

# QUESTIONS AND ANSWERS FOR MEDIATION PROVIDERS: MEDIATION AND THE AMERICANS WITH DISABILITIES ACT (ADA)



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# **Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)**

## **Introduction**

More than ever, employers and employees are turning to mediation and other forms of Alternative Dispute Resolution (ADR) to resolve equal employment opportunity (EEO) disputes. While the proliferation of public and private sector ADR programs has been a boon for employers and employees alike, many mediators have sought guidance on how to ensure that the mediation process is accessible to participants with disabilities. Mediators also have raised questions about special considerations that may arise when mediating employment cases alleging discrimination under the Americans with Disabilities Act (ADA) or the Rehabilitation Act of 1973 (Rehabilitation Act).<sup>1</sup>

There are two basic ways that disability issues may arise in mediation concerning EEO disputes. First, the dispute itself may raise a claim under Titles I or II of the ADA or Section 501 of the Rehabilitation Act, such as allegations of disparate treatment based on disability, denial of reasonable accommodation, improper disability-related inquiries and medical examinations, or breach of medical confidentiality. Second, in some cases presented for mediation – whether or not the case arises under the ADA or Rehabilitation Act – parties or their representatives may request a reasonable accommodation for the mediation process itself.

This technical assistance document addresses frequently asked questions regarding the ADA and mediation.<sup>2</sup> It is intended for any mediation provider handling EEO disputes, whether affiliated with an employer-provided, organizational, or solo practice mediation service in either the public or private

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<sup>1</sup>The principles for ensuring accessibility of the mediation process are discussed here in general terms that apply to all mediation providers and participants who may be covered under the ADA or the Rehabilitation Act, as well as others who may voluntarily adopt those principles as best practices. The ADA prohibits disability discrimination by private employers, state and local governments, and public accommodations; the Rehabilitation Act contains similar anti-discrimination rules that apply to executive branch federal government agencies as well as various federally funded programs and activities. For purposes of this document, the term “ADA” is generally used to refer to both the ADA and the Rehabilitation Act.

<sup>2</sup>Although this guide focuses on mediation, it will generally also apply to other types of Alternative Dispute Resolution (ADR), such as conciliation, early neutral evaluation, or settlement conferences.

sector. The topics addressed include how to provide access to mediation for participants with disabilities, what types of accommodation may be required, how to handle associated costs, and suggested ADA training of mediators.

### **General Considerations**

#### **1. What legal obligations do mediation providers have to participants in the mediation process who are individuals with disabilities?**

Titles I and II of the ADA and Section 501 of the Rehabilitation Act collectively prohibit private employers with fifteen or more employees and federal, state, and local government employers of any size from discriminating against qualified individuals with disabilities with respect to all terms, conditions, and privileges of employment. These laws also require covered employers to make “reasonable accommodations” that enable qualified individuals with disabilities to enjoy equal employment opportunities. Consequently, when an employer provides mediation of EEO disputes as a benefit or privilege of employment, it must make reasonable accommodations needed for the mediation, absent undue hardship (i.e., significant difficulty or expense in light of the employer’s resources and business operations).

An outside mediator has a similar obligation under Title II (covering state and local governments) or Title III of the ADA (covering public accommodations), or under Section 504 of the Rehabilitation Act (covering government programs and activities) to provide auxiliary aids, effective communication, and accessible services unless an undue burden or fundamental alteration of the nature of the mediation program would result.<sup>3</sup>

**Example:** A private practice solo mediator is offering mediation services on a case in which one of the parties has requested a sign language interpreter due to a hearing impairment. The mediator contacts an interpreter service, and learns that hiring an interpreter will cost \$80/hour. The mediation is expected to last 6

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<sup>3</sup>The term “reasonable accommodation” is used in this document to refer not only to “reasonable accommodation” in employer-sponsored mediation programs, but also “reasonable modifications of policies, practices, and procedures,” the provision of “auxiliary aids and services,” and other similar changes that provide accessibility for people with disabilities in private and government-sponsored mediation programs. “Auxiliary aids” include such services or devices as qualified interpreters, assistive listening devices, telecommunications devices for deaf persons (“TDD” or “TTY”), readers, taped texts, Brailled materials, and large print materials.

hours. The total cost of \$480 to provide the interpreter is unlikely to be deemed a “significant difficulty or expense” under the ADA, because the overall financial resources of the mediation provider are considered, not just the fee for that single mediation.

- ❑ **Practice Tip:** Mediation providers should anticipate that accommodations or auxiliary aids and services will be periodically requested, and should take this into account in annual budget planning.

**2. Apart from any legal obligations, are there any ethical codes or practice standards that address accessibility of the mediation process?**

Yes. The Model Standards of Conduct for Mediators (1994), <http://www.abanet.org/ftp/pub/dispute/modstan.txt>, state that among the obligations of mediators to improve the practice of mediation is the duty “to make mediation accessible to those who would like to use it.” (Comment to Model Standard IX). In addition, several voluntary practice standards have been issued by mediation organizations which specifically address disability accessibility, including the ADA Mediation Guidelines (2000), available at <http://www.cojcr.org>, issued by a national work group comprised of representatives from a variety of organizations, and the Practice Standards for ADA Mediators (1999), available at [http://www.keybridge.org/med\\_info/ada/ada\\_mediator\\_standards.htm](http://www.keybridge.org/med_info/ada/ada_mediator_standards.htm), issued by the Center for Mediation, Key Bridge Foundation, Washington, D.C. These sources suggest that mediators can consider voluntary best practices such as:

- using “the broadest definition of disability” when deciding whether to provide an accommodation;<sup>4</sup>
- encouraging parties to use the ADA/Rehabilitation Act legal and community resources available to become familiar with their rights and responsibilities, so that they can fully consider their interests and options;
- where a question arises about a party’s capacity to participate in mediation, assessing the party’s abilities and determining appropriate accommodations through dialogue with the party,

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<sup>4</sup>ADA Mediation Guidelines (2000) at Section B.1. (available at <http://www.cojcr.org>).

rather than making assumptions about a party's abilities based on her medical condition or diagnosis;

- advising parties of their right to independent legal or other representation;
- ensuring that the mediator has sufficient information about the case and accessibility needs to plan the mediation and manage it effectively;
- clearly defining the role of representatives (e.g., disability rights advocate, expert, vocational rehabilitation counselor, family member, attorney, union representative, or other person), neutral experts and resource persons, personal assistants, interpreters, and other non-party participants in the mediation;
- ensuring mediator training and post-training mediation support, on substantive law and procedural issues, disability awareness, and the practical application of mediation to ADA disputes;
- ensuring mediator competency, i.e., knowledge of disabilities, disability access, and disability law, including general ADA case law developments and guidance issued by regulatory agencies; and,
- maintaining confidentiality of disability-related information in arranging access and when conducting the mediation.

