# ADA MEDIATION GUIDELINES

## Introduction

The ADA Mediation Guidelines for mediation providers are the product of a national Work Group convened to develop mediation practice Guidelines unique to conflicts arising under the Americans with Disabilities Act (42 USC Sec.12101-12213) ("ADA") and similar laws promoting the eradication of discrimination against persons with disabilities.

The ADA Mediation Guidelines were developed between January 1998 and January 2000 by a Work Group comprised of 12 mediation practitioners, trainers, and administrators. (See back page for the list of Work Group members.) The Guidelines address ADA mediation issues in the areas of Program & Case Administration, Process, Training, and Ethics. A Draft, and later, the Interim Standards, were widely distributed for public comment during the development period. The final Guidelines could not have been developed at all were it not for the tremendous collaboration and valuable comments contributed by many mediators, stakeholders, and advocates. The Work Group expresses its appreciation to the many people who contributed to this effort.

The term "ADA mediation," as used in this document, applies to programs mediating claims arising under the Americans with Disabilities Act and other disability civil rights statutes, such as the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and comparable state and local civil rights laws. The mediation of special education disputes raises issues that are not addressed here.

The Guidelines provide direction for mediators, administrators, funders, and consumers of ADA mediation. They also provide direction for disability access in any type of mediation involving persons with disabilities, such as family, commercial or labor mediation. The Guidelines are available to be followed voluntarily by individual mediators and mediation provider organizations who wish to signal to potential parties and mediation participants their familiarity with disability issues and their commitment to high quality ADA mediation services.

In developing the Guidelines, the Work Group reviewed existing mediator codes of conduct and other relevant documents to ensure that the Guidelines were in keeping with already developed work in the field. The ADA Mediation Guidelines address only issues that are unique to resolving disability-related disputes. The Guidelines do not include basic mediation ethics, general principles of administering a mediation program or educational information about ADA regulations, compliance, or disability access. Codes and resources that informed the development of the Guidelines are available to persons seeking additional information on integrating the Guidelines into mediation practice. [See "Resources" Appendix 1]. Illustrations of the practice implications of certain guidelines marked by an asterisk [*] appear in Appendix 2.

Public policy and legal issues often arise in ADA mediations. These Guidelines do not constitute legal advice. Persons interested in ADA mediation are encouraged to consult with attorneys and legal resources for substantive interpretation of the ADA and related disability civil rights statutes and regulations.

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# ADA MEDIATION GUIDELINES

I. Program and Case Administration

This section of the Guidelines refers to the administration of mediation programs and to the administration of cases by mediation providers, both mediation provider organizations (any entity that manages or administers mediation services) and private mediators.

**A. Program Development**

1. Providers, staff, and volunteers involved in ADA mediation in any capacity should be trained in disability-related issues and ADA compliance requirements, according to their particular program's needs and structure.
2. Mediation providers should be responsive to their constituents. The input of people with disabilities and other stakeholders should be considered in program development and evaluation.

**B. Disability Access to Mediation**

Mediation providers have obligations to make their services accessible to persons with disabilities. These obligations are articulated in the ADA Title III (Public Accommodations) under which mediation providers would be considered as "Service Establishments," in Title II (Public Service) if they are state or local government entities such as publicly funded court or community mediation programs, and in Title I (Employment) for internal employment dispute resolution programs. Mediation provider organizations and private mediators may not charge the individual with the disability for any expenses relating to making the session accessible.

1. ADA mediation providers should make all aspects of mediation—ranging from training to mediation sessions—accessible to persons with disabilities, including parties and other mediation participants, staff, volunteers, and mediators. For these purposes, the broadest definition of disability should be applied, including chronic conditions, episodic symptoms, and temporary disabilities. This is in keeping with generally accepted mediation principles that the parties be able to participate fully in the process. Persons conducting intake or case development should notify the mediator

of a case of any disability accommodation required to enable a party's participation in the mediation.*

2. Mediation provider organizations should have in place policies and procedures concerning accessibility for persons with disabilities. Essential components include procedures for requesting a disability accommodation, for grieving the denial of accommodations, and a non-discrimination policy that includes disability. The policies and procedures should be communicated to the parties, to mediation participants, to mediators and to staff and volunteers.

