TASK FORCE ON DIVERSITY IN ALTERNATIVE DISPUTE RESOLUTION

Crafting an Effective Alternative Dispute Resolution System that Addresses Issues of Diversity

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RESOURCE MATERIALS

December 9, 2009

Defending Liberty Pursuing Justice

Standing Committee on Diversity

Goals

The 2007-2008 Goals for the Diversity Committee are as follows:

1. Improve the employment opportunities for ADR professionals of color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities, by raising awareness of diversity in the ADR field and exploring proactive solutions to eliminating employment barriers these ADR professionals encounter.

2. Enhanced awareness of diversity in the ADR field and barriers will be developed through presentations and networking with organizations inside and outside of the ABA with compatible diversity objectives and with the other ABA Sections.

3. Sponsor networking and social events at the Section and Annual Meetings and co-sponsor programs with diverse organizations involving ADR professionals of color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities.

4. Initiate discussions about diversity/cultural competency among DR Committees and ABA Sections.

5. Increase participation of ADR professionals of color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities to encourage those identified to join and to take an active role in the Section, including participation in the

Leadership

Chair: Angelia Janette Tolbert

Committee Roster

LISTSERV Lists (help)

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Dispute Resolution Diversity Committee
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Programs, Meetings and Events

Section Events

40-Hour Family Mediation Training
November 9, 2009 - November 13, 2009
Location: TBD
Format: Live/In-Person

Fifth Annual Arbitration Training Institute A Comprehensive Training in Commercial Arbitration
February 10, 2010 - February 13, 2010
Omni Shoreham Hotel
Washington, DC
Format: Live/In-Person

2010 Representation in Mediation Competition
February 26, 2010 - March 13, 2010
Location: TBD
Format: Live/In-Person

Article Links

Section's programs, so that they can have the opportunity to advance to leadership positions.

6. Explore leadership mentoring opportunities with DR Section Leadership for ADR professionals of color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities with mentoring to take on leadership roles at both the committee and section levels.

7. Stress the importance of diversity and recognize contributions by ADR professionals of color, women, persons of any sexual orientation and religion, and persons with impairments and/or disabilities by having diverse panels in all Section programming and diverse participation in all Section publications, including regular reports on achievements in the diversity area in the Section?s publications.

8. Encourage DR and ABA publication, newsletter and webpage articles and faculty presentations by Diversity Committee members, diverse ADR professionals and those interested in diversity.

WE STRIVE FOR DIVERSITY IN THE ADR PROFESSION

The Diversity Committee is made up of Alternative Dispute Resolution neutrals from around the world, which includes persons of color, women, Gay, Lesbian, Bisexual and Transgender persons and persons with impairments or disabilities. Our goal is to strive for diversity within the Dispute Resolution Profession and to have it mirror the diversity of our society. The ability of our Profession to facilitate justice and mediate effectively calls for diversity within our Profession that fairly represents the population that we serve. We have a long way to go before we can achieve our objective of a diverse Profession. However, diversity will never be achieved if we do not lead the way.

Articles

Michael S. Greco

Immediate Past President, American Bar Association

Corporations will carry the Bottom Line Torch and Ignite The Diversity Fire in the ADR Profession

Why Do We Care About Diversity?

How do You Ensure the Public?s Confidence in ADR: Create an Alt. Diverse Resolution Profession

Diversity Links

ACCESS ADR, A Project Promoting Diversity in ADR

Commission on Racial and Ethinic Diversity in the Profession

Publications

Employing Lawyers with Disabilities in Corporations and Law Firms

January 16, 2007

The first-ever National Conference on the Employment of Lawyers with Disabilities, which I hosted in Washington, DC, as President of the American Bar Association (ABA) in May 2006, challenged legal employers to hire and retain lawyers with disabilities. The Conference was sponsored by the ABA Commission on Mental and Physical Disability Law, the ABA Office of the President and the federal Equal Employment Opportunity Commission.

This historic event was part of my commitment to make the legal profession more open to lawyers with disabilities in the same way that the profession has reached out to women and persons of color and from racially and ethnically diverse backgrounds. As my esteemed law partner, former U.S. Attorney General Richard Thornburgh said in delivering the Conference?s keynote address:

We can talk a good game about diversity and about how we're open to hiring lawyers with disabilities. But if we don't really do it, don't do the recruiting we need to do, or don't change our profession's attitudes and practices, then the aims of this Conference will not have been achieved.

Nor, may I add, will the legal profession reflect the true diversity of our nation.

President John F. Kennedy once told us that "a journey of a thousand miles starts with a single step." The first two steps in the journey to make law offices across America diverse with regard to disability have been taken. The May 2006 Conference was an unqualified success, and the *Conference Report*, which is available on the ABA Commission's website (www.abanet.org/disability), has been issued. The next step is up to corporate counsels, and leaders of law offices and legal employers throughout our country.

What Needs To Be Done?

In the legal profession, disability diversity encompasses lawyers already employed when they become impaired, and lawyers with a disability during all or most of their lives. The major concern of the first group is accommodations that will allow them to continue as they

have in the past. Such impairments typically occur later in life, and often these lawyers choose not to consider themselves as having a disability. Also, because recently disabled lawyers already are part of a firm, there is less resistance to providing them with reasonable accommodations.

The primary concern for the second group is obtaining employment and the availability and effectiveness of reasonable accommodations once employed. What law firms should do for members of these two groups differs depending on whether the issues involve hiring or retention.

Some of the most important steps that law offices can take to improve hiring practices involve common sense, include:

- Appointing a diversity representative well-versed in disability issues to the firm's management committee.
- Understanding the requirements of the Americans with Disabilities Act (ADA) and state disability discrimination laws.
- Referencing persons with disabilities in the equal opportunity language in job announcements.
- Writing job descriptions that only include the specific tasks essential to the position to be filled, and evaluate candidates based on ability to perform them.
- Asking interview questions first that highlight candidates' strengths, and then inquiring about any limitations.

The Workplace

Once a lawyer with a disability is hired, both the individual and the law office benefit by making the workplace "disability friendly." For example:

- Establishing flexible work arrangements for all employees.
- Prorating billable hours or billing hours directly to the firm.
- Appointing a committee chaired by a well-respected senior partner that includes representatives from all employment levels to address diversity issues, including disability.
- Specifying in an official document that diversity, including persons with disabilities, is an important value, and monitoring diversity progress.

- Creating an active mentor program, individualized to meet different needs, including those of lawyers with disabilities.
- Creating a centralized fund to pay for reasonable accommodations.

