

DISABILITY ACCESSIBILITY GUIDEBOOK

for Mediators





ADR Institute of Canada
Institut d'arbitrage et de
médiation du Canada ^{TM/CM}

ADRIC.ca

ABOUT US

ADRIC is the Canadian national community of Alternative Dispute Resolution Professionals and Corporate collaborators promoting or using Alternative Dispute Resolution (ADR) approaches to bring together the provider and user perspectives of ADR.

Together with its affiliates and public and private organizations, ADRIC works to:

- promote ADR as an alternative to litigation on the national and international stage;
- support affiliates in providing information, resources and training on the appropriate use of ADR locally, and advocate for / provide same at the national level;
- support our members to reach their greatest potential to benefit their individual and organizational clients.

Through networking, professional development, accreditation, notices of opportunities and rosters, ADRIC members gain a credible and competitive advantage in positioning themselves successfully in the marketplace. ADRIC is the only national professional body dedicated to supporting members and organizations in an otherwise unregulated ADR industry.

ADR Institute of Canada, Inc.

234 Eglinton Avenue East, Suite 407

Toronto, ON (Canada) M4P 1K5

TEL: 416-487-4733

TOLL FREE: 1-877-475-4353

FAX: 416-901-4736

www.adric.ca

ARBITRATION. MEDIATION. RESOLUTION.

CO-AUTHOR - MARTHA E. SIMMONS



Martha E. Simmons, JD, LL.M, Ph.D, Winkler Professor of Dispute Resolution, Academic Co-Director, Winkler Institute

Martha E. Simmons has been the Director of Osgoode's Mediation Intensive Program and Mediation Clinic since 2012. She joined the full-time faculty in July 2017. As Academic Co-Director of the Winkler Institute, she also serves as the Winkler Professor in Dispute Resolution.

Professor Simmons, who has JD, LL.M and Ph.D degrees from Osgoode, was the recipient of an Osgoode Hall Law School Teaching Award in

2013 for her work in both the JD and Graduate Programs. Her primary areas of research and teaching are dispute resolution, legal education, innovation and access to justice.

She is also active in the community and currently serves as Academic and Policy Committee Co-Chair of the Family Dispute Resolution Institute of Ontario (FDRIO) and as a Vice-President of the Association of Canadian Clinical Legal Education (ACCLE).

CO-AUTHOR - DAVID LEPOFSKY

David Lepofsky, CM, O.Ont, LL.B (Osgoode Hall Law School 1979), LL.M (Harvard Law School 1982) LL.D. (Hon.) (Queens 1999, University of Western Ontario 2006, Law Society of Upper Canada 2016)

David Lepofsky is a visiting professor at the Osgoode Hall Law School and an adjunct member of the University of Toronto Faculty of Law. He holds volunteer leadership roles in the disability community. He is chair of the Accessibility for Ontarians with Disabilities Act Alliance and the chair of the Toronto District School Board's Special Education Advisory Committee.

Until 2015, he practised law in Toronto with the Ontario Ministry of the Attorney General, in the areas of constitutional, civil, administrative and most recently, criminal law.



TABLE OF CONTENTS

CHAPTER 1

Introduction: Why it is Important to Ensure that Participants with Disabilities can Fully Participate in your Mediations	9
The Meaning of Accessibility	11
Why the Mediator is in a Position to Ensure Accessibility	12
The Guidebook: An Outline	13
Resources	14

CHAPTER 2

What, When and How To Ask: Inquiring about Disability-related Accommodation in Mediation	15
What to Ask: A Focus on Accommodation	16
When to Inquire: A Continuing Obligation	16
How to Ask: Using Appropriate and Inclusive Terminology	18
Resources	19

CHAPTER 3

How It Works: The Mediation Process and Accommodation	20
Timing of the Mediation and Breaks	20
People Using Service Animals	21
Behaviour in the Mediation	22
Capacity to Mediate	23
Resources	25

CHAPTER 4

Accommodating the Needs of People with Hearing Loss	26
Facts and Stats at a Glance	26
About Hearing Loss and its Impact in Mediation	26
Possible Accommodations	27
Sign Language Interpretation	28
Real-Time Captioning	31
Deafblind Intervenors	32
Assistive Listening Devices	32
Lip-Reading	33
Resources	33

CHAPTER 5

Accommodating the Needs of People with Vision Loss	35
Facts and Stats at a Glance	35
About Vision Loss and its Impact in Mediation	35
Possible Accommodations	37
Early Disclosure of Documents	37
Accessible Written Material	38
Resources	39

CHAPTER 6

Accommodating the Needs of People with Intellectual Disabilities	40
Facts and Stats at a Glance	40
About Intellectual Disabilities and their Impact in Mediation	40
Possible Accommodations	42
Process Accommodations	42
Support Persons	43
Communication Boards and Photographs	43
Resources	44

CHAPTER 7

Accommodating the Needs of People with Mental Health Conditions	45
Facts and Stats at a Glance	45
About Mental Health Conditions and their Impact in Mediation	45
Possible Accommodations	47
Process Accommodations	47
Support Persons	48
Resources	49

CHAPTER 8

Accommodating the Needs of People with Physical and Mobility Disabilities	50
Facts and Stats at a Glance	50
About Physical and Mobility Disabilities and their Impact in Mediation	50
Possible Accommodations	51
Physical Space	51
Attendant Care	53
Scheduling	53
Resources	53

CHAPTER 9

Accommodating the Needs of People with Communication Disabilities	54
Facts and Stats at a Glance	54
About Communication Disabilities and their Impact in Mediation	54
Possible Accommodations	55
Augmentative and Alternative Communication	55
Communication Intermediaries	56
Resources	57

CHAPTER 10

Accommodating the Needs of People with Autism	58
Facts and Stats at a Glance	58
About Autism and its Impact in Mediation	58
Possible Accommodations	59
Limit Numbers of Participants	59
Set a Clear Agenda	60
Sensory Accommodations	60
Online Dispute Resolution	60
Resources	61

CHAPTER 11

Accommodating the Needs of People with Learning Disabilities 62

- Facts and Stats at a Glance 62
- About Learning Disabilities and their Impact in Mediation 62
- Possible Accommodations 63
- Adaptive Technology 64
- Process Accommodations 64
- Timing 64
- Agenda-setting and Preparation 64
- Opening Statements 65
- Resources 65

CHAPTER 1

Introduction: Why it is Important to Ensure that Participants with Disabilities can Fully Participate in your Mediations

Mediation is increasing in popularity and use. Despite this fact, mediators and mediation training programs have not considered a large proportion of society in a sufficient way. The population we are talking about is persons with disabilities. Over four million Canadians have a physical, mental or sensory disability. These statistics suggest that in any mediation on any day, any number of mediation participants will have a disability. It is imperative that mediators be aware of the barriers faced by persons with disabilities and the ways to accommodate. Mediation, as a voluntary facilitated negotiation process, requires active contribution of all participants. Mediation aims to empower parties but this is not possible unless parties can participate meaningfully in all parts of the process. Many mediators have never thought about disability barriers to participation. Mediation training courses do not discuss disability. Mediation texts rarely cover the topic. Because it is not discussed, accommodations are not always being made. Mediators are in the best position to effect change in this regard by making mediation accessible to people with disabilities. This Guidebook is de-

signed to help. It is a resource for mediators. It can also be helpful to representatives and parties in mediation.

Historically, persons with disabilities have faced many barriers when taking part in legal proceedings in Canada. Mediation, as an analogous process, and a process now mandated in many court processes, must learn from and remedy these barriers where it is possible to do so. Section 15 of the Canadian *Charter of Rights and Freedoms* guarantees the right to the equal protection and equal benefit of the law without discrimination because of mental or physical disability.¹ That includes the right of barrier-free full access to, and full participation in court proceedings and mediations that form part of the court process. In addition to *Charter* guarantees, mediators have a duty to accommodate people with disabilities, even in private mediations, pursuant to human rights legislation, to Supreme Court of Canada rulings, to the *Employment Equity Act*, and to other provincial legislation such as the *Accessibility for Ontarians with Disabilities Act* (AODA)².

If you plan in advance for the likely possibility that participants in your mediation will have disabilities, you will have greater success. If you do not, you will more often be hit with barriers that could stop the mediation in the middle until you implement an accommodation. This will slow down the process and cost parties time and money. Making mediations fully accessible to persons with disabilities requires joint efforts by mediators, governments and the legal profession. Currently, there is little practical assistance for mediators in Canada. One notable exception is British Columbia's Mediator Roster Society's helpful guide, *Accommodating People with Disabilities: A Reference Guide for Mediators*.³ The United States offers mediators more guidance with the *Americans with Disabilities Act* (ADA) *Mediator Guidelines*.⁴ Those guidelines provide a helpful starting point for our consideration. However, these are intended for use only in cases brought under the ADA. This Guidebook aims to be broader in scope.

In the middle of a mediation, a mediator cannot easily pause to research and arrange the options for solving accessibility issues. Who wants to stop a mediation in mid-process? Mediators may not know about all the barriers that can arise in mediations that

impede persons with disabilities or about all the available solutions, which often require minimal effort, to overcome these barriers. Mediators may not even know that there are people with disabilities needing accommodation in their mediations. It is encouraged that you seek out such information. Many disabilities are invisible. It is in the mediator's hands to ensure accessibility. This is the first step.

There is a great deal that individual mediators can do to make a real difference. Mediators often voice a strong desire to help, but have voiced the need for a collection of practical tips on what they can do to assist. This Guidebook responds to that desire for guidance. It offers mediators practical suggestions on what they might do to make their processes accessible. It does not advocate a particular approach to mediation or mediator orientation. Those decisions and strategies are for you to decide upon. The suggestions offered should be workable within your process, and are not intended to change the nature of the mediations that you conduct. Each individual mediator knows his or her process the best.

This Guidebook's suggestions to mediators are based on a recognition that mediator neutrality is a hallmark of mediation. Mediation is a flexible process. The mediator has significant leeway to amend the process to accommodate a person with a disability, without risking a breach of neutrality. Indeed, mediation's flexibility may make it a better process upon which to embark for some people with disabilities, rather than a more formal one-size-fits-all rigid process. Accommodations for disability can be made, often with little effort.

THE MEANING OF ACCESSIBILITY

Before we can discuss ways to make your mediations accessible to people with disabilities, we must first define what we mean by accessibility. An accessible mediation will:

1. Enable parties, counsel, and other participants to get into the mediation space and remain there comfortably through the duration of the mediation;
2. Allow all participants to understand completely and take part meaningfully and fully in all phases of the mediation process;

3. Ensure that all participants understand the goals, steps, and ground rules of the process;
4. Make sure that all material and information conveyed in the mediation can be read and understood;
5. Make certain that all participants can fully and effectively communicate with all others involved in the mediation process, without any accessibility barriers.

