

Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC’s Mediation Program

Seth D. Harris*

Introduction	1
I. Mediators’ Role in Reducing Transaction Costs	13
A. The Background Conditions for Successful Mediation	13
B. Mediators in Negotiations over Disabilities Accommodations	17
III. Evidence from the EEOC’s Mediation Program	31
A. Methodology and Its Limitations	31
B. Findings	35
III. Conclusion	64

INTRODUCTION

In 1998, an ad hoc group of twelve mediators convened as the ADA Mediation Guidelines Work Group (“Work Group”) to propose

* Professor and Director of Labor & Employment Law Programs, New York Law School. I am grateful to Sam Estreicher and Michael Stein for their invitation to present an earlier version of this paper at “The Americans with Disabilities Act: Empirical Perspectives,” a conference sponsored by New York University Law School’s Center for Labor & Employment Law, and to the conference’s participants for their comments. Elizabeth Chambliss, Kris Franklin, Frank Munger, and Beth Noveck also provided valuable comments. Dr. Ruth Obar performed the statistical analyses in Part III with abundant patience, creativity, clarity, and diligence. Pat McDermott and the staff of the U.S. Equal Employment Opportunity Commission, particularly Peggy Mastroianni, Stephanie Garner, Draga Anthony, Steve Ichniowski and Ron Edwards, provided essential help with gaining access to the data sets analyzed in Part III. Marisa Baldaccini, Daniel Goldberger, Leanne Hamovich, Christopher Neely, and Jessica Rosen provided important research assistance. Jamie Wenger and Melissa Stevenson provided their usual valuable and varied support. Nonetheless, all errors are mine. Thank you to New York Law School for its generous financial support of my research including, but certainly not limited to, this paper.

standards that would govern the work of mediators involved with negotiations over disabilities-related disputes,¹ including those arising out of the Americans with Disabilities Act (ADA).² Congress intended that negotiations – an “interactive process” in the ADA’s lexicon – and mediation facilitating those negotiations would be a common method by which employers and workers with disabilities would identify effective and efficient workplace accommodations and address other problems relating to ADA compliance.³ Thus, the Work Group’s goal of helping mediators contribute to efficient, effective, and accessible negotiations was central to the success of the ADA’s problem-solving process.⁴

1. See Judith Cohen, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward*, CARDOZO ONLINE J. CONFLICT RESOL., Aug. 2001, <http://www.cojcr.org/vol2no2/article01.html> (see the section entitled “Developing a Draft”). The Guidelines are not limited to mediation relating to the Americans with Disabilities Act (“ADA”). They also apply to negotiations over claims arising under the Rehabilitation Act of 1973, the Fair Housing Act Amendments of 1988, and other comparable state and local laws. See ADA MEDIATION STANDARDS WORK GROUP, ADA MEDIATION GUIDELINES (Feb. 16, 2000), <http://www.cojcr.org/ada.html> (see the Introduction).

2. Pub. L. No. 101-336, 104 Stat. 327 (1990).

3. See 29 C.F.R. § 1630.2(o)(3) (2005) (“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation”); 29 C.F.R. pt. 1630 app., § 1630.9 (2005) (interpretive guidance stating that the employer should engage in the interactive process); S. REP. NO. 101-116, at 34 (1989) (“A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations [E]mployers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation.”); H.R. REP. NO. 101-485, pt. 2, at 65 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 348 (same). See also 42 U.S.C. § 12212 (2000) (“Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, *mediation*, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter”) (emphasis added); H.R. REP. NO. 101-485, pt. 3, at 76-77 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500 (further discussing Congress’ encouragement of voluntary alternative dispute resolution in ADA cases).

4. Mediation involves a neutral third-party assisting in a negotiation, but without the power of a judge or arbitrator to impose an outcome. Only when an employer and a worker with an impairment cannot negotiate an agreement does the task of determining a proposed accommodation’s “reasonableness,” and how much hardship is “undue,” fall to a court. See Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 147 (2003) [hereinafter *Re-Thinking Discrimination*]. Of course, litigation is relevant to negotiations over accommodations. It affects participants’ calculi in assessing what will be an acceptable accommodation. See Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market* 10 U. PA. J. BUS. & LAB. L. (forthcoming Jan. 2008) (manuscript at 75-79, available at <http://ssrn.com/abstract=876648>) [hereinafter *Law, Economics, and Accommodations*]

The Work Group published the ADA Mediation Guidelines (“Guidelines”) in January 2000 after an extensive public dialogue and comment process.⁵ The Guidelines’ premise is that mediators must do their jobs differently when mediating disputes about disabilities discrimination. Certain differences between negotiations over disabilities discrimination issues and other issues are predictable consequences of the fact that disabilities discrimination laws protect individuals with physical or mental impairments.⁶ For example, capacity issues involving people with intellectual impairments are more likely to arise.⁷ Access for a person with a motion impairment to the facility hosting a mediation session is also more likely to be an issue.⁸ A sign-language interpreter or documents translated into Braille may be needed in mediated negotiations over ADA disputes more commonly than in negotiations over other issues.⁹

But the Work Group did not focus exclusively on impairment-related issues. The Guidelines also suggest how mediators should prepare to address, and actually address, the substance of disabilities disputes. For example, the Guidelines heavily emphasize the importance of training in the substantive requirements of disabilities discrimination laws and the practical challenges associated with

(describing how the potentially substantial cost of a discrimination lawsuit should be considered in an employer’s economic analysis of an employee’s request for an accommodation).

5. ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1; *see also* Cohen, *supra* note 1 (see the section entitled “*The Public Dialogue Begins*”).

6. *See* 42 U.S.C. § 12111(8) (2000) (“The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”). I will hereafter employ the ADA’s lexicon and refer to the employee’s “impairment” rather than the employee’s “disability.” The ADA defines “disability” to include “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2)(A) (2000). Thus, the employee has an impairment, while the interaction of the impairment and the employee’s environment creates a “disability.” *See* Seth D. Harris, *Introduction: Understanding the Context for the ‘Coelho Challenge’ – Our Right to Work, Our Demand to be Heard: People With Disabilities, the 2004 Election, and Beyond*, 48 N.Y.L. SCH. L. REV. 711, 721 (2004).

7. *See, e.g.*, Paul Steven Miller, *A Just Alternative or Just an Alternative? Mediation and the Americans with Disabilities Act*, 62 OHIO ST. L. J. 11, 16 (2001) (discussing the question of capacity); Cohen, *supra* note 1 (see the section entitled “*Participant Capacity*”) (same); ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, § I.D (same).

8. ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, app. II.

9. *Id.* § II.B.4.

compliance.¹⁰ The Guidelines even contemplate bringing outside experts into negotiations to help the parties better understand the substance of their dispute and possible solutions.¹¹

Despite the attention paid to the substance of disabilities-related negotiations, the Guidelines do not focus on the substantive differences among disabilities discrimination disputes. In particular, with very few exceptions, the Guidelines do not distinguish between accommodations disputes and disagreements over other questions and, as a result, do not address the question of whether these differences might affect how mediators do their jobs.¹² Yet, the most significant substantive difference between the ADA (and the Rehabilitation Act on which it was based) and other civil rights statutes is the central importance of “reasonable accommodation.”¹³ Along with its definition of “disability,”¹⁴ “reasonable accommodation” embodies the ADA’s authors’ rights-based vision that assuring people with disabilities access to workplaces, public accommodations, and public services requires modifying environments that were constructed without taking account of people with disabilities.¹⁵ “Reasonable accommodation” is critical to a host of determinative issues in the ADA.¹⁶

This paper inquires into the question that the Guidelines did not answer: is a mediator’s job different and more difficult when a worker and an employer negotiate over a disabilities accommodation issue as

10. See, e.g., *id.* § III. The Guidelines also urge mediators to prepare to assist the participants with acquiring the necessary information to understand the issues and law relevant to their negotiations. *Id.*

11. *Id.* § II.B.2.

12. An exception to this proposition can be found in Section II.A.2 where the Guidelines state that mediated negotiations can satisfy the requirement that the parties engage in an interactive process when an accommodation issue arises. See *id.* § II.A.2.

13. Title VII required reasonable accommodation of religious practices beginning in 1972, so the concept was not an innovation in the Rehabilitation Act or the ADA. See 42 U.S.C. § 2000e(j) (2000); see also Pub. L. No. 92-261, 86 Stat. 103 (1972) (adding § 701(j) to Title VII). However, the Supreme Court has drastically narrowed the force and effect of this religious accommodation mandate. See *generally* *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (holding that employers are not required to provide religious accommodations that impose more than a de minimis cost).

14. See *supra* note 6 (giving the ADA’s definition of “qualified individual with a disability”).

15. See Harris, *supra* note 6, at 713-14 (describing how the ADA focused on removing societal barriers to equal opportunity).

16. Among other things, “reasonable accommodation” is relevant to determining whether an individual is “qualified” and thereby entitled to the law’s protection, 42 U.S.C. § 12111(8) (2000), whether the individual has suffered “discrimination,” *id.* § 12112(b)(5)(A), or presents a “direct threat” to others’ health and safety, *id.* § 12113(b), and whether a job qualification standard is “job-related and consistent with business necessity.” *Id.* § 12113(a).

compared with negotiations over other disabilities discrimination issues and other discrimination issues unrelated to disabilities? The mediator's job is largely defined by shaping and adjusting the parties' expectations. Parties who cannot reach an agreement on their own frequently have different, non-overlapping, expectations about what constitutes a fair and appropriate agreement.¹⁷ The mediator's challenge is to help the parties adjust their expectations so that they can move toward some mutually agreeable resolution of their problem. This study seeks to assess whether differences exist between workplace accommodations disputes and other types of employment discrimination disputes with respect to the parties' expectations and the mediator's efforts at changing those expectations.

Parties' expectations are principally a function of the information on which they are based. Initial expectations are largely formed according to the parties' own knowledge, which they bring with them into negotiations untempered by information which the other negotiating party might provide.¹⁸ During properly functioning negotiations, the parties exchange and acquire new information which, in turn, permits them to adjust their initial expectations and move toward some middle ground. The mediator's job, therefore, includes helping and encouraging the parties to exchange information and to accept new information as relevant to their expectations about the negotiation's results.

This paper focuses on transaction costs in negotiations over accommodations that might make this aspect of the mediator's job more difficult.¹⁹ Ronald Coase described "transaction costs" as those costs necessary "to discover who it is one wishes to deal with, to inform

17. See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 282 (2006) (assuming that parties should "settle in mediation if there are one or more sets of agreement terms that both parties would prefer to accept rather than try the case to an adjudicated conclusion").

18. See *infra* Part III.

19. These costs are not the only relevant issue in mediation, but helping the parties overcome them is one important part of the mediator's job. There are other important issues. For example, the question of whether a further elaboration of the ADA's norms requires that courts resolve ADA reasonable accommodation claims rather than private negotiations or dispute resolution systems is beyond the scope of this paper; however, it is worthy of continuing consideration. See Ann C. Hodges, *Mediation and The Americans With Disabilities Act*, 30 GA. L. REV. 431, 456 n. 160 (1996) (collecting articles debating this topic); see generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (criticizing the growth of pre-litigation and alternative dispute resolution processes where important public law questions are implicated).

people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on.”²⁰ In addition, Coase and other commentators also included “search and information costs, [and] bargaining and decision costs” in their definitions of “transaction costs.”²¹ Thus, if the information needed in disabilities accommodations negotiations is more complex, more extensive, and more closely held by the parties, then transaction costs will be higher and the mediator’s job in those negotiations will be more difficult.

Why might mediators’ roles in disabilities accommodations negotiations be different and more difficult than in other kinds of employment discrimination negotiations? First, there may be a wider gap between the parties’ expectations regarding the negotiation’s results. Workers’ rights and employers’ responsibilities under the ADA’s accommodation mandate are more ambiguous and contingent than under most other anti-discrimination statutes. The ADA requires employers to provide reasonable accommodations without defining what is “reasonable.”²² The Supreme Court also has not defined “reasonable” as applied to “accommodations.”²³ Moreover, employers need not provide accommodations that would impose an “undue hardship”; however, the statute defines undue hardship using factors that vary widely from workplace to workplace.²⁴ As a result of the ADA’s

20. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

21. RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 6 (1988) (quoting Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979)); Robert C. Ellickson, *The Case for Coase and Against “Coaseanism,”* 99 YALE L.J. 611, 615-16 (1989) (defining “transaction costs” as including “get-together costs,” “decision and execution costs,” and “information costs”); see also Daniel A. Farber, *Parody Lost/ Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 405 (1997) (interpreting “transaction costs” as “measurable costs of entering into transactions”).

22. See 42 U.S.C. § 12112(b)(5) (2000) (defining “discrimination” to include a failure to provide reasonable accommodations for a worker’s known physical or mental limitations); see also 42 U.S.C. § 12111(9) (2000) (giving illustrations, but no definition of “reasonable accommodation”).

23. See *U.S. Airways v. Barnett*, 535 U.S. 391, 412-14 (2002) (adopting a litigation framework for addressing accommodations claims without defining “reasonable,” but also holding for the first time that an accommodation can be reasonable because of its effects on co-workers of an employee with a disability rather than the employer providing the accommodation). For a further discussion of the *Barnett* litigation framework, see Harris, *Re-Thinking Discrimination*, *supra* note 4, at 142-51.

24. 42 U.S.C. § 12111(10) (2000) (defining “undue hardship” as “an action requiring significant difficulty or expense, when considered in light of the factors set forth in [Section 12111(10)(B)],” which are “(i) the nature and cost of the accommodation . . . ; (ii) the overall financial resources of the facility or facilities involved in the provision

self-conscious ambiguity about rights and responsibilities, the parties' initial expectations regarding whether and how an accommodations dispute should be resolved may range more widely and conflict more aggressively.²⁵ Employers may be significantly more hesitant to reach any agreement to provide an accommodation. Workers may expect extensive and expensive modifications to their employers' workplaces.²⁶ Thus, the expectations gap which the mediator must help the parties bridge may be wider and more resistant to narrowing in disabilities accommodations negotiations than in other employment discrimination negotiations.

Second, and closely related, employers may enter negotiations biased against accommodations claims. This bias would be rooted in the belief that the ADA asks employers to bear additional costs with no expectation of concomitant benefits. The received wisdom in the academy and the judiciary is, in the words of Judge Guido Calabresi, that:

[t]he concept of reasonable accommodation permits the employer to expect the same level of performance from individuals with disabilities as it expects from the rest of its workforce. But the requirement of reasonable accommodation anticipates that it may cost more to obtain that level of performance from an employee with a disability than it would to obtain the same level of performance from a non-disabled employee.²⁷

of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity . . ."). *But cf.* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 717 (1978) (holding that cost is not a legitimate reason for discriminating against women); UAW v. Johnson Controls, 499 U.S. 187, 215 (holding the same).

25. See Polly Beth Proctor, *Determining "Reasonable Accommodation" Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 Sw. U. L. REV. 51, 52-53 (2003).

26. These reactions may be the products of "reference bias"; that is, parties' definition of success in a negotiation often depends upon some reference point found outside the negotiations that is manipulable or random. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 245 (1993) (discussing "reference bias"). Here, the employee and the employer may begin with different reference points, and therefore define success differently, because of the statutory command's ambiguity.

27. *Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 138 n.3 (2d Cir. 1995) (citation omitted). For a sample of scholars' endorsement of this received wisdom, see John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2609 (1994) ("Clearly, given a choice between two

It is entirely likely that employers have received the same wisdom. As a result, they may commence negotiations assuming that accommodations necessarily result in a net economic loss – in essence, accommodations are a kind of targeted tax to finance the societal goal of increasing employment among people with disabilities.²⁸ Information about the merits of a particular accommodation dispute, therefore,

equally productive workers, one requiring the expenditure of significant sums in order to accommodate him and one requiring no such expenditures, the profit-maximizing firm would prefer the worker who is less costly to hire.”); RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 487 (1992) (describing the ADA as “[i]nsisting that disabled individuals be accorded job opportunities that cost more than they are worth”); MARK KELMAN, *STRATEGY OR PRINCIPLE?: THE CHOICE BETWEEN REGULATION AND TAXATION* 8-9 (1999) (describing the ADA’s accommodation mandate as requiring the provision of “beneficial, non-market-rational treatment to certain customers (or workers)”); Mark Kelman, *Market Discrimination and Groups*, 53 *STAN. L. REV.* 833, 836 (2001) (defining “accommodation” as “a claim to receive treatment from a defendant that disregards some (though not all) differential input costs”); Linda Hamilton Krieger, *Foreword – Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 *BERKELEY J. EMP. & LAB. L.* 1, 4 (2000) (“The ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect.”); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 *GA. L. REV.* 27, 31 (2000) (“[The ADA] not only required employers to stop discriminating against persons with disabilities, but explicitly demanded that they shoulder the costs necessary to enable persons with disabilities to work.”); Sherwin Rosen, *Disability Accommodation and the Labor Market*, in *DISABILITY AND WORK: INCENTIVES, RIGHTS AND OPPORTUNITIES* 18, 21 (Carolyn L. Weaver, ed., 1991) (“By forcing employers to pay for work site and other job accommodations that might allow workers with impairing conditions defined by the law to compete on equal terms, it would require firms to treat unequal people equally, thus discriminating in favor of the disabled.”).