**C. Mediator Recruitment and Selection**

1. ADA mediation presents complex issues, and mediation provider organizations that provide ADA mediator training should select mediators who have mediation experience in addition to training.

   Mediation provider organizations that do not provide ADA mediator training should select as mediators only persons who have completed advanced ADA Mediation Training as set out in Section III of these Guidelines, or who have equivalent knowledge.

2. Provider organizations should have a diverse pool of mediators. Diversity recruiting efforts should include seeking out qualified mediators who have disabilities.

**D. Party Capacity**

1. In order for the mediation process to work, the parties must be able to understand the process and the options under discussion and to give voluntary and informed consent to any agreement reached. Mediators and provider organizations therefore should determine whether the parties in a mediation have the capacity to do so. In making such determinations, neither the mediator nor the provider organization should rely solely on a party's medical condition or diagnosis. Instead, they should evaluate a party's capacity to mediate on a case-by-case basis, if and when a question arises regarding a party's capacity to engage in the mediation process and enter into a contract.

2. This evaluation should be based on several factors. The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. An adjudication of legal incapacity is not necessarily determinative of capacity to mediate.* However, a mediation agreement signed by a person without legal capacity may require co-signing by a surrogate to ensure its enforceability.
3. Capacity is a decision-specific concept. Capacity to mediate may not be the same as capacity to make financial or health care decisions, to vote, marry, or drive. A party with a judicial determination of incapacity may still be able to participate in mediation. Conversely, a party without such a determination may not have the ability or understanding to participate.
4. If a party appears to have diminished capacity or if a party's capacity to mediate is unclear, the provider organization or the mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively. If so, the provider organization or the mediator should offer such an accommodation.
5. The provider organization or mediator should also determine whether the party can mediate with support. If a representative, such as attorney or support person, is present or participating, the party with diminished capacity remains the decision-maker in any agreement.
6. If, despite support, a party lacks capacity to participate in the mediation, mediation should not proceed unless a surrogate participates in the process to represent the interests of the party and make the mediation decisions in place of the party. Surrogates are defined according to state law, and might be agents under durable and health care powers of attorney, guardians, or family members. The surrogate and the person represented by the surrogate should be present and participate when possible. The mediator should encourage the surrogate to express the party's interests, values, and preferences.

### E. Party Preparedness

1. Provider organizations and mediators should encourage the parties to become aware of their legal rights and responsibilities under the ADA prior to the mediation so that the parties participate meaningfully and make informed decisions.
2. While providers may supply parties with educational materials, such as booklets on ADA rights and responsibilities, this information is not a substitute for legal representation. Before the mediation session, and at the outset of the session, parties should be advised that they may obtain independent legal or other representation. Parties in an ADA mediation should also be advised of the risks of not being represented by counsel, or of not having a potential agreement reviewed by counsel. The provider or mediator may refer parties to resources to seek representation.

### F. Referral of Cases to Mediators

The provider organization should provide the mediator with sufficient information about the case to permit the mediator to plan and conduct the mediation competently. Such information may also be conveyed to the mediator directly by the parties, or their representatives, if they are represented. Disability-related information will ordinarily be provided by the parties, and other appropriate mediation participants (particularly representatives and resource persons) during the course of the mediation. However, prior knowledge may be critical to the mediator's effective management of the mediation process. Prior knowledge may also alert the mediator to the need for the participation of a resource person in the session if the parties or their representatives have not already raised this issue.

## II. Mediation Process

### A. Mediation Techniques or Methods

1. These Guidelines do not advocate a particular mediator orientation, strategies, or techniques, except as those may impact disability-related issues.