### **3. What does it mean for the mediation process to be accessible for people with disabilities?**

Making the mediation accessible for individuals with disabilities may mean providing auxiliary aids or services, adapting procedures, modifying policies, changing locations, or other methods of removing barriers to full and informed participation in the process. As a best practice, mediators should help all parties identify what they need to participate effectively in the mediation and reasonably adapt the process to their needs.

A mediator should consider whether the parties can:

- physically access the mediation facility;
- obtain and use necessary information related to the mediation process;
- understand the purpose and goals of the mediation;

- understand the role of each person present (including advocates, support persons, resource persons or neutral experts, interpreters, etc.);
- understand the steps in the mediation process and the “ground rules”; and,
- participate as fully as possible according to each party’s abilities in all phases of the mediation process, including preliminary phases.

**A detailed chart setting forth common disability-related accommodation requests and solutions relating to the mediation process is attached at Appendix A.**

### **Accommodating Mediation Participants with Disabilities**

The following questions and answers address situations in which reasonable accommodations may be necessary to make the mediation process accessible to individuals with disabilities. While the legal obligation of a mediation provider (or an employer that offers mediation as a benefit or privilege of employment) extends only to those who meet the ADA and Rehabilitation Act’s definition of an “individual with a disability,” mediation providers are free to take measures, in accordance with their understanding of ethical obligations or their adoption of best practices, that lead to a greater level of accessibility than the law requires.

#### **4. Does a mediator need to change the way a mediation is ordinarily handled to accommodate someone with a disability?**

In some instances, yes. In addition to ensuring that the mediation site is physically accessible, a mediator may need to modify some typical mediation procedures to ensure that the mediation process is accessible. This does not mean compromising the impartiality and effectiveness of the mediator.

**Example:** To accommodate a party with a traumatic brain injury who is unable to follow the process for sustained periods of time, a mediator may need to allow more frequent breaks than are usually taken.

**Example:** An individual with a cognitive disability tells the mediator that she is having difficulty following discussions and understanding various settlement alternatives available to her. She asks the mediator to advise her what settlement option he thinks is best and to do whatever he can to help convince the employer to agree to it. This is not a reasonable accommodation, because it would require the mediator to act as an advisor to, or advocate for,

one of the parties, rather than as a neutral third party, and would thus fundamentally alter the nature of the mediation process. (Of course, the mediator may advise the individual regarding her right to bring a representative, such as an attorney or family member, to serve as an advocate during the mediation.)

**5. How should the mediator find out if any of the participants need accommodation because of a disability?**

When a mediation program has an intake or screening process before the case is referred to a mediator, the intake process should include:

- asking whether any accommodations may be needed;
- making arrangements for the accommodations requested; and,
- advising the mediator of any accommodation arrangements that have been made and any accommodation needs that the mediator will need to address.

Referral sources and intake personnel should ensure that mediation providers are advised in advance when their cases involve parties with disabilities who need accommodation, and when any accessibility arrangements have already been made or any process changes or other accommodations have been requested. Mediators should also consult directly with the parties and their representatives before the first session to help identify any accessibility needs. This consultation can be conducted in person, by telephone, or by e-mail.

**A sample intake form is attached as Appendix B.**

- ☐ **Practice Tip:** Through either a standardized intake form or standardized verbal inquiry, always ask all parties during the intake procedure and/or during the convening phase what, if anything, they will need to facilitate participation in the mediation.
- ☐ **Practice Tip:** If intake is done by someone other than the mediator, establish a standardized procedure for fully communicating to the mediator before the mediation begins any accommodation requests made during intake, arrangements which have been made following intake in response to the requests, and any accommodation issues that may remain for the mediator to address.

**6. Should mediators ask all mediation participants if they need accommodations?**

Yes. As a best practice, mediators should explain the mediation process to all the parties and ask if there is anything they might need to help them participate effectively. The inquiry should not be limited to parties whose potential need for accommodation is immediately apparent, since many disabilities are not obvious. This is consistent with the standard practice of most mediators, of describing the process and asking all parties if there are any modifications they will need, whether for disability-related or other reasons. The mediator also should be aware that a party might not be able to anticipate all necessary accommodations until the party is involved in the mediation process. If a barrier does not become apparent or a request has not been made until after the mediation has begun, accommodations can be considered and provided at that time.

**7. Does a mediation participant have to ask for an accommodation for a disability in order to trigger any legal obligation to provide it?**

In general, mediation providers should be proactive regarding accessibility, for example holding mediations in physically accessible locations and ensuring that mediation staff understand basic ADA accessibility provisions such as the right to enter with a service animal.<sup>5</sup> However, individuals will need to request accommodation in cases where the mediation provider will not otherwise know that any policy modifications or services requiring advance arrangements are needed (e.g., sign language interpreter, materials in alternative format, special break schedule during mediation sessions, or other arrangements that might require advance planning or modifying usual procedures).

Sometimes a mediation participant will not request accommodation until the mediation has started. In those instances, the mediation provider should nevertheless address the request, and proceed to determine whether and what accommodation can be provided.

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<sup>5</sup>To obtain more information regarding the accessibility and design requirements for new construction, barrier removal in existing facilities, and other site accessibility issues, contact the U.S. Department of Justice ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TDD), or the Architectural and Transportation Barriers Compliance Board (“Access Board”) at (800) USA-ABLE (1-800-872-2253).



**8. Does a mediation participant's request for accommodation for a disability have to take any particular form?**

No. An individual seeking accommodation should advise the mediation provider what accommodation is needed and why. The request can be oral rather than written, and need not contain any magic words, such as "ADA" or "reasonable accommodation," but it must be sufficient to give notice of the need for a change or adjustment due to a physical or mental condition.

**9. What should mediation providers do when a mediation participant identifies a possible need for accommodation for a disability?**

The intake person or mediator should work with the individual and, where appropriate, with the party's representative, to determine the appropriate accommodation. Mediators can avoid unnecessary inquiry about an individual's disability by simply describing the process and asking what accommodations might be needed.

- ❑ **Practice Tip: Ask what the parties will need rather than making assumptions.** Be candid, open, and specific with the parties about what information you need to provide accommodation. For example, it is okay to say "I don't have any previous experience mediating with someone who is blind [deaf, uses a wheelchair, etc.], so I will need your help to assist you with this process as effectively as possible."

The mediation provider and the requesting individual should engage in an informal process to clarify what the individual needs. If the request is received at the intake stage, the person doing the intake should begin the accommodation process where feasible, in consultation with the mediator. If it is not feasible to begin making accommodation arrangements at the intake stage, the person doing the intake should refer the accommodation request to the mediation provider.