Different disabilities that are discussed in this Guidebook include physical, mental, sensory, communication, neurological, mental health and intellectual disabilities. Despite this delineation, this Guidebook is also premised on an overarching belief in universal accessibility. All mediators should create a space and process that is, as much as possible, accessible to all at all times. Many of the suggestions offered here are best practices to apply irrespective of the presence of a need for disability accommodation. For example, speaking in plain language and reframing to ensure comprehension are good tools to use in all mediations whether or not a participant has a disability. Characteristics such as personality type and learning style, while not related to disability, can also be accommodated through an open environment that accepts and appreciates difference.

WHY THE MEDIATOR IS IN A POSITION TO ENSURE ACCESSIBILITY

A mediator is in an especially good position to help people with disabilities participate fully in the mediation process. The mediator is the steward of the process and knows that process better than anyone else. Most people have little or no experience with mediation. They may be afraid or reluctant to ask for an accommodation to their disability. They may not know that they can ask, or whom to ask. They may not know when it is appropriate to speak during the mediation. They may not even know what to ask for.

Before every mediation, every mediator, should, as early as possible, speak to counsel and clients to ascertain if there are any disability accommodation needs. Too many lawyers, acting for parties to a mediation, will have not themselves turned their minds to this. Thus, your pre-mediation inquiry will likely come to them as something that they have never before considered. Such a query will necessarily be paired with a detailed descrip-

tion of the mediation process and an estimated timeline of what the specific mediation will look like. Only after such a description is provided can a client make an informed decision about the kinds of disability accommodations required. Since mediation is not a commonly discussed or popularized process in the media, people may have little understanding as to the impact of their disabilities on their ability to participate. You will be required to outline the process in sufficient detail to allow individuals with disabilities to imagine the kinds of accommodations and supports they will require.

A mediator should aim to create a welcoming environment in which a person with a disability can feel comfortable seeking an accommodation for their disability needs. The mediator's neutral position allows for the gathering of information from both sides that will enable the creation of the best process possible for the disputants. As the process director, the mediator can and should adjust the process to accommodate as much as is practicable. The mediator can also direct counsel to take steps to ensure that a person's disability-related accessibility and accommodation needs are met. You cannot control the language or behaviours of all involved in the mediation. What you can do, however, is set an example and expectation for all to follow. Disability accessibility and accommodation is one major consideration, the one on which we focus here. There are many other characteristics that the mediator will want to take into account. Gender, power imbalance, and the presence of counsel for one or both parties are just some other examples.

THE GUIDEBOOK: AN OUTLINE

This Guidebook will provide you with important information on how to accommodate the needs of participants with disabilities in your mediations. This Guidebook suggests a three-step approach that requires the following actions:

- 1) Find out if any person in your mediation has a disability-related need requiring accommodation to fully participate in the process;
- 2) Direct the steps that will meet their needs; and
- 3) Let the person with a disability know to speak to you if that need is not effectively addressed.

The first step requires asking what individuals need. Partici-

pants with disabilities are uniquely poised to tell you about their specific needs. Chapter 2 will provide tips on how to ask. Chapter 3 will then discuss the mediation process and some general suggestions on making mediation more universally accessible for all participants. Chapters 4 through 11 will then assist in fulfilling the second step by presenting particular challenges and accommodations for people with specific disabilities. Each of these Chapters will begin with the way in which the mediation will impact the person with a disability and then will suggest specific accommodations that may be required.

A few caveats: this Guidebook offers tips on a barrier-by-barrier or disability-by-disability basis. It is important to remember that any two people with the same disability may require different accommodations. Many examples will be offered throughout the Guidebook, but to start, consider the following: not all blind people use Braille and not all deaf people use sign language. As well, disabilities do not always fit into watertight compartments. A person can have more than one disability. For example, some physical or sensory disabilities might for some people be accompanied by a learning disability. The complete lived experience of mediation participants must be considered when assessing the impact of the mediation process on the individual. Thus, the third step is very important. Make sure you circle back to the participant who has requested a disability-related accommodation to ensure that the accommodation is indeed meeting their needs.

RESOURCES

Accessibility for Ontarians with Disabilities Act -
<https://www.ontario.ca/laws/statute/05a11>

Weiler Report – Making Ontario’s Courts Fully Accessible to Persons with Disabilities -
http://www.ontariocourts.ca/accessible_courts/en/report_courts_disabilities.htm

British Columbia Mediator Roster Society, *Accommodating People with Disabilities: A Reference Guide for Mediators -* [www.mediatebc.com/PDFs/1-23-Resources-\(For-Mediators\)/AccommodatingHandbook-web.aspx](http://www.mediatebc.com/PDFs/1-23-Resources-(For-Mediators)/AccommodatingHandbook-web.aspx).

-
- 1 *Constitution Act 1982* c.11, “Canadian Charter of Rights and Freedoms” at s.15(1).
 - 2 2005, S.O. 2005, c.11.
 - 3 Mediator Roster Society, *Accommodating People with Disabilities: A Reference Guide for Mediators*, online: [www.mediatebc.com/PDFs/1-23...Mediators\)/AccommodatingHandbook-web.aspx](http://www.mediatebc.com/PDFs/1-23...Mediators)/AccommodatingHandbook-web.aspx).
 - 4 ADA Mediation Standards Work Group, *Americans with Disabilities Act (ADA) Mediator Guidelines*, online: <http://www.mediate.com/articles/adaltr.cfm>.

CHAPTER 2

What, When and How To Ask: Inquiring about Disability-related Accommodation in Mediation

Preparation is a most important part of a mediator's job. There are many factors to consider when preparing for mediation. Disability-related accommodation is often overlooked. Unless you prepare adequately, you may not know which participants have a disability and need accommodation and, in turn, you will not be equipped to mediate.

Will you know if participants in your mediations have disabilities? Maybe or maybe not. Many disabilities are invisible and are not obvious to an onlooker. Examples of invisible disabilities include debilitating pain, deafness, dyslexia and epilepsy, among many others. Of those disabilities that may be visible, mediators and other mediation participants may not notice them unless brought to their attention. For instance, a blind lawyer, sitting at the mediation table, may not have a white cane displayed in plain view. The only way to know about accommodation needs is to ask. The Chapter will discuss what, when and how to inquire about accommodation so that you can prepare for and support meaningful participation by all involved in the mediation.

WHAT TO ASK: A FOCUS ON ACCOMMODATION

Once you accept the need to ask about accommodation needs, the question becomes, “What exactly am I supposed to ask?”. How do you inquire about disability in order to optimize your preparation and organize for accommodation? First, and most important, remember to ask for what accommodation people require, rather than asking at large about their disabilities. It may seem like a small distinction but probing into people’s disabilities can be unnecessarily intrusive. The specific label of the disability can at times be irrelevant. However, asking about required accommodations is essential. Asking someone: “Do you have a mental health disability?” can be off-putting. Instead, ask if people have any accommodation needs that would help them fully participate in the mediation.

Even if you ask in this way, people may not speak up to identify their need for an accommodation. Some may be nervous about speaking up at all. Some may be reluctant to bring attention to their disability needs. Some may not know what to ask for. You must inquire about the needs of all participants in the mediation in a manner that welcomes disclosure of their accommodation needs.

Asking once may not be enough. You should inform parties of the ability to ask for disability-related accommodation at several points in your pre-mediation process and throughout the mediation itself. Be sure to offer accommodation, by expressing your willingness to do so both aloud and in writing, at each stage. This method will help ensure that your offer is received by all, including those who cannot hear the spoken word and those who cannot read print.

WHEN TO INQUIRE: A CONTINUING OBLIGATION

Your inquiry about accessibility and disability accommodation needs should begin from the very first communication with mediation participants. You should send an email or letter to all participants with a statement to the following effect:

I aim to create an accessible mediation process. If you have a disability-related need for accommodation to let you fully participate in the mediation, please let me know as soon as possible so that I can arrange for such accommodation.

Having a standard form statement such as this on your initial emails or letters will ensure that you do not forget to inquire about accommodation. The earlier in the process you learn about any accessibility and accommodation needs, the easier it will be for you to successfully address them.

You should repeat this inquiry in the mediation's preparation phase. In any formal pre-mediation meeting with the parties and/or at any ad hoc meeting with counsel before the mediation begins, you should canvass with counsel in person if there are any participants who have disability-related accommodation needs. It is here that you will have an opportunity to describe the mediation process and expectations in more detail so that participants can ascertain their needs. Do not be surprised if lawyers have not thought about this in advance, and have not canvassed their clients about their particular needs.

During the mediation itself, you should include a comment in your opening statement that invites participants to raise their needs for accommodation before the mediation begins. You might find wording like the following to be helpful:

I would like to make sure you receive reasonable accommodation for any physical, sensory or mental disabilities that may affect your ability to fully and equally participate in the mediation. If you require any accommodation, please let me or your counsel know as soon as you realize that someone needs assistance. We will do whatever is reasonably necessary to make your mediation experience pleasant and fruitful.

Recall that it can be too late to plan for an accessibility need if this is the first time you are raising the issue. Hopefully you have heeded our prior advice and this is at least the third time the parties are hearing about your openness to accommodate. If you find out about an accessibility need too late to accommodate it, you should reschedule the mediation so you can arrange a needed accommodation. Also, leave the door open for parties to discover their need for accommodation during the mediation itself as the need arises.

Some may be reluctant to publicly disclose their accessibility need. A person in a wheelchair has an obvious disability. Yet

some invisible disabilities may be neither obvious nor always comfortably disclosed. A person with a mental health issue, a learning disability, an anxiety disorder or with a need to frequently visit the washroom, may not wish to voice these in front of a room full of strangers. Your offers of accommodation might be most helpful if they give individuals a chance to discuss their needs with you or counsel in a discreet way.

You may be reluctant to ask participants about accessibility or accommodation needs, for fear of offending someone. The next section gives you practical tips to ensure this does not happen.

HOW TO ASK: USING APPROPRIATE AND INCLUSIVE TERMINOLOGY

Some people fear discussing disability with strangers because they do not know the appropriate terminology to use. You may wonder whether there are terms to avoid when speaking to and about persons with disabilities. There is no need to be hypersensitive or worried about this. Do not avoid inquiring about accommodation out of such a concern.

Mediators cannot be expected to know all the latest terminology for disabilities. Do not fear that the topic of disability is touchy for people with disabilities. You should feel comfortable asking a person with a disability about preferred terminology. Each individual may have a different preference. Disability-related terminology periodically changes, as many people with disabilities know.

