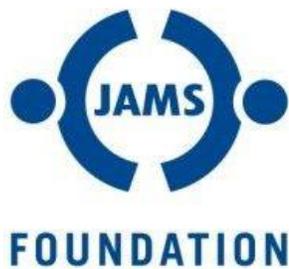


# A Handbook for Assessing and Maximizing Capacity in Elder Mediations

Autonomy and Self-Determination Expressed Through Capacity



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# Table of Contents

- I. Introduction ..... 1
  - A. The Need for Clarity in Assessing an Older Adult’s Mediation Capacity ..... 1
  - B. What Readers Will Can Gain From the Handbook ..... 2
  - C. How Mediators Can Use the Handbook..... 2
- II. The Effects of Ageism in Mediation..... 3
- III. Self Determination, Autonomy, and Capacity in Elder Mediation ..... 3
  - A. The Connections Between Self Determination, Autonomy and Capacity (Unknown Source) ..... 3
  - B. Characteristics Common to Elder Mediations ..... 5
  - C. Mediator Capacity..... 5
- IV. What is the Capacity for Older Adults to Participate in Mediation? ..... 6
  - A. Standards of Conduct ..... 7
  - B. What Capacities Are Mediators Looking For from Participants?..... 7
  - C. Meaningful Participation ..... 9
- V. Assessment Tools ..... 10
  - A. Step ONE: Observational ..... 11
    - 1. Physical signs of diminished capacity: ..... 11
    - 2. Cognitive signs of diminished capacity: ..... 12
    - 3. Emotional signs of diminished capacity: ..... 12
    - 4. Behavioral signs of diminished capacity: ..... 12
    - 5. Mitigating factors: ..... 13
    - 6. Worksheet:..... 13
  - B. Step TWO: Professional Assessment ..... 13
  - C. Step THREE: The Mediator’s Assessment ..... 14
  - D. Step FOUR: Adaptations: Accommodations and Modifications ..... 14
- VI. Adaptations to Maximize Participation ..... 14
  - A. Adapting to Physical/Sensory Impairments ..... 15
  - B. Adapting to Cognitive Impairments ..... 16
  - C. Use of Support Person or Surrogate..... 17
- VII. Mediator Impartiality Examined ..... 19
- VIII. Confidentiality ..... 20
- IX. APPENDICES ..... 21
  - A. Capacity Assessment Flowchart for Mediators ..... 22
  - B. Capacity Worksheet for Mediators ..... 24

C. Standards of Conduct ..... 28

1. ABA Model Standards of Conduct for Mediators ..... 28

2. ABA Model Rules: Rule 1.14: Client with Diminished Capacity ..... 28

3. Code of Ethics for Elder Mediators (EMIN) ---Elder Mediation International Network..... 29

D. Resources ..... 31

1. Training Opportunities and Resources ..... 31

2. Online Resources ..... 31

3. Bibliography of Citations ..... 31

## **I. Introduction**

Determining capacity is integral to supporting autonomy and self-determination within mediation. This handbook will specifically focus on these concepts within the context of Elder Mediation but can be applied more broadly to other types of mediation. As a part of our research for the Elder Mediation grant, we found that there is no shared universal definition of ‘Older Adult’. For the purposes of this handbook we will define an Older Adult as someone who is older than 65 (Wikipedia Contributors, “Old Age”), understanding that chronological age is not necessarily an indicator of health, ability, or capacity to mediate.

The tools provided in this handbook will assist mediators and community mediation centers to navigate the continually fluctuating landscape of assessing and determining capacity in the Older Adult, including addressing the need for adaptations and guarding against ageism. This handbook will help mediators and community mediation centers create maximum participation, honor the Older Adults wishes, and recognize autonomy, including respecting the Older Adult’s decision to make what the mediator or other parties might consider “poor choices”, such as the choice not to participate at all. The complex realities of determining capacity of an Older Adult while fostering autonomy and self-determination include nuance and unknowns on top of the usual challenges involved in mediation.

### **A. The Need for Clarity in Assessing an Older Adult’s Mediation Capacity**

There is a lack of synthesized information within the mediation community about how to proceed when a mediator suspects a client does not have the requisite capacity to fully participate in the mediation. Mediators need tools to help determine each client’s level of capacity and in turn facilitate a process that respects each individual’s ability to participate to the greatest extent possible. Both the medical and legal fields have patient/client capacity guidelines for their professionals to follow yet the field of mediation does not. Although there have been periodic attempts to engage in a discussion of mediation capacity in Older Adults through professional journals and other publications, law review articles and professional articles published on-line, the mediation community has not embraced this topic with any systematized guidelines.

The paucity of information regarding assessing the capacity of Older Adults and the lack of any universal structured guidelines leaves mediators and mediation centers to make assumptions and therefore make decisions based on indeterminate factors. One mediator may decide a client has full capacity while another may decide that same client should not participate at all.

We suggest that the mediator’s role is not to judge *whether or not* a client can participate but *in what ways* they can participate. We hope this handbook will help mediators assess the Older Adult’s ability to participate and make any adaptations necessary. The creation of this handbook does not suggest the mediation community needs or would benefit from one set of uniform rules. Each Older Adult, as well as

each mediator and community mediation center, is unique. This handbook is best used as a menu of options and as a starting place to create a process that works for each mediator, each community mediation center and each Older Adult.

## **B. What Readers Will Can Gain From the Handbook**

This handbook is based on the guiding principles of NAFCM's Hallmarks 6 and 8:

- ✦ NAFCM Hallmark 6: "*Providing a forum for dispute resolution at the earliest stage of conflict*" by creating tools to maximize participation and self-determination of Older Adults, "9 Hallmarks, 1992"
- ✦ Hallmark 8: "*Initiating, facilitating and educating for collaborative community relationships to effect positive systemic change*" by creating tools to maximize participation and self-determination of Older Adults, "9 Hallmarks, 1992"

and will foster participation in mediation by Older Adults to the maximum extent possible for each individual. Mediators will obtain needed guidelines and tools:

1. for determining capacity and supporting autonomy and self-determination for Older Adults in mediation;
2. for determining the need to engage a clinician to assess capacity; and
3. for creating appropriate and reasonable adaptations for modified participation in mediation.

## **C. How Mediators Can Use the Handbook**

This handbook will not make mediators experts in official capacity assessments or mental disorders of aging. The task is not to become diagnosticians or to make any mental health assessments. Yet, as mediators, we are required, on a regular basis, to determine the capacity of participants to mediate. With an Older Adult, the risk of some level of impairment is greater than in a younger population. Mediators must keep in mind that the task is to make a preliminary evaluation and not a clinical assessment or diagnosis. We hope this handbook will provide tools for mediators to make the initial (and on-going) evaluation of an Older Adult's capacity.

This handbook was created to explore how to foster and support unimpeded participation in mediation by Older Adult's to the maximum extent possible for each individual. Included within this handbook are guidelines, checklists, issues to consider, and resource to access. Our intent is to help provide mediators with concrete guidelines and tools that may be utilized to manage capacity. Mediators draw upon many proficiencies before, during and after a mediation. We hope this handbook adds to those proficiencies. This handbook utilized alongside professional and personal experience, informed intuition, and asking good questions, is intended to support a structured process to ensure maximum participation of Older Adults with diminished capacity. This will add a *thinking* component to a *gut feeling*.

## II. The Effects of Ageism in Mediation

This handbook would be remiss without an explanation of how ageism plays a role in mediation, as in all parts of society. There is an abundance of literature on this subject. Here is a sampling of the prevailing considerations.

- In 1969 Dr. Robert M. Butler wrote “Ageism is a process of systematic stereotyping or discrimination against people because they are old, just as racism and sexism accomplish with skin colour and gender.” (Butler, “Ageism: Concepts and Theories”, 1969)
- The World Health Organization website states “Research suggests that ageism may now be even more pervasive than sexism and racism. This has serious consequences both for older people and society at large. For example, ageism limits the questions that are asked and the way problems are conceptualized and is hence a major barrier to developing good policies.” (“Aging and life-course/Frequently Asked Questions: Ageism”, 2019)
- “Negative attitudes are also widely present even within the health and social-care settings where Older Adults are at their most vulnerable. Some of this prejudice arises from observable biological declines and may be distorted by awareness of disorders such as dementia, which may be mistakenly thought to reflect normal ageing. Socially ingrained ageism can become self-fulfilling by promoting in older people stereotypes of social isolation, physical and cognitive decline, lack of physical activity and economic burden.” (Levy BR et al., “Longevity increased by positive self-perceptions of aging”, 261-270)

Experienced mediators are cognizant of stereotypes, biases and cultural differences of the participants in mediation. Mediators are generally well schooled in recognizing and adjusting for those behaviors and attitudes that create barriers to a successful mediation. Mediators must also be constantly vigilant to recognize ageism and keep these set of biases out of mediation rooms, both from the participants and from themselves as mediators. Ageism stereotypes can serve to limit the participation in a mediation of the older adult when there is no empirical evidence of diminished capacity. Ageism can be ‘the elephant in the room’ if mediators are not mindful in recognizing and adjusting for the potential impact these biases may create.

