Order OBD 1160.1* (Apr. 6, 1995) at 1. The order sets a goal of September 11, 1995 for completing dissemination of ADR guidance. *Id.* at 2. In addition, the order requires ADR training for civil attorneys and the creation of the position of Senior Counsel for Alternative Dispute Resolution. *Id.* at 1. Thus, like the EEOC, the Department of Justice appears to be moving toward greater use of ADR.

161. In issuing the ADA regulations, *see supra* note 67, 78. The Department of Transportation did not use negotiated rulemaking, but did involve interested groups in the rulemaking process through an advisory commission. *Federal Transit Administration*, Telephone Interview with Susan Schrueth, Acting Director Office of Civil Rights, Sept. 22, 1994 (hereinafter Information from the FTA).

162. 28 C.F.R. § 35.190(b)(8) (1995).

163. Information regarding the complaint procedures was received from the Federal Transit Administration and Federal Highway Administration respectively. *See also* 28 C.F.R. §§ 35.170-35.178 (1995).

164. The Federal Transit Administration and the Federal Highway Administration are the two agencies within the Department of Transportation with significant ADA responsibilities.

activities at the FTA.¹⁶⁵ The FHWA received no additional staff to handle ADA responsibilities and there are no employees working exclusively on ADA matters.¹⁶⁶ Since the effective date of the statute, the FTA has received about 380 complaints under Title II.¹⁶⁷ About 290 complaints are still pending.¹⁶⁸ The FHWA has received about 180 complaints, the investigations of which are currently pending in the field offices.¹⁶⁹

The FTA investigates complaints received and notifies the complainant whether it finds a violation of the statute.¹⁷⁰ If a violation is found, the FTA requires the transit agency to establish a remedial plan. If the agency fails to do so, the FTA can refer the case to Justice for litigation or, where the agency is a recipient of federal funds, seek to terminate a hearing from an ALJ funding under section 504 of the Rehabilitation Act.¹⁷¹

In its compliance process, the FTA attempts to resolve disputes informally.¹⁷² The FTA has established a specific informal compliance process for complementary paratransit service and key station accessibility.¹⁷³ If the FTA has reasonable cause to believe that a transit agency is not in compliance with these portions of the ADA, it will attempt to negotiate a voluntary compliance agreement with the agency, which will establish a plan for compliance.¹⁷⁴ The FTA then monitors compliance with the plan until compliance with the statute is achieved, and for at least two years thereafter.¹⁷⁵

165. Information from the FTA, *supra* note 161.

166. Information from Morris, *infra* note 176.

167. Information from the FTA, *supra* note 161.

168. *Id.* (as of September 1994).

169. Information from Morris, *infra* note 176 as of September 1994. This number does not include complaints relating to driver licensing which also come under the jurisdiction of the Federal Highway Administration. *Id.*

170. The FTA has taken the position that an isolated incident of noncompliance with the regulations does not constitute discrimination. See 49 C.F.R. Part 37, App. D. This position has resulted in some dissatisfaction among complainants. Information from the FTA.

171. See 49 C.F.R. §§ 27.125, 27.127 (1995).

172. Information from the FTA, *supra* note 161. When the FTA performs an on-site review which is triggered by multiple complaints at one transit property, it will meet with disability groups as well as the transit officials and attempt to achieve informal resolution of compliance disputes.

173. See Federal Transit Administration, Office of Civil Rights, Informal Compliance Process.

174. *Id.*

175. *Id.*

The FHWA handles complaints relating to roads and highways.¹⁷⁶ The complaints are forwarded to the field offices for investigation, where warranted. Complaints against subrecipients¹⁷⁷ are referred to recipients for investigation since recipients are required to have a complaint procedure by Title VI of the Civil Rights Act of 1964.¹⁷⁸ Where possible, complaints will be resolved informally by agreement with the entity charged with a violation.¹⁷⁹ Where a recipient or subrecipient of federal funds is involved, the FHWA has the ultimate sanction of funding termination for noncompliance.¹⁸⁰ Prior to taking such action, however, the FHWA must attempt to resolve the complaint through negotiation.¹⁸¹ Complaints against nonrecipients which are not resolved must be referred to the Department of Justice for litigation where warranted.¹⁸² The FHWA anticipates that most valid complaints under the ADA will be resolved informally, like complaints under other civil rights statutes have been resolved.¹⁸³ The FHWA has provided training and information to state and local highway administrations and Indian tribal governments regarding the ADA, and anticipates additional training, including information about ADR.¹⁸⁴

C. Title IV

The Federal Communications Commission (FCC) received only six complaints alleging violations of the ADA telecommunications provisions as of September 1, 1994.¹⁸⁵ One complaint, which involves a petition for

176. Telephone Interview with Edward W. Morris, Jr., Director, Office of Civil Rights, FHWA (Oct. 4, 1994) (hereinafter, Information from Morris).

177. Recipients refers to entities that receive federal funding directly. Subrecipients receive such funding indirectly through a recipient. See 49 C.F.R. § 27.5 (1995)

178. Information from Morris, *supra* note 176.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Information from Morris, *supra* note 176.

184. *Id.*

185. Except where otherwise noted, all information regarding FCC complaints was provided by Lynda Dubroof, Senior Staff Attorney, Federal Communications Commission, Common Carrier Bureau. (hereinafter Dubroof). Four involved intrastate communication and therefore, were forwarded to the appropriate state for resolution. *Id.* All were resolved within 180 days. *Id.* One complaint involved interstate communication and that was resolved by final order of the Commission. *Id.*

decertification¹⁸⁶ of an entire state program, is still pending before the agency, while others have been resolved.¹⁸⁷ The FCC has not yet gathered data regarding complaints filed directly with the states and resolved by the states, but plans to do so in the future.¹⁸⁸ The FCC is open to using ADR procedures in ADA matters, but has not yet done so.¹⁸⁹ The Commission has adopted an "Initial Policy Statement and Order" encouraging the use of alternative dispute resolution¹⁹⁰ and has used negotiated rulemaking with some success in other areas.¹⁹¹ A staff member in the agency's General Counsel's office is trained in ADR and provides training for other FCC personnel as needed.¹⁹²

D. Summary of Existing Dispute Resolution

Congress clearly contemplated judicial litigation as the primary enforcement mechanism under the ADA.¹⁹³ In the more than two years since the effective date of the statute, few cases have been litigated relative to the number of complaints filed, however.¹⁹⁴ There are several explanations for this result. Under Title I exhaustion of administrative remedies is required and, given the EEOC's backlog, most complaints remain in the investigatory stage. While a complainant can request a right to sue letter before completion of the investigation, many complainants clearly have not done so, either because they do not know this possibility exists or because they do not have the legal representation and resources to file suit. Many Title II and III complainants also are apparently waiting for the investigating agency to act.¹⁹⁵ A further explanation for the limited number of litigated cases may be the crowded trial dockets of the district courts, delaying decisions in those cases that have been filed. In addition, the

186. See 47 U.S.C. § 225(f)(4) (describing procedures for revocation and suspension of certification).

187. Dubroof, *supra* note 185.

188. *Id.*

189. *Id.*

190. See 47 C.F.R. § 1.18 (1994).

191. Dubroof, *supra* note 185.

192. *Id.*

193. See 42 U.S.C. §§ 12117 (Supp. V 1993) (Title I enforcement provisions), 12133 (Supp. V 1993) (Title II enforcement provisions), 12188 (Supp. V 1993) (Title III enforcement provisions).

194. See *supra* notes 96-98, 141-46 and accompanying text.

195. Unlike the first three titles of the statute, Title IV has not generated a large number of complaints and those filed have been resolved in a timely manner.

enforcement agencies do not have the resources to litigate more than a small number of ADA cases.¹⁹⁶

Congress certainly contemplated a high level of voluntary compliance resulting from the litigation of a small number of cases by the agencies.¹⁹⁷ More time for assessment is necessary before determining whether that result will be achieved. Some informal resolutions are occurring as contemplated by the statute, but again, the number is not large in comparison to the number of complaints filed.

With respect to the alternative dispute resolution methods encouraged by the statute, their use thus far is limited. All agencies appear to be using negotiations to settle cases and achieve compliance. Three pilot mediation projects have been undertaken, one completed, one in process, and a third just beginning. Further use of alternative dispute resolution may occur, but consideration and implementation have been delayed by changes and contemplated changes at the enforcement agencies.

Evaluation of the effectiveness of dispute resolution under the statute must be made in light of these existing enforcement efforts.

IV. ALTERNATIVES TO EXISTING DISPUTE RESOLUTION METHODS

In evaluating alternatives to existing dispute resolution methods, it is useful to identify some elements of effective dispute resolution. With the exception of Title IV cases, a primary problem with existing dispute resolution mechanisms is the large backlog of cases at the investigative stage. Any change in dispute resolution procedures should have, as one of its goals, a reduction in the investigative delays. Another goal should be effective enforcement of the statute.¹⁹⁸ In addition, a third goal is quicker and more efficient resolution of disputes, which includes cost effectiveness and preferably actual reduction in costs for the government and the parties.

196. Under Title III, the Attorney General is directed to litigate cases involving a pattern and practice of discrimination or issues of general public importance. 42 U.S.C. § 12188(b)(1)(B) (1988 & Supp. V 1993).

197. The technical assistance provisions of the statute evidence Congress' belief in voluntary compliance. See 42 U.S.C. § 12206 (1988 & Supp. V 1993); S. REP. NO. 116, *supra* note 1, at 43. (requiring agencies to provide technical assistance and indicating an expectation that EEOC will provide training and other technical assistance to employers seeking to comply with statute).

198. See *infra* notes 256-59 and accompanying text (discussing values encompassed in goal of effective enforcement, including justice, statutory intent, procedural fairness, and finality and enforceability of result).

While no one change may achieve all of these goals, any proposed change in dispute resolution under the statute should be tested against them.¹⁹⁹

In enacting the ADA, Congress decided to rely on both private and public enforcement. While the administrative agencies are authorized and expected to file enforcement actions in some cases,²⁰⁰ private enforcement was clearly contemplated as well. By limiting appropriations for ADA enforcement, Congress has placed much of the enforcement burden on individuals with disabilities. A litigation-based approach is costly for an individual, particularly when the potential for monetary recovery is limited.²⁰¹ Where the potential recovery is not large, many private

199. While the focus of this report is the administrative process, resolution of disputes in the administrative process will assist in reducing judicial backlogs by reducing the number of cases filed in court. In recent years, employment discrimination cases have increased at a rate several times faster than the remainder of the civil caseload in the federal courts. See John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991); *Dunlop Commission Fact Finding Report*, *supra* note 99, at 103-04, n.29, Exhibits IV-3, IV-4. These figures predate the ADA which added to the jurisdiction of the federal courts. In 1994, the number of suits brought by the EEOC under the ADA increased significantly. See *EEOC Attorneys Filed 373 Lawsuits in 1994*, 147 Lab. Rel. Rep. (BNA) 538, 539 (Dec. 26, 1994). Reducing the caseload of the federal courts is the goal of the Long Range Planning Committee of the Judicial Conference of the United States, which has recommended, *inter alia*, limiting the right of employment discrimination plaintiffs to file suit. See *Major Changes in Federal Court System Are Urged*, 147 Lab. Rel. Rep. (BNA) 507, 508 (Dec. 19, 1994). The ADR proposals *infra* address this problem indirectly, without limiting plaintiffs' right to a federal forum for redress of discrimination complaints.

200. With respect to entities that receive federal funds and are thereby subject to section 504 of the Rehabilitation Act as well as the ADA, in addition to filing suit the government may enforce the statute by suspending or terminating funding or threatening to do so. See 29 U.S.C. § 794a (adopting remedies of 42 U.S.C. § 2000d-1 which include withdrawal of funding). Most state and local governments and transit agencies fall into this category.

201. Under Title III, damages are not available in private actions, and punitive damages are not available at all. 42 U.S.C. § 12188. Compensatory and punitive damages, where appropriate, are available for intentional discrimination under Title I, along with back pay. 42 U.S.C. § 12117; 42 U.S.C. § 1981a(a)(2). In reasonable accommodation cases, however, where the employer makes a good faith effort to find an accommodation, damages are not available. 42 U.S.C. § 1981a(a)(3). It is not clear whether compensatory damages are available in actions under Title II. See *Coleman v. Zatechka*, 824 F. Supp. 1360, 1373-74 n.29 (D. Neb. 1993) (noting confusion among circuit courts regarding availability of damages under section 504 but finding based on section 504 precedent in 8th Circuit that such damages are available in Title II action). Title II remedies are based on remedies under section 504 of the Rehabilitation Act and courts have disagreed on whether damages are available under section 504. *Id.* See also *Smith v. Robinson*, 468 U.S. 992, 1020 n.24 (1984) (recognizing confusion in circuit courts about the availability of damages under section 504); *Eastman v. Virginia Polytechnic Institute and State University*, 939 F.2d 204,

attorneys are reluctant to accept cases for litigation.²⁰² Accordingly, numerous individuals may be relying on the government agencies for litigation assistance which will not be forthcoming. These facts raise the question of whether there is a better enforcement model. In considering this question, any proposed modification must consider the fact that enforcement for Titles II and III is patterned after, and in the Titles I and IV is a part of, existing enforcement models. Accordingly, modification may impact other statutory enforcement efforts, reduce efficiency resulting from common enforcement methods, or treat individuals with disabilities differently from other civil rights plaintiffs.

A. *Administrative Litigation*

1. *The Fair Housing Act System*

One possible change in ADA dispute resolution would be the creation of an enforcement mechanism using internal administrative litigation, similar to the current system for enforcement of the Fair Housing Act (FHA).²⁰³ As a result of 1988 amendments, spurred by perceived ineffectiveness of the prior enforcement system, the FHA contains a comprehensive enforcement mechanism which gives the parties the option of administrative or judicial litigation.²⁰⁴ Complaints filed are investigated by the Secretary of Housing and Urban Development (HUD), who is required to engage in conciliation efforts.²⁰⁵ The Secretary determines whether there is reasonable cause to believe that a violation of the Act has occurred, issuing a charge of discrimination in cases of reasonable cause and dismissing the complaint where no reasonable cause is found. After a formal charge of

207-9 (4th Cir. 1991) (holding section 504 does not permit award of damages).

202. See Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 467 (1992) (private attorneys reluctant to take even strong cases on contingency basis because of high litigation costs unless potential damages are significant).

203. 42 U.S.C. §§ 3610, 3612-3614 (1994). The National Labor Relations Act provides a similar enforcement mechanism, but without the election option available in the Fair Housing Act. See 29 U.S.C. §§ 153, 154, 160 (1994).

204. See Leland Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 10, 11 (Administrative Conference of the United States 1992), reprinted in 7 ADMIN. L.J. 59 (1993). Information about the Fair Housing Act amendments was taken from the Ware study unless otherwise noted.

205. See *id.* at 15. The amendments continue to provide a role for handling of complaints by state and local agencies with rights, procedures and remedies that are substantially equivalent to those under the Fair Housing Act. *Id.*

discrimination is issued, either party may elect to have the case adjudicated in federal district court by the Attorney General. If no such election is made, the case proceeds to hearing before an Administrative Law Judge (ALJ) pursuant to the requirements of the Administrative Procedure Act.²⁰⁶

The parties to the administrative hearing are HUD, represented by the Office of General Counsel, and the respondent.²⁰⁷ The statute requires that the proceedings be expeditious and that both discovery and the hearing process be inexpensive.²⁰⁸ The proceedings are less formal than a trial in federal district court. Decisions of the ALJ are directly reviewable in the Court of Appeals using the substantial evidence standard, and are enforceable in the Court of Appeals as well.²⁰⁹ Remedies available include compensatory damages, injunctive and other equitable relief, and civil penalties.²¹⁰

The Attorney General retains the authority to bring civil actions in pattern and practice cases and cases which raise general issues of public importance, authority parallel to that in Title III ADA cases. Furthermore, the amendments do not affect an individual's private right of action, which can be filed in federal district court without exhausting administrative remedies.²¹¹

Evaluations of the enforcement procedures are mixed, although the consensus seems to be that the procedures are an improvement over preexisting enforcement efforts.²¹² A primary concern with the FHA

206. *Id.* at 17.

207. The complaining party may intervene and be represented by counsel.

208. Available discovery methods include interrogatories, depositions, requests for production of documents and requests for admissions, and sanctions are provided for failure to cooperate in discovery. *See Ware, supra* note 204. Discovery is conducted on an expedited basis. *Id.*

209. *Id.* at 18. In addition, the Secretary has discretion to review the ALJ's decision, although the applicable regulations indicate that such review will be undertaken in extraordinary cases only. *Id.*

210. *Id.*

211. *See Ware, supra* note 204, at 19. Punitive damages and attorneys fees and costs are available in private actions. *Id.* A private action cannot be initiated if an administrative proceeding is pending, however. *Id.*

212. *See Ware, supra* note 204, at 30-31 (amendments improved enforcement but HUD needs to encourage more use of administrative adjudication to increase enforcement); United States Commission on Civil Rights, *The Fair Housing Amendments Act of 1988: The Enforcement Report*, 221-25 (1994) (hereinafter *CRC Enforcement Report*) (finding administrative adjudication reasonably effective but recommending some enforcement changes); JOHN P. RELMAN, FEDERAL FAIR HOUSING ENFORCEMENT UNDER PRESIDENT BUSH: AN ASSESSMENT AT MID-TERM AND RECOMMENDATIONS FOR THE FUTURE *in* LOST

process is the backlog of complaints at the investigation stage.²¹³ While there is a time deadline for investigation of complaints, the time deadline frequently is not met.²¹⁴ The FHA caseload is about 6,000 per year,²¹⁵ much smaller than the EEOC's caseload in Title I cases although larger than that under Titles II and III. The percentage of cause findings is also small, only 3% in 1992, while the percentage of no cause findings is 20%.²¹⁶

In about 60% of FHA cause cases, at least one party elects litigation in the federal district court.²¹⁷ Desire for a jury trial, the availability of punitive damages in court, or the attorneys' greater familiarity with the

OPPORTUNITIES: THE CIVIL RIGHTS RECORD OF THE BUSH ADMINISTRATION MID-TERM 105-06, 117-18 (Susan M. Liss & William L. Taylor, eds., 1991) (hereinafter RELMAN I) (although significant problems remain, enforcement has improved under amended procedures); JOHN P. RELMAN, FEDERAL FAIR HOUSING ENFORCEMENT: THE BUSH RECORD AND RECOMMENDATIONS FOR THE NEW ADMINISTRATION *in* NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS 92-94 (Susan M. Liss & William L. Taylor eds., 1993) (hereinafter RELMAN II) (amendments started more effective enforcement but HUD has not processed and prosecuted complaints effectively in the last two years of the Bush administration); *Oversight Hearing*, *supra* note 99, at 71 (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs) (HUD has had limited success in enforcement but the amendments, including administrative litigation are still a major improvement over prior efforts); Telephone Interview with Judge Alan Heifetz, Chief Administrative Law Judge, Department of Housing and Urban Development (July 21, 1994) [hereinafter Information from Judge Heifetz] (Judge Heifetz' analysis is reported *infra*) (enforcement has improved under amendments).

213. See *Ware*, *supra* note 204, at 28-30 (detailing extensive investigatory delays); RELMAN I, *supra* note 212, at 108 (noting continuing inability to complete timely investigations resulting in large backlog); RELMAN II, *supra* note 212, at 88; *CRC Enforcement Report*, *supra* note 212, at 223 (noting large backlogs in many HUD offices).

214. *Oversight Hearing*, *supra* note 99, at 71-3 (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs) RELMAN II, *supra* note 212, at 88 (in 1990, HUD failed to meet its deadline in 64% of its cases); *Ware*, *supra* note 204, at 28 (in most cases investigation deadlines are not met).

215. Information from Judge Heifetz, *supra* note 212 (from 1989-1994 over 30,000 cases filed with HUD); RELMAN II, *supra* note 212, at 88 (4,457 cases in 1990).

216. *Oversight Hearing*, *supra* note 99, at 76 (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs) A large number of cases have been administratively closed, leading to criticism of HUD's enforcement. See RELMAN II, *supra* note 212, at 88 (between March 1989 and July 1992 HUD administratively closed 44% of its cases). Administrative closure occurs where the complaint is withdrawn, the complainant cannot be located, or HUD has no jurisdiction. *Id.* The EEOC has been similarly criticized. See *Oversight Hearing*, *supra* note 99, at 4 (Testimony of Alfred W. Blumrosen) (criticizing the EEOC for the large number of administrative closures).

217. See *CRC Enforcement Report*, *supra* note 212 at 57 (through November 1993, parties in 309 of 514 cases elected a judicial forum).

district courts are possible explanations.²¹⁸ Cases tried before the ALJs are resolved relatively quickly, however, with seven to seven and one half months from charge to ALJ decision.²¹⁹ While punitive damages are available in district court and some large awards have been granted by the courts, damage awards of the ALJs are relatively comparable to those in Department of Justice actions in federal courts.²²⁰ Larger damage awards have been obtained in private actions than in Department of Justice actions in the federal courts or in ALJ decisions.²²¹

2. *Analysis of Administrative Litigation*

Use of ALJs provides certain advantages. A corps of ALJs dedicated to ADA cases has the potential to develop a level of expertise in the subject matter that federal judges may be unable to develop because of the wide range of cases that are within their jurisdiction.²²² A consistent interpre-

218. Information from Judge Heifetz, *supra* note 212. There has been no systematic study of the reasons for this election. See *Enforcement Report*, *supra* note 212, at 232 (recommending such a study). This election has placed a heavy burden on limited resources of the Housing Section of the Justice Department, which has been forced to obtain assistance from local U. S. attorneys. See *Oversight Hearing*, *supra* note 99, at 80 (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs); RELMAN I, *supra* note 212, at 97 (number of election cases has increased reducing Justice's ability to litigate pattern and practice case).