Do not worry about using visual terms like “see” with a blind person, or audio terms like “hear” with a person with hearing loss. People with vision loss will colloquially speak about going to see a movie. Do not worry about offending anyone with the use of such common terms. They are not likely to be offended. The most important advice is to avoid oft-used, pejorative or negative descriptions of disabilities. Avoid terms like “victims” of cerebral palsy or people who “suffer” from blindness or who are “afflicted” with deafness, or persons “confined” to a wheelchair. Those terms, which still appear in newspapers and other media, negatively stereotype persons with disabilities. They suggest that people with these disabilities live a life of misery and suffering. While possibly well-intentioned when used, these

phrases are insulting. They reinforce a view of disability as something wrong with the individual. In addition, when referring to people without disabilities, it is best to use neutral terms like “people without disabilities”. To refer to them as “normal people” implies that persons with disabilities are “abnormal”. Once again, this terminology is offensive.

There has been a recent effort to select terminology in the disability field, which gets away from old stereotypes. For example, this population was often called “the disabled” or “the handicapped”. Such terms over-emphasized their disabilities. They under-emphasized the fact that they are people first, who happen to have disabilities. They also ignore the social construction of disability: persons with disabilities only have difficulty in some societal settings because these environments were created by and for persons without disabilities. It is best to simply refer to mediation participants with disabilities as “persons with disabilities”. That focuses on their being people first, rather than defining them solely by their disabilities.

Much commonly used terminology remains perfectly acceptable. People with vision loss will, for example, likely have no difficulty with the use of terms such as blind or visually impaired. Other disability terminology has changed. The old term “mentally retarded” should never be used. Although acceptable in the past, it is outdated and offensive. Instead, the terms “developmental” or “intellectual disability” should be used. The term “crippled” has also been long discarded. Instead, it is best to say “persons with mobility disabilities” where this is the disability being discussed. There are many misapprehensions when it comes to people with disabilities. For example, the public has been misinformed for years that the use of a white cane necessarily connotes total “blindness”. In reality, the white cane is an assistive device that can be used by people with either total blindness or low vision. This is just one example of many myths that must be debunked. Be open to learning that your assumptions are faulty and this will go a long way.

RESOURCES

ARCH Disability Law Centre – www.archdisabilitylaw.ca

ARCH, “Providing Legal Services to Persons with Disabilities”,

<http://mrc.lsuc.on.ca/pdf/equity/providingLegalServicesPersonsWithDisabilities.pdf>

CHAPTER 3

How It Works: The Mediation Process and Accommodation

As the mediator, you decide how the mediation will proceed. There are many process choices that must be anticipated in all cases, but these are particularly important when you have participants with disabilities. Process considerations include, for example, a reflection on the length and time of day of the mediation. This Chapter will encourage you to think carefully about the pacing of the mediation and to inquire about when breaks are required or would be helpful. This Chapter will also consider how to plan for mediations that will include service animals, how best to manage disruptive behaviour during the mediation, and how to assess capacity to mediate.

The suggestions offered here will work within any mediation paradigm that you employ. Regardless of whether you conduct mediations entirely in open session or in caucus, the issues raised are relevant and applicable.

TIMING OF THE MEDIATION AND BREAKS

Most mediations are set for half or full day sessions. Just because

this is the norm does not mean it will work for all participants. Parties, counsel, or other mediation participants may have disabilities, which produce accommodation needs in relation to the pacing or timing of the mediation during the day. Mediations can last a very long time, requiring stamina, which some participants do not have. Other participants may have a particular time of day in which they are not able to participate meaningfully. Some participants, for example, have fatiguing conditions requiring more frequent breaks and/or requiring them to begin mediation earlier or later in the day.

Canvass with parties and counsel beforehand on how best to handle such circumstances. Inquire whether the timing you typically propose will be amenable to all participants. Let prospective mediation parties know what a typical day in mediation looks like. When do you start? How frequently do you take breaks? Is there a lunch break and if so how long is it? There are many reasons why answers to these questions will be important to participants.

Although you may have a schedule you typically employ, allow participants to take breaks as they require. Let them know that a reason for the break need not be provided. Some reasons that pauses will be required might be indelicate or too personal to discuss in an open forum. For example, some may need frequent washroom breaks, with the need arising very urgently and suddenly. Therefore, any inquiry is best made in a private setting.

In addition to ad hoc breaks that can be requested by participants, regular breaks should be built-in to every mediation. We can all use some time for rejuvenation in a demanding process like mediation. Let all participants know that if anyone needs more frequent breaks, or needs to interrupt the mediation for health reasons, they can ask you. Discuss these items in an opening statement so that all involved may feel at ease.

PEOPLE USING SERVICE ANIMALS

Increasingly, people with different disabilities use trained service animals. The best known of these are guide dogs for people with vision loss. Service animals can also assist people with hearing loss, people with motor and mobility limitations, people with

autism spectrum disorder, people with mental health conditions and those with other disabilities. For example, individuals with manual dexterity limitations may have a service animal to retrieve needed objects. Service animals are live assistive devices and should be treated as such. They are not pets. Petting, talking to, or distracting these animals interferes with their jobs and may be dangerous for the animal or handler.

Persons with disabilities are entitled to, and should be welcomed to bring their service animals with them to mediation. You would think that by now, it is widely understood that such service animals are not to be barred from public places, yet, persons with disabilities far too often still encounter difficulties in some public venues. At times, this triggers media coverage. Do not make your mediations a place where persons who rely on service animals are made to feel unwelcomed. You want all participants to be able to contribute meaningfully throughout.

Once the service animal is welcomed into the mediation, how does it work? The animal is entitled to sit with the person who requires it. Service animals are trained to be unobtrusive. The individual requiring its service is responsible for managing the animal. You might canvass whether a break will be needed at some point to enable the service animal to relieve itself. This might require a few extra minutes to enable the individual and his or her animal to get outside and back to the mediation before resuming. If any other participants are fearful or allergic to the animal, you can arrange the seating to easily accommodate this. To ensure there are no unexpected difficulties, it is helpful to ensure that mediation participants are made aware of the presence of the service animal, and the right to have one's service animal present, in advance of the mediation.

BEHAVIOUR IN THE MEDIATION

Mediation, as an interactive process, requires that all participants retain productive communication throughout. Of course, persons with disabilities, like all others, should respect decorum during mediation. Mediators often request that parties not interrupt each other during the mediation so as to show respect to the other side. This is often one of several ground rules mediators set. You should be aware that some disabilities may lead a person to make sounds involuntarily from time to time, which the individual may

not be able to control. You would want to take this into consideration in addressing such situations. It is often helpful to discuss ground rules such as non-interruption with each party before the mediation so as to inquire whether refraining from interrupting is going to be difficult for one or both parties. Alternative ground rules can be put into place if either party is unable to refrain from making sounds while the other party is speaking. In the rare case where this cannot be managed, you may opt to hold the mediation more extensively in caucus. Think about the trade-off that will take place if you make this decision. Parties may be better able to express themselves in separate rooms but they will lose the benefit of hearing each other and repairing their relationships. Depending on the nature of the dispute, this may be worth the adjustment.

What other ground rules do you set in terms of behaviour? How can these rules impact the way in which a person with a disability can participate? Consider those ground rules which are necessary to maintain a productive process and those that merely exist as a matter of course.

CAPACITY TO MEDIATE

A topic that may arise during a mediation with some persons with disabilities is the capacity of a party with a disability to mediate. Such a consideration may arise, for example, in the context of some participants with mental health or addiction related disabilities. Capacity to mediate differs from legal capacity. Do not make stereotyped assumptions about the capacity of individuals to participate in mediation. The starting point is a presumption that a person has the capacity to mediate, unless shown otherwise. In short, if a party has sufficient capacity to understand the nature of mediation and to appreciate the implications of any agreement into which they may enter, that person should be allowed to participate.

A major consideration in deciding whether a person with a disability has the capacity to participate in mediation is to determine if that person appreciates the role of the mediator and understands the mediation process. If you have a concern that a participant may lack the capacity to participate in the mediation, you should conduct a screening to assess their capacity.

The *ADA Mediator Guidelines* provide the following helpful points in section I.D.:

D. Party Capacity

- 1 In order for the mediation process to work, the parties must be able to understand the process and the options under discussion and to give voluntary and informed consent to any agreement reached. Mediators and provider organizations therefore should determine whether the parties in a mediation have the capacity to do so. In making such determinations, neither the mediator nor the provider organization should rely solely on a party's medical condition or diagnosis. Instead, they should evaluate a party's capacity to mediate on a case by case basis, if and when a question arises regarding a party's capacity to engage in the mediation process and enter into a contract.
- 2 This evaluation should be based on several factors. The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. An adjudication of legal incapacity is not necessarily determinative of capacity to mediate. However, a mediation agreement signed by a person without legal capacity may require co-signing by a surrogate to ensure its enforceability.
- 3 Capacity is a decision-specific concept. Capacity to mediate may not be the same as capacity to make financial or health care decisions, to vote, marry, or drive. A party with a judicial determination of incapacity may still be able to participate in mediation. Conversely, a party without such a determination may not have the ability or understanding to participate.
- 4 If a party appears to have diminished capacity or if a party's capacity to mediate is unclear, the provider organization or the mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively. If so, the provider organization or the mediator should offer such an accommodation.

- 5 The provider organization or mediator should also determine whether the party can mediate with support. If a representative, such as attorney or support person, is present or participating, the party with diminished capacity remains the decision-maker in any agreement.
- 6 If, despite support, a party lacks capacity to participate in the mediation, mediation should not proceed unless a surrogate participates in the process to represent the interests of the party and make the mediation decisions in place of the party. Surrogates are defined according to state law, and might be agents under durable and health care powers of attorney, guardians, or family members. The surrogate and the person represented by the surrogate should be present and participate when possible. The mediator should encourage the surrogate to express the party's interests, values and preferences.⁵

RESOURCES

Judy Cohen, "Making Mediation Sessions Accessible to People with Disabilities" (2000), online: mediate.com/articles/cohen.cfm.

Saskatchewan Human Rights Commission, "Policy on Service Animals", <http://saskatchewanhumanrights.ca/learn/policies/policy-on-service-animals>.

5 ADA Mediation Standards Work Group, *Americans with Disabilities Act (ADA) Mediator Guidelines*, online: www.cardozo.yu.edu/cojcr/guidelines.htm at I.D.

CHAPTER 4

Accommodating the Needs of People with Hearing Loss

FACTS AND STATS AT A GLANCE

- About one in ten people in Ontario have hearing loss
- Categories of Hearing Loss
 - *Deaf - people born with no hearing at all*
 - *Deafened – people who used to be able to hear but lost all hearing*
 - *Hard of Hearing – People who have some hearing but below the level of hearing that would be ordinarily expected from a fully functioning hearing system*
- Of all accommodations requests received by court accessibility coordinators, accommodation for people with hearing loss is most common

ABOUT HEARING LOSS AND ITS IMPACT IN MEDIATION

The most common accommodation requests in Ontario's provincially-run courts in recent years have come from people with hearing loss. At least 10% of Canadians are deaf or have significant hearing loss. People can have a wide spectrum of hearing loss. Accommodation must be made for people with hearing loss. This Chapter will explore specific needs and accommodations for people with hearing loss.