28. See generally Amy L. Wax, *Disability, Reciprocity and “Real Efficiency”: A Unified Approach*, 44 *WM. & MARY L. REV.* 1421, 1432-42 (2003) (arguing that although some accommodations are efficient, the ADA shifts the costs of employing people with disabilities from taxpayers to employers); Jerry L. Mashaw, *Against First Principles*, 31 *SAN DIEGO L. REV.* 211, 218-20 (1994) (arguing that the ADA mandates expenditures by private parties such that “employers . . . may feel an acute sense of injustice and demoralization in carrying out their obligations”). A small group of scholars, to which I belong, dissents from the received wisdom that the ADA’s accommodation mandate differs qualitatively from traditional anti-discrimination mandates, particularly with regard to costs. See, e.g., Michael A. Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 *U. PA. L. REV.* 579, 583-86 (2004); Samuel R. Bagenstos, *“Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights*, 89 *VA. L. REV.* 825, 828-30 (2003); Harris, *Law Economics, and Accommodations*, *supra* note 4; Christine Jolls, *Antidiscrimination and Accommodation*, 115 *HARV. L. REV.* 642, 644-47 (2001); see also Helen A. Scharzt et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 *MISS. L.J.* 917 (2006) (offering empirical evidence about the costs and benefits of accommodations that support many of the theoretical arguments in Harris, *Law, Economics, and Accommodations*, *supra* note 4).

may be filtered through and distorted by a categorical bias against accommodations claims. The mediator in a disabilities accommodation negotiation would therefore be required to address the employer's bias before efforts to adjust the parties' expectations could hope to succeed.

Third, bilateral asymmetric information may be a particular problem in disabilities accommodation negotiations. Bilateral asymmetric information, which is common to many negotiations, simply means that employers have information that workers do not, workers have information that employers do not, and all of this information may be relevant to resolving their accommodation problems. Since the parties do not have the same information at the outset of the negotiations, the parties' expectations about how to resolve their dispute will frequently conflict. Absent new information that adjusts expectations, agreement will be difficult, if not impossible. Information asymmetries can also exacerbate the risk of stereotyping and biases which, in turn, make it more difficult for parties to consider new information that will adjust their expectations.

The problem of bilateral asymmetric information is particularly significant in disabilities accommodation negotiations, which usually require more extensive information about the worker's impairment and the employer's business than negotiations over other workplace discrimination issues. Unlike most workers alleging workplace discrimination, every worker bringing a claim under the ADA must prove her way into the statute's protected class; that is, she must demonstrate that she is a "qualified individual with a disability."²⁹ For pay, hiring, promotion, discharge, and most other types of discrimination claims, no further information about the worker's impairment is required. But redressing an accommodation problem typically requires even more information: how the impairment operates, how it interacts with the employer's workplace and the worker's job, how it might affect co-workers, and the worker's prognosis, among other things. This information is in the worker's control, and it may be quite personal. Beyond the sheer bulk of this additional information, the worker may resist deep intrusions into her physical or mental condition.³⁰ Similarly, the employer has information unavailable to the worker that may be relevant but, in the employer's view, proprietary: the costs of production, workplace design costs and options, industry practices, product market projections, and their

29. See *supra* note 6 (giving the ADA's definition of "qualified individual with a disability").

30. See *infra* text accompanying notes 92-94.

own plans regarding human capital issues.³¹ In sum, more information may be needed for successful accommodations negotiations, but more resistance to information disclosure might be expected. The mediator's challenge to assure that all of this relevant information gets introduced into the negotiation may therefore be greater.

Finally, finding an effective and efficient accommodation can be a vastly more complex undertaking than, for example, calculating and remedying a discriminatory pay differential or redressing a discriminatory firing or demotion decision. Information about available and appropriate accommodations must be collected, possibly from public and non-public sources. Then, general information about accommodations must be adapted to the idiosyncratic relationship between an individual employee's impairment and the structure of the employer's organization and its job designs, organizational structure, and physical workplace.³² If collecting and using this information adds a further degree of difficulty to disabilities accommodation negotiations, then the mediator's task in helping the parties to adjust their expectations and solve their problem may also be more difficult.

Using data from the U.S. Equal Employment Opportunity Commission's ("EEOC") mediation program, this paper offers preliminary evidence about these possible differences between disabilities accommodation negotiations and negotiations over other employment discrimination issues. It searches for differences in the parties' expectations and differences arising out of three sources of informational transaction costs – bilateral asymmetric information, biases, and the difficulties associated with finding a solution to accommodations problems – using an original analysis of a data set constructed by E. Patrick McDermott and his co-authors from a survey of participants in the EEOC's mediation program.³³

31. See Seth D. Harris, *Coase's Paradox and the Inefficiency of Permanent Strike Replacements*, 80 WASH. U. L.Q. 1185, 1208 (2002).

32. See *infra* Part II.B.3.

33. See E. PATRICK McDERMOTT ET AL., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MEDIATION PROGRAM (2000), available at <http://www.conflict-resolution.org/sitebody/acrobat/report1.pdf> [hereinafter McDERMOTT ET AL., PARTICIPANTS STUDY]. McDermott and his co-authors found that participants were generally satisfied with the EEOC's mediation program. One of this paper's unexpected findings is that participants' satisfaction with mediators' performance in negotiations over disabilities accommodations may not be correlated with participants' ability to reach an agreement. To the contrary, greater satisfaction with the mediator may signal a bargaining failure. See *infra* Part III.B.2.

I analyzed answers to two sets of questions in the survey. The first set of questions directly addresses the issue of whether participants in disabilities accommodations negotiations have greater expectations than participants in other employment discrimination negotiations. The evidence suggests that they do not. On this issue, speculation about the effects of the ADA's textual ambiguities appears to be wrong.

The second set of questions solicited participants' reactions to the mediators who participated in their negotiations. The participants' responses offer indirect evidence of differences in the informational transaction costs that arise in disabilities accommodations negotiations and negotiations over other employment discrimination issues. The legal literature identifies three methods that mediators use to overcome these informational transaction costs: (1) mediators improve information exchange; (2) mediators help to de-bias negotiations; (3) mediators serve as bridges to information about solutions to accommodations problems and, in selected cases, propose solutions that the participants would not or could not propose themselves.³⁴ The survey did not question participants directly about these three mediator techniques; however, participants were asked to react to five favorable statements about their mediators that were reasonable proxies for these techniques. The survey revealed small but statistically significant differences between the responses of participants in disabilities accommodations negotiations and participants in negotiations over other kinds of employment discrimination issues. This evidence suggests that mediators have a more difficult time using their techniques to overcome transaction costs in disabilities accommodation negotiations. Thus, because they are harder to overcome, we can deduce that informational transaction costs in disabilities accommodations negotiations are more prominent and stubborn. The EEOC evidence also offers some insight into the particular ways in which informational transaction costs in disabilities accommodations negotiations are different.

This is the first empirical study of its kind. Other studies have found that mediation of disabilities accommodations charges filed with the EEOC can increase the likelihood of low-cost, desirable outcomes for workers and employers.³⁵ Two studies have assessed participants' satisfaction with the EEOC's voluntary mediation program

34. See *infra* Parts II.B.1, II.B.2, and II.B.3.

35. See, e.g., Miller, *supra* note 7, at 18-22 (providing data regarding the results of mediation of ADA reasonable accommodation charges at the EEOC in FY 2000); Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation*

and mediators' performance in negotiations regarding all types of employment discrimination charges filed with the EEOC.³⁶ Another study has considered mediators' perceptions of what is required to help bring negotiations over EEOC charges to a successful resolution.³⁷ But there has been little attention paid to what is required to achieve desirable outcomes in mediated negotiations over disabilities accommodations. This paper offers some preliminary answers to that question.

Part II discusses the background conditions that must be present for mediation to reduce transaction costs in negotiations. This part argues that mediation should succeed in disabilities accommodation negotiations at the same rate it succeeds in other types of negotiations. Part II also discusses the three categories of informational transaction costs that can arise in employment discrimination negotiations and the three techniques mediators use to help overcome these transaction costs. In addition, Part II summarizes this information into testable hypotheses. Part III tests these hypotheses against evidence from the EEOC mediation program. The evidence does not support the hypothesis that there is a greater gap between the parties' expectations in disabilities accommodations negotiations than in negotiations over other types of employment discrimination negotiations. However, the evidence supports the hypotheses that there are differences in the informational transaction costs that arise in disabilities accommodations negotiations and negotiations over other types of employment discrimination disputes.

of the Americans with Disabilities Act by the Equal Employment Opportunity Commission, 50 KAN. L. REV. 1, 36-38 (2001) (discussing the EEOC mediation program's importance in helping raise the EEOC's predetermination settlement rate, provide complainants with relief, and assure participants' satisfaction).

36. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33; CRAIG A. McEWEN, CENTER FOR DISPUTE SETTLEMENT, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S PILOT MEDIATION PROGRAM (1994) (studying exit survey responses of participants in mediated negotiations over all employment discrimination claims during the EEOC's pilot mediation program to assess time to resolution, mediation outcomes, and participant satisfaction with the mediators and the mediation program). See also Thomas A. Kochan et al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233 (2000) (a similar study of mediated negotiations in the Massachusetts Commission Against Discrimination's experimental program to assess mediation outcomes, time to completion, costs incurred, and participant satisfaction).

37. E. PATRICK McDERMOTT ET AL., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, THE EEOC MEDIATION PROGRAM: MEDIATORS' PERSPECTIVE ON THE PARTICIPANTS, PROCESSES, AND OUTCOMES (2001), available at <http://www.conflict-resolution.org/sitebody/acrobat/report2.pdf> [hereinafter *MEDIATORS STUDY*].

Part III also suggests three conclusions about what these differences are. First, information exchange is more difficult in disabilities accommodations negotiations. As a result, the mediators face the additional challenge of introducing more and better information into disabilities accommodations negotiations if negotiators are to reach agreement. Second, the mediators' role in proposing solutions and providing information about possible solutions is more critical to disabilities accommodations negotiations. Finally, disabilities accommodations negotiations are more likely to be stalled and frustrated by employers' biases against disabilities accommodations. I will conclude with a few suggestions about the implications of these findings and how the mediation and disabilities communities might respond.

I. MEDIATORS' ROLE IN REDUCING TRANSACTION COSTS

A. *The Background Conditions for Successful Mediation*

Lon Fuller's classic article "Mediation – Its Forms and Functions"³⁸ describes the background conditions that are necessary for a mediator to help negotiating parties reduce transaction costs.³⁹ Fuller's analysis drew from his experience with bargaining between unions and employers; however, the characteristics of the collective bargaining relationship which Fuller considered most important are present in accommodations disputes between employers and their employees as well.⁴⁰ Thus, there is no particular reason to believe that disabilities accommodations negotiations are especially ill-suited to mediation. To the contrary, this section suggests that mediation should help to resolve many ADA workplace accommodations disputes.

38. Lon L. Fuller, *Mediation – Its Forms and Functions*, in ALTERNATIVE DISPUTE RESOLUTION 115 (Michael Freeman ed., 1995).

39. This section does not purport to offer a comprehensive treatment of the mediator's role and the myriad of ethical and practical issues associated with it. See, e.g., AMERICAN ARBITRATION ASSOCIATION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf [hereinafter MODEL STANDARDS]. Also, I do not mean to suggest that Fuller analyzed mediation through an economic lens. I have translated Fuller's analysis into the language of transaction costs – hopefully without doing violence to his ideas – to better serve this paper's purposes.

40. Collective bargaining and an employer's relationship with a worker with an impairment share other elements. For example, both relationships involve two parties. See Fuller, *supra* note 38, at 122.

In Fuller's view, mediation "is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves."⁴¹ Thus, the mediator is not bound to enforce rules or other externally imposed mandates.⁴² Her role is to help the parties shape procedural and substantive rules that will govern both their negotiations and their subsequent relationship. This definition of the mediator's role is consistent with the ADA's problem-solving philosophy and structure. The ADA largely allows the participants to shape the interactive process' procedural rules within very broad statutory boundaries.⁴³ And the statute's non-specific mandate that the employer provide a reasonable accommodation gives the negotiators great latitude to shape the outcome.⁴⁴

The interactive process between employers and workers with disabilities occurs "in the shadow of the court" – that is, litigation looms as an option for either party, but the parties are free to implement solutions that differ from the remedies which a court might award or accommodations which a court might deem "reasonable."⁴⁵ For

41. *Id.* at 118; see also BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 85 (2004) (explaining that the four characteristics of mediation are impartiality, process orientation, problem solving, and client focus).

42. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post Modern, Multicultural World*, 38 WM. & MARY L. REV. 5, 36 (Oct. 1996) (describing mediation as an "intermediate space" between formal litigation and informal, familial discussion in which, through "more authentic grappling with issues and differences . . . we may arrive at contingent agreements, promises to meet and confer again, contingent performances, plans for the future without adjudication of the past . . ."). One of the few limitations on this general principle is that the mediator is subject to ethical rules which may require her to impose some limitations on the participants' behavior or withdraw from her role in their negotiations. See MODEL STANDARDS, *supra* note 39. Also, this is not to suggest that legal doctrine is irrelevant to negotiations, including mediated negotiations. See generally Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 167-69 (2002) (discussing the various effects of legal doctrine on negotiations); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950-52 (1979) (same).

43. See Proctor, *supra* note 25, at 58-71 (discussing courts' decisions interpreting the "interactive process" regulatory requirement); Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 940-41 (2003) (same).

44. This latitude is made necessary by the great diversity of impairments experienced by workers and the equally great diversity among American workplaces. It is made possible by the lack of a single definition of "reasonable accommodation" or "undue hardship" in the ADA. See *supra* notes 22-24 and accompanying text.

45. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 789 (1984); see also Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing*

example, an employee with an impairment might offer to pay part of the cost of her accommodation by accepting lesser wage increases, even though the law prohibits an employer from requiring or a court from ordering such a payment.⁴⁶ Discussions in the interactive process also need not be limited to the type, cost, availability, and effectiveness of various accommodations. The negotiating parties may discuss any topic and reach any agreement that they consider relevant to their relationship. For example, the parties may agree to a series of collaborative efforts to increase the employee's productivity that are unrelated to the accommodation.⁴⁷ The parties may even agree to sever their relationship.⁴⁸ Within broad boundaries, the interactive process belongs to the parties, not the law. Fuller's definition of the mediator's role as an aid to the process of norm formation is thus particularly apt in the interactive process.

Fuller also posited that mediators operate best when each party to a negotiation seeks to gain the maximum return at the lowest possible cost.⁴⁹ However, this calculus does not require a zero-sum or constant-sum negotiation. Parties may value different aspects of their relationship differently; therefore, it may be possible for both parties to benefit from an exchange facilitated by a mediator.⁵⁰ This general insight is particularly relevant to the relationship between an employer and an incumbent employee with an impairment. As I

Environment, 5 U. PA. J. LAB. & EMP. L. 487, 508 (2003). *But see* Berger, *supra*, at 515 (arguing that mediation should be commenced as soon as possible after a dispute arises because "mediation undertaken after the commencement of litigation can hardly proceed without reference to it; people bargain in the shadow of the law").

46. *See* Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 57-58); *see also* J.H. Verkerke, *Is the ADA Efficient?* 50 UCLA L. REV. 903, 947 n.144 (2003) (discussing the EEOC's strict limitation of cost-sharing agreements and describing the potential benefits of a broader use of such agreements).

47. *See* Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 45-46).

48. *See* Fuller, *supra* note 38, at 118. *See generally* Hodges, *supra* note 19, at 467-68 ("The conventional wisdom on mediation suggests it is most appropriate for cases having a range of possible solutions, where the dispute is fact-based and where preservation of continuing relationships is important. Reasonable accommodation cases fit neatly within this description. In such cases, the employee is seeking an accommodation from the employer to enable the employee to work. Frequently, a range of possible accommodations exists, varying in cost, difficulty, and effectiveness. The employee and the employer would be well served by attempting to reach a mediated solution to the problem, minimizing hostility and finding an accommodation best satisfying both participants.")

49. *See* Fuller, *supra* note 38, at 125.