- ❑ **Practice Tip:** Sometimes the party requesting accommodation will have particular solutions in mind. In other instances the party will only know the problem, and the mediator should explore possible solutions. Help the parties identify the accommodations they need by first listening to them, then exploring options for accommodations.
- ❑ **Practice Tip:** Decide together with the party what accommodation is appropriate and how it will be implemented. Once the appropriate accommodation has

been identified, the mediator can ask the party for referrals to any preferred provider of any auxiliary services, e.g., sign language interpreters, Braille service, computer-assisted real-time translation (CART), etc. Mediators can also contact their state or local Independent Living organizations for such referral or use their own list of local resources for possible referrals in addition to asking the party for referrals.

**A list of potential accommodation resources is included at Appendix C.**

**10. Is the mediator required to provide the specific accommodation that an individual with a disability requests?**

No. Except where a specific accessibility standard is required by law, the mediation provider may choose among reasonable accommodations as long as the chosen accommodation is effective to remove the barrier to the mediation. If a requested accommodation would pose significant difficulty or expense, or would fundamentally alter the mediation, the mediator must determine if there is an alternative reasonable accommodation that does not pose these problems and offer the accommodation if one exists.

**Example:** A party with a learning disability asks to tape record the mediation session, explaining to the mediator that this will accommodate his inability to take comprehensive notes. The mediator is concerned that allowing a tape recording of the mediation session will inhibit the other participants and may raise confidentiality concerns, and instead offers a qualified note taker for the session. Assuming the notes are satisfactory, this may be an equally effective accommodation.

**Example:** If a mediator's office is in an upstairs floor in a building with no elevator, and thus providing physical access to the office would be too difficult or costly, the mediator could hold meetings with a person using a wheelchair on the first floor of the building or in an alternative accessible location.

☐ **Practice Tip:** Bear in mind that solutions to accessibility problems are highly individualized, and therefore any given situation may require a different solution than you have employed in the past, even for someone with the same disability.

**11. May an individual with a disability be entitled to more than one accommodation?**

Yes. Some parties may have multiple disabilities and related needs, or a single disability might affect the person in multiple ways. For example, a person who is blind and also has emphysema may require an accommodation for his restricted vision and another accommodation for his inability to walk long distances or climb stairs.

**12. What if more than one participant needs an accommodation, and their requests are in conflict?**

Requests for accommodations sometimes may be in conflict. For example, one party may need frequent breaks to recap and review what is happening, and the other party may need to limit the time spent in mediation because of a physical inability to sit for long periods. The mediator may suggest a process modification such as an initial joint session to identify interests and desired outcomes, and then adjourn the session and conduct the rest of the mediation in subsequent sessions or “shuttle diplomacy style” by phone if both parties agree.

**13. Does a mediation provider have to provide reasonable accommodation for a non-party participant in the mediation (e.g., a party’s representative)?**

Title III of the ADA prohibits discrimination against people with disabilities who seek to enjoy the goods, services, facilities, privileges, advantages, or accommodations offered by places of public accommodation. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability against participants in programs or activities that receive federal financial assistance or that are conducted by the federal government. Title II of the ADA essentially applies the same standards as Section 504 to State and local government entities, regardless of whether they receive federal funds.

Consequently, the following entities must provide accommodations for non-party participants in a mediation:

- Private mediation providers, whether or not they are retained by an employer;
- Private employers that receive federal financial assistance and that provide mediation of disputes to their employees as a benefit or privilege of employment;

- Federal agencies, whether providing mediation for their own employees or for members of the public; and,
- State or local government entities, whether providing mediation for their own employees or for members of the public (regardless of whether or not the entity receives federal financial assistance).

The obligation of a private employer covered only by Title I to accommodate a non-party participant in the mediation of an employee's EEO dispute is less clear. In these circumstances, however, providing an accommodation may help to ensure the fairness of the process and facilitate resolution of the dispute.

**Example:** A private employer that receives no federal financial assistance (and, therefore, is not subject to Section 504 of the Rehabilitation Act) establishes an in-house mediation program to resolve EEO disputes and allows employees participating in the program to bring someone with them to the mediation. An employee wants to use the mediation program and wants to bring a representative with him. The representative is blind and uses a service animal. Allowing the employee's representative to attend the mediation with the service animal would ensure that the employee can have a representative of his choice at the mediation.

**14. Who pays for the cost of any accommodations if more than one entity provides a mediation?**

Where two or more entities each have an independent legal obligation to provide and pay for an accommodation for a mediation participant, they are both responsible. Therefore, they should communicate and coordinate in advance to plan who will arrange for the accommodation and how the cost will be handled. In some cases of joint obligation, one entity will offer to cover the entire cost; in other cases, a cost-sharing arrangement may be devised.

**15. May providers of mediation services charge an individual with a disability for the cost of reasonable accommodations, such as sign language interpreters?**

No. If an accommodation needed by an individual with a disability does not pose significant difficulty or expense, the mediation provider has to provide and pay for it.

- ❑ **Practice Tip: Develop a standardized method for handling any costs associated with providing accommodations for**

**mediation, such as a central fund for this purpose.** Also, if you are a private entity, consult with your tax preparer regarding tax deductions and credits available for providing reasonable accommodation.

**16. Should a mediation provider decline a case if it concludes it can't afford to pay for a requested accommodation?**

Before you decide that providing an accommodation poses a significant difficulty or expense, consider some of these alternatives:

- consult with the Job Accommodation Network (JAN), 1-800-526-7234 (V/TDD, <http://www.jan.wvu.edu>, or your regional Disability Business Technical Assistance Center (DBTAC), 1-800-949-4232 (V/TDD), <http://www.adata.org>, regarding possible no-cost or low-cost options available in your area.
- anticipate the occasional accommodations which will inevitably need to be provided to some mediation participants, and annually budget a line item for this expense, or build the expected costs into your overhead and fee structure. Be sure, however, that you do not bill a party for the cost of providing accommodations.
- consider asking your local professional association to create an accommodations resource center or common fund for accommodation costs incurred by solo mediators.

**Mediation Readiness**

**17. How should a mediator consider a party's disability in assessing the party's capacity to participate in mediation?**

Bear in mind that regardless of whether or not a mediation participant has a disability, people's capacity to participate effectively in mediation varies widely based on their knowledge, education, training, personalities, and a host of other factors. Moreover, even for parties with disabilities, the impact of their disabling conditions on their functional abilities can vary from day to day. Therefore, rather than focusing on the disability, it is most useful for mediators to focus on communicating with all parties about their needs throughout the process, and on being prepared to modify the process as needed to enhance the parties' participation.

**18. What if a mediator is concerned that an individual cannot participate competently in a mediation because of a physical or mental disability?**

A best practice is for the mediator to consult with the party before the mediation begins to determine what he may need to participate in the mediation. During the convening phase before the first mediation session, the mediator can discuss with the parties what might enhance each party's ability to participate (e.g., later starting time, presence of a representative or support person, etc.) The mediator's discussions with the parties during the convening phase also provide an opportunity for the parties to vent frustrations and clarify desired outcomes prior to the mediation session. It is also a good opportunity for the mediator to give a party feedback about any difficulties the mediator is having understanding the party. The mediator can be candid about her own need for assistance to understand the party's needs and interests.