Different people with hearing loss can use different means for effectively communicating with people who can hear. The

accommodation needs of persons with hearing loss can vary depending, among other things, on whether they are deaf (born deaf), deafened (lost all their hearing some time during their life), hard of hearing (retain some partial hearing) or are deaf-blind.

The deaf community has particular cultural values that must be taken into account and respected in mediation. In addition, some deaf people do not have a strong comprehension of the English language. Some may be functionally illiterate. This is important to consider right from the start when drafting and sending intake forms and mediation agreements. Notably, many mediators use flip charts or white boards in their mediations. These can be inaccessible for some deaf participants.

Since deaf and deafened participants, as well as participants who are hard of hearing, receive much of their information visually, body language and eye contact are very important. Watch your own body language and reflect on the messages that you are sending. When you nod to indicate that you are listening, is this being misconstrued as agreement?

There are some ways to eliminate barriers impeding the participation of persons who are hard of hearing that can assist all mediation participants. For example, noisy machinery, such as air conditioning, running in or near the mediation room can be very distracting. If it is not necessary, you might ask to have that equipment turned down or turned off. If that cannot be done, ask to change to a quieter room. Ambient noise can be a significant impediment for all participants in mediation, but particularly for those using assistive listening aids where feedback may be an issue.

POSSIBLE ACCOMMODATIONS

There are many assistive devices and techniques that people with hearing loss use. Two people with the same degree of hearing loss may choose different communication supports. Do not make assumptions about which supports a person with hearing loss will request or require. Some examples provided here are: sign language interpretation, real-time captioning, deafblind intervenors, assistive listening aids, and lip-reading. Other accommodations may also be used. For example, proper

amplification may be sufficient to provide accessibility. The preferences of different people with hearing loss vary from individual to individual.

Mediations do not often take place exclusively in one physical space. Interpretation supports may be required for communication in or near the mediation room, in addition to any caucus rooms. It is therefore important to ensure that an interpreter, intervenor, or other accommodation support, is available for those times, and not only during the formal mediation itself. It is also important to consider the size and layout of break out rooms that will be required, if communication support personnel will also need to be in the room.

SIGN LANGUAGE INTERPRETATION

There is no single universal “sign language” used by all deaf people around the world. There are different sign languages in many different countries. The sign languages commonly used in the deaf community in Canada are American Sign Language (ASL) in the English-speaking community and Langue des signes québécoise (LSQ) for the French-speaking community. ASL and LSQ are not simply codifications of English or French. They are languages of their own with their own grammar and syntax. It is important that the mediator respect them as such. There is no written form of sign language. Thus some deaf people, unable to hear and sound out words, may not learn to read fluently. Therefore, mediators may not be able to rely on passing notes or providing written material in a mediation where one or more of the participants is deaf.

Sign language interpretation is complex. There are some considerations that must be borne in mind. First, sign language interpretation works within a linguistic continuum. A person who is fluent in ASL may still have difficulties understanding a specific qualified and competent ASL interpreter. Before a mediation with such interpretation, you should confirm with the interpreter and the person with hearing loss that they effectively understand each other. If they do not, there is a mismatch of skills that needs to be corrected before the mediation proceeds.

You should not assume that proper interpretation services are readily available. There is a shortage of qualified sign language interpreters. This scarcity is even more acute outside large cities. To be available for mediation, interpreters must be booked well in advance. In order to ensure that appropriate supports are available, you should canvass with the parties and their counsel as early as possible, whether there is a need for sign language interpreters, and confirm that they can find such services before the date of mediation. If a person requiring sign language interpretation is a newcomer to Canada, they may not be able to effectively communicate using either ASL or LSQ. They may need to have an ASL or LSQ interpreter to translate from the spoken word to that Sign Language and then a second interpreter, called a certified Deaf Interpreter or Deaf Intermediary, who translates the Sign Language to gestures that the person will understand. Once again, ensuring you have the appropriate supports in advance is critical.

It is not unusual for a sign language interpreter to ask a speaker in advance for their speaking notes, to help the interpreter prepare. It is helpful, for example, to share in advance with the interpreter your opening statement, any pleadings, and any mediation documents that are shared between the parties. This helps the interpreter ensure they accurately interpret, especially if technical terminology or complicated names come up during the mediation.

Sign language interpretation can be quite demanding for the interpreter. Interpreters will need to switch, or to take a break, more frequently than mediations usually take breaks. You might canvass with the interpreters how frequently they need breaks. A single interpreter may be sufficient if they are only needed for two hours. If there will be a need for more than two hours, you should definitely request two interpreters to work as a team, spinning each other off. Alternatively, you can plan breaks every two hours to ensure that the interpreter has adequate down time. You should canvass the time demands with the interpreters in advance, so you will know their limits.

If two different people in the mediation need interpretation, it will be necessary to consider arranging for separate interpreters for each. The two deaf individuals may be in different positions

in the mediation, and unable to both see the same interpreter while he or she is signing. Moreover, each person with hearing loss may need to converse at the same time. In addition, each client with hearing loss will require an interpreter in caucus. If the mediation will go on for more than two hours that means that there needs to be two teams of two interpreters each. The sheer number of people may seem challenging. Make sure the room is large enough to accommodate all the people involved, and that there are chairs for everyone. Also be sure to introduce everyone in the room so that there is no confusion about each person's role.

People with hearing loss report that when they use an interpreter, some people erroneously look at and speak directly to the interpreter, rather than looking at and speaking to the person with hearing loss. Some speakers even incorrectly address the person with hearing loss in the third person. No doubt this is because hearing people tend automatically to look at the person who is orally speaking to them. When addressing yourself to a mediation participant with hearing loss, you should always look at them, not at the interpreter. Speak in the first person to the person with hearing loss. This helps make the party with hearing loss feel comfortable and respected in the mediation process.

The sign language interpreter is trained and required to translate every word spoken. If a mediator were to say to the interpreter: "Ask him if he did borrow the car," (referring to the party in the third person), the interpreter will translate that question verbatim. This is understandably confusing to the person with hearing loss. It is recommended instead that you look at the mediation participant and ask "Did you borrow the car?". Speak to the participant as if they could hear you. The interpreter will do the rest.

The sign language interpreter's physical position in the mediation room is important as they must have a direct unobstructed line of sight with the person for whom they are interpreting. The interpreter must be able to easily hear the spoken words they will interpret. There must be appropriate lighting for the person with hearing loss to see the interpreter, and for the interpreter to see any sign language that they must translate to the spoken word. The interpreter may well have his or her back to the mediator. It is often best for the sign language interpreter

to sit opposite the person with hearing loss, wherever that may be. This means that the person requiring the interpreter will not be able to look around the room. If they take their eyes off the interpreter, they cease to know what is going on. Once again, sufficient room in the mediation venue is critical so that you can be flexible with spacing and positioning of all participants.

REAL-TIME CAPTIONING

Real time captioning (also called Communication Access Real-time Translation or “CART”) can be preferred by some persons with hearing loss. A captioner is a skilled reporter who provides real-time voice-to-text translation. Some court reporters are equipped to provide this service. Most mediation facilities can avail themselves of such services.

Real-time captioning is most typically requested by people who are deafened or hard of hearing, as they have likely learned to read but may not know sign language. In the past, the CART captionist had to travel to the site of the event, which was being captioned. With the rise of the internet, there are good CART services which operate remotely. In your mediation room, you will set up a computer that is connected to the internet, and a device (like a smart phone) to stream the audio to the captionist. The captionist types the captions in real time from a remote location. These are then instantly transmitted to your mediation’s screen via the internet. You need to book the CART services well in advance, learn what technology you need to have on hand in the room, and test it out in advance, to ensure there are no snags during the mediation. You will also need to conduct all proceedings that involve the person who needs captioning, in the same room, whether a caucus session or whether a meeting with all mediation participants together.

Captionists do not provide verbatim transcription like court reporters. They may change words that are said in order for something to come out in proper English and be understood by the person reading the captioning. They will also note extraneous sounds in the environment, like if someone’s cell phone rings. If they are in the room with you, and not working from a remote location, the captioner will typically sit beside the person requiring captioning so they can see the screen.

DEAFBLIND INTERVENORS

For people with deafblindness, a “deafblind intervenor” may be used. Intervenors are professionals who use a distinctive two-hand form of sign language, communicated to the deafblind person by touch. It does not require vision to receive. The intervenor interprets in the hand of the deafblind individual. This allows the individual to communicate effectively and receive information from the world around them. Since many deafblind individuals have additional cognitive or medical needs, intervenors are also trained to help with these. If a person in your mediation is using a deafblind intervenor, keep in mind the seating arrangement. The intervenor must sit immediately next to the person requiring their service.

Deafblind individuals will have varying levels of sensory loss, so may use many different ways to communicate. Some of these will be discussed in Chapter 5, where we talk about vision loss. Other examples of tools used by deafblind intervenors are: tactile symbols or objects of reference.

Tactile symbols serve the same purpose as pictures, which are often used as a graphic form of communication. Communication boards will be discussed in Chapter 9 in connection with communication disabilities. Tactile symbols take the pictures and make them accessible to deafblind persons by using shape and texture to convey meaning.

Objects of reference are personalized communication tools that deafblind people use to signify their desires and needs. They are particular objects that represent something the person wants to communicate. For example, a sponge may represent taking a bath. A ball might represent sports. A cup may indicate a desire to drink. The deafblind intervenor will have to be accustomed to the person in order to convey these wants and needs in the mediation.

ASSISTIVE LISTENING DEVICES

Some people who are hard of hearing benefit from assistive listening devices to amplify sound to a level they can hear. These include the well-known hearing aid but also may include other devices. For example, a Frequency Modulation (FM) or Infrared (IR) microphone/transmitter, placed in front of a person who is

speaking, can transmit amplified audio to a person who is hard of hearing, who wears a linked receiver. These can be used with or without a hearing aid. These can also transmit to a person's smart phone, equipped with needed amplification technology. This is expected to become more available as technology evolves.

If a participant in your mediation has an assistive listening device, it is prudent to ensure that ambient noise is kept to a minimum, as previously noted. If the device is working properly, no further accommodation will likely be required to facilitate hearing. Do not feel like you have to speak loudly or particularly slowly to accommodate. The device will assist the person to communicate.