Concluding Thoughts

I have suggested some concrete actions that corporations and law offices can take to make the hiring and retention of lawyers with disabilities more successful. Other practical suggestions and perspectives are contained in the ABA Commission's *Conference Report*, which I hope you will read. The adoption of such suggestions and perspectives will increase the potential that lawyers with disabilities will be hired and retained.

Yet, much hard work remains before we will be able to see the day when the face of our profession is truly diverse, and all lawyers with and without disabilities are considered equal before the Bar. That day will come only when you and I, and our corporate and law firm colleagues across the land, make the commitment to hire and retain lawyers with disabilities. It is past time for us to make that commitment.

Corporations Will Carry the Bottom Line Torch and Ignite the Diversity Fire in the ADR Profession

By Elizabeth A. Moreno, Esq.

Diversity happens when it has a positive impact on the bottom line. This was the overall consensus of representative corporations, law firms and Alternative Dispute Resolution (ADR) providers at the April 5, 2006 ABA Dispute Resolution Diversity Forum held in Atlanta. The purpose of the Diversity Forum was to address ways in which the ADR profession can become more inclusive to minority and woman neutrals.

The corporate panel, who was represented by corporate counsel from Cingular Wireless and T-Mobile and employee internal dispute resolution directors from Coca Cola Enterprises and Shell, agreed that awareness needs to be raised that the profession needs to become more diverse. The lack of diversity is problematic in the employment arena. Corporations are finding that mediation is losing its effectiveness and they are losing their credibility with employees when they can only offer a homogenous group of neutrals to resolve workplace disputes. Corporations have an immediate need for

Diverse ADR neutrals and the national ADR providers they use are not delivering a diverse panel.

Shell, which has an employee internal dispute resolution program 'RESOLVE', is not comfortable with just raising an awareness. They are taking affirmative steps to make sure that they can choose neutrals from a diverse ADR panel. Several years ago, Shell was one of the first to carry the torch in demanding that their law firms commit to diversity within their firms and if not, Shell would end its relationships with the firms. Once again Shell has come to the forefront and announced that they will extend their supplier diversity program to certified minority and women ADR neutrals. Shell is committed to the economic development of minority and women owned and operated firms and actively engage in efforts to provide for supplier inclusion by partnering with minority and women's business enterprises. Certified minority and women owned ADR firms would become part of Shell?s second tier supplier diversity program, in that certified women and minority enterprises would enter into subcontracts with Shell's primary national suppliers of ADR services. Shell is in the process of developing details of the demands that would be made on the primary supplier of ADR services to utilize minority and women owned ADR enterprises. Shell astutely recognizes that by embracing the concept of inclusion, Shell will rise to a higher level, reflecting its belief that it will benefit from diversity through better relationships with customers, suppliers, partners, employees, government and other stakeholders, with positive impact on the bottom line.

Representative Law firms agreed that law firm Diversity initiatives did not gain any momentum until corporations made demands that law firms commit to diversity or they would lose the corporation as a client. Law firms were represented by Buckley King, Littler Mendelson, Paul Hastings, and Powell Goldstein, who agreed that diversity in the ADR profession needs to take place, but that it is the economic motivation that will move Diversity forward in the ADR profession. If corporations make demands that law firms use ADR providers that are diverse in mediating or arbitrating their cases, or risk losing business, they will use diverse ADR panels. The representative Atlanta law firms are beginning to look at the utilization of diverse ADR providers more seriously after law firms heard similar representations at the Atlanta Legal Diversity Conference in July 2005. At that conference, Wal-Mart announced that their law firms must embrace diversity at all levels, including its vendors

and must demonstrate that there are substantive numbers of women and minority lawyers in the upper level of their firms. If not, their relationship with the firms will be terminated. Representatives from Visa International, Del Monte, Pitney Bowes and Cox Communications made similar representations. These diversity demands came on the heels of Sara Lee's 'call to action' letter in 2004, signed by more than 100 general counsel, indicating that they would consider a firm's diversity when hiring outside counsel.

What did the representative national ADR providers, National Arbitration Forum (NAF), Resolute Systems, Inc. (RSI) and National Association Securities Dealers (NASD), have to say after hearing the corporate and law firm panels? The representative ADR providers were aware of the issues and were taking steps to diversify their panel of neutrals. However, they confirmed that demands will cause them to step up their efforts in order to avoid a blow to their bottom line. NASD already has a statement on their web site that they are committed to diversity and that they carefully select from a broad cross -section of people, diverse in culture, profession, and background. NAF and RSI will place a similar statement on their web sites. The representative providers have been actively recruiting diverse neutrals through networking at Diversity functions and with minority organizations, and by sponsoring or presenting training sessions for ADR minority professionals.

Unless it affects the bottom line, entities will not be motivated to move forward and embrace diversity. Now that corporations are beginning to make noises and demands about utilization of diverse ADR panels, law firms and ADR providers are beginning to realize that corporate demands may affect their relationship with that corporation in the future and ultimately, their bottom line. Shell Oil has taken the step to carry the bottom line torch which will ignite the Diversity fire in the ADR profession.

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ADA Guidelines Raise the Ethics Bar

By Judy Cohen

The rapid expansion of civil rights mediation, a relatively new field, is partly driven by ADA complaints, thousands of which have been mediated over the last 10 years. Innovative practices in civil rights mediation pose powerful challenges to accepted notions about mediator ethics. The existing guidance, the Model Standards of Conduct for Mediators, was introduced in 1994, shortly after the Americans With Disabilities Act or ADA[1] was enacted. Consequently, the framers did not have the opportunity to consider the emerging complexities of the ADA and other civil rights mediation or of generic mediation involving participants with disabilities. Interaction across race and gender lines — however uneasy that interaction might be — is not new to most mediators, but integrating people with disabilities into the process has proven problematic for many.

Charting new terrain

The Model Standards, according to their Introductory Note, provide "a general framework," "a beginning, not an end," "a step in the development of the field." Taking a next step, 12 mediation practitioners gathered in 1998 to form the ADA Mediation Guidelines Work Group. Their vision was to identify aspects of generic mediator guidance that did not adequately address, or that militated against, people with disabilities participating equally in mediation, and to articulate alternatives.

The drafters solicited public comments and discussed and incorporated feedback from a wide range of perspectives, building on the foundation of the Model Standards, as well as on the work of specialties — including elder law, bioethics and family mediation. This process culminated in the ADA Mediation Guidelines, issued in February of 2000.[2]

There were some surprises along the way. While the orthodox view was that a skilled mediator can handle any type of case, many practitioners were responsive and willingly submitted ideas and queries. However, a number of disability rights activists argued that they should not need to be skilled mediators to take on ADA cases. And a minority among mediators expressed that it was improper to develop supplemental guidance.