On the other hand, mediators can be leaders in recognizing and eliminating ageism in our society by the way mediations are handled. “*Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it’s the only things that ever has.*” (Margaret Mead) Mediators can be just such a group of thoughtful, committed souls.

## III. Self Determination, Autonomy, and Capacity in Elder Mediation

### A. The Connections Between Self Determination, Autonomy and Capacity (Unknown Source)

During an Elder Mediation process, mediators rely on the concepts of self-determination, autonomy, and capacity to explore the Older Adult's abilities to mediate. **Self-determination** presumes individuals have the right to freely make informed decisions about their lives without outside pressure. This does not require self-sufficiency, but does require that they can freely make decisions about their lives regardless of how those wishes are carried out.

**Autonomy** pushes this concept into more personal territory. Exercising autonomy not only requires an individual to be able to make decisions that shape his or her own life but also to assume responsibility for those decisions. Embracing participant autonomy is paramount to a sustainable agreement. If a party is (or feels) coerced into an agreement they are less likely to follow through with that agreement. Autonomy should only be questioned and overridden if an individual is proven incapable of knowing his or her own interests. For example, that could be the case with someone experiencing advanced stages of dementia that refuses to turn on the heat in their home when temperature is below freezing outside.

**Capacity** is the final consideration. This connection is the ability of an individual to: 1) appreciate the relevant information provided to them about the topic, and 2) to form a reasonable and realistic judgment or decision based on the potential consequences of that choice. The mediator needs to consider that the required level of capacity in decision-making increases or decreases depending on the level of risk involved. The more serious the consequences of the decision, the more capacity required. For example, less capacity is required to decide between a ham or a turkey sandwich for lunch and more capacity is required to decide which adult child is going to be given power of attorney.

Capacity should not be viewed as static or permanent: an individual's capacity fluctuates based on factors such as medication, illness, hearing loss, diminished eye sight, time of day, familiarity with the situation or space, stress, personality and cognitive impairment. Diminished capacity can result from many factors, many of which can be corrected or adjusted for. Mediators must assess the capacity of each individual prior to mediation in order to make any necessary adaptations. Assessing capacity is also an on-going process throughout the mediation. (ADA Mediation Standards Work Group, "ADA Mediation Guidelines", Part I-D.)

Most mediators are familiar with the concepts of medical and/or legal incapacity. These concepts can *factor into* determining an individual's capacity to fully mediate but *does not define* an individual's capacity to participate on some level in mediation.

In a nutshell:

- ✓ **Self-determination** is the ability to make one's own decisions, but does not necessarily mean the ability to follow through with those decisions.
- ✓ **Autonomy** adds the ability and responsibility to follow through with those decisions.
- ✓ **Capacity** includes the ability to make decisions (self-determination), the ability to follow through with those decisions (autonomy) plus understanding the consequences of those decisions.

## B. Characteristics Common to Elder Mediations

Elder Mediations have characteristics that are distinct from other mediations – those that do not involve older people or issues typical to Older Adults.

Considering the similarities and differences in birthday parties is a good analogy to begin to understand how Elder Mediations differ. We all know what a birthday party is. All birthday parties have characteristics that are similar. Yet, culture dictates that a birthday party for a 7-year-old is different from a birthday party for a 35-year-old, which is different from a birthday party for a 70-year-old. Elder Mediation is similar. Mediations for and with Older Adults look different from typical non-elder mediations.

Elder Mediations share some characteristics with other types of mediation such as mediator confidentiality and neutrality, voluntary participation, and informed consent. The mediator follows the same general path, including intake processing with all participants, creating a safe and inviting environment, asking good questions and reality checking agreements.

Elder Mediation generally has these characteristics in common (adapted from Elder Decisions, “Elder/Adult Family Mediation Teaching Institute”, p. 13-16).

- generally **multi-generational**,
- usually **multi-party**, involving multiple principals and often numerous resource people,
- usually **multi-issue**. Medical, financial, legal or other specialty concerns often require additional information and decisions,
- a gathering of parties generally with **long-standing and complicated relationships** that will **continue into the future** and affect others who are not in attendance, including caregivers and family members.

The process may be a means to understanding what **community resources** are available and may be needed to resolve the dispute. Typical mediations deal with a specific finite issue and when the agreement is reached, the situation is over. Elder Mediations often do not have an ‘end point’, and will require **on-going** decision-making over time. Often Elder Mediations require ongoing sessions with **multiple meetings** over time. The mediator has to pointedly attend to the Older Adult’s ability to **safely express self-determination and maintain autonomy** to the greatest extent possible.

## C. Mediator Capacity

When we discuss capacity in mediation the literature most often refers to the capacity of **parties** to participate. The capacity of the **mediator** to facilitate a particular mediation is also an important factor. Unintended bias and the use of ageist terminology can be devastating to the perception of mediator neutrality. Having specific training and direct experience with Older Adults can provide greater sensitivity and skill to “support families and individuals to help them navigate the intricate life issues facing older people and their families” (Elder Mediation International Network, “Code of Ethics for Elder Mediators”, p. 14). Mediators should:

- ‡ be curious, ask good questions, and listen;
- ‡ apologize if mistakes are made;
- ‡ follow the advice of the parties;
- ‡ find out about the Older Adult as an individual and
- ‡ refrain from creating an “us versus them” atmosphere by emphasizing age over individualism.

If the mediator is unable to assist the Older Adult (or other involved party) to manage their emotions, feel empowered, and express their needs and wants, the mediator might not be a good fit for that particular mediation process.

#### **IV. What is the Capacity for Older Adults to Participate in Mediation?**

The most important maxim a mediator can remember in evaluating the capacity to mediate for Older Adults is the following:

***It is not the mediator’s role to judge whether or not an Older Adult can participate in mediation, but to assess in what ways the Older Adult can participate.***

As a person ages, the risk increases that they will experience physical and/or mental changes that affect their ability to self-determine. In Elder Mediation, the mediator needs to be able to assess the Older Adult’s ability to self-determination.

The capacity of the Older Adult to participate in the decision-making and in the discussion of a mediation -- the ability to self-determine -- is not like an on-off switch where you either have total capacity or you have absolutely no capacity. The ability to make self-determinations must be considered analogous to a dimmer switch. For the Older Adult, there are degrees of self-determination, degrees of capacity and degrees of participation.

Mediation is about empowerment and in Elder Mediation this ability to empower others is especially important to maximize the engagement of Older Adults, who may already be marginalized in one way or another by ageism in general or diminished capacity in the specifics.

On one end of the spectrum, if Older Adults have the capacity to **fully** “self-determine”, they are able to participate **fully** in the mediation. On the other extreme, when they have reached a point where having the older adult participate in a mediation may be detrimental to them, they should not be required to participate at all. There is a wide range of capacity or ability to self-determine that can be accommodated in between those two extremes. In Elder Mediation, the goal is to have the Older Adult participate to the maximum level that their degree of capacity, their ability to self-determine, allows them. The mediator’s task is to assess where the Older Adult is on the continuum of varying capacities.

# Exploring Capacity in the Older Adult

In Elder Mediation, CAPACITY is viewed on a continuum from...

Not able to  
Participate

TO

Fully able to  
Participate

Capacity Continuum

In order to accurately place the Older Adult on a sliding Capacity Scale, the mediator needs to be clear as to the aspects and elements of capacities that may serve as indicators of the ability to participate and to what degree within the mediation. Before we discuss the kinds of capacities relevant to mediation, we shall examine the standards of conduct relevant to self-determination and capacity.

## **A. Standards of Conduct**

The *Model Standards of Conduct for Mediators* (American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution, 2005), the ABA *Model Rules of Professional Conduct*: Rule 1.14: Client with Diminished Capacity (2016), and the Elder Mediation International Network: *Code of Ethics for Elder Mediators* talk about the proper conduct for lawyers and/or mediators in regard to self-determination and capacity. The texts of the related sections are contained in Appendix D. Pay particular attention to the Code of Ethics for Elder Mediators which states categorically "Elder Mediators must recognize the ethical and human right of each person to make choices for themselves where possible." (Section 6.4.1, page 9)

## **B. What Capacities Are Mediators Looking For from Participants?**

This section examines what mediators have said the relevant capacities are for mediation. Keep in mind that capacity must be examined in a contextual manner. For example, capacity to drive a car or feed oneself is not necessarily indicative of capacity to participate in mediation. In order to determine if the parties have the capacity to fully participate in mediation, mediators need to know what abilities they expect from the participants. And, for Elder Mediation, the mediator must ascertain the level of capacity the Older Adult exhibits.