2. In ADA cases where reasonable accommodations are an issue, the joint session provides an opportunity for the parties to engage in the "interactive process" (favored by the EEOC, courts and commentators) to identify and evaluate accommodation alternatives (42 USC 12101-1630.9). However, when this process is taking place in the context of mediation, it must be clear that anything said or done—even as part of the interactive process—will remain confidential and inadmissible as evidence in any legal proceeding unless otherwise agreed to by the parties.

**B. Other Mediation Participants**

The role of some mediation participants may overlap. However, the role of mediation participants should be as clearly defined as possible.

1. Representatives

   (a) The parties may bring a representative of their choice to the mediation session. A representative is an individual who serves as an agent and advocate for the party, advising, counseling, or presenting the party's views. Unlike a surrogate, who is legally authorized to make decisions on behalf of the party, a representative does not make decisions on the party's behalf. The representative may be a disability rights advocate, expert, vocational rehabilitation counselor, job coach, family member, attorney, union representative, or other person.

   (b) A party may bring a support person, as a representative or in addition to the representative, to assist the person throughout the mediation process, for example by providing emotional or moral support.

   (c) Where representation might serve the interests of the parties to ensure effective participation and thoughtful decision-making, the mediator may suggest that the parties (or one party) obtain representation.

   (d) The roles of support person, surrogate, and representative may vary, depending on the circumstances of the parties, a case, or a mediation.

2. Neutral experts and resource persons

   Supplementary disability-related information might be critical to the resolution of a dispute. The parties may engage experts, or with the

parties' permission, the mediator may invite a neutral expert to educate the mediator and the parties about the disability and to assist in developing options.

3. Personal assistants

   Persons with disabilities may be accompanied by a personal assistant (PA) who is supervised by the person with a disability and provides physical aid or other assistance. The PA should not speak on behalf of the person with the disability or assist with his/her communication, unless requested to do so by that individual.

4. Interpreters

   A qualified sign language or oral interpreter has the dual role of being a "disability accommodation" for persons who are deaf, hard of hearing, or who have speech disabilities, and of facilitating communication between these persons and other participants in the session. The mediator should allow the interpreter to confer with the individual with a disability to clarify terms before and during the mediation.

## III. Mediator Training

### A. ADA Mediator Training Contents

At a minimum, ADA mediator training should include:

1. Substantive law and procedural issues

   (a) ADA or other applicable federal or state statutes and/or local ordinances

   (b) State and federal regulations and policy statements

   (c) Court decisions applying these legal principles

   (d) Other related laws (e.g., Family and Medical Leave Act of 1993, Workers Compensation, Age Discrimination in Employment Act, Social Security Disability)

   (e) Mediating in a unionized setting (for employment mediation training)

   (f) The administrative processes for handling disability cases in federal, state, and local agencies and the courts, where appropriate

(g) Settlement/release and employee benefits options (for resolutions where the employee does not return to work)

2. Disability awareness

   (a) Disability etiquette* (appropriate ways to interact with people with disabilities and terminology*

   (b) Addressing one's own biases about disability*

   (c) Common disabilities, their impact on persons' functioning, and accommodation options

   (d) Planning and running an accessible session

   (e) Disability resources, including sources of information and technical assistance

3. Practical application

   (a) Common ADA dispute issues and options in the area to be handled by the mediators (e.g., employment, public accommodations, and housing)

   (b) Adaptation of mediation techniques to ADA mediation and unique circumstances of people with particular disabilities

   (c) Ethical considerations

   (d) ADA Mediation Guidelines

**B. ADA Mediator Training Logistics**

1. ADA mediator training—for already trained, experienced mediators—should be a minimum of fourteen (14) hours in length. The following time guidelines are advisory only, as some subject areas may require more time, based on the needs of the program, and some areas may be combined.

   (a) Substantive law and procedural issues—three hours. However, more time may be required, depending on the legal issues covered and the extent of prior legal training of the trainees. Discussion and activities, such as case studies, should be included, in addition to lectures. Legal issues are also covered throughout the entire training through discussion, role-plays, and other practical application activities.