LIP-READING

Lip-reading is another technique that some people with hearing loss use. People who lip-read receive information by visualizing the words people are saying by looking at the speaker's lips, teeth and tongue to detect words, expressions, and speech patterns. Lip-reading goes beyond identifying individual words. Lip-readers often respond by themselves speaking aloud. Some may prefer to use this technique in social settings, but may be reluctant to do so in a more formalized setting like a mediation. When speaking to a person who reads lips, you are encouraged to speak clearly but not to exaggerate your speech. Some, who speak to lip readers, do not know this, and are predisposed to exaggerate their speech, making it harder for the lip reader.

Make sure that the person who is lip-reading can see the face of each person talking throughout the mediation. A direct, unobstructed line of sight to a speaker's face is required. Sufficient lighting is also essential. The person who is lip-reading should be seated where this is practical without having to move around each time a new person begins to speak. It is easier to lip-read in an environment with no visible or audible distractions. These should be eliminated as much as possible.

RESOURCES

Annette Leonard, Deb Duren & John Reiman, "Considerations for Mediating with People who are Culturally Deaf",
<http://www.mediate.com/articles/cadre6.cfm>.

Kimberley, A. Neeson, "White Paper: Realtime Captioning/CART/Captioning, online:
<http://neesonsreporting.com/wp-content/uploads/2016/08/Presentation-on-Captioning-White-Paper-2013.pdf>

National Institute on Deafness and Communication Disorders (American) -
<http://www.nidcd.nih.gov/health/hearing/pages/asl.aspx>

Canadian Deafblind Association (Ontario Chapter) - cdbaontario.ca
Assistive Listening Device Systems - alds.com

CHAPTER 5

Accommodating the Needs of People with Vision Loss

FACTS AND STATS AT A GLANCE

- *More than about a million people in Canada are either totally blind or have significant vision loss*
- *Of that population, almost half are 65 years or over*
- *The significant majority of people with vision loss have some vision and the number of people who are totally blind from birth is extremely small*

ABOUT VISION LOSS AND ITS IMPACT IN MEDIATION

Vision loss is very common, particularly among older people. Some people are born blind or with significant vision loss. Others lose some or all of their vision during their life. These experiences are very different. Accommodations for them will differ depending on the personal life circumstances of each individual. It may not be obvious to you that someone in your mediation has some degree of vision loss. You must ask to find out.

Some people may tell you they are “legally blind.” This widely used term is a misnomer. There is no single definition of blindness in the law. The term “legally blind” has been used to include both people with no vision and those with limited partial vision. It may be confusing to you for someone to de-

scribe themselves to you as “legally blind” even though it is obvious that they have some useful vision. They are not thereby trying to deceive anyone. If participants identify themselves as such, you should follow up by asking what accommodation they need. After all, that is the important part, not the precise degree of vision they have.

Accommodations will vary widely. If people have some useful vision, they may not use accommodations widely known to be used by blind persons such as a white cane, guide dog or Braille. Yet, some people with some limited vision may use these. Be aware of your own assumptions, which may be faulty.

Think about the process changes you will have to make to your mediation when a person with vision loss is involved. Many mediators will use a white board or projector to share information in the mediation. This can be an effective tool to ensure all participants are on the same page. However, if a participant is blind or has low vision, this strategy will be ineffective. Even worse, it can be ostracizing. If you begin your mediations with a summary of the case and an agenda in the form of a presentation, this should be circulated in an accessible format beforehand so that all participants can benefit from it. If there are videos or photographs used as evidence, be sure these are described aloud.

Keep in mind the importance of body language in mediation. Such non-verbal cues are not accessible to participants who cannot see them. Non-verbal communication conveys meanings through gestures, eye contact, posture, facial expressions, and other body movements. Some of these behaviours are conscious. Others are subconscious. All convey meaning and emotion. For example, the fact that you are looking at a person with vision loss may not be sufficient to let him or her know that you are addressing them or that it is time for them to speak. You must identify them by name. Indeed, there are many people with or without disabilities that would benefit from identifying to whom you are speaking by using their names.

You may not think of some basic support you can provide to increase a participant’s comfort with the mediation process. Depending on the extent of vision loss, some mediation partici-

pants will need assistance figuring out where everything is in the room. It is helpful if someone can guide them around the room to know where they will be sitting, where the mediator will be, where the other party will be and so on. Such an orientation will be reassuring and should be conducted in caucus rooms as well. It is also helpful to tell clients what proper mediation attire is so that they can dress appropriately.

POSSIBLE ACCOMMODATIONS

There are many different accommodations that people with vision loss can require in mediation. Not surprisingly, many relate to the reading of documents and access to printed information. The mediator should ensure that all materials are provided in an accessible format. There are several options for people with vision loss, whether blind or partially sighted, to get access to printed information. It is easier, quicker and cheaper to produce accessible information in these alternative formats today than ever before, but preparation is key. For this reason, early disclosure of documents is an essential requirement when a mediation participant is blind or has vision loss. Different people will use different technologies and accommodations. Do not assume that you know what they require. Always ask.

EARLY DISCLOSURE OF DOCUMENTS

Well in advance of the mediation, parties should be encouraged to provide all needed documents as early as possible in an accessible alternate format, to avoid delays. If this is not accomplished, and someone produces a document in the mediation without prior notice, ensure that the participant has a break to review it.

Providing such an accommodation is not onerous. Advanced disclosure of documents to opposing parties in accessible formats is usually easy, especially if the person with vision loss can use a computer to read. Even if a document was only available in typed hard copy, most if not all law offices are equipped with standard scanner/optical character recognition technology that lets a printed document be quickly scanned and converted to an accessible electronic document. Some people might even have access to scanners on their smartphones. However, you should not rely on the assumption that real-time scanning will be possible. Scanning via smart phone is neither as

fast nor as versatile as scanning a document via computer.

ACCESSIBLE WRITTEN MATERIAL

There are many modalities in which people with vision loss will read written material. Some examples are: Braille, large print, and spoken word. Each of these has been affected heavily by technological advances and will likely continue to develop as handheld and portable devices become more readily available.

To facilitate these modalities, participants might bring a laptop or tablet, equipped with the needed adaptive technology, to use in mediation. Requisite electric outlets should be available to ensure functionality. Because such equipment can be expensive and requires good computer skills, you should not assume that all with vision loss will use it. Many people experience vision loss in their 60s or 70s so can be more reluctant to become fluent with using this adaptive technology. Inquiring about preferred and required accommodation will allow you to prepare effectively for your mediation.

Braille can be generated via computer and a Braille printer. Many people with vision loss do not extensively use Braille. Extensive Braille use (i.e. for long documents), is more typical for people who are blind at birth, or lose reading vision at a very young age. Previously, Braille could only be produced by a human transcriptionist, which was very time-consuming. Now, there are easier ways to produce Braille. If a party has a document in an accessible computer file, such as MS Word, HTML, or .txt, a computer-savvy Braille user can use a portable refreshable Braille display to run with a laptop computer. If using this device, Braille is displayed, one line at a time, on a grid. No paper is involved. The Braille is produced by tiny rods that pop up in the shape of the letters to be displayed, and then re-arrange to display the next line. These devices are expensive and are only used by a limited number of people with vision loss, but are very useful for those who have them.

Large print text helps many people with vision loss. It is easy and inexpensive to provide this accommodation to mediation participants. Any computer and printer with a capacity to enlarge fonts can produce large print. Different people will require different levels of enlargement. You should ask participants who require

large print what font size they need in order to accommodate appropriately. If documents are provided electronically, participants have the opportunity to increase the size, boldness and colour of the font as they require.

Previously, accommodation through spoken word (i.e. reading a document aloud), required a human reader, either live, or recorded for playback. With computers, this practice has changed drastically. Computers and hand-held devices like smart phones can be equipped to read aloud common computer file formats like MS Word, HTML and .txt files via a computer voice. PDF formats can present serious accessibility problems and should be avoided, despite some unreliable claims that they can be made accessible.

Lower tech options can also be helpful, particularly with short notice. No matter how much preparation you do, there are often last minute additions that are brought into mediation. If a mediation participant refers to printed text in a mediation that has not been provided in advance, this material should be read aloud. This easily accommodates a participant with vision loss and makes sure that the information is understood by all.

RESOURCES

World Health Organization, "Visual Impairment and Blindness" - <http://www.who.int/mediacentre/factsheets/fs282/en/>.

Jennifer Sutton, "A Guide to Making Documents Accessible to People Who are Blind or Visually Impaired" - <http://www.sabeusa.org/wp-content/uploads/2014/02/A-Guide-to-Making-Documents-Accessible-to-People-Who-are-Blind-or-Visually-Impaired.pdf>.

CHAPTER 6

Accommodating the Needs of People with Intellectual Disabilities

FACTS AND STATS AT A GLANCE

- *Up to 3% of the population has an intellectual disability*
- *An intellectual disability refers to someone with an IQ below 70 or marked deficit in adaptive functioning*

ABOUT INTELLECTUAL DISABILITIES AND THEIR IMPACT IN MEDIATION

Intellectual disabilities are invisible disabilities that are characterized by significant limitations in intellectual functioning and adaptive behaviour. Examples include Down Syndrome, Fragile X Syndrome, or brain injury, among others. These disabilities have been referred to in the past as developmental disabilities, developmental delay, or mental retardation, although such terminology has evolved, and “intellectual disability” is now considered the appropriate term.

The diagnosis of an intellectual disability involves a clinical assessment and standardized testing. It includes an assessment of IQ and adaptive functioning. Adaptive functioning looks at a person’s conceptual ability (i.e. do they understand time, money, literacy?), social skills (i.e. do they behave appropriately in social situations?), and practical activities of daily living (i.e. do they understand how to get on public transit?). The largest proportion of people with intellectual disabilities are grouped in

the mild range, with IQs of about 55-70. There are also people assessed to be in the moderate, severe and profound ranges. People in the latter two ranges would likely not be able to participate meaningfully in mediation unless through a substitute decision-maker. They would likely have 24-hour personal support. People in the moderate range would need assistance to participate but could likely do so. People in the mild range will have fairly decent adaptive functioning and may be able to participate without assistance but with some accommodations as we will describe.

People with intellectual disabilities do not necessarily have mental health conditions but they do have a 30-60% likelihood of being at risk for a mental health disorder. For example, people with intellectual disabilities have a high incidence of Obsessive Compulsive Disorder (OCD). Since people with intellectual disabilities may present with similar behaviours to people with mental health conditions, these are sometimes confused. Since different accommodations are required in mediation for each, it is important to distinguish between the two.