In 1998, Coy & Hedeem, published mediation professors, named eight "minimal requirements" for participation in community mediation, including the ability to:

- (1) see how specific issues are related and connected to each other;
- (2) focus on one issue at a time;
- (3) understand cause and effect, match events and consequences;
- (4) take responsibility for one's own actions;
- (5) conceive of and respond to common measures of time in the context of scheduling;
- (6) comprehend the nature of a behavioral commitment;
- (7) identify desired outcomes; and
- (8) understand the mediator's role

Coy and Hedeem's analysis provides useful tools for mediation referrals "involving disputants with certain emotional or mental disabilities" but is not specifically geared towards a graduated approach most useful for Older Adults. (Coy & Hedeem, Minimalist Approach to Criteria section.)

Jeanne Cleary, a clinical psychotherapist and mediator, published an article on Mediate.com in August 2015 entitled: "On the Question of a Party's Capacity to Use Mediation", written to stimulate conversation about capacity determinations. She identified, specifically with concerns about a party's mental health, the following regarding the categories of capacity useful in mediation: (Section A, emphasis added.)

- **"Cognitive capacity:** ability to understand what is happening, what is being discussed; to be able to track a conversation; to be able to follow lines of thinking and the development of ideas, to be able to take in information and use it." Example: After a thorough explanation, the Older Adult understands the operating principles of the mediation.
- The Older Adult is able **"to follow a line of thinking**, can responsively answer questions with relevant answers."
- **"Relational competence:** is this person able to engage with the other party while still having their own voice? Is this person able to engage with the other party in a way that allows for the other to have their own voice? (power dimensions)." Example: The party is able to generate their own wishes relative to the situation.
- **"Emotional stability:** ability to regulate one's feelings enough to be able to use cognition and to engage with others effectively enough."

These are all useful guidelines to help mediators understand the mediation process and what, in an ideal situation, mediators should expect participants to be able to understand and to do.

The ADA Mediation Guidelines offers a similar description of what abilities to look for when mediating with someone with diminished capacity:

*"The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and*

*keep an agreement.*” (ADA Mediation Standards Work Group, Part I-D. Party Capacity)

The ADA guidelines also state “capacity is a decision-specific concept”; that is, capacity depends upon the context of the mediation. The guidelines also specifically state accommodations must be considered to enable the party to successfully participate in mediation.

In each of the above instances, mediators are urged to begin with the presumption of capacity and are cautioned about being too hasty to dismiss the person’s ability to participate. In order to effectively assess the capacity of the Older Adult to mediate, mediators should be less concerned with what the Older Adult *cannot do* and focus on how they *can* participate as fully and meaningfully as possible. This process starts by explaining the mediation process to the Older Adult and other parties.

A series of questions follows that explanation in order to assess the Older Adult’s capacity to mediate:

- Do they understand the process (self-determination)?
- Do they understand the topic(s) being discussed (self-determination)?
- Do they want to participate in the mediation (self-determination)?
- Do they have the ability to make decisions that will shape his or her life (autonomy)?
- Do they have the ability to assume responsibility for those decisions (autonomy)?

Throughout all this, the mediator has to be aware of, and guard against, making assumptions about age or infirmity.

Mediating with Older Adults requires a variable definition of what is meaningful participation. The next section more fully explores that concept.

### **C. Meaningful Participation**

APA Handbook: Diminished Capacity states: The real question might not be “can the party mediate” but “can the party mediate with support?” (Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists, p. 131.) In Elder Mediation, meaningful participation in the process encompasses a wide range of the concept of “capacity to mediate”.

The issue is not whether the Older Adult can participate in the mediation, the question becomes: at what level can this person participate. Thus the guidelines above are not to be used to rule out participation except in the most extreme cases. Lack of *total* competency in a person’s abilities, does not mean that an Older Adult cannot participate, but is merely the opening inquiry into the level of participation. Mediators should define **meaningful participation** to include a multitude of options: adaptations, the use of advocates or the use of surrogates. There are many ways to

ensure Older Adults can benefit from mediation. (Wood, “Addressing Capacity: What is the role of the Mediator?”).

## **V. Assessment Tools**

The mediator is not a trained clinician. Even if the mediator also happens to be a trained clinician, specifically one trained in clinical psychological screenings, it is still not the mediator’s job to perform a professional assessment. The mediator’s role is to be a neutral third party professional helping facilitate problem-solving/dispute resolution for the parties. Once a mediator steps outside that role, they step outside their zone of neutrality and become someone else in the eyes of the party needing the evaluation. In addition, they jeopardize their role as neutral with the other parties to the dispute.

A more significant problem, however, may not be a mediator who is trained in professional clinical capacity evaluations, but instead that the mediator has not received any training in capacity assessments at all. This lack of training, does not diminish the need to make capacity judgments in every single mediation, both initially in order to determine if the parties have the capacity to mediate and on a continuing basis to ensure that the parties maintain the ability to self-determine throughout the mediation.

Intimidation and/or other power imbalances may arise at any point in the process. A mediator’s standards of conduct and ethical guidelines require a party to be able to self-determine in order to participate in mediation. It is the mediator’s responsibility to ensure the party has sufficient capacity to participate. That responsibility is especially important in Elder Mediations for two reasons:

1. There is a greater probability of physical and cognitive diminished capacity the older a person gets; and
2. The goal of a capacity assessment in Elder Mediation is NOT to prohibit participants from mediating if they have a diminished capacity, but to maximize how they can participate.

Mediators are, consciously or unconsciously, already making decisions about a party’s capacity to mediate. Rather than a full professional clinical assessment, a screening process satisfies a mediator’s due diligence in the capacity determination. To avoid mediator judgment based solely “on a feeling that something is not right” or other equally haphazard decision, the gut feeling should be followed by a **factually based assessment**. This section (V) will provide a reasonable and sound conceptual framework for making that preliminary assessment.

The complete preliminary screening process involves up to four steps. **Step ONE:** Observational. This includes physical observations and the impressions gleaned from conversation(s) with the participant. This preliminary screening is used to identify capacity “red flags”. **Step TWO** involves a professional assessment of the participant’s capacity. This becomes a part of the process **if** observations of the participant’s physical or cognitive level go beyond a certain threshold. In **Step THREE**, the job is to decide if the mediation (a) can go forward without any needed adaptations to the

process, (b) can go forward with adaptations to the process or (c) cannot go forward even with adaptations. If the mediation is to go forward with adaptations to the process, **Step FOUR** requires the mediator to determine what adaptations to the process are necessary and what, if anything, to share with the other parties to the mediation while respecting the confidentiality of the process.

### **A. Step ONE: Observational**

As a part of the preliminary ‘capacity’ screening, Step One requires the mediator to observe the physical, cognitive, emotional and behavioral signs of capacity of the Older Adult.

The ABA Handbook on Diminished Capacity offers useful guidelines for an attorney making those observations as well as specific items to look for while communicating with their client. (ABA Handbook: Diminished Capacity, Part IV-A, pp 13-17.)

We have adapted those guidelines for use in assessing the Mediation Capacity of an Older Adult to participate in an Elder Mediation. The “Observational Guidelines” in the text box should be kept in mind while making your observations.

#### **Observational Guidelines**

- No single sign provides a determinate signal that an Older Adult has a diminished capacity.
- Focus on decisional abilities, not cooperativeness or affability.
- Pay attention to changes over time; history is important.
- Beware of ageist stereotypes.
- Consider whether mitigating factors could explain the behavior. (Grief, depression, recent stressful events, reversible medical factors, medication, normal fluctuations in mental ability in Older Adults).
- Observing in a home setting can be more revealing than a conversation in an office setting.
- Be mindful of undue influence.

#### 1. Physical signs of diminished capacity:

- a) *impaired senses*, e.g. vision loss, hearing loss;
- b) *tires easily*;
- c) *needs quiet space to reflect*;
- d) *mobility challenged*.