(b) Disability awareness—three hours.

(c) Practical application—eight hours. In addition to presentation of practical ADA mediation skills, this should include role-plays, discussion, and other participatory activities. Role-play exercises should be designed to reflect the types of disability- related disputes in which the trainees will likely be involved as mediators.

2. Training should include at least one opportunity for participants to interact personally with a person who has a disability.
3. Each training participant should participate in role-plays of ADA disputes, including role- play as a mediator, and to debrief and receive feedback.
4. A trainer skilled in ADA mediation must be present throughout the training. The section on substantive law and procedural issues may be presented by a non-mediator, and the disability awareness section may be presented by persons with disabilities who do not have mediation expertise.
5. ADA mediation training manuals should include a copy of the laws and regulations applicable to cases that mediators will be mediating, a list of national and local disability- related resources, and basic information about reasonable accommodations and disability etiquette and terminology.
6. Some mediation provider organizations provide ADA mediator training and offer trainees who successfully complete the training opportunities to mediate. Such organizations should require that training participants demonstrate, through an evaluated performance, sufficient competency in the areas of ADA mediation practice addressed in training, before providing mediation services. This may be done after an apprenticeship period, but before the mediator conducts an unsupervised mediation. ADA mediator training programs that do not provide mediation services do not have an obligation to evaluate training participants.

**C. Post-Training/Mediator Support**

1. To ensure quality mediation services, mediator feedback and ongoing support and skills development are recommended. Mediator apprenticeship should include observing actual ADA mediation sessions conducted by experienced ADA mediators, conducting ADA mediations with, or observed

by, a skilled ADA mediator, and participating in follow-up debriefing with the observing mediator or co-mediator, including an evaluation of the apprentice's performance.

2. Mediators need to keep abreast of developments in ADA and in the ADA mediation field. ADA mediation provider organizations should require that ADA mediators fulfill a certain minimal number of continuing education hours annually addressing ADA and other disability-related topics. ADA mediation continuing education may include non- mediation areas such as disability-related public hearings, workshops provided by Independent Living Centers and other disability organizations, or attending workshops on disability issues.

IV. Ethics

The following ethical guidelines are minimum guidelines unique to ADA mediation that mediation provider organizations and mediators should follow. These Guidelines should be considered in conjunction with basic ethical standards of mediation, which are not addressed here.

**A. Mediator Competency**

1. Mediators should have knowledge of disabilities, disability access, and disability law. This includes being aware of general ADA case law developments and guidance issued by regulatory agencies. The ADA mediator needs to have information about the status of the law to work with the parties effectively in exploring the range of settlement options, and to know if the parties are making informed decisions and enforceable agreements.
2. ADA mediators should not accept cases for which they are not qualified. Where particular background information is required for ADA mediations, mediators should acquire legal or disability-related information in order to have sufficient knowledge to mediate the case competently.

**B. Fair Process**

1. The mediator should encourage parties to seek information and advice from relevant sources during the course of the mediation. Agreements

should be based on a clear understanding of the issues, options, and facts of the particular case. Agreements should never be coerced by the mediator or by the mediation provider organization. The mediator should make every effort to ascertain whether the parties have a sufficient understanding of their rights and obligations under the ADA, and the implications of any (a) agreement that they reach, or (b) decision to reject an offer of settlement.

2. Where the mediator believes that a party(ies) does not understand the implications of a contemplated agreement, the mediator should encourage the parties to consult appropriate sources of information and advice.
3. The mediator should terminate the mediation if s/he believes that the parties' agreement would be inconsistent with principles of mediation ethics (such as those listed here and those articulated in the standards of practice listed in Appendix I).
4. The mediator should ask whether the parties have considered the impact of parties who are not at the table, such as a labor union, on the enforceability, successful implementation, or durability of the agreement.