If a party discloses to the mediator that he or she has cancer or AIDS, the mediator should already have some sense of the particular obstacles the person may face.

Access to the process

While the ADA is a legal statute, the Guidelines' context is ethical and practical — highlighting a fundamental conflict on disability access between legal requirements and mediator ethics. Developing case law[3] has narrowed the definition of disability. Many individuals who would traditionally be considered disabled, or who are treated as if they are disabled — for example, those with severe facial disfigurements, but no functional limitations — have gradually lost legal protection from discrimination.

However, consistent with the Model Standards' ethical guidance that mediators are obligated "to make mediation accessible to those who would like to use it,"[4] the Guidelines suggest that, in assessing whether to provide disability accommodations, "the broadest definition of disability should be applied, including chronic conditions, episodic symptoms and temporary disabilities."[5]

This broad definition is essential to preserving the perception of the mediator's neutrality. The question of whether an individual even has a disability is often a component of a dispute; indeed, it is often the first objection raised by a respondent in an ADA mediation. A mediator who makes a disability determination, or bases a decision about whether to accommodate on such an assessment, is not playing a neutral role — and in fact is generally not competent to determine whether a party has a disability as defined in the ADA. In any case, such an action would reflect bias.

In practice, a fundamental ADA mediator tool is the ability to work with an individual who has a disability to develop and provide accommodations to the process. To handle accommodations competently, a mediator should understand the range of disabilities and feel comfortable addressing disability issues. For example, if a party discloses to the mediator that he or she has cancer or AIDS, the mediator should already have some sense of the particular obstacles the person may face. Rather than shrink from discussing the impact of the disability, the skilled ADA mediator explores the person's needs without being invasive or directive.

Knowledge about the disability — that the person might fatigue easily, or that the disability is stigmatized — may facilitate the mediator's explo-

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ration of potential modifications. However, because each person experiences a disability differently, the most effective and respectful accommodation process relies on the individual as the critical information source.

Mediator bias

Equal access to the process requires an unbiased mediator. The Model Standards instruct that: "A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation."[6]

But disability prejudice is significant and pervasive in our culture. Mediators who do not have insight into the disability experience are prone to share society's assumption that people with disabilities are dependent, need help and cannot make their own decisions. Equal access for people with disabilities can be undermined by the negative attitudes of other mediation participants, including the mediator.

Mediators who cannot remain impartial are obligated to withdraw, according to the Model Standards.[7] But whether a particular mediator withdraws will depend on his or her personal practice and moral code; some may be loath to address their biases or to recuse themselves. Blatant biases reflect a dehumanizing view of people with disabilities, but most parties can easily perceive subtle, or even subconscious, bias.

From the beginning, bias has been one of the most challenging aspects of ADA mediation. As the Work Group members were painfully aware, people with disabilities frequently report that they feel that mediators disregard their views and do not regard them as equal participants. Striving to address this, the Guidelines include several examples. In one of them, the mediator bias scenario concerns a party with major depression who has been disciplined for tardiness on the job. The mediator has not been responsive to the party's hesitation about an 8 a.m. start time. The party consequently appears late. The mediator, insensitive to disability-related or other reasons why the person might be tardy, begins to "wonder how s/he ever held and job in the first place, and unconsciously discounts the few remarks that the employee makes during the session."[8]

The Work Group was not able to address this problem beyond suggestions on awareness training and the recommendation that basic ADA mediator training be followed by ongoing support and skills development, such as apprenticeship.

Competency

The Model Standards define mediator competency according to whether "the parties are satisfied with the mediator qualifications."[9] When the Model Standards were promulgated, the concept of acceptability was based largely on labor arbitration practice. This approach is effective in the labor-management context in which:

- arbitrators have long-standing credibility and often ongoing relationships with the parties
- the work product — that is, the award — is available for review
- the parties and the neutral are knowledgeable about the substantive and procedural issues, and
- the table is comparatively balanced.

But this does not translate well to ADA mediation, where, as in family, bioethics or environmental mediation, the table is typically unbalanced, the mediator is unknown to at least one of the parties and has qualifications that are hard to verify, and resolution depends on specific skills and knowledge the parties do not have. The Guidelines created for the first time a quantifier for ADA mediator competency, summarized by the view that: "Mediators should have knowledge of disabilities, disability access and disability law."[10]

Training

The Guidelines recommend at least 14 hours of specialized training for already skilled mediators, including at least three hours each of substantive law and disability awareness.[11]

Awareness topics include disability etiquette — that is, appropriate ways to interact with people with disabilities — and addressing individual biases about disability. A requisite training component is "at least one opportunity for participants to interact with a person who has a disability."[12] Many new ADA mediators are transformed by hearing perspectives that arise from life experiences different from their own. For example, in recent trainings, a person with a mental health condition explained how she managed the voices that she heard as she worked; and a wheelchair user described his hurt when co-workers brushed off his exclusion from activities in inaccessible locations.

The Guidelines also suggest that each trainee should have the opportunity to roleplay and receive feedback as mediator at least once.[13] In ADA mediation, this is one of the most effective ways to identify mediators who are not comfortable with disabilities. Ultimately, this attention may assist in screening out those with strong anti-disability bias.

Confidentiality

Confidentiality is addressed in the Model Standards in terms of "reasonable expectations of the parties."[14] In ADA mediation, confidentiality is particularly significant because of the sensitive nature of disability-related information. New ADA mediators sometimes question the fairness of arranging access to the process directly and confidentially with the person with a disability. But mediators should realize that concerns about job security or about the reactions of co-workers may make a person reluctant to disclose a disability. Additionally, as the Guidelines explain, even after disclosing a 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."[15] The mediator may reality-test with the person about benefits and deficits of disclosure. Ultimately, though, whether to disclose is a per-

sonal decision, and the mediator needs to respect the person's assessment and decision.

Capacity to mediate

The core value of the ADA Mediation Guidelines is self-determination. This conflicts with the Model Standards' only clause to explicitly address disability concerns. The Model Standards reflect a pre-ADA ethic of protecting people with disabilities rather than the current view — oriented towards recognizing their independence and abilities. Thus, the Model Standards articulate that:

A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.[16]

This statement has received particular attention by ADA mediators. In 2001, notably, the ABA Commission on Disability Law began a project to revisit this language and its unintended disempowerment of people with disabilities. And the disability and ADR committees of the Association of the Bar of the City of New York[17] initiated a collaboration to address it. The group composed new language, merging the framers' legitimate intent to protect people with impaired capacity with a post-ADA approach that recognizes the mediator's role in cases in which any mediation party — not just a person with a disability — encounters obstacles to participating fully.

