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# Mediating Civil Rights: The Age Discrimination Act

by LINDA R. SINGER  
and RONALD A. SCHECHTER  
Center for Community Justice

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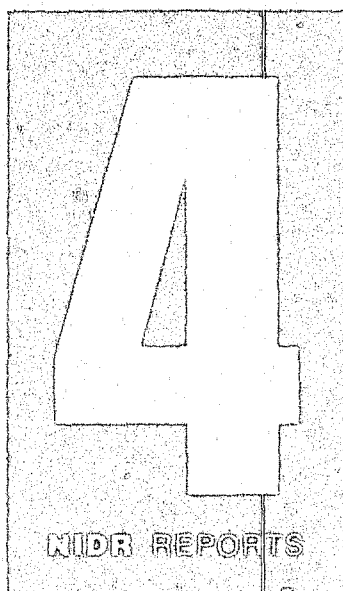
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**NATIONAL INSTITUTE FOR DISPUTE RESOLUTION**

# Mediating Civil Rights: The Age Discrimination Act

by LINDA R. SINGER  
and RONALD A. SCHECHTER  
Center for Community Justice

NCJRS

OCT 3 1986

ACQUISITIONS

# Acknowledgments

We are grateful to the National Institute for Dispute Resolution for its generous support of this case study. We also thank the officials of the Federal Mediation and Conciliation Service and the United States Department of Health and Human Services for their cooperation and the individual mediators and advocates who willingly shared their experiences and observations with us.

Linda R. Singer  
Ronald A. Schechter

*Mediating Civil Rights: The Age Discrimination Act* is the fourth in a series of summary reports of research and other projects sponsored by the National Institute for Dispute Resolution. The complete report of this project is available in manuscript form from the Institute at the cost of reproduction.

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Report design by Susan Lehmann  
Typesetting by VIP Systems, Inc.  
Printing by Line Marque, Printing, Inc.

Library of Congress Catalog Number: 86-062274

The Center for Community Justice, a nonprofit organization located in Washington, D.C., has been active since 1971 in designing, operating, and evaluating alternative methods of resolving disputes in community and institutional settings.

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## Foreword

In 1978, officials of what later became the Department of Health and Human Services agreed to a bold experiment. In consultation with staff of the Federal Mediation and Conciliation Service (FMCS) and a few dispute resolution specialists, they created an enforcement scheme involving the use of mediation to resolve complaints filed under the Age Discrimination Act of 1973. In half of the federal regions, FMCS was to provide mediation services. In the remaining regions, mediation was to be provided by community conciliators.

That experiment was examined by Linda R. Singer and Ronald A. Schechter of the Washington-based Center for Community Justice. In this summary of their study, Singer and Schechter analyze what little is known about the use of mediation in this context. They point out both the difficulties and the promise of such enforcement schemes. This report details, also, the difficulty of any research that involves actual mediations.

One of the most interesting facets of the enforcement scheme reported by the authors is the use of community conciliators. Data for the study on the use of these conciliators are scarce, but are sufficient to suggest that their success rate appeared to be on a

par with, if not higher than, the success rate of FMCS mediators.

The report provides insight into some of the questions that legislators and public policy makers should address when considering schemes similar to the one noted here. Is the law specific enough to provide concrete guidance to those charged with implementing it? Has the law been on the books long enough so that any vagueness inherent in the legislation has been cleared up? If mediation is to be used, to what degree should legislation set guidelines for that mediation? What should mediators do if parties are close to an agreement which is not consistent with applicable legislation?

These questions, and others about mediation and other dispute resolution mechanisms, may have no ready answers. At the Institute, our hope is that studies like this one will shed light on the various uses of dispute resolution and contribute substantially to the debate about those uses. From that debate will come answers that benefit the whole of society.

Madeleine Crohn

*President*

National Institute for Dispute Resolution

## Mediation Under the Age Discrimination Act

In 1978, the Department of Health, Education and Welfare (HEW, since changed to the Department of Health and Human Services, or HHS) began testing the use of mediation to provide a "faster and more creative" resolution of complaints of age discrimination filed with federal agencies under the federal Age Discrimination Act (ADA). [47 C.F.R. 57850, 57855 (December 28, 1982).] Compared with other efforts at the federal, state, and local levels to mediate discrimination complaints, this experiment had two unique components. First, mediation was to be mandatory in every case. Second, mediators would be completely independent of the agencies responsible for enforcing the substantive provisions of the law. The Federal Mediation and Conciliation Service (FMCS) was charged with administering the experiment. The agency was to use its own staff mediators and specially hired, part-time community conciliators.

In 1983, the Center for Community Justice (CCJ), supported by the National Institute for Dispute Resolution, attempted to assess the experience of both groups of mediators. Located in Washington, D.C., the Center for Community Justice is a private, non-profit organization. It has a long history of designing, administering, training, and evaluating methods of resolving disputes, including those arising between individuals and institutions.