50. *See id.* at 127; Menkel-Meadow, *supra* note 45, at 795; *see also* Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 106-07 (2002) [hereinafter Menkel-Meadow, *The Lawyer as Consensus Builder*].

have explained elsewhere, accommodations disputes need not be zero-sum contests.⁵¹

Finally, Fuller argued that “[m]ediation by its very nature presupposes relationships normally affected by some strong internal pull toward cohesion;” by contrast, “mediation has scarcely any role to play in human relationships fluidly organized on what may be broadly described as the market principle.”⁵² Fuller might have been describing the difference between the “internal labor market” and the “external labor market.” The external labor market is a competitive market in which prospective employers and job applicants bargain over the terms and conditions of employment. Job applicants are generally mobile and offer general skills that may benefit many employers. As a result, prospective employers can choose from among many fungible job applicants. Similarly, job applicants can choose from among many fungible employers.⁵³ Neither the job applicant nor the prospective employer invests significantly in the relationship before the job is offered and accepted. There are few transaction costs associated with choosing one employer or worker over another and, therefore, few barriers to competition in the external labor market.⁵⁴ Supply and demand should set the terms and conditions of employment.⁵⁵

By comparison, the internal labor market relationship creates precisely the kind of “strong internal pull toward cohesion” that Fuller considered necessary to the success of mediation.⁵⁶ The internal labor market is characterized by barriers to competition that may have several sources.⁵⁷ Regardless of their source, however, these barriers increase the efficiency of the employment relationship, particularly if the parties sustain the relationship over a long term. The employee gets greater career compensation and increased employment security. The employer gets increased productivity and

51. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 33).

52. Fuller, *supra* note 38, at 124.

53. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 13-14).

54. *Id.*

55. See Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1353 (1988).

56. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 14-15).

57. See *id.* (manuscript at 14-17) (discussing the “human capital theory,” “job-match theory,” and “supervision theory” approaches to internal labor market theory).

profitability.⁵⁸ Thus, the internal labor market creates a bilateral monopoly because both the employer and the employee are better off continuing their existing relationship than seeking to forge a new relationship with another worker or employer.⁵⁹ For these same reasons, I have argued elsewhere that the internal labor market creates conditions that permit accommodations to produce Pareto superior results for employers and their employees with impairments, rather than zero-sum results that advantage accommodation-seekers to their employers' disadvantage.

Thus, Fuller's description of the background conditions for successful mediation nicely captures the nature of the relationship between an employer and an incumbent employee seeking accommodation in the internal labor market. However, the description may also suggest that mediation will be less helpful in the external labor market, assuming that external labor markets are truly competitive for job applicants with impairments and their prospective employers. But both Michael Stein and J. Hoalt Verkerke have argued that the ADA addresses market failures that arise when workers with impairments seek employment in the external labor market. Thus, mediation also may be a valuable tool for reducing transaction costs even outside the internal labor market.⁶⁰

B. *Mediators in Negotiations over Disabilities Accommodations*

The preceding section argues that the same background conditions for successful mediation pertain to disabilities accommodations negotiations that are found in other types of negotiations such as collective bargaining. Simply, disabilities accommodations negotiations are, as a general matter, no worse suited to mediation than other types of workplace disputes. This section turns from similarities to differences. It considers three categories of informational transaction costs that might retard the process of adjusting the parties' expectations and moving toward settlement: (1) bilateral asymmetric information; (2) the risk of stereotyping and other forms of bias; and (3) the high cost of identifying solutions to accommodations problems. This part will discuss how these categories of transaction costs might differ in disabilities accommodations negotiations when compared

58. *Id.* (manuscript at 14-15).

59. *Id.* (manuscript at 20).

60. See generally Michael A. Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003); Verkerke, *supra* note 46; Michael A. Stein, *Labor Markets, Rationality, and Workers with Disabilities*, 21 BERKELEY J. EMP. & LAB. L. 314, 325-28 (2000).

with other negotiations over claims of employment discrimination. It will also discuss the mediation literature's assessment of how mediators can help to redress these transaction costs. This section's conclusion summarizes this analysis into hypotheses that will be tested by the empirical evidence offered in the next part.

(1) *Mediators and Information Exchange*

Bilateral information asymmetries are not unique to accommodations disputes, but the nature, and perhaps the quantity, of information involved may be quite different. Employers have a great deal of information that is not readily available to their employees, but which may be relevant to discussions about accommodations, including the costs of production, workplace design costs and options, industry practices, product market projections, and their own plans regarding human capital issues.⁶¹ Similarly, workers with impairments have relevant information that is not available to their employers: the nature and extent of workers' physical or mental impairments, their prognoses, the impairments' potential consequences in the workplace, and the workers' professional and personal preferences. The ADA prohibits employers from asking job applicants for medical information prior to making a job offer unless the information is job-related.⁶² Even after making the job offer, the employer may have insufficient experience with the particular disability at issue to know what medical information to seek.⁶³ Further, employers may be hesitant to ask for medical information because mere possession of the information may suggest that subsequent actions by the employer flow from the employee's impairment.

Yet, the exchange of relevant information is critical to the process of adjusting the parties' expectations. As noted above, expectations are largely a function of the information on which they are based.⁶⁴ Better and more complete information allows both parties to

61. See Harris *supra* note 31, at 1208.

62. See 42 U.S.C. § 12112(d)(2)(A)-(B) (2000) ("Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability [However, a] covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.").

63. The ADA permits employers to request limited medical information after making a job offer. See 42 U.S.C. § 12112(d)(3) (2000).

64. Inflated expectations may also be the product of heuristics. Russell Korobkin has explained that negotiating parties' expectations may be influenced by overconfidence bias and reference bias which, if not addressed, can interfere with mediators' efforts. See Korobkin, *supra* note 17, at 284-91, 308-14.

understand why their initial expectations may be unreasonable or, at least, unacceptable to the other party, and why adjustment is necessary to reach a settlement.⁶⁵ Thus, the mediator's job includes getting the parties to exchange information and accept the exchanged information as relevant to their expectations about the negotiation's results.

According to Fuller and other scholars, even experienced negotiators will not and should not undertake a wholesale disclosure of the relevant information they possess and, perhaps more important, their subjective preferences and judgments about that information.⁶⁶ The participant receiving this "information dump" will not have sufficient context to understand the import of the disclosing party's preferences or information. The unregulated disclosure of information could be misinterpreted as strategic behavior and regarded with suspicion.⁶⁷ Rather than aiding negotiations, this method of information disclosure may inhibit progress between the parties.

Mediation scholars and practitioners argue that one of the mediator's most important roles is to assist the negotiators with information exchange in a manner that narrows information asymmetries and avoids the problems created by unregulated information disclosure.⁶⁸ Rather than an "information dump," the better approach is controlled disclosure in context. Many mediators begin negotiations with a "joint session" at which both parties present their "sides" of the problem to the mediator while the other party listens.⁶⁹ While this session ostensibly serves to edify the mediator, it also forces the

65. The litigation framework for reasonable accommodation cases adopted in *U.S. Airways v. Barnett* is premised on the same understanding of information asymmetries between employers and workers with disabilities. See Harris, *Re-Thinking Discrimination*, *supra* note 4, at 144-46.

66. See Fuller, *supra* note 38, at 128; Menkel-Meadow, *supra* note 45, at 822-23 (describing the importance of finding a balance between withholding information and disclosing it); Mnookin, *supra* note 26, at 239-40 (discussing the "negotiator's dilemma" of choosing between sharing information to expand the available resources to be distributed and withholding information to maximize the resources received); see also Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 788-89 (1999) (describing "reactive devaluation" as "our inability to process accurately, if at all, any information, legitimate objectives, or desires of those who are oppositional to us").

67. See Fuller, *supra* note 38, at 127.

68. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1899 (1997) ("The mediator may gather more information than the parties would share if left to their own devices.").

69. See SAM KAGEL & KATHY KELLY, *THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK* 114-15 (1989); Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S16 (1989); ADA MEDIATION STANDARDS WORK

parties to listen to each others' definitions of the problem. The presence of a dispassionate mediator may encourage a more thorough and forthcoming exposition by both parties than might be possible if the only audience were the opposing party. The forum – a more formal presentation before a neutral observer – may also lend credibility to the information disclosed. Disclosure also may be more complete if the mediator asks questions that illuminate particular facts or perceptions. These questions may be answered more willingly because they come from a disinterested inquisitor.⁷⁰

The joint session may be followed by “shuttle diplomacy.” The mediator holds separate private meetings with each party. These meetings allow the parties to disclose information in confidence that they would not otherwise disclose, at least at the outset of their negotiations.⁷¹ Also, these private sessions allow the mediator to encourage the parties to identify their preferences among the various issues under negotiation. Using these techniques and others allows mediators to assure that information that might not otherwise be disclosed, or undervalued if it is, will be more fully and completely disclosed and understood.⁷²

In negotiations over employment discrimination issues, we would expect that the employer and the employee would know their own expectations about the dividends they will earn from their internal labor market relationship, but they would not have a complete grasp of the other party's expectations. The asymmetries in disabilities accommodations negotiations may be wider, however. The employer may not fully understand the scope, nature, and duration of the employee's impairment and its effects on the employee's productivity. The employer may not know what non-monetary aspects of a job the employee would value in light of her impairment.⁷³ For example, an employee with a back problem may value a move from a job that requires heavy lifting to a sedentary job that is free of difficult

GROUP, *supra* note 1, § II.A.2 (referencing the joint session); MEDIATORS STUDY, *supra* note 37, at 20.

70. See Kagel & Kelly, *supra* note 69, at 115; Korobkin, *supra* note 17, at 297.

71. See Fuller, *supra* note 38, at 128, 132; KAGEL & KELLY, *supra* note 69, at 116; Feinberg, *supra* note 69, at S17-19; Hodges, *supra* note 19, at 433.

72. See Korobkin, *supra* note 17, at 295-96 (describing other techniques a mediator can use in private caucus with a party, including asking the party to examine the weaknesses of her case).

73. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 48-49) (discussing employment that is less valuable because of shadow prices or more valuable because of shadow benefits when cash wages are held constant).

physical labor.⁷⁴ The employer also may not know how the employee prioritizes these non-monetary aspects of a job, cash wages, and other benefits. The employer may not have an accurate assessment of whether the employee is open to discussing changes in the employment relationship that extend beyond the accommodation to larger questions about the employee's career path and wage progression. The employer also may not know whether the employee is willing to engage in productivity-enhancing training and related behaviors or sacrifice seniority by changing jobs or departments, for example.⁷⁵

Similarly, the employee may not have sufficient information about the requested accommodation's costs to the employer and other information that is special to accommodations disputes. For example, the employee may not know whether an accommodation's costs should be amortized across other employees and customers who may benefit from it.⁷⁶ The employee also may not know a great deal about alternative accommodations. For example, the employee may not have complete information about alternative career paths that might create opportunities for reassignment to different jobs within the employer's organization, particularly if the employer's business plan, its capital position, and its predictions about product market conditions could alter the mix of available career paths. The employee may not have an accurate assessment of whether the employer is open to discussing changes in the employment relationship that extend beyond the scope of the accommodation to broader questions of productivity and the duration of the relationship.⁷⁷

Disclosure of this information would allow the mediator to help the parties identify their real needs.⁷⁸ A genuine needs assessment is essential to a clear definition of the problem to be solved and,

74. See, e.g., *U.S. Airways v. Barnett*, 535 U.S. 391, 394 (2002) (describing Barnett's request to remain in the mailroom because of a back problem rather than returning to the cargo loading area).

75. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 45-54).

76. See *id.* (manuscript at 33-34 & n.83) (explaining that the cost of an accommodation cannot be treated entirely as an increase in one worker's wages when the accommodation may increase the employer's benefits by increasing the productivity of other employees or improving accessibility for customers or others and should, therefore, be amortized across all beneficiaries).

77. See *id.* (manuscript at 45-54).

78. See source cited *supra* note 76; see also James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 *HOFSTRA LAB. & EMP. L.J.* 429, 453-54 (2001) (discussing the mediator's role in improving information exchange and parties' understanding in the USPS mediation program).

therefore, a precondition for finding a genuine solution.⁷⁹ With the requisite information and an accurate needs assessment in hand, the mediator could focus the parties' attention on the most important issues and steer the negotiations to a resolution of those issues.⁸⁰ The mediator could also structure the negotiations and the disclosure of further information to increase the likelihood that the participants will agree.⁸¹ But eliciting the information is the starting place for much of what the mediator must accomplish.

(2) *Mediators and De-Biasing Negotiations*

Asymmetric information carries other dangers beyond the complex task of controlled information disclosure in context. Information asymmetries increase the risk that the employer's representatives will rely on stereotypes rather than facts in their decision-making. Stereotypes and biases are transaction costs to the extent that they are barriers to the process of sharing, accepting, and understanding information. Any barrier to the appropriate use of information in a negotiation can interfere with the mediator's effort to help the parties adjust their expectations. Again, the risk of bias and stereotyping is not unique to disabilities accommodations disputes, at least among employment discrimination matters. However, as with information asymmetries, the risk may be different in quantity or kind.

Employers cannot be expected to have adequate information about their employees' many and varied prospective impairments. But, like all of us, employers' representatives have been exposed to cultural narratives about people with impairments and their capacity for work. People with impairments were historically depicted as "afflicted, dependent, childlike, miserable, sick, and even evil."⁸² Depictions of people with impairments have evolved,⁸³ but portrayals of a feeble, helpless, and lacking population persist, particularly for people with mental impairments.⁸⁴ Even when the prevailing attitude is not overtly hostile or knowingly patronizing, a particular stereotype that is sometimes called the "spread effect" may operate.

79. See Menkel-Meadow, *supra* note 45, at 795, 797.

80. See Kagel & Kelly, *supra* note 69, at 120.

81. See Fuller, *supra* note 38, at 128; Feinberg, *supra* note 69, at S18-19.

82. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 262-63 (2001); see Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Impairments*, 40 UCLA L. REV. 1341, 1344, 1359 (1993).

83. See Rovner, *supra* note 82, at 264; Drimmer, *supra* note 82, at 1405.

84. See Rovner, *supra* note 82, at 264; Drimmer, *supra* note 82, at 1343. In some cases, employers are simply averse to people with disabilities. See Stewart J. Schwab

Employers may assume that a worker's impairment affecting one skill necessarily signals other limitations. These culturally inspired stereotypes may fill the information gap created by information asymmetries and skew the participants' perceptions of the information they receive.⁸⁵ More important, they may have the effect of skewing the employer representative's perception of the type, cost, and feasibility of the accommodation needed for a worker's impairment.⁸⁶ The result can be an added transaction cost which the mediator must help overcome.

Beyond any impairment-focused biases, employers may also enter into disabilities accommodations negotiations with a bias against providing accommodations. In other words, employers may practice what scholars preach. The academy's received wisdom is that accommodation mandates are normatively different from anti-discrimination mandates. Samuel Issacharoff and Justin Nelson spoke for many scholars:

The Title VII cases required neither an independent normative justification for their redistributive impact nor an independent measure of how much redistribution was appropriate. The redistribution in early discrimination case law flowed directly from the prohibition on discrimination simpliciter and the measure of required redistribution followed tort-based principles of making whole the victims of that discrimination. In the ADA context, by contrast, the overwhelming sweep of cases concern not discrimination simpliciter, but a claimed failure to redistribute in the form of accommodation. The ADA cases, therefore, require an independent normative command for the obligation to redistribute or accommodate and some measure of how much redistribution should ensue.⁸⁷

In other words, employers may accept their obligation to remedy race, sex, disability, and other kinds of discrimination which they see as resulting from irrational animus or skewed decision making. Yet, they will resist providing accommodations because they view them as

& Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1214 (2003).

85. Congress recognized the ubiquity of these biases in the ADA's preamble. See 42 U.S.C. § 12101(a)(2), (7) (2000).

86. Schwab & Willborn, *supra* note 84, at 1219-21 (discussing employers' ignorance about the relationship between disability and productivity).

87. Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?* 79 N.C. L. REV. 307, 310-11 (2001). See *supra* note 27 (citing other scholars' articles adopting the same view). But see *supra* note 28 (listing selected articles rejecting this received wisdom).

a mandated redistribution of their resources yielding net costs rather than net benefits.⁸⁸ Other scholars have rejected the received wisdom, both by arguing that there is no normative difference between accommodation mandates and anti-discrimination mandates⁸⁹ and by showing both theoretically and empirically that accommodations' benefits to employers can and often will exceed their costs.⁹⁰ But the majority of employers may well join the majority of scholars and influential judges⁹¹ in a bias-qua-assumption that the received wisdom is correct.