2. Cognitive signs of diminished capacity:
  - a) *Short-term memory loss:* Are they forgetting what has just been discussed, repeating the same question again and again, forgetting names or the purpose of the interview?
  - b) *Communication problems:* Do they have difficulty finding particular words, frequently shifting to unrelated topics, trouble organizing thoughts?
  - c) *Comprehension problems:* How well do they comprehend open-ended questions? Repeated questioning?
  - d) *Lack of mental flexibility:* Do they have difficulty understanding or adjusting to changes? Can they understand and acknowledge different viewpoints or multiple alternatives?
  - e) *Calculation problems:* Are they experiencing basic difficulties with simple math problems; lack of awareness of current financial assets or debts?
  - f) *Disorientation:* Are they disoriented relative to space, time or location. Have they gotten lost while driving (spatial orientation)? Can they identify where they are (orientation to location)? Do they know the current time and the current year (orientation to time)?
3. Emotional signs of diminished capacity:
  - a) *Significant emotional distress:* Does the client appear extremely anxious, tearful, or seem depressed? Does the client respond very slowly to questions or appear to be very tired?
  - b) *Emotional lability/inappropriateness:* Are they moving quickly between emotions during the interview (e.g. from laughing to tears)? Does the client express emotions inconsistent with what is being discussed?
4. Behavioral signs of diminished capacity:
  - a) *Delusions:* Beliefs that are unlikely to be true. These beliefs may be manifest generally in feeling frightened or unsafe or they may be specific, such as feeling that they are being spied on. Check for reality-based feelings, however. Older Adults commonly express fears about people/relatives stealing from them. Unfortunately, that may be based in truth.
  - b) *Hallucinations:* Hallucinations are sensory experiences in the absence of physical stimuli that could be causing those feelings. They are frequently auditory or visual (e.g. hearing voices that no one else can hear), but could involve the other senses. Note, however, that high functioning Older Adults who are recently widowed and still grieving may report hearing a deceased spouse.

c) *Poor Grooming/Hygiene*: If an Older Adult is experiencing serious emotional problems or cognitive difficulties, they may not be taking good care of their body. Look for appearance, clothing and smell for possible clues. They may wear multiple layers of clothing or not brush their hair, shave, or shower regularly.

5. Mitigating factors:

Look for mitigating factors that may be temporary or reversible and not signs of permanent diminished capacity. Some examples include:

- Stress, grief, depression, recent events,
- Reversible medical factors,
- Medications,
- Normal fluctuations in mental ability and fatigue,
- Education levels,
- Socio-economic background,
- Cultural and ethnic differences.

6. Worksheet:

See Appendix B for a worksheet to use to memorialize your capacity assessment. The worksheet has been adapted from the Capacity Worksheet available to attorneys as part of the *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (ABA Handbook, pp. 23-26).

## **B. Step TWO: Professional Assessment**

In many situations, the mediator will determine that the Older Adult has the capacity to participate on their own or with adaptations to adjust for any diminished capacity. In some situations, however, the mediator will be unsure of the Older Adult's capacity to participate, suspect capacity diminishment but be unable to determine the level of capacity or otherwise feel the need for a professional assessment to evaluate the level of capacity. In rare instances, the mediator may decide to seek a clinical opinion as a defensive measure if they suspect the Older Adult's decisions or agreements will be challenged by a third party.

A professional assessment may be sought from a mental health professional with expertise in gerontology such as a medical doctor or psychologist or another related advisor with such expertise, including a geriatric case manager, an estate planner or an attorney.

There are two choices for seeking professional advice, a consultation or a referral.

- A consultation is a conversation between the mediator and a clinician/advisor. The mediator describes what was observed and seeks the opinion of the clinician/advisor regarding the capabilities of the client. There is usually no need to identify the client and the client's consent is not required.
- A referral is a formal evaluation of the client in person by the clinician/advisor. This may result in a written report and requires the consent of the client.

If a clinician's/advisor's advice is sought, find someone with experience in evaluating and with knowledge of Older Adults.

### **C. Step THREE: The Mediator's Assessment**

If the mediator determines a clinician is not required, the mediator can conduct his or her own informal assessment of the Older Adults capacity to participate. If a clinician/advisor is sought for a consultation or a referral, the mediator would assess the level of capacity of the Older Adult to participate in the mediation - taking into account the professional information provided. See Capacity Worksheet for Mediators in Appendix B.

### **D. Step FOUR: Adaptations: Accommodations and Modifications**

Once the mediator has made an assessment of the level of capacity of the Older Adult, he or she should determine how best to proceed. **Adaptations** can either be in the form of **accommodations** or **modifications**.

Most of the time these words are used interchangeably but they have distinct definitions. **Accommodations** create an environment for the Older Adult who only needs superficial assistance to fully participate in mediation as the other parties do. **Modifications** change the scope of participation so the Older Adult can still be a part of the process but not as fully as the other parties. For example, accommodations could include larger print materials and preferential seating. This ensures the Older Adult has access to the same materials and opportunities to participate as everyone else. Modifications fundamentally change the opportunities by adjusting expectations. For example, if an Older Adult is suffering from memory loss that impairs their ability to attend to the facts needed to resolve the issue, they need a modification to participate. That could entail the Older Adult appointing a surrogate to make decisions for them. This accommodation fundamentally changes the Older Adult's level of participation in decision-making. (Austin Independent School District, "Handbook/Standards: Instructional Strategies", Accommodations and Modifications section.)

Part VI contains a variety of suggested adaptations to maximize an Older Adult's participation in the mediation process.

## **VI. Adaptations to Maximize Participation**

Older Adults with diminished capacity may still be able to participate in the mediation process. The mediator is called to create appropriate **adaptations** so the Older Adult can understand, deliberate upon and reach sustainable agreements about matters affecting their own well-being to the maximum extent possible. The discussion includes:

- (A) adaptations to sensory impairments,
- (B) adaptations to cognitive impairments and,

(C) when adaptations alone will not allow the Older Adult to participate, the use of advocates or surrogates. When appropriate, the best first course of action is to ask the Older Adult and/or their supporters (family members, care givers, friends, practitioners) regarding what they perceive as needed adaptations and what they have discovered already works for the Older Adult.

### **A. Adapting to Physical/Sensory Impairments**

As a person ages, their bodies may develop one or more physical/sensory impairments. They may have mobility problems. They may have attention deficits unrelated to cognitive causation. They may require special seating arrangements to avoid chronic pain.

Mediators should adapt to the needs of the Older Adult to minimize or eliminate any barriers created by physical impairments. This may involve:

- choosing a specific time of day for the mediation;
- limiting the length of the mediation session;
- allowing frequent breaks or the availability of snacks; or,
- tailoring the adaptation to the particular impairment.

There is a danger that sensory losses will manifest themselves in ways that can be mistaken for mental confusion. Be ever vigilant that you **Do not mistake sensory loss for mental confusion.**

Rarely will sensory impairments hinder mediation if the appropriate steps are taken to accommodate those changes. Be particularly mindful of Older Adults who pretend they can hear and see without impairments. Often Older Adults have learned how to respond in order to mask their impairment. Be mindful of generalities in the Older Adult's responses and any signs of social or conversational withdrawing. Be specific in asking, in a non-judgmental way, regarding potential impairments of hearing and vision. The following list of possible accommodations has been adapted from the ABA Handbook: Diminished Capacity (pp.27-30).

#### **To address hearing loss:**

- Minimize background noise (e.g., close the doors, forward incoming calls) as individuals with hearing loss have difficulty discriminating between sounds in the environment.
- Look at the Older Adult when speaking. Many individuals with hearing loss read lips to compensate for hearing loss.
- Speak slowly and distinctly. Older Adults may process information more slowly than younger adults.
- Do not over-articulate or shout as this can distort speech and facial gestures can be demeaning.
- Use a lower pitch of voice because the capability to hear high frequency tones is the first and most severe impairment experienced by many Older Adults with compromised hearing.

- Arrange seating to be conducive to conversation. E.g. have the participants sit closer than you customarily would or have them sit face-to-face, at a smaller table.
- Focus more on written communication to compensate for problems in oral communication. Provide written summaries and follow up material.
- Have auditory amplifiers available.

### **To address vision loss:**

- Increase lighting.
- Reduce the impact of glare from windows and lighting as Older Adults have increased sensitivity to glare. Have the Older Adult face away from a bright window.
- Do not use glossy print materials, as they are particularly vulnerable to glare.
- Format documents in large print (e.g., 14- or 16-point font) and double-spaced as presbyopia (blurred vision at normal reading distance) becomes more prevalent with age.
- Give the Older Adult additional time to read documents, as reading speed is often slower.
- Give the Older Adult adequate time to refocus his or her gaze when shifting between reading and viewing objects at a distance, as visual accommodation can be slowed.
- Be mindful of narrowing field of vision. Help the Older Adult find people in their field of vision when focusing between speakers by appropriate pauses or verbal cues.
- Have reading glasses and magnifying glasses available on conference tables.
- Arrange furnishings so pathways are clear for those with visual or physical limitations.

### **B. Adapting to Cognitive Impairments**

For Older Adults with some evidence of cognitive impairment who may be in the murky gray area of “questionable capacity,” the practical steps suggested below may offer significant support. The following list of possible accommodations has been adapted from the ABA Handbook: Diminished Capacity (pp. 28-30).