219. Information from Judge Heifetz, *supra* note 212. See *Oversight Hearing*, *supra* note 99, at 80 (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs) (ALJ adjudication has provided speedy relief); RELMAN II, *supra* note 212, at 88 (cases have been tried and decided within the statutory time limits).

220. *Oversight Hearing*, *supra* note 99, at 77 (Testimony of John P. Relman, Washington Lawyers' Committee for Civil Rights and Urban Affairs) (although awards not comparable in early years of the ALJ system, the ALJ awards have risen steadily in recent years); *CRC Enforcement Report*, *supra* note 212, at 61-64 (noting the difficulty of making such comparisons because of the number of variables but concluding generally that damages in the two forums are comparable excluding punitive damages). Information from Judge Heifetz, *supra* note 212 (damage awards relatively comparable).

221. See RELMAN II, *supra* note 212, at 88, 91 (ALJ damage awards are low compared to private damage awards with the exception of two cases decided by Judge Heifetz and although damage awards in cases tried in federal court by Justice are improving, they compare unfavorably to those in privately litigated cases).

222. Information from Judge Heifetz, *supra* note 212. The advantage of expertise might be offset by the cost to establish and administer the ALJ system and concerns about impartiality when ALJs are hearing cases that arise from the agency in which they work. See Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 274 (1981) (recommending a pilot program to test the idea of unified group of ALJs hearing various federal administrative cases) (hereinafter Lubbers, *Unified Corps*). Under the ADA, if the ALJs heard cases under various titles, the concern

tive body of law might develop more quickly than in the diverse federal courts.²²³ In a system that provides for optional administrative litigation, however, two bodies of law are developing, one in the courts and one in the administrative body, and they may or may not be consistent. Moreover, the administrative determinations may have less precedential import,²²⁴ hindering the goal of development of the law, which is particularly important for a relatively new statute.

If the experience of HUD ALJs is a guide, speedier resolution might result from an ALJ system.²²⁵ HUD ALJs have successfully used the

about agency bias might be minimized, but a structure would have to be created to employ ALJs handling cases from various agencies. Such a system has been utilized, pursuant to recommendation of the Administrative Conference of the United States, by the Federal Bank Regulatory Agencies. See Recommendation 87-12: *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, in Administrative Conference of the United States, Recommendations and Reports, Vol. 1, at 70 (1987); Michael P. Malloy, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, in Administrative Conference of the United States, Recommendations and Reports, Vol. 2, 1216 (1987). For further discussion regarding use of common ALJs to decide cases from various agencies, see Lubbers, *Unified Corps*, *supra* (proposing a pilot program to test the use of a unified corps of ALJs); Jeffrey S. Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. BAR NEWS & J. 383 (1984) (discussing the proposal for a unified corps of ALJs in the context of the history and practice of administrative adjudication); Victor W. Palmer & Edwin S. Bernstein, *Establishing Federal Administrative Law Judges as An Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673 (1984) (analyzing and supporting legislation to establish a unified corps of ALJs); Michel Levant, *A Unified Corps of Administrative Law Judges—The Transition from A Concept to an Eventual Reality*, 6 W. NEW ENG. L. REV. 705 (1984); Norman Zankel, *A Unified Corps of Federal Administrative Law Judges is Not Needed*, 6 W. NEW ENG. L. REV. 723 (1984) (analyzing and opposing legislation to establish a common corps of ALJs).

223. Information from Judge Heifetz, *supra* note 212. See Lubbers, *Unified Corps*, *supra* note 222, at 274 (noting that a unified corps of ALJs could dilute expertise); Zankel, *supra* note 222, at 736 (citing the efficiency of separate groups of ALJs who can develop expertise in the subject area from which their cases are drawn). ALJs working in the same subject area have the opportunity to consult with one another and discuss difficult issues of law in a collegial atmosphere, which should improve consistency and quality of decisionmaking. Information from Judge Heifetz, *supra* note 212. If the corps of ALJs is large, however, because of the volume of cases, consistency may not result. See Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 UCLA L. REV. 1055, 1059-60 (1992) (discussing the high level of inconsistency among Social Security Administration ALJ decisions). Inconsistency is also more likely to be a problem when the cases are largely fact-based. *Id.*

224. Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 562 (1987).

225. See Ware, *supra* note 204, at 28 (noting HUD ALJ proceedings are expeditious). An ALJ system does not guarantee quicker decisions, however. The Social Security hearing

concept of settlement judges to assist in resolving cases when agreed to by the parties, a process which might be useful in ADA cases also.²²⁶

The FHA enforcement model might be applied to ADA cases under any or all of the four titles. The FHA model, with its election of enforcement mechanisms, is more appropriate than the model of the National Labor Relations Act, which limits charging parties to the administrative forum and denies them any litigation forum if the General Counsel determines that the complaint has no merit.²²⁷ Since Congress clearly contemplated private enforcement of the ADA and the private right of action preexists any administrative litigation forum, any change eliminating that right seems politically unlikely. Moreover, since other civil rights groups are not limited to an administrative forum, it seems inappropriate to limit individuals with disabilities. Also, in cases where punitive and compensatory damages are available, such as intentional discrimination cases under Title I, the constitutionality of restriction of litigation to the administrative forum is questionable.²²⁸ Additionally, the low rate of cause findings by the EEOC makes that agency more analogous to HUD than to the NLRB.²²⁹

process is marked by long delays and there are concerns about delays in decisionmaking by NLRB ALJs as well. See *Oversight Hearing*, *supra* note 99, at 180 (Testimony of Janice Goodman, Vice-President, National Employment Lawyers Association) (stating that attorneys who appear regularly before the NLRB confirm that ALJ proceedings are neither faster nor necessarily more efficient than judicial proceedings).

226. Information from Judge Heifetz, *supra* note 212. The use of settlement judges is a form of ADR in which an ALJ other than the one assigned to try a case meets with the parties to help them resolve the dispute. Administrative Conference of the United States, Recommendation 88-5: Agency Use of Settlement Judges in Recommendations and Reports 21-28 (1988); Daniel Joseph & Michelle L. Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, in Administrative Conference of the United States, Recommendations and Reports 282, 292 (1988); Morell E. Mullins, *Alternative Dispute Resolution and the Occupational Safety and Health Review Commission: Settlement Judges and Simplified Proceedings*, 5 ADMIN. L. J. 555, 560-61 (1991). The settlement judge may increase the prospects of settlement by previewing the case, i.e. pointing out the strengths and weaknesses of each party's position, based on his or her judicial expertise. *Id.*; Joseph & Gilbert, *supra* at 296-97.

227. See 29 U.S.C. § 160 (1994) (setting forth administrative hearing procedure under the NLRA); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (NLRB General Counsel has unreviewable discretion to decline to litigate unfair labor practice charges). *But see Oversight Hearing*, *supra* note 99, at 172-74 (Testimony of Lawrence Z. Lorber) (recommending an NLRB-type system for discrimination claims).

228. See *Ware*, *supra* note 204, at 13-14 (discussing constitutional issues raised by eliminating the right to jury trial in action for damages). The concern for constitutionality led to the compromise of an optional administrative litigation in the FHA. *Id.*

229. HUD found cause in 3% of its cases and no cause in 20% in 1992. See *supra* note 185. In fiscal 1992, the EEOC found cause in 2.4% of cases, while finding no reasonable

At this point in time, there is little reason to consider altering the dispute resolution mechanism under Title IV. The number of complaints has been extremely low and they are handled efficiently through the existing complaint resolution mechanism of the FCC. While the FCC's administration of the statute has not proceeded without criticism, the primary focus of the criticism has not been dispute resolution.²³⁰ Provision of an alternative administrative enforcement mechanism for cases under Titles I, II and III merits further consideration, however.²³¹

In considering administrative litigation, one question that arises is whether a common corps of ALJs should be used for cases arising under the three titles. Use of separate groups for cases under each title would increase the administrative costs,²³² but permit more agency supervision over the ALJs.²³³ Given the overlap in types of cases and in certain

cause in about 61%. See *EEOC's Performance in Handling Caseload Criticized by Witnesses at House Hearing*, 1993 Daily Lab. Rep. (BNA) 143 d3 (July 28, 1993). Other data indicate that between 1989 and 1993, in cases where the EEOC made a cause finding, 95% were "no cause" while only 5% were "cause." See *Oversight Hearing*, *supra* note 99, at 13 n.6 (Testimony of Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers University). These figures include all cases, and since the ADA became effective in July 1992, the number of ADA cases included in the total is presumably small. In 1990, the NLRB found cause in approximately 43.9% of cases filed against employers and 25.4% of cases filed against unions. *Dunlop Commission Fact Finding Report*, *supra* note 99, at pp. 81, 83. While the low rate of cause findings may indicate that many nonmeritorious charges are filed with the EEOC, critics of the agency point to the number of "no cause" cases successfully litigated by the charging parties through private counsel. *Oversight Hearing*, *supra* note 99, at 13 n.6 (Testimony of Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers University).

230. See Karen Peltz Strauss, *THE RIGHT TO EFFECTIVE COMMUNICATION: CIVIL RIGHTS OF PERSONS WHO ARE DEAF AND HARD OF HEARING in NEW OPPORTUNITIES*, *supra* note 212, note at 146-48 (criticizing the FCC's administration of Title IV in several respects).

231. In cases where both the ADA and the Rehabilitation Act apply, a hearing before an ALJ is required in any event prior to termination of federal funding under the Rehabilitation Act. See 49 C.F.R. §§ 27.125, 27.127 (1994) (requiring hearing before terminating federal funding and detailing the hearing procedures).

232. Use of a combined group of ALJs would save on administrative costs. See Palmer & Bernstein, *supra* note 222, at 686, 702 (consolidation of administration would reduce administrative costs by eliminating duplication).

233. Whether agency supervision is an advantage or a disadvantage is a matter for debate. See Malcolm C. Rich, *The Central Panel System and the Decisionmaking Independence of Administrative Law Judges: Lessons for a Proposed Federal Program*, 6 W. NEW ENG. L. REV. 643, 646-49 (1984) (agency supervision may improve administrative effectiveness in implementing policies, but also may reduce public confidence in the administrative system because of pro-agency bias or appearance of such bias); Palmer & Bernstein, *supra* note 222, at 693-703 (agency supervision may result in pressure on ALJs

issues, a common group of ALJs is a sensible approach.²³⁴ Title II cases will frequently involve common issues with Title I and Title III cases, such as employment discrimination or access to buildings and programs.²³⁵ Moreover, knowledge about various disabilities and their effects, and accommodations that can be made to enable individuals with such disabilities to participate fully in society transcends all the titles. Development of expertise in these areas is one advantage of an ALJ system.

Establishment of an ALJ system would add significant administration costs to the enforcement process.²³⁶ ALJs would have to be hired and an administrative structure would be required to support the system.²³⁷ Costs would also increase if more cases were litigated as a result of the administrative litigation option.²³⁸ These additional costs might be offset in part by a reduction in costs for judicial enforcement.²³⁹ Costs to the parties might be less in an administrative litigation process as a result of the reduced formality of the process.²⁴⁰ This would benefit the parties, but

to decide cases in favor of the agency, but a common corps of ALJs may reduce efficiency as agencies lose control over their docket); Zankel, *supra* note 222, at 733-35, 742 (judicial independence problems are limited and can be addressed by means other than a consolidated corps).

234. The ALJ pool used by the federal bank regulatory agencies could serve as a model. See Recommendation 87-12, *supra* note 222, at 71, 73 (recommending use of a pool of ALJs to handle all bank regulatory agencies formal adjudications).

235. To the extent that there is a group of cases that is relatively unique, it is transportation cases under Titles II and III.

236. Because the number of ADA cases potentially subject to administrative litigation greatly exceeds those under the FHA, a larger corps of ALJs would be necessary. As of 1984, the cost to maintain an administrative law judge was \$125,000 per year for salary and support. Levant, *supra* note 222, at 712. The cost is certainly significantly larger ten years later. See *infra* note 237 for current salary figures.

237. The annual salary for administrative law judges ranges from 65% to 100% of the pay for level IV of the Executive Schedule, which is \$115,000. 5 U.S.C. §§ 5332, 5372 (1994). Overhead costs such as office space and hearing rooms would be necessary, as well as travel costs for the judges from their home base to the hearing locations. The primary costs of an ALJ system are the "payroll, physical facilities and travel." Palmer & Bernstein, *supra* note 222, at 702.

238. Litigation of additional cases is not necessarily a negative, however, as it may improve enforcement of the statute.

239. The agency's cost of litigation would increase in an administrative system because the agency must pay for the system or, in the case of common ALJs, a part of the system. While the ADA increased the workload of the federal courts, no additional federal judges were added solely as a result of the ADA.

240. See Silver, *supra* note 224, at 562. As Silver notes, however, costs of litigation are still substantial. *Id.*

would reduce agency costs only slightly, certainly not enough to offset the costs of establishing the system.

The HUD model requires administrative litigation by the HUD General Counsel or judicial litigation by the Department of Justice when there is reasonable cause to believe a violation has occurred. Neither the EEOC nor the Department of Justice is required to litigate a case whenever reasonable cause is found; the agencies can leave the case to private litigation. If the HUD model were followed, additional agency resources would have to be committed to litigation in all cause cases. Such a change would benefit individuals with strong cases that have low dollar value, for those individuals might be unable to find private counsel. Additionally, agency litigation may lead to enforcement in cases where the individual would not pursue the case with private counsel, improving enforcement.²⁴¹

Litigation of all reasonable cause cases would use agency resources for individual cases that might be better spent on impact litigation involving pattern and practice cases, however.²⁴² The value of a system with several litigation options is the provision of alternatives to parties with different preferences regarding dispute resolution. The wider the range of alternatives available, the more likely that parties will be satisfied. Nevertheless, these alternatives come at a cost, both to the parties and to the government, in a time of shrinking resources and increased pressure to reduce government spending.

The significant resource infusion necessary to create an ALJ system might be better used in other ways, such as reducing the backlog of cases awaiting investigation,²⁴³ increasing the judicial litigation of impact cases, and/or funding an alternative dispute resolution system. Another possible use of such resources would be tax credits to encourage voluntary compliance.

One additional difficulty with altering the ADA's enforcement procedure is that the ADA adopts the enforcement procedures of other statutes. This

241. If individuals were required to litigate in the administrative forum without agency assistance, the addition of the administrative forum would not increase enforcement activity but might reduce litigation costs slightly and resolve cases more quickly.

242. For a criticism of agency use of resources for individual cases to the detriment of systemic cases, see *Oversight Hearing*, *supra* note 99, at 5 (Testimony of Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers University). Litigation of systemic cases may benefit more people with fewer resources. *Id.* For legal and financial reasons, the private bar may be less likely to litigate systemic cases, at least without agency support. *Id.*

243. Addition of an administrative litigation option would have no impact on the substantial backlog of cases at the investigation stage.

is particularly problematic with respect to Title I. Creation of an ALJ option for Title I cases would require separation of those cases from employment discrimination cases arising under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.²⁴⁴ Such separation is not impossible, but it conflicts with the view, strongly held by many, that parity in civil rights claims involving different groups is desirable. Moreover, using the existing system for enforcement achieves some efficiency by using personnel previously trained in employment discrimination cases.²⁴⁵

Testing the adoption of an administrative litigation option against the goals of any change in dispute resolution procedure recited earlier leads to the conclusion that the benefits may not justify the allocation of resources necessary for the system. The change would not impact the investigation backlog. It would impact effective enforcement of the statute only if more valid cases are litigated due to the change, thus reducing discrimination. The change should provide an option for resolution which is quicker and perhaps less expensive for the parties. The cost to the government would be significant, however. As will be demonstrated in the remainder of the

244. See 42 U.S.C. § 12117 (adopting the procedures of Title VII of the Civil Rights Act for Title I of the ADA); 29 U.S.C. § 626 (1994) (ADEA enforcement procedures).

245. There is currently widespread concern over the enforcement problems in employment discrimination cases as a whole, and congressional oversight hearings are ongoing. See *Oversight Hearing*, *supra* note 99. Some critics of the existing enforcement scheme have recommended an ALJ system for employment discrimination cases. See *Oversight Hearings*, *supra* note 99, at 22-6 (Testimony of Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers University) (recommending an ALJ system for employment discrimination cases). For a view opposed to an ALJ system for the EEOC, see *Oversight Hearing*, *supra* note 99, at 179-184 (Testimony of Janice Goodman, Vice-President, National Employment Lawyers Association). The Dunlop Commission also is considering related issues, particularly whether there should be a specialized tribunal for workplace disputes and whether more integrated agency administration is appropriate. *Dunlop Commission Fact Finding Report*, *supra* note 99, at 113-14. Consideration of such changes is beyond the scope of this study, but given the current structure of the ADA, any enforcement change under Title VII will directly affect Title I enforcement. Accordingly, the issues addressed here are directly impacted by consideration of changes in employment discrimination enforcement as a whole.

When Title VII was enacted, an enforcement model based on the NLRB system was initially contemplated but Congress rejected the model for enforcement through the federal courts. *Oversight Hearing*, *supra* note 99, at 42 (Testimony of David L. Rose). Efforts to amend the statute to provide for EEOC internal enforcement authority were rejected in 1972. *Id.* at 43. Among the reasons for rejection were concerns on the part of employers that the agency would exhibit pro-plaintiff bias. See H.R. REP. 88-914, 88th Cong., 2d Sess., at 293 (1964).

report, a more effective use of these resources would be increased government litigation, combined with mediation which will be more effective with a realistic threat of litigation.

B. *Early Intervention Programs*

Another possible change in the dispute resolution mechanisms under the ADA is implementation of an early intervention program similar to the system used by the EEOC during the Carter administration.²⁴⁶ Analysis of that program and several other early intervention programs will assist in determining whether such a system would be useful for ADA cases.

1. *The Rapid Charge Processing System*

In the late 1970s, the EEOC implemented the rapid charge process (RCP), which required Commission staff to conduct a limited preliminary investigation of charges filed and then schedule a fact finding conference with both parties.²⁴⁷ The EEOC representative served as a moderator/advisor, with the goal of encouraging settlement. The settlement, if reached, was embodied in an agreement signed by the parties and the EEOC. If no settlement was reached, the evidence from the investigation and the conference was used to make a determination of cause. If the evidence was insufficient for such a determination, the case was returned to the investigation process. A General Accounting Office report found that the system improved charge processing, and was effective.²⁴⁸ The report also 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.²⁴⁹

246. This system, as constructed at the EEOC in the late 1970s, incorporates alternative dispute resolution. This article considers early intervention programs as those which assess charges at the time of filing or shortly thereafter, taking the action deemed appropriate based on that assessment. An early intervention program may or may not incorporate ADR.

247. The system is described in EEOC Request for Comments, *supra* note 117, at 39023. In addition to using the system itself, the EEOC encouraged state and local agencies which had work-sharing agreements with the EEOC to use similar procedures, and many did so. Project on Equal Education Rights, NOW Legal Defense and Education Fund & SRI International, *The Settlement Solution: Assessing Mediation as A Tool in the Enforcement of Civil Rights 7-8* (1980) [hereinafter PEER Study].

248. *Id.*

249. Silver, *supra* note 224, at 543, *citing* Comptroller General, *Further Improvements Needed in EEOC Enforcement Activities 11-19* (1981) (assessing the rapid charge process).

2. *Washington Field Office Program*

The rapid charge processing system was abandoned with the change in administrations, but recently a pilot program in the EEOC's Washington Office has revived some of the features of the system.²⁵⁰ The system, entitled "Washington Field Office Charge Assessment, Planning and Resolution System," operates through initial assessment of the merits of a charge at the intake step of the procedure.²⁵¹ Cases with no evidence of discrimination are investigated only through a letter to the Respondent requesting its position and supporting documentation. If the evidence of the Respondent accords with the charging party's evidence, the case is closed with a no cause determination after an interview with the charging party.

In cases that appear stronger on intake, the agency makes early settlement efforts. Very strong cases are discussed bi-monthly with the legal department in order to develop the evidence necessary for a cause determination. Settlement efforts are made in those cases as well.

Evaluation of the system established that upon implementation of the system, average processing time for cases decreased and cause findings increased. The settlement rate varied, decreasing in 1994.²⁵² Evidence regarding the impact on protected groups was mixed. With respect to ADA cases, more were rated meritorious than their percentage in the system would suggest, but nationally, "merit resolutions"²⁵³ of ADA cases handled by the EEOC exceed merit resolutions of all cases.

Director Reilly's assessment of the program is positive, but she recommends more structure in the settlement program. She also suggests that, absent settlement, cases assessed as low merit should be dismissed quickly with a right to sue letter indicating "insufficient evidence" or "cessation of administrative process" rather than no cause. Such a system would allow the agency to concentrate investigative resources on cases

250. See *Oversight Hearing*, *supra* note 99, at 84-5 (Testimony of Susan Buckingham Reilly, Washington Field Office Director, Equal Employment Opportunity Commission) (describing program).