### The Age Discrimination Act

The Age Discrimination Act (ADA) was enacted in 1975 and amended in 1978. Its purpose was "to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance." [42 U.S.C. Section 6101 *et seq.* (1983).] The Act provides that "no person . . . shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance."

Despite this broad prohibition, the Act contains a number of ambiguous exceptions. A recipient of federal funds may consider a person's age if doing so is "necessary to the normal operation or the achievement of any statutory objective" of the recipient's programs or activities. In addition, a recipient may take an action otherwise prohibited if "the differentiation made by such action is based upon reasonable factors other than age," even if the effect of the action has a disparate impact on a particular age group. The prohibitions on age discrimination do not apply to those programs "established under authority of any law" which provides benefits or assistance based on a person's age or which establishes criteria for participation in the program in age-related terms.

Some critics suggest that the exceptions are so broad that they strip the act of any real power. At the very least, the breadth of these exceptions and the lack of authoritative interpretations of their meaning make the ADA a questionable choice for testing the use of outside mediation of civil rights cases.

As originally enacted, the ADA was enforceable only by federal agencies. An agency could terminate or refuse to provide funds to entities that violate the Act, or the Justice Department could seek to enjoin discriminatory practices. The 1978 amendments allow aggrieved individuals to file suit on their own. Remedies include an injunction against the discriminatory practice, attorneys' fees and costs.

Before filing suit, an aggrieved person must file an administrative complaint with the funding agency and must wait either 180 days or until the agency finds in favor of the discriminating recipient of federal funds, whichever occurs first. The complainant also must notify the Secretary of Health and Human Services, the Attorney General, and the recipient 30 days before filing suit.

## The Regulations

When enacted, the ADA was an unusual civil rights statute in that it contained certain preconditions. The Act first required the United States Commission on Civil Rights to prepare a report on age discrimination in programs and activities receiving federal funds. After this report was transmitted to the President and Congress, HEW was to promulgate government-wide regulations to carry out the Act's prohibitions. Only with the issuance of these regulations was the Act to become effective. After issuance of final government-wide regulations, each federal agency or department was to submit proposed regulations to HEW for approval.

The United States Civil Rights Commission submitted its report on age discrimination in January 1978, concluding that "discrimination on the basis of age is widespread." HEW published its final government-wide regulations on June 12, 1979. The regulations (and the prohibitions of the Act itself) went into effect on July 1, 1979.

The current regulations cover three general subjects: (1) standards for determining discriminatory practices; (2) a description of the responsibilities of federal agencies; and (3) procedures for investigation, conciliation, and enforcement.

The regulations on determining discriminatory practices do little to clarify the ambiguities of the Act. Nor have there been any significant court cases dealing with the meaning of the Act's prohibitions or exceptions.

The regulations restate the statutory requirement that each of approximately 30 federal agencies promulgate agency-specific regulations regarding age discrimination by recipients of agency funds. Proposed regulations were to have been published by each agency by September 12, 1979, 90 days after HEW published its government-wide regulations. Final regulations were to have been submitted to HEW within 120 days of publication.

Despite these time limits, only HHS has implemented agency-specific regulations. In fact, a number of agencies have yet to submit proposed regulations. HHS has not approved any regulations submitted by other agencies. The Office of Management and Budget initially disapproved certain information-gathering and recordkeeping regulations as being too burdensome on recipients of federal funds. Those difficulties were resolved in December of 1982. HHS then stated that it was unable to approve any final agency regulations because pending litigation concerning the scope of the regulations "might affect the substantive review of agency regulations." Three agencies have published final rules without clearance from HHS.

## The Complaint Process

Complaints are filed with the government agency funding the allegedly discriminatory program or activity. During FY 1983, six agencies received a total of 133 complaints. The total number of complaints filed in previous fiscal years was hardly greater: 144 complaints were filed in FY 1982; 76 in FY 1981; 103 in FY 1980; and 14 in FY 1979.

Regional offices of the funding agencies receive most ADA complaints by mail. If a potential complainant walks into a funding agency, or telephones, an employee speaks to the person and attempts to elicit enough facts to judge which federal statutes prohibiting discrimination might apply to the case. After reviewing a complaint to ensure that it falls within the jurisdiction of the ADA, the funding agency must refer it to FMCS, which HEW designated in 1979 as the "mediation agency" for resolving ADA complaints.

The involvement of a mediation agency independent of the enforcement agency was a departure from other attempts to mediate formal civil rights complaints. HHS publications emphasize that the ADA mediators are "in no way connected with HHS or the funding agency in the age discrimination dispute. Instead, mediators have been recruited and selected by FMCS. Each mediator is assigned to the dispute by the FMCS without consultation with HHS." [47 Fed. Reg. 57856.]

ADA mediation is unique in federal practice because FMCS has no enforcement power. According to FMCS, mediation and enforcement were separated to "remove the funding agencies from the dual role of mediator and adjudicator and, at the same time [to] provide the complainant with a disinterested and professional neutral trained in dispute resolution."