- Communication is often best with simple questions requiring brief responses to assess participants’ understanding and optimal pace, as reaction time is often slower among Older Adults, particularly for more complex tasks.
- Conduct business at a slower pace to allow the participants to process and digest information, as information-processing speed declines with age.
- Unless they ask for assistance, allow extra time for responses to questions, as word recall can decline with age. Avoid the temptation to fill in words for the Older Adult when they pause in speaking.

- Break information into smaller, manageable segments.
- Discuss one issue at a time, as divided attention between two simultaneous tasks, as well as the ability to shift attention rapidly, shows age-related decline.
- Provide cues to assist recall rather than expecting spontaneous retrieval of information.
- Repeat, paraphrase, summarize, and check periodically for accuracy of communication and comprehension. The importance of repeated testing for comprehension has been documented in research of informed consent procedures showing that comprehension is sometimes incomplete even when individuals state that they understand.
- If information is not understood, incompletely understood, or misunderstood, provide corrected feedback and check again for comprehension.
- Provide summary notes and information sheets to facilitate later recall. Include key points, decisions to be made, and documents to bring to the next meeting.
- Schedule appointments for times of the day when the Older Adult is most likely to be alert. Peak performance periods change with age and for many Older Adults mornings are often best.
- Provide time for rest and bathroom breaks.
- Schedule multiple, shorter appointments rather than one lengthy appointment, as Older Adults may tire more easily than younger adults.
- Conducting the mediation in the Older Adult's residence may provide the comfort and safety to allow maximum participation. This being in a place of comfort often makes the Older Adult more relaxed, optimizes decision-making, and provides the mediator with clues about "real-world" functioning.

### **C. Use of Support Person or Surrogate**

A support person or a surrogate may be an alternative to uphold self-determination and informed consent when

- there is a guardianship or conservatorship (in which case the guardian or conservator **must** be present,
- extreme dementia or other reason for diminished capacity has been diagnosed or is suspected,
- there is evidence of alcoholism or severe depression, or
- other serious health or capacity issues exist.

A **support person** is a relative, friend, advocate or relevant health care provider that accompanies the Older Adult at the mediation. Older Adults place particular value on connection with others, as they continue to watch their peers pass away and a support person may provide an enhanced level of confidence or comfort to allow them to participate more fully. A support person serves to heighten the capacity of the Older Adult and can help maintain a level playing field.

A **surrogate** is a person who actually sits in the place of the Older Adult during the mediation. If there is no capacity of the Older Adult to participate at any level, a surrogate may still allow the parties to reap the benefits of a mediated approach to problem solving. Allowing surrogates to participate will broaden the use of mediation and make the experience, at some level, available to people with significant diminished capacity. In addition to a lack of capacity to mediate at any level of participation, an Older Adult may not directly participate if he or she chooses not to participate. (Mediation is a voluntary process). In those cases, the Older Adult may wish to choose a surrogate to speak on their behalf.

There are some guidelines and best practices to be aware of when using a surrogate.

- Mediators should be aware of scope of surrogate's authority to make decisions for the Older Adult.
- The person represented by a surrogate should also be present and, when possible, participate.
- The mediator should encourage the surrogate to express the party's interests, values and preferences. (ADA Mediation Standards Workgroup, "ADA Mediation Guidelines", § I(D)(4))
- The Center for Social Gerontology (CSG) guardianship mediation model is similar to the ADA Mediation Guidelines for a surrogate. The CSG model includes a flow chart decision-tree to determine when the respondent under a guardianship petition must be a party to the mediation, in what instances a mediation can be held with "representatives" only and in what instances mediation should include both the respondent and the representatives. (Hartman, "Adult Guardianship Mediation Manual", p. 51)
- Determine what standards a surrogate should use when stepping into a party's place in the mediation: Best Interest or Substituted Judgement.
  - **Best Interest Standard:** doing what is perceived to be the Older Adult's best interest.
  - **Substituted Judgment Standard:** relying on the Older Adult's previously expressed values and preferences.

Both the ADA Mediation Guidelines and the Center for Social Gerontology prefer the surrogate use the Substituted Judgment standard.

**Caveats** in the use of **support persons** or **surrogates** include the following:

- Mediators should monitor the Older Adult's overreliance on the support person to ensure the views of the party with diminished capacity are clearly conveyed and on the table.
- Family members are often protective of the party, claiming the Older Adult would not want to participate and/or it will upset him and/or he would not understand anyway. Such protection may be accurate or not; but, no matter how benevolent, mediators should be cognizant that listening to these family members denies decision-making authority to the Older Adult.

- Mediators should be especially diligent in assessing the appropriateness of an advocate or surrogate in cases where one of the adult children takes on this role.

(Much of the surrogate and advocate materials above will be found in Eric F. Wood's article *Dispute Resolution and Dementia: Seeking Solutions*, pp. 814-818)

## **VII. Mediator Impartiality Examined**

"Parties with diminished capacity come to an uneven mediation table, weighted in favor of those who may have more knowledge, a better grasp on the facts, and better ability to sequence thoughts and articulate reasons." (Wood, "Dispute Resolution and Dementia: Seeking Solutions", p. 820) Power may be further imbalanced in Elder Mediations by powerful and/or domineering facility staff and administration, health-care bureaucracies, housing managers, or even dominant family members. Then, of course, there are ageist stereotypes at play that imbalance the playing field to an even greater degree.

In traditional mediation settings, the mediator is neutral and does not intervene or advocate for a party. If mediation is to work for parties with diminished capacity, some leveling of the playing field is critical to the success of the promise and the benefits of mediation. A new approach, or paradigm, is not only appropriate, but is necessary. Medical ethicist Kevin Gibson "suggests that mediators should strive to protect and enhance party autonomy rather than chasing after an ideal of impartiality. ...A more appropriate frame for discussing mediator action [than neutrality] is intervention that preserves or enhances participant autonomy, understood as the individual's power of self-determination..." (p. 6,7)

Supporting autonomy of parties with diminished capacity and countering power imbalances in the mediation process takes three forms according to Wood, (p. 820-822).

1. *Process supports*: accommodations such as a support person or advocate, using communication techniques (e.g. allowing weaker party to speak first), and special settings for the mediation: the party's home, a senior center, an assisted living facility, etc.
2. *Interventions to foster fairness of the outcome*: reality testing of the proposed solution, the mediator offering additional options, etc.
3. *Mediator knowledge and skills*: a mediator's education and training in understanding aging and various forms of dementia, communicating with people with diminished capacity, resources, legal rights, etc.

The challenges presented in creating a balanced playing field for all parties and what Impartiality should look like in Elder Mediation would benefit from additional methodical research and the development of clear standards and/or guidelines from mediators and their professional organizations.

## VIII. Confidentiality

Mediation is a confidential process. Questions of confidentiality are closely related to concerns for capacity in the Older Adult.

The Code of Ethics for Elder Mediators (EMIN) reinforces the confidentiality of the mediation process in Elder Mediation (Section 3.2). However, in the interest of safety and to prevent unintended consequences, EMIN has drafted some exceptions in Section 6.3 for disclosing information to non-participants. For the most part, the exceptions are the customary exceptions for all mediations: in cases of threat to human life/safety; with participants' permission; for situations involving actual or potential abuse; for court-ordered exceptions; for research or educational purposes (non-identifying information only); and when necessary for the Elder Mediator to respond to ethical complaints against them. (Elder Mediation International Network, p. 3, 8-9.)

What is not discussed are the unique circumstances that may arise in mediations involving participant(s) with impaired or fluctuating capacity. These involve situations where the mediator knows of the diminished capacity, but the other parties do not. What should the mediator do if the diminished capacity causes difficulties in the mediation? What if the mediator finds, during the course of the mediation, that the Older Adult does not understand the issues at hand and cannot make an agreement or will be unable to carry out the agreement? Or what if the mediator feels one party is exploiting or otherwise taking advantage of the Older Adult because of the diminished capacity?

When is revealing the Older Adults diminished capacity to the other participants appropriate? Are there circumstances where an adaptation must be made to balance the playing field and the reason for that adaptation must be revealed to the other participants in order to maintain the appearance and the reality of impartiality? When do you violate the Older Adult's confidentiality?

The ADA Mediation Guidelines recommend that mediators "maintain confidentiality with respect to disability-related information in arranging and when conducting the mediation." (ADA Mediation Standards Work Group, Section IV-D.1.) Even when the Older Adult has disclosed the diminished capacity or the reason for such diminished capacity, there may still be undisclosed information the Older Adult does not wish to reveal, e.g. the diagnosis or the severity of the problem(s). The Guidelines specifically discuss two potential situations and how to handle them.