The task of overcoming an employer's biases about people with impairments or accommodations may be made more difficult by the complexities associated with drawing out the requisite information about the worker's impairment. The worker may have to disclose significant amounts of private information about her impairment, perhaps more than she expected before raising concerns about an accommodation. As noted above, solving accommodation problems involves matching the worker's impairment with an appropriate, effective, and efficient accommodation. This matching process typically requires more information about the worker's impairment than a

88. See Bagenstos, *supra* note 28, at 862-67 ("In many circumstances where the cost of the accommodation makes a worker with a disability less net productive than other workers who are available to fill his position, an employer 'could quite hard-headedly – and perhaps hardheartedly – hold to job-qualification requirements which do not make allowances for the disabled.' An accommodation requirement therefore imposes costs by requiring employers to act in a way that is (for them at least) irrational."); Schwab & Willborn, *supra* note 84, at 1220 ("Employers see some accommodations, such as paying for moving expenses, as 'normal', while they view others, such as one-time accommodations to individuals with disabilities, as 'abnormal.' Even though both types of accommodations may impose the same costs on employers, employers may be more willing to pay 'normal' costs, or, equivalently, may be more willing to ignore them in their hiring calculus. This normality bias harms individuals with disabilities by perpetuating a myth that they are more costly."). The failure to agree to an accommodation in these circumstances may also be a species of "loss aversion." See Mnookin, *supra* note 26, at 244.

89. See Stein, *supra* note 28; Jolls, *supra* note 28.

90. See Harris, *Law, Economics, and Accommodations*, *supra* note 4; D.J. Hendricks et al., *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*, 25 *DISABILITIES STUD. Q.* 175 (2005); Schartz et al., *supra* note 28; Peter Blanck, *Workplace Accommodations: Empirical Study of the ADA*, in *THE AMERICANS WITH DISABILITIES ACT: EMPIRICAL PERSPECTIVES* (Samuel Estreicher & Michael A. Stein eds., forthcoming 2007) (manuscript on file with the author).

91. See *supra* note 27 (quoting *Borkowski*); see also *Vande Zande v. Wisc. Dep't of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (suggesting that accommodations can be reasonable when their costs exceed their benefits, as long as the costs are not disproportionate).

traditional disparate treatment or disparate impact claim.⁹² Further complicating this already multi-factored equation, the worker may be less willing to disclose all of the requisite information if she believes that her employer will greet it with skepticism or resistance born of stereotypes, and even more so if the disclosure could put her livelihood at risk.

One mediator in a single negotiation cannot alter societal attitudes about accommodations and people with impairments. But commentators, including the authors of the Guidelines, have posited that a mediator can serve as a communications buffer to help de-bias negotiations over accommodations issues.⁹³ Most obviously, “shuttle diplomacy” between the participants allows the mediator to strip biased, patronizing, or unduly emotional language out of the participants’ communications.⁹⁴ The Guidelines also specifically encourage mediators to get specialized training in “disability awareness” including “[d]isability etiquette (appropriate ways to interact with people with disabilities) and terminology” and “[a]ddressing one’s own biases about disability.”⁹⁵ Well-trained mediators in disabilities disputes are attuned to language and behavior that suggests biases that might interfere with productive negotiations.⁹⁶

Beyond serving as a communications buffer, the most important de-biasing device may be the mediator playing the role which Fuller

92. See *supra* text accompanying notes 29-31.

93. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 183 (2003) (discussing how mediators assist with deconstructing stereotypes); see also Antes et al., *supra* note 78, at 453-54 (describing finding in their study of the program that mediators’ intervention changed the manner in which parties expressed themselves from emotion to calm and how the language of the interaction became less harsh). But see also Menkel-Meadow, *supra* note 68, at 1920-21 (describing a larger and more controversial role for the mediator in balancing unequal distributions of power or resources).

94. See Fuller, *supra* note 38, at 134; SHARON C. LEVITON & JAMES L. GREENSTONE, *ELEMENTS OF MEDIATIONS* 41-42 (1997) (these private meetings, or “caucuses,” can decrease tensions between the parties); accord MOORE, *supra* note 93, at 368, 375. Cf. Berger, *supra* note 45, at 517-18 (discussing the emotional toll that can result from employment litigation, particularly for worker-plaintiffs).

95. ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, app. 2, § III; see also Miller, *supra* note 7, at 17 n.18 (discussing disabilities etiquette).

96. Fuller and others have also discussed another role of the “generalized other” that is quite important, but not unique to the accommodation context. Since negotiations frequently result in written agreements, a mediator can help the participants understand how a disinterested third-participant would interpret the written agreement. If this understanding leads to the elimination of unwanted ambiguity, the transaction costs of enforcing the agreement will be reduced by preempting disagreements between the participants. It will also prevent judicial interpretations that stray from the participants’ true, if not clearly expressed, intent. See Fuller, *supra* note 38, at 130; KAGEL & KELLY, *supra* note 69, at 154-55.

defined as the “generalized other” – that is, to provide a third-party perspective on the issues in the negotiation.⁹⁷ The mediator might insist that the parties substantiate any claims they make in the negotiations that could be tainted by stereotypes or biases. For example, the mediator might urge the employer’s representatives to bring forth evidence about the employee’s true productive abilities in light of his impairment and prospective accommodation. The mediator might also use the employer’s misjudgments about an employee’s abilities to elicit relevant information from the employee.⁹⁸ The “generalized other” can also serve as a check on unreasonable expectations about outcomes or unreasonable interpretations of facts.⁹⁹ For example, while the mediator is neither party’s legal representative, she can provide information from the perspective of a disinterested observer that would allow the participants to draw their own conclusions about how a court might rule on a disputed question of law.¹⁰⁰ The Guidelines urge mediators to receive training in the relevant statutory and regulatory provisions and judicial interpretations of those provisions, as well as other laws that might relate to the ADA and other disability-specific statutes (e.g., the Family and Medical Leave Act).¹⁰¹

(3) *Mediators, Information, and Solutions*

Even in a world of perfect information exchange and unbiased understanding, identifying effective solutions to accommodations

97. See Fuller, *supra* note 38, at 130; see also Berger, *supra* note 45, at 508; MOORE, *supra* note 93, at 15; see also Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. LAB & EMP. L. 321, 335-36 (2005).

98. See Kagel & Kelly, *supra* note 69, at 125-28; Green, *supra* note 97, at 348.

99. See Hodges, *supra* note 19, at 433; KAGEL & KELLY, *supra* note 69, at 129-31; see also Korobkin, *supra* note 17, at 314-16 (discussing how a mediator can address parties’ reference bias by focusing their attention on the transaction costs associated with achieving their expected results).

100. See Korobkin, *supra* note 17, at 298 (discussing the mediator’s role in debiasing parties’ attitudes by “unapologetically challenging the parties’ evaluations – specifically, explaining the weaknesses in their positions or even providing predictions of how likely they are to prevail in court that diverge from their predictions, sometimes sharply”); Menkel-Meadow, *supra* note 45, at 804 (mediators may become involved with “helping evaluate the merits of an argument, the legality of a solution, assisting in the drafting of an agreement, or in cases of an evaluative mediation, actually predicting what a court might do with a particular case or offering particular substantive resolutions of particular legal issues”); see also Diane K. Vescovo et al., *Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 73-39 (2000) (discussing the legal ethics rules governing an attorney-mediator’s provision of legal information, as opposed to legal advice).

101. See ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, § III.A.

problems may require knowledge which neither the employer nor the employee possesses. In some respects, this may be the most intuitively obvious difference between disabilities accommodations negotiations and other employment discrimination negotiations. Acquiring any kind of new information entails costs, but information about accommodations may be especially difficult to find and adapt. The accommodation equation discussed in the preceding section can be more complex than finding a solution to hiring, firing, pay, or discipline discrimination problems, for example. There are useful public resources available to help employers identify appropriate accommodations,¹⁰² but there is some evidence that employers have not taken full advantage of public resources relating to disabilities accommodations.¹⁰³

Collecting information from non-public sources may entail even higher costs. Learning about other employers' accommodations practices – information that the Supreme Court has suggested is relevant to determining whether an accommodation is “reasonable”¹⁰⁴ – would require an even more extensive effort than using the already underused public resources. Further, collecting the requisite information is only part of the task in an accommodations case. General information from any source must be adapted to the idiosyncratic relationship between an individual employee's impairment and the structure of the employer's organization and its job designs, organizational structure, and physical workplace. Engaging available resources, gathering information about industry practices, and adapting the information collected to the needs of a particular employer's relationship with a particular employee with an impairment invariably adds cost to the interactive process.

Commentators have long argued that mediators can serve as a bridge to information that may help the parties find solutions to their

102. Publicly funded organizations like the Job Accommodation Network and the U.S. Department of Labor's Office of Disability Employment Policy are available to provide employers with accommodations consultations and information about federal and state tax benefits for assistive devices. See Job Accommodation Network, <http://www.jan.wvu.edu/> (last visited Nov. 10, 2007); Office of Disability Employment Policy, U.S. Department of Labor, <http://www.dol.gov/odep/> (last visited Nov. 10, 2007).

103. For example, few employers have availed themselves of available federal tax credits even though these public subsidies would largely offset the costs of workplace accommodations. See U.S. Gen. Accounting Office, *Business Tax Incentives: Incentives to Employ Workers with Disabilities Receive Limited Use and Have an Uncertain Impact 2* (2002), available at <http://www.gao.gov/new.items/d0339.pdf>.

104. See Harris, *Re-Thinking Discrimination*, *supra* note 4, at 145-46.

accommodations problems. As the Guidelines' very existence suggests, mediators have become increasingly specialized. Specialization is, in part, a product of negotiators' expectations that their mediator will have specific and relevant substantive knowledge and experience that will help solve their problem.¹⁰⁵ The Guidelines urge mediators to meet this expectation by receiving specific training in "[c]ommon disabilities, their impact on persons' functioning, and accommodation options,"¹⁰⁶ as well as "[d]isability resources, including sources of information and technical assistance."¹⁰⁷ Further, experienced mediators may have task-specific knowledge acquired during prior negotiations which benefits the participants. The mediator may have participated in negotiations over a similar disability in a similar workplace, or been exposed to a menu of alternative solutions to accommodations problems in prior negotiations. But recognizing the limits of any individual's knowledge in a field as large and diverse as workplace accommodations, the Guidelines also contemplate that the mediator or the participants will invite into the negotiating sessions "a neutral expert to educate the mediator and the participants about the disability and to assist in developing options."¹⁰⁸ Thus, the mediator's own knowledge and connections to other sources of information can significantly reduce the participants' information search, identification, and collection costs.

The mediator can also reduce transaction costs by offering her own solutions to the accommodations problem. Mediation scholars have largely rebuffed the criticism that a "neutral" mediator should not play a substantive role in negotiations.¹⁰⁹ A "neutral" third-party need not be a substantive agnostic. "Neutral" means only that the mediator brings no agenda to the bargaining table other than helping

105. See Menkel-Meadow, *supra* note 68, at 1882.

106. ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, § III.A.

107. *Id.* § III.C.2. The Guidelines would also impose an obligation on mediators to "fulfill a certain minimal number of continuing education hours annually addressing ADA and other disability-related topics." *Id.* Cf. Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 50, at 82-83 (suggesting lawyers participating in negotiations as neutrals must have knowledge of "sociology and psychology of group behavior, as well as economics, political science" and other subjects).

108. ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, § II.B.2.

109. See, e.g., Menkel-Meadow, *supra* note 68, at 1887; KAGEL & KELLY, *supra* note 69, at 139-40; MAYER, *supra* note 41, at 135-37; see also Feinberg, *supra* note 69, at S12, S17-18 (a prominent, long-time mediator explaining that his mediation model regularly includes proposing solutions in negotiations).

the participants to solve their problem.¹¹⁰ Thus, the mediator's proposed solutions should not be confused with the mediator's imposition of her own preferences. The goal is to move the parties toward agreement. The mediator's proposals can bring a fresh creativity to the problem-solving enterprise and, by proposing new solutions, help the parties to break down their own barriers to creativity.¹¹¹ For example, the mediator's proposal might broaden the scope of an accommodations negotiation by introducing topics which both parties had been hesitant to discuss. The mediator is especially well-positioned to play this role. The mediator is substantively knowledgeable and may have experience solving similar accommodations problems that would inform the parties' negotiations.¹¹² Moreover, the mediator also has substantial knowledge about the parties' preferences and the priorities they assign to various aspects of their relationship. Thus, the mediator should be able to identify opportunities for "logrolling." If the parties value different elements of their relationship differently, then Pareto superior exchanges may be possible. The mediator can facilitate these exchanges, without disclosing the parties' confidential information, by proposing them as a package solution to an accommodations problem. The parties might not have been willing to make these proposals out of fear of disclosing their preferences. The mediator's proposal masks these signals.¹¹³

For example, an employee might be unwilling to disclose to her employer that she is willing to forego a portion of future wage increases in return for an accommodation that would facilitate a promotion that garners greater prestige.¹¹⁴ The employer might be

110. See MAYER, *supra* note 41, at 83-84; Menkel-Meadow, *The Lawyer as Consensus Builder*, *supra* note 50, at 73-74, 93-94, and 107-08 (discussing ethics rules governing mediator neutrality).

111. See MAYER, *supra* note 41, at 104; KAGEL & KELLY, *supra* note 69, at 140 ("Commentators are wrong . . . to suggest avoidance of this problem requires mediators to refrain altogether from pushing the participants toward a possible basis for settlement. Many disputes *cannot* be solved through any other means.") (emphasis in original); LEVITON & GREENSTONE, *supra* note 94, at 13-14 (describing how the mediator can assist the parties by stimulating ideas and asking probing questions). As Vivian Berger has suggested, the mediator "is able to advance a participant's suggestion as her own, thereby avoiding 'reactive devaluation' and reflexive rejection by the other side." Berger, *supra* note 45, at 508; *accord* Menkel-Meadow, *supra* note 45, at 799.

112. The ADA Mediation Guidelines urge mediation service providers to select only experienced mediators for disabilities-related mediations. ADA MEDIATION STANDARDS WORK GROUP, *supra* note 1, § I.C.

113. See Kagel & Kelly, *supra* note 69, at 135-36.

114. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 57-58) (explaining why an employee might be willing to make this kind of exchange).

willing to exchange the accommodation for an understanding that the employee will not receive a portion of her expected wage increases; yet, the employer might hesitate to disclose this willingness for fear of conceding that an accommodation is legally “reasonable” or being subjected to a discrimination claim based on the wage proposal. The mediator can overcome the parties’ hesitation by proposing a solution that both parties would find acceptable, but which neither party would propose themselves.

(4) *Hypotheses*

In sum, the legal literature suggests that mediators should be able to help overcome informational transaction costs by improving information exchange, de-biasing the negotiations, and proposing solutions or providing information about solutions. This section has argued that, while informational transaction costs may arise in both disabilities accommodations negotiations and negotiations over other employment discrimination claims, there is reason to believe that these transaction costs are qualitatively or quantitatively different when an accommodation is at issue. If mediators involved with disabilities accommodations negotiations systematically have greater difficulty helping negotiating parties overcome these transaction costs, this greater difficulty would be circumstantial evidence that the transaction costs are different either in kind or degree.

Two hypotheses drawn from these conclusions will be tested in the next part’s discussion of the EEOC’s mediation program evidence. Proof of either hypothesis would suggest differences between disabilities accommodation negotiations and negotiations over other employment discrimination issues, but the two hypotheses would suggest that these differences flow from different sources. The first source might be some systematic difference between parties’ expectations in disabilities accommodations negotiations when compared with other employment discrimination negotiations, including negotiations over other ADA claims. Simply, if each party expects a disproportionately favorable result, then the mediator would be required to work harder to get the parties to travel the longer distance to some middle ground. Consistent with the speculation set forth in the introduction, the first hypothesis to be tested will be that parties’ expectations in disabilities accommodations negotiations are greater (or more disparate) when compared with the parties’ expectations in negotiations over other employment discrimination issues.

The second source might be the kind and degree of informational transaction costs that arise in disabilities accommodations negotiations. The data set analyzed for this paper does not offer direct evidence about these transaction costs. It permits only an inference about transaction costs drawn from evidence about the techniques mediators use to overcome them. Thus, the second hypothesis is that mediators are less successful in adjusting the parties' expectations by improving information exchange, de-biasing negotiations, and proposing solutions or providing information about solutions in disabilities accommodations negotiations than in other employment discrimination negotiations. Proof of this hypothesis about transaction-cost-reducing techniques would be circumstantial evidence that the transaction costs, which arise in disabilities accommodation negotiations, are different from those that arise in other employment discrimination negotiations.

III. EVIDENCE FROM THE EEOC'S MEDIATION PROGRAM

This part analyzes evidence from the EEOC's mediation program to test two hypotheses drawn from the discussion in the preceding part:

Hypothesis 1: There is a systematic difference between parties' expectations in disabilities accommodations negotiations and negotiations over other employment discrimination issues with expectations being greater, or more disparate, in the disabilities accommodations negotiations.