Historically, some people have erroneously spoken about a person's intellectual disability in terms of a "mental age." They may have said, "He has the mental age of a 9 year old." Avoid doing this. It is inaccurate and tends to be misleading. It oversimplifies one's understanding of the individual's abilities. It reinforces problematic stereotypes. It encourages some to treat adults as children. Intellectual disabilities are far more nuanced. They do not lend themselves to such categorical age-related pigeonholes. A person may deal with math problems at a lower level, typically associated with a younger age. Yet they may address other activities at a more advanced developmental level.

Take care in screening whether mediation is an appropriate process choice for a person with an intellectual disability. Do the participants appreciate the nature of the process? Can they fully participate if requisite accommodations are in place? Return to the capacity discussion in Chapter 3 for more such considerations. As we have suggested in other parts of this Guidebook, a clear and concise description of the mediation process and

expectations should be provided at the start of the mediation and in any pre-mediation meetings. This will help participants with intellectual disabilities to know what accommodations they will require. As the mediation unfolds, you should check in with participants to ensure that they understand the process and the information being communicated. Screening does not end when mediation begins.

POSSIBLE ACCOMMODATIONS

People with intellectual disabilities can face the same barriers that anyone new to mediation would face but at an exaggerated level. People with intellectual disabilities have a wide variety of needs and there is a wide spectrum of abilities under the heading of intellectual disabilities. No accommodation will work for all participants and the level of accommodation required will vary greatly. Below are some process accommodations to consider, as well as some discussion on the inclusion of a support person in the mediation and the use of communication boards and photographs to help with communication.

PROCESS ACCOMMODATIONS

The complexity of information and the nature of legal jargon are among the most likely barriers that persons with intellectual disabilities will face in mediation. The abstruse language which lawyers often use poses a significant barrier to full participation. Plain language, spoken at a reasonable pace, and where possible, in short sentences, can help address this barrier. Insist upon such language in your mediations, both in written material and in verbal communication.

There are other ways of making communication easier. You might split complex information into small distinct parts. You might also use symbols, pictures or actions to help convey your message. Where you can, ask concrete, open-ended questions. If needed, you can repeat your statement or question, using different wording. Also, pause sufficiently after a question or statement, to allow time for the information to be understood. People with intellectual disabilities may require more time to process, so provide them with that time.

It can be helpful to ask clarifying questions. For example, “Did you understand that?”, or “Do you have questions about that?”.

Do not assume participants are following along. Ask participants with intellectual disabilities to repeat to you what the expectations are in their own words so that you can be assured that they understand. Particularly as you are approaching agreement, it is essential that all parties understand their obligations and entitlements. Agreements can easily fall apart if this is not the case.

Scheduling can be very important for people with intellectual disabilities. Persons with intellectual disabilities or their support people can help to articulate their daily routines, when they are their best or worst, when they eat, etc. Based on this information, you can schedule the mediation when it will be optimal. Again, regular breaks are usually helpful.

SUPPORT PERSONS

Some individuals with intellectual disabilities may bring a support person with them to the mediation. This should be encouraged if it will help with comprehension, comfort, and communication. Participants should sit with their support persons. Always talk directly to the individual with an intellectual disability, not to their support person. If you want to know if the party agrees to an offer, do not turn to the support person and ask: "Does he agree to this proposal?" Holding additional caucuses so that the participant can get the needed time in private with their support person can also help a great deal.

COMMUNICATION BOARDS AND PHOTOGRAPHS

Some people with intellectual disabilities use communication boards instead of speech to communicate. These allow participants to use pictures as their language if they do not use words for speech. More on this is discussed in Chapter 9, which deals with communication disabilities.

Also, it can be easier for some people with intellectual disabilities to tell a story when they have a concrete picture in front of them. So, for example, if you are asking the person to explain why the sound in their neighbour's apartment bothers them, you could have a picture of their apartment so they could describe where the door is, where their bed is, and so on. This can be easier than having the person conceptualize the space and describe the issues without the aid

of pictures. Visual images can also be used to depict schedules or timelines which can assist the parties in storytelling.

RESOURCES

Developmental Services Ontario - <https://www.dsontario.ca>

Community Living Ontario - <http://communitylivingontario.ca>

American Association on Intellectual and Developmental Disabilities (AAIDD) - <https://aaid.org>

CHAPTER 7

Accommodating the Needs of People with Mental Health Conditions

FACTS AND STATS AT A GLANCE

- *About one in five people will have a mental health condition in any given year*
- *Mental health issues are almost always invisible*
- *Many people with mental health disabilities live with economic disadvantage and in social isolation*

ABOUT MENTAL HEALTH CONDITIONS AND THEIR IMPACT IN MEDIATION

Given the prevalence of mental health related disabilities, people who attend mediation are likely to have a wide range of such conditions. Examples include but are not limited to: anxiety disorders, depression, bipolar disorder and addiction. These may have little or no impact on mediation or can substantially affect the process. Since mental health conditions are invisible disabilities, you will not recognize them if you do not know about them.

The lack of visibility raises the issue of confidentiality and disclosure. The person with a mental health condition may opt not to reveal its existence or nature. Some people labelled as having psychiatric disabilities may be reluctant to disclose, or to seek accommodation for fear that a mental health condition might be brought up in a subsequent court proceeding or social setting following the mediation. Unless the person decides to disclose, you will likely be unaware that the disability exists. From

your interactions with the individual, you may observe reactions or behaviours that signal the possibility of unrequested accommodation needs. You must stay attuned for such signals.

Even in situations where people ultimately disclose a mental health condition, it may take multiple conversations before a client feels comfortable discussing these issues. There is still considerable perceived stigma around mental health disabilities so participants may be afraid to disclose early on in the process. Do not worry about labels of various mental health disabilities. Alert participants to what they will be required to do in the mediation and what functional environments they will be in. By walking through the process requirements with them, you may trigger the aspects of concern and point out required accommodations.

In addition to the barriers that may be existent in mediation, people with mental health disabilities can be impacted by the side effects of medication. Intellectual functioning may be affected by medication. Stamina can be affected as well. Some medications can cause drowsiness. Be aware of how participants are doing during the mediation. If participants seem to be losing steam, take a break or end the mediation for the day and reconvene at another time. Flexibility is required.

Some psychiatric disabilities can impede a person from effectively communicating. Since communication is integral in mediation, you should help parties to communicate by reframing and helping with logical sequencing. People may have difficulty controlling their emotions, expressions and behaviours. They may also have difficulty empathizing with others or emoting empathy. This may impact the communication in the mediation. Parties may want to see the other side showing regret or remorse and this may not be possible for some people with mental health conditions. Participants may also have difficulty refraining from speaking when someone else is talking. Others may be easily distracted by the physical environment, electronic devices, other conversations taking place or the situation itself. Such distractions should be eliminated as much as possible.

People with mental health needs are often wrongly stereotyped

as being dangerous. Mental illness causes and symptoms differ from person to person. Many people experience symptoms episodically. People with psychiatric conditions may encounter the justice system, and thus be involved in mediation, when they are more symptomatic. Additionally, the stress of a legal situation may exacerbate pre-existing disabilities. Keep this in mind.

Addiction is a subset of mental health conditions that is receiving more attention than in the past. Addiction to drugs or alcohol can have long-term effects on behaviour, even after rehabilitation. Be aware of the potential effects of withdrawal or the fear of triggers that may arise in the mediation. Being open to changing your process and taking breaks as people require will help to accommodate those with addictions in your mediations.

POSSIBLE ACCOMMODATIONS

People with mental health conditions may not require any specific accommodations to participate meaningfully in mediation. On the other hand, some individuals may require significant accommodation. Explore the extent to which accommodations are required for each participant. Below are some process accommodations that may be helpful. In addition to these, the option of having a support person is also suggested.

PROCESS ACCOMMODATIONS

Timing of the mediation and the ground rules that will frame the process are two important aspects of mediation to consider in the context of mental health.

A full-day mediation process, although common, may be too strenuous for clients who have limited attention spans or have other medical needs that dictate the period of time for which they can attend mediation. Some times of day are better than others and this should be canvassed with counsel and clients. Timing requirements may have to do with medication times or side effects or other issues related to the individual manifestations of the person's disability. If possible, you should try to schedule your mediation activities in accordance with their timing-related needs. More frequent breaks during the mediation may also assist.

Some people with mental health conditions engage in more non-traditional behaviours. For example, someone may laugh or cry when it is not socially appropriate. They may react inappropriately or not react at all during a conversation. These behaviours can impact interactions between participants in the mediation. If one participant's behaviour is impeding the process, you may consider holding the remainder of the mediation in caucus.

Participants may need to get up and walk around periodically. Again, a mediator should show flexibility, and should help the other participants to be understanding and accommodating. People may also need additional physical space around them or may need to have a separate room that they can escape to when required. Giving an individual a quiet reprieve can be essential.

SUPPORT PERSONS

Having a support person can often be helpful for people with mental health issues. A support person can assist a participant to understand the mediation process, can explain the issues in dispute, or can simply be there as a comfort. Such support can address the anxiety-provoking and stressful nature of mediation.

Support people need not be specially trained or certified. A support person may be a friend or relative of the participant. They may also be social workers, family support workers or other relevant service providers who can assist the individuals. Depending on the needs of the participant with a mental health condition, the participation of the support person can vary. Some people require a support person only in break or caucus times. Others require the support person to be in the mediation room but without active participation. Others require the support person to speak on their behalf. Once again, flexibility is key. What is required at the beginning of a mediation session may change through the process so do not assume that the same support is required throughout. Continual check-ins can be useful to ensure the appropriate support is provided at the requisite time.

RESOURCES

Canadian Association for Addiction and Mental Health – www.camh.ca

Ontario Human Rights Commission, “Public Consultation Paper: Human Rights and Mental Health Strategy” -

<http://www.ohrc.on.ca/sites/default/files/attachments/>

[Public_consultation_paper%3A_Human_rights_and_mental_health_strategy.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Public_consultation_paper%3A_Human_rights_and_mental_health_strategy.pdf)

Bob Finlay, “Accommodating Mediation Participants with Mental Health and Addiction Issues” - http://www.finlaycounselling.ca/pdfs/mediation_participants.pdf

James Morrison, *DSM-IV Made Easy: The Clinician's Guide to Diagnosis* (New York: Guilford Press, 1995).

CHAPTER 8

Accommodating the Needs of People with Physical and Mobility Disabilities

FACTS AND STATS AT A GLANCE

- *About 17% of people in Ontario have what can be characterized as a physical or mobility disability: about 2.2 million people*
- *Nationally, about 8 in 10 people with a mobility disability uses a mobility device like a cane or walker*
- *Mobility disabilities affect people's limbs and their ability to physically enter and participate in the mediation space*

ABOUT PHYSICAL AND MOBILITY DISABILITIES AND THEIR IMPACT IN MEDIATION

Mobility disabilities are those that limit the physical use of a person's limbs. People with mobility disabilities that affect their lower limbs often use a wheelchair, crutches, a walker or other assistive support to help with ambulatory movement. Others may not use any assistive device but may still require some accommodation. A person with a chronic fatiguing condition, for example, may be able to walk, but only for limited distances. While we often think of mobility disabilities as being visible, some physical disabilities are not visible, such as severe arthritis, chronic lung or heart conditions. These can significantly affect a person's ability to climb stairs, stand for extended periods of time, or move across a room.