- If the mediator believes that disclosure of information about the Older Adults diminished capacity would enhance the mediation process or be beneficial to the parties, the mediator can "invite disclosure by the person with a disability during private caucus, but may not disclose the information without the person's permission." (Section IV-D.1.) AND
- In the event the mediator believes one or more of the parties lack an understanding of the terms or implications of the agreement the mediator must ensure the confidentiality of the parties' communication to the extent allowed by law and should withdraw from the case. (Section IV-D.2.)

Clearly the intent is to maintain the confidentiality of the mediator's knowledge of the diminished capacity unless the mediator obtains the permission of Older Adult to reveal the assessment, or any portion of assessment. The guidelines further state that when a mediator wishes to encourage one or more of the parties to obtain the services of an expert or a resource person, this encouragement should be done in a private caucus rather than a joint session.

For an interesting discussion of *lawyer* confidentiality obligations and disclosures (in some instances, arguably, to maximize the impaired client's autonomy) see Marilyn Levitt, *The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing with the Incompetent Client*, 1998.

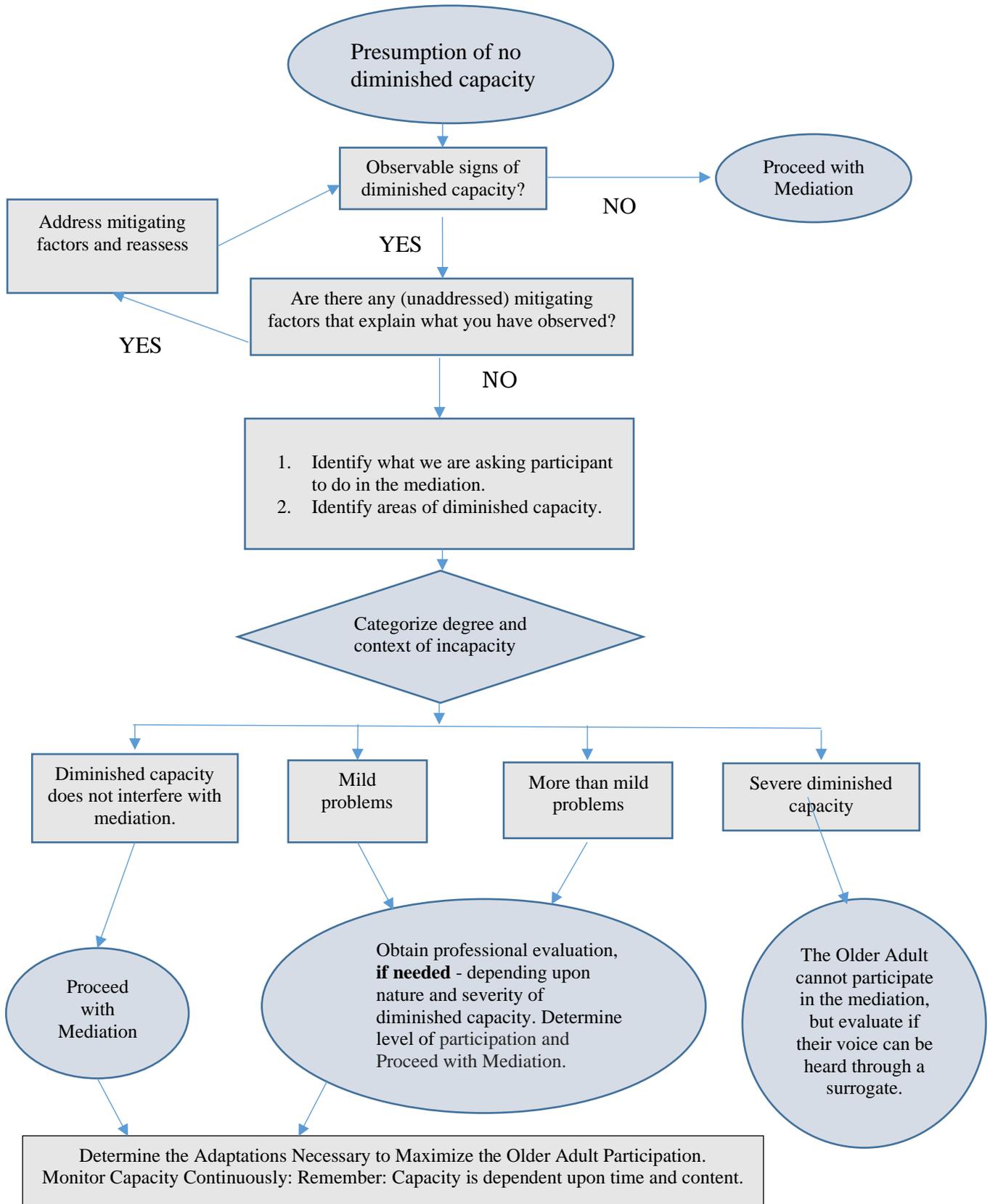
The American Bar Association Model Rules of Professional Conduct also discuss the confidentiality of a client's diminished capacity, indicating that a lawyer/mediator may reveal information about the client in order to protect the client, "but only to the extent reasonably necessary to protect the client's interest." (Rule 1.14: Client with Diminished Capacity, Section (c). The "Comment" to that rule elaborates on the potential adverse effects and provides additional guidance regarding protecting the client's confidentiality, concluding with the statement "The lawyer's position in such cases is an unavoidably difficult one." (Comment (8): Disclosure of the Client's Condition.) Clearly, *the mediator's position in such cases is an unavoidably difficult one* also.

The mediation community would be well advised to develop clear standards/guidelines of mediator conduct for balancing the need to reveal the nature and extent of diminished capacity in an Older Adult with the need to maintain confidentiality and avoid unfair advantage to other participants.

## **IX. APPENDICES**

- A. Capacity Assessment Flowchart for Mediators
- B. Capacity Worksheet for Mediators
- C. Standards of Conduct
- D. Resources

## A. Capacity Assessment Flowchart for Mediators



## **Flowchart Description**

**PRESUME CAPACITY:** In assessing capacity of the Older Adult for participation in mediation, the goal is having the Older Adult(s) contribute to the mediation process to the maximum extent possible. A mediator should start from a presumption of full capacity and assess if the Older Adult's capacity is diminished rather than presuming no capacity and make them prove each increment of capacity.

**OBSERVABLE SIGNS:** Are there observable signs of diminished capacity? In your preliminary conversations with the Older Adult, observe the person's orientation to time and place. (See Part V-A of this Handbook and the "Observational Signs" section of the Capacity Worksheet for a full description of things to look for.)

**MITIGATING FACTORS:** There can be mitigating factors that may diminish a person's perceived capacity. These are factors that are temporary or reversible. (See Part V-A-5 of this Handbook and the "Factors That Can Be Reversed To Restore and/or Enhance Capacity" section of the Capacity Worksheet.) Temporary mitigating factors are often addressed with the passage of time. (Does the Older Adult 'lose steam' in the evening? Then schedule a mediation for the morning when that factor is not present). Reversible mitigating factors must be addressed to restore capacity that has been diminished by them. (For example, if the Older Adult is taking pain medication for some recent surgery, wait until after the effects of the pain medication have been addressed.)

**OBSERVABLE SIGNS:** At this point, after correcting for mitigating factors, check again for observable signs of diminished capacity. If there are still signs of diminished capacity that concern you, and they are not related to newly observed or still unaddressed mitigating factors, identify how you are asking the Older Adult to participate in the mediation (context) and the degree of incapacity for that task. (See Part V-A of this Handbook.)

**IDENTIFY DEGREE OF INCAPACITY AND CONTEXT OF MEDIATION:** See Part IV and Part V of this Handbook and the "Factors Relevant to the Context of the Decision" section of the Capacity Worksheet.

**CATEGORIZE LEVEL OF INCAPACITY:** Remember to maximize their 'voice' in the mediation process. See Part V-B of this Handbook and the "Preliminary Conclusions About Client Capacity" section of the Capacity Worksheet.

**DETERMINE ADAPTATIONS NECESSARY TO MAXIMIZE THE OLDER ADULT PARTICIPATION:** See Part VI of this Handbook. Maximize their participation with adaptations. If the diminished capacity is too severe, the Older Adult should not participate, but evaluate if their voice can be heard through a surrogate.

## B. Capacity Worksheet for Mediators

This worksheet has been adapted from the ABA Handbook: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association.

# Capacity Worksheet for Mediators

Please read and review the handbook prior to using the worksheet.