- ❑ **Practice Tip: Avoid making assumptions about whether a party is unable to participate in mediation due to an emotional or cognitive limitation.** By taking the time to understand the party's perspective and abilities, the mediator may be able to work with the party to reach an agreement that the party will be able to carry out.
- ❑ **Practice Tip:** When a party is not able to articulate what he wants from the process or doesn't seem to understand the process, a third party support person whom the party respects and trusts can be very helpful. The support person can serve as an ally and coach to the party, helping the party follow what is happening, evaluate options, and decide what is in the party's best interest. This person might be a trusted family member, friend, co-worker, or attorney.

In addition, frequent private caucuses give the mediator the opportunity to check in with the parties and assess whether something else is needed. The mediator should attempt to provide an appropriate accommodation whenever possible. If the mediator determines, however, that she can no longer effectively facilitate the party's participation, the mediator should inform the parties that she cannot conduct the mediation and should withdraw from the case.

## **Establishing Effective Procedures**

### **19. What should a mediation provider include in its policies and procedures to help ensure that mediation services are accessible?**

- A standardized procedure and clear program guidelines for:
  - relaying any accommodation request information obtained by the intake personnel or referral source;
  - inquiring about accessibility needs at the convening phase;
  - processing accommodation requests;
  - locating resources to assist the mediator in resolving an accommodation issue; and,
  - providing and funding accommodations (explain who is responsible for processing accommodation requests in your organization, and outline the steps to take and resources to consult if an accommodation request is received).
- A method for tracking information regarding accommodations provided for mediation, so that you can analyze whether there are any problems and implement appropriate changes to your accommodation policy and procedures.
- A way of clearly communicating your accessibility procedures and program guidelines to any contract mediators or employees, as well as training on the guidelines.
- A process for ensuring that mediated agreements comply with non-discrimination laws.

In the case of employer-provided mediation programs, consider whether the mediation program should be under the auspices of an independent office which does not run the risk of perceptions of partiality or bias in favor of management. Some employers have concluded that their in-house legal department, human resources department, or equal employment opportunity/civil rights department are not appropriate offices in which to house the mediation program for this reason.

## **Special Considerations for Mediators**

**20. What basic things should a mediator keep in mind for a case that involves a disability law issue, or where a mediation participant has a disability?**

- Familiarize yourself with the up-to-date ADA or Rehabilitation Act requirements that apply to the case, relevant current case law developments, and available government and community resources to help meet the accessibility and other accommodation needs of the parties. **A checklist of legal issues frequently arising in an EEO case raising a denial of reasonable accommodation is attached at Appendix D. A list of selected reference materials addressing ADA and mediation is attached at Appendix E.**
- If a party asks for an accommodation you don't know how to provide or about which you need more information, you should initiate a discussion with the party as part of the interactive process. In other words, don't pretend to know more than you do, and establish open two-way lines of communication with the parties about any disability-related needs.
- Manage your parties' expectations. In order to avoid a party misperceiving as advocacy your efforts to adapt the process to disability needs, maintain a clear and distinct boundary between process changes intended to ensure accessibility versus the merits of the claims under mediation.

**21. What might a mediation provider do to explain the presence of an interpreter, reader, or other non-party participant at the mediation?**

The mediator may fully explain to all those present at the mediation what the role of an interpreter, reader, or other non-party participant will be, where he is present to assist an individual with disability-related needs. However, the mediator should in all cases require all mediation participants, both parties and non-parties, to sign a confidentiality agreement not to discuss what occurs during the mediation with anyone outside the process.

**22. What confidentiality obligations apply when a party discloses information about a disability to the mediation provider?**

Based on standard mediation practices, the mediator should treat medical information about the participants confidentially, including the fact that a participant has requested a reasonable accommodation for the



mediation, the fact that a participant has a disability, and the extent of a known disability.<sup>6</sup> The mediator can address disability-related needs without identifying them as such. For example, if a party has requested a break to take medication at a certain time, the mediator can call a “stretch” break for all participants. Under the rules governing most mediation programs, all participants to a mediation, including the parties, their respective representatives, and the mediator, must keep all mediation communications confidential.<sup>7</sup> The mediation provider will typically require that everyone in the mediation sign a confidentiality agreement, and also will direct the participants that after the mediation, they should destroy any notes they took during the mediation.

### **23. How can mediators ensure the integrity of mediation agreements reached in ADA/Rehabilitation Act cases?**

Mediation providers should advise the parties to a mediation following execution of a mediated agreement that they may contact the mediation provider if either party fails to comply with responsibilities under the agreement. Some employer mediation programs allow a party a specified period of time to initiate a complaint process regarding any alleged breach of a settlement agreement. Mediation providers can also establish a procedure for formally following up with the parties at a date specified in the mediated agreement, to help ensure the durability of the agreement and to provide the parties with an opportunity to seek the mediator’s assistance if the agreement has not been implemented.

### **Mediator Training and Skills Development**

Although the ADA and the Rehabilitation Act do not specifically require any type of training for mediators regarding disability law, training is the best way for mediators to ensure compliance with their legal and ethical obligations.

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<sup>6</sup>In employer-provided mediation, there is additionally an ADA obligation requiring the employer and the mediator to keep the employee’s medical information confidential. This obligation applies to the employer when it conducts the mediation in-house, as well as to any mediation provider retained by the employer that is acting as the employer’s agent.

<sup>7</sup>See, e.g., EEOC Alternative Dispute Resolution Policy Statement (July 17, 1995) (available at <http://www.eeoc.gov/policy/docs/adrstatement.html>); Questions and Answers About Mediation (explaining EEOC’s Mediation Program for charges pending before EEOC) (available at [http://www.eeoc.gov/mediate/mediation\\_qa.html](http://www.eeoc.gov/mediate/mediation_qa.html)). Threats of physical harm present an exception to the confidentiality rule, and can be disclosed.

Novice and experienced mediators alike have found ADA-specific mediation training extremely helpful in preparing them to be sensitive and responsive to the accessibility needs of mediation participants. The following questions address frequently-raised concerns regarding ADA training for mediators.

**24. Is training in mediating disability-related cases a standard part of all mediation training?**

Typically not. However, training in the basics of disability law, disability awareness generally, and the legal and ethical obligations to make the mediation process accessible is a best practice for developing the knowledge and skills necessary to mediate both disability-related cases and other types of cases as well.