The Committee separated out the stigmatizing reference to illegal conduct, which is not related to self-determination or disability. The Committee also deleted the reference to drug and alcohol use, reasoning that medications for disability conditions may cause impairments (such as difficulty concentrating) or the perception of impairment (such as trembling) and that, similar to any other mediation capacity issue, impairments or apparent impairments caused by substances are best addressed on a case-by-case basis. The Committee's proposed language, submitted as a recommendation to the Joint Committee currently revising the Model Standards, [18] is that:

A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct.

When a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating actively in the mediation process, the mediator should explore with the party the circumstances and potential accommodations, modifications, or adjustments that would enable the party's comprehension and/or participation. If no accommodation, modification, or adjustment can reasonably be provided that enables the person's participation to a reasonable level, the mediator should postpone or terminate the session.

The proposed language acknowledges that there are many potential reasons why parties may not have the capacity to mediate, such as distraction by extreme anger or language barriers. Capacity to mediate is no longer characterized as a disability concern, but given a universal context.

A mediator who is disability-aware cannot balance an unbalanced table, but can help create the conditions for self-determination.

Coercion

According to the Model Standards, self-determination relies on "the ability of the parties to reach a voluntary, uncoerced agreement."[19] Building on this, the Guidelines stress that the parties must be "aware of their legal rights and responsibilities under the ADA prior to the mediation so that they can participate meaningfully and make informed decisions."[20]

An early debate in ADA mediation practice was whether a mediator should provide legal educational material to the parties. The Work Group concluded that, because the critical information for parties is how the law applies to their case, legal handouts are not adequate and that parties in ADA mediation should be represented. Accordingly, the Guidelines state that parties in an ADA mediation should "be advised of the risks of not being represented by counsel or of not having a potential agreement reviewed by counsel."[21]

People with disabilities in ADA mediation are frequently unrepresented, and find themselves negotiating across the table from attorneys, human resources directors and managers. In rights-based ADA mediation, a person with a disability who lacks understanding of the legal issues involved cannot make an informed decision. In these circumstances, there is a risk of coercion. The party's ability to exercise self-determination is further impaired when the mediator has both an inadequate background in ADA law and strong biases–biases that may comport with those of the non-disability side of the table.

A mediator who is disability-aware, in legal and substantive disability issues, cannot balance an unbalanced table, but can help create the conditions for self-determination. Such a mediator can reality-test and assist in generating options objectively and can work with the parties to help ensure informed decisions.

In public accommodation cases, mediation normally involves straightforward applications of law — for instance, putting in a ramp according to specifications laid out in the regulations. These cases are frequently brought by disability advocates who understand ADA rights and obligations, and who are less likely to be coerced or make uninformed decisions.

However, the vast majority of ADA cases are employment mediations. Such cases primarily involve unrep-

resented employees and developing case law, individualized remedies, technical workplace issues, entwined relationships — and also deep self-esteem, privacy and identity issues. Moreover, employees have a desperate reliance on the outcome, especially because it is often difficult for people with disabilities to find employment. To ensure that a party is not coerced, the mediator must be highly skilled, with a clear understanding of current case law, as well as knowledge of workplace practices.

Other mediation participants

The role of educator is antithetical to the neutral mediator function. However, an educator may, in certain circumstances, be introduced in the mediation process. The Model Standards allude to the mediator's responsibility "to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions."[22] And the Guidelines go a step further in recognizing the potential for neutral experts to play a critical role in reality-testing and helping the parties collaborate on creative and realistic options. The Guidelines describe the various roles of neutral experts in providing supplementary disability-related information "to educate the mediator and the parties" and "to assist in developing options." [23]

Challenges remain

The baseline practices and ethics outlined in the ADA Mediation Guidelines are part of a larger movement in the ADR field to develop and improve the process. The Guidelines are a small step toward developing a theory and practice of ADA mediation — a work in progress, with the hope that mediators will participate in ongoing collaboration regarding their application and continuing development.

Endnotes

[1] 42 U.S.C. §§ 12101-12213.

[2] The scope of mediation in the Guidelines extends to mediating claims arising under the ADA and other disability civil rights statutes, such as the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988 and state and local civil rights laws. The accessibility guidance, however, applies to any kind of mediation in which a person with a disability participates.

[3] *See, Sutton v. United Airlines*, 527 U.S. 471(1999); *Murphy v. United Parcel Serv.*, 527 U.S 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) and *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184 (2002). In all of these cases, the U. S. Supreme Court took a restrictive view of what it takes to demonstrate a disability under the ADA.

[4] Model Standards of Conduct for Mediators, IV, Comments.

[5] ADA Mediation Guidelines, IB1.

[6] Model Standards of Conduct for Mediators, II, Comments.

[7] *Id.*, VI, Comments.

[8] ADA Mediation Guidelines, IIIA2.

[9] Model Standards of Conduct for Mediators, IV.

[10] ADA Mediation Guidelines, IV.

[11] *Id.*, IIIB1.

[12] *Id.*, IIIB2.

[13] *Id.*, IIIB1(3).

[14] Model Standards of Conduct for Mediators, V.

[15] ADA Mediation Guidelines, D1.

[16] Model Standards of Conduct for Mediators, VI, Comments.

[17] The Committee on Alternative Dispute Resolution and the Committee on Legal Issues Affecting People with Disabilities.

[18] Send comments to: Professor Joseph B. Stulberg, Reporter for Joint Committee, Moritz College of Law, The Ohio State University, 55 West 12th Avenue, Columbus, OH 43210-1391.

[19] Model Standards of Conduct for Mediators, I.

[20] ADA Mediation Guidelines, IE1.

[21] *Id.*, IE2.

[22] Model Standards of Conduct for Mediators, I, Comments.

[23] ADA Mediation Guidelines, IIB2.

Question of Competencies in ADA Mediations

By Peter R. Maida

When the Americans With Disabilities Act (ADA)[1] was passed in 1990, it presented the question of whether disability has a unique impact on mediation. Many mediators, faced with a party with a disability, resorted to a way of thinking about the professional/client relationship that was retrograde: the person with the disability was objectified. The general standards and guidelines of mediation practice were no longer sufficient. Somehow the analysis of the problem became focused on the person with the disability — objectifying the disability — to the exclusion of other factors that might affect the outcome.

However, thinking more precisely about competencies and capacities in ADA mediation, the potential value of mediator rosters and mediator training can help point the way back to basic principles preserving the integrity of all participants. It also helps sharpen the focus on mediator responsibility and avoids the negative consequences associated with objectifying disability.