**Client Name:** \_\_\_\_\_ **Date of Interview:** \_\_\_\_\_  
**Mediator:** \_\_\_\_\_ **Place of Interview:** \_\_\_\_\_

### OBSERVATIONAL SIGNS

Physical Signs	Examples	Adaptations
<ul style="list-style-type: none"> <li>Impaired Senses,</li> <li>Reduced Stamina,</li> <li>Needs To “Pace” Activities,</li> <li>Mobility Challenged</li> </ul>	<ul style="list-style-type: none"> <li>Vision loss, hearing loss.</li> <li>Tires easily.</li> <li>Needs quiet space to reflect.</li> <li>In a wheelchair, recovering from knee surgery.</li> </ul>	<ul style="list-style-type: none"> <li>Adjust the space and place people so the Older Adult can see and hear everyone adequately.</li> <li>Minimize background noise.</li> <li>Take frequent breaks.</li> <li>Provide assistive devices for mobility, ensure elevators are available if not meeting on the first floor.</li> </ul>
Cognitive Functioning	Examples	Adaptations
Short-term Memory Problems	<ul style="list-style-type: none"> <li>Repeats questions frequently</li> <li>Forgets what is discussed within 15-30 min.</li> <li>Cannot remember events of past few days.</li> </ul>	<ul style="list-style-type: none"> <li>Write down answers or create a visual cue to repeated questions on an index card or white board and refer Older Adult to answers.</li> </ul>
Language/Communication Problems	<ul style="list-style-type: none"> <li>Difficulty finding words frequently.</li> <li>Vague language.</li> <li>Trouble staying on topic.</li> <li>Disorganized.</li> <li>Bizarre statements or reasoning.</li> </ul>	<ul style="list-style-type: none"> <li>Create a clear, visual, concise agenda and refer to it frequently.</li> <li>Reframe/restate statements to check for understanding.</li> <li>Ask specific questions to garner detail.</li> </ul>
Comprehension Problems	<ul style="list-style-type: none"> <li>Difficulty repeating simple concepts.</li> <li>Repeated questioning.</li> </ul>	<ul style="list-style-type: none"> <li>Create a “cheat sheet” for reference that includes answers to frequently repeated questions.</li> </ul>
Lack of Mental Flexibility	<ul style="list-style-type: none"> <li>Difficulty comparing alternatives.</li> <li>Difficulty adjusting to changes.</li> </ul>	<ul style="list-style-type: none"> <li>Create a visual representation of options.</li> <li>Meet for multiple sessions.</li> </ul>

		<ul style="list-style-type: none"> <li>Split tasks/changes into small steps.</li> </ul>
Calculation/Financial Management Problems	<ul style="list-style-type: none"> <li>Addition or subtraction that previously would have been easy for the Older Adult.</li> <li>Bill paying difficulty.</li> </ul>	<ul style="list-style-type: none"> <li>Introduce use of an aid such as a calculator.</li> <li>Invite a book keeper or accountant to join the discussion.</li> <li>Open up discussion for ideas (automatic bill payment, etc.)</li> </ul>
Disorientation	<ul style="list-style-type: none"> <li>Trouble navigating office.</li> <li>Gets lost coming to office.</li> <li>Confused about day/time/year/Season.</li> </ul>	<ul style="list-style-type: none"> <li>Meet Older Adult at the office door.</li> <li>Send a reminder before each session.</li> <li>Coordinate transportation to and from the session.</li> <li>Conduct the sessions in a familiar setting.</li> </ul>
Emotional Functioning	Examples	
Emotional Distress	<ul style="list-style-type: none"> <li>Anxious.</li> <li>Tearful/distressed</li> <li>Excited/pressured/manic.</li> </ul>	<ul style="list-style-type: none"> <li>Create a calm environment (quiet, no visual or auditory distractions, etc.).</li> <li>Allow the Older Adult time to settle in before starting the session.</li> </ul>
Emotional Lability	<ul style="list-style-type: none"> <li>Moves quickly between laughter and tears.</li> <li>Feelings inconsistent with topic.</li> </ul>	<ul style="list-style-type: none"> <li>Take a break.</li> <li>Explore whether this is typical or atypical behavior.</li> <li>If atypical, consult a clinician.</li> </ul>
Behavioral Functioning	Examples	
Delusions	<ul style="list-style-type: none"> <li>Feels others out “to get” him/her, spying or organized against him/her.</li> <li>Fearful, feels unsafe.</li> </ul>	<ul style="list-style-type: none"> <li>Depending on severity, consult a clinician.</li> <li>Ask Older Adult what might help them feel safe.</li> </ul>
Hallucinations	<ul style="list-style-type: none"> <li>Appears to hear or talk to things not there.</li> <li>Appears to see things not there.</li> <li>Misperceives things.</li> </ul>	<ul style="list-style-type: none"> <li>Consult a clinician.</li> </ul>
Poor Grooming/Hygiene	<ul style="list-style-type: none"> <li>Unusually unclean/unkempt in appearance.</li> <li>Inappropriately dressed.</li> </ul>	<ul style="list-style-type: none"> <li>Explore whether their appearance is typical or atypical.</li> <li>If atypical consult a clinician.</li> </ul>

Other Observations/Notes on Potential Undue Influence

Other Observations/Notes of Functional Behavior

**FACTORS THAT CAN BE REVERSED TO RESTORE AND/OR ENHANCE CAPABILITY**

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/Accommodate
Stress, Grief, Depression, Recent Events Affecting Stability of Older Adult	<ul style="list-style-type: none"> <li>• Ask about recent events, losses.</li> <li>• Allow some time.</li> <li>• Refer to a mental health professional.</li> </ul>
Medical Factors	<ul style="list-style-type: none"> <li>• Ask about nutrition, medications, hydration.</li> <li>• Refer to a physician.</li> </ul>
Time of Day Variability	<ul style="list-style-type: none"> <li>• Ask if certain times of the day are best.</li> <li>• Try mid-morning appointment.</li> </ul>
Hearing and Vision Loss	<ul style="list-style-type: none"> <li>• Assess ability to read/repeat simple information.</li> <li>• Adjust seating, lighting.</li> <li>• Use visual and hearing aids.</li> <li>• Refer for hearing and vision evaluation.</li> </ul>
Educational/Cultural/Ethnic Barriers	<ul style="list-style-type: none"> <li>• Be aware of race and ethnicity, education, long-held values and traditions.</li> </ul>

**FACTORS RELEVANT TO THE CONTEXT OF THE DECISION**

The more important the decision, the more concern there is about the capacity.

The more serious the concerns about the following factors...	The higher the function needed in the following abilities...
<p>Is decision-making consistent with Older Adult’s known long-term values or commitments?</p> <p>Is the decision being made objectively fair? Will anyone be hurt by the decision?</p> <p>Is the decision being considered irreversible?</p>	<p>Can Older Adult articulate reasoning leading to this decision?</p> <p>Is Older Adult’s decision consistent over time? Are primary values Older Adult articulates consistent over time?</p> <p>Can Older Adult appreciate consequences of his/her decision?</p>

**PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY**

<input type="checkbox"/> Intact - No or very minimal evidence of diminished capacity	<i>Action:</i> Proceed with mediation
<input type="checkbox"/> Mild problems - Some evidence of diminished capacity	<i>Action:</i> (1) Proceed with mediation, or (2) Consider medical referral if medical oversight lacking, or (3) Consider consultation with mental health professional, or (4) Consider referral for formal clinical assessment to substantiate conclusion, with Older Adult consent
<input type="checkbox"/> More than mild problems - Substantial evidence of diminished capacity	<i>Action:</i> (1) Proceed with mediation with great caution, or (2) Medical referral if medical oversight lacking, or (3) Consultation with mental health professional, or (4) Refer for formal clinical assessment, with Older Adult consent
<input type="checkbox"/> Severe problems - Client lacks capacity to proceed with mediation	<i>Action:</i> (1) Referral to mental health professional to confirm conclusion (2) Do not proceed with mediation; or withdraw, after careful consideration of how to protect Older Adult's interests

**CASE NOTES:** Summarize key observations, application of relevant criteria for capacity, conclusions, and actions to be taken:

## **C. Standards of Conduct**

### **1. ABA Model Standards of Conduct for Mediators**

Adopted in 2005 by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution.