**C. Legal and Disability-Related Information**

ADA Mediators should use their knowledge of the law and disability issues to assess when unrepresented parties need legal or other counsel, or when the participation of an expert or resource person would be advisable. Mediators may encourage one or more of the parties to consider obtaining such assistance where needed. However, such encouragement should be given in a manner that protects the mediation process. Discussing matters of this kind in a private caucus session of the mediation is often preferable to doing so in a joint session.

**D. Confidentiality**

1. Mediators should maintain confidentiality with respect to disability-related information in arranging access and when conducting the mediation. While the person with the disability may have disclosed his/her disability, there still may be information that the person does not wish to reveal, such as the diagnosis or the severity of his/her limitations or health problems. Where a mediator believes that disclosure of such information would

enhance the mediation process or would otherwise be beneficial to the parties, the mediator should invite disclosure by the person with a disability during private caucus, but may not disclose the information without the person's permission.

2. If a mediator withdraws from a case because the mediator believes that one or more of the parties does not understand the implications of the agreement or the terms of a potential agreement, or for any other reason, s/he should do so in a manner that protects the confidentiality of the parties' communications in the mediation to the fullest extent legally possible.

**Note:** These Guidelines are not intended to be used in litigation involving the practice of mediation—either as evidence of a standard of due care for ADA mediators or as a measure of "reasonable accommodation" for purposes of establishing liability on the part of mediators. Instead, these Guidelines represent a set of aspirational principles and practices that the Work Group recommends to ADA mediators and mediation providers. The Work Group is not a governmental organization. Therefore, its views on the matters addressed in these Guidelines do not have the force of law in any jurisdiction unless they are adopted by rule or statute by a governmental body.

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Appendix 1

**Resources**

The following is a list of some of the codes and protocols that were reviewed by the drafters of the ADA Mediation Guidelines, along with the web sites where they can be located, and phone number for obtaining copies. These codes and protocols include basic mediation standards that the ADA Mediation Guidelines do not address. There are numerous other codes. Providers and mediators should be aware of developments, including codes of the ethics and mediation practice standards, in their own jurisdictions.

"A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship," 1995

"Ethical Guidelines of Professional Responsibility," 1986, Society of Professionals in Dispute Resolution (SPIDR)

"Model Standards of Conduct for Mediators," 2005 American Arbitration Association/American Bar Association/Society of Professionals in Dispute Resolution

"Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights," 1998, Society of Professionals in Dispute Resolution (SPIDR)

"Quality Assurances Statement," 1996, National Association for Community Mediation (NAFCM)

**Federal Enforcement Agencies**

Equal Employment Opportunity Commission (EEOC)
www.eeoc.gov, 800-669-EEOC (Voice) 800-800-3302 (TTY)
(for deaf and speech impaired telephone users)
*Documents on ADA employment issues, including policy guidance* 800-669-4000 (V) 800-669-6820 (TTY)
*Guidance on ADA employment issues.*

Access Board, www.access-board.gov, 800-USA-ABLE (V/TTY)
*Technical assistance and documents on the ADA Accessibility Guidelines and Architectural Barriers Act, and enforces Architectural Barriers Act.*

Department of Justice, Civil Rights Division, Disability Rights Section, https://www.justice.gov/crt/disability-rights-section, 800-514-0301 (V) 800-514-0383 (TTY)
*ADA information, documents, and technical assistance (Titles II/public service and III/public accommodations, Section 504 of the Rehabilitation Act) Issues quarterly reports.*

U.S. Department of Transportation, www.fta.dot.gov, 888-446-4511 (Voice only).
*Enforces ADA provisions governing mass transportation systems and services.*

Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity, 800-343-3442 V 800-483-2209 TTY
*Enforces disability rights in housing.*

Federal Communications Commission, www.fcc.gov.
Documents 202-857-3800 V 202-293-8810 TTY
*Questions* 202-418-1898 V 202-418-2224 TTY

Note: These websites have links to other disability-related web sites.