- ❑ **Practice Tip:** Mediation program directors can use questionnaires to inventory their roster mediators' professional training, experience, and interests, to develop and maintain a skills matrix that facilitates matching mediators' skills to particular disability cases.
- ❑ **Practice Tip:** Mediation program directors can develop a process for supervising and supporting their mediators who are new to ADA/Rehabilitation Act cases, and for providing them with constructive feedback/evaluation.

**25. Do mediators need any special training to mediate cases involving persons with disabilities?**

There are different views among mediators about this issue. However, many experienced ADA mediation providers generally recommend training addressing these topics:

- ADA requirements for accessibility and reasonable accommodation;
- How to apply ethical standards and modify mediation procedures to meet the needs of the parties (ways to level the playing field between the parties, how to interact with parties about their needs for changes in the mediation process, and recommended practices to enhance each party's participation throughout the mediation);
- How to facilitate mediation by adapting the process to accommodate the individual limitations and abilities of the parties; and,

- How to access government and community resources that can help accommodate the needs of parties with various kinds of disabilities.

**26. What types of basic ADA/Rehabilitation Act training are generally useful to all mediation providers, regardless of the types of cases they handle?**

Mediators working with all types of cases can benefit from training that includes an overview of accessibility requirements under ADA/Rehabilitation Act and mediator ethics, as well as disability awareness exercises (etiquette, communications, bias, accessibility, resources, practical application, interaction with people with different disabilities on common dispute issues, mediation access, and process adaptations). This will help mediators respond to accessibility needs of mediation participants.

- ❑ **Practice Tip:** Equip all mediators with educational materials about the ADA and a list of informational resources. Some of these same materials could be made available to the parties before the first mediation session when the case being mediated involves an ADA dispute.

**27. What could be included in specialized training for mediators who are handling ADA/Rehabilitation Act cases?**

- Mock mediation (by trainers or experienced mediators) that demonstrates how information-gathering should occur in the convening phase and during mediation, followed by debriefing (feedback to mediator and discussion of issues).
- Legal updates and case studies presented by a legal expert, including coverage of statutes, regulations, and interpretive guidance from federal enforcement agencies.
- Role playing for mediation trainees on how to engage in the interactive process with a party who has a disability to determine necessary process modifications, or on assessing a party's capacity to participate in mediation.
- Helpful strategies for facilitating effective participation for parties with mental disabilities.
- Roundtable discussion in which people with disabilities share their perspectives/experiences with mediation.

- Training on alternative settlement options where return to work is not feasible (e.g., financial remedies, social security disability income, vocational rehabilitation, etc.).

**28. After initial training, how can mediators continue improving their skills for mediation of disability-related disputes?**

- Participate in supervised clinical hours that involve being observed and critiqued by experienced mediators in performing a mediation from intake through final agreement.
- Remain current with EEOC and DOJ policy guidance and technical assistance documents posted on <http://www.eeoc.gov> and <http://www.ada.gov>, as well as literature posted on other disability-related websites.
- Engage in peer exchanges with fellow mediators experienced in mediating disability cases, including mediators with disabilities.
- Make contacts with local disability organizations and participate in their activities.

**29. What steps can a mediation organization or employer with a roster of mediators take to provide helpful skills development and continuing education?**

- Designate a qualified internal person or office to serve as an expert resource for your mediators on accessibility and accommodation issues that arise in their mediations. Publicize this resource to your mediators and mediation participants to help identify options for resolving access problems and to assist if problems arise in implementing an agreement.
- Develop a centralized mechanism for funding accommodations, and if you have a funding source (e.g., some federal government agencies contract with the Department of Defense Computer/Electronic Accommodations Program (CAP)), publicize to your mediators the existence of this resource and the procedure for accessing it.
- Provide a range of continuing education opportunities for beginning, intermediate and advanced level mediators, and provide

training by experts in disability mediation for roster mediators who lack experience.

- Provide regularly updated educational materials for mediators on disability law developments.
- Provide a mentoring/apprenticeship program to partner less experienced mediators on your roster with more experienced ADA mediators for informal guidance.

**30. How can a mediation provider obtain neutral experts or other objective information about disabilities and workplace accommodations to share with the parties at little or no cost?**

- Contact your regional Disability and Business Technical Assistance Center (DBTAC); the U.S. Department of Labor's Job Accommodation Network (JAN); federal, state, or local public agencies (e.g., vocational rehabilitation); and non-profit organizations with technical expertise related to the accommodation issues in the dispute.
- Consult public agency websites (e.g., <http://www.eeoc.gov> and <http://www.ada.gov>) for objective information regarding rights and responsibilities related to disability accessibility.
- Consult disability organizations (e.g., the Epilepsy Foundation, American Lung Association, United Cerebral Palsy, etc.) for relevant information on the accessibility issues presented in a particular case.
- Request generic medical information from a health care provider about the nature of a particular physical or mental impairment.

**31. Do mediation programs have to make their training accessible to people with disabilities?**

Private or government employer-sponsored mediation programs that train employees as mediators must, absent significant difficulty or expense, accommodate otherwise qualified employees who are individuals with disabilities and seek to participate in the mediation training. Similarly, non-employer-sponsored mediation services that train members of the public as mediators or that provide training for current mediators must provide accommodation for otherwise qualified mediators with disabilities who seek to

participate in the training absent significant difficulty or expense or a fundamental alteration of the program.

**32. I am a person with a disability and I am interested in becoming a mediator. What should I do to ensure that the training is accessible?**

Prior to the training, you should contact the training provider to ask what will take place and to advise the provider of your accessibility needs. Discuss accessibility options with the provider, and negotiate to identify the options that will make the training accessible to you without posing significant difficulty or expense for the provider. If you need the provider to obtain certain auxiliary aids or services, offer any suggestions or contact information you may have that could assist the provider in making these arrangements.

## Appendix A - Commonly Requested Accommodations Relating to Mediation

The following are examples of some types of requests for disability accommodation relating to mediation, the possible barriers that might trigger the need for a person to make the request, and the possible actions by a mediation provider or trainer that might remove the barrier. The facts and circumstances of each particular case should be considered to determine, through the interactive process with the party, whether one of the possible solutions provided here, or another solution, will be appropriate to remove the barrier to mediation participation.