Hypothesis 2: Mediators are less successful in adjusting parties' expectations in disabilities accommodations negotiations by improving information exchange, de-biasing negotiations, and proposing solutions or providing information about solutions when compared with negotiations over other kinds of employment discrimination claims.

As the first section in this part will explain, the evidence in this paper is preliminary and limited methodologically. Nonetheless, it is suggestive and, in some cases, strong.

A. *Methodology and Its Limitations*

The EEOC has been committed to mediation of charges brought under the ADA since Congress enacted the statute. The agency's voluntary mediation pilot program for ADA charges was launched in

1991 and lasted until 1994, but did not include reasonable accommodation claims. Apparently, the EEOC's staff did not have sufficient expertise to mediate reasonable accommodation charges appropriately.¹¹⁵ In April 1999, the EEOC launched a full-scale mediation program for all categories of discrimination charges, including reasonable accommodation charges.¹¹⁶ The program was designed, in part, to reduce transaction costs.¹¹⁷ As E. Patrick McDermott and the co-authors of his studies of the mediation program explained, "[m]ediation is a pre-investigation dispute resolution procedure. The incentive for the respondent to participate is that . . . the respondent [i.e., employer] can postpone preparing a position statement and/or responding to an EEOC information request."¹¹⁸ A successful mediation would accomplish two cost-saving results. The provision of the accommodation would be accelerated, thereby benefiting the employer.¹¹⁹ And the employer would avoid the transaction costs associated with the EEOC's investigation and any litigation that might follow.¹²⁰ Yet, these results of successfully mediated negotiations do not disclose how and whether mediators succeed in overcoming transaction costs that arise in the negotiations. Making this determination requires looking inside the negotiations.

In September 2000, McDermott and his co-authors published their first study evaluating participants' satisfaction with the EEOC's full-scale mediation program ("participants study").¹²¹ This study surveyed "charging parties" (i.e., workers filing discrimination charges with the EEOC) and "respondents" (i.e., employers charged with discrimination)¹²² regarding their satisfaction with the program.¹²³ In August 2001, the same group of authors published a second study evaluating mediators' judgments about the EEOC's

115. See Hodges, *supra* note 19, at 446; Cohen, *supra* note 1 (see the section entitled "Early 1990s").

116. Cohen, *supra* note 1 (see the section entitled "Late 1990s").

117. Another important purpose of the mediation program is to reduce the EEOC's backlog and to increase the efficiency of its enforcement efforts. See Miller, *supra* note 7, at 11.

118. McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 65.

119. See Harris, *Law, Economics, and Accommodations*, *supra* note 4 (manuscript at 40-42).

120. See *id.* (manuscript at 75-79) (discussing the role of litigation costs).

121. McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 60.

122. Any use of the phrase "participants" hereafter should be read as including both charging parties and respondents.

123. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 67-69 for a full discussion of the methodology used in the design and collection of these survey data.

mediation program (“mediators study”).¹²⁴ The survey used for the participants study produced the data set analyzed in this paper.

Only selected charges were eligible for mediation in the EEOC’s program. Pursuant to the EEOC’s Priority Charge Handling Procedure, agency staff classified charges into three groups: “A” charges were highly likely to result in an investigative finding of “reasonable cause” that the employer had violated the law in a systemic manner through a pattern or practice of discrimination;¹²⁵ “B” charges might have merit, assuming a further investigation; and “C” charges were adjudged meritless and immediately dismissed.¹²⁶ All charging parties were informed about the availability of voluntary mediation upon filing their charges, but only “B” charges were eligible for mediation.¹²⁷ Thus, workers filing “B” charges and the charged employers had the opportunity to involve a mediator in their negotiations over the charges before the EEOC launched its investigation and litigation had commenced.

From April 1, 1999 through March 31, 2000, the program conducted more than 11,700 mediated negotiations which resolved more than 7,500 discrimination charges.¹²⁸ The participants study surveyed a sample of 1,683 charging parties and 1,572 respondents who had participated in mediated negotiations from March 1 to July 31, 2000.¹²⁹ The surveys were administered immediately after the parties concluded their mediated negotiations.¹³⁰ This paper’s analyses will rely on the data set assembled by McDermott and his co-authors,

124. MEDIATORS STUDY, *supra* note 37, at 5.

125. McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 63 (equal Pay Act charges were also included in this category, apparently regardless of their merit); see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, PRIORITY CHARGE HANDLING TASK FORCE LITIGATION TASK FORCE REPORT (1998), available at http://www.eeoc.gov/abouteeoc/task_reports/pch-lit.html.

126. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 63; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 125. For a detailed description of the EEOC’s charge handling procedures and associated internal processes, see Moss et al., *supra* note 35, at 28-41. The surveys were distributed to participants immediately after they had concluded their mediated negotiations or, for those who did not conclude their negotiations, before the conclusion of the survey period. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 67-68.

127. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 65.

128. See *id.* at 9. See also Moss et al., *supra* note 35, at 37 (reviewing EEOC data on mediation of ADA Title I charges filed between January 1, 1999 and June 30, 2000, and finding that, out of 3,277 mediations held involving ADA cases, 62.2% (n =2,039) resulted in settlements and 37.8% (n=1,238) in “mediation failures”).

129. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 67.

130. *Id.* at 67-68.

but provide new analyses that focus on ADA reasonable accommodation charges. Three hundred and ninety-six (396) of the charges brought by the surveyed charging parties and 379 of the charges filed against surveyed respondents alleged a violation of the ADA.¹³¹ Only 8.6% of the surveyed charging parties' charges alleged a failure to provide a reasonable accommodation in violation of the ADA while 8.7% of the charges filed against surveyed respondents alleged a violation of the ADA's reasonable accommodations provisions.¹³²

The purpose of the participant's study was to measure charging parties' and respondents' satisfaction with the EEOC mediation process.¹³³ As a result, several of the questions included in the participants study survey bear little relevance to the hypotheses this part will test and, so, will not be considered in the following analyses.¹³⁴ Instead, this paper's analyses focus on questions in the participants survey that related to the mediator's role in reducing transaction costs.

Two important caveats regarding the participants study's data set must be noted.¹³⁵ First, the survey instrument used to construct the data set was not designed principally to assess how mediators reduce transaction costs in negotiations generally or in negotiations over disabilities accommodations in particular. As noted above, the survey was designed to measure participants' satisfaction with the EEOC's mediation program. This paper's analyses retrofitted the

131. *Id.* at 20.

132. *Id.* at 21. The mediators study surveyed 2,062 mediators who participated in negotiating sessions during that same period. *See id.* at 6.

133. *See id.* at 68.

134. *See* McDermott et al., Participants Study, *supra* note 33, at 22-24.

135. The study's authors were not concerned with applying their conclusions beyond the EEOC's mediation program. Their task was to analyze the program's popularity with its participants. *See* McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 60; MEDIATORS STUDY, *supra* note 37, at 5. So, nothing in this section is intended as a criticism (or endorsement) of the authors' methodology or conclusions. These two caveats should inform efforts to apply the lessons of the EEOC's mediation program to mediation in the broader accommodations context. A third caveat should also be considered. The programmatic context for the mediation – that is, these mediations occurred in the context of legal charges brought to a federal administrative agency in contemplation of litigation – may have influenced the mediators' performance and the content of the tasks they needed to accomplish. *See generally* Craig McEwen, *Examining Mediation in Context: Toward Understanding Variations in Mediation Programs*, in THE BLACKWELL HANDBOOK OF MEDIATION 81 (Margaret S. Herrman ed., 2006) (describing the research challenge associated with mediation program variability associated with mediation's context). This paper's conclusion may have to be adjusted for mediated negotiations over accommodations in other contexts.

data to serve different purposes. The fit is not perfect.¹³⁶ Nonetheless, the analyses offer valuable, if not comprehensive, insights into the mediator's role in the negotiation process.

Second, the charges that were eligible for the EEOC's mediation program during the study period were not a representative sample of all accommodations disputes in American workplaces. Apart from the sorting that occurred in the EEOC's charge classification process, the universe of charges may also have been skewed by selection effects.¹³⁷ Charges are filed when the employer does not provide an accommodation which the worker considers legitimate and pressing. When an employer believes it should or must provide an employee with an accommodation, it likely will. The accommodated employee would not, therefore, file a discrimination charge with the EEOC. Similarly, an employee who doubts that her employer is legally obligated to provide her requested accommodation is unlikely to file a discrimination charge. Thus, the disputes underlying EEOC charges occupy a substantive middle ground that is not representative of the entire universe of accommodations disputes in all American workplaces.

Even though this data set is not a perfect sample of workplace accommodations disputes, it offers a valuable window into the role that mediators can play in reducing transaction costs in many negotiations over accommodations disputes that employers and workers with impairments could not resolve themselves.¹³⁸ These caveats merely suggest that this window does not offer the only view into the role of mediators in negotiations over disabilities accommodations. Further research will be required to create a comprehensive picture of mediators' role in negotiations over accommodations.

B. *Findings*

The analyses in this section offer evidence drawn from the participants study's data set relating to the mediators' techniques for reducing informational transaction costs: (1) improving information exchange; (2) de-biasing negotiations; and (3) proposing solutions and

136. See *infra* Part III.B.3.

137. The Priest-Klein thesis is the leading theory of selection effects and I have relied on that theory in this discussion. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

138. Mediators in the EEOC's program were EEOC employees or contract mediators or *pro bono* mediators from outside the agency. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 65.

providing information about additional prospective solutions to accommodations problems. The mediators study offers some direct evidence suggesting that these techniques contribute to successful negotiations of employment discrimination charges generally; however, the mediators study did not distinguish disabilities accommodations negotiations from negotiations over other charges.¹³⁹

Participants' responses to the survey were analyzed after separating the responses into three categories of charges at issue in the participants' negotiations:

- all ADA reasonable accommodation charges ("ADA-RA"),
- all ADA charges not relating to reasonable accommodations ("ADA non-RA"), and
- all charges brought under all statutes, including the ADA, but excluding ADA reasonable accommodation charges ("all other charges" or "charges other than ADA-RA").

Of course, the ADA non-RA category is a subset of the "all other charges" category. The goal of the following analyses is to identify similarities and differences between mediated negotiations involving ADA-RA charges and mediated negotiations involving ADA non-RA charges and all other charges; therefore, the ADA non-RA and "all other charges" categories are control or comparison groups for the

139. MEDIATORS STUDY, *supra* note 37, at 20-22. As a result, it is not possible to draw the kinds of distinctions in the mediator study's data set that are this part's focus, although a future re-analysis of the mediator study's data set may allow distinction drawing of this sort.

The mediators were asked to describe conduct in which they engaged during the negotiation which facilitated resolution of the dispute. *See id.* at 18. A large percentage named either information exchange activities or conduct that can be fairly characterized as the work of a "generalized other." The conduct most frequently cited as contributing to the resolution of the dispute was "reality checking" behavior (26.7%) – the quintessential definition of the "generalized other's" role. *Id.* at 22. The mediators also named "helping participants see different vantage points" (4.5%) and "evaluating the strengths and weaknesses of the dispute" (6.8%). *Id.* at 21-22. Both of these responses are variations on the same "generalized other" theme. A smaller percentage of mediators named the "generalized other" role of clarifying facts and areas of agreement (3.1%). *Id.* at 21. The information exchange and de-biasing activities included listening, reflexive questioning, paraphrasing, restating, and facilitating catharsis (9.7%), the use of "shuttle diplomacy" in various forms (12.5%, called "caucusing" in the study), "keeping the participants focused" (7.7%), and "reframing" and the use of probing questions (4.3%). *Id.* at 21-22. The mediators were also asked to identify the "turning point" in the negotiation. "Information obtained at the mediation," named by 43.7% of mediators, was named most often. *Id.* at 26. Another sizable group of mediators viewed their own role in providing information and proposing solutions to be the critical element in the participants reaching agreement: 6.1% named "providing knowledge of the law or process," and 5.6% named "exploring or proposing options." *Id.* at 22. In sum, the mediators' self-reporting on their behavior in negotiations supports both hypotheses set forth in Part III.

ADA-RA charges. This evidence will offer insight into whether the mediator's substantive role differs in negotiations over disabilities accommodations.¹⁴⁰

(1) *Expectations and Results*

A gap between expectations and results is a predictable product of the bilateral asymmetric information that exists at the beginning of most negotiations.¹⁴¹ Participants enter into mediated negotiations with expectations rooted in incomplete information and, in some cases, untempered by a generalized other's assessment of the strength of their position.¹⁴² In addition, each side enters the mediated negotiation with limited knowledge of the other side's preferences or goals. Thus, both participants formulate their initial expectations, and their opening bargaining positions, relying principally on their own preferences, goals, experiences, and knowledge. These initial expectations should differ from the actual results of their negotiations because the results are necessarily informed by both sides' preferences which are, in turn, adjusted according to information disclosed during the course of the negotiation.

Hypothesis 1 posits a systematic difference between participants' expectations in disabilities accommodations negotiations and negotiations over other employment discrimination issues with greater/more disparate expectations among the participants in disabilities accommodations negotiations. The survey inquired directly about participants' expectations entering the negotiations and how those expectations compared with the actual results of their negotiations. The survey asked both charging parties and respondents: "Going into the mediation, did you know what you wanted from this mediation?" Participants responding "yes" to this question were then asked "Did you obtain what you wanted going into the mediation?"¹⁴³ Table 1 collects charging parties' and respondents' answers to these questions regarding expectations and actual results sorted by charge category:

140. The participants study also did not distinguish between disabilities accommodations charges brought under the ADA and religious accommodation charged brought under Title VII. McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 20-22.

141. See *supra* text accompanying notes 17-18.

142. See *supra* Part II.B.1 and text accompanying notes 97-101.

143. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 28-30.

TABLE 1. EXPECTED RESULTS VS. ACTUAL RESULTS: ALL OTHER CHARGES; ALL ADA NON-RA CHARGES; ALL ADA-RA CHARGES/COMPARING CHARGE CATEGORIES.

Participants / Expectations	Charges other than ADA-RA (Group A)		ADA Non-RA Charges (Group B)		ADA - RA Charges (Group C)		p-values (Tests of independence between groups:)	
	n	%	n	%	n	%	A and C	B and C
Charging parties								
Expectation: knew what they wanted going into mediation	1465	100%	243	100%	140	100%	0.159	0.977
Yes	1208	82%	212	87%	122	87%		
No	257	18%	31	13%	18	13%		
Participants obtained what they wanted	1164	100%	201	100%	117	100%	0.480	0.665
Yes	497	43%	84	42%	46	39%		
No	667	57%	117	58%	71	61%		
Respondents								
Expectation: knew what they wanted going into mediation	1384	100%	235	100%	130	100%	0.504	0.723
Yes	1184	86%	203	86%	114	88%		
No	200	14%	32	14%	16	12%		
Participants obtained what they wanted	1154	100%	199	100%	111	100%	0.184	0.525
Yes	663	57%	120	60%	71	64%		
No	491	43%	79	40%	40	36%		

Table 1 shows no statistically significant differences between ADA-RA charges, ADA non-RA charges, and all other charges with respect to expectations and results. These data also disclose the predicted gap between expected results and actual results achieved through mediated negotiation in each charge category.¹⁴⁴

144. These responses raise a methodological issue. Participants were surveyed after they had completed their negotiations – some successfully and some unsuccessfully. Thus, it is entirely possible that their responses to the questions about their expectations were influenced by the results of their negotiations. Nonetheless, there is no reason to believe that this bias would have affected respondents and charging parties differently or participants in different charge categories differently. Absent some reason to believe that there are systematic differences between these groups’

For all charge categories, more than 80% of charging parties and respondents entered negotiations with an expectation regarding the result. Charging parties involved with both ADA non-RA and ADA-RA claims were slightly more likely to expect a result than were charging parties involved with all other charges – 87%, 87%, and 82% respectively – but the high p-value suggests that this difference has little, if any, statistical significance.¹⁴⁵ The more striking differences are between expectations and results, particularly for the charging parties. Among charging parties who entered the negotiation with an expectation, roughly 40% in each charge category got what they expected. There were no statistically significant differences across charge categories. Respondents also experienced a substantial gap between expectations and results, but a smaller gap than that experienced by the charging parties. Between 57% (all other charges) and 64% (ADA-RA) of respondents entering the negotiations with an expectation got what they expected. Again, the differences between charge categories were not statistically significant. In sum, Table 1 strongly suggests that Hypothesis 1 is incorrect and that there are no systematic differences between the expectations of participants in ADA-RA negotiations, ADA non-RA negotiations, and all other charges negotiations. This conclusion finds additional support in the analysis of participant satisfaction with the results of the mediation which finds that there are no significant differences between the three charge categories. This analysis is discussed in the next section.

