

Unique Issues In Mediating ADA Disputes

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Although cases arising under the Americans with Disabilities Act (ADA) sometimes present straightforward generic mediation issues, they frequently raise unique and multi-layered issues for the mediator. It is important for ADA mediators to be trained in disability law, and in disability awareness including bias issues, disability access, and how to set up and run an accessible mediation session. Often, however, no particular knowledge about disability is required of the mediator. In many cases, the person with the disability or his representative provides any necessary information during the session.

Case development: disability-related information and access options. Mediators should ascertain during the case development phase the extent to which they need background information on the disability. However, it is important that mediators treat the person as an individual and not medicalize their approach to her by over-focusing on the disability. Depending on the context of the dispute, the issue is frequently not the disability per se, but the impact that it has on the person's functioning. For example, if a person uses a wheelchair, her condition may arise from any of a number of disabilities. While she may have total wheelchair access on the job, if she has post-polio syndrome, she may tire easily and may require frequent breaks. The issue is not the wheelchair, or even the post-polio, but the fact that the disability causes her to be exhausted.

Consider the case I became involved with at the behest of the director of a Community Center. There was a young woman who had been a member of the Center for many years.* She had a disability that resulted in behavior that others found inappropriate. Lately these behaviors had been intensifying. Staff at the Center did not know how to deal with the person; the Director was prepared to tell her to stop attending. I was asked to mediate.

At the outset, I thought it would be beneficial for the mediation participants from the Center to learn more about the woman's disability. I did not have the expertise to present the information, nor did I want to play the role of educator. I asked the parties if they thought it would be beneficial for me to bring in a neutral expert, and they agreed. I contacted a local disability organization that arranged for a community educator to participate in the mediation free of charge. I worked closely with him, educating him about the mediation process and discussing how he would work with me in mediation. During the session, he showed a video that was very effective in helping the participants understand the young woman's disability and that her behaviors were not under her control. He helped serve as a reality-tester throughout the process, and he assisted the parties in brainstorming solutions. As part of the mediation agreement, he provided training for staff at the Center.

Planning an accessible session. The mediator is obligated as a "service provider" under Title III of the ADA to make his mediation services accessible. Note that the mediator may not charge the person with the disability for access arrangements. The other party, such as the employer, may agree to pay for the disability accommodation, but ensuring accessibility is ultimately the mediator's responsibility. Closely related to this issue are disability etiquette, and accommodation questions that the mediator needs to consider to make the process accessible.

The appropriate time to find out about a party's access needs is during the normal course of case development, by talking directly to the person with the disability. Absent this step, the ability of the person to participate effectively can be impaired, and, if a person with a psychiatric or cognitive disability does not have access, their resulting behavior may present the appearance that they are just not cooperative.

This discussion should be conducted in private, because some of the disability-related information may be confidential. It may, however, be necessary to share information about certain disability accommodations with the other party. The mediator may even feel that it is in the disabled person's interest to do so. The decision to disclose or not, however, remains with the party.

Background knowledge, flexibility are key. My experience with a party with mental illness is illustrative: I began to identify her access needs for a mediation session by describing the process and what would happen in the session. Based on that, I asked what would make the session accessible to her. She replied that an environment with low stimulation would be the most comfortable: quiet and without a lot of distracting decoration on the walls.

Concerted effort and best intentions notwithstanding, the ADA mediator will not always have complete information about the person's disability before the session. Process issues can arise unexpectedly, with persons having trouble participating effectively in the session due to communication or other obstacles. It is helpful for mediators who plan to work in the ADA field to develop background knowledge about the range of disability access options for mediation. Some of the more complex access issues involve process adaptations for persons with hidden disabilities such as cognitive and psychiatric disabilities that impact on communication and processing of ideas.

For example, I once mediated a case involving a man who-unknown to me at the outset-has paranoid schizophrenia. We began the session well enough, as he was articulate in explaining his reasons for bringing the case. But when the other party began to speak, the man kept interrupting. Finally, it became clear to me that he simply could not bear to listen to the other person talk. I asked if he would feel more comfortable leaving the room while the person spoke. He replied in the affirmative, and I conducted the mediation session completely by private caucus. Initially I found during our caucuses that sometimes when I spoke, he would just stare down and would not respond to me. Based on that and other factors, I realized that he had mental illness. Knowing that persons with schizophrenia can have trouble following long, complex thoughts, I began to use shorter, simpler sentences, and presented ideas in a concrete way. This made it easier for us to communicate.

Word choice. ADA mediators should also become familiar with disability etiquette and preferred terminology. When in doubt, ask the person with a disability directly what he prefers. A potentially serious example of this was raised during a training session I arranged on mediating with persons who have mental illness. As I moderated the presentation, a trainee mentioned taking "time out" during mediation sessions. One of the speakers responded that the concept was good, but that the term "time out" might conjure traumatic memories for persons who have been hospitalized, as the "time out" room is where psychiatric patients may be disciplined or isolated.

Room set-up and session logistics. Either through training or by conferring directly with the individual ahead of time, mediators need to learn the appropriate ways to set up the room for persons with the range of common disabilities. When advance planning is not possible, the mediator needs to be open and respectful of the person's requests. In setting up the room for a co-mediation involving a man who is Deaf, he and the sign language interpreter put her chair across from him and next to the mediators so that he could see both her and us. Then they left the room to caucus with his attorney. My co-mediator promptly moved the interpreter's chair next to the Deaf person's chair, saying, "The interpreter should sit with the Deaf person."