**Other Disability Resources**

Job Accommodations Network (JAN) 800-ADA-WORK (Voice/TTY), https://askjan.org/.
A service of the President's Committee on Employment of People with Disabilities
*Information and guidance on reasonable accommodations in the workplace.*

ADA Disability and Business Technical Assistance Center (DBTAC), www.adata.org 800-949-4232 (V/TTY).
*Technical assistance on rights & responsibilities under the ADA.*

The American Bar Association (ABA) Commission on Disability Rights, 202-662-1570, https://www.americanbar.org/groups/diversity/disabilityrights/.
*Directory of attorneys specializing in disability law.*

The ABA Commission on Disability Rights, and commercial enterprises such as BNA, LRP, Commerce Clearing House, Thompson, and Prentice Hall, publish disability law reporters, which are a good source for keeping up-to-date with case law.

**Disability Awareness Materials**

"Targeting Disability Needs: A Guide to the Americans with Disabilities Act for Dispute Resolution Programs" published by the American Bar Association, the American Association of Retired Persons, and the National Institute for Dispute Resolution. Order through The American Bar Association (ABA) Commission on Mental and Physical Disability Law

"Disability Etiquette: Tips on Interacting with People with Disabilities" published by United Spinal Association.

"Making Dispute Resolution Sessions Accessible to People with Disabilities" by Judy Cohen, SPIDR News, Spring 1997. (Society for Professionals in Dispute Resolution)

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Appendix 2

**Supplemental Examples**

**I. Program and Case Administration**

**B. Disability Access to Mediation**

1. ADA mediation providers should make all aspects of mediation—ranging from training to mediation sessions—accessible to persons with disabilities, including parties and other mediation participants, staff, volunteers, and mediators. . . . Persons conducting intake or case development should notify the mediator of a case of any disability accommodation required to enable a party's participation in the mediation. (See example below)

*Inaccessible case scenario:* A person who has self-identified as having a traumatic brain injury (TBI) has trouble sequencing and has poor short-term memory. She is unable to keep track of the proceedings, repeats herself, can't organize her responses, and asks questions that have already been answered. The mediator believes that she's being disruptive, not paying attention, and not participating in good faith. The process breaks down.

*Same scenario, with mediator who uses effective process adaptations:* Having been informed that the party has TBI, the mediator—before the session—inquires as to the person's needs and limitations in order to make the session accessible. Based on the person's input, the mediator periodically reviews what has been said in the session, and works with a flip chart so that the person with TBI can follow and participate in the proceedings. (Alternately, if the mediator was not informed before the session, she inquires about the person's needs

during a private caucus, even if she is knowledgeable about TBI, as it affects people differently.

**D. Party Capacity**

1. " . . . An adjudication of legal incapacity is not necessarily determinative of capacity to mediate."

For example, a resident of a nursing home who is legally incapacitated may have disputes with a roommate about space or TV, or with staff about eating or dressing schedules. This person may have the capacity to participate in mediation regarding these issues. Also, persons may be under limited guardianships. For instance, a person could have a guardian (sometimes called a conservator) for financial decisions, but not for health care or personal decisions, and so this person could participate in a mediation about health care treatment.

**III. Mediator Training**

**A. ADA Mediator Training Contents**

2. Disability awareness

(a) Disability etiquette* and terminology

*Scenario without disability etiquette:* A person who is blind is a party to a mediation. The mediator starts the session by saying the names of the parties, their advocates, and the other mediation participants, and gesturing towards each as s/he says their name. The person who is blind, feeling disempowered because this introduction was not accessible to him/her, feels uncomfortable. S/he spends the session wondering who is speaking, and has trouble following the course of the session.

*Same scenario, with the mediator using disability etiquette:* The mediator starts off the session by going around the table and having each person, including observers, say their name and their role in the mediation. The person who is blind is able to identify who is speaking by their voice and location. S/he has equal access to participate fully in the session.