Establishing competencies

Most mediators are able to distinguish between impediments in the mediation process related to competency that can be overcome and those that cannot. However, the important question is whether the door to mediation services is shut more often to clients with disabilities than to those with no apparent disabilities who happen to lack the competencies to mediate. The response to a person who has no apparent disability but exhibits behaviors associated with cognitive or mental disabilities is to assume that an inability to mediate is because of a disability. And a person with a disability who is able to mediate is thought of as a "superperson" — able to work harder at mediation than a non-disabled person to overcome the disability. The scenarios are demonstrated in the following chart.

This focus highlights a possible conclusion about the relationship between disability and its role in mediation — particularly if disability is objectified, giving it more importance than it actually has in the success or failure of the process. When parties have difficulty with mediation so that the outcome is doomed and one of the

CHART 1: MEDIATION SUCCESS OR FAILURE BASED ON MEDIATOR ASSUMPTIONS ABOUT PARTY DISABILITY

	When disability is apparent	When disability is not apparent
Behaviors evidencing ability to mediate	Success of mediationseen as related to factors external to the disability, or the perception that party has been able to overcome the disability	Success of the mediation is not seen as related to a disability
Behaviors evidencing inability to mediate	Party's inability to continue the mediation is seen as related to the disability	Party's inability to continue the mediation seen as possibly related to a disability

Experience demonstrates that mediator assumptions influence how mediators characterize what is going on in the mediation. Mediators often ascribe too much significance to disability.

CHART 2: WHAT HAPPENS WHEN MEDIATOR SUSPENDS ASSUMPTIONS ABOUT DISABILITIES AND THINKS ONLY ABOUT COMPETENCIES

	PARTY EXERCISES COMPETENCIES		PARTY DOES NOT EXERCISE COMPETENCIES	
	Disability apparent	**Disability not apparent**	**Disability apparent**	**Disability not apparent**
Behaviors evidencing ability to mediate	Competencies are intact and exercised	Competencies are intact and exercised	Mediator views success as related to factors external to competencies, such as time constraints or third party pressure	Mediator views success as related to factors external to competencies, such as time constraints or third party pressure
Behaviors evidencing inability to mediate	Mediator views failure as related to factors external to competencies, such as time constraints or third party pressure	Mediator views failure as related to factors external to competencies, such as time constraints or third party pressure	Mediator sees need to facilitate competencies	Mediator sees need to facilitate competencies

In this chart, competencies refer to the skills required to participate in a mediation, such as the ability to engage in problem-solving and decision making, and the ability to anticipate future scenarios. The assumption of this article is that most people, with or without disabilities, are competent to mediate. This chart suggests that when mediators withhold judgments about disability, they are likely to be more effective in disability-related mediations because they focus on facilitating the actual competencies needed by the parties.

***Peter R. Maida**, a mediator for more than 25 years, is the executive director of the Key Bridge Foundation in Washington, D.C., which mediates complaints filed under the Americans with Disabilities Act in a project funded by the U.S. Department of Justice. He can be reached at pmaida@keybridge.org.*

parties has a disability, the tendency might be to relate the failure of mediation to that disability. Where there is a non-apparent disability in a failed mediation, the tendency is to search for and attribute the failure to factors associated with mental and cognitive disability. If the mediation has a successful outcome, it is rarely attributed to disability, which is more often seen as an impediment to successful mediation.

Changing the cells in the chart based on specific disabilities would demonstrate other aspects of this problem, such as the lethal role of mental disability with respect to the success of mediation. In these cases, the headings on the side of the chart might read: "Not appropriate for mediation" or "Therapeutic mediation only."

Now consider the chart below in which competencies are the principle determinants of the success or failure of mediation.

Chart 2 demonstrates what happens if one considers the important role of competencies in mediation when disability is not given as the reason for success or failure. Disability status is unimportant; instead, competencies to mediate are highlighted. Some disabled people are able to mediate because of competencies that aid in mediating, such as ability to collaborate or ability to appreciate the interests expressed by the other party. When a disabled person is not able to express these competencies, the mediation might fail because of competencies that are blocked rather than because of disability. The key to the ability to mediate when competencies are blocked is the same for all parties whether disabled or not — that is, either an advocate has to represent one's interests, or the mediator must work on facilitating the competencies needed to continue. Thus, other factors play a role in the mediation's success or failure. The advice and support of advocates is crucial to being able to mediate for some. Chart 2 illustrates that it is possible to explain success or failure in mediation without objectifying disability — that is, making it the central focus.

Competencies v. mental capacity

Some mediation practitioners have focused on whether there are benefits in distinguishing between determining capacity and facilitating competencies in mediation.[2] Using the plural form of competency points to an important distinction. To participate in mediation, all parties must have certain competencies. Some are obvious, such as:

- thinking and behaving in a collaborative manner
- balancing the emotional and cognitive dimensions of problemsolving
- understanding the interests of other parties
- risk-taking, and
- following shared principles when making decisions.

Most individuals have the competencies to participate in mediation. The mediator's role is to help activate competencies that already exist, or to be a role model for parties about the competencies needed to complete the mutual problem-solving process.

Capacity usually refers to a legal or mental health finding about a person's overall ability to function. A court generally determines capacity after a lengthy consideration of data about individual ability to function, to understand and to make decisions. In the mental health context, capacity determination is usually based on the findings of a battery of specific tests.

Mediators usually have neither the legal authority nor the technical expertise to determine capacity. Even if they had both, determining capacity as defined in law and mental health would raise ethical issues in requiring a mediator to function as someone other than a mediator while delivering mediation services. Testing for capacity determination also raises the issue of the client's lack of informed consent before being tested.

The ADA and competencies

The ADA states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials and arbitration is encouraged to resolve disputes arising under this Act."[3] Interpreted liberally, the person with a disability is empowered to play a role in determining appropriateness. In mediation, this recalls the importance of self-determination. The ADA acknowledges that input from all parties is important in implementing its provisions.

Although the ADA doesn't directly address the dispute resolution practitioner's behavior, he or she must determine the appropriateness of mediation without violating the civil rights of the person with the disability. Determining capacity without the expertise, legal authority and consent of the person with the disability could violate civil rights by withholding access to service. On the other hand, facilitating competencies in aid of determining appropriateness falls within a mediator's range of skills and party expectations. In addition, facilitating competencies is interactive, involving not only the mediator but also all parties in the mediation.

Finally, facilitating competencies is a skill that is useful whenever anyone in the mediation seems to be "outside" the process. The mediator must judge when the mediation is not proceeding — and the reason may be one or more parties are not acting competently. In mediation, determining capacity usually has an indirect reference to the cognitive, emotional or behavioral abilities of an individual. Certainly, people without disabilities can reveal failures to act competently. Sometimes people without disabilities are categorized as if they have disabilities when they demonstrate behaviors that the mediator associates with disability status.