251. *Id.* The charge is coded at that time and the code, which reflects the assessment of the merits, indicates the method of additional processing. *Id.*

252. Processing time also increased in 1994, but not to the level that preceded implementation of the system. *Oversight Hearing*, *supra* note 99. The assessment of the Field Office Director is that processing time increased because of staff turnover and concentration on some of the oldest cases. *Id.*

253. Merit resolutions include settlements, determinations of cause, and withdrawals of cases where the charging party receives benefits. *Id.*

more likely to be meritorious, while not precluding plaintiffs in other cases from filing suit.

3. *Office of Civil Rights Program*

The Office of Civil Rights for the Department of Education, which is responsible for enforcing Title VI of the 1964 Civil Rights Act,²⁵⁴ also has utilized an early intervention program. The Office of Civil Rights complaint processing system includes a voluntary procedure known as early complaint resolution (ECR) which enables the recipient of federal funds and the complainant to attempt to resolve their dispute.²⁵⁵ An agency investigator serves as a mediator in the process, which occurs prior to investigation and regardless of whether there is a civil rights violation. Unlike the EEOC's Rapid Charge Processing system, the Office of Civil Rights process is separate from the investigation. If ECR is unsuccessful, the case is assigned to a different investigator and nothing in the process becomes part of the investigation. Additionally, any settlement agreement reached requires the complainant to withdraw the complaint. The Office of Civil Rights is not a party to any agreement and does not endorse it.

4. *Analysis of Early Intervention Programs*

These early intervention programs promise, and in some cases deliver, a reduction in the backlog of cases.²⁵⁶ Cases are disposed of more quickly, which is of value to all parties. Nevertheless, efficiency is not the only goal of dispute resolution. Other values include justice and statutory intent, procedural fairness, and finality and enforceability of the result.²⁵⁷

Early intervention methods which promote settlement through mediation-like processes have been criticized both because they do not serve the

254. Title VI prohibits discrimination based on race, color and national origin by recipients of federal funds. 42 U.S.C. § 2000d (1994). The Department of Education's responsibilities are limited to discrimination in education. Silver, *supra* note 224, at 487. The discussion of the procedure for the Office of Civil Rights is taken from Silver's article.

255. *Id.* at 502.

256. Settlement rates at OCR, EEOC and the state agencies studied ranged from 64% to 19.5% with most at the higher end of the range. PEER Study, *supra* note 247, at 47-49.

257. Silver, *supra* note 224, at 519. Professor Silver has evaluated EEOC's RCP system and OCR's ECR procedure in light of these values. *Id.* at 519. In assessing justice, she includes norm articulation and substantive fairness along with statutory intent. *See id.* at 521-26 (analyzing whether the processes serve goal of justice). These goals enumerated by Silver combine to make up what this report has referred to as effective enforcement of the statute. *See supra* note 175 and accompanying text.

purpose of articulating norms and developing coherent policy and because they focus on ad hoc individual justice, perhaps at the expense of systemic issues.²⁵⁸ Use of such methods will bring about change for more complainants through settlement of individual cases, but without knowing the merits of the cases, it is difficult to know whether the results effect justice.²⁵⁹ If the use of early intervention settlements diverts agency attention from systemic problems, then overall results in terms of achieving enforcement objectives *may* be negative.²⁶⁰ A third criticism is that such programs may cause respondents who have not discriminated to offer concessions to complainants to resolve the dispute.²⁶¹ Because the ADA is a relatively new statute, development of norms of statutory interpretation is particularly important. Early intervention may diminish the opportunities for development of the law by effectuating settlements. If the settlements fairly resolve the issues between the parties, however, it is difficult to argue that they should be forced to litigate for purposes of developing the law.

Where the early intervention and settlement occurs without investigation, as in the Office of Civil Rights procedure, assessment of whether the settlement is appropriate in light of the goal of eliminating discrimination is problematic.²⁶² Furthermore, the agency's lack of involvement in approving or participating in the settlement leaves the weaker party in settlement negotiations, most often the charging party, more vulnerable to sacrificing legitimate positions for little compensation.²⁶³ EEOC's procedure, which is a part of the investigation process, is better in this regard.

258. Silver, *supra* note 224, at 540. Because these programs incorporate mediative processes, the same criticisms are made of mediation. See further discussion of these issues and evaluation of the mediation alternative *infra*.

259. Silver, *supra* note 224, at 540.

260. *Id.* The PEER Study found that "preparing a case for mediation tends to discard either the opportunity to identify class or systemic issues or the opportunity to pursue them when known." PEER Study, *supra* note 247, at 128. Where mediation was used, the intake interviewer commonly convinced the complainant to eliminate class allegations and focus on individual complaints to facilitate mediation. *Id.* at 127. In addition, it is difficult to mediate class cases because the agencies do not have the means to identify and notify class members. *Id.* As a result, respondents have little incentive to agree to a class settlement since the class members will not be bound. *Id.* Furthermore, there is little incentive for the agency to raise class issues that might jeopardize settlement. *Id.* at 128.

261. Silver, *supra* note 224, at 542-43.

262. *Id.* at 544.

263. *Id.* at 556 (discussing the impact of the inequality of bargaining power on the complainant).

Procedural fairness is related to the issue of substantive fairness. Procedural fairness requires the parties to have information about the process.²⁶⁴ An additional concern, however, is the possible imbalance of power in settlement negotiations.²⁶⁵ This may in part be mitigated by providing as much information as possible regarding rights and remedies to the parties, but may be exacerbated by either the presence of counsel for one party and not the other,²⁶⁶ or by an agency representative who gets credit for settlement.²⁶⁷

An additional question about the viability of the early intervention procedures is whether they will result in enforceable agreements. A settlement agreement fashioned by the parties may be more likely to generate compliance than a judicial decision imposed on the parties.²⁶⁸ While a written settlement agreement would provide a basis for a common law contract enforcement action, this may not be a satisfactory enforcement option for a charging party, the party most likely to be asserting noncompliance.²⁶⁹ Agency enforcement is preferable, but courts disagreed as to whether the EEOC could enforce agreements reached through Rapid Charge Processing.²⁷⁰ Instead of attempting to enforce settlement agreements, the Office of Civil Rights requires filing of a new complaint, with the time limit for filing calculated from the breach rather than the date of the underlying discrimination.²⁷¹ Accordingly, Silver concluded that the early complaint procedures suffered from the lack of conclusive enforceability.

In addition to the benefits noted above, the early complaint resolution procedures provided certain other advantages over litigation. Whereas litigation is a winner take all proposition, the early resolution procedures

264. *Id.*

265. *See id.* (discussing the impact of inequality in bargaining power).

266. *See id.* (noting that both providing information and the presence or absence of counsel may impact bargaining power). Most likely, the complainant will be without counsel. *Id.* at 557.

267. If the agency representative is internally rewarded for settlements, the incentive may be to press for settlement regardless of the merits of the case and the fairness of the settlement for the parties. *See Silver, supra* note 224, at 556 (discussing the impact of mediator credit for settlement on the process).

268. *Silver, supra* note 224, at 575.

269. *Id.* at 575. As Silver notes, the common law action will require significant investment of resources, legal assistance, and time, the absence of which prompted charging party reliance on the agency initially. *Id.*

270. *See id.* at 576-78 and cases cited therein (discussing cases deciding whether EEOC could enforce settlements reached through Rapid Charge Processing).

271. *Id.* at 579-80.

provided an opportunity for each of the parties to achieve some benefit.²⁷² In addition, the complaint resolution procedures gave the parties substantial control over the process and the outcome.²⁷³ Furthermore, the mediative process may be more conducive to preserving relationships than litigation and the nonconfrontational nature of the process may facilitate settlement at an early stage in the dispute.²⁷⁴ In sum, these early intervention programs provide both advantages and disadvantages which must be balanced in determining whether their use advances the statutory goals. Because the programs incorporate forms of alternative dispute resolution, they will be considered further in the next section.

Like the EEOC's Rapid Charge Process and the Office of Civil Rights Early Complaint Resolution Program, the early assessment program undertaken by the Washington Field Office offers some promise of reducing the backlog and speeding case processing. The Department of Justice already operates in similar fashion under Title III as it declines to investigate certain cases. All Title II cases are investigated by the appropriate agency, however. The drawback of such a system, which assesses and tracks cases very early in the investigation process, is its potential to ignore valid discrimination claims where the plaintiff is less articulate or less able to identify the evidence of discrimination for the investigator or intake officer.²⁷⁵ Also where a statute is relatively new, with little time for judicial development of the law, it is important not to screen out at an early stage cases that would develop the law or test innovative theories of legal interpretation. Accordingly, where an early assessment system is adopted, training of the investigators and intake

272. Silver, *supra* note 224 at 584-85.

273. *Id.* at 585-86.

274. *Id.* at 587-88.

275. In some cases, the complainant simply may not have access to the evidence necessary to establish the violation, such as evidence of differential treatment. Applicants for jobs are in particularly difficult positions to obtain such data. The Washington Field Office program appropriately declines to code such cases as "no evidence" cases. *Oversight Hearing, supra* note 99, at 84 (Testimony of Susan Buckingham Reilly, Washington Field Office Director, Equal Employment Opportunity Commission).

A second problem is the potential for undue influence on agency personnel in prioritizing cases. Concern has been voiced in recent years over close relationships between personnel of regulatory agencies and the entities being regulated. See Edna Earle Vass Johnson, *Agency "Capture": The "Revolving Door" Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95 (1983) (discussing these concerns). Without suggesting any lack of integrity on the part of government officials, at any point in governmental processes where discretion must be exercised, the possibility of pressure from the regulated entity exists. *Id.* at 96, 98, 119.

officers to ask appropriate questions and develop evidence in support of alternative legal theories is essential.²⁷⁶ Given such training, however, the system offers an appropriate way to prioritize cases to allocate limited resources most effectively. In addition to early intervention programs, other uses of alternative dispute resolution should be analyzed for their dispute resolution potential.

C. *Alternative Dispute Resolution*

1. *The Role of ADR in ADA Cases*

Given the statutory encouragement of ADR,²⁷⁷ it is appropriate to consider whether the agencies are currently using ADR effectively and whether additional use of ADR might contribute to enforcement efforts. Despite the statute's support of ADR, one might question whether ADR has a role to play in ADA disputes, particularly given the nature of the public rights involved.²⁷⁸ In addition to the dispute resolution function, courts also play a role in establishing norms—a process of giving “meaning to our public values.”²⁷⁹ Critics of ADR argue that it limits this function of the courts.²⁸⁰ While this is a persuasive reason to maintain litigation as a

276. The questions asked at the investigatory and intake stages need to be developed with the advice of agency lawyers.

277. 42 U.S.C. § 12212 (Supp. V 1993).

278. Some commentators have argued that ADR is inappropriate in cases involving significant public rights. See HENRY J. BROWN & ARTHUR L. MARRIOTT, *ADR PRINCIPLES AND PRACTICE* 396 (1993) (arguing that cases involving fundamental human and civil rights should be litigated); Irving R. Kaufman, *Reform for A System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REV.* 1, 30 (1990) (noting that the risk of undermining public values by evading litigation is greater in cases serving remedial and social functions such as civil rights cases). 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 (1993) (arguing that the public justice values underlying discrimination statutes are best preserved by de novo review of arbitral determinations of law in discrimination cases).

279. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 30 (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 that courts perform not only function of dispute resolution but also function of creating rules which assert public values).

280. See Owen Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085 (1984) (stating purpose of adjudication is to give force to public values and purpose is not served by settlement); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *HARV. L. REV.* 668, 671-72 (1986) (suggesting that in creating ADR systems we must preserve role of courts in establishing law particularly in cases involving significant public

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 with potential to be backlogged at the litigation stage in the future. ADR offers some promise of quicker, inexpensive disposition of cases with greater satisfaction on the part of litigants. As persuasively noted by the Pound Conference Report:

[t]he 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.²⁸¹

Agency efforts at alternative dispute resolution thus far have concentrated on settlement negotiation and mediation. Both offer potential for effective resolution of ADA disputes.²⁸² Given the large number of complaints, settlement - accomplished with or without mediation - is essential for effective enforcement of the statute.²⁸³ Nevertheless, as noted, caution must be used in adopting ADR techniques because of the need for judicial development of the law. In selecting cases for litigation and settlement, agencies must balance the interests of establishing the law and achieving benefits for victims of discrimination. This can be done through development of enforcement policies by the agencies and ensuring that decisions

rights and duties); Kaufman, *supra* note 278, at 30 (recognizing argument that settlements do not enforce public norms like trials). As suggested by Kaufman, resolutions through ADR have no greater impact on this function than settlements reached through other mechanisms. *Id.* at 29-30.

281. National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, *The Pound Conference: Perspectives on Justice in the Future* 300 (1979), quoted in Kaufman, *supra* note 278, at 38. The mediation proposal herein will not unduly interfere with the law development function. See *infra* notes 319-21 and accompanying text (further discussing the impact of the mediation proposal on law development).

282. Sander and Goldberg suggest a rule of presumptive mediation—i.e. that mediation should be the first ADR method of choice to promote settlement since it offers such 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 *NEG. J.* 49, 59 (1994). According to Sander and Goldberg, mediation has the greatest potential for overcoming obstacles to settlement except for differing views of facts and law and a plaintiff's belief that he or she may obtain a jackpot recovery. *Id.* They further suggest that a skilled mediator often can achieve settlement without resolving disputes over factual and legal questions. *Id.*

283. "Settlements are the lifeblood of equal opportunity law." *Oversight Hearing, supra* note 99, at 12 (Testimony of Alfred W. Blumrosen, Thomas A Cowan Professor of Law, Rutgers University).

regarding settlement and litigation are made in accordance with established priorities.²⁸⁴ These concerns must be salient in establishing mediation policies.

The pilot mediation projects and the Department of Justice grant for mediator training are steps in the right direction. Mediation is appropriate for ADA cases for a number of reasons.²⁸⁵ Mediation offers the promise of settlement with assistance of a neutral party trained to help the parties resolve their disputes. The advantages of mediation are many. It is a low cost alternative to litigation, with potential for resolving the dispute more quickly.²⁸⁶ Thus, it has the potential to reduce agency backlogs of complaints if it is utilized during or prior to the investigative process.²⁸⁷ Mediation has the ability to focus on the underlying interests of the parties and to accommodate those interests in a resolution agreeable to the

284. Such policies and the decisions pursuant thereto should use available agency expertise. For example, currently when ADA cases in which cause has been found by the regional office are presented to the EEOC Commissioners for decisions regarding litigation, the Office of Legal Counsel, which contains significant ADA expertise, has no input into the recommendation. Conversation with EEOC Commissioner Rosalie Gaull Silberman. See Kaufman, *supra* note 278, at 31 (suggesting that courts using ADR establish rules to exempt cases from arbitration that involve complex or novel legal issues to insure that the judicial role of law development be preserved); Misteravich, *supra* note 279, at 41-44 (arguing that "hard cases," those with no legal solution from precedent, statute or other legal standard, be reserved for the courts, citing JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 25 (1983)).

285. The Administrative Dispute Resolution Act provides the necessary authority for use of voluntary mediation. 5 U.S.C. § 572 (1994) (authorizing government agencies to use ADR). In addition, companion bills have been introduced in Congress to encourage mediation of ADA Title I cases along with other discrimination cases, see 1993 H.R. 2016, 103d Cong. 1st Sess.; 1994 S. 2327, 103d Cong. 2d Sess. These bills contemplate mediation after reasonable cause has been found by the EEOC and after issuance of a right to sue letter to the charging party. *Id.*

286. Speedy resolution benefits both the parties and the agency. Mediation can reduce staff time required for each case. See PEER Study, *supra* note 247, at 105-06.

287. Empirical evidence regarding the efficiency of mediation is mixed. See Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION*, at 398-99 (1989). Kressel and Pruitt note that 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 RCP was used, but noted that a number of other reforms contributed to the reduction. See PEER Study, *supra* note 247, 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.

parties.²⁸⁸ Compliance with a negotiated resolution of the dispute is more likely because the solution was designed and agreed to by the parties.²⁸⁹

Mediation may be effective in preserving relationships between the parties that might be destroyed or at least severely damaged by the adversary process.²⁹⁰ Mediation increases the control of the parties over the dispute resolution process, which many students of mediation believe

288. See Stephen B. Goldberg, *Meditations of A Mediator*, 2 NEG. J. 345, 348 (1986) (mediation can focus on underlying interests rather than legal issues and find ways to satisfy those interests); Craig McEwen, *Note on Mediation Research*, in STEPHEN B. GOLDBERG, FRANK E.A. SANDER, & NANCY H. ROGERS, *DISPUTE RESOLUTION* 155, 156 (2d ed. 1992) (noting that mediation can produce outcomes reflecting the parties' needs).

289. See Kressel & Pruitt, *supra* note 287, at 396-97; Janice F. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes*, in *MEDIATION RESEARCH*, *supra* note 287, at 34-35 (empirical data show high rates of compliance with mediated agreements in many types of cases); JAY FOLBERG & ALISON TAYLOR, *MEDIATION* 36 (1984) (because parties in mediation create their agreement, parties are invested in its success and therefore are more likely to comply); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S12 (1989) (indicating that mediated agreements are more durable because created by parties); Craig McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981) (showing by empirical study of small claims cases that compliance with mediated settlements is higher than compliance with adjudicated decisions).

290. See FOLBERG & TAYLOR, *supra* note 289, at 10-11 (mediation reduces hostility and therefore likelihood that battle will continue beyond mediation process, while litigation focuses hostilities and hardens positions); Feinberg, *supra* note 289, at S11. Mediation may also promote "cooperative problem-solving behavior that would make future disputes easier to resolve." Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 NEG. J. 249, 253 (1990). See Feinberg, *supra* note 289, at S11 (noting that mediation encourages cooperative behavior for the future). These attributes will be important in certain types of ADA disputes where an ongoing relationship is involved. Examples would include employment cases where employment will continue after resolution of the dispute, public accommodation cases involving regular customers, e.g., a doctor/patient relationship, and public entity cases involving regular consumers of government services. An example of the latter would be a dispute between a transportation agency and a group of commuters with disabilities. 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 later disputes.

increases self-esteem and competence.²⁹¹ In addition, most studies of mediation reflect high satisfaction levels on the part of participants.²⁹²

Despite these advantages, mediation of ADA disputes raises concerns as well. As noted above, resolution of disputes through mediation may result in diminished ability to identify and resolve systemic discrimination problems.²⁹³ The primary function of agencies utilizing ADR may change from law enforcement to conflict resolution.²⁹⁴ Additionally, less powerful parties may be disadvantaged by the less formal procedures.²⁹⁵ If

291. FOLBERG & TAYLOR, *supra* note 289, at 11. Many advocates of mediation see the primary benefit of the process as self-determination. *Id.* at 35; Robert A. Baruch Bush, *Efficiency and Protection or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 266-73 (1989) (arguing that mediation is unique in encouraging empowerment and self-determination).

292. See Kaufman, *supra* note 278, at 22-23 (citing statistical data confirming participant satisfaction with ADR); Kressel & Pruitt, *supra* note 287, at 395-96 (party satisfaction rates in mediation are usually 75% or greater even for those who do not reach agreement); Goldberg & Brett, *supra* note 290, at 250-52 (finding higher participant satisfaction rates with mediation than arbitration); McEwen & Maiman, *supra* note 289, at 254-60 (finding higher participant satisfaction rates with mediation than with litigation). Among factors influencing participant satisfaction are the level of control and privacy, see Kressel & Pruitt, *supra* note 287, 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* note 290, at 251-52. Data suggest that satisfaction level is not dependent on outcome. *Id.*; Kaufman, *supra* note 278, at 23.

293. See *supra* notes 258-60 and accompanying text (noting that focus on mediating individual cases may divert attention from systematic discrimination).

294. See PEER Study, *supra* note 247, at 9-10 (noting that mediation shifts agency's focus from law enforcement to dispute resolution).

295. See Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359, 1398-99 (1985) (discussing various ways in which informal processes may disadvantage less powerful parties); Richard Abel, *Informalism: A Tactical Equivalent to Law*, 19 CLEARINGHOUSE REV. 375, 383 (1985) (arguing that informalizing legal proceedings would disadvantage the poor and perpetuate inequality); William Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 386, 388 (1985) (arguing that both informal and formal systems can harm the disadvantaged depending on the circumstances). Additionally, 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 287, at 404-05. A study of 600 small claims court cases in New Mexico evaluated outcomes of cases assigned randomly to mediation and adjudication. The results revealed that 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. The minority disputants fared worse in mediation than whites also, although the differences disappeared when both mediators were mediators of color. Minority disputants were more enthusiastic about mediation than white disputants,

individuals with disabilities are disadvantaged in mediation, relative to litigation, then mediation is inconsistent with the goals of the statute.²⁹⁶ Related to the power issue is the need to ensure that the individual's disability does not preclude effective participation in mediation, which requires more direct involvement by the parties than litigation, where the parties' representatives play a more active role.²⁹⁷ Any mediation procedure adopted needs to take into account these concerns.