When sending a case to FMCS, the funding agency notifies both the complainant and the respondent that a complaint has been accepted and that it is being forwarded to FMCS for mediation. The funding agency does no preliminary factual investigation before referring a complaint to FMCS for mediation. It sends a request for ADA mediator assistance, together with a copy of the complaint, to FMCS.

The government-wide regulations allow FMCS 60 days from the funding agency's receipt of the complaint to mediate the dispute. Both complainant and recipient are required to participate in the mediation process. However, the parties need not meet with the mediator at the same time. The mediator must protect the confidentiality of all information obtained during mediation, and may not disclose any information without prior approval of the FMCS Director.

If an agreement is reached through mediation, it is put in writing, and the funding agency takes no further action on the complaint. If no settlement is reached within the 60-day period, or if the mediator decides



that further mediation would be unproductive, FMCS returns the complaint to the funding agency and has no further role in the case.

At the end of the mediation, the mediator fills out a report, which no one outside of FMCS sees. The funding agency receives a much less extensive report, giving virtually no information about what occurred. If the case is successfully mediated, a copy of the agreement is attached.

In cases where no agreement is reached through mediation, the funding agency informally investigates the complaints and attempts to reach a settlement. If

the informal investigation and conciliation fail to resolve the complaint, the agency completes a formal investigation. If the investigation indicates a violation, and the recipient does not rectify it voluntarily, the agency arranges for enforcement action. Enforcement actions include terminating the recipient's financial assistance or referring the matter to the Department of Justice for litigation. The funding agency also may direct the recipient to take any remedial action necessary to overcome the effects of the discrimination. In addition, the individual complainant can file suit against the recipient.

## 2. The Center's Assessment

In preparing this report, the Center for Community Justice (CCJ) attempted to draw on both objective data and subjective impressions of participants and observers of the mediation process. The tracking sheets provided by FMCS revealed certain basic information concerning each ADA complaint: (1) the date the complaint was filed with the funding agency; (2) the date it was received by FMCS; (3) the identity of the funding agency and the mediator; (4) the date the case was scheduled to be returned to the funding agency; and (5) the date and basis for closing the case.

Using this information, Center staff prepared a statistical overview of the ADA mediation program. FMCS also furnished digests of complaints from one hundred closed cases, together with digests of the agreement or other disposition of each case.

However, except for a few complaints and agreements provided by HHS, neither FMCS nor the funding agencies would disclose full complaints or actual agreements. Nor would the funding agencies or FMCS provide the names and addresses of complainants or respondents. Consequently, we were unable to interview individual disputants. The only exceptions involved a few respondents in the New York metropolitan area who responded to the Center's questionnaire.

Interviews were conducted with a variety of people who had contact with ADA mediation. These included FMCS officials in Washington; FMCS mediators; community conciliators; representatives of advocacy groups for the aging; and officials of funding agencies to which the ADA applies, both in Washington and in regional offices that handle ADA complaints. The Center was unable to obtain permission from FMCS to observe any mediation sessions. Thus, information about mediation techniques and processes is based on interviews with mediators rather than on direct observation.

The information gleaned from these sources was sufficient for developing a general description of the

mediation process and its results and some observations and very tentative conclusions about differing approaches and techniques. The problems associated with the statute itself have been mentioned. In addition, the relatively small number of complaints filed, and the even smaller number of complaints sent to FMCS by funding agencies, make statistical conclusions risky. Furthermore, restrictions on access to mediation files, disputants, and mediation sessions make it impossible to reach definitive conclusions concerning the usefulness of mediation in this context.

### **The Mediators**

The ADA mediation program originally contained two unique provisions. First, it was the only federal program in which the mediation function was completely separated from the investigatory and enforcement functions. Second, the program was to use two distinct groups of mediators: FMCS staff mediators and community conciliators. Community conciliators with experience or training in mediation outside of the labor/management context were recruited by FMCS to serve on a case-by-case basis. They were assigned only to ADA cases.

FMCS mediators and community conciliators came to the ADA experiment with completely different backgrounds. Only one community conciliator had even minimal labor/management mediation experience. The nine conciliators selected ranged in age from 33 to 72; three were over 65. Beyond a common interest in mediation, their backgrounds varied. Among them were a retired dentist, who still volunteers at a community mediation service, two attorneys, and two directors of community mediation services.

Twenty FMCS mediators from among the agency's staff were selected to handle ADA cases, based on their interest and the recommendations of their regional directors. (The group was expanded in 1985.)

The FMCS mediators had extensive experience in the labor/management field, but virtually no experience in mediating interpersonal or community disputes. Neither mediators nor conciliators had prior experience in resolving disputes between individuals and institutions.

According to documents sent by FMCS to both staff mediators and community conciliators, the community conciliator experiment had three purposes:

1. "To determine whether CC's [community conciliators] or FMCS field mediators can more effectively and efficiently handle the cases;"
2. "To see whether FMCS can handle ADA cases even during its peak caseload periods;" and
3. To determine "whether community conciliators can be a consistently dependable source of mediation over broad geographical areas rather than in only isolated pockets."