Do not presume that when a person with a disability is in mediation, his or her capacity has to be determined beforehand. Focusing attention only on that person will result in treat-

ing him or her differently than an individual about whom capacity is not deemed an issue. The objective as mediators ought to be to approach all parties in mediation — including ourselves — as if an audit of competencies needs to be made constantly from the beginning. A good revelation is to ask yourself what every individual will need to get through the mediation. This often results in a list of competencies to consider and suggests approaches to take. Consider emotions, for example, whose expression may not stop or impede the mediation process. When they do, the mediator must address the impediments to continuing. Likewise, not all competency deficits or blocks stop the process. When they do, be prepared to facilitate activating competencies that need to be strengthened, supported, unblocked, acknowledged or reinforced.

Being drawn to mediation because of a sincere desire to help usually serves no useful purpose in determining capacity — or in facilitating competencies.

Mediator competencies

A number of dispute resolution specialists have helped focus the thinking about mediator competencies, although there is little agreement about what they are and how to measure them.[4] Competencies of mediators are directly related to competencies needed by parties. For example, a mediator who expects parties to collaborate in reaching a mutually acceptable resolution of their disagreement ought to be able to facilitate collaborative behavior. This requires distinguishing between party moves that are competitive from those that are collaborative. If parties must balance emotional and cognitive factors to function, a mediator must be able to identify whether the emotional and cognitive dimensions of behavior and thought are in or out of balance.

Rosters and competencies

Rosters, which can aid in facilitating mediators' competencies, have become the usual way of delivering mediation services in this country.[5] Thousands of rosters put mediators at the hands of government agencies and of local, state and federal courts as well as the private sector. Various government agencies use rosters of mediators who specialize in EEO disputes. And many organizations have rosters specializing in other substantive areas of practice such as commercial, construction, family and small claims disputes.

After the ADA was passed, the U.S. Department of Justice (DOJ) was interested in having a roster of mediators throughout the country that would bring the necessary skills to the table when mediation was used to resolve disagreements implementing the new law. The DOJ, as well as disability rights advocates, were concerned that people would be asked to bargain away their rights in mediation. The DOJ sponsored 25 trainings over five years to create a roster of individuals experienced in mediating civil rights disputes as well as training in the substantive aspects of the law. The training produced a national roster of about 600 individuals with substantive expertise in the ADA. However, roster membership doesn't guarantee that mediators will exercise the competencies necessary to provide services that meet the needs of all parties.

Thirteen years after the ADA was passed, cases are now sufficiently different so that each one presents a new challenge for a mediator. A helpful practice to ensuring that all parties' needs are met as well as supporting the learning that experience brings is to supervise and monitor cases that roster mediators are assigned.[6]

Monitoring and supervising provide important mentoring and learning opportunities. Observing how mediators facilitate competencies of all parties can be especially helpful when experience is shallow. Getting guidance and an opportunity to ask questions helps mediators deliver appropriate services. Roster management also helps to avoid practices that deprive individuals of their rights as well as those that objectify disability and impede successful practice.

Viewing mediation involving people with disabilities with a broader scope highlights the responsibilities to clients, regardless of their personal characteristics. Not only does this improve practice techniques, but it also helps avoid the negative consequences associated with focusing on the disability. These consequences include:

- objectifying the disability, thereby supporting the belief that a person with a disability in mediation is significantly different from a person without a disability
- encouraging the mediator to think about the person as the "identified patient" — the one labeled and often scapegoated as the problem — rather than focusing on the competencies of all parties at the mediation, including the mediator
- depriving people with disabilities of their rights to have access to mediation
- overreaching, where mediators function as judges and mental health professionals
- depriving the person with the disability of self-determination
- relying on stereotypical notions of how people with disabilities behave, and
- assuming erroneously that the disability is more directly connected to mediation competencies than other characteristics of the parties.

Rosters remain helpful because of the possibility of reaching a large group of mediators through convenient newsletters and normal supervisory contact. Also, particularly with a roster that spe-

cializes in mediation of disability cases, the day-to-day mentoring helps maintain the broader vision, so important in avoiding the objectification of disabilities.

Training and competencies

One way to ensure that roster mediators share common skills, knowledge and abilities is through training. Through training, all mediators can examine assumptions with respect to people with disabilities in their roles as parties in mediation. Mediators in training are usually instructed to look for real or potential violence, mental, cognitive and behavioral indicators influencing client decisionmaking. Other than this, most discussions about capacity in training focus on a party's inability to continue.

Mediators generally fend for themselves in determining capacity to mediate, with vague notions about how to determine whether mediation is the appropriate method of dispute resolution. Being drawn to mediation because of a sincere desire to help usually serves no useful purpose in determining capacity — or in facilitating competencies. And interventions based on problemsolving techniques from professions such as social work, law, human resources and finance usually have goals other than facilitating the client's ability to participate in a process whose central principle is self-determination.

Consequently, training is probably the most difficult activity to discuss. There are many different types of training, most held in private settings. And complaints about training are not about failing to meet some standards with respect to determining capacity. Questions abound, including: Is a four-day training about a disability substantive area better than a one-day session? Is 40 hours better? Is training that focuses on disability part of the problem of objectifying disability and distorting its role in reaching a mediated agreement? How is training focused on the legal requirements of the ADA to avoid objectifying disability? Political agendas often influence the answers. Is sensitivity or cultural diversity training that focuses on disability good or bad? Or is the trap of objectification also a problem with these types of trainings? A goal would be to have mediators that understand the substantive area, including legal and disability awareness, combined with the opportunity to mediate cases with supervision and the possibility of mentoring.

Mediation trainers should:

- avoid using the terminology usually associated with determining capacity—for example, "this mediation failed because of the person's disability" or "this disabled person doesn't have the capacity to mediate"
- include exercises that focus on recognizing cues of competencies necessary for the mediation to proceed regardless of who is presenting the behavior
- teach a range of techniques that encourage trainees to test whether a blocked competency may be impeding mediation progress
- present strategies about intervening to determine whether the trainee has assessed correctly what competency needs to be facilitated
- introduce techniques that would represent a non-intrusive reinforcing of blocked competencies, and
- instruct about how determining competencies occurs throughout the mediation for all parties — including the mediator.

Endnotes

[1] 42 U.S.C. §§12101-12213.

[2] *See* Susan H. Crawford, Lewis Dabney, Judith M. Filner & Peter R. Maida, *From Determining Capacity to Facilitating Competencies: A New Mediation Framework*, 20 Conflict Resol. Q. 385-401 (2003).

[3] 42 U.S.C. § 12212.