2. *Analysis of Other Mediation Systems in Civil Rights Cases*

In determining whether to utilize mediation under the statute, it is useful to consider other efforts to use mediation in the discrimination context. The discussion above relating to early complaint resolution procedures evaluated the advantages and disadvantages of the EEOC's Rapid Charge Processing system and the Office of Civil Rights' Early Complaint Resolution procedure, both of which involved mediation. In addition, local civil rights agencies in Chicago and Washington, D. C. have utilized mediation in discrimination cases. While there has been no systematic evaluation such as the PEER study, some data is available regarding these mediation programs.

The District of Columbia Department of Human Rights and Minority Business Development successfully mediates about one hundred cases per

however, despite the objective monetary disadvantage. Presentation of Michele S. G. Hermann, *What Happens When Mediation is Institutionalized to the Parties, Practitioners and Host Institutions?*, Program of AALS Section on Dispute Resolution (Jan. 1994). One explanation of these differences may be that the parties are more interested in process than outcome. *Id.*, Comments of Robert Baruch Bush.

This disadvantage, if true, may contradict one of the perceived advantages of mediation, that it empowers the parties. See McEwen, *supra* note 288, 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 are true. 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. *Id.* In one view empowerment may come only from legal advocacy, while in another it may come from more direct involvement in the dispute and its resolution. *Id.*

296. In determining disadvantage, however, the empowerment potential of mediation should be considered and valued. In addition, in determining the benefits of litigation and settlement, the emotional cost of lengthy litigation should not be undervalued. *Id.*

297. See *Targeting Disability Needs*, *supra* note 117, at 35-37 (discussing issues regarding the capacity of persons with cognitive impairments to participate in dispute resolution and techniques that might facilitate their participation).

year.²⁹⁸ Mediation is offered to complainants at the time the charge is filed.²⁹⁹ When the program began in 1990, only about one third of respondents agreed to mediation, but that number has been increasing and the agency is beginning to see repeat customers among respondents and respondents' counsel. The settlement rate in mediation has been forty to fifty percent. There is one staff mediator, who not only is involved in meditations, but also recruits and trains volunteer mediators, who come primarily from other local mediation programs. The staff mediator is also responsible for educating respondents and potential respondents about the program. If a case is not resolved in mediation, it is transferred to the investigative unit. The mediation is confidential and nothing which occurs in mediation becomes part of the investigative file. The agency has a form for the settlement agreement which is used in all cases. In addition, the agency reviews all agreements to be sure that they are balanced and enforceable before closing the case.³⁰⁰

The Chicago Commission on Human Relations (the Commission) uses mandatory conciliation³⁰¹ for all cases in which it has found substantial evidence of a violation.³⁰² The mediators, attorneys with a background

298. Data regarding the D.C. Department of Human Rights and Minority Business Affairs, received from La Verne Fletcher, Acting Supervisor, Mediation. Successful mediation consists of resolving the dispute with an agreement between the parties. The agency handles cases alleging discrimination in employment, housing, public accommodation and education. The number of cases filed per year varies from 400 to 700. *Id.* Disability discrimination is covered by the law and the agency has mediated some disability discrimination cases, but separate data on those cases is not available.

299. Almost all complainants agree to mediate, which may be a result of the fact that mediation occurs within a few weeks of filing while investigations take twelve to fifteen months to complete. *Id.* If complainant agrees to mediate, the respondent is then served with the complaint and given the option to mediate.

300. To date, the agency has not had any complaints about failure to honor settlement agreements. If such a complaint were raised, however, the agency would attempt to resolve the dispute, and if unable to do so, would either reopen the case or use the office of the corporation counsel to enforce the agreement.

301. If the complainant fails to attend the conciliation conference without good cause, the complaint may be dismissed and/or the complainant may be ordered to pay the conciliator's fees. Amendments to Rules and Regulations Governing the Chicago Human Rights Ordinance, Chicago Fair Housing Ordinance, and the Chicago Commission on Human Relations Enabling Ordinance, section 230.100(b) (Amended January 27, 1993) (hereinafter *Amended Rules*). If the Respondent fails to attend, a default judgment may be entered against the Respondent. *Id.* In addition, the failure to attend will be considered in determining the amount of attorney's fees awarded if the complainant prevails at hearing. *Id.* Respondent also may be ordered to pay the conciliator's fees. *Id.*

302. Information regarding the procedure was obtained from Miriam I. Pickus, Deputy

in discrimination law and training in mediation, are paid by the Commission,³⁰³ and no fee is charged to the parties for mediation. Approximately fifty percent of the cases mediated settled at this stage,³⁰⁴ and seventy-seven percent of the disability cases conciliated settled.³⁰⁵ If no settlement is reached at the conciliation conference, the case is scheduled for an administrative hearing.

In disability cases, the Commission also uses a procedure known as a disability evidentiary conference.³⁰⁶ The 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 complainant.³⁰⁷ At the evidentiary conference the conciliator attempts to resolve the dispute, but if no settlement is reached the conciliator submits to the Commission's compliance staff a recommendation on whether the staff should find substantial evidence of a violation.³⁰⁸

Commissioner of the Chicago Commission on Human Relations and from the Rules and Regulations Governing the Chicago Human Rights Ordinance, the Chicago Fair Housing Ordinance, and the Chicago Commission on Human Relations Enabling Ordinance (hereinafter Chicago Rules). The Commission has jurisdiction over discrimination in employment, public accommodation, and housing in the City of Chicago, including discrimination based on disability.

303. Compensation for the attorneys is below the market rate, but the Commission has had no difficulty in obtaining attorney/mediators.

304. These statistics are for the twelve month period preceding September 1994.

305. The actual numbers of disability cases are small, however. Letter from Miriam Pickus (Sept. 13, 1994). From 1991 to 1993, the Commission found substantial evidence in 36 disability cases involving employment and public accommodation. *Id.* Twenty-eight were settled, with four cases still pending as of September 1994. *Id.* For all disability cases for the time period from 1991 through 1993, the Commission closed 72 employment cases, 41 by settlement agreement, a settlement rate of 57%. *Id.* Fifty-three public accommodation cases were closed, 35 by settlement agreement, a settlement rate of 66%. *Id.* These settlements include those reached at a conciliation conference, cited above, as well as settlements during investigation, either through a Disability Evidentiary Conference, see *infra* notes 306-08 and accompanying text, or without such a conference. *Id.*

306. See *Chicago Rules*, *supra* note 302, at Subpart 525. Like the conciliation conference, the Disability Evidentiary Conference is mandatory and failure to appear subjects the parties to the same penalties. *Id.* at § 525.125.

307. *Id.* Prior to the conference, the respondent is required to submit an affidavit with evidence of undue hardship. *Id.* Like the ADA, proof of undue hardship eliminates the accommodation obligation under the Chicago Ordinance. *Id.* at § 520.100. The complainant files a responsive affidavit. *Chicago Rules*, *supra* note 302, at § 520.100.

308. *Id.* at § 525.115. For settlement statistics which include settlements reached at Disability Evidentiary Conferences, see *supra* note 305. If the staff finds substantial evidence, it may waive the normal conciliation conference and proceed directly to an

In accessibility cases, the Commission can use the city's Office for People with Disabilities to perform a site survey and determine what changes would make the facility accessible. These technical experts even prepare blueprints for the design change, which saves money for the business and facilitates settlement of accessibility disputes.

Under the Chicago Rules, settlements are written, signed by the parties and the conciliator, and presented to the agency's compliance staff for approval.³⁰⁹ Approval, which results in an order approving the settlement and dismissing the complaint, is granted if the settlement is knowing and voluntary, unambiguous, and consistent with the ordinance.³¹⁰ The Commission retains jurisdiction to enforce the settlement and the parties must acknowledge in the agreement the Commission's jurisdiction to seek judicial enforcement.³¹¹

These two procedures, Chicago and the District of Columbia, have some common elements and some significant differences, but both have been relatively successful in settling cases. The District of Columbia's voluntary procedure, offered early in the investigation process has employed significant educational efforts to increase participation. Complainants are encouraged to participate by the promise of rapid processing through mediation. Respondents' participation rate has increased through educational efforts and successful participation in the procedure. Chicago's mandatory procedure has a high rate of settlement for mandatory mediation, but that may be attributable to the fact that it is employed after a finding of substantial evidence or for the Disability Evidentiary Conference, after a finding of a technical violation.

Both procedures are cost free to the parties, except for their representation, should they choose to use it. Both procedures provide for agency approval and enforcement of settlement agreements to ensure consistency with the statutory mandate. Because no systematic study of the meditations has been done, there is no evidence regarding whether complainants are disadvantaged by the process in any way.

administrative hearing. *Chicago Rules*, *supra* note 302, at § 525.120.

309. The description of settlement procedures, including enforcement procedures is taken from *Chicago Rules*, *supra* note 302, at §§ 230.130, 230.140.

310. As a condition of approval, the Commission may require compliance reports. *Id.* at § 230.130.

311. To obtain enforcement of the agreement, a party must notify the Commission in writing. The Commission investigates, and if it finds substantial evidence of a violation of the agreement, it must notify the parties in writing and have the city's Corporation Counsel seek judicial enforcement of the order approving the settlement. *Id.* at § 230.140.

These procedures contain some elements that contrast with procedures that have achieved less success in participation. A mediation pilot project at the Illinois Human Rights Commission which charges the participants a filing fee to participate in mediation has resulted in very limited participation.³¹² The Department of Justice pilot project, where the charges are dismissed before mediation, also has resulted in limited participation.³¹³ Under the latter procedure, respondents have limited incentive to engage in mediation because of the removal of the threat of government action. Additionally, the Department of Justice project has been unable to engage in educational efforts about mediation prior to agreement to participate because the Privacy Act restricts the agency's ability to disclose the names and addresses of the parties to the grantor, which is prepared to engage in such education, before they agree to participate in mediation.³¹⁴

The results of the EEOC pilot mediation project also yield useful information. Respondents were less likely to agree to participate than complainants. The cases included large numbers of discharge cases in which agreements to mediate were particularly difficult to obtain. The settlement rate of the EEOC project was similar to those of the Chicago and District of Columbia agencies.

Finally, the Better Business Bureaus/ADA Coalition of Connecticut (BBB/ADACC) Center for Dispute Settlement has mediated disability discrimination cases referred by the Connecticut Commission on Human Rights and Opportunities (CCHRO), the state agency enforcing Connecticut anti-discrimination laws.³¹⁵ The program was initiated in April 1994 as a pilot program involving one CCHRO office and cases alleging only disability discrimination. The CCHRO has recently expanded the program to include all CCHRO offices, all types of discrimination, and a number of

312. In few cases have both parties agreed to mediation according to Professor Lamont Stallworth, Chicago Center for Employment Dispute Resolution.

313. Meeting with Department of Justice, Public Access Section (Mar. 28, 1994).

314. *Id.* See 5 U.S.C. § 552a (1994) (preventing disclosure of records without written consent of person to whom record pertains, with limited exceptions).

315. Information regarding this program was obtained from Suzanne Ghais, Connecticut Better Business Bureau, presentation at Collaborative Approaches: A Conference on Disability Aging and Dispute Resolution, Washington, D. C. (Mar. 31, 1995); telephone conversation with Paulette Hotton, President, Better Business Bureau of Connecticut; and telephone conversation with Rick Gomez, Human Rights & Opportunities Representative, Connecticut Commission on Human Rights and Opportunities. See also BBB/ADACC Center for Disability Dispute Settlement Mediation Agreement. The governing statute was amended in 1994 to encourage voluntary use of alternate dispute resolution and to authorize the Commission to use mandatory mediation. P.A. No. 94-113 (May 25, 1994); P.A. No. 94-238 (June 7, 1994).

different ADR service providers. In addition, the BBB/ADACC is offering mediation in disability discrimination cases which have not yet been filed with any agency.

The pilot program is similar to other programs described. The CCHRO first screened the cases and referred those deemed appropriate to mediation.³¹⁶ If both parties agreed, the case was assigned to a volunteer mediator trained by the Center on disability law.³¹⁷ If an agreement was reached in mediation, it was recorded on an agreement form, containing standard provisions for enforcement, a nonadmissions clause, and nonretaliation provisions. The agreement was reviewed by the Center to ensure that it was administratively correct and then forwarded to the CCHRO for review for enforceability and systemic discrimination problems. Upon approval by the CCHRO, the case was closed, with the CCHRO retaining the right to reopen the complaint or sue for enforcement based on noncompliance with the agreement.³¹⁸

Because of the scope of the state law, the cases referred for mediation were employment discrimination cases. In the first year of the program, there were five meditations, three of which resulted in settlement. As noted, the satisfaction of the agencies involved and the parties has led to expansion of the program. Also educational efforts have been expanded to increase participation in the program. The expanded program is similar to the pilot program in process, but includes additional ADR service providers trained and certified by the CCHRO. The parties may choose a service provider from the CCHRO list or any other provider. The ADR program is combined with an early assessment program which classifies cases for investigative purposes. Unlike the pilot program, the expanded program gives the agency the option to mandate the use of ADR in cases deemed appropriate. Future assessment of the effectiveness of this program may

316. The agency withheld from mediation cases that appeared to raise issues with precedential impact or affect large groups of individuals. This determination and a post-settlement review help preserve the law development function and the enforcement role for systemic litigation.

317. If the complainant agreed to mediate, the charge was sent to the respondent, along with information regarding mediation. If the respondent agreed, then the CCHRO sent a joint request for mediation to the BBB/ADACC Center. The Center then contacted the parties and provided additional information regarding the mediation process. The parties were charged a \$60.00 fee for mediation, with financial aid available to parties unable to pay the full fee.

318. If no agreement was reached, the case was returned to the CCHRO for investigation and did not lose its investigation priority by virtue of referral to mediation. The mediation process was confidential and nothing that occurred in mediation is admissible in any subsequent litigation.

provide useful information for designers of the recommended ADA mediation program.

3. *An ADA Mediation Proposal*

The review of these existing programs and mediation research supports the use of mediation by the ADA enforcement agencies. Mediation of ADA cases offers the potential to reduce the backlog of cases, reach satisfactory results for the parties, and effectuate the purposes of the statute. Successful mediation at the administrative level also may reduce the number of cases judicially litigated. Furthermore, in mediation the parties take responsibility for resolving their own dispute, reducing reliance on government enforcement. A mediation program should be designed carefully, however, to minimize the disadvantages of mediation discussed above and to ensure active participation. Ideally, the mediation program should strive for a high settlement rate, a high compliance rate, and party satisfaction. The program cannot lose sight of the statutory goals as well and it is particularly important to maintain the focus on protection of the rights of individuals with disabilities.

Initially, the concern that mediation will interfere with the law development function must be addressed. While judicial development of the law is particularly important with a recently enacted statute, the mediation program proposed will not interfere with that function. The proposed program is voluntary, so many cases will not be mediated.³¹⁹ Of those cases mediated, many will not settle.³²⁰ Accordingly, there will be many cases available for judicial litigation. In addition, the program proposes that the cases be screened on intake and at that point, the agencies can identify cases raising issues that the agency has targeted for law development, investigating those cases for litigation purposes while referring other cases to mediation.³²¹ Thus, the law development function will be preserved, at the same time that quicker resolution is available for many

319. In the EEOC pilot project, 87% of charging parties and only 43% of respondents offered mediation agreed to mediate, which would leave well over half of the cases in which mediation is offered for litigation. See EEOC Report on ADR Pilot Program, *supra* note 102, at 3.

320. Only 52% of the mediated cases in the EEOC Pilot Program settled, again leaving a large percentage of cases for litigation. See *id.*

321. See Letter from Richard T. Seymour, Lawyers Committee for Civil Rights Under Law, to Frances M. Hart, Equal Employment Opportunity Commission, regarding Comments on Alternative Dispute Resolution (Sept. 20, 1993) 5-6 (hereinafter Lawyers Committee Comments) (on file with author).

parties through mediation. The program design set forth below is calculated to minimize other disadvantages of mediation and they will be discussed further in the course of the program analysis.

This Article makes a series of broad recommendations regarding program design.³²² An extremely important element of designing the program, however, is input from those who will be potential users of the system.³²³ In the course of this study, many representatives of various groups have been consulted.³²⁴ Further, more extensive consultation will provide significant benefits. To be effective the program must meet the needs of the parties to ADA disputes.³²⁵ In addition, disputants are more likely to use the procedures if they are involved in their design.³²⁶ Involvement of leaders of organizations representative of those likely to utilize the procedures in the design will enable them to educate and motivate their constituents to participate in mediation, enhancing the likelihood of success of the project.³²⁷

The Federal Advisory Committee Act (FACA)³²⁸ provides a mechanism for incorporating the input of representatives of potential disputes in the design of the mediation program. FACA permits establishment of an advisory committee where the head of the agency involved determines that it is in the public interest in connection with the performance of the agency's duties.³²⁹ FACA governs the procedure for establishment and operation of the committees.³³⁰ Use of an advisory committee pursuant

322. For useful information regarding program design, see Administrative Conference of the United States, Systems Design Work Group, *The Dispute Systems Design Pre-Design Organizational Checklist* (June 30, 1993) (hereinafter *Pre-Design Checklist*); Administrative Conference of the United States, Dispute Systems Design Working Group, *Operational Aspects of Designing Dispute Resolution Systems* (Feb. 1994) (hereinafter *Designing Systems*).

323. Examples of such groups are the various groups that represent individuals with disabilities, the Better Business Bureau, the Equal Employment Advisory Council, the Chamber of Commerce, the National Association of Manufacturers, and labor organizations. In employment cases where the employees are represented by a union, unique issues arise which must be taken into account in program design and settlement. See *infra* note 350. Accordingly, the involvement of labor organizations is important to the process.

324. While the report owes much to the ideas and information from the various people consulted, the recommendations herein are solely those of the author.

325. See WILLIAM L. URY, JEANNE M. BRETT, AND STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED* 65 (1988).

326. See *id.*; *Designing Systems*, *supra* note 322, section I, at 4.

327. URY, BRETT & GOLDBERG, *supra* note 325, at 76.

328. 5 U.S.C. app. II (1994).

329. 5 U.S.C. app. II, § 9(a)(2) (1994).

330. 5 U.S.C. app. II, §§ 7-13 (1994).

to FACA will insure effective input into the design process through the exchange of ideas among representatives of various groups participating on the committee. The communication and commitment inherent in the advisory committee process provide advantages over mere solicitation of written comments, which should enhance both the development of the mediation project and subsequent participation in the process.

The successes and failures of prior projects as well as mediation research should guide the design of the system. As in the consideration of an ALJ system, an initial question is whether a common mediation system should be established. For the reasons discussed in connection with an ALJ system, use of a common mediation system is a sensible approach. Although the agencies lose some control, the development and use of expertise on disabilities in general, and the ADA, in particular, is a significant benefit of a common system. Furthermore, a common system will coordinate the enforcement efforts of the diverse agencies involved in ADA enforcement. The enforcement agencies should establish a joint committee composed of representatives from each agency to design a mediation program that will be effective in cases under all titles of the ADA.³³¹ The following discussion addresses significant issues that must be determined in designing the program.

a. Voluntary or Mandatory Mediation

A significant question to be addressed is whether mediation should be voluntary or mandatory. The ADA authorizes voluntary mediation.³³² Neither the ADA nor the Administrative Dispute Resolution Act clearly authorizes mandatory mediation, however. The legislative history of the

331. The primary enforcement agencies which should be involved in the design of the program include the EEOC, the Department of Justice, the Department of Transportation, and the Federal Communications Commission. The Title II investigative agencies also can provide input into the design of the process, in addition to referring cases to the program and participating in the educational effort. These agencies include the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior and Labor. See 28 C.F.R. § 35.190 (1995).

The EEOC's recent endorsement of ADR and prospective adoption of mediation is consistent with this proposal. Indeed, the program proposed by the EEOC appears to incorporate many of the elements suggested *infra*. See *supra* notes 124-39 and accompanying text.

332. See 42 U.S.C. § 12212 (Supp. V 1993). This section, section 513, encourages ADR where appropriate and authorized by law. The Administrative Dispute Resolution Act also authorizes agencies to use voluntary dispute resolution proceedings. See 5 U.S.C. § 572 (1994).

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."³³³ The conference report on the ADA states that "it is the intent of the conferees that the use of . . . alternative dispute resolution is completely voluntary."³³⁴ This legislative history strongly supports the conclusion that ADR should be voluntary. 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 about compulsory arbitration rather than mediation. Accordingly, it might be argued that mandatory mediation is permissible.

Nevertheless, the lack of any exhaustion requirement under Titles II and III suggests that plaintiffs could not be compelled to mediate cases under those titles. Since 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. Title II complaints, where investigation is required, could not be dismissed for failure to mediate. In addition, dismissal of a Title III complaint for failure to mediate may affect the remedies available since only the Department of Justice can sue for damages under Title III. With respect to cases under Titles I and IV, which involve mandated agency procedures, mandated mediation may be an option. The EEOC's Rapid Charge Processing system implemented under Title VII required participation in a mediation conference.³³⁵ Since Title I adopts Title VII procedures, and nothing in the ADA expressly precludes mandatory mediation, it may remain an option for the EEOC.