However, the difference between charging parties' and respondents' expectations-results gaps suggests that information asymmetries at the start of negotiations were not limited to personal or workplace information. Table 2 re-arranges the results collected in Table 1 to demonstrate that there is a highly significant difference between the charging parties' and respondents' expectations-results gaps in all charge categories.

responses, these data offer some insight into the relationship between comparative expectations and results.

145. Unfortunately, these data do not offer any insight into the question of whether the expectations of charging parties regarding the ADA's reasonable accommodation mandate are consistent with charging parties' expectation with respect to other, older employment discrimination statutes or other types of charges available under the ADA. As noted above, the EEOC's staff sorted charges based on their perceived merits. *See supra* text accompanying notes 125-127. This data set contains only "B" charges and, therefore, reflects the EEOC staff's expectations regarding the charge's merit as much as it does charging parties' expectations.

TABLE 2. EXPECTED RESULTS VS. ACTUAL RESULTS: ALL OTHER CHARGES; ALL ADA NON-RA CHARGES; ALL ADA-RA CHARGES/COMPARING CHARGING PARTIES WITH RESPONDENTS

Charge Type	Charging parties		Respondents		p-values Tests of independence
	n	%	n	%	
Expectation: knew what they wanted going into mediation					
Charges other than ADA-RA (Group A)	1465	100%	1384	100%	0.00246
Yes	1208	82%	1184	86%	
No	257	18%	200	14%	
ADA Non-RA Charges (Group B)	243	100%	235	100%	0.7812
Yes	212	87%	203	86%	
No	31	13%	32	14%	
ADA - RA Charges (Group C)	140	100%	130	100%	0.8918
Yes	122	87%	114	88%	
No	18	13%	16	12%	
Participants obtained what they wanted					
Charges other than ADA-RA (Group A)	1164	100%	1154	100%	Less than 0.0001
Yes	497	43%	663	57%	
No	667	57%	491	43%	
ADA Non-RA Charges (Group B)	201	100%	199	100%	0.0002
Yes	84	42%	120	60%	
No	117	58%	79	40%	
ADA - RA Charges (Group C)	117	100%	111	100%	0.0002
Yes	46	39%	71	64%	
No	71	61%	40	36%	

The notably low p-values in the latter half of Table 2 demonstrate the significance of the differences between charging parties' and respondents' expectations-results gaps in each charge category.

Respondents' far narrower expectations-results gap may indicate that respondents had a superior ability to assess the merits of the

charges being negotiated.¹⁴⁶ Respondents are much more likely than charging parties to be “repeat players” in EEOC processes, employment mediation, employment discrimination charges, and employment discrimination litigation. Their more extensive experience should yield far greater knowledge about these processes and an attendant ability to accurately, or more accurately, assess which results can be expected.¹⁴⁷ Further, these respondents were substantially more likely than these charging parties to be represented by counsel in their negotiations.¹⁴⁸ As a result, respondents

146. This conclusion relies on the same logic that caused Priest and Klein to posit that a systematic difference in litigants’ ability to assess cases’ strengths and weaknesses would affect the proportion of cases they are able to win in litigation. Priest & Klein, *supra* note 137, at 19, 24. Some scholars have suggested that defendants’ superior ability to assess their likelihood of success employment discrimination cases explains plaintiffs’ significantly smaller success rate in employment discrimination litigation. See, e.g., Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1582-83 (1989) (discussing how attorney competence affects litigation success rates); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 750-52 (1988) (explaining that plaintiffs in constitutional torts cases may bring weaker cases to trial because they may have more difficulty in predicting outcomes than the generally more experienced government litigators they are up against). The large disparity in plaintiffs’ and defendants’ success rates in ADA cases might also be explained in this way. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (finding that employers win more than 93% of ADA Title I cases brought against them); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (finding a similar victory rate for employers in appellate decisions under the ADA’s Title I); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENT. & PHYS. DISAB. L. REP. 403 (1998) (discussing a report by the American Bar Association analyzing almost every reported and unreported case brought under the ADA’s Title I and finding that employers won 92.11% of those cases). *But see* Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505 (2000) (arguing that the overwhelmingly pro-defendant outcomes in ADA cases are less a product of judicial prejudice and more a product of faulty lawyering); Louis S. Rulli, *Employment Discrimination Litigation Under the ADA From the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 368-73 (2000) (examining ADA Title I cases filed in the U.S. District Court for the Eastern District of Pennsylvania from 1996 to 1998 and finding that plaintiffs won only 2.7% of judge and jury decisions, but also finding that between 47% and 63% of the cases settled).

147. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (explaining that more powerful parties with greater resources, including repeat players and parties represented by counsel, are more likely to succeed in litigation).

148. See McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 22 (finding that 57% of respondents reported being represented by counsel while only 41% of

were more likely to have an experienced voice provide advice about expected results. This counseling should have given respondents better assessments of the mediated negotiation's likely outcomes.

In sum, the information asymmetry between charging parties and respondents includes the likely course of the negotiations. Yet, while the substance of the asymmetric information in ADA-RA cases may differ, for example, from a race-based disparate-treatment-in-hiring charge brought under Title VII, these data disclose that the expectations-results gap is equally broad across charge categories. Any differences between ADA-RA charges and either ADA non-RA charges or all other charges found in the following analyses cannot be explained by a broader expectations-results gap or a greater difference between charging parties' and respondents' expectations-results gaps.

Nonetheless, this expectations-results gap defines one important part of the mediator's challenge. The mediator must help to overcome the expectations-results gap so that the participants can settle the charge.¹⁴⁹ The critical question in all of these negotiations is whether transaction costs will frustrate the mediator's efforts to narrow the expectations results gap and prevent an otherwise efficient agreement. The remaining analyses search this data set for evidence of a difference between disabilities accommodation negotiations and negotiations over other charges and evidence that, as a result of any difference, the mediator's substantive role must differ.

(2) *Direct Correlation vs. No Correlation*

Participants were asked whether they agreed or disagreed with five positive statements about their mediator's role in their negotiations:

- (1) "the mediator understood my needs";
- (2) "the mediator helped clarify my needs";
- (3) "the mediator helped the participants develop options for resolving the charge";
- (4) "most of the options developed during the mediation session were realistic solutions to resolving the charge"; and

charging parties reported being represented by counsel). Neither participant is required to involve counsel in the mediated negotiations. *Id.* at 55-56.

149. The mediators study lends support to this analysis of Tables 1 and 2. A very large percentage of mediators identified the unrealistic or unreasonable expectations of the participants or their representatives as the behavior that interferes most with the resolution of the dispute. *See* MEDIATORS STUDY, *supra* note 37, at 31-35.

(5) "I was satisfied with the results of the mediation."¹⁵⁰

Participants responded using a typical Likert scale with a continuum from "1" ("strong disagreement") to "5" ("strong agreement").¹⁵¹ The responses of charging parties and respondents were kept separate.

The survey's statements do not precisely track the three mediator techniques identified in Hypothesis 2 (improving information exchange, de-biasing negotiations, and proposing solutions or providing information about solutions), but they are reasonable proxies. "The mediator understood my needs" and "the mediator helped clarify my needs" are proxies for one part of the mediator's role in facilitating information exchange and, perhaps, de-biasing the negotiations. "The mediator helped the participants develop options for resolving the charge" is a proxy for the mediator's role in proposing solutions and providing information about potential solutions. "Most of the options developed during the mediation session were realistic solutions to resolving the charge" is a proxy for another aspect of facilitating information exchange and proposing solutions or providing information about possible solutions. Thus, the first four of these five statements offer a reasonable test of participants' perception of mediators' role in reducing informational transaction costs in their negotiations and, therefore, Hypothesis 2.

Participants' responses to these statements necessarily reflect their subjective views of the mediators' role in their negotiations; therefore, testing Hypothesis 2 requires positing a relationship between the participants' responses and the actual effectiveness of the mediators' efforts to reduce transaction costs and overcome the expectations-results gap. There are two possible relationships. First, participants' "agreement" with a positive statement about the mediator may be *directly correlated* with the mediator's success in overcoming the expectations-results gap and helping participants to resolve the charge. A direct correlation would mean that participants are more satisfied with aspects of the mediator's performance that actually contribute to a settlement of the charge and less satisfied when the mediator's performance does not contribute to settlement. Thus, a direct correlation necessarily subsumes a conclusion that the participants accurately perceived and reported when the mediators were effective.

If the data disclose a direct correlation, then associating the survey's statements with the mediator's role in facilitating information

150. McDERMOTT ET AL., PARTICIPANTS STUDY, *supra* note 33, at 25-29.

151. *See id.* at 22.

exchange, de-biasing negotiations, and proposing solutions and providing information about prospective solutions becomes relatively easy. Greater agreement with “the mediator understood my needs” and “the mediator helped clarify my needs” would suggest that the mediator’s role in facilitating information exchange and, more precisely, her role as a “generalized other,” contributed to the resolution of the charge. It may also indicate that the mediator succeeded in de-biasing the negotiations. Greater agreement with “the mediator helped the participants develop options for resolving the charge” would suggest that the mediator’s role in proposing solutions and serving as a bridge to information about potential solutions contributed to the resolution of the charge.

Greater agreement with “most of the options developed during the mediation session were realistic solutions to resolving the charge” would suggest that the participants defined “realistic” to mean that the proposals were consistent with the information being exchanged during the course of the negotiations and, as a result, more likely to serve as the basis for a settlement. Greater agreement, therefore, would tend to prove: (1) the mediator contributed to resolution of the charge by facilitating information exchange that permitted the participants to understand which proposed solutions were “realistic,” and (2) the mediator proposed solutions or provided information about possible solutions which contributed to the resolution of the charge.

The next part’s analyses of the responses given by charging parties and respondents involved with ADA non-RA charges and all other charges to the five statements in the survey find a direct correlation between participants’ “agreement” with the statements and resolution of the charge. Thus, there is strong evidence that mediators improve information exchange, de-bias negotiations, and help to overcome the costs of finding solutions to problems in negotiations over ADA non-RA and all other charges. But the analyses find *no correlation* between ADA-RA participants’ “agreement” with most of the statements and resolution of their charges. Participants expressed greater *disagreement* with some statements even when the behaviors discussed in those statements, in fact, bridged the expectations-results gap and made settlement more likely.

There are two possible explanations for a finding of no correlation for ADA-RA participants. The first explanation would be that mediators cannot help to overcome the expectations-results gap in ADA-RA negotiations by improving information exchange, de-biasing

negotiations, and proposing solutions and serving as bridges to information about solutions. As with the explanation of the direct correlation, this explanation presupposes that the participants accurately perceived and reported when mediators performed well in these aspects of their performance. Thus, greater “agreement” would correctly signal better mediator performance, but better mediator performance on these measures would not have contributed to a successful resolution of the charge. This is the “accurate perception” explanation of the “no correlation” result.

But there is a second possible explanation that is, at once, more complex and more intriguing. This explanation assumes that the expectations-results gap affects participants’ perceptions of the mediator’s performance. Adjusting a participant’s expectations may produce a successful negotiation – that is, one that resolves a discrimination charge – but it may also cause the participant to be unhappy. Changing expectations, particularly when the change almost certainly requires the participant to accept a less desirable result than expected, likely causes some disappointment. Exposing a participant to hard truths and encouraging a participant toward an unexpected result may cause the participant to blame the messenger – the mediator – even if the message contributes to producing a settlement agreement. In turn, this impulse to blame the messenger may have led the participants to express their unhappiness by criticizing aspects of the mediator’s performance even when the mediator performed well.

This second explanation necessarily rejects the assumption that the participants accurately perceived or reported on the mediators’ performance. Rather, participants’ disagreement with positive statements about aspects of the mediator’s performance may actually signal the areas of the mediator’s greatest effectiveness precisely because the mediator facilitated a disappointing outcome. Thus, when participants report greater agreement with “the mediator understood my needs” and “the mediator helped clarify my needs,” the negotiations may have confirmed and given comfort to the participants’ initial expectations rather than adjusting those expectations to move the negotiations toward settlement. The failure to adjust expectations, therefore, would be associated with a failure to resolve the charge. This is the “skewed perception” explanation.

If the skewed perception explanation proves true, participants expressed greater agreement with “the mediator helped the participants develop options for resolving the charge” because the options

developed were consistent with their initial expectations and not because the options adjusted those expectations to move toward settlement. This explanation would also suggest that the participants defined “realistic” in the statement “most of the options developed during the mediation session were realistic solutions to resolving the charge” to mean proposals that confirmed their initial expectations. Greater agreement with this statement, therefore, would signal that the mediator had not succeeded in offering solutions or providing information about other possible solutions that effectively adjusted participants’ expectations. Greater disagreement would suggest a successful effort to propose solutions and provide information about possible solutions which adjusted participants’ expectations. Both greater agreement and greater disagreement would therefore suggest that mediators in ADA-RA negotiations contribute to resolution of discrimination disputes by proposing solutions and providing information about possible solutions.

The remaining analyses test Hypothesis 2. As a necessary step in this process, they assess whether the data disclose a direct correlation or no correlation between participants’ agreement with the statements about aspects of the mediator’s performance and the negotiation leading to settlement. They also seek to find the best explanation for the differences between ADA-RA and ADA non-RA and all other charge negotiations found in the data.

(3) *Findings Regarding Hypothesis 2*

The survey inquired directly about the expectations-results gap and the mediator’s role in overcoming it. In addition to sorting participants’ responses by charge category, the survey sorted charging parties’ and respondents’ mean responses to the five positive statements according to the status of the participants’ mediated negotiations at the time of the survey. Participants were divided into three “status groups”:

- participants in completed mediated negotiations that resolved the charge (Group I - “Resolved”),
- participants in completed mediated negotiations that did not resolve the charge (Group II - “Not Resolved”), and
- participants in mediated negotiations that were ongoing at the time of the study (Group III - “Ongoing”).

Seventy-four percent (74%) of all charging parties and 81% of all respondents completed their mediated negotiations. Fifty-six percent (56%) of all charging parties’ charges and 61% of charges against all

respondents were resolved (“Group I”), while 18% of all charging parties and 20% of all respondents concluded their mediation without resolving the charge (“Group II”).¹⁵² Fourteen percent (14%) of all charging parties and 13% of all respondents reported that their mediation was ongoing (“Group III”) when they responded to the survey. Since it is not possible to know from the survey’s results how the “ongoing” negotiations eventually turned out, Group III is excluded from the following analyses.¹⁵³

Table 3 reports the mean responses of charging parties in Group I (“Resolved”) and Group II (“Not Resolved”) broken out by charge category. Statistically significant results are in bold:

152. *Id.* at 22.

153. *See id.* The participants study did not report the outcomes with regard to the remaining charges. *Id.*

TABLE 3. CHARGING PARTIES' MEAN RESPONSES BY NEGOTIATION STATUS AND CHARGE CATEGORY

Participant / Statements / Status	Charges other than ADA-RA (Group A)		ADA Non-RA Charges (Group B)		ADA - RA Charges (Group C)		p-values (Mean difference tests between Groups)	
	n	Avg.	n	Avg.	n	Avg.	A and C	B and C
Charging parties								
Mediator understood needs								
Resolved (Group I)	849	4.43	147	4.49	82	4.38	0.612	0.350
Unresolved (Group II)	272	4.04	37	4.16	29	4.41	0.053	0.307
p-values (Mean difference tests between Groups I and II)	Less than 0.001		0.039		0.862			
Mediator helped clarify needs								
Resolved (Group I)	845	4.42	146	4.53	82	4.33	0.363	0.087
Unresolved (Group II)	273	3.96	38	4.08	29	4.31	0.070	0.293
p-values (Mean difference tests between Groups I and II)	Less than 0.001		0.002		0.927			
Mediator helped develop options								
Resolved (Group I)	847	4.45	146	4.43	81	4.48	0.731	0.655
Unresolved (Group II)	270	3.92	38	4.03	29	4.10	0.363	0.741
p-values (Mean difference tests between Groups I and II)	Less than 0.001		0.009		0.036			
Options developed were realistic								
Resolved (Group I)	849	4.25	147	4.32	81	4.00	0.022	0.012
Unresolved (Group II)	263	3.46	37	3.38	28	3.64	0.468	0.434
p-values (Mean difference tests between Groups I and II)	Less than 0.001		Less than 0.001		0.149			
Satisfied with results of mediation								
Resolved (Group I)	799	3.88	137	3.88	80	3.81	0.607	0.648
Unresolved (Group II)	260	2.22	37	1.95	27	2.37	0.586	0.174
p-values (Mean difference tests between Groups I and II)	Less than 0.001		Less than 0.001		Less than 0.001			

Table 3 discloses differences between negotiations over ADA-RA charges and negotiations over charges other than ADA-RA and ADA non-RA charges.¹⁵⁴ As a preliminary matter, there is no difference

154. Variance equality holds for all of these results. There is no evidence that the unequal sample sizes and, in particular, the smaller sample size for unresolved ADA-

across charge categories in the mean responses to “I was satisfied with the results of the mediation.” In all three charge categories, the “Resolved” group was satisfied with the results of their mediated negotiations while the “Not Resolved” group was unsatisfied. The extremely low p-values assign a high level of significance to this difference between the two groups’ mean responses. These data disclose, as we might have predicted for a voluntary mediation program, that the participants entered into their negotiations expecting to settle the charge and were dissatisfied when the negotiations did not result in settlement.