Finally, ADA mediators need to ensure that the parties are in agreement on the details of access arrangements. Consider a mediation that I once observed involving another Deaf complainant: the mediation agency had arranged for a volunteer sign language interpreter and the complainant had arranged for her own interpreter. Neither of parties knew of these arrangements until the time of the mediation arrived. The volunteer mediator turned out to be unqualified to interpret at the session. And the respondent did not trust the interpreter provided by the Deaf person.

Attitude of the parties and the mediator. For people who do not have much contact with persons with disabilities, it may be natural to make assumptions about the person's limitations. Persons with stigmatized disabilities face particular attitudinal barriers, and it is critical that mediators not reflect the same stereotypes that often lead to these cases being mediated in the first place. As in every mediation, the ADA mediator's attitude and communication style has an impact on the parties. The mediator is frequently a model for the parties of positive ways to interact, to communicate, and to treat each other.

In the Community Center case, the director was concerned about children witnessing the person's behavior. The expert's opinion was that exposing children to behaviors of people who are different is a positive thing. Mediators are products of our society like everyone else, so they may need to monitor their reactions in order to avoid coming in to the mediation with a culturally biased approach.

In a mediation case involving a man with AIDS -which he had contracted through intravenous drug use-the man needed to discuss events that would happen after his death. The other party had difficulty discussing the issue. The parties were counting on me to work with them to make this discussion possible.

If I had felt uncomfortable discussing AIDS and the man's likely imminent death, or if my responses to him reflected a negative attitude about AIDS or his prior drug use, I would not have

been able to mediate effectively. The parties needed a mediator who was unbiased and who could be straightforward in order to help them confront the issues directly.

Representation. Because of disability-related cognitive limitations, an unrepresented employee was having a hard time making herself understood during a mediation. She had been having problems with basic job responsibilities such as reporting on time and following instructions. During the mediation, the employer tried to explain why these functions were important parts of the job, but the employee just didn't get it. Although I made some efforts at bridging the gap, my ability to educate and to overcome the communication obstacles was limited by my role as mediator.

One of the thorniest issues facing ADA mediators is the large number of persons with disabilities who come to mediation without a representative. The case described above may have been a loser for the employee in court, but with representation by her job coach in mediation, the parties could have come to understand each other's interests and issues. Without this representation, the mediation session basically replicated the lack of effective communication experienced at the work place.

It is frequently in the interests of both parties that the person with a disability be represented. A legal representative can give the client a realistic picture of her alternatives to settlement, and can help the client accept a fair offer and move forward with her life.

Simultaneous with a layoff due to a reduction in force, an employee was diagnosed with cancer. Believing that she had been discharged due to her disability, she filed an ADA charge against the employer. The case was referred to mediation, where she was unrepresented. During the session, she was unable to provide any evidence of discriminatory pretext for her layoff. Nevertheless, because the layoff had been mishandled, the employer offered a settlement of about \$10,000. My co-mediator and I urged the complainant to have the agreement reviewed by an attorney, but she did not do so. She sat on the offer for several months, trying to decide whether or not it was fair.

Public policy issues. Where rights are at stake in mediation, there is a third party who is not at the table: the protected class or, put another way, public policy interests. Mediators in the human rights area cannot ignore the public policy issues that are at stake; neither can they function as advocates for the parties. The mediation field needs to address seriously the ethical role of the mediator where an unrepresented party may be waiving legal rights, where the agreement may not meet a legal standard, or where a covered entity may sign off on an agreement that leaves it vulnerable to future charges.

Role of the law. I was talking with an employer's attorney during case development for a mediation. The employer had refused to reassign an employee who had become disabled. I was familiar with case law in the particular area in question, and knew that unless there was a big surprise, it was a loser for the employer. I asked the attorney if he was familiar with the relevant case law. "Yes," he sighed and cited the case I had in mind, "I know: we lose. I read her the decision, but she insists on her position."

The Americans with Disabilities Act is a new law and it is still developing. It is particularly complex because many of the circuit court decisions conflict with EEOC-issued regulations, and the circuits are in disagreement with each other on some important issues. As ADA cases reach the Supreme Court, further changes in the development of the law are occurring. For mediators to facilitate and reality-test effectively in mediation of statutory claims, they need to know the prevailing case law and to have some sense of the probable outcome of the case if mediation is unsuccessful. In this case, I didn't even have to get to the session to start working on it.

In another case, an employee was injured on the job and unable to perform all of the essential job functions. It was clear to me as she spoke during the mediation that she was not a "qualified individual with a disability," and she did not have the seniority for a reassignment. During the mediation, I kept the parties together. The employee spoke about her training and qualifications and about her dedication to the job. Through this process, the employer-who did not know the employee personally beforehand-came to realize that she was a skilled and valuable employee. The parties were able to work out a creative solution to save the employee's job.

As long as a mediation agreement does not violate the law, the parties can design creative settlement features that go beyond it. Mediators should know the law, but should not allow it to steer the process, or to limit the mediator's perspective on settlement options for a case. This case would not have been resolved with the employee keeping her job-and the employer retaining a valuable employee-if I had separated the parties prematurely to start reality-testing settlement options based on my evaluation of the likely outcome in court or arbitration.

Closing note. While mediating ADA cases does require background knowledge and some degree of expertise, mediators must keep in mind above all that the person with a disability is an individual, human being who is just like anyone else except for the disability. While background may be important as a backdrop for the case, the ADA mediator should approach the case like any other, with an openness to helping the parties understand their own interests and each other's and reach a resolution that works for both of them.