*Scenario without disability etiquette:* There is a sign language interpreter at a mediation because one of the parties is deaf. The mediator starts the session without mentioning the presence of the interpreter (s/he wants to be sensitive and not call attention to the deaf person). The interpreter voices for the deaf person, and the hearing persons all look at the interpreter as s/he speaks. When they have comments or questions for the deaf person, they also address these to the interpreter. As a result, the deaf person feels ignored and does not experience himself/herself as an equal participant in the session. S/he finally gives up and says less and less, since no one seems to be listening or talking to him/her.

*Same scenario, with mediator using disability etiquette:* The mediator opens the session by explaining that the interpreter is there to facilitate communication between deaf and hearing participants, and that the mediation participants should address each other and not the interpreter. Result: the deaf person is able to communicate on an equal basis with the other mediation participants.

* Note: Disability etiquette is the "cultural aspect of interacting with persons who have disabilities." Observing disability etiquette not only makes the person with a disability more comfortable, but also contributes to the accessibility of the process.

**A. ADA Mediator Training Contents**

2. Disability awareness

(a) Appropriate terminology

*Scenario with inappropriate terminology:* A person who uses a wheelchair is a party to a mediation. The mediator refers to the party as being "wheelchair bound." The wheelchair user is offended by the term, and feels that the mediator must be on the other party's side or at least cannot possibly understand his/her perspective.

*Same scenario, with mediator using appropriate terminology:* The mediator refers to the party as "using a wheelchair." This term may strike the wheelchair

user as neutral, or may lead him/her to believe that the mediator will understand the issues at hand.

**A. ADA Mediator Training Contents**

2. Disability awareness

(b) Addressing one's own biases about disability

*Scenario, where mediator is not aware of his/her own biases:* An employee with major depression has been disciplined for excessive tardiness. The mediator assumes that the employee is ashamed of having depression, and carefully avoids discussing it with him/her—either in arranging the session or during it. The session is scheduled for 8:00 a.m. When the mediator confirms the date and time with the employee, the employee says, "Oh well, okay." The mediator takes that as a "yes." The employee arrives 30 minutes late for the mediation and looks disheveled. The supervisor is exasperated, saying, "See? This is what I have to put up with every day." The employee seems 'out of it' and participates less and less as the session goes on. The mediator is beginning to wonder how s/he ever held a job in the first place, and unconsciously discounts the few remarks that the employee makes. In private caucus, the mediator starts by raising questions about the possible consequences of the employee's tardiness. The employee looks as though s/he's about to cry, then silently gets up and leaves the room, then the premises.

*Same scenario, but with a mediator who is informed and unbiased about psychiatric disabilities:* The mediator is aware that passivity can be a barrier to full participation in mediation for people who are depressed, and knows that psychiatric medications can have side effects that impact on the person's functioning. After confirming the time of the mediation with the employee, the mediator notices the employee's hesitancy, and adds, "You know, I have been informed that you have major depression. I wanted to be sure to talk to you about that before the session. Is there anything you want me to know about how this condition, or how any treatment you're receiving for it might be affecting you?" The employee is relieved to have this opening and speaks for several minutes about how sedated s/he feels in the morning due to his/her antidepressant medications, and how much energy it has taken to get to work at

all, albeit late. After listening, the mediator asks again if the employee is comfortable with the proposed schedule, or would like to propose another time. The mediation is scheduled for 11:00 a.m., when the employee is most alert and able to concentrate and participate.

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Appendix 3

The ADA Mediation Guidelines were developed in 2000 by a Work Group consisting of:

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Note:

Work Group members who represent organizations listed above functioned as liaisons. Their participation does not indicate organizational endorsement of the Guidelines. The views set out in this publication have not been considered by the American Bar Association House of Delegates and do not constitute the policy of the American Bar Association.

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- Jossey-Bass Publications
- Bureau of National Affairs (BNA)

For more information about the ADA Mediation Guidelines, contact Judith Cohen, Work Group Coordinator, at judy.cohen@verizon.net.

Reproduction and distribution of the ADA Mediation Guidelines is encouraged.