The incidence of physical disabilities is directly correlated with

age. In the population under 24 years of age, about 4.4% of the population is living with a physical disability. From 25-60 years old, this number increases to about 17%. Then, by the age of 60 and above, that number sky rockets to about 43%. As this suggests, some people are born with physical disabilities and some acquire them as they age. Also, mobility disabilities are frequently accompanied by other types of disabilities – According to Statistics Canada, 95.7% of people who reported a mobility disability also reported another co-morbid disability, most commonly a pain-related disability.⁶

Many physical disabilities can be episodic in nature, meaning that the challenges imposed can fluctuate. Some fluctuate by the day, others by the week or hour. Multiple sclerosis for example, may pose little challenge one day and severe challenge the next. For this reason, the needs that people have for accommodation in mediation can change with relatively little notice.

Unfortunately, there continues to be stereotypes about people with physical disabilities. Many people assume that individuals with mobility disabilities also have lower mental capacity or a developmental disability. This is not the case. Be sensitive to the stereotypes that you and others possess. Awareness of such biases is the first step to combatting them.

POSSIBLE ACCOMMODATIONS

At first, you might think that many of the needs of persons with mobility disabilities may seem beyond the control of an individual mediator. The mediator cannot re-design an inaccessible mediation facility or office space. Yet, there are helpful steps an individual mediator can take to ensure accessibility.

PHYSICAL SPACE

If a person participating in your mediation has a mobility disability, check your mediation facility to ensure that it does not have accessibility barriers. If it does, try moving the mediation to a more accessible space. There are many barriers that you cannot change and some that you can. You must visit a mediation facility in order to ascertain its accessibility. Do not just take the word of a facility's staff. It is unfortunately too common for a person to call a restaurant, store, or other building and be told it is disability-accessible, only to find out upon arrival

that this is not so. This miscommunication is made worse by the fact that building codes provide inadequate and out-dated standards for accessibility of new construction projects and major renovations. Ensure that ramps, accessible doorways, elevators and washrooms are readily available. Are there accessible door openers? Are doorways maneuverable? Are elevator buttons placed so that they can be reached?

Even if a structure has proper accessibility features built into it, it can still have accessibility problems. A garbage can in the middle of a ramp, or a car parked in a position that blocks level access to an accessible doorway, can present serious impediments. Typically these are readily remedied, if the property is properly scoped out in advance. Arrive early on the day of mediation to remove any barriers that you can.

Accessibility outside the building is important and often overlooked. Be sure that there is accessible parking nearby and that it is reachable via accessible public transit services. Also note how far a distance a person must travel from accessible parking spots or bus stops before arriving at the doorway. Once inside, it is preferable to hold the mediation on a floor of a building that is easier to access, and which is closer to accessible washrooms. It may be necessary to allow for longer caucuses or longer breaks to enable persons with mobility disabilities to get to the accessible washroom and back to the mediation. This is of particular importance if the accessible washroom is on another floor, or a further distance from the meeting rooms, or if the participant moves more slowly.

Movable furnishings are ideal to ensure the accessibility of the physical mediation space. When looking for mediation facilities, this is an important consideration to bear in mind. Arrange the furniture in the room so that there is space to maneuver around and so that mobility aids can be kept with the person using them. The same goes for caucus rooms. Special equipment such as specific chairs may be required. People can bring their own, or these may be rented. Ask participants what they require and how to acquire the needed device or equipment.

It is completely unacceptable to have a person with a mobility disability carried up and down stairs. In addition to the gross

indignity that this causes, it risks injury, if the person is dropped or wrongly handled. Another solution must be found.

ATTENDANT CARE

Persons with mobility disabilities may be accompanied by personal assistants, who provide physical assistance, or other help. This can be the case, for example, when accommodation is required for note-taking or when assistive devices cannot be utilized unaided. Attendant care can also be required for personal grooming, such as washroom activity, or assistance with administering medication. These personal assistants are supervised by the individual who requires their support.

A mediation participant may require attendant care in the mediation room or may prefer to have the personal assistant wait outside the room. If the support person attends the mediation, always speak directly to the mediation participant. Do not ask questions about them to the support person.

SCHEDULING

Stamina can be an issue for people with physical and mobility disabilities. A full-day mediation can be too much. Sometimes travelling to the mediation space may be too much. Can the mediation take place at or near the participant's home? Can online dispute resolution or teleconferencing be used instead? Alternative means of participating can be very helpful.

If the person is able to attend the mediation facility but can only meaningfully participate for a half-day, make that happen. Conduct the mediation over two separate days rather than cramming it into one full-day. The long-term benefits of such an arrangement far outweigh its inconvenience.

RESOURCES

Report of the Disability Issues Committee, "Making Ontario's Courts Fully Accessible to Persons with Disabilities" (December 2006), online: Court of Appeal of Ontario http://www.ontariocourts.on.ca/accessible_courts/en/report_courts_disabilities.htm
March of Dimes - <https://www.marchofdimes.ca/EN/Pages/default.aspx>

6 Statistics Canada, "Mobility Disabilities among Canadians Aged 15 years and Older, 2012". Online: statcan.gc.ca.

CHAPTER 9

Accommodating the Needs of People with Communication Disabilities

FACTS AND STATS AT A GLANCE

- *About 1.3% of the population have a communication disability*
- *Can either be with someone their whole life or be triggered by an acquired issue like an injury or illness*
- *A communication disability is any kind of speech or language disability that is not the result of hearing loss*

ABOUT COMMUNICATION DISABILITIES AND THEIR IMPACT IN MEDIATION

A communication disability, or speech and language disability, impacts a person's ability to understand and to be understood through the spoken word. Such disabilities can be associated with either physical or mental impairment and can also impact a person's ability to read and write. Disabilities such as cerebral palsy, cognitive disability, brain injury, Parkinson's disease, Multiple Sclerosis, or other conditions can affect communication.

People with communication disabilities are often quite hidden because of the nature of the disability. Since people with communication disabilities cannot communicate effectively, they are often silent or silenced. As such, lawyers and mediators tend to know far less about this range of disabilities and how to accom-

modate them. Strategies vary from person to person and vary wildly so more planning in advance is always required.

Some people with communication disabilities have impaired speech but nevertheless speak for themselves without intervention. This would be the case, for example, for some people with cerebral palsy. Those unfamiliar with their speech may find it difficult to understand but over time, you can easily become familiar with it. If there is any difficulty understanding parties in a mediation, always feel free to ask them to repeat themselves. Where needed, you might repeat your understanding of what the individual said to confirm that their statement is understood. In this way, the common mediation practice of reframing proves useful in the context of disability.

Other than communicating, people with communication disabilities face stereotypes that may impact the mediation process. For example, people may think that those with communication disabilities lack credibility because they are not communicating clearly. People may also assume that cognitive functioning is affected because of impaired speech. Providing appropriate accommodations can shift these presumptions.

POSSIBLE ACCOMMODATIONS

People with communication disabilities can be accommodated in a variety of ways. There are a variety of systems that are designed to augment or serve as alternatives to speech. People with communication disabilities may be able to speak (although speech may be unclear), or they may be able to communicate through body gestures, facial expressions, sign language, writing, typing or drawing, pointing at pictures on a communication board, using a communication device, or speaking through a familiar person who can assist them in communicating. Because verbal communication is often difficult, online dispute resolution mechanisms may be ideal for clients with communication disabilities so this should be considered.

AUGMENTATIVE AND ALTERNATIVE COMMUNICATION

People with a range of speech, language and/or other communication disabilities may use different techniques for effective communication. Many of these are clustered together in a field called “Augmentative and Alternative Communication” (AAC).

If a participant has AAC needs, it is worthwhile discussing specific requirements to ensure that the proper services are brought to the mediation, and to confirm with the individual that they can understand the communication provided via the AAC modality being used. Some examples include communication boards, photographs, dry erase boards, or yes/no boards.

Communication boards are either high-tech or low-tech tools for communication that use pictures, symbols, words, or a combination of these. Communication boards are not standard and are instead personalized to the individual and the circumstance in which they are being used. High-tech devices can generate speech and pictures, or diagrams can be selected by using a pointer, adapted mouse, joystick or other method. Because high-tech methods can fail, it is often suggested that low-tech communication boards are available as an alternative so as not to stall the mediation in case of a technology glitch.

Low-tech communication boards offer a series of pictures, diagrams, symbols, or words that individuals can select from in order to communicate. Again, each board will be developed specifically for the person and context for which it is being used. Since communication intermediaries are generally required when AAC is used, these are discussed in the next section.

It is important to remember to simplify language and concepts when a mediation participant is using AAC. Although open-ended questions are typically encouraged in mediation, a person using a yes/no board will only be able to answer questions in this way. Also, even if a person is using a computerized communication board with many symbols, not everything in the world will be available on it. Stick to important material in order to come to agreement. Allow sufficient time for individuals using AAC to answer questions and explain their stories.

COMMUNICATION INTERMEDIARIES

The mediation may benefit from the inclusion of a communication intermediary when one or more participants have a communication disability. Communication intermediaries are speech-language pathologists who have specialized training and experience with AAC. The communication intermediary can help inform you about the person's communication abilities and

needs and can also provide assistance during the mediation to help with communication. They operate much in the same way that sign language interpreters operate, but they use different techniques to help people with communication disabilities to participate. For more detail on mediating when an interpreter is present, including physical space needs as well as process needs, see Chapter 4.

RESOURCES

Communication Disabilities Access Canada -

<http://www.cdacanada.com>

<http://www.accpc.ca/ej-resources.htm>

CHAPTER 10

Accommodating the Needs of People with Autism

FACTS AND STATS AT A GLANCE

- *About 1 in 68 children are diagnosed with autism*
- *Autism is the fastest growing and most commonly diagnosed neurological disorder in Canada*
- *Autism affects social interactions, verbal and nonverbal communication and behaviour*

ABOUT AUTISM AND ITS IMPACT IN MEDIATION

Autism Spectrum Disorder is a complex neurodevelopmental condition. Autism is caused by a combination of genetic and environmental factors and is a lifelong spectrum disorder. Social interaction is often problematic for people with autism. Relevant effects of autism can include difficulty in initiating, maintaining and ending conversations, difficulty knowing when to make eye contact, and how close to stand in relation to others. People with autism may also exhibit repetitive or ritualistic behaviours.