The same pattern emerges in the charging parties’ mean responses to the first four statements in the other than ADA-RA and the ADA non-RA categories. For each of the four statements, the “Resolved” group, which was satisfied with the results of its mediated negotiations, agreed significantly more than did the “Not Resolved” group, which was dissatisfied with the results of its mediated negotiations. In other words, Group I agreed more than Group II with the first four statements as well as the fifth statement. Thus, there is a direct correlation between these participants’ “agreement” with all five of these statements and resolution of the charge through mediated negotiations. Greater agreement directly correlated with resolution of the charge while lesser agreement directly correlated with the charge not being resolved.

Charging parties in ADA-RA cases responded differently than charging parties in the other two categories:

- the ADA-RA/Not Resolved group agreed as much as the ADA-RA/Resolved group with “the mediator understood my needs” and agreed significantly more with this statement than did the charging parties in the “Other than ADA-RA/Not Resolved” group;
- the ADA-RA/Not Resolved group agreed as much as the ADA-RA/Resolved group with “the mediator helped clarify my needs” and agreed significantly more than the “Other than ADA-RA/Not Resolved” group, while the ADA-RA/Resolved group agreed significantly less with this statement than the “Other than ADA-RA/Resolved group”;
- the ADA-RA/Not Resolved group agreed as much as the ADA-RA/Resolved group with “most of the options developed during

RA charges affected the results of these analyses. The results are robust. The same results are produced when using a technique proposed in JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* 66-74 (1977). This technique includes adjustment for unequal sample sizes.

the negotiation were realistic solutions to resolving the charge” and the ADA-RA/Resolved group agreed significantly less with this statement than the Resolved groups in each of the other two categories.

Some care must be taken before drawing broad conclusions from these data. While these differences are statistically significant, none are large in absolute terms. Further, with the exception of “the mediator understood my needs,” the ADA-RA/Resolved group agreed more with each statement than did the ADA-RA/Not Resolved group, even though there is no statistically significant difference between these mean responses. These differences, while genuine, must be measured in feet rather than miles.

Even with these caveats, ADA-RA charges were not as likely to be resolved as the ADA non-RA and all other charges even if the charging party agreed more that the mediator understood her needs, the mediator helped to clarify her needs, or the options proposed were realistic. By contrast, ADA non-RA charges and all other charges were more likely to be resolved if the charging party agreed more with these three statements. On these three measures, rather than the direct correlation between “agreement” and resolution found for the other two charge categories, there is no statistically significant correlation between ADA-RA charging parties’ “agreement” with the four statements and the charge being resolved.

In order to assess whether Table 3 supports Hypothesis 2 (“Mediators are less successful in adjusting parties’ expectations in disabilities accommodations negotiations by improving information exchange, de-biasing negotiations, and proposing solutions or providing information about solutions”), we must understand why these differences between ADA-RA charges and ADA non-RA charges and all other charges arise. Answering this question requires returning to the two possible explanations for a finding of no correlation discussed above: accurate perceptions or skewed perceptions.

The accurate perceptions explanation would suggest that these data show that mediators involved in negotiations over ADA-RA charges are less successful in facilitating settlement by improving information exchange, serving as a generalized other, de-biasing negotiations, and proposing (realistic) solutions and providing information about possible solutions. Rather, mediators may need new methods to help resolve ADA-RA charges. This would be a powerfully counter-intuitive result that goes well beyond the more conservative statement in Hypothesis 2. Hypothesis 2 posits only

some differences in the use of three mediator techniques, not the complete ineffectiveness of these techniques.

The skewed perceptions explanation would lend greater support to Hypothesis 2. If the perceptions of charging parties in negotiations over ADA-RA charges were skewed by the expectations-results gap, then these data would be consistent with the hypothesis that mediators in ADA-RA cases face a stiffer challenge in reducing transaction costs by improving information exchange, de-biasing negotiations, and proposing solutions and providing information about solutions.¹⁵⁵ The ADA-RA/Not Resolved group's somewhat greater agreement with "the mediator understood my needs" and "the mediator helped clarify my needs," and the ADA-RA/Resolved group's somewhat lesser agreement with "the mediator helped clarify my needs" would suggest that the mediators were less successful in facilitating the exchange of sufficient information or the right kind of information to adjust these charging parties' initial assessments of their needs. This information failure was more likely to be associated with failed negotiations.

In addition, unlike other charging parties, charging parties negotiating over ADA-RA charges were apparently slightly more willing to call proposals "realistic" when the proposals confirmed their initial expectations. As a result, the ADA-RA/Resolved group's lesser agreement than the other categories' Resolved groups with "most of the options developed during the negotiation were realistic solutions to resolving the charge" seems to signal that the proposals presented during the negotiations were more likely to ratify the ADA-RA charging parties' initial expectations rather than adjust expectations to produce movement toward settlement. In sum, the skewed perceptions explanation suggests that mediators have a more difficult task in improving information exchange, serving as a generalized other, and proposing solutions and providing information about solutions in negotiations over ADA-RA charges than in negotiations over other employment discrimination.

The skewed perceptions explanation may be correct for either of two reasons, both of which lend support to Hypothesis 2, although in

155. In theory, there is a third possible explanation for these differences: participants in ADA-RA negotiations may have had a negative reaction to their mediators based on these mediators' personal characteristics or some aspect of their behavior unrelated to the substance of the negotiations. The survey data do not permit absolutely excluding this possibility, but given the large number of mediators and participants involved, and the fact that the EEOC does not assign mediators to negotiations by subject area, it is a highly unlikely explanation for these results.

different ways. First, the information asymmetries in ADA-RA negotiations may be more resistant to narrowing than those found in other negotiations. As suggested above, the information that is relevant to an ADA-RA charge may be more difficult to exchange and there may be more information that needs to be exchanged to reach settlement.¹⁵⁶ If this diagnosis is correct, then the mediator involved with a negotiation over an ADA-RA charge must do more to facilitate the exchange of more, better information to bridge these charging parties' yawning expectations-results gaps. This explanation supports Hypothesis 2 and its premise that differences in the effectiveness of the three mediator techniques for overcoming information transaction costs signal differences in the informational transaction costs themselves.

Second, charging parties bringing ADA-RA charges may be more resistant to accepting new information as it is introduced into the negotiation. It is worth noting that any added resistance cannot be associated with these charging parties' disabilities. Charging parties in the ADA-RA category responded differently from charging parties in both of the other categories, but the responses from charging parties in the ADA non-RA category closely resembled the responses from charging parties in the all other charges category. Disability is not the relevant difference. The negotiation's focus on accommodations issues is.

This difference may be the consequence of the intensely personal nature of physical and mental impairments, and the private information that charging parties have about their impairments. Charging parties, because they possess this information, may be especially stubborn when asked to accept contrary or inconsistent information or proposed solutions from their employers, or even from mediators.¹⁵⁷ Again, this explanation is consistent with Hypothesis 2, but suggests a different prescription. More or better information may not be sufficient. The mediator may need to play a more aggressive "generalized other" role in negotiations over ADA-RA charges to overcome the charging parties' resistance. At this stage of the analysis, it is not possible to determine which of these two explanations best conforms to the data, but an answer is forthcoming in the next section.

Table 4 reports the mean responses of respondents in the Resolved group and the Not Resolved group by charge category and,

156. See *supra* text accompanying notes 29-31, 73-77.

157. See *supra* text accompanying notes 29-31, 73-77.

therefore, offers further evidence relevant to Hypothesis 2. Again, statistically significant results are in bold:

TABLE 4. RESPONDENTS' MEAN RESPONSES BY NEGOTIATION STATUS:
ALL OTHER CHARGES; ALL ADA NON-RA CHARGES;
ALL ADA RA CHARGES

Participant / Statements / Status	Charges other than ADA-RA (Group A)		ADA Non-RA Charges (Group B)		ADA - RA Charges (Group C)		p-values (Mean difference tests between Groups)	
	n	Avg.	n	Avg.	n	Avg.	A and C	B and C
Respondents								
Mediator understood needs								
Resolved (Group I)	867	4.36	153	4.42	83	4.30	0.530	0.246
Unresolved (Group II)	286	4.24	51	4.10	25	4.36	0.489	0.238
p-values (Mean difference tests between Groups I and II)	0.032		0.017		0.726			
Mediator helped clarify needs								
Resolved (Group I)	840	4.25	148	4.26	80	4.11	0.172	0.201
Unresolved (Group II)	276	4.05	50	3.96	24	4.08	0.883	0.638
p-values (Mean difference tests between Groups I and II)	0.001		0.025		0.883			
Mediator helped develop options								
Resolved (Group I)	864	4.37	155	4.39	83	4.34	0.722	0.644
Unresolved (Group II)	279	3.92	52	3.73	25	4.16	0.238	0.054
p-values (Mean difference tests between Groups I and II)	Less than 0.001		Less than 0.001		0.287			
Options developed were realistic								
Resolved (Group I)	864	4.26	155	4.32	83	4.18	0.392	0.212
Unresolved (Group II)	267	3.40	51	3.10	25	3.80	0.097	0.013
p-values (Mean difference tests between Groups I and II)	Less than 0.001		Less than 0.001		0.037			
Satisfied with results of mediation								
Resolved (Group I)	844	4.16	149	4.22	79	4.10	0.618	0.348
Unresolved (Group II)	268	2.52	48	2.50	24	2.92	0.111	0.163
p-values (Mean difference tests between Groups I and II)	Less than 0.001		Less than 0.001		Less than 0.001			

Table 4 tells essentially the same story about respondents that Table 3 told about charging parties.¹⁵⁸ There is a direct correlation between respondents' mean responses to the four statements about the mediator's substantive role and resolution of ADA non-RA and all other charges. There is no such correlation for ADA-RA charges with respect to three of the four statements. Also, there is a lesser correlation between ADA-RA respondents' mean responses to the fourth statement and resolution of the charge.

The responses from the respondents negotiating over ADA-RA charges were different from respondents in the other charge categories in these ways:

- the ADA-RA/Not Resolved group agreed as much as the ADA-RA/Resolved group with “the mediator understood my needs” and “the mediator helped to clarify my needs” while there were statistically significant differences between the “Resolved” and “Not Resolved” groups for all other charges and ADA non-RA charges in their responses to these two statements;
- the ADA-RA/Not Resolved group agreed as much as the ADA-RA/Resolved group with “the mediator helped to develop options” and agreed more than the ADA non-RA/Not Resolved group with that statement; and
- the difference between the mean responses of the ADA-RA/Resolved and ADA-RA/Not Resolved groups to “options developed were realistic” were substantially smaller than the differences between the other categories' Resolved and Not Resolved groups because the ADA-RA/Not Resolved group agreed more than the respondents in both other categories with that statement.

The same caveats regarding the differences identified in Table 3 apply to Table 4. But even with these caveats, these data suggest that ADA-RA charges were not as likely to be resolved as other types of ADA charges even if the respondent agreed more that the mediator understood its needs, clarified its needs, or helped to develop options.

158. Variance equality holds for all of these results, except for the responses by respondents in ADA-RA and ADA-Non-RA charges to the statement “the mediator helped to develop options.” Our analysis corrected for the variance inequality in these responses. In addition, there is no evidence that the unequal sample sizes and, in particular, the smaller sample sizes for unresolved ADA-RA charges affected the results of these analyses. The results are robust as confirmed using the same technique described in note 155 for Table 3. Again, this technique includes adjustment for unequal sample sizes.

Further, respondents' agreement that the options proposed were realistic had a slightly weaker association with the settlement of ADA-RA charges than other types of ADA charges and all other charges.

The explanation for these results again depends upon whether the governing assumption is accurate perceptions or skewed perceptions. If we assume accurate perceptions, then these data would suggest that mediators involved in negotiations over ADA-RA charges are less successful in facilitating settlement by improving information exchange, and proposing solutions and providing information about possible solutions. An entirely new approach to mediation in ADA-RA cases would be required to increase the likelihood that charges will be settled. Again, this explanation goes well beyond Hypothesis 2.

As with Table 3, the skewed perceptions explanation suggests that the data in Table 4 are consistent with the hypothesis that mediators involved with negotiations over ADA-RA charges face a more difficult challenge in reducing transaction costs by improving information exchange, de-biasing negotiations, and proposing solutions and serving as a bridge to information about potential solutions. The ADA-RA/Not Resolved group's somewhat greater agreement with "the options developed were realistic" supports this hypothesis. Just like the charging parties in ADA-RA negotiations, the respondents apparently were more likely to define "realistic" to mean that the proposals confirmed the respondent's initial expectations rather than adjusting those expectations as part of an effort to move toward settlement. This interpretation of the data is buttressed by the lack of any correlation between settlement and "agreement" with the statements about the mediator understanding or clarifying the respondents' needs. All of these data suggest that respondents are more likely to resist abandoning their initial understanding of the accommodations problem and their expectations regarding the likely solution to the problem.

Table 4 also discloses that the ADA-RA/Not Resolved group was somewhat more likely to agree with "the mediator helped to develop options" than respondents in both of the other categories. Thus, respondents' "agreement" that the mediator helped develop options is less important to the resolution of ADA-RA charges. These data cannot be interpreted as demonstrating that these respondents were satisfied because the mediator's solutions would *not* lead to settlement. To the contrary, there is evidence that respondents entered their negotiations hoping to settle the charges. For example, the ADA-RA/Not Resolved group agreed less than the Resolved group with "I was

satisfied with the results of the mediation” (i.e., the Resolved group was satisfied while the Not Resolved group was dissatisfied).¹⁵⁹ The likelier explanation is that respondents negotiating over ADA-RA charges were more likely to agree that the mediator helped develop options because the mediator helped to develop options that tended to reinforce the respondents’ initial expectations. Again, this data point lends some support to Hypothesis 2 and the proposition that mediators have a more difficult challenge overcoming informational transaction costs in ADA-RA cases.

In sum, these analyses suggest that there is no correlation or little correlation between the responses of charging parties and respondents negotiating over ADA-RA charges to several positive statements about their mediators and resolution of the charge being negotiated. For charging parties, the lack of a correlation may suggest either (1) the information that is relevant to accommodations charges is more resistant to exchange or that more information is needed to resolve ADA-RA charges, or (2) the charging parties are more resistant to new information provided during the course of the negotiations. One question for the next section is which of these explanations best fits the data. The lack of a correlation may also suggest that mediators have a more difficult task in proposing solutions and providing information about solutions because these efforts must solve the accommodation problem while also adjusting the charging parties’ expectations. For respondents, the data also suggest that mediators’ task in proposing solutions and providing information about solutions is more difficult for the same reason, except that the respondents’ expectations must be adjusted. In order to sort out these possibilities, and to clarify how these data support Hypothesis 2, further analyses are required.

(4) “Agreement” and Resolution

Logistic regression analyses helped to determine whether participants’ agreement with any of the statements about the mediator’s role in reducing transaction costs was directly related to the successful resolution of the charge being negotiated. The preceding section found no correlation or little correlation between ADA-RA charging parties’ and respondents’ agreement with positive statements about the mediator’s role in reducing informational transaction costs and the likelihood that a charge would be resolved through mediated negotiations. Since these regression analyses inquire into which aspect

159. See *supra* text accompanying Table 3.

of the mediator’s performance contributed most to the participants resolving the charge through a mediated negotiation, they necessarily disclose a direct correlation between “agreement” and resolution of the charge. Further, participants’ “agreement” with one of the survey’s positive statements necessarily reflects an accurate perception of whether the mediator contributed to resolving the charge being negotiated.

The independent variables in these regression analyses were the participants’ responses to the statements in Questions 2, 3, and 4. The dependent variable was the status of the participant’s mediation – that is, whether the charge was resolved (i.e., Group I) or not resolved (i.e., Group II). Thus, the regression analyses disclose the strength of the relationship between the participants’ agreement with the statement and resolution of the charge. The logistic regressions’ results are summarized in Table 5 for charging parties and Table 6 for respondents. “OR” represents the “odds ratio” which is the percentage increase in the odds that the charge will be resolved if there were a one-unit increase in “agreement” with the statement.¹⁶⁰ “CI” represents the “confidence interval” at a 95% significance level (the significant results are in bold type), except where there is an * indicating the 90% significance level.