#### **STANDARD I. SELF-DETERMINATION**

**A.** A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

**1.** Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

**2.** A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

**B.** A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

#### **STANDARD VI. QUALITY OF THE PROCESS**

**A.** A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

**10.** If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

### **2. ABA Model Rules: Rule 1.14: Client with Diminished Capacity**

The *ABA Model Rules of Professional Conduct* were adopted by the ABA House of Delegates in 1983. They serve as models for the ethics rules of most jurisdictions. Although the MPR does not speak about mediation, it does speak to a lawyer's responsibility to clients with "diminished capacity"

## Rule 1.14: Client with Diminished Capacity

### Client-Lawyer Relationship

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

### 3. Code of Ethics for Elder Mediators (EMIN)

---Elder Mediation International Network

#### 3 Definitions and Descriptions

##### 3.10 Mild Cognitive Impairment (MCI)

MCI is defined as a level of cognitive and/or memory impairment beyond that expected for normal aging but not sufficiently advanced to be called "dementia" or "Alzheimer's disease". Studies<sup>3</sup> show that 10 to 40 per cent of people with MCI will go on to develop dementia. For this reason MCI is considered a risk factor for the dementia. Researchers believe that abnormal changes in the brain may begin as early as 5-10 years before there are signs of Alzheimer's disease.

#### 5. Guiding Principles

##### 5.1 Person-centered

Supporting and honoring the people and partnerships amongst all concerned participants (individual, family, family support systems, care providers) while ensuring the preservation of self-determination, dignity and quality of life at all times

##### 6.4 Ability to Participate

6.4.1 Elder Mediators must recognize the ethical and human right of each person to make choices for themselves where possible.

6.4.2 Elder Mediators need to recognize each participant's capacity to give consent or agreement to mediation services and maximize opportunities for people to participate by making appropriate modifications to the process. When providing mediation

services to people who have been assessed by an expert as having diminished capacity or as being unable to give voluntary consent, Elder Mediators must find appropriate ways to include their voice in decision-making or indirectly via their representatives or advocates.

6.4.3 Elder Mediators must recognize the need to balance the ethical rights of participants to make choices. When providing mediation services to people who are unable to give voluntary consent, Elder Mediators must include them or their representatives in decision-making as appropriate. Elder Mediators need to recognize participants' capacity to give consent or agreement to mediation services.

6.4.4 The Elder Mediator must explore whether the participants are cognitively capable of engaging in the mediation process or if there is/are a family member(s), advocate, professional advisor or other, who are able and appropriate to represent the person's wishes. If the Elder Mediator believes that any participant is unable to participate meaningfully, and if there is no appointed guardian ad litem or there is no agreement on who could be the spokesperson, they must suspend or terminate the mediation and encourage the participants to seek appropriate professional help. The Elder Mediator ensures, as far as possible, that all voices are represented in the mediation process.

6.4.5 The Elder Mediator must ensure that each participant has an opportunity to understand the implications of available options. Should a participant need additional information or assistance for negotiations to proceed in a fair, orderly and inclusive manner or for an agreement to be reached, the mediator must refer the person to appropriate resources.

6.4.6 if an advocate has been appointed for a participant who is not capable of consent, the Elder Mediator has a responsibility to that person (the person who is not capable of consent). The Elder Mediator and the advocate will establish the level of participation in the mediation process. (Depending on the jurisdiction concerned, the mediator must inquire as to the provisions of a living will, Power of Attorney or similar legal documents that protect the wishes of the vulnerable person.)

## D. Resources

### 1. Training Opportunities and Resources

- (a) <http://www.elderdecisions.com>,
- (b) <https://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/elder-care-mediation.htm>,
- (c) <https://www.pon.harvard.edu>
- (d) <https://www.caringacross.org>

### 2. Online Resources

- (a) <https://www.mediate.com/elder/>,
- (b) <http://www.elderdecisions.com>,

### 3. Bibliography of Citations

9 Hallmarks, NAFCM, 1992, <https://www.nafcm.org/page/9Hallmarks>. Accessed 16 May 2019.

ABA Handbook: Diminished Capacity, ABA Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, 2005

ADA Mediation Standards Work Group, *ADA Mediation Guidelines*, Part I-D., 16 February 2000, Retrieved from <https://www.cadeworks.org/resources/literature-article/ada-mediation-standards>, Accessed 22 January 2019

Aging and life-course (Frequently Asked Questions: Ageism section), World Health Organization, 2019, (<https://www.who.int/ageing/features/faq-ageism/en/> . Accessed 26 March 2019

American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution, *Model Standards of Conduct for Mediators*, 2005

American Bar Association, *Model Rules of Professional Conduct*, Rule 1.14 Client with Diminished Capacity (retrieved from [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_14\\_client\\_with\\_diminished\\_capacity/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/)) and Comment #8: Disclosure of the Client's Condition (retrieved from [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_14\\_client\\_with\\_diminished\\_capacity/comment\\_on\\_rule\\_1\\_14/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/) ), last revised 2016

APA Handbook: Diminished Capacity, ABA Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists*, 2008, pp. 130-131

Austin Independent School District, *Handbook, Instructional Strategies*, (Accommodations and Modifications section: What Are Adaptations, Accommodations And Modifications?), n.d., retrieved from [http://www.austinschools.org/lifeskills/standards\\_handbook/documents/Accommodations%20and%20Modifications.pdf](http://www.austinschools.org/lifeskills/standards_handbook/documents/Accommodations%20and%20Modifications.pdf), Accessed 1 May, 2019

Butler, Robert N., *Ageism: concepts and Theories*, (What is meant by ageism? section), Law Commission of Ontario, 1969, retrieved from <https://www.lco-cdo.org/en/our-current-projects/a-framework-for-the-law-as-it-affects-older-adults/older-adults-funded-papers/ageism-and-the-law-emerging-concepts-and-practices-in-housing-and-health/ii-ageism-concepts-and-theories/>. Accessed 26 March 2019. (Originally published in: Robert N. Butler. *Why survive? Being old in America*. New York: Harper & Row (1975).)

Cleary, Jeanne, *On the Question of a Party's Capacity to Use Mediation*, (HOW DO WE DETERMINE A PARTY'S CAPACITY AT THE MEDIATION TABLE? Section-A), August 2015, Retrieved from <https://www.mediate.com/articles/ClearyJ2.cfm#>, Accessed 12 February 2019

Coy, Patrick & Hedeem, Timothy, *Disabilities and Mediation Readiness in Court- Referred Cases: Developing Screening Criteria and Service Networks*, (Minimalist Approach to Criteria section), September 2000, Retrieved from <https://www.mediate.com/articles/cohed1.cfm>, Accessed 15 January 2019, (Originally appeared in *Mediation Quarterly*, Volume 16, Number 2, Winter 1998/99)

Elder Mediation International Network, *Code of Ethics for Elder Mediators*, Ninth Edition, Elder Mediation International Network – [ethics@eldermediation.ca](mailto:ethics@eldermediation.ca), September 2018

Georgia Law Review, Vol. 35, No. 2, Winter 2001 comprises a series of articles relating to Elder Mediation derived from the 2000 Joint Conference on Legal/Ethical Issues in the Progression of Dementia.

Gibson, Kevin, *Mediation in the Medical Field: Is Neutral Intervention Possible?*, *Hastings Center Rep.*, Sept.–Oct. 1999, p. 6,7)

Hartman, Susan, *Adult Guardianship Mediation Manual*, The Center for Social Gerontology, 1996, p. 51

Levitt, Marilyn, *The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing with the Incompetent Client*, 1 *Journal of Health Care Law & Policy*, 1998, p. 202

Levy BR et al., “*Longevity Increased By Positive Self-Perceptions of Aging*”. Journal of Personality and Social Psychology, 2002, 83(2): 261-270), Retrieved from <https://www.who.int/ageing/features/faq-ageism/en/> (what is the impact of ageism on health? section)

Margaret Mead, “*Never doubt...*” This concept has been expressed by numerous authors. The version quoted is generally attributed to Margaret Mead. One of the first known instances attributing this quote to Margaret Mead is found in the following: Donald Keys, *Earth at Omega: Passage to Planetization*, (Epigraph of Chapter VI: The Politics of Consciousness), Quote Page 79, Published by Branden Press, Boston, Massachusetts. 1982. Source: Quote Investigator, 12 November 2017. <https://quoteinvestigator.com/2017/11/12/change-world/>

Unknown Source, This section (III-A) was inspired by the authors' readings. Regretfully, the source for that inspiration cannot be located and the authors have been unable to identify it in extensive subsequent searches.

Wikipedia Contributors. “Old Age”, Wikipedia, Wikimedia Foundation, 16 May 2019, [https://en.wikipedia.org/wiki/Old\\_age](https://en.wikipedia.org/wiki/Old_age). Accessed 26 March 2019.

Wood, Erica F., “Dispute Resolution and Dementia: Seeking Solutions” , Georgia Law Review, Vol. 35, No. 2, Winter 2001, pp. 785-834

Wood, Erica, “Addressing Capacity: What is the role of the Mediator?”, Addressing Capacity: What is the role of the Mediator? July 2003, retrieved from <https://www.mediate.com/articles/woodE1.cfm>, Accessed April 3, 2019