<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
Transportation-related issues.	<ul style="list-style-type: none"><li>• No accessible transportation available.</li><li>• Available transportation is unreliable, hours of operation do not coincide with meeting times, has reservation restrictions that prevent party from reserving it when needed for mediation.</li><li>• Party unable to use available transportation.</li><li>• Private accessible transportation is cost prohibitive for party.</li></ul>	<ul style="list-style-type: none"><li>• Change mediation location to site to which party can travel.</li><li>• Hold session by telephone conference call.</li></ul>

<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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Accessible parking.	<ul style="list-style-type: none"> <li>• No designated and/or van accessible parking spaces near mediation site.</li> <li>• Non-accessible parking is available for free, but accessible parking is only available in paid parking lot.</li> <li>• Available accessible parking is on steep slope, far from building, or is in some other way inaccessible to the party.</li> </ul>	<ul style="list-style-type: none"> <li>• Create a temporary accessible parking space</li> <li>• Offer to meet party at drop-off point and “valet park” car for her, and retrieve car at end of meeting.</li> <li>• Reimburse party for parking lot or garage fee incurred to obtain accessible parking space, if non-accessible parking is available at no cost to the other mediation participants</li> <li>• Select a different meeting site that is accessible.</li> </ul>
Accessible route to meeting room.	<ul style="list-style-type: none"> <li>• Route from arrival to meeting room has curb, elevated threshold, too-steep ramp, stairs, or slippery surfaces.</li> </ul>	<ul style="list-style-type: none"> <li>• Install temporary or permanent ramp(s), curb cuts, or stair lift; remove cause of slippery surfaces and apply non-slip covering.</li> <li>• Identify alternative accessible route.</li> <li>• Select a different meeting site that is accessible.</li> </ul>



<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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Assistance with opening doors.	<ul style="list-style-type: none"> <li>• Door too heavy to push or pull.</li> <li>• Opening mechanism difficult to locate or operate.</li> <li>• Automatic opening mechanism not working.</li> <li>• Unsafe/unable to use revolving door.</li> <li>• Space on user side of door too small to accommodate person during opening process.</li> <li>• Doors along accessible route are locked.</li> </ul>	<ul style="list-style-type: none"> <li>• Identify alternative accessible route that avoids the doors that are causing the barrier.</li> <li>• Escort the person on arrival and exit, opening doors for him.</li> <li>• Select an alternative site that is accessible.</li> </ul>
Assistance with locating or operating elevator.	<ul style="list-style-type: none"> <li>• Can't locate, reach, or push buttons.</li> <li>• Elevator too small, or not working.</li> <li>• Unable to cognitively process information to operate elevator.</li> </ul>	<ul style="list-style-type: none"> <li>• Escort the person on arrival and exit, operating the elevator for him.</li> <li>• Change meeting place to room that is accessible without use of elevator.</li> <li>• Select an alternative meeting site that is accessible.</li> </ul>

<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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Assistance with verbal communication.	<ul style="list-style-type: none"> <li>• Limitations in speaking, hearing, or comprehending.</li> <li>• Difficulty identifying who is speaking.</li> <li>• Difficulty following or understanding complex sentences or long speeches.</li> </ul>	<ul style="list-style-type: none"> <li>• Communicate in writing (TDD, fax, e-mail, CART, written or typed documents/notes, captioning).</li> <li>• Speak clearly, face the party, make sure the party can see your lips when speaking.</li> <li>• Speaking louder when requested (NOTE: with certain hearing impairments, this distorts rather than amplifies the sound)</li> <li>• Have only one person speak at a time.</li> <li>• Provide sign language interpreter services.<sup>8</sup></li> </ul>
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<sup>8</sup>NOTE: It is important to discuss with the party requesting accommodation exactly what type of interpretation services are needed. There are different types of interpretive services available and different types of sign language. The interpreter selected should be qualified to provide the type of interpretation that the party needs. For example, a person who uses finger spelling rather than American Sign Language requires a sign language interpreter who will interpret with finger spelling. Similarly, a person who is deaf and blind might need an interpreter who can translate manually (communicates tactilely into party's hand). It is also important to make sure that the interpreter you use is familiar with how to interpret the terminology used in the mediation process.

<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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<p>Assistance with verbal communication. (<i>continued</i>)</p>		<p>... e.g., “what I understood you to say was ...,” and repeat what you thought the party said.</p> <ul style="list-style-type: none"> <li>• If complexity or length of speech is a problem, use simple words and concepts that the party understands.</li> <li>• Periodically confirm that the person has understood what has been communicated.</li> <li>• Never assume that the person might not hear or understand statements you intend only for others.</li> </ul>
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<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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Assistance with written communication.	<ul style="list-style-type: none"> <li>• Can't see writing due to vision or mobility impairment.</li> <li>• Can't understand writing due to cognitive impairment, or has not learned to read written language due to disability.</li> <li>• Unable to write due to disability.</li> </ul>	<ul style="list-style-type: none"> <li>• Convert text to large print, Braille, or audio tape.</li> <li>• Read text to party.</li> <li>• Provide visual interpreter services/reader.</li> <li>• Ensure party has appropriate method to approve and sign documents.</li> </ul>
Specific times to meet or specific break periods due to disability-related fatigue, medical treatment, medication, etc.	<ul style="list-style-type: none"> <li>• Mediation schedule conflicts with disability-related schedule that cannot be changed.</li> <li>• Mediation schedule creates fatigue or other problem for party's health.</li> <li>• Party unable to maintain concentration and comprehension for prolonged periods of time.</li> </ul>	<ul style="list-style-type: none"> <li>• Find out what days, times, and schedule work best for the party.</li> <li>• Consider amount of time it takes for party to get to/from mediation site when scheduling mediation.</li> <li>• Schedule mediation sessions and meetings so that they do not conflict with the party's disability-related needs.</li> </ul>

<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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Control of environmental factors.	<ul style="list-style-type: none"> <li>• Party's sensitivity to light, noise, chemicals, temperature or other factors can trigger adverse reactions – such as decreased ability to hear or concentrate, trigger seizures or migraines, worsen overall condition, or cause allergic reaction.</li> </ul>	<ul style="list-style-type: none"> <li>• Eliminate adverse environmental factors or reduce to level which eliminates the barrier to participation.</li> <li>• If individual has chemical-sensitivity, provide mutually agreeable chemical-free meeting site and request that participants avoid use of scented personal care items.</li> <li>• Select alternative meeting site.</li> </ul>
Permission for personal assistant to accompany throughout mediation process.	<ul style="list-style-type: none"> <li>• Party cannot attend mediation without assistant to provide help.</li> <li>• Opposing party objects to presence of assistant because mediation confidential.</li> </ul>	<ul style="list-style-type: none"> <li>• Permit assistant to be present if necessary to enable party to participate.</li> <li>• Explain to assistant the necessity for confidentiality, and obtain signed confidentiality agreement from assistant.</li> </ul>