Even where mandatory mediation is permissible, a determination must be made as to whether it is appropriate in ADA cases. The case for mandatory mediation is based on a belief in the value of the process. Parties that would not voluntarily mediate may settle in mandatory

333. See LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT, VOL. 1 516-17 (Comm. Print 1990); H.R. REP. NO. 485 III, 101st Cong., 2d Sess. 513 (1990). Congress notes agreement with the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59 (1974), (holding that arbitration award did not preclude judicial litigation of Title VII claim).

334. 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).

335. See PEER Study, *supra* note 247, at 150.

mediation and be satisfied with the process.³³⁶ Mandatory mediation may increase the mediation's efficiency impact.³³⁷ Nevertheless several concerns arise in connection with mandated mediation. If settlement is not reached or would have been reached without mediation, mediation may simply increase the parties' costs.³³⁸ In addition, if individuals with disabilities are disadvantaged in mediation,³³⁹ then compulsion to mediate should be avoided.³⁴⁰ A large scale mediation program may become so routinized that the benefits of mediation are lost.³⁴¹ Given the risks, and the probable need for legislative change to compel mediation of claims under Titles II and III,³⁴² the first effort should be voluntary media-

336. 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. Some of the difficulties that existing mediation projects have had in obtaining participation suggest consideration of mandatory mediation.

337. See *id.* at 2, 12-13. (noting that larger scale program may achieve more benefits more efficiently).

338. See *id.* at 1, 13 (noting that mandated processes add costs where either trial or settlement is inevitable). The emotional costs to the parties may also be increased. See *id.* at 1.

339. See *supra* notes 295-96 and accompanying text (noting that less powerful parties may be disadvantaged by less formal dispute resolution methods).

340. See PEER Study, *supra* note 247, at 151 (noting that mediation makes greater demands of time, expertise and emotion on complainant than traditional investigation); SPIDR Report, *supra* note 336, at 1-2 (mandatory dispute resolution must serve interests of parties, judicial system and public, and program should not harm historically disadvantaged groups).

341. See SPIDR Report, *supra* note 336 at 13-14 (bureacracy may routinize mediation causing loss of high quality and flexibility through rigid procedures and brief mediation sessions).

342. Legislative change would also be necessary to authorize agencies to impose effective penalties for respondents' failure to participate, such as payment for the mediator or payment of plaintiffs' attorneys fees. The ADA does not currently authorize the enforcement agencies to impose penalties for noncompliance, but Congress could authorize agency imposition of monetary penalties with appropriate safeguards. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 446 (1977) (holding that it is constitutional for Congress to authorize federal agency to impose monetary penalties with contests heard by administrative agency); *Crowell v. Benson*, 285 U.S. 22 (1932) (holding it constitutionally permissible for administrative body to hear and decide claims for compensation with appropriate safeguards).

tion.³⁴³ Ongoing assessment of the voluntary mediation efforts should reveal whether mandatory mediation might be effective.³⁴⁴

b. The Timing of Mediation

Another important issue is the timing of the mediation. If mediation takes place early in the investigative process, before positions harden, settlement may be more likely.³⁴⁵ On the other hand, at that point, the parties may be insufficiently aware of the strengths and weaknesses of both their own position and that of the other party to be motivated to settle.³⁴⁶ The systems discussed above used both models with some success. So long as mediation is not used as a delaying tactic or to impose costs on a party with fewer resources, there seems to be little reason to limit access to mediation. A combination of early intervention techniques and use of mediation could reduce the backlog and speed case processing, providing benefits to the parties as well as the government.³⁴⁷

343. Another reason to implement voluntary mediation initially is the additional cost of a mandatory mediation project.

344. Should mandatory mediation be considered, the SPIDR Report's criteria for mandatory mediation should be followed. See SPIDR Report, *supra* note 336 at 2-3. These criteria are: 1) funding comparable to litigation; 2) absence of coercion to settle in the form of reports to the trier of fact and financial disincentives to trial; and 3) availability of a high quality program that is readily accessible, permits party and attorney participation and provides clear procedures. *Id.* The program should be created with input from all stakeholders and monitored for quality. *Id.* Case assessment by a person knowledgeable about dispute resolution procedures, procedures for motions for exclusion and clearly defined requirements for participation and sanctions for noncompliance are also essential features. *Id.*

345. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 57 (1986) (early intervention by mediator may prevent polarization and limit hostility).

346. *Id.* at 57-58. This may create particular problems for complainants who may have insufficient access to information to evaluate the strength of their cases. For this reason, the Lawyers Committee suggests that some investigation take place before referral to ADR. See Lawyers Committee Comments, *supra* note 321, at 2. The proposal here contemplates only preliminary intake information, carefully collected to increase the likelihood of correct identification of issues. Such limited investigation may prove insufficient to facilitate effective mediation. A requirement of more extensive investigation, however, would utilize more agency resources, thus raising the cost of mediation. This issue should be addressed in the evaluation of the program. The design of mediation program should be altered if necessary to increase the fairness of the process and the probability of settlement.

347. This approach has just been adopted by the EEOC. See *supra* notes 124-39 and accompanying text. The Connecticut Commission on Human Rights and Opportunities also has implemented such a system. See *supra* notes 315-18 and accompanying text. The mediation system and early intervention program each could be implemented alone as well.

Such a system could operate as follows.³⁴⁸ When complaints are filed, investigators or intake officers should be trained to ask questions that would enable the agency to classify the case in several ways.³⁴⁹ This interview, whether done in person or by telephone, should reveal the nature of the dispute; whether it turns primarily on factual issues, legal issues or both; whether it involves novel legal questions; whether technical expertise such as engineers, architects, medical or vocational experts might be useful; whether systemic problems may exist; and whether the case appears frivolous or unsupported by any evidence.³⁵⁰ When the interview reveals

348. Each agency handling ADA cases would have to adapt this proposed process to its particular needs and staffing patterns. This Article attempts to sketch out broad outlines of how such a process might work.

349. Training particular employees to perform this function, rather than having it done by the investigator or intake officer assigned to the case, has certain benefits. More intensive training of fewer people will make the system function more efficiently than limited training of all staff. As noted, *infra*, relatively accurate assessment of cases at this stage is crucial to the success of this endeavor. The relative accuracy of the assessments should be a part of the employees' evaluation to insure accountability. If the employees who made the assessment also investigated the cases, they might have an incentive to ignore information that cast doubt on the accuracy of their initial assessment. Also, investigators might be reluctant to refer for mediation cases that they thought would settle, desiring to retain credit for the settlement. See EEOC Report on ADR Pilot Program, *supra* note 102, at 7. Of course, if the ultimate goal is settlement of those cases that can be settled fairly to all parties, the matter of credit for the settlement is irrelevant. If the mediation process is a better vehicle for achieving a fair settlement which is satisfactory to the parties, however, then referral to mediation should be encouraged.

350. At this stage, the agency should attempt to determine whether there are class or systemic issues involved. If such issues are apparent, the agency should consider whether referral to mediation is appropriate. While systemic issues are not per se inappropriate for mediation, it is essential that the plaintiff class be adequately represented in mediation and that the mediation deal with the systemic issues rather than allowing an individual to settle for individual relief, leaving the class issues unremedied. Thus, mediation might be appropriate where there is counsel, a disability rights organization or a labor organization to represent the group and deal with the systemic issues. Where no such representative is available, the agency should consider continuing the investigation and leaving any settlement negotiations until the agency has taken the case as an advocate. For discussion of class issues and agency mediation, see PEER Study, *supra* note 247, at 126-34.

Another significant issue that should be considered at this point is whether the complainant can effectively participate in mediation. This is particularly important in cases involving individuals with cognitive impairments, some of whom may not have the capacity to participate in mediation. See *Targeting Disability Needs*, *supra* note 117, at 35-36. Agencies should be extremely cautious in determining that an individual does not have the capacity to participate in mediation, however, to avoid falling into the very stereotypes that the ADA was designed to eliminate. See *Targeting Disability Needs*, *supra* note 117, at 35-36. The agency should explore ways to mediate effectively with the individual before

issues that the agency has decided have priority for purposes of development of the law, the case can be diverted from the mediation track and litigated by the agency, thereby preserving the law development function of the agency and the courts. Great care should be taken in developing the questions to be asked and in training the investigators to ensure that cases are correctly classified initially.³⁵¹ The importance of this task cannot be overestimated because it will determine the success of the system. Nevertheless, the initial classification should not be determinative if a later investigation reveals additional information.

Like the Washington Field Office system at the EEOC, the classification should then determine the additional resources expended on the case by the agency. At this stage, mediation should be offered to the parties. The time period for mediation should be limited³⁵² and, absent settlement, the case should be returned to its place in the investigation queue.³⁵³ Initially, mediation should be offered in all cases, except those targeted for litigation

concluding that mediation will not be effective. See *Targeting Disability Needs*, *supra* note 117, at 35-36.

In employment cases, the presence of a union representative should be ascertained at this point as well. Union representation, with the accompanying collective bargaining agreement, raises unique issues for settlement. For consideration of these issues, see Nancy Segal, *The Use of Alternative Dispute Resolution to Resolve ADA Issues in the Unionized Workplace*, presented to the 21st Annual Conference of the Society of Professionals in Dispute Resolution; and Ann C. Hodges, *The ADA in the Unionized Workplace*, 48 U. MIAMI L. REV. 567 (1994).

351. Investigators must take particular care with unsophisticated or inarticulate complainants who may themselves be unaware of the evidence relevant to establishing a violation of the law. Each agency should develop appropriate questions, investigation techniques and guidelines for classification for the sections of the ADA under its jurisdiction.

352. Time limits will discourage the parties from using mediation for delay purposes, and further the goal of speedy case processing. The time period for mediation, however, must be adequate to allow for scheduling the mediation and thoroughly exploring settlement possibilities with the mediator. The EEOC pilot project used a sixty day time period, which seems appropriate if resources permit.

353. To insure that agency employees do not discourage mediation, they should not be penalized for any additional time that the investigation takes as a result of the "time out" for mediation. The mediated case should be given the same priority that it had before the parties opted to try mediation to avoid discouraging the parties. In addition, to encourage participation in mediation, the classification for further investigation purposes should not be revealed to the parties. The agencies should not deny mediation based on the agency's view of the merits upon the intake interview. This issue, however, should be addressed in evaluation of the project. The results of the evaluation should assist in a determination of whether charges that appear meritless and/or charges that appear to be clear violations should be withheld from mediation. See *Lawyers' Committee Comments*, *supra* note 321, at 2.

for law development purposes. Should analysis of initial results of mediation suggest that some cases are more amenable to mediated settlements,³⁵⁴ the agencies should consider special efforts to convince parties in those cases to try mediation. For example, cases involving reasonable accommodation in employment and access to facilities and services under Titles II and III seem particularly appropriate for mediation.³⁵⁵ In most such cases there are a range of options to resolve the dispute, precisely the kind of case where mediation works well. The mediator can explore the various options with the parties, searching for a solution which is satisfactory to all.

Cases involving issues such as discharge from employment or disability of an individual present more difficulties. These cases are susceptible to mediated solutions, however, and should not be excluded.³⁵⁶ An employer who adamantly refuses to reemploy a discharged individual might be willing to pay back pay and provide a positive reference to avoid litigation.³⁵⁷ Similarly, a dispute over whether an individual is disabled could be resolved by settling the underlying issue, providing accommodation in employment for example, without determining whether a statutory disability exists. Mediation also offers potential to settle large cases such as those involving transportation systems.³⁵⁸ Use of negotiated

354. Initially, the program should mediate a range of cases, enabling analysis of effectiveness in various types of disputes.

355. These cases involve fact-based and case specific application of standards and, therefore, are particularly appropriate for alternative dispute resolution. See Administrative Conference of the United States, Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-3 (1995), reprinted in Administrative Conference of the United States, *Agency Arbitration*, Studies in Administrative Law and Procedure 88-1, at 77 (stating that arbitration is appropriate where legal norms have been established); President's Committee on Employment of People with Disabilities, ADR Workgroup, *Alternative Dispute Resolution and the ADA*, submitted in response to EEOC's Request for Comments, at 3-4 (noting whether disagreement is factual or legal and whether relationships of parties changes as result of dispute resolution are important factors in determining appropriateness of dispute for ADR).

356. See EEOC Report on ADR Pilot Program, *supra* note 102, at 6 (of 135 mediated settlement agreements, 99 were in discharge cases).

357. See EEOC Report on ADR Pilot Program, *supra* note 102, at 4 (in pilot program 51% of cases included monetary relief, 17% included reinstatement or change in employment status, and 37% included references).

358. Disputes regarding the ADA's transportation provisions may be less susceptible to mediation for reasons other than size of the dispute and number of interested parties. Many of the statutory transportation requirements are quite specific, leaving less room for the flexibility of mediated solutions. See, e.g. 42 U.S.C. § 12162 (Supp. V 1993) (discrimination to purchase new rail passenger cars unless one per train is accessible to individuals with

rulemaking and mediation in environmental disputes has demonstrated that even large, multi-party disputes can be resolved through alternative processes.³⁵⁹

To ensure that a voluntary mediation system is utilized, the parties must be motivated to participate. First, the charges must be retained by the agencies pending mediation.³⁶⁰ Second, written material describing the process, along with its advantages and disadvantages should be prepared for distribution to the parties.³⁶¹ Education is essential to convince the parties to disputes to use mediation and to ensure satisfaction with the process by creating realistic expectations about the process and potential results.³⁶² This education must be undertaken by the agencies involved and their

disabilities). However, these disputes should not be precluded from mediation. Even where the statutory requirements have not been complied with, a mediated solution with 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. See Federal Transit Administration, Office of Civil Rights, *Informal Compliance Process* (1993). The legality of agency approval of a mediation agreement that conflicts with specific statutory requirements is questionable, however.

For the same reasons, Title IV cases may be less susceptible to mediation. See 47 U.S.C. §§ 225(c),(d) (Supp. V 1993); 47 C.F.R. §§ 64.603, 64.604 (1995) (discussing telephone and voice relay services).

359. See Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (1994); Administrative Conference of the United States, *Negotiated Rulemaking Sourcebook* (1990); GOLDBERG, SANDER & ROGERS, *supra* note 288, at 345-56 (discussing use of negotiated rulemaking by federal agencies); LINDA R. SINGER, *SETTLING DISPUTES* 140-50 (1990) (describing successful mediation of complex environmental disputes and negotiated rulemaking).

360. Retention of the charges is necessary to provide the threat of agency litigation, which in turn provides an incentive for respondents to participate in the process. In addition, it facilitates review of the settlement agreement and enforcement if necessary.

361. The Department of Justice is initiating this process with its grant for mediator training, which includes production of a consumer guide to mediation services.

362. See EEOC Report on ADR Pilot Program, *supra* note 102, at 5 (recommending development of appropriate informational materials about process to enable parties to make informed decisions and have realistic expectations); PEER Study, *supra* note 247, at 152-53; see also *Designing Systems*, *supra* note 322, Section III at 1. La Verne Fletcher of the D. C. Department of Human Rights suggests that the mediation process begins when the complaint is filed. The mediator must sell mediation to the parties. Other alternative dispute resolution professionals consulted in the course of this study support the importance of education in convincing parties to participate effectively in the process. See also Lee Russell, Center for Dispute Resolution, San Diego, California (telephone conversation, October 8, 1994) (noting that education, which begins with first contact with parties, increases comfort level in uncomfortable situation-conflict, thus, improving likelihood of productive participation); see also BROWN & MARRIOTT, *supra* note 279, at 121-23.

personnel, who must have a clear understanding of the process and a commitment to its use.³⁶³

In addition to educating the parties to particular disputes, the agencies can make potential users of the process aware of its benefits by making presentations to groups such as disability organizations, employer organizations, government agencies, and business groups.³⁶⁴ Persons who have successfully used the procedure may become proponents to others.³⁶⁵ Successful mediations should be publicized to the extent possible to encourage others to utilize the process.³⁶⁶ The process of dispute settlement also is likely to be more effective if the users are trained.³⁶⁷ Training of potential disputants through the use of technical assistance grants, such as the joint training undertaken by the EEOC and the

363. See EEOC Report on ADR Pilot Program, *supra* note 102, at 4, 5 (uneven training of EEOC staff may have adversely impacted ability to obtain agreements to mediate); *Designing Systems*, *supra* note 322, section III, at 1, 4. The Department of Justice Pilot Project has had limited success in obtaining agreements to mediate which may be due, in part, to the failure to undertake an educational effort. See *supra* note 314 and accompanying text. The EEOC project, which included an educational effort, was more successful at obtaining agreements to mediate, although it also experienced some difficulty which required extending the project to reach the targeted number of mediations. EEOC Report on ADR Pilot Program, *supra* note 102, at 2-3. Use of agency personnel for education will avoid the Privacy Act problems that created difficulties in the DOJ Pilot Project.

If external mediators are used, they too could be a part of the educational process. See MOORE, *supra* note 345, at 53-54 (education by mediator about process enhances probability of successful mediation).

364. The D. C. Department of Human Rights has utilized educational presentations to increase participation in mediation. The presentations might even include simulated mediations or other demonstrations of the procedure. See URY, BRETT & GOLDBERG, *supra* note 325, at 76 (recommending real or simulated demonstrations to overcome skepticism of potential participants). The Federal Trade Commission has used radio public service announcements to publicize the benefits of dispute resolution to consumers. Information from ACUS.

365. See URY, BRETT & GOLDBERG, *supra* note 325, at 76 (suggesting that designers or users of system are its most effective proponents). 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 has been working in ADA education.

366. URY, BRETT & GOLDBERG, *supra* note 325, at 77. Because of privacy protections and confidentiality, permission of the parties to publicize particular disputes would be necessary. Yet, statistical data could also be used for publicity purposes.

367. URY, BRETT & GOLDBERG, *supra* note 325, at 78-79 (participants need skills to use new procedures effectively).

Department of Justice, will serve the dual purpose of training potential users and creating advocates of the system.³⁶⁸

Early mediation serves the goal of speedier resolution, which should help reduce the backlog. Because of the investigation backlogs in most agencies, mediation should not cause delays in the process if cases are simply referred for mediation and, if no settlement is reached, inserted back in their rightful place in the investigation queue. Those who decline mediation at an early stage should not be precluded from choosing mediation later, should they decide to do so. Agency investigators and attorneys should be alert to the possibility of later mediation, even after a cause finding. Cases not ripe for early settlement might be excellent candidates for later mediation as the facts develop and the parties become more aware of the evidence.

c. The Source of Mediators

The next crucial question is the source of the mediators. Since there is no charge to parties for the investigation process, any charge for mediation would discourage its use.³⁶⁹ Thus, the option should be cost free to the parties.³⁷⁰ Cost to the agency, training, and availability for timely mediation are essential factors to be considered in determining the best source of mediators.

There are several potential sources of mediators. First, agency employees could be trained in mediation. If agency employees are used, the mediation could be separate from the investigative process,³⁷¹ or a part of the process.³⁷² The second possible source of mediators is employees

368. See *supra* notes 117-20 and accompanying text (describing EEOC and Department of Justice training in ADA and ADR). These and future trainees might also serve as advocates for individual disputants, helping balance the power in the process. See *infra* notes 423-25 and accompanying text (noting that technical assistance grants could be source for training individuals to serve as advocates).

369. Of course, the parties pay their own costs, such as attorneys fees, in either process. Should the case be litigated, attorneys' fees for mediation should be recoverable to the same extent as attorneys' fees for the other aspects of the administrative process. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61 (1980).

370. The cost to the parties for mandatory mediation, if adopted, should also be equivalent to regular case processing. SPIDR Report, *supra* note 336, at 16.

371. See *supra* notes 298-300 and accompanying text (describing D.C. Department of Human Rights mediation process).

372. See *supra* notes 301-311 and accompanying text (describing Chicago Commission on Human Relations mediation process).

from other agencies who are trained in mediation.³⁷³ Third, the process could use mediators from the Federal Mediation and Conciliation Service, which currently mediates labor disputes and cases under the Age Discrimination Act.³⁷⁴ The final alternative is outside mediators.³⁷⁵ There are advantages and disadvantages to each system. Regardless of the source of mediators, efforts should be made to include mediators with disabilities in the process.

One advantage of using agency employees to mediate is their familiarity with the law and with the resulting remedies if the case was litigated. Moreover, the agency would retain more control over the process if the mediators were agency employees. Most agency employees are not trained in mediation, however, and some may not be well-suited for such a role. Furthermore, employees at most agencies are stretched to the limit, and imposition of additional duties will require additional personnel. Some parties may prefer mediators unconnected with the agency, fearing disclosure of information that might facilitate settlement to an agency with statutory investigative responsibilities.³⁷⁶ Thus, use of agency mediators may result in lower settlement rates or settlements without full information.

373. See *Inter-agency Pilot Project on Sharing Neutrals*, a paper describing the project of the Administrative Conference of the United States and a number of federal agencies. (hereinafter *Inter-agency Pilot Project*) (on file with author). For further discussion of the project, see *infra* notes 378-83 and accompanying text.

374. See 29 U.S.C. §§ 172, 173 (1994) (discussing creation and organization of FMCS and its responsibility for mediating labor disputes); 34 C.F.R. § 110.32 (1995) (referring age discrimination complaints to FMCS for mediation); 5 U.S.C. § 7119 (1994) (providing that FCMS will assist federal agencies and their employee representatives in resolving negotiation impasses); Linda R. Singer & Ronald A. Schechter, *Mediating Civil Rights: The Age Discrimination Act* (1986) (evaluating the Age Discrimination Act Mediation program); Jerome T. Barrett & Lucretia Dewey Tanner, *The FMCS Role in Age Discrimination Complaints: New Uses of Mediation*, 32 LAB. L. J. 745 (1981) (describing FMCS role in mediating age discrimination complaints); information from representatives of the Federal Mediation and Conciliation Service.