FMCS designated half its geographic regions to staff mediators and half to community conciliators. FMCS trained each group of mediators separately. In the Fall of 1979, the community conciliators attended a five-day workshop covering techniques of mediation and the substantive aspects of the ADA. Although FMCS staff mediators also received training on the substantive aspects of the ADA, their training did not include mediation techniques. The two groups never attended a joint session of any kind.

Community conciliators had no contact with the regional offices. Their activities were coordinated through FMCS headquarters in Washington, D.C. In contrast, FMCS mediators were assigned cases through their regional offices. Both community conciliators and FMCS officials criticized the assignment, management, and reporting system for community conciliators. Community conciliators complained that regional office officials often were hostile, and had no notion of what they were doing. They also complained about a lack of local coordination and support.

FMCS headquarters officials stated that the centralized approach, together with the fact that the community conciliators were not regular employees, resulted in less control over their activities. This led to what they characterized as "a discipline problem" including, they believed, the use of improper mediation techniques by some community conciliators.

On January 1, 1983, FMCS terminated the community conciliator experiment and stopped assigning cases to community conciliators. Since then, FMCS has assigned all ADA complaints to staff mediators. In a letter to community conciliators, FMCS explained its decision "to bring this experiment to a close." The agency noted that one purpose of the experiment was to compare "the effectiveness and efficiency of community and labor mediators in the mediation of disputes outside the labor/management area." The Ser-

vice noted that a recent briefing on a draft report prepared by HHS "indicated that there has been no discernible difference in the effectiveness and efficiency of the mediation of ADA complaints as between the community conciliators and our federal mediators."

In addition, FMCS noted that because the agency's labor/management dispute caseload had been declining, its field staff "will have adequate time to handle ADA complaints." The letter also stated that since the 1982 reorganization of FMCS from eight regions to four, there had been "an unnecessary duplication of administrative services," because community conciliators and FMCS mediators were operating within the same regions.

## The Process

Both FMCS staff mediators and community conciliators (when they were used) initiated contact with the parties by telephone. The purpose of this conversation was to explain the mediator's role and describe the mediation process. In addition, mediators attempted to elicit from each party information about the dispute. Mediators then attempted to schedule meetings. Some mediators noted that scheduling was often a problem, given the distances involved. (For example, one mediator was responsible for a four-state region involving considerable long distance travel.)

Beyond initial telephone conversations and scheduling of meetings, there was a surprising lack of uniformity in the procedures followed by mediators. Some mediators met separately with each party first, bringing them together only if there appeared to be some hope of settlement. One community conciliator made several calls to each party before meeting with them to "get a picture" of the case and shorten the actual mediation sessions.

One FMCS mediator noted that there was "no norm." He said that in the majority of cases, he started with a joint session, explaining the process he would follow and emphasizing the need for confidentiality and his desire to help both sides reach an agreement. After each side clarified its position, the mediator separated the parties. He described separate sessions with the complainant and the respondent as "the key" to achieving agreements. In some cases, he met with the parties both before and after the joint session.

Another staff mediator stated that he met only in joint sessions. In his opinion, there was "no need" for separate caucuses because in ADA cases, there is "only one issue: age discrimination." He began the meeting with a brief introduction, then asked the complainant to describe the problem. The respondent was then given an opportunity to speak. At that point, the mediator determined if there was any room for settlement. If it appeared feasible, he continued to work with the parties jointly until an agreement was reached.

Most mediators and conciliators interviewed indicated that cases often took a full day to settle. If an agreement was reached, it was put in writing and signed by both parties. Copies of the agreement were then attached to the mediator's reports to FMCS and the funding agency.

## Results of Mediation

Data obtained from FMCS indicate a decline in mediated cases resulting in agreements. Between November 1979 and February 1, 1981, 43 percent of the closed cases (30 of 69) were resolved through mediation. During FY 1982, 32 percent of closed (20 of 62) cases were resolved through mediation. During fiscal 1983, only 26 percent (16 of 62 closed cases) were resolved through mediation.

Available data also indicate that community conciliators were more successful in obtaining agreements in ADA cases than were FMCS mediators. In FY 1982, community conciliators reported reaching agreements in 44 percent of the cases (15 of the 34) they mediated. During the same period, FMCS mediators reported reaching agreements in 5 of 28 cases, or 18 percent. Community conciliators successfully mediated 3 of 9 cases in FY 1983 (33 percent), while FMCS mediators obtained agreements in 13 of 53 cases (25 percent). Averaging each group's agreement rate for FY 1982 and 1983, community conciliators achieved agreements in 42 percent of their cases, as opposed to 22 percent for FMCS mediators.

While community conciliators handled 55 percent of all ADA cases during FY 1982, the figure dropped to 15 percent in FY 1983. The number of cases mediated in any year has been small. Consequently, no definitive conclusions can be drawn from these figures. Nevertheless, the drop in the overall agreement rate from FY 1982 to FY 1983 may reflect, at least in part, FMCS's decision to cease using community conciliators after January 1, 1983.