<i><b>Request</b></i>	<i><b>Some Possible Barriers</b></i>	<i><b>Some Possible Solutions</b></i>
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Reminders about what is being discussed, roles of others who are present, etc.	<ul style="list-style-type: none"> <li>• Cognitive impairment causes confusion or forgetfulness.</li> <li>• Physical condition prevents party from full advantages of all sensory data to simultaneously track data and remember details.</li> <li>• Party unable to take notes, is unfamiliar with language used during mediation, or does not absorb all the information.</li> </ul>	<ul style="list-style-type: none"> <li>• Regularly recap proceedings.</li> <li>• Regularly verify the party's understanding thus far.</li> <li>• Provide party with effective notes of the meeting.</li> </ul>
An accommodation that cannot be provided because it poses significant difficulty or expense or a fundamental alteration of the mediation provider's business.	<ul style="list-style-type: none"> <li>• Party does not understand legal rights and limitations for accommodations. For example, the party requests mediator to provide or arrange for personal care needed by the party when using the bathroom.</li> </ul>	<ul style="list-style-type: none"> <li>• Explain why the requested accommodation cannot be provided.</li> <li>• Brainstorm with the party to determine if there are any alternative means for her to obtain the services or assistance needed.</li> </ul>

## Appendix B - Sample EEO Mediation Intake Form

*This is a sample form that may be useful for mediation intake personnel to use or customize for a particular mediation program. It is intended to prompt the intake personnel to: (1) inquire whether any accommodations may be needed for the mediation process; (2) take appropriate action to respond to accommodation requests; and, (3) provide any information regarding accommodation requests to the mediator at the time the case is assigned by forwarding a copy of this form.*

Case Number \_\_\_\_\_

Date: \_\_\_\_\_

### 1. Charging Party/complainant/employee contact information:

Name \_\_\_\_\_ Work location/Branch \_\_\_\_\_

Work telephone: \_\_\_\_\_ Home telephone: \_\_\_\_\_ E-mail: \_\_\_\_\_

### 2. Currently assisted in process by:

Name \_\_\_\_\_ Role: \_\_\_\_\_ (attorney, union rep.,  
advocate, other (specify))

Firm/Organization: \_\_\_\_\_ Work telephone: \_\_\_\_\_

E-mail: \_\_\_\_\_ Will this person attend mediation? Yes No Unknown

### 3. Respondent/management official/agency representative contact information:

Name \_\_\_\_\_ Work location/Branch: \_\_\_\_\_

Work telephone: \_\_\_\_\_ E-mail: \_\_\_\_\_

Circle one: management official agency representative  
other (specify) \_\_\_\_\_

### 4. Accommodation requests for the mediation process (ask parties and relay any requests promptly to mediator):

Party requesting accommodation: \_\_\_\_\_

Accommodation requested: \_\_\_\_\_

### 5. Status of any accommodation requests for the mediation process (Indicate what arrangements made by intake personnel, or whether accommodation requests have been forwarded to mediator to process):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Continued on next page)

## 6. Mediator Information and Mediation Logistics

Primary Mediator: \_\_\_\_\_ Co-mediator: \_\_\_\_\_  
Other Mediators: \_\_\_\_\_ Role: Trainee Other \_\_\_\_\_  
Location of Mediation: \_\_\_\_\_  
Date of Mediation: \_\_\_\_\_ Time of Mediation: \_\_\_\_\_  
Name of Location Contact Person: \_\_\_\_\_ Telephone: \_\_\_\_\_  
E-mail: \_\_\_\_\_



## **Appendix C - SELECTED RESOURCES**

### **FEDERAL AGENCIES**

#### **U.S. Equal Employment Opportunity Commission (EEOC)**

1-800-669-4000 (voice)

1-800-669-6820 (TTY)

<http://www.eeoc.gov>

EEOC Publications Center:

1-800-669-3362 (voice)

1-800-800-3302 (TTY)

EEOC private sector mediation programs:

<http://www.eeoc.gov/mediate/index.html>

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin; the Age Discrimination in Employment Act, which prohibits discrimination against individuals 40 years of age or older; sections of the Civil Rights Act of 1991; the Equal Pay Act; Title I of the Americans with Disabilities Act, which prohibits discrimination against people with disabilities in the private sector and state and local governments; and Section 501 of the Rehabilitation Act of 1973, prohibiting disability discrimination in federal government employment. In addition to mediation, investigation, and litigation, EEOC provides extensive technical assistance to employers and employees.

#### **U.S. Department of Justice**

##### **Civil Rights Division**

##### **Disability Rights Section**

ADA Information Line

1-800-514-0301 (voice)

1-800-514-0383 (TTY)

<http://www.ada.gov>

The Department of Justice investigates and litigates claims under Titles II and III of the ADA, and also litigates cases against public employers under Title I of the ADA. The Department also provides education and technical assistance to businesses, State and local governments, and individuals with rights or responsibilities under the ADA through a variety of means to encourage voluntary compliance. Activities include providing direct technical assistance and guidance to the public through a toll-free ADA Information Line, an internet ADA Home Page, and Fax on Demand, developing and disseminating

technical assistance materials to the public, undertaking outreach initiatives, and coordinating ADA technical assistance government-wide.

### **National Council on Disability**

202-272-2004 (voice)

202-272-2074 (TTY)

<http://www.ncd.gov>

The National Council on Disability (NCD) is an independent federal agency making recommendations to the President and Congress on issues affecting Americans with disabilities. NCD's overall purpose is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

### **Access Board**

1-800-USA-ABLE (V/TTY)

<http://www.access-board.gov>

The Access Board is an independent federal agency devoted to accessibility for people with disabilities. Key responsibilities of the Board include: developing and maintaining accessibility requirements for the built environment, transit vehicles, telecommunications equipment, and for electronic and information technology; providing technical assistance and training on these guidelines and standards; and enforcing accessibility standards for federally-funded facilities.

## **OTHER RESOURCES**

### **American Bar Association (ABA) Commission on Mental and Physical Disability Law**

(202) 662-1570

<http://www.abanet.org/disability>

ABA's Commission on Mental and Physical Disability focuses on the law-related concerns of persons with mental and physical disabilities through a variety of activities and publications. Its mission is "to promote the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and their full and equal participation in the legal profession." The Commission's members include lawyers and other professionals, many of whom have disabilities.

**ADA Disability and Technical Assistance Center (DBTAC)**

1-800-949-4232 (V/TTY)

<http://www.adata.org>

There are ten regional DBTAC centers throughout the United States that act as a one-stop comprehensive resource on ADA issues in employment, public services, public accommodations, and communications. Each DBTAC center works closely with local business, disability, governmental, rehabilitation, and other networks to provide ADA information and assistance. Programs vary in each region, but all of the centers provide technical assistance, education and training, materials, information and referrals, among other services.

**Association for Conflict Resolution**

1015 18<sup>th</sup> Street, N.W., Suite 1015

Washington, D.C. 20036

(202) 464-9700

<http://www.acrnet.org>

ACR is a membership organization that actively promotes professional development for mediators, conciliators, fact finders, arbitrators, and other neutrals. (The Society for Professionals in Dispute Resolution (SPIDR) merged with the Academy of Family Mediators (AFM) and the Conflict Resolution Education Network (CREnet) to form ACR in January 2001.