375. Both the EEOC and Department of Justice pilot projects used outside mediators. See *supra* notes 105, 149 and accompanying text.

376. For example, see the comments of the Equal Employment Advisory Council, an association of major corporations, suggesting that respondents would have a disincentive to be candid with agency officials who might ultimately sue the respondent. See Letter from Jeffrey A. Norris to Frances M. Hart (Sept. 6, 1993) at 3 (in Comments of Equal Employment Advisory Council in Response to EEOC's Request for Comments on Alternative Dispute Resolution) (on file with author).

This concern is greater where the mediation is part of the investigatory process than where mediation is separate and confidential.³⁷⁷

An alternative is to use employees from other agencies to mediate cases. This system would use a common corps of mediators for all titles as suggested above. The Administrative Conference and a number of federal agencies have begun a pilot project to promote sharing of mediators among federal agencies.³⁷⁸ The mediators in the project are federal employees trained in mediation who will mediate cases for their own or other agencies on a collateral duty basis.³⁷⁹ These mediators are available for external as well as internal disputes.³⁸⁰ Agencies who use mediators must also contribute mediators or other resources to the project.³⁸¹ One advantage of using these mediators is the low cost. In addition, the mediators are trained and experienced.³⁸² There are two significant limitations to the use of these or similar mediators. The mediators are located in the Washington metropolitan area only,³⁸³ and they are not specifically trained in the ADA. The latter concern is remediable. The former, however, is

377. Even where mediation is confidential, however, the parties may not be convinced that the information disclosed in mediation will not be revealed to agency investigators and/or attorneys. An additional drawback of using agency employees is that the employees with ADA expertise at many of the agencies are located in Washington, D.C., while the disputes that must be mediated are not limited to Washington. While the EEOC has investigators at various regional offices, the employees handling ADA cases at other agencies are primarily, if not exclusively, in Washington. Thus, the mediators or the parties would have to travel, adding to the costs, unless mediation can be done by telephone. Telephone mediation is possible, but probably less effective. See PEER Study, *supra* note 247, at 157 (mediating in a conference setting is often more efficient). A review of the various mediation techniques in MOORE, *supra* note 345, and FOLBERG & TAYLOR, *supra* note 289, reveals that effectiveness may depend on face to face meetings.

378. See *Inter-agency Pilot Project*, *supra* note 373, at 1 (describing pilot project).

379. *Id.*

380. Interagency ADR Working Groups, *Pilot Project on Sharing Neutrals*, ADR NETWORK, Vol. II, No. 1, at 1, 12 (June 1994).

381. *Inter-agency Pilot Project*, *supra* note 373, at 1, n.1.

382. See *Inter-agency Pilot Project*, *supra* note 373, at 2 (describing qualifications required for mediator participation). Because the mediators are expected to mediate internal EEO complaints, their experience will be somewhat relevant to ADA disputes. See *Pilot Project on Sharing Neutrals*, *supra* note 380, at 12 (agencies are increasingly using mediation in EEO disputes). The project anticipates expanding the corps of available neutrals by using less experienced mediators as co-mediators, enabling them to gain experience to mediate alone. See *Inter-agency Pilot Project*, *supra* note 373, at 2 (describing use of co-mediators).

383. *Inter-agency Pilot Project*, *supra* note 373, at 1. The mediators will work within a sixty mile radius of Washington, D.C. *Id.*

problematic and, as in the case of agency employees, the mediator or the parties would have to travel for a face to face mediation.

The agencies might use mediators from the Federal Mediation and Conciliation Service (FMCS), an experienced mediation agency.³⁸⁴ FMCS mediators are stationed around the country, avoiding the geographical problems of using employees located in Washington. There is some debate among mediation scholars, however, as to whether the approach to mediation used successfully in labor disputes is appropriate in civil rights disputes.³⁸⁵ In labor disputes, the mediated settlement (as well as the non-mediated settlement) reflects the power of the parties. A labor contract negotiation is, in essence, a power contest. By way of contrast, mediation of a civil rights dispute involves the external standards of the statute. On that basis some might argue that FMCS mediators are inappropriate for the task of rights-based mediation, at least without some assurance that the mediators could make the transition in mediation approach.³⁸⁶ FMCS mediators do have some experience in mediation of cases involving statutory civil rights under the Age Discrimination Act.³⁸⁷ A study of the mediation program found it difficult to evaluate, however, because of the unavailability of data.³⁸⁸ FMCS mediators would require ADA training.

A second concern about use of FMCS mediators is their availability. Currently, the first priority of the FMCS is mediation of labor disputes. Absent contrary congressional direction, these disputes are likely to continue as first priority because of the number of people impacted by such disputes, their immediacy,³⁸⁹ and the inclinations of the mediators who

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

385. See Moore, *supra* note 345, at 40-42 (discussing this debate in general terms). Moore characterizes the debate as a distinction between focus on process, rather than substance. As Moore notes, however, not all labor mediators are of the process school. Some scholars, as well as FMCS representatives, believe that mediation techniques transcend subject matter.

386. This Article does not attempt to take a position on the debate among mediation scholars on this issue, but merely raises the question. It is important, however, to insure that the statutory rights are not sacrificed to mediation in a general sense. One way to deal with the concern about mediation approach would be in the assignment of mediators to ADA cases. Information from FMCS.

387. 42 U.S.C. § 6103 (1988); 34 C.F.R. § 110.32 (1995).

388. See Singer & Schechter, *supra* note 374, at 11, 16, 19 (noting that conclusions of study are tentative and general because of restrictions on access to necessary data). Cf. Barrett & Tanner, *supra* note 374, at 752, 754 (concluding that mediation is successful because about half of complaints are resolved).

389. Telephone Interview with Pete Swanson, ADR Mediator, FMCS (Jan. 12, 1995).

presumably joined the agency with a goal of mediating such disputes and are experienced at doing so. Accordingly, without a significant infusion of additional mediators, mediation of ADA cases in a timely manner might be difficult, if not impossible.

The final option is the use of outside mediators. The two pilot projects have trained a group of mediators in ADA issues and the recent Department of Justice grant contemplates training an additional ninety mediators. Because of these three projects, a group of mediators trained in both mediation and the ADA exists and will soon increase in size. Use of outside mediators would minimize training costs³⁹⁰ and avoid the need to increase government employment. In addition, the group is not limited to Washington, D.C., although at present it is not nationwide. There are mediators in many areas of the country, however, that might be trained to mediate ADA cases.³⁹¹ The use of outside mediators relinquishes some governmental control over the process and requires agency monitoring of nonemployees to ensure quality work. While the controls that exist for employees, such as evaluation which may impact pay and promotion, are not present for outside mediators, the desire to continue to mediate may provide a substantial incentive to comply with quality standards. Use of outside mediators from the private sector furthers the goal of minimizing government bureaucracy.

Unless a sufficient number of mediators are willing to work pro bono, these mediators must be paid with government funds. Because local civil rights agencies have had some success using pro bono mediators, the

Even if the FMCS does not mediate ADA cases, the agency might be able to assist in training mediators for the task. *Id.*

390. 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.

391. 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, 474-80 (1994) (recommending use of community mediation dispute resolution programs for Title III disputes); Letter from Gene Valentini to EEOC (Sept. 17, 1993) at 1 in Comments of South Plains Association of Governments in Response to EEOC Request for Comments (suggesting use of mediators from federal and local government agencies as means of handling more cases and fostering accessibility to mediation) (on file with author). These 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 Administrative Conference maintains a roster of neutrals available for use in agency disputes. See THOMAS R. COLOSI & CHRISTOPHER B. COLOSI, Administrative Conference of the United States, *Mediation: A Primer for Federal Agencies* 12 (1988).

possibility should not be overlooked.³⁹² Pro bono mediation of ADA cases may assist private mediators in increasing their experience and expanding their potential client base. This same advantage may encourage some mediators to handle ADA cases at low cost. The agencies also could explore using grants to existing mediation agencies.³⁹³ These agencies often have sources of volunteer or low cost mediators.³⁹⁴ There are a number of additional ways to fund mediation that are consistent with government spending regulations, and limited, of course, by the agencies' budgets.³⁹⁵

Use of each source of mediators will require some training.³⁹⁶ It goes without saying that the mediators should be trained in mediation skills.³⁹⁷ In addition, essentials of any training program for ADA mediators include the following. The mediator must have a general understanding of various

392. 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 NEG. 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, has suggested 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) 284, 284 (November 11, 1993). Lawyers trained in mediation might fulfill pro bono obligations by mediating cases.

393. Such grants were used for the pilot projects. Some organizations already have initiated private mediation services for ADA cases. For example, the Trade Winds Rehabilitation Center, Inc. in Gary, Indiana, has an ADA mediation program. See *Trade Winds Rehabilitation Center, Inc., Northwest Indiana Americans with Disabilities Act Mediation Project* (1995) (describing ADA mediation program).

394. See *supra* note 392 (discussing sources of volunteer mediators).

395. See George D. Ruttinger, *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking*, Report to the Administrative Conference of the United States, 877-902 (Nov. 19, 1986) (discussing various methods of acquiring and paying neutrals for use in government ADR). The process is complicated by the fact that a number of different agencies are involved in ADA enforcement and potentially in ADA mediation, should a common corps of mediators be used.

396. Insuring that neutrals are qualified is particularly important when the parties do not have a choice as to which neutral to use. See Linda Singer, *SETTLING DISPUTES* 170 (1990) (citing *Society of Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, Qualifying Neutrals: The Basic Principles* (1989)). The SPIDR Commission on Qualifications emphasizes competent performance over formal qualifications such as degrees and specialized training. *Id.*

397. For one listing of such skills, see *Society for Professionals in Dispute Resolution (SPIDR) Commission on Qualifications, Qualifying Neutrals: The Basic Principles*, 17-19 (1989) (among requisite skills are ability to listen actively, ability to analyze problems, identify issues and frame issues, and sensitivity to values of the disputants).

types of disabilities and the impact that such disabilities have on the lives of individuals.³⁹⁸ In particular, the mediator must understand the impact of disabilities on the dispute resolution process and the ways to make the mediation accessible to individuals with disabilities.³⁹⁹ The mediator should have an understanding of the ADA.⁴⁰⁰ While the mediator is not a legal advisor to the parties, the mediator must be aware of the legal context in which the dispute arises and the standards that would be applicable if the case were litigated.⁴⁰¹ The mediator must be knowledgeable about available resources in the community at the national, state and local level which can aid in reaching a satisfactory settlement.⁴⁰² These

398. *Targeting Disability Needs*, *supra* note 117. This publication, which was written by the American Bar Association Commission on Mental and Physical Disability Law and the Commission on Legal Problems of the Elderly and published by the American Association of Retired Persons for the National Institute for Dispute Resolution is an excellent source for alerting mediators and mediation programs to issues relating to the ADA and the source of many of the training recommendations herein.

399. *Targeting Disability Needs*, *supra* note 117 at 22-37 (discussing how various disabilities affect dispute resolution and suggesting ways to make dispute resolution accessible to individuals with disabilities).

400. See *Qualifying Neutrals: The Basic Principles*, *supra* note 397, at 19 (recommending consideration of performance criteria including knowledge of the process that will be used to resolve dispute if no agreement is reached and awareness of legal standards that would be applicable if cases were litigated); Lawyers Committee Comments, *supra* note 321 at 3 (stating that mediators without knowledge of law cannot effectively demonstrate strengths and weaknesses of parties' positions and probable outcome of litigation).

401. Some mediation scholars suggest that subject matter expertise is irrelevant in mediation. See Stephen B. Goldberg, *A Qualified Mediator's Skills Don't Depend on Experience*, NAT'L L.J., April 11, 1994, at C14 (arguing that mediator does not need expertise in subject matter of dispute). An expert mediator certainly could resolve an ADA dispute without ADA expertise. Nevertheless, training in the ADA should be required for several reasons. Under the proposed program, the mediated agreements will be reviewed by the agencies for consistency with the statute. Also, the knowledgeable mediator can assist in settlement by previewing the possible outcomes of a trial, causing the parties to view their case more realistically. *Id.* Finally, because statutory rights are involved, the mediator should be sufficiently knowledgeable to alert unsophisticated parties to statutory issues. Thus, training in the ADA should be required, although extensive expertise should not. See *President's Committee on Employment of People with Disabilities, ADR Workgroup, Alternative Dispute Resolution and the ADA* 6 (Dec. 2, 1992) (on file with author) (listing training necessary for ADA dispute resolvers).

402. See *Targeting Disability Needs*, *supra* note 117, at 38-39 (discussing available resources). *Targeting Disability Needs* not only lists resources, but offers suggestions on how such resources might be used. Through the technical assistance programs, the agencies have identified resources as well. See, e.g., Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act*, Resource Directory (1992). The information should be updated on a

resources may have ideas for solutions to accessibility or accommodation problems or may offer services that will assist in providing solutions. Use of such resources may make the difference between settlement or no settlement. Furthermore, in addition to specific ADA training, mediators of statutory civil rights cases need to be aware of mediation techniques for dealing with power imbalances. This issue will be discussed further below.

None of the sources of mediators discussed is unquestionably superior to the others, assuming adequate training and a sufficient number of mediators to handle the cases in a timely fashion. Use of outside mediators, however, 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, thereby, freeing agency resources and reducing governmental enforcement expenditures. As discussed below, however, the agency must retain some control over the process to ensure protection of statutory rights. The issue of protection of rights raises several other issues which must be considered in designing a mediation program. They include the following: 1) agency review and approval of settlements; 2) enforceability of settlements; 3) imbalances of power; 4) the role of attorneys in mediation; 5) the need for and use of experts; and 6) confidentiality.

d. Agency Review and Approval of Settlements

Because the issues involve statutory rights and the mediation referral contemplated is a part of the agencies' processes, the agencies should retain a role in the settlements. Whether or not the mediator is an agency employee, the referring agency should review settlement agreements reached in mediation for consistency with the statute, and approve the agreements that meet established criteria.⁴⁰³ The range of acceptable

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 number of national companies have formed Project Access, which provides information to businesses on compliance with the ADA and resources for issues relating to employment of individuals with disabilities. See Peter David Blanck, *Communicating the Americans With Disabilities Act, Transcending Compliance: A Case Report on Sears, Roebuck and Co.* 21 (Washington, D.C.: The Annenberg Washington Program in Communications Policy Studies of Northwestern University, 1994) (describing Project Access) (on file with author).

403. See Lawyers Committee Comments, *supra* note 321, at 3 (arguing that EEOC should be involved in each ADR proceeding to insure consistency with purposes of Civil

agreements should be wide because the facts of cases and the strength of cases varies widely. Nevertheless, to the extent possible, the agencies should ensure that charging parties with strong cases are not being coerced to settle for little because of their lack of power and money, and that respondents are not coerced to pay significant sums to charging parties in frivolous cases to avoid large litigation costs or bad publicity. In addition, this review process can be used to identify repeat offenders who may have systemic discrimination problems which are being settled with individuals. The effective use of agency review for this purpose will help prevent sacrificing the goal of resolution of systemic discrimination to the goal of speedy resolution of individual disputes. Upon discovery of systemic problems, the EEOC and the Department of Justice can utilize their litigation authority to remedy the systemic discrimination.

While review of settlements will add to the agency workload, the reduction in investigations should make up for the additional work. To minimize the added burden, the agencies could create either guidelines for settlement approval or settlement agreement forms containing required language.⁴⁰⁴ To avoid significant limitations on the creativity of the parties and the mediator, however, guidelines or settlement forms should be extremely flexible, with few rigid requirements. One useful requirement, however, would be language regarding enforcement of the settlement.⁴⁰⁵ Development of guidelines regarding settlement could provide other benefits as well. These guidelines could assist the mediator and the parties in determining what appropriate settlements might be. Such a guide would be particularly useful for parties operating without representation in the mediation process.⁴⁰⁶

Rights laws). Because the agencies enforcing Titles I, II and III have the authority, on their own or through the Justice Department, to litigate violations of the statute, they also have the authority to approve or reject settlements of disputes. The FCC can accept settlements as final judgments or take action to enforce the statute despite the settlement. Dubroof, *supra* note 185. The EEOC signed agreements reached through the rapid charge processing procedure. Silver, *supra* note 224, at 579.

404. The D.C. Department of Human Rights has used a settlement agreement form for mediated settlements. The Federal Transit Administration has established guidelines for voluntary compliance agreements. See Informal Compliance Process, *supra* note 358, at Attachment II.

405. See discussion of enforceability *infra* notes 407-414.

406. To be most useful to the mediator and the parties, the guidelines should include what a full remedy would be if the case were successfully litigated. See PEER Study, *supra* note 247, at 152-53 (recommending such guidelines to inform parties in order to inject realistic assessments into negotiations). The risk of such guidelines is that individuals with weak cases and no legal advice might rigidly adhere to unrealistic expectations about

Another possible approach is to require the mediator or the parties to 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, providing information that would enable the agency to determine whether to approve the agreement. Given the confidential nature of mediation, agreement of the parties to the statement should be required before the statement is submitted to the agency. However, such a requirement might hinder negotiations by requiring negotiations over the statement in addition to the settlement agreement. It is unclear whether agreement to such a statement would be a stumbling block in negotiations and whether it would be valuable to the agency. Thus, the agencies should consider experimenting with this requirement.

e. Enforceability of Mediated Agreements

The goal of mediation is to settle cases. These settlements, however, achieve the statutory goal only if they are enforceable. While studies of mediation indicate that compliance with agreements is widespread,⁴⁰⁷ a successful mediation program should result in enforceable agreements to help ensure such compliance. Judicial decisions in cases 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.⁴⁰⁸ There is disagreement over whether federal courts have jurisdiction to enforce such agreements. 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.⁴⁰⁹ Other courts have found such actions to be enforceable under Title VII.⁴¹⁰ Courts have split on whether exhaustion

settlement.

407. See *supra* note 289 and accompanying text (noting high compliance rates).

408. See cases cited *infra* at notes 409-12 and accompanying text.

409. See *Morris v. City of Hobart*, 39 F.3d 1105 (10th Cir. 1994) (holding that federal court had no jurisdiction over suit to enforce private settlement of Title VII claim). Unlike the cases cited *supra* note 410, *Morris* did not involve a predetermination settlement agreement and therefore, according to the court, did not implicate the statutory enforcement scheme. 39 F.3d at 1111-12 n.4.

410. See, e.g., *EEOC v. Safeway Stores, Inc.*, 714 F.2d 567, 573 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (holding conciliation agreement enforceable); *EEOC v. Henry Beck Co.*, 729 F.2d 301, 306 (4th Cir. 1984) (finding that because contrary holding would enable respondents to use conciliation as a delaying tactic impairing enforcement of Title VII, settlement agreement negotiated under rapid charge processing procedures was enforceable by EEOC); *James v. Texas Dept. of Human Serv.*, 818 F. Supp. 987, 990 (N.D. Tex. 1993)

of administrative remedies is required before filing suit to enforce a settlement agreement.⁴¹¹

To ensure enforceable agreements, the ADA could be amended to make failure to comply with a mediated settlement agreement unlawful. Barring such amendment, the agencies should be willing to seek enforcement of such agreements in order to make the mediation program a success. If, as is the case in most mediation programs, noncompliance is rare, enforcement will not be a strain on agency resources. The agencies should also support individuals seeking judicial enforcement where requested. As the Fifth Circuit noted in *Safeway Stores*, lack of enforceability would undermine the statutory scheme, allowing respondents to use conciliation to delay and possibly make proof of discrimination more difficult, seriously prejudicing the complainants and the agency.⁴¹² The ADA's encouragement of ADR strongly supports enforceability of mediated settlement agreements. The arguments for enforcement are compelling and should be made forcefully by the agencies.⁴¹³

(holding action to enforce settlement agreement actionable under Title VII and therefore, federal court has jurisdiction); *Sherman v. Standard Rate Data Serv., Inc.* 709 F. Supp. 1433, 1440 (N.D. Ill. 1989) (finding that federal court has jurisdiction over private action to predetermination settlement agreement); *Kiper v. Louisiana St. Bd. of Elementary and Secondary Educ.*, 592 F. Supp. 1343, 1359 (M.D. La. 1984) (holding that federal court has jurisdiction over action by aggrieved employee to enforce conciliation agreement). Some courts have recognized a distinction between enforcement of conciliated agreements after a cause finding and enforcement of agreements negotiated prior to determination. *See also* *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982) (finding that EEOC may not seek enforcement of settlement agreement without investigation and determination of reasonable cause). Other courts have found no distinction. *See* *Eatmon v. Bristol Steel and Iron Works*, 769 F.2d 1503, 1511 (11th Cir. 1985) (finding no distinction between conciliation agreements and predetermination settlement agreements for purposes of jurisdiction over enforcement actions). To the extent that the courts recognize a distinction, an agreement reached in mediation as contemplated herein would be a predetermination settlement agreement.