CCJ's analysis of FMCS tracking sheets shows a striking difference in the results obtained by community conciliators and FMCS mediators. Community conciliators obtained agreements nearly twice as often as FMCS mediators. Since obtaining settlements acceptable to both parties clearly is one measure of effectiveness, the statement that there was "no discernible difference in the effectiveness" of the two groups seems inaccurate. In fact, one FMCS official stated that FMCS ceased using community conciliators for "institutional reasons" and "institutional needs unrelated to settlement rates."

When asked about the difference in settlement rates, FMCS mediators cited a lack of consistency in recordkeeping. For example, "mediation terminated" may have been used differently by the two groups. A re-

view of FMCS tracking sheets indicates that there may be some validity to this point. However, a review of summaries of 100 closed cases found only three indications that the two groups may have reported results differently. These instances would not account for the bulk of the difference in settlement rates. Other FMCS mediators pointed to possible geographic differences. Most FMCS mediators were assigned to highly urbanized (and hence possibly more sophisticated) regions.

One FMCS official stated that he "can't believe the numbers are right," that mediators obviously did not know how to report their results, and that no conclusions should be drawn from these statistics. At the same time, he noted that with some exceptions, "as a group the community conciliators worked harder at it" than staff mediators, because successfully mediating these cases was seen as an "opportunity to enhance their status as mediators."

A number of FMCS staff mediators seemed uncomfortable with some of the complainants, who had no prior experience with mediation, and with the nature of the issues raised by ADA cases. Because of their labor/management background, FMCS mediators were more familiar with economic issues, which often could be resolved by "splitting the difference." Although all labor issues are not economic, some FMCS mediators failed to understand the deeply personal nature of the disputes involved in ADA cases.

In addition, a number of the FMCS mediators seemed to miss those elements that help push labor/management disputes toward resolution, including common economic interest in getting disputes resolved; the ongoing negotiating relationship between parties; and the pre-existing structure of their relationship. Some community conciliators, on the other hand, had prior experience mediating interpersonal disputes or working with the elderly. These differences may help explain, in part, different settlement rates between the two groups.

The data also reveal that the agreement rate for mediating ADA complaints was significantly lower than that of other programs mediating civil rights complaints. A 1980 study by the Project on Equal Education Rights (PEER) found that HEW's Office of Civil Rights (OCR) obtained agreements in 64 percent of the complaints handled by OCR's experimental Early Complaint Resolution procedure. The PEER Study also reported that the Equal Employment Opportunity Commission's (EEOC) Rapid Charge Processing System for handling employment discrimination complaints obtained agreements in close to 60 percent of the cases.

Some variations in agreement rates among programs may reflect differences in selection procedures. All ADA complaints are referred to FMCS for mediation, regardless of the nature of the complaint or the

wishes of the parties. In contrast, OCR screens certain complaints from mediation, and either party can refuse to participate. In such cases, the complaints are handled by the normal administrative process of investigation and enforcement. The EEOC also screens certain types of cases (usually class complaints) from mediation. In addition, EEOC procedures combine factual investigation with mediation. Each party is asked to provide detailed information or documentation on the claim prior to mediation. An EEOC mediator has far more background information on a complaint than does an ADA mediator.

Several FMCS mediators stated during interviews that they do not believe that agencies should conduct a pre-mediation investigation. In their opinion, mediation is most successful when mediators start from scratch.

FMCS mediators also differed on whether any ADA cases should be screened from the mediation process. Most FMCS mediators believed that many cases did not involve claims of age discrimination. One mediator stated that "people will yell age discrimination" simply to get an investigation. Generally, FMCS mediators stated that funding agencies should exercise more care in screening out cases that are outside ADA's jurisdiction. On the other hand, both FMCS mediators and community conciliators agreed that all cases within ADA's jurisdiction should be forwarded for mediation.

Most FMCS mediators and community conciliators recognized that certain types of single-issue cases were extremely difficult to mediate. The most common example cited involved admission to graduate school programs. Because there is little room for compromise in these cases, mediation almost always failed. In addition, the lack of a continuing relationship between the parties provides little incentive to reach an accommodation. A number of community conciliators stated that these cases should be screened from mediation, perhaps after an exploratory telephone call, because they do little more than waste everyone's time. Generally, FMCS mediators believed that these cases should be processed through mediation.

There was disagreement over whether cases involving recipients who are "chronic offenders"—cases akin to class actions—should be screened from mediation and forwarded directly for agency enforcement. A number of community conciliators were concerned that chronic offenders could use the process to avoid correcting a discriminatory system. However, others stated that individual complainants had a right to settle their complaints regardless of the overall ramifications. Virtually all FMCS mediators believed that cases involving chronic offenders should not be screened from mediation. Most saw no law enforcement role in the mediation of civil rights complaints. Others noted the lack of enforcement action on cases in which mediation failed and stated that a mediated

settlement really was the complainant's only available remedy.