**Job Accommodation Network (JAN)**

1-800-526-7234 (V/TTY)

<http://www.jan.wvu.edu>

JAN is a free service of the Office of Disability Employment Policy of the U.S. Department of Labor providing information and guidance on reasonable accommodation in the workplace.

## **Appendix D - Checklist of Frequently-Raised Legal Issues in Workplace Reasonable Accommodation Cases under the ADA**

- I. Does the individual have an impairment that meets the definition of “individual with a disability” under the ADA?
  - A. What is the physical or mental impairment?
  - B. Does the physical or mental impairment substantially limit one or more major life activities, or does the individual have a record of such an impairment, or is the individual regarded as having such an impairment?
    1. What major life activities are affected? (e.g., caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working (impact on ability to perform class of jobs or broad range of jobs in various classes), sitting, standing, lifting, reaching, reproduction, and processes such as thinking, concentrating, and interacting with others)
    2. Does the individual use mitigating measures (e.g., medication, insulin, prosthetic limb, hearing aid, etc.)
    3. Do mitigating measures control the symptoms of the impairment such that they are not substantially limiting?
- II. Is the individual qualified?
  - A. Can the individual perform the essential functions of the position held or desired with or without accommodation?
  - B. If the individual cannot perform the essential functions of his current position, has it been considered whether he could perform the essential functions of an existing vacant position for which he is qualified and to which he could be reassigned?
- III. Accommodation
  - A. Did the individual request accommodation, or alternatively was the need for accommodation obvious or already known?

- B. Did the employer engage in an interactive process to clarify individual needs and appropriate reasonable accommodation?
- C. Is there an available reasonable accommodation? Some examples include:
  - 1. Job restructuring (reallocating or redistributing marginal job functions or altering how or when essential or marginal functions are performed)
  - 2. Physical modifications to facilities (e.g., rearranging furniture to create uncluttered path for an employee in a wheelchair or a blind employee)
  - 3. Use of accrued paid leave, or granting unpaid leave
  - 4. Modified or part-time schedule
  - 5. Modifying a workplace policy (e.g., permit eating or drinking at workstation for diabetic, or modification of break schedule to permit employee to take medication)
  - 6. Telework where suited to the duties being performed.
  - 7. Reassignment to a vacant position.
- IV. Undue Hardship -- Would the proposed accommodation pose an undue hardship on the employer, i.e., significant difficulty or expense?
- V. Direct Threat
  - A. Is direct threat to safety (significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation) implicated by the proposed accommodation solution? See 29 C.F.R. § 1630.2(r).
    - Determination that a direct threat exists must be based on an individualized assessment of the applicant/employee's present ability to safely perform the essential functions of the job, considering reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence. Factors to be considered: (1) duration of the risk; (2) nature and severity of the potential

harm; (3) likelihood the potential harm will occur; (4) imminence of the potential harm.

- B. If there is a direct threat to safety, can the threat be reduced or eliminated by an alternative or additional accommodation?

## **Appendix E - Selected References Regarding Mediation and ADA**

### **Selected EEOC ADA Publications**

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (as revised, October 17, 2002)

<http://www.eeoc.gov/policy/docs/accommodation.html>

Questions and Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (October 20, 2004)

[http://www.eeoc.gov/facts/intellectual\\_disabilities.html](http://www.eeoc.gov/facts/intellectual_disabilities.html)

Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (July 28, 2004)

<http://www.eeoc.gov/facts/epilepsy.html>

Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (October 29, 2003)

<http://www.eeoc.gov/facts/diabetes.html>

EEOC Fact Sheet on Work At Home/Telework as a Reasonable Accommodation (February 3, 2003)

<http://www.eeoc.gov/facts/telework.html>

The Americans With Disabilities Act: A Primer for Small Business (August 15, 2002)

<http://www.eeoc.gov/ada/adahandbook.html>

Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 (July 6, 2000)

<http://www.eeoc.gov/policy/docs/fmlaada.html>

EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities (March 25, 1997)

<http://www.eeoc.gov/policy/docs/psych.html>

## **Selected References on Mediation and ADA by other sources**

*Disclaimer: The views expressed in the reference materials included on this list are those of the authors or issuing agencies, and not necessarily those of the U.S. Equal Employment Opportunity Commission, the U.S. Department of Justice, or the National Council on Disability.*

“ADA Guidelines Raise the Ethics Bar,” Judy Cohen, Dispute Resolution Magazine (Winter 2004).

ADA Mediation Guidelines (2000)

<http://www.cojcr.org>

Practice Standards for ADA Mediators, Center for Mediation, Key Bridge Foundation, Washington, D.C. (1999)

[http://www.keybridge.org/med\\_info/ada/ada\\_mediator\\_standards.htm](http://www.keybridge.org/med_info/ada/ada_mediator_standards.htm)

“Considerations for Mediating with People who are Culturally Deaf,” Annette Leonard, Deb Duren, and John Reiman

<http://www.directionservice.org/cadre/deafpaper.cfm> (October 16, 2003)

“Convening for Enhanced Self-Determination and Access to the Process,” Judith Cohen, The Texas Mediator, Vol. 18, No.2 (Summer 2003)

<http://www.mediate.com/articles/cohen6.cfm#>

“Facilitation of ADA Reasonable Accommodation Disputes,” Sara Adler, American Bar Association (1999)

<http://www.bna.com/bnabooks/ababna/annual/99/annual27.pdf>

“From Determining Capacity to Facilitating Competencies: A New Mediation Framework,” Susan Crawford, Lewis Dabney, Judith Filner, and Peter Maida, Conflict Resolution Quarterly 20:4 (2003)

“Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights,” Peter S. Adler, Thomas A. Kochan, Gerald W. Cormick (April 1998)

<http://www.acrnet.org/pdfs/guidelines.pdf>

“A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act,” EEOC Commissioner Paul Steven Miller, 62 Ohio St. L.J. 11 (2001)

<http://www.mediate.com/articles/miller1.cfm>



“Making Mediation Sessions Accessible to People with Disabilities,” Judy Cohen, SPIDR NEWS (Spring 1997)

<http://www.mediate.com/articles/cohen.cfm>

“Maximizing Effective Participation,” Patricia Porter, Alternatives to the High Costs of Litigation, Vol. 21, No. 6 at 117 (June 2003)

<http://www.cpradr.org>

“Mediating Employment Disputes Under the Disabilities Act,” Samuel H. DeShazer and Judy Cohen

<http://www.mediate.com/articles/cohenada.cfm>

“Mediating Reasonable Accommodations for ADA Cases: What Every Mediator Needs to Know,” Debra Dupree (March 2003)

<http://www.mediate.com/articles/dupreeD.cfm>

“Mediation Capacity: It is Not a Disability Issue,” Kathleen A. Blank, Alternatives to the High Costs of Litigation, Vol. 21, No. 6 at 117 (June 2003)

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