411. *Compare* *Blank v. Donovan*, 780 F.2d 808, 809 (9th Cir. 1986) (settlement agreement negotiated pursuant to Title VII complaint not enforceable where Title VII administrative requirements have not been exhausted) *and* *Parsons v. Yellow Freight Sys.*, 741 F.2d 871, 874 (6th Cir. 1984) (holding that plaintiff seeking to enforce settlement agreement resulting from Title VII proceeding must exhaust administrative requirements before filing enforcement action in court) *with* *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1508 (11th Cir. 1985) (no exhaustion required prior to enforcement action based on settlement agreement) *and* *Sherman v. Standard Rate Data Serv., Inc.*, 709 F. Supp. 1433, 1441 (N.D. Ill. 1989) (exhaustion of administrative remedies not required before action to enforce Title VII settlement agreement).

412. 714 F.2d at 573.

413. Questions about enforceability may discourage participation in the process.

In addition to active enforcement, the agencies have two other roles to play in the enforcement area. First, review of the agreement should include review for enforceability. As noted above, enforcement language could be drafted by the agencies as a guide for the mediator and the parties. Also, the agreement to mediate should include agreement that any settlement reached is enforceable by the agency.⁴¹⁴ While such agreement would not confer jurisdiction on the federal courts, it would at a minimum allow the agency to seek enforcement on a contractual basis. Second, education about mediation should include information about enforcement of mediated agreements so that the decision about whether to mediate is an informed one.

f. Power Imbalances

Because mediations in ADA cases often will involve an individual with a disability and a business or government entity, concern about power imbalances surface. The complainants may be at a disadvantage in this informal procedure because of the historical discrimination they have endured and their lack of resources.⁴¹⁵ All power imbalances cannot be eliminated in mediation and these imbalances are also present in investigation and litigation proceedings. Nevertheless, steps can and should be taken to ensure that power imbalances do not adversely affect either party in ways unique to mediation.⁴¹⁶

The current debate in the dispute resolution community, with respect to the role of the mediator, affects this issue.⁴¹⁷ 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 his or her own view of the merits of the case, the merits

414. The mediated settlement agreements in the EEOC pilot project were enforceable by the agency. R. Gaul Silberman, Susan E. Murphy, & Susan P. Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1557 (1994).

415. In a given case, however, the disadvantaged party might be the small employer faced with a disability rights organization.

416. While prejudice certainly is not unique to mediators, the informality of mediation may increase the chance that these prejudices have an influential impact. Delgado et al., *supra* note 295, at 1386. Mediation lacks certain protections against acting on bias that are present in the judicial setting. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1588-90 (1991).

417. For discussions of these views of mediation, see Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259-62 (1989); MOORE, *supra* note 343, at 34-35, 40-42.

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 attempting to settle the dispute in light of the legal rights of the parties. The clear view of some people is that the latter approach, identified as "rights-based mediation," is most appropriate for ADA mediation.⁴¹⁸ A third view is that mediation is not the most appropriate vehicle for dispute resolution, where the goal is efficiency or protection of rights.⁴¹⁹ Instead, mediation is effective and should be employed where the goal is empowerment.⁴²⁰ This report does not attempt to resolve, or even enter, this debate. As proposed here, mediation attempts to further all three goals—efficiency, protection of rights, and empowerment of the parties.

Mediation in the statutory rights context, however, should not be undertaken without the parties' and the mediators' awareness of the statutory rights involved. Accordingly, the agencies' education role should include learning about statutory rights and remedies.⁴²¹ Such education will alleviate much of the power disparity that results from lack of knowledge or information. Additionally, education of the mediators about statutory rights and disabilities will reduce their biases. Furthermore, there are mediation techniques that can be used to deal with imbalances of power while remaining neutral, as the mediator is required by ethical standards to do.⁴²²

In addition to the use of adequately trained mediators, monitored to ensure acceptable performance, the agencies can assist in balancing power by encouraging parties to bring a representative or advocate to the mediation.⁴²³ One trained group of potential advocates for complainants exists as a result of the joint EEOC/DOJ training. The training could be repeated or expanded, and technical assistance grants could be used to

418. *Targeting Disability Needs*, *supra* note 117, at 9-10.

419. Bush, *supra* note 417, at 262-66.

420. *Id.*

421. See *supra* notes 361-68 and accompanying text. This education can be accomplished primarily through written materials, many of which have already been created by the agencies' technical assistance programs. The recent Department of Justice grant for mediator training, for example, contemplates the development of a consumer's guide to mediation. The key is insuring party access to these materials through an organized effort by agency personnel.

422. See *Targeting Disability Needs*, *supra* note 117, at 30-31 (discussing mediation techniques for balancing power while remaining neutral); MOORE, *supra* note 345, at 280-82 (discussing mediation techniques for dealing with parties with unequal power).

423. See *Targeting Disability Needs*, *supra* note 117, at 31 (noting that advocate may assist in balancing power).

encourage disability and business organizations to provide such training.⁴²⁴ In addition, the agencies might consider maintaining lists of organizations providing advocacy services for the use of parties seeking representation.⁴²⁵ Alternatively, a staff person knowledgeable about the ADA could serve as a resource for unrepresented parties. The staff person should be limited to providing information, and barred from giving legal advice.⁴²⁶ One or more of the individuals who do initial screening of cases could perform this function. In addition to the efforts mentioned, the agencies

424. 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 to enable them to achieve compliance for themselves and others with disabilities. Information from program brochure for *Access to Programs and Services: A Self Advocacy Workshop on Titles II & III of the Americans with Disabilities Act (ADA)*.

425. See PEER Study, *supra* note 247, at 184. At one time, the EEOC maintained lists of attorneys for referrals of charging parties. Where one party has an attorney and the other does not, the party without legal representation may be at some disadvantage. In a given dispute, either party could be disadvantaged by lack of representation. See Comments of the Eastern Paralyzed Veterans Association Concerning the Equal Employment Opportunity Commission Request for Comments Regarding Use of Alternative Dispute Resolution and Negotiated Rulemaking Procedures, (Sept. 10, 1993), at 2; Comments of National Federation of Independent Business in Response to EEOC Request for Comments, Letter from John J. Motley, III, (Sept. 22, 1993), at 1 (both on file with author). Some systems have limited the role of attorneys to minimize this problem, and avoid legalization of the process. See MOORE, *supra* note 345, at 107-08; Grillo, *supra* note 416, at 1597; PEER Study, *supra* note 247, at 36. The better approach would allow attorneys, however, encouraging the unrepresented party to obtain representation or using mediation techniques to balance the power differentials. Lawyers may serve as protectors of rights and provide a buffer between adverse parties. Grillo, *supra* note 416, at 1597-1600. There is insufficient research to indicate whether lawyers help or hinder settlement prospects. Moore, *supra* note 345, at 108.

The EEOC Pilot Program revealed a concern for fairness on the part of the parties where the other party appeared with an unanticipated representative. The outside evaluator recommended that the agency develop criteria for who may participate in a mediation session and at what point such decisions must be made. See EEOC Report on ADR Pilot Program, *supra* note 102, at 5. While barring attorneys is not recommended, guidelines as to number of representatives permitted and a time limit for notifying the mediator of such representatives are appropriate. Each party should then be notified as to who will be representing the other party to avoid surprises and resulting fairness concerns.

426. The staff person should be someone who will have no role to play in the mediation, investigation, or litigation of the case, however. This function might also be performed by technical assistance staff. Use of any agency staff for such a function might generate accusations of agency bias, however.

should carefully monitor settlements reached through mediation to ensure that neither party is disadvantaged by the mediation process.⁴²⁷

g. *Confidentiality*

Another issue, mentioned briefly above, is whether the mediation is confidential or whether the information revealed in mediation is available to the agency for its investigation should mediation be unsuccessful. Allowing the use of information from the mediation for investigative purposes would conserve resources, as the investigator would not have to duplicate the mediator's efforts. Balanced against this efficiency goal is the impact of lack of confidentiality on settlement agreements. Although candid participation in mediation increases the probability of settlement, a party might be unwilling to disclose information that might aid in a settlement if the information could be used in the investigation to the party's detriment.⁴²⁸ Candid participation in mediation should increase the probability of settlement.⁴²⁹ Additionally, confidentiality minimizes the possibility that a party will participate in mediation only as a form of discovery.⁴³⁰ Also, the confidentiality of mediation may be an incentive for the parties to choose mediation over litigation.⁴³¹

The Administrative Dispute Resolution Act requires confidentiality in dispute resolution proceedings, with limited exceptions.⁴³² It might be argued that mediation in the course of investigation, like that conducted under the rapid charge processing procedure, is not a dispute resolution proceeding covered by the Act. Even if such an argument were to prevail,

427. See EEOC Report on ADR Pilot Project, *supra* note 102, at 5 (recommending such monitoring).

428. See Philip J. Harter, *Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 324 (1989) (indicating that fear that disclosure may be used to party's detriment will discourage candor).

429. Moore, *supra* note 345, at 160 (noting that confidentiality is considered to be a necessity in mediation); SINGER, *supra* note 359, at 171-72 (indicating that candid participation allows development of satisfactory solutions). The parties need to know that information disclosed to the mediator in caucus sessions will not be disclosed to the other party absent authorization. See *Recommendation 88-11 of the Administrative Conference of the United States*, 41 ADMIN. L. REV. 357, 358 (1989) (confidential caucus sessions encourage candor including raising sensitive and creative ideas).

430. *Id.*

431. See FOLBERG, & TAYLOR, *supra* note 289, at 35 (suggesting that unlike litigation, matter in mediation can be discussed privately); SINGER, *supra* note 359, at 172.

432. See 5 U.S.C. § 574 (1994) (preventing neutrals and parties in ADR proceedings from disclosing confidential communications with limited exceptions and barring admissibility of improperly disclosed communications).

however, the rationale supporting the Act's confidentiality provisions is persuasive, outweighing efficiency concerns, and should be followed in the mediation process recommended here.⁴³³ Nevertheless, confidentiality should not bar agency review of the settlement agreement recommended above.

h. Technical Experts

ADA mediation may require the use of technical experts to facilitate settlement. Engineers, architects, rehabilitation experts, and experts in particular disabilities are among those whose expertise might be required in a given case. Training of mediators in resource availability will aid in bringing expertise into mediation. Selection of mediators with expertise is another method.⁴³⁴ Agencies should seek to ascertain whether mediators have such expertise and assign cases to them on that basis. In addition, regardless of the mediator source utilized, the agencies should encourage individuals with the required expertise to train as mediators. Government employees with related training, knowledge and/or experience could be encouraged to train as mediators. Technical assistance grants or FMCS could be used for such training.⁴³⁵

Where the mediator is not the source of expertise, cost of the expert becomes an issue. While the parties to the dispute could agree to use and pay an expert, provision of technical assistance at no cost would facilitate resolution of the dispute in many cases.⁴³⁶ While some assistance is available pro bono, other experts charge for their services. To facilitate settlement, the agencies could utilize several methods of obtaining experts. As in the case of mediators, some experts, both within and outside the government, might provide services at little or no cost.⁴³⁷ Alternatively, the agencies could set aside funds for technical assistance on an ad hoc basis when deemed necessary by the mediator. A third alternative is to

433. See Harter, *supra* note 428 (discussing confidentiality issues).

434. In labor arbitration, the parties to a dispute requiring technical expertise frequently select an arbitrator with such expertise.

435. As a part of the training, the technical experts could serve as co-mediators, providing their expertise while learning mediation techniques.

436. For example, the actual construction cost of making a business accessible might be small, but an architect might be needed 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 option for accessibility and unwilling to pay for the architect's services without some assurance that a resolution of the dispute will result.

437. The agencies could work out a worksharing arrangement with government agencies employing individuals with relevant technical expertise.

employ one or more trained experts to be utilized in mediation. The problem with the latter approach is the difficulty of finding one or even several individuals with expertise in the broad range of areas likely to be needed in ADA disputes. Nonetheless, to the extent possible, expertise should be available at minimal cost to the parties.

i. Monitoring and Evaluation

The proposal for a mediation program set forth above is based on the best current information available. The key to a successful program, however, is continued monitoring, evaluation, and revision where necessary to accomplish the goals of the program.⁴³⁸ The broad goals of any change in the dispute settlement process, as set forth above, include effective enforcement of the statute and efficient resolution of disputes. The mediation program should be evaluated against these broad goals.

To add to the information provided by the existing pilot programs, the proposed program should be structured to enable empirical evaluation based on specific criteria established prior to the commencement of the program.⁴³⁹ These criteria should be developed with the assistance of the recommended advisory committee. Moreover, employment of a professional evaluator, similar to the EEOC pilot program, will assist in creating an evaluation system that will provide the data necessary to determine whether mediation meets the statutory goals and will be cost effective on a larger scale.⁴⁴⁰

The evaluation process should include the parties, the mediators, and agency personnel at all levels who have any involvement with the process.⁴⁴¹ Data collected from the program results should include: the settlement rates, both overall and by the type of case, use of party

438. See Administrative Conference of the United States, *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists* 55-58 (1992) (providing guidance in evaluating ADR programs); Administrative Conference of the United States, Dispute Systems Design Working Group, *Performance Indicators for ADR Program Evaluation* 1 (Nov. 1993) (noting importance of program evaluation). For a useful guide for evaluation, see ELIZABETH ROLPH & ERIK MOLLER, *Evaluating Agency Alternative Dispute Resolution Programs: A Users' Guide to Data Collection and Use* (1995).

439. See *Designing Systems*, *supra* note 322, section I, at 8-9.

440. As noted in *Implementing the ADR Act*, *supra* note 438, at 58, evaluation issues should be considered in planning the project.

441. See EEOC Report on ADR Pilot Program, *supra* note 102, at 5, 6 (showing that reevaluation process included parties, mediators and agency personnel); PEER Study, *supra* note 247, at 13 (indicating that evaluation process included administrative agency personnel, interest groups, professional associations, attorneys, complainants, and respondents).

representatives, and use of technical expertise; party satisfaction, overall and broken down by the type of case and representation; comparison of mediated settlements with settlement guidelines, settlements reached through other processes, and litigation results;⁴⁴² an assessment of mediator quality;⁴⁴³ the impact on systemic litigation; any changes in the case backlogs; the comparative processing time of mediated cases and other cases; the rate of compliance with the mediated agreements; agency approval rates of mediated settlements; and the relative costs and benefits of the mediation project.⁴⁴⁴

Collection and analysis of this data from the program should assist in answering the following issues: (1) whether the mediation program is consistent with statutory goals; (2) whether the mediation program adversely impacts systemic litigation of ADA issues; (3) whether the mediation program reduces case processing time and the backlog; (4) whether mediation reduces the cost of case processing for the parties and/or the government; (5) whether at a particular point in the investigative process mediation is most effective; (6) whether mediation is more effective for certain types of cases; (7) whether mediation disadvantages disabled individuals or other historically disadvantaged groups; (8) whether the process is equally fair and effective for represented and unrepresented parties; (9) whether the results of mediated settlements, settlements reached through other processes, and litigation in similar cases are comparable; (10) what are the best sources of qualified mediators; (11) whether the parties comply with mediated settlements; (12) whether a common group of

442. This comparison will facilitate the determination of whether particular groups are being disadvantaged by mediation.

443. For useful discussions on selection and evaluation of mediators, *See generally* Christopher Honeyman, *Five Elements of Mediation*, 4 NEG. J. 149 (1988) (discussing mediator selection by Wisconsin Employment Relations Commission); Christopher Honeyman, *On Evaluating Mediators*, 6 NEG. J. 23 (1990) (discussing various methods of evaluating mediators). *See also* SPIDR Commission on Qualifications Report, *supra* note 397 (discussing qualifications and selection of mediators).

444. These criteria should incorporate the question of whether settlements are reached in cases in which mediators believe that discrimination occurred. *See supra* note 116 and accompanying text. The mediation program should not be a means by which individuals obtain relief they would not be entitled under the statute from respondents desirous of avoiding litigation and bad publicity. Nor should it allow respondents who have violated the law to settle a case cheaply to the disadvantage of the complainant. Instead, it should provide rapid, effective relief for complainants whose rights have been violated. Additionally, if mediation resolves only those cases that would otherwise settle in the investigation process, then it adds little of benefit, unless early settlement saves investigation resources at least equivalent to the resources expended in mediation.

mediators is effective in handling disputes under the various titles of the ADA and achieves promised efficiency; (13) whether availability of technical expertise affects settlement; and (14) whether agency approval of mediated settlements is effective and necessary. In addition, the program can test some of the specific proposals set forth herein for effectiveness, providing a basis for retaining or altering them in the future.⁴⁴⁵

This analysis of the program, along with analyses of the other pilots, will establish a base of knowledge that will enable design of the most effective continuing mediation program. In addition, if the programs demonstrate that mediation is a fair and satisfactory method of resolving disputes, parties in the future will be encouraged to participate in mediation in greater numbers. More participants in the mediation process may lead not only to expansion of agency-sponsored mediation, but to the growth of private mediation of ADA disputes, which will reduce agency caseloads without detracting from statutory goals. A determination of whether mediation disadvantages disabled individuals is particularly important in ensuring that the statutory goal of elimination of discrimination is not compromised by mediation and in encouraging complainants to participate in mediation.

An important caveat is that the evaluation of the program and evaluations of mediators, whether agency employees or outsiders, should avoid overemphasis on settlement rates. The goal of statutory enforcement should not be outweighed by the goal of settlement, which is probable if settlement rate is the crucial factor in evaluations. Because settlement is the goal of mediation, mediators will likely measure their own success by settlement. The agencies should counterbalance the resulting tendency to push for settlement at all costs by reassuring mediators that there are cases that will not, and should not, settle, and recognizing that fact in the evaluation.

Furthermore, systematic evaluation on an ongoing basis should be continued throughout the program. Such evaluation will provide the data needed to alter the program as necessary for successful mediation, or to eliminate it if it no longer meets its goals.

445. The program could use several sources of mediators and compare their effectiveness or evaluate the impact of the educational programs on participation rates and power imbalances. The program might vary the timing of mediation in the investigation process and compare the effectiveness of mediation when used earlier and later in the investigation process.

j. Scope of the Program

The recommended mediation program could be initiated as a larger pilot program than has been tried thus far, encompassing a range of ADA cases. Such a pilot would permit the agencies to try the mediation proposal on a limited, low cost basis. The proposed pilot would add to the information provided by the EEOC and DOJ pilot programs in several ways. The EEOC program analyzed all cases mediated, revealing limited information about mediation of ADA cases. In addition, because the only issues mediated were discharge, discipline, and terms and conditions of employment, the program excluded many ADA cases from mediation, including reasonable accommodation cases, which would appear to have significant potential for mediated solutions. The DOJ pilots will mediate few, if any, Title II cases, and no mediation program has included Title IV cases. Thus, an additional pilot would enable more accurate assessment of the effectiveness of mediation for various types of ADA cases. As a result, any permanent program could be targeted at those cases in which mediation is most effective. In addition, the proposed program will test the efficacy of using a common group of mediators for all ADA cases.

Alternatively, based on the previous pilot programs⁴⁴⁶ and other mediation research set forth in this report, the program could be implemented on a larger scale, with careful monitoring and evaluation to allow modification for effectiveness. Given the EEOC's forthcoming mediation program, initiation of the joint ADA program recommended seems appropriate.

4. Other Uses of ADR

Adoption of a mediation program should not end ADR efforts of ADA agencies. As noted above, the use of ADA mediation by the agencies is likely to spur private mediation, particularly if private mediators gain experience in ADA mediation through a government program.⁴⁴⁷ The agencies could continue to use technical assistance to encourage organizations such as dispute resolution centers to establish ADA mediation

446. If completed as anticipated, the prior pilots will mediate 850 ADA cases and 267 employment discrimination cases, some of which were ADA cases.

447. For an article supporting the use of private mediation in Title III cases, see Hermanek, *supra* note 391. See *infra* Section IV, 4a. (discussing agency review of privately mediated settlements).

programs.⁴⁴⁸ Growth of private mediation will reduce dependency on government resources for statutory enforcement.

a. Arbitration

In addition to mediation, private arbitration is growing, particularly in the employment arena.⁴⁴⁹ The growth in arbitration was spurred by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁴⁵⁰ In *Gilmer*, the Court held that an individual employee who had signed an arbitration agreement as a part of his application for registration with the New York Stock Exchange was bound to arbitrate a statutory claim of age discrimination.⁴⁵¹ The *Gilmer* Court, following a recent trend of Supreme Court's decisions favoring arbitration of statutory disputes, rejected the argument that arbitration is procedurally and substantively inadequate to resolve such disputes.⁴⁵²

Gilmer was based on the Federal Arbitration Act,⁴⁵³ which reflects a liberal federal policy favoring arbitration agreements.⁴⁵⁴ Commentators on *Gilmer* have speculated about whether it will be applied to require arbitration under employment agreements, because the Federal Arbitration Act states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."⁴⁵⁵ There is disagreement in

448. The Department of Justice grant is one example of how such a grant might be used. See discussion of the grant *supra* notes 148-53 and accompanying text.

449. See Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: A Budding Partnership*, 48 ARB. J. 53 (1993) (noting increasing use of arbitration of statutory employment discrimination laws); see also Thomas J. Piskorski & David B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment-Related Disputes*, 19 EMP. REL. L.J. 205, 205, 216-17 (1993) (noting that employers are increasingly considering arbitration to resolve employment disputes).