Another factor that may have affected resolution rates was that, in contrast to EEOC and OCR, FMCS has no enforcement authority. In the context of an EEOC or OCR complaint, the connection between mediation and enforcement may put more pressure on the parties to settle. Both parties recognize that the mediating agency also can investigate the complaint, dismiss it if it is unsupported, or remedy violations of law if the complaint is found to be valid.

In fact, HHS reports that funding agencies have succeeded in resolving a significant number of cases on their own, generally after FMCS mediation has failed to produce an agreement. FMCS mediators believe that their efforts contribute to these agreements.

### **Time Involved**

FMCS has 60 days from the time a complaint is received by the funding agency to complete mediation. Obviously, to the extent that funding agencies delay forwarding complaints to FMCS, the mediator's time is reduced. Such delays, which averaged 17 days during FY 1982 and 1983, were cited by several mediators as the source of significant problems.

Despite these delays, FMCS returned complaints to funding agencies within 60 days in more than 70 percent of the cases. When the time limit was not met, FMCS generally obtained an extension from the funding agency. FMCS held only 20 complaints—16 percent of the closed cases—for more than 70 days.

### **Nature of Resolutions**

Based on agreements supplied by HHS and summaries of complaints and resolutions provided by FMCS, it is clear that many resolutions developed by FMCS mediators and community conciliators were extremely creative. In many cases, they included terms that went beyond the provisions of the Act. For example:

- The complainant and a county office on aging reached an agreement in which the complainant accepted the office's decision that since he was under 60, he was not eligible for home-delivered meals, even though he is blind. The office agreed to provide technical assistance by helping him apply for other programs. The office also informed the complainant of his eligibility for "guest" status and invited him to attend citizens' advisory council meetings.
- A lengthy agreement worked out between a complainant and the Texas Department of Human Resources provided that the department would determine the complainant's eligibility for its winter energy conservation program. It arranged a home visit to help the complainant identify potential sources of assistance from other state and federal agencies. The par-

ties released each other from liability, apologized for any misunderstandings, and agreed that in the future they would discuss any allegations of noncompliance in the presence of an FMCS mediator before initiating other action.

- A complainant alleging denial of admission to a nursing aid program because of age, sex, and race agreed to go into carpentry instead. The college agreed to arrange financial aid.

### **Role of Neutrals**

Virtually all FMCS mediators and community conciliators interviewed said that mediation was helpful, and that their role was a useful one. As a group, they believe that the informal nature of the process helped to produce settlements, because the parties were more at ease than in a formal court or agency setting. Interviews also revealed sharp differences of opinion concerning the mediator's role, particularly when cases involved an imbalance of power between the parties, and the mediator's interest in the contents of agreements.

All FMCS mediators and community conciliators agreed that complainants generally were unrepresented in mediations, and that respondents normally were represented either by counsel or a high-ranking official. However, there was disagreement over whether power imbalances existed between complainants and respondents and, if so, what mediators should do about them.

Most FMCS mediators reported that they rarely encountered a disparity in bargaining ability in ADA cases. They noted that complainants were not intimidated by the mediation process, and that almost all complainants presented their cases adequately. Virtually all FMCS mediators, consistent with the traditional model of labor/management mediation, believe that it was not their role to correct power imbalances. These mediators stated that if they attempted to correct an imbalance, they would be functioning as advocates for one party rather than as a neutral.

One FMCS mediator acknowledged that complainants often were less sophisticated than the respondents' representatives, and that, as a result, complainants may not have expressed their positions adequately. His approach was to ask questions of complainants, but not "put words in their mouths." He simply tried to get complainants to state what they wanted.

Generally, community conciliators took a more active role in correcting perceived power imbalances. They saw their function as helping weaker parties formulate and articulate their positions in appropriate ways. One community conciliator stated that this was part of a mediator's "ethical responsibility." Another

often suggested to unrepresented parties that they seek legal advice.

There was similar disagreement over whether a mediator should be concerned with the contents of a settlement. Again, FMCS mediators followed the traditional labor/management model, stating that the contents of an agreement were irrelevant so long as both parties accepted the agreement. As one FMCS mediator noted, "right and wrong do not matter; whether something is age discrimination is for the enforcers, not the mediators." Another said that "the important thing is that the complaint is resolved."

Most community conciliators disagreed with this view. They sought agreements that were "fair" to both sides. One community conciliator said that he "disagreed ethically" with the FMCS training message that any agreement was acceptable as long as both parties agreed.

Generally, community conciliators believed that they could prevent a totally inadequate settlement from developing by controlling the mediation process. One conciliator stated that she would use "reality testing" to help the weaker party decide whether a settlement offer was appropriate. She would ask the complainant how the agreement would look a day or a week later and advise the party to take the agreement home and discuss it with friends and family. A number of community conciliators stated that if they saw a truly unconscionable agreement developing, they would terminate the mediation process.

This approach is clearly at odds with the FMCS mediators' prevailing view, and may help explain, at least in part, the criticism voiced by some FMCS officials about community conciliators, namely, that they used methods that were inconsistent with appropriate mediation techniques.