[4] *See Report on Mediator Credentialing and Quality Assurance*, ABA Section of Disp. Resol. Task Force on Mediator Credentialing and Quality Assurance (2003) and Judith M. Filner, An Introduction to Mediator Credentialing (2000), available online at http:// www.keybridge.org/med_info/credentialing.htm.

[5] *See* Peter R. Maida, *Rosters and Mediator Quality*, Disp. Resol. Mag., Fall, 2001, pp. 17-20.

[6] The Key Bridge Foundation supervises and monitors cases assigned to the ADA Mediation Roster that was established through U.S. Department of Justice funding. The decision to supervise and monitor was made after a brief period of assigning cases and waiting until they were completed before contacting the mediator. It became apparent that roster mediators required technical assistance in this new substantive area of practice.

Eliminating Barriers for Minority ADR Neutrals

By Floyd D. Weatherspoon

The use of alternative dispute resolution (ADR) has grown by leaps and bounds during the past 25 years. Indeed, ADR has expanded from its traditional use in labor arbitration into the judicial systems, educational systems, community disputes, state and federal agencies, and complex commercial disputes. Corporations have found ADR to be so cost effective that many have made ADR mandatory in resolving employment disputes. Similarly, the banking industry has incorporated the use of ADR as a mandatory method for resolving credit card and contract disputes. The use of ADR is also expanding in the health care field, in special education, natural disasters and on-line disputes.

Participants at the National Conference of Minority Professionals in Alternative Dispute Reolution.

Exclusionary Practices

As the use of ADR has grown, so has the need for competent ADR professionals, e.g., mediators, arbitrators, facilitators, etc. In addition, ADR organizations, including state and federal governments and corporations have created and expanded ADR rosters and panels to provide arbitration, mediation and facilitation services. Unfortunately, minority ADR neutrals have been intentionally and unintentionally excluded from receiving such opportunities.

Not only have minorities been disproportionately excluded from ADR rosters and panels, they are often not selected as trainers in a myriad of training programs provided by colleges and universities, private training organizations and governmental agencies. Ironically, minorities are aggressively recruited to attend such programs but rarely chosen to serve as a facilitator or trainer. Often, those opportunities are only made available to the same select non-minority trainers and facilitators. With few exceptions, minorities are also often excluded from the high-paying lucrative rosters.

In surveys conducted during the 2004 and 2005 National Conference of Minority Professionals in Alternative Dispute Resolution held at Capital University Law School (Columbus, Ohio), minority participants identified a number of obstacles they face as neutrals. The major obstacle identified by minority ADR neutrals was that the selection practices and processes used to select neutrals negatively impacts their efforts to gain acceptance on the lucrative ADR rosters and panels.

Minorities seem to have no trouble serving on community mediation rosters or doing *pro bono* work. However, with few exceptions, minority ADR neutrals report a difficulty in making the transition from serving as a voluntary neutral to being compensated as a professional ADR neutral. Even in the judicial system with court appointed neutrals, minorities are often under-represented on rosters. Minority neutrals identified exclusionary selection criteria as a major obstacle to placement on rosters and panels. ADR providers were described as the "gate keepers" who "sit at the door" to disperse ADR opportunities to those who have met their subjective requirements.

The selection of individuals to the various rosters and panels reminds me of when I pledged a fraternity. I was required to engage in a selection process that felt somewhat meaningless and arbitrary until it was determined by those in power that I was acceptable for admission into the exclusive club. At the end, I felt I had endured too much to turn back, even though the process did not make me a loyal frat brother. Similarly, the criteria for entrance into the exclusive ADR club are often not relevant and at times, the process

can even be arbitrary and discriminatory. Those who make it through the process buy into and propagate a selection system that has a disparate impact on women and minority neutrals. They too take the position, "I met the criteria and every one interested in becoming a part of this exclusive club must also meet the same criteria." This appears to be the sentiment of those who become a part of a system that may unintentionally exclude minority and women neutrals.

In Search of a Mentor

Finding a compatible and committed mentor is a challenge for any new ADR practitioner, but can be especially daunting for minority neutrals. It is crucial to locate a mentor who is well-respected in the field and who can introduce new minority neutrals to advocates and ADR providers. My first attempt at finding a mentor was not successful. I asked a law professor who taught ADR courses if he would permit me to sit in on one of his classes. His response was a resounding "no". At first, I was disheartened but I have come to understand that it is better for a prospective mentor to decline up front than to say "yes" and never be available or committed.

My next strategy was taking a graduate level labor arbitration course taught by a well-respected labor arbitrator at the local university. After completing the course, I asked him whether I could shadow him with his U.S. Postal Service labor cases. He gave an enthusiastic "yes". He introduced me to the advocates and gave me ideas on how to become an effective arbitrator. The U.S. Postal Service was one of the first arbitration rosters that accepted me.

Similarly, in the private sector, I met another law professor at a reception who was a white male with extensive experience as a labor arbitrator. He made a telephone call to the advocates of a permanent local arbitration panel and I was soon placed on another panel. I often share this story with new minority ADR neutrals because I was able to make a meaningful contact at a reception where I was the only minority present. In fact, I almost did not attend because I knew I would be the only minority present. Nevertheless, I forced myself to attend, engaged in the dialogue and made contacts. It appeared to me that everyone knew one another. In reality, the new non-minority neutrals were actively engaging in networking and making contacts. These kinds of informal gatherings can often be more useful than getting another degree or attending a training program.

The failure on the part of ADR providers, including governmental agencies, to make a conscious effort to circulate information within the minority ADR network is not necessarily intentional discrimination but just indifference. Nevertheless, the end result is still the same—the exclusion of minority neutrals.

As Director of Minority ADR Initiatives, I have contacted members of the National Academy of Arbitrators to serve as mentors for individuals completing our new Minority Labor Arbitrator Development Program. In most cases, the mentors have been white males who have readily agreed to serve as mentors. Minority members of the Academy have also served as mentors, as well as volunteering to serve as instructors for our labor arbitration training program. Interestingly, the difficulty in ensuring that the mentoring program is successful has been the failure of mentees to contact their mentors on a regular basis to develop a professional relationship. Developing a meaningful professional relationship between new minority ADR neutrals and well-established non-minority ADR neutrals can be a challenge.

In my own professional experience, as well as in the Minority Labor Arbitration Development Program, the mentors have been white males with 20 plus years of experience. I encourage new minority ADR neutrals to seek this group out for mentoring and coaching. I sense that these mentors do not feel threatened or in competition with new minority ADR neutrals. They seem to welcome the opportunity to help minorities enter a field that has been largely dominated by Caucasians.