450. 500 U.S. 20 (1991).

451. *Id.* at 26.

452. *Id.* at 27-32. The Court did examine the arbitration procedures at issue, however, finding them satisfactory. The court suggested that in the absence of certain protections, arbitration of statutory claims might inadequately protect statutory rights. *Id.*

453. 9 U.S.C. § 1 (1994).

454. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

455. 9 U.S.C. § 1. For discussions of this issue, see, e.g., James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 107-14 (1993) (discussing scope of FAA exemption for employment contracts and arguing that it should be read to exclude only contracts of employees actively engaged in transportation); Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 791, n.66, 793

the lower federal courts about the scope of the exemption.⁴⁵⁶ With respect to the ADA, the legislative history supports a conclusion that an arbitration agreement should not preclude a statutory forum.⁴⁵⁷ Regardless

(1992) (noting court's avoidance of issue of scope of the FAA); James A. Burstein & Kenneth D. Schwartz, *Gilmer v. Interstate/Johnson Lane Corporation: The Supreme Court Endorses Arbitration of Age Discrimination Claims*, 17 EMP. REL. L.J. 173, 181-83 (1991) (discussing arguments for and against narrow interpretation of FAA's exclusion for employment contracts); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI. KENT L. REV. 753, 753-54 (1990) (noting that *Gilmer* leaves issue of scope of exclusionary clause unresolved).

456. See, e.g., *American Postal Workers Union v. U.S. Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987) (holding that collective bargaining agreements are contracts of employment within meaning of FAA exemption); *United Elec., Radio and Machine Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 (4th Cir. 1954) (holding that exclusionary clause exempts all employment contracts from FAA coverage); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76, 78 (D.C. Mass. 1993) (holding that insurance sales agent required to arbitrate gender discrimination claim pursuant to arbitration clause in her agent contract, which is not excluded under FAA exemption for employment contracts); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430, 1438 (N.D. Ill. 1993) (holding that lawyer required to arbitrate claim of race, gender and religious discrimination because agreement not excluded under FAA exemption for employment contracts); *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832 (E.D. Pa. 1991) (noting that FAA exemption for employment contracts excludes workers actively involved in interstate transportation and not plaintiff who was involved in consulting services related to state and local government), *aff'd without published opinion*, 972 F.2d 1330 (3d Cir. 1992) (noting narrow reading of employment contract exemption).

457. See Legislative History, *supra* note 333, at 516-17 (stating "the Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities"); Hayford, *supra* note 334, at 15-17 and authorities cited therein (discussing congressional statements indicating that use of ADR in ADA cases should be voluntary). In *Alexander v. Gardner-Denver*, 415 U.S. 36, 59-60 (1974), the Supreme Court held that an employee was entitled to pursue an action in federal court alleging race discrimination under Title VII despite an arbitration decision finding that he was discharged for just cause. The issue of race discrimination had been raised before the arbitrator, but was not mentioned in the decision. *Id.* at 42. The Court found that the employee was entitled to a trial de novo because the two proceedings differed significantly. *Id.* at 56-58, 60. The *Gilmer* Court distinguished the *Gardner-Denver* decision on several grounds. 500 U.S. at 33-35. First, the employees there, unlike *Gilmer*, had not agreed to arbitrate statutory claims and thus, the arbitrator had no authority to resolve such claims. Second, the Court noted the absence of the tension between collective and individual rights in *Gilmer*, which involved a nonunion workplace. The final differentiating factor was that the *Gardner-Denver* case was decided under Title VII, not the Federal Arbitration Act. The ADA was passed before *Gilmer* was decided, however. See Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 92 (1993) (suggesting that *Gilmer* decision may have changed congressional understanding of legal limits on arbitration between passage of ADA

of how the courts decide the issue, the agencies will be faced with the question of whether to investigate and litigate cases where a private ADR proceeding has been conducted or agreed upon. The Court in *Gilmer* expressly noted that *Gilmer's* agreement to arbitrate did not preclude his filing of an EEOC charge or EEOC involvement in combating discrimination.⁴⁵⁸

Arbitration of employment discrimination claims has generated substantial controversy.⁴⁵⁹ Arbitration may be imposed on unwilling or unknowing employees.⁴⁶⁰ Additionally, the statutory rights and remedies may be unavailable in arbitration.⁴⁶¹ For example, arbitration may eliminate discovery⁴⁶² or restrict the arbitrator's authority to award damages. Furthermore, some arbitrators may be inclined to favor employers, since employers are likely to be repeat customers, while employees are not.⁴⁶³ The agencies should be alert to these concerns in

and Civil Rights Act of 1991).

458. 500 U.S. at 28. It is not clear, however, what the impact of a private arbitration award or settlement would be on the EEOC's ability to obtain individual relief. Livingston, *supra* note 457, at 95-96.

459. Several members of Congress have introduced legislation to overturn the *Gilmer* decision and bar employers from requiring arbitration of discrimination claims. See H.R. 4981, 103d Cong., 2d Sess.; S. 2405, 103d Cong., 2d Sess.; *Legislation Bans Mandatory EEO Arbitration*, 146 Lab. Rel. Rep. (BNA) 561 (Aug. 29, 1994) (citing concern over mandatory arbitration of discrimination claims, including particular concerns about arbitration in securities industry, members of Congress introduced companion bills to prohibit compulsory arbitration).

460. See Jennifer R. Dowd, *Enforcing Arbitration Agreements in Age Discrimination Suits: Gilmer v. Interstate Johnson Lane Corp.*, 33 B.C.L. REV. 435, 455 (1992) (noting that after *Gilmer*, employees must be careful what they sign and with whom to avoid inadvertent waiver of judicial forum for vindication of statutory rights); *Legislation Bans Mandatory EEO Arbitration*, *supra* note 459, at 562 (describing legislation to ban compulsory arbitration of discrimination claims imposed by employers on employees as condition on employment). The Court in *Gilmer* rejected the argument that unequal bargaining power required a holding that employment arbitration agreements are not enforceable. 500 U.S. at 33. The court indicated, however, that fraud or overwhelming economic power might justify a refusal to enforce the agreement. *Id.*

461. See Peter M. Panken, et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, C779 ALI-ABA 63, 72 (LEXIS) (1992) (arbitrator may be less likely than jury to award significant damages).

462. See Jenifer A. Magyar, *Statutory Civil Rights Claims in Arbitration: An Analysis of Gilmer v. Interstate/Johnson Lane Corp.*, 72 B.U. L. REV. 641, 655 (1992) (arbitration proceedings may eliminate discovery, particularly important in civil rights cases which are often difficult to prove without discovery).

463. See Panken, *supra* note 461 (noting that an arbitrator must be fair to major clients which, in nonunion context, are employers, not employees); *AAA President Predicts*

deciding whether to proceed in a case where an arbitration agreement exists. In addition, some of the same concerns exist with respect to settlement agreements reached through private mediation. These cases reach the agencies when the charging party, dissatisfied with the arbitration decision, private arbitration or mediation agreement, or mediated settlement, files a charge.

In considering the appropriate approach to these cases, the agencies might look to the National Labor Relations Board (NLRB) precedent regarding precedent to arbitration. The NLRB has a policy of deferral to arbitration in cases where the unfair labor practice claim filed with the NLRB overlaps with a contractual right subject to arbitration.⁴⁶⁴ The NLRB will defer to an arbitrator's award which meets its *Spielberg* standards, which require fair and regular proceedings to which all parties agreed to be bound, and a decision which is not repugnant to the purpose and policies of the statute.⁴⁶⁵ Additionally, the issue in the unfair labor practice case must have been presented to and considered by the arbitrator, a criterion which is met if the contractual and statutory issues are factually parallel and the arbitrator was presented generally with the facts relevant to the unfair labor practice.⁴⁶⁶ The requirement that the proceedings be fair and regular has been interpreted to incorporate minimum due process standards,⁴⁶⁷ while the absence of repugnancy to the statute means not "palpably wrong as a matter of law."⁴⁶⁸

The NLRB also defers to the arbitration proceeding where the arbitration has not yet occurred, but retains its right to review the award under the *Spielberg* standards.⁴⁶⁹ The criteria for prearbitral deferral, first articulated in *Collyer Insulated Wire*, are: (1) the parties must have an established and productive collective bargaining relationship; (2) the parties must be willing to arbitrate the dispute; and (3) the meaning of the contract must be

Upswing in Use of ADR, Individual Employment Rights (BNA) 3, (July 20, 1993) (noting concern for bias in favor of repeat customers). If the employer is paying the cost of the arbitration, that fact might influence the arbitrator as well, subconsciously if not consciously.

464. See PATRICK HARDIN ET AL., *THE DEVELOPING LABOR LAW* 1016-17 (1992) (describing the NLRB's deferral policy).

465. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) (setting forth standards for deferral to an arbitration award).

466. *Olin Corp.*, 268 N.L.R.B. 573 (1984).

467. *Hardin*, *supra* note 464, at 1061.

468. *Inland Steel Co.*, 263 N.L.R.B. 1091, 1091 (1982).

469. See *United Technologies Corp.*, 268 N.L.R.B. 557 (1984) (deferring allegation that employee was threatened with discipline for filing grievances to grievance and arbitration procedure, retaining jurisdiction to review the case for consistency with *Spielberg* standards after dispute was resolved in arbitration).

central to the dispute.⁴⁷⁰ In addition to deferring to arbitration awards, the NLRB has deferred to prearbitration settlements.⁴⁷¹ The NLRB's deferral policy is controversial, particularly prearbitration deferral, and the agency has expanded and contracted the cases subject to deferral over the years.⁴⁷² Critics of the policy argue that the NLRB has abandoned its duty to enforce statutory rights.⁴⁷³ The agency's rationale for deferral includes furthering the national labor policy favoring arbitration, requiring the parties to use their agreed-upon method of dispute resolution, deferral to arbitral expertise in contract interpretation, and conservation of the agency's resources.⁴⁷⁴

Where the statute does not mandate investigation of each charge filed, agencies have the authority to allocate investigative resources, declining to investigate cases where a resolution of the matter was reached in another forum. This also applies where agency litigation is discretionary, which is the case under Titles I, II and III. The requirement of a Title II investigation could be satisfied through the review of the arbitrator's award or mediated settlement and any evidence the parties desired to present supporting their claim that the resolution was inconsistent with the statute. Such review under Title IV would also serve to determine whether the

470. See *Collyer Insulated Wire*, 192 N.L.R.B. 837, 842 (1971) (setting forth criteria for deferral).

471. See *Plumbers & Pipefitters Local Union 520 v. NLRB*, 955 F.2d 744 (D.C. Cir.), cert. denied, 113 S. Ct. 61 (1992) (upholding NLRB's authority to defer to settlement agreements where settlement was reached through collective bargaining process that was fair and regular, parties agreed to be bound by settlement, outcome was not "palpably wrong" in that both sides compromised to some degree, unfair labor practice and contractual issues were factually parallel, and both parties were generally aware of relevant facts).

472. See generally *Hardin*, supra note 464, at 1017-68 (detailing various changes in NLRB deferral policy). See also *Plumbers & Pipefitters Local Union, 520 v. NLRB*, 955 F.2d at 746 (criticizing NLRB for lack of coherent rationale for its policy deferring to prearbitral settlements).

473. See the dissents of Members Fanning and Jenkins in *Collyer*, 192 N.L.R.B. at 847-50 (arguing that it was inappropriate to cede jurisdiction of statutory claims to arbitrator who may be reluctant to decide statutory issues and may provide only partial remedy for violation).

474. See *Collyer*, 192 N.L.R.B. at 839 (supporting deferral based on national labor policy favoring arbitration, statutory policy of encouraging parties to resolve disputes by their agreed upon methods, and skill and expertise of arbitrators in deciding issue arising under collective bargaining relationships); *United Technologies*, 268 N.L.R.B. at 558, 559 (citing *United Aircraft Corp.*, 204 N.L.R.B. 879 (1973), *enf'd sub nom.*, *Machinists Lodges 700, 743, 1746 v. NLRB*, 525 F.2d 237 (2d Cir. 1975) (reemphasizing factors supporting deferral in *Collyer* and adding rationale of conserving agency resources)).

statutory requirements were met and thus whether the dispute resolution could be accepted by the agency as a final judgment in the matter.⁴⁷⁵

Because the NLRA provides no private right of action, deferral by the agency is a final determination of the charging party's case. By contrast, under Titles I, II, and III of the ADA, an agency determination not to proceed based on an arbitral award or settlement does not preclude judicial action by the employee.⁴⁷⁶ Nevertheless, the agencies should approach deferral with caution. The benefits of deferral are similar to those under the NLRA, but the balance of power may be quite different. Deferral to a union negotiated arbitration procedure leaves the dispute to be resolved through a procedure agreed upon by two relatively equal parties. In a discrimination dispute, the arbitration agreement may well have been imposed on an employee with little knowledge of the consequences and minimal effective bargaining power.⁴⁷⁷ In addition, there may be an imbalance in representation of the parties. Thus in considering deferral, the agencies should emphasize, whether on an ad hoc basis or through regulatory guidelines, criteria that ensure fairness to all parties.⁴⁷⁸

The agencies should consider developing and publishing the criteria that they will consider in determining whether to take action in cases where an arbitration or mediation agreement has been executed by the parties.⁴⁷⁹ The criteria should include the circumstances under which the agency will

475. As noted, these issues, particularly those involving agreements to arbitrate, are most likely to arise in employment discrimination cases. In communications and transportation cases, the statute sets forth clear minimum standards that must be met and there is little flexibility for either a mediated or arbitrated solution. If such a proceeding took place, the agency substantive review of the resolution would be relatively straightforward because the statutory standards are specific.

476. If courts follow *Gilmer*, however, the action may be effectively precluded.

477. See *Prudential Ins. Co. v. Lai*, 66 Fair Empl. Prac. Cas. (BNA) 933 (9th Cir. 1994) (refusing to enforce agreement to arbitrate on basis that plaintiff employees did not knowingly waive their right to judicial forum). Deferral of individual discrimination cases under the NLRA also has been more controversial than deferral of cases involving disputes over changes in working conditions. See *Hardin*, *supra* note 464, at 1022-25 (detailing shifts in NLRB deferral policy in individual discrimination cases and the arguments for and against deferral).

478. These cases are most likely to arise in the employment context.

479. See *Estreicher*, *supra* note 455, at 790 (suggesting that the EEOC issue regulations setting forth minimum procedural requirements for arbitration of Title VII and ADEA claims). Because the issue is most likely to arise in employment cases, the development of such guidelines should be a higher priority for the EEOC than for other enforcement agencies. The other agencies could defer action unless and until the issue arises with some frequency.

defer action on the case until the dispute resolution mechanism is completed.⁴⁸⁰ Publication of such criteria would aid the parties in establishing arbitration and mediation procedures that would survive agency scrutiny. Encouraging fair procedures would promote efficiency by increasing the number of cases in which the agencies could decline to act on the basis of a private dispute resolution. In addition, it would serve the goals of the statute by encouraging employers and businesses to establish dispute resolution mechanisms that would fairly consider claims.⁴⁸¹

The NLRB's criteria provide a starting point. The mediation or arbitration procedure should be voluntary, fair and regular, and provide the rights and remedies that would be available in a statutory proceeding.⁴⁸² Procedures imposed on all employees as a condition of employment should be suspect, but not automatically rejected. Fairness should include the notice of the procedures, right to representation, a neutral arbitrator or mediator chosen by both parties with equal knowledge of the backgrounds of the candidates, a right to at least some discovery,⁴⁸³ a right to compel witnesses, and a written opinion.⁴⁸⁴ All remedies available under the statute should be available to the arbitrator.

In addition, like the NLRB, the agency should do a substantive review to ensure that the discrimination issue was actually considered by the arbitrator⁴⁸⁵ and that the decision or settlement is not inconsistent with the

480. Given the current backlogs at all agencies other than the FCC, deferral will not cause substantial investigative delays.

481. Pursuant to its statutory authority, 15 U.S.C. § 2310, the Federal Trade Commission has established minimum requirements for informal dispute resolution procedures which must be exhausted by consumers prior to judicial action. See 16 C.F.R. pt. 703 (1995).

482. Many of the criteria set forth are relevant only to arbitration, where the neutral party has the authority to impose a decision on the parties at interest.

483. If the discovery were required to be as extensive as in litigation, one of the advantages of arbitration would be lost. Nevertheless, a party, typically the employee, should not lose the case because of inaccessibility of necessary evidence. An example of such evidence would be comparative data regarding treatment of similarly situated employees to establish discrimination.

484. The final report of the Dunlop Commission encourages development of private arbitration for employment disputes and sets forth many of these same criteria for fairness. *Dunlop Commission Final Report*, *supra* note 99, at 25-34. The Commission recommends that employers not be permitted to make agreement to arbitrate public law claims a condition of employment. *Id.*

485. Actual consideration, rather than factual parallelism is a preferable standard and one used by the NLRB before the *Olin* decision. See *Suburban Motor Freight*, 247 NLRB 146, 147 (1980) (requiring that unfair labor practice issue be presented to and considered by arbitrator as condition of deferral).

statute.⁴⁸⁶ Finally, the agency should ensure that the case does not involve systemic issues which were ignored or not adequately treated in the arbitration or mediation. Where the award or settlement meets these criteria, the agency should decline to proceed further with the investigation and should not litigate the case. If the award or settlement does not meet the criteria, then the agency might still decline to proceed further based on other adequate grounds.⁴⁸⁷ This procedure will encourage private dispute resolution and conserve resources without diminution of protection of statutory rights.

b. Other Forms of ADR

The agencies should remain alert to other opportunities to use ADR. Litigation of ADA cases may provide opportunities for other ADR methods such as summary jury trials⁴⁸⁸ or early neutral evaluation.⁴⁸⁹ Agencies

486. Consistency should require application of appropriate legal standards, but mere recitation of the proper standard should not be sufficient for deferral. Many arbitrators have little or no expertise in statutory discrimination. In a 1975 survey of members of the National Academy of Arbitrators, only half of respondents indicated that they stayed abreast of Title VII law and only 14% believed that they could accurately define basic employment discrimination terms. Harry Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 28 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 59 (1976), cited in LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK 75 (1994). Nevertheless, 72% of respondents felt competent to decide legal issues in discrimination cases. *Id.* Furthermore, arbitrators in employment discrimination cases do not have the political or personal accountability of judges and therefore, caution should be exercised in deferring their interpretations of the law. Malin & Ladenson, *supra* note 278, at 1230-38. Careful review of conclusions of law still preserves the benefits of deferral as many cases turn on factual issues, where deference will be greater.

The suggestion of the Dunlop Commission that the EEOC implement a training program and adopt standard training requirements for arbitrators hearing discrimination cases is valuable and would go far in addressing this problem and insuring that cases would survive a substantive review by the agency. See *Dunlop Commission Final Report*, *supra* note 99, at n.13.

487. For example, the Department of Justice might decline to litigate because the case did not involve a pattern or practice of discrimination or an issue of general public importance.

488. A summary jury trial involves abbreviated presentation of the case to a nonbinding jury. Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6 (1993).

489. Early neutral evaluation involves a neutral assessment of the merits of the claim and is designed to narrow and define issues as well as to facilitate settlement. BROWN & MARRIOTT, *supra* note 278, at 20. *Implementing the ADR Act*, *supra* note 438, at 30-31 suggests factors to be considered in determining the appropriate form of ADR, such as "the relationships among the disputants, their need for control over the process, the utility of an

should also consider that ADR may be used creatively in settlement of large systemic cases. For example, if a settlement requires ongoing action by the defendant, the agreement could include use of ADR to resolve disputes that arise over the course of implementation of the settlement.⁴⁹⁰ The potential for ADR is limited only by lack of creativity in its use and consistency with statutory goals.

CONCLUSION

The ADA enforcement agencies are working to achieve effective dispute resolution under the statute. With the exception of Title IV, agency enforcement is marked by large investigative backlogs and long delays. The significant resource investment required to establish an administrative adjudication solely for ADA cases does not promise sufficient benefit in resolving these problems. Additional resources would be better allocated to systemic litigation and establishment of an alternative dispute resolution system for ADA cases. A joint voluntary mediation program should be established by the agencies, after consultation with an advisory committee of representatives of potential disputants, to provide an alternative for parties to ADA disputes. This mediation program could operate effectively as part of an early intervention program, which identifies in the intake process cases appropriate for various types of investigation, ADR, and litigation.

Mediation promises quicker resolution of disputes with high satisfaction levels and empowerment of the parties, reducing the governmental enforcement burden. The proposed mediation program should be carefully monitored, evaluated, and modified as necessary, to ensure that the program is achieving the promised benefits, improving enforcement of the statute and moving the nation forward in its goal of eliminating discrimination against individuals with disabilities. In addition, the agencies should look for other opportunities to use ADR creatively to achieve enforcement goals.

independent analysis of the merits, the urgency to resolve the dispute and the desire for privacy." *Id.* at 30.

490. For an example of this type of use of ADR, see Peter David Blanck, *On Integrating Persons with Mental Retardation: The ADA and ADR*, 22 N.M. L.REV. 260 (1992) (illustrating use of ADR in settlement of class action against state of Wyoming by class of plaintiffs with mental retardation seeking improvement of conditions at state training school and establishment of framework for integration into community).