Some people involved in civil rights enforcement have criticized mediation because the process fails to inform complainants of their legal rights. Interestingly, neither community conciliators nor FMCS mediators considered it appropriate to provide this information within the mediation context. This view is shared by FMCS headquarters personnel. One official said that a mediator should neither act as advocate nor be concerned with the goals of the statute, so long as both parties are satisfied with the agreement. This view differs from that of many mediators in other contexts involving disputes between unrepresented individuals over alleged legal rights (most notably divorce mediation). Generally, FMCS mediators stated that their role was to obtain an agreement, not to explain the details of the law to complainants. However, most FMCS mediators explained the statute in general terms during the initial session.

Somewhat surprisingly, FMCS mediators generally did not perceive themselves as hampered by the ambiguities of the statute, because they saw their role as

facilitating settlements, not deciding right or wrong. One FMCS mediator stated that the ADA established his role as a mediator, and did not establish strict legal standards to be applied to the process.

### **Use of Information Developed through Informal Processes**

Government-wide ADA regulations require that mediators "protect the confidentiality of all information obtained in the course of the mediation process." Mediators are prohibited from testifying in "any adjudicative proceeding" and from producing any document or otherwise disclosing any information obtained in the course of the mediation process without prior approval of the Director of FMCS. [45 C.F.R. Section 90.43(c)(3)IV].]

In keeping with this requirement, no information developed through mediation is shared with any party outside of FMCS. If mediation is successful, FMCS sends the funding agency a brief report (not the detailed report submitted to FMCS by the mediator) and a copy of the written settlement agreement. If mediation fails, the funding agency receives notification of that fact. It does not have access to any information generated by FMCS in conducting the mediation.

This policy, as well as the need to protect the mediators and the mediation process, makes it extremely

difficult for outside researchers to assess the techniques or results of ADA mediation. Under current FMCS policy, not even "sanitized" case files with all identification removed may be shared with outsiders. Nor may mediation sessions be observed, even with the consent of both parties.

### **Use of Precedents**

In general, mediated agreements have no precedential effect on future mediations. They can be useful, however, in providing examples of ways in which similar problems have been resolved by other mediators.

FMCS has not developed a formal system regarding the use of mediated agreements as precedent. Nor has an informal system of sharing case resolutions been developed, at least with regard to community conciliators. During the three years in which FMCS used community conciliators, community conciliators did not meet as a group beyond their initial training. Nor did they meet with the FMCS mediators as a group. Furthermore, FMCS never developed a system to provide community conciliators with feedback on the methods used in handling their cases, or with information on what other mediators were doing with similar cases or problems.

### 3.

## Reactions to ADA Mediation

### Reaction of Disputants

No assessment of disputants' reactions could be undertaken since disputants' identities were not made available.

### Reaction of Interest Groups

In interviewing officials of organizations representing the elderly (many of which had lobbied for passage of the ADA), there was an almost universal lack of experience with or even knowledge of the mediation component of the enforcement process. None of the representatives interviewed had any direct experience with individual ADA cases or with the mediation process. Those interviewed knew of relatively few complaints under the ADA because people do not know about the statute. Government agencies and recipients of federal funds have done nothing to publicize the ADA. Curiously, neither have the groups whose representatives we interviewed.

In contrast to some government officials interviewed, officials of groups representing the elderly believe that the elderly are an appropriate group for mediation and that, as a whole, they are not overly intimidated by the process. One official noted that the EEOC mediates Age Discrimination in Employment Act cases, and that mediation has not led to a reduction in the number of those cases. Another official stated that local advocacy groups could help elderly complainants overcome their fears of mediation.

Officials of organizations representing the elderly recognized that, because of ambiguities in the statute and a lack of case law, there is little authority for determining ADA's scope and meaning. This made some officials skeptical of mediation, because they believed that mediators need a clear understanding of the Act before they can develop appropriate settlements.

Although those interviewed believed that the elderly population was appropriate for mediation, they were concerned about the power imbalances between individual complainants and institutional respondents. They agreed that mediators should be more active than in traditional labor/management cases, so that they could correct power imbalances. One representative stated that mediators also should be concerned about content, and ensure that all agreements are consistent with the goals of the statute.

### Reaction of Enforcement Agencies

Given the fact that the ADA complaint structure initially removes mediation from the enforcement agencies, one might anticipate resistance to or criticism of the process by those agencies. Regional managers of funding agencies interviewed noted initially that they had not had great experience with the statute or the process because so few cases have been filed. However, several regional managers had strong negative opinions about ADA mediation.

One HHS regional manager stated that she and her staff "don't think it works well at all," and that FMCS mediation of these cases had not been "useful." In particular, she believed that FMCS waited until too close to the deadline and then was rushed, often leading to an unsuccessful mediation. She also objected to the fact that when a case is returned to HHS after unsuccessful mediation, government-wide regulations require the agency to employ an informal means of settlement. She found this process duplicative, annoying to parties, and time consuming.