Racial and Ethnic Discrimination

In my experience, many minority neutrals believe discrimination exists in selecting minority neutrals to serve on various rosters and panels. ADR organizations and administrators readily deny any such practice exists and are angered when such allegations are suggested. However, many minority ADR neutrals perceive that the selection processes are exclusionary and that these processes discriminate against minority neutrals. This theory of discrimination was articulated by the Supreme Court's decision in *Griggs v. Duke Power*. The Supreme Court determined that discrimination is not only overt "but also practices that are fair in form but discriminatory in operation" is still discrimination. (401 U.S. 424, 431 (1971)).

The Supreme Court cited the familiar Aesop's fable of the fox and the stork to illustrate how discrimination can occur

without racial animus. As the story goes, the fox and stork each invited the other to dinner but served dinner in a manner which prevented the other from eating. The Supreme Court determined that selection devices must not be designed to prevent "all seekers" a fair opportunity to be considered. Similarly, when ADR organizations and ADR providers invite minority neutrals to apply but their selection devices cause minorities to be disproportionately excluded, then this may result in unintentional discrimination. Just like the fox and the stork, the invitation is used as a pretext to exclude.

As *Griggs* illustrates, discrimination is not always blatant; indeed it is often delivered with a smile. Minority neutrals often share their experiences of communicating with administrators of ADR programs and providers around the country who advise them of the process and selection criteria for placement on their roster. The code words for exclusion are terms such as "qualification," "criteria," "quality of service" and "standards." Depending on the manner in which these terms are presented, minority ADR neutrals may interpret these terms to mean "minorities need not apply." Clearly, all of these factors can and should be a consideration for placement on the various ADR rosters. However, the question is whether these factors are related to what neutrals do. Do these criteria predict performance as a neutral? Often there is no real correlation.

Elimination of Discriminatory Practices

The exclusion of minority lawyers in major law firms mirrors the exclusion of minority ADR neutrals on rosters and panels. Discriminatory selection processes, stereotypical biases and the "good ole boys" network are just a few of the barriers that minority lawyers face in gaining employment in major law firms. Sometimes it takes an economic incentive to effect change. For example, opportunities for minority lawyers in major law firms may increase since Wal-Mart threatened to take its business elsewhere unless the problem was addressed. Similarly, if major corporations that are contracting for ADR services issue a similar ultimatum, ADR providers would re-evaluate their selection devices and develop programs for minorities to gain placement on their rosters.

Left to right: Terrence Wheeler, Center for Dispute Resolution at Capital University Law School; Donna Parchment, Dispute Resolution Foundation in Kingston, Jamaica; Agnes Wilson, American Arbitration Association; Jack Guttenberg, Capital University Law School; Floyd Weatherspoon, Capital University Law School

ADR providers should evaluate whether their selection devices are having a disproportionate impact on minority ADR neutrals. If their selection devices can be justified based on a business necessity, they should also explore whether other selection devices could be used which would have fewer discriminatory effects on minority neutrals but still achieve their overall goals. This principle was also mandated in *Griggs*.

The federal government is a major user of ADR as well as a major contractor for ADR training. Unfortunately, even the government has subjective selection devices that disproportionately exclude minority ADR neutrals. For example, government agencies often contract with ADR consulting firms to conduct ADR training and/or to provide neutrals without considering whether they have a diverse pool of ADR trainers and/or neutrals. Moreover, they establish internal pools of ADR neutrals, which are not reflective of the employees they will serve. These practices can be perceived as unintentional discrimination.

Some people might assume that minority neutrals will not be acceptable to advocates, unable to handle complex issues, incompetent and inexperienced. Non-minorities, especially white male neutrals, normally don't face such biases. I recall contacting a major ADR provider to request support of the National Minority ADR conference and being informed by a senior official that they didn't see the benefit of their participa-

Not only have minorities been disproportionately excluded from ADR rosters and panels, they are often not selected as trainers in a myriad of training programs provided by colleges and universities, private training organizations and governmental agencies.

tion in the conference because none of the participants would meet their qualifications. Without inquiring into the qualifications of the participants, the bias and racial assumption was that none of the minority neutrals were qualified.

Often minority ADR neutrals are unaware or the last to know about new developments and expansion of opportunities in the field of ADR. By the time the information accidentally filters down to the minority ADR network, the new ADR initiative is already in place, the qualifications have been established, the roster is closed and the same select group of non-minority neutrals has been selected by their associates. For example, a permanent panel of neutrals was being selected at a federal agency and three months after the panel of non-minorities was selected, I received a call inquiring whether I was aware of any minority neutrals who could be considered when they select members for their roster in a few years. Why was the absence of minority neutrals not considered when the list was first established?

The lack of information sharing with minority ADR neutrals is not limited to any one field. Minority ADR neutrals are often ignored and excluded from opportunities involving disputes related to banking, special education, construction, federal labor issues, and even sports. Recently, I tried to organize a training program on sports arbitration as a part of our Minority ADR Initiative. I learned very quickly that information on opportunities in this field is closely held and reserved for only a few non-minorities. The failure on the part of ADR providers, including governmental agencies, to make a conscious effort to circulate information within the minority ADR network is not necessarily intentional discrimination but just indifference. Nevertheless, the end result is still the same—the exclusion of minority neutrals.

The solution to this barrier is quite simple. If there is a good faith intention to share information regarding paid opportunities and to diversify rosters, then ADR providers should make a concerted effort to circulate information in a timely manner to various minority professional organizations. Diversity means more than selecting one superstar minority neutral. In addition, ADR organizations can establish a network of minority neutrals in the various fields. ADR providers can circulate their announcements to organizations such as the Association for Conflict Resolution and the National Bar Association, as well as to minority networks such as the Mediators of Color Alliance (MOCA).

Helping minority ADR neutrals to gain opportunities and acceptance in the field of ADR requires ADR providers to continue evaluating their selection procedures for placement on rosters and panels. In addition, lawyers who now play a major role in selecting neutrals to serve in private disputes must also look outside their network for diversity. Finally, minority ADR neutrals must be vigilant in their efforts to seek opportunities and acceptance in the field.

The role of minorities in ADR is more vital today than it has ever been. Changes to the current processes must be made to ensure equal and effective ADR. The future of ADR depends upon the increased inclusion of minority neutrals. It is my belief that increasing the number of minority neutrals will lead to an increase in the use of ADR and will enhance users' satisfaction with ADR outcomes.

Floyd Weatherspoon is a Law Professor and Director of Minority ADR Initiatives at Capital University Law School. He is an active labor and employment mediator, arbitrator, and trainer. Professor Weatherspoon wishes to thank Rebekah Cundiff and Rasheda Hansard for their assistance in researching this article.