TABLE 5. ODDS RATIOS OF CHARGE RESOLUTION (CHARGING PARTIES)

Variables	Non-ADA-RA Charges		ADA Non-RA Charges		ADA-RA Charges	
	OR	CI	OR	CI	OR	CI
Q2– Mediator helped clarify needs	0.972	(0.753, 1.255)	1.096	(0.540, 2.224)	0.055	(0.288, 1.069)
Q3 – Mediator helped develop options	1.150	(0.895, 1.477)	0.775	(0.380, 1.582)	2.074	(1.111, 3.873)*
Q4 – Options were realistic solutions	1.785	(1.491, 2.137)	2.412	(1.487, 3.912)	1.299	(0.877, 1.926)
Constant	0.209		0.248		0.585	

The regression analyses support Hypothesis 2. Table 5 discloses the same statistically significant result for ADA non-RA charges and all other charges. Increasing the charging parties’ agreement with “most of the options developed during the mediation session were realistic solutions to resolving the charge” contributed to resolution of

160. The odds can be expressed in percentages by subtracting 1 from the odds ratio and multiplying the result by 100. For example, if the odds ratio is 1.785, a one-unit increase in satisfaction will increase the odds of resolving the charge by 78.5%.

the charge. A one-unit increase in “agreement” effected a 78.5% increase in the odds that all other charges were resolved and a 141.2% increase in the odds that ADA charges were resolved. ADA-RA charges, by contrast, were more likely to be resolved as a result of a different mediator technique. Charging parties’ agreement with “most of the options developed during the mediation session were realistic solutions to resolving the charge” was not a significant contributor to ADA-RA charges being settled. Rather, greater agreement with “the mediator helped develop options” significantly contributed to resolving ADA-RA charges. A one-unit increase in “agreement” with this statement more than doubled the odds that the charge would be resolved.

These regression analyses suggest answers to three questions left open by the preceding analyses regarding Hypothesis 2. First, it suggests that the “accurate perception” explanation – that is, that charging parties in ADA-RA negotiations accurately perceived the mediators’ performance – is unlikely. Instead, it is more likely that the charging parties’ perceptions were skewed. The regression analysis shows that ADA-RA charging parties’ response to “the mediator helped to develop options” was the only response for which “agreement” directly correlated with settlement of the charge. Yet, charging parties in the ADA-RA/Not Resolved group agreed with two other statements about the mediator’s performance as much as did charging parties in the ADA-RA/Resolved group: “the mediator understood my needs” and “the mediator helped to clarify my needs.” Charging parties in the ADA-RA/Resolved group also agreed less than the Resolved groups for ADA and all other charges on “the options proposed were realistic.” All of these reported perceptions were apparently inaccurate; that is, they were not correlated with the mediator’s success in helping the participants to settle. Rather, these responses reflect perceptions skewed by the expectations-results gap. As noted above, the skewed perceptions analysis lends support to Hypothesis 2.

Second, this regression analysis provides evidence that the information failures suggested by Table 3 probably cannot be explained by charging parties offering greater resistance to new information in ADA-RA negotiations. If charging parties’ resistance were the best explanation, then a mediator’s proposed solutions would almost certainly be subject to the same resistance. The mediators could not significantly contribute to settlement by helping to develop and propose solutions as this regression analysis shows they could and did. The problem apparently does not lie with the attitudes of charging parties seeking disabilities accommodations. Rather, the better explanation

appears to be that the information in ADA-RA cases is more resistant to exchange and/or more information is needed to resolve ADA-RA charges than other kinds of charges. This analysis also lends support to Hypothesis 2. Mediators were less successful using their three techniques for reducing informational transaction costs in disabilities accommodations negotiations because those transaction costs were different.

Finally, this regression analysis reinforces the preliminary conclusion in the preceding section that mediators involved with negotiations over ADA-RA charges have a more important role to play in proposing solutions and providing information about possible solutions than mediators involved with negotiations about other kind of charges. In other negotiations, because they are less encumbered by the transaction costs that characterize disabilities accommodations negotiations, overcoming the expectations-results gap is a function of the substance of the proposals made at the bargaining table. Charging parties negotiating over ADA-RA charges apparently need a more creative, more assertive mediator wielding solutions and information about still more possible solutions to overcome the transaction costs that impede the path to settlement. Again, this analysis supports Hypothesis 2.

Table 6 summarizes the results of the regression analyses for respondents.

TABLE 6. ODDS RATIOS OF CHARGE RESOLUTION (RESPONDENTS)

Variables	Non-ADA-RA Charges		ADA Non-RA Charges		ADA-RA Charges	
	OR	CI	OR	CI	OR	CI
Q2- Mediator helped clarify needs	0.617	(0.483, 0.787)	0.510	(0.289, 0.901)	0.702	(0.339, 1.451)
Q3- Mediator helped develop options	1.094	(0.850, 1.408)	1.140	(0.622, 2.089)	1.062	(0.451, 2.502)
Q4- Options were realistic solutions	2.723	(2.207, 3.360)	3.635	(2.317, 5.703)	1.901	(0.870, 4.151)
Constant	0.333		0.207		0.817	

Table 6 discloses statistically significant results that resemble the results in Table 5 for all charges other than ADA-RA charges. Negotiations over ADA non-RA charges and all other charges resolved the charges when the respondents agreed that the options developed were realistic. A one-unit increase in agreement with this statement produced whopping 263.5% and 172.3% increases respectively in the

odds that ADA non-RA charges and all other charges would be resolved. Charging parties' agreement with this statement also contributed significantly to the resolution of ADA charges and all other charges. Taken together, these two data points offer evidence that negotiations over ADA non-RA charges and all other charges are similar and, most important, settle for the same reasons.¹⁶¹ The substance of the participants' proposals during the negotiations determine whether they will settle. They do not appear to systematically stumble over transaction costs. When the mediator succeeds in reducing transaction costs by improving information exchange, de-biasing negotiations, and proposing solutions and providing information about additional solutions, resolution of the charge depends upon the participants and the mediator proposing realistic solutions to the problems. In this context, "realistic" means solutions that are consistent with the participants' genuine needs and the information disclosed during the course of the negotiation.

Again, negotiations over ADA-RA charges were different. According to these regression analyses, there was no measure on which respondents' "agreement" bore a statistically significant relationship to resolution of the charge. In particular, respondents' agreement with the statement that the options proposed during the negotiations were realistic did not contribute significantly to settlement. This paper's earlier analyses suggested that respondents negotiating over ADA-RA charges defined "realistic" to mean that the proposals confirmed the respondent's initial expectations rather than adjusting those expectations as part of an effort to move toward settlement. The regression analyses make the same suggestion.

These data also reinforce the earlier finding that respondents negotiating over ADA-RA charges apparently agreed more with "the mediator helped to develop options" when the proposals were consistent with the respondents' initial expectations, not when the proposals made a genuine contribution to settlement. Once again, this suggests that these respondents' responses do not reflect accurate perceptions of the mediator's performance. Rather, the responses appear to be expressions of dissatisfaction resulting from the mediators' efforts to narrow the expectations-results gap. The perceptions of respondents in negotiations over ADA-RA charges, like the perceptions

161. There is one other statistically significant result on Table 6: settling all other charges is less likely when the respondent is satisfied that the mediator has helped to clarify its needs. A one-unit increase in satisfaction on this measure results in a 38.3% decrease in the odds that the charge will be resolved. This is an interesting result; however, it does not shed light on the mediator's role in ADA-RA cases.

of charging parties in those negotiations, were skewed by the expectations-results gap. All of this evidence lends support to Hypothesis 2.

These results are especially noteworthy in light of the evidence in Table 2 showing that respondents in all charge categories, including the ADA-RA category, had narrower expectations-results gaps than did charging parties.¹⁶² The narrower gap is probably a result of respondents' experience as "repeat players" in employment discrimination cases, EEOC processes, mediation, and perhaps negotiations over employment discrimination issues. Greater experience should yield a better understanding of what negotiations can and will produce.¹⁶³ In addition, respondents were more likely to be represented by counsel. More experienced, more knowledgeable, and better counseled participants should understand the importance of adjusting their expectations in order to reach settlement.¹⁶⁴ In negotiations over other charges, the evidence suggests that respondents learned this lesson well enough that the substance of proposals made at the bargaining table determined the negotiations' success or failure. But in ADA-RA cases, the evidence suggests that respondents were less willing to adjust their expectations for the purpose of reaching settlement.

This behavior might be explained in two ways. The first explanation would be that disabilities accommodations charges are more idiosyncratic than other kinds of employment discrimination charges. This explanation would be consistent with Hypothesis 2. More and different information may be needed to adjust respondents' expectations in negotiations over ADA-RA charges than in negotiations over other kinds of charges. This would be an appealing explanation if only because it is consistent with the discussion of information failures which explained the charging parties' regression analyses. But Tables 4 and 6 do not lend this explanation much support. If information failures were the best explanation, then we would expect a direct correlation between respondents' agreement with "the mediator helped clarify my needs" or "the mediator helped to develop options" and resolution of the charge. Both of these statements are generally related to the mediator's role in information exchange. Yet, both Tables 4 and 6 suggest that respondents' agreement with these statements did not contribute to settlement. Information failures do not appear to be the problem for respondents.

162. See *supra* text accompanying Table 2.

163. See *supra* text accompanying notes 146-147.

164. See *supra* text accompanying note 148.

A second, more controversial explanation suggested above may gain more support from this evidence; that is, respondents may bring deeper, more stubborn biases into negotiations over ADA-RA charges than negotiations over other charges.¹⁶⁵ These biases cause respondents in negotiations over ADA-RA charges to be less able or willing to consider new information and new proposals that would otherwise adjust their expectations and lead to settlement. As a result, respondents' satisfaction with the three mediator techniques does not correlate directly with resolution of the ADA-RA charge. The biases would make respondents' expectations-results gap less susceptible to narrowing using these tools. This explanation would also be consistent with Hypothesis 2 and a finding of information failures since biases and stereotypes can fill gaps in information.¹⁶⁶

An even narrower version of this explanation would make it fit the evidence more comfortably. Any biases must be particular to accommodations issues or the intersection of disabilities issues and accommodations issues. The biases cannot be directed at the charging parties' disabilities. Respondents in ADA-RA negotiations gave different responses when compared with the responses of respondents in ADA non-RA negotiations, yet both groups of respondents negotiated with workers with disabilities. By comparison, respondents in ADA non-RA negotiations gave responses that resembled the responses of respondents in negotiations over all other charges – that is, negotiations that did not involve workers with disabilities. Once again, there does not appear to be a significant difference between negotiations over ADA non-RA charges and all other charges. Thus, it is unlikely that biases about disability interfered with the successful resolution of ADA-charges. Rather, the difference appears to arise out of the fact that the ADA-RA negotiations addressed accommodations issues.¹⁶⁷

165. See *supra* text accompanying notes 27-28, 67-68, 87-91.

166. See *supra* text accompanying notes 82-86.

167. The evidence does not appear to support speculation that respondents in ADA-RA cases bargain harder – that is, pursuing a bargaining strategy which involves resisting modifying their position and agreeing to settle only on their preferred terms – because they expect to win in litigation. A bargaining strategy of this sort would almost certainly have to apply to both ADA charges and ADA-RA charges. Employers have been comparatively more successful in all reported ADA employment decisions, not merely decisions regarding reasonable accommodations. See *supra* note 146. Further, the Supreme Court's employer-friendly ADA jurisprudence applies to all ADA employment cases, not just reasonable accommodation cases. See, e.g., *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999) (holding that whether an individual has a "disability" is determined by taking into account natural adjustments he has made to his impairment); *Murphy v. UPS*, 527 U.S. 516 (1999) (holding that whether an

The heart of the issue may be, as posited above, that employers systematically doubt the legitimacy of workers' requests for disabilities accommodations.¹⁶⁸ When asked to remedy other allegations of employment discrimination, respondents apparently will agree if the solutions are realistic. By contrast, respondents apparently are not as likely to agree if an accommodation is realistic. This difference suggests that respondents are skeptical about disabilities accommodations that cause them, in some cases and in some unspecified way, to resist even realistic requests for accommodations.

In sum, these regression analyses lend further support to Hypothesis 2 – that is, mediators face a different, more difficult challenge when reducing informational transaction costs in negotiations over ADA disabilities accommodations using their three traditional techniques. They also suggest how and why negotiations over disabilities accommodations are different. The evidence suggests that charging parties and respondents complicate the negotiations in different ways. Charging parties need mediators' help in overcoming information asymmetries, particularly with respect to solutions to their accommodations problems. The information that is relevant to an ADA-RA charge is more resistant to exchange, so the mediator must do more to facilitate this exchange and bring additional relevant information into the negotiation sessions, for example, offering additional solutions.

With respect to respondents, the mediator's challenge may be to de-bias the respondent's opening view of the charging party's accommodation request. There is some reason to believe that the mediator faces an additional challenge of persuading respondents that the charging parties' requests for accommodations should be addressed on their own merits rather than rejected as unwarranted regardless of their merits. If this analysis is accurate, then information exchange and proposing solutions will not be sufficient. De-biasing is the critical mediator technique when dealing with respondents.

employee has a "disability" is determined by taking into account the mitigating factors that he employs); *Sutton v. United Air Lines*, 527 U.S. 471 (1999) (holding that corrective and mitigating measures, including eyeglasses, should be considered in determining whether an individual has a "disability" under the ADA, and that for an employee to be "substantially limited" in the major life activity of "working" she must be excluded from a broad class of jobs); *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002) (holding that an employee must be prevented or severely restricted from doing tasks central to most people's daily lives before she will be found to have a "disability"). *See also* *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that states are immune from suit under the ADA's Title I).

168. *See supra* text accompanying notes 26-28, 87-91.

III. CONCLUSION

Using evidence from the EEOC's mediation program, this paper has peered inside negotiations over workplace disabilities accommodations to assess whether the informational transaction costs that arise in those negotiations differ from the transaction costs that arise in negotiations over other kinds of employment discrimination claims. The evidence suggests two conclusions. First, there is no systematic difference between parties' expectations in disabilities accommodations negotiations and negotiations over other employment discrimination issues. Second, mediators have greater difficulty adjusting parties' expectations in disabilities accommodations negotiations by improving information exchange, de-biasing negotiations, and proposing solutions or providing information about solutions.

The evidence also offers preliminary insights into the particular challenges faced by mediators involved in negotiations over disabilities accommodations. The exchange of information that is necessary to a successful negotiation may be more difficult in disabilities accommodations negotiations both because more information is needed and the information is more difficult to exchange. As a result, the mediator may be required to introduce more and better information into disabilities accommodations negotiations to help workers with impairments overcome their initial expectations about the likely outcome of the negotiations. Second, the evidence suggests that mediators' role in proposing solutions and providing information about possible solutions is more critical to disabilities accommodations negotiations, particularly for workers engaging in those negotiations. Finally, the evidence suggests that negotiations can be affected by employers' biases relating to the appropriateness of accommodations as a remedy for discrimination charges. This evidence suggests that before any of the mediators' traditional methods can be expected to reduce transaction costs in disabilities accommodations negotiations, the mediator will face the challenge of de-biasing employers' approach to disabilities accommodations issues.

The evidence does not support the conclusion that mediators are entirely unable to address information asymmetries, bias, and solution identification costs in disabilities accommodations negotiations by improving information exchange, de-biasing the negotiations, and proposing solutions and providing information about potential solutions. Rather, the evidence suggests that these methods do not work as well in disabilities accommodations negotiations because mediators face added and more complex transaction costs. Thus, this

evidence does not support scrapping mediators' existing strategies and beginning anew. It suggests a need to learn more about how to adapt those methods in disabilities accommodations negotiations.

These findings are noteworthy. Negotiations lie at the heart of the ADA's plan for assuring that workers get the accommodations they need to be integrated into workplaces. More successful negotiations may result in the provision of more accommodations, at least to incumbent employees. Thus, this study lends important empirical support to the Work Group's efforts to create special ethical and practical rules for mediators engaged in negotiations over disabilities issues. But it also suggests that there is more work to be done identifying exactly what it is that mediators must do differently in disabilities accommodations negotiations and then providing mediators with the training and information they need to perform these additional, or modified, tasks. This paper should encourage more enthusiastic and widespread adoption of the ADA Mediation Guidelines, but also encourage further, similar efforts to identify and address the particular difficulties that arise in negotiations over disabilities accommodations.

This paper should also encourage further research into mediators' substantive role in disabilities accommodations negotiations. Its conclusions are preliminary and limited. Further, this paper addressed only a narrow set of questions focused on informational transaction costs in disabilities accommodations negotiations. There may be other transaction costs that are unique to these types of negotiations or that manifest themselves differently in accommodations negotiations that also require mediators to change the way they conduct these negotiations. So, this paper should also serve as a call for further research on the broader topic of mediation, transaction costs, and negotiations over disabilities accommodations.