Another problem concerning complaints alleging multiple grounds of discrimination (for example, race, sex, and age). One official complained that the agency must delay action on all grounds of a complaint to await FMCS' mediation of the age complaint. This official believed that the agency should be able to



employ its own early complaint resolution procedures for ADA cases as well as for others.

One regional employee observed that in several cases complainants decided not to press ADA issues because of the delay created by the mediation component. After having the options explained to them, these complainants sought remedies under statutes prohibiting discrimination based on race or handicap. (In view of FMCS' relatively rapid turnaround time, it could be that these complainants were given biased information about delays.)

Another regional manager cited three problems with the design and operation of the mediation scheme. First, she believed that automatic referral of all complaints to mediation creates stumbling blocks in cases where complainants sought regulatory changes. Second, she complained that the agency received inadequate information from FMCS and mediators, that

the one-page report from mediators contained virtually no useful information, and that, in essence, her agency must start from scratch at that point. The third problem was her concern that resolutions achieved by mediators do not ensure compliance with the statute. As she put it, "FMCS is interested in resolution, not compliance." She believes that, as a result, underlying problems are not always solved and, therefore, may recur. She was fearful that people were settling for less than full compliance.

Several other funding agency employees cited the informal investigation at the agency level as duplicative. They felt that, following unsuccessful mediation, the complaint should be submitted for formal investigation. One employee noted that this would not rule out the possibility of settlement, because agencies always try to settle, even during a formal investigation.

#### 4.

## Conclusion

The purpose of this assessment was to determine whether disputes between individuals and institutions over alleged denials of federally guaranteed civil rights can be mediated successfully. Due to limited numbers of cases and restrictions on our access to information, it was impossible to reach definitive conclusions. However, a number of observations can be made about mediation under the ADA.

First, there have been significant problems with the statute itself. The ADA is confusing, perhaps toothless, and unenforced. There is a general lack of awareness about its existence and purpose. Even advocacy organizations for the elderly, the one group potentially most affected by the Act, generally have not taken an aggressive role in enforcing the statute. Nor have they been active in exploring the opportunities offered by mediation. Furthermore, there is some slight evidence that enforcement agencies, unenthusiastic about mediation by an independent agency, have been withholding complaints from FMCS or discouraging complainants from filing under the ADA when their complaints are covered by multiple anti-discrimination statutes.

Whatever the reason, few complaints have been mediated. Where the mediation process has been successful, it has resolved complaints quickly, and in most cases within the 60-day time limit. On the other hand, the rate of resolution by agreement reached in mediation shows a steady decline in the five years since the experiment began—from 43 percent in 1979 to 26 percent in 1983.

Many complaints filed under the ADA have been particularly difficult to mediate. The statute applies only to complaints involving the provision of services or benefits by recipients of federal funds. Thus, disputes generally arise between parties with no joint history and no continuing relationship. Complaints most often deal with the denial of admission to an academic program or the provision of a requested

service. These disputes leave little room for adjustment or compromise.

Furthermore, beyond the theoretical sanctions of the statute (and, perhaps, the inconvenience of a full investigation by the funding agency), respondents lacking an ongoing relationship with complainants have little incentive to resolve these cases. Indeed, as several mediators noted, a mediated agreement may offer complainants their only possible remedy.

Perhaps the most interesting feature of this experiment was the use of two groups of mediators. FMCS mediators and community conciliators differed significantly in their backgrounds, training, and approaches to mediating civil rights complaints. FMCS mediators, with extensive experience in labor/management disputes, take a traditional approach to mediation. This approach emphasizes neutrality as well as the mediator's lack of concern for the substance of the dispute, the contents of an agreement, or potential imbalances of power between the parties. Most community conciliators, on the other hand, felt some responsibility for assisting unrepresented complainants and obtaining equitable agreements.

Whether the different orientation produced different processes or results cannot be determined from available data. It is clear, however, that while total numbers are small, there was a sharp difference in rates of agreement obtained by the two groups of mediators. The difference in rates of obtaining agreements is particularly striking in view of the fact that community conciliators stated that they were concerned about the content of agreements and believed that the acceptability of an agreement was not sufficient if it did not resolve the complaint fairly.

There was a surprising lack of communication within and between the two groups of mediators. The isolation of the mediators from one another and from information about the results of other mediators' efforts may have hampered their ability to resolve cases

in the most effective or creative ways.

Finally, personnel at regional offices of funding agencies seem dissatisfied with the mediation process. They believe that since these agencies handle other civil rights complaints, mediation would be quicker and less cumbersome if conducted in-house. (It is not clear whether these criticisms would persist if rates of agreement through mediation were higher.)

No firm conclusions or prescriptions can be based on these observations. Yet two points are clear. First, it is unfortunate that FMCS terminated its experiment with community conciliators before accumulating sufficient data to permit firm conclusions about the relative success of private mediators, many of whom were experienced in resolving community disputes and discrimination complaints.

Second, far more thought should be given both to the role of legal standards in the mediation of civil rights complaints and to the role of mediators and the specific processes that should be used in mediating disputes between individuals and institutions.

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