Because there is no visible sign that a person is autistic, their challenges with the mediation process may not be recognized or may be misunderstood by other participants. Since intelligence and verbal skills are typically not affected, it may take time to realize the impact of autism in mediation.

Every individual with autism is unique. Many persons with Aspergers or other high-functioning forms of autism never even get diagnosed or do not get diagnosed as children. These individuals may not tell you about their disability before mediation and the mediation may not be impacted. Other people with autism may not be appropriate candidates for the mediation process. Be cognizant that mediation is not right for everyone and if you cannot provide sufficient accommodation to allow the person to participate meaningfully, another process should be suggested.

Mediation can be stressful for any client, but for participants with autism, many of whom face social challenges, the experience can be unbearable. The anxiety produced by such stress can render a person unable to participate meaningfully in mediation.

As a mediator, it is prudent to advise counsel to role-play mediation with clients. This can be helpful in many contexts, but particularly for people with autism. Practicing how to answer questions, how to generate options, how to stay calm when the other side is being inflammatory, can all be very helpful to optimize performance and comfort in mediation.

POSSIBLE ACCOMMODATIONS

Mediation participants with autism may benefit from a variety of accommodations, depending on their specific needs. Some options are provided here, but many of the accommodations discussed throughout this Guidebook may be helpful.

LIMIT NUMBERS OF PARTICIPANTS

Autistic people can become over-stimulated and overwhelmed by large groups of people. For this reason, limit the number of participants included in the mediation if one of the parties has autism. The social nuances of large groups can be difficult to respond to, particularly for people with autism who have difficulty with timing and nature of social responses. Smaller groups may lead to more meaningful participation, so keep the mediation to its essential participants. You can also break up into caucus more often if even the essential participants are too numerous. This may be a more productive way to conduct the mediation. Caucus rooms should also be available for people to retreat to when needed.

SET A CLEAR AGENDA

Setting clear expectations is important for people with autism. It can be very effective to have a clear agenda for your mediation and to describe the steps as you go. The predictability of following an agenda can be very helpful for people with autism. Do not assume that participants will infer meaning from vague descriptions of processes or expectations. Also, make sure that people have enough time to process information as it is presented and ask if everyone is prepared to move on before moving forward. Related to the agenda, if you would like the participants to give opening statements, be sure to tell them about this in advance. If the person with autism is not prepared to give a verbal presentation, offer for a written statement to be prepared instead.

If possible, participants should be provided with questions in advance. This practice will reduce the anxiety of having to answer questions on the spot. It will also mean that more meaningful answers are provided.

SENSORY ACCOMMODATIONS

People with autism can have strong responses to sensory overload. Overstimulation can relate to all five senses, so remain aware of the needs of autistic persons in this regard. Monitor the mediation room for ambient noise or visual stimuli. Limit these as much as possible. If the mediation room has very bright lights that cannot be dimmed, make sure there is another room to which people can retreat if needed. Sitting for long periods in a bright room can be exhausting for people with this sensitivity.

People often expect others to have eye contact with them when they are speaking. Retaining eye contact can be overstimulating for a person with autism. Do not interpret a lack of eye contact with disrespect. Encourage others to manage this expectation as well.

Scents can also be over-stimulating for some autistic individuals. All participants should be asked not to wear perfumes or other scented toiletries if this is distracting for any of the participants.

ONLINE DISPUTE RESOLUTION

Online Dispute Resolution (ODR) is increasing in popularity for

a variety of populations using dispute resolution. Its use can increase accessibility for many people with disabilities but can be particularly useful for persons with autism. Conducting mediations through ODR platforms or through instant message chat systems such as Skype or Facetime can be helpful for people with autism who may prefer in some cases to be in their own spaces. Social anxiety can be addressed through the use of such platforms.

RESOURCES

Autism Speaks - <http://www.autismspeaks.ca/about-autism/facts-and-faqs/>

Autistic Network International - www.autreat.com

CHAPTER 11

Accommodating the Needs of People with Learning Disabilities

FACTS AND STATS AT A GLANCE

- *About 10% of the Canadian population is living with a learning disability*
- *Learning disabilities refer to a variety of disorders that affect learning*

ABOUT LEARNING DISABILITIES AND THEIR IMPACT IN MEDIATION

Learning disabilities are very common and are among the fastest growing disabilities in Canada not related to aging. Learning disabilities have neurological origins and impact specific areas of learning. A learning disability can affect the acquisition of language or information. It can also impact the retention of that information. Learning disabilities can also influence the way people understand and organize information and the way in which they output that information through text or language.

Although sometimes incorrectly conflated, learning disabilities are different from intellectual disabilities. People with learning disabilities, by definition, have an average to above average IQ, so they do not have the significant impairment in learning and adaptive functioning characteristic of an intellectual disability. For more on intellectual disabilities, see Chapter 6.

There are many categories of learning disabilities that can affect mediation in different ways. Dyslexia, for example, is a language-based learning disability that can impact a person's ability to read fluently, to comprehend written text, and to write. Dyscalculia is another learning disability which affects a person's ability to understand math. Auditory processing disorders impact the way in which sound travels through the ear, is processed, and is interpreted by the brain. There are also non-verbal learning disabilities which interfere with non-verbal cues such as facial expressions and body language. These can impact a mediation in significant ways. Since parties are often asked to communicate directly with one another, a lack of eye contact or the misjudging of non-verbal cues can be misinterpreted, leading to increased conflict. For example, a lack of eye contact, which some people with learning disabilities are unable or uncomfortable to maintain, might be interpreted as a lack of trust. This can be detrimental to a mediation. Other people with learning disabilities have visual perception deficits which impact the understanding of information presented visually. There are also comorbid disorders which have distinctive symptoms but occur with a learning disability. Examples of these are Attention Deficit Hyperactivity Disorder (ADHD), social disorders, or conduct disorder.

Disclosure can be a difficult aspect when it comes to learning disabilities. It is quite common that adults may not have a formal diagnosis of a learning disability but may self-diagnose that they feel they are living with a learning disability. They may or may not be comfortable disclosing this. They may or may not know what accommodations they require.

POSSIBLE ACCOMMODATIONS

Learning disabilities can manifest differently, depending on the task being required. If a person has a reading disorder, for example, and they are not being asked to read, there will be no impact. Also, every person with a learning disability may function differently. Different strategies will work for different people. Many of the accommodations discussed throughout this Guidebook may be helpful. Below are some additional suggestions.

ADAPTIVE TECHNOLOGY

Voice-to-text and text-to-voice software can be very helpful for people with some learning disabilities. In voice-to-text software, for example *Dragon Naturally Speaking*, you dictate into the program and it types. Text-to-voice is the opposite, where you bring up text and the computer reads it aloud to you. Organizational tools and spelling and grammar checking are also computer tools that can be very helpful for people with learning disabilities.

Real-time captioning, discussed in Chapter 4, in relation to hearing disabilities, can also be very helpful for people with auditory processing disabilities who cannot process information heard auditorily but can process visual information in printed form.

PROCESS ACCOMMODATIONS

TIMING

Like with many other disabilities, long full-day mediations can be difficult for people with some learning disabilities. Sitting and focusing for long periods of time is just not possible for some people with learning disabilities who will have to spend more energy to process information. So take breaks and plan on shorter mediations. Also, be clear about scheduling and when breaks will be taken. People with learning disabilities often take longer to take in, process and put out information. Leave extra time for all these steps during the mediation.

AGENDA-SETTING AND PREPARATION

The process of mediation can be a barrier to people with learning disabilities because it is unfamiliar to them. Preparation should be built in to increase comfort. Taking the time to outline where people should sit and what they should do at each step of the process can be very helpful.

Having a set agenda that can be followed is useful to keep everyone on track. An agenda can also help people whose learning disabilities impact their memory (working, short term or long term) to stay on task throughout the mediation. Encouraging parties to take notes throughout and recapping the progress through the mediation can also be beneficial.

OPENING STATEMENTS

If you are going to ask participants to make an opening statement, be aware that this may pose various challenges for some participants with learning disabilities. Some learning disabilities make it difficult to tell a story in a sequential manner. Giving participants sufficient notice that they will be expected to outline the background of their dispute will allow them to prepare their narrative for ease of presentation.

RESOURCES

Learning Disability Association of Toronto - <http://www.ldatd.on.ca>

Professional Designations for MEDIATORS and ARBITRATORS

ADRIC's professional designations in mediation and arbitration identify and differentiate their holders. They demonstrate to potential clients that you have achieved prescribed training and experience levels recognized by your peers and based on objective third party assessment by a committee of senior and highly respected practitioners.

C.Med, Q.Med, C.Arb or Q.Arb¹ after your name enhances your credibility and marketability. These national designations communicate your membership in a national organization dedicated to upholding the highest standards in ADR and your commitment to continuing education and engagement in the practice.

The C.Med [Chartered Mediator] and C.Arb [Chartered Arbitrator] are Canada's preeminent generalist designations for practising mediators and arbitrators and the most senior designations offered by ADRIC, signifying a high level of training, experience and proficiency.

The Qualified Mediator (Q.Med) and Qualified Arbitrator (Q.Arb) are Canada's entry level designations acknowledging required minimum training. They provide recognition of work and experience and offer a solid foundation as you progress to the next designation.

These designations are recognized and respected across Canada and internationally. They are often accepted as the minimum criteria for membership on rosters.

For more information and criteria, [visit ADRIC.ca](http://visitADRIC.ca)

APPLICATION FEE

A one-time application fee is payable to your regional affiliate to cover the costs of administering the accreditation process.

ANNUAL FEE AND OTHER REQUIREMENTS

There is an annual fee to maintain your designation (see current rates at ADRIC.ca). You must also remain a member in good standing with your regional affiliate and commit to the Continuing Education and Engagement Programme to retain your designation.

APPLICATION FORMS

Application forms for these designations may be downloaded from your regional affiliate website or contact your affiliate to have a copy sent to you.

BC

adrfbc.com

AB

adralberta.ca

SK

adrsaskatchewan.ca

MB

adrmanitoba.ca

ON

adr-ontario.ca

QC

imaq.org

Atlantic

Provinces
adratlantic.ca



¹All designations are TMADR Institute of Canada, Inc.



ADR Institute of Canada
Institut d'arbitrage et de
médiation du Canada™/M/C

ADRIC.ca

ADR Institute of Canada, Inc.

234 Eglinton Avenue East, Suite 407

Toronto, ON (Canada) M4P 1K5

TEL: 416-487-4733

TOLL FREE: 1-877-475-4353

FAX: 416-901-4736

www.adric.ca

ARBITRATION. MEDIATION. RESOLUTION.

JOIN US ON SOCIAL MEDIA

