

AN ETHICAL PROCESS FOR ELDER MEDIATORS: RESPONDING TO QUESTIONS  
THAT ARISE WHEN THERE ARE VULNERABLE OR INCAPABLE PARTICIPANTS

by

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## **Abstract**

Elder mediation is a process for resolving conflicts between older adults and their families. Some scholars have argued that older adults may be disadvantaged in elder mediation. At particular risk are older adults who have diminished cognitive capacity or are victims of elder abuse. Older adults in those situations may bargain away their legal rights in mediation due to having less negotiating ability. In this thesis I examine this issue through a review of scholarly literature, laws and policies. I identify situations where vulnerable or incapable older adults may be harmed in mediation. I argue that elder mediators must choose an appropriate course of action in these situations to ensure that the older adult participant is not harmed. Many of these decisions have ethical considerations.

I then examine existing ethical codes and demonstrate that these do not provide sufficient guidance to elder mediators in these situations. In order to fill this gap, I propose that elder mediators adopt an ethical decision-making process. I argue that elder mediators can effectively use this ten-step process and demonstrate how to use it in practice by applying it to a typical elder mediation scenario.

## **Preface**

This research project included three different phases: 1) reviewing laws and literature relevant to elder mediation, 2) analyzing elder mediation ethical scenarios and applying provisions from existing mediator codes of conduct, and 3) demonstrating how an ethical decision-making process used by psychologists can assist elder mediators by informing the process of making ethical determinations.

During the first phase of my research, I attended conferences on elder mediation in North America and Europe to gather information about current elder mediation practices and challenges. The balance of my work was conducted via literature reviews and case analyses. These informed my overviews of relevant law and scholarly writing on elder mediation, construction of the scenarios and the prospective application of a process for ethical decision-making.

Readers of the thesis will find an up-to-date survey of key issues in elder mediation along with practical and analytical tools for making ethical decisions in Canadian practice contexts.

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## **Section I: Introduction**

It is common for aging adults to develop health issues that compel them to seek help and care from family members. Unfortunately, this often results in family conflict over issues such as division of caregiving responsibilities or management of the older adult's money. If these conflicts are not resolved in a timely manner these disputes end up in court. Recently, older adults, family members and caregivers are turning to elder mediation as a preferred alternative for resolving these issues. Elder mediation is a growing practice area, and can be used to address care issues once they arise, or to create a family plan to prevent conflicts from occurring. One reason for its burgeoning popularity is its potential to maintain family relationships while also enabling families to avoid court. However, even though this new practice area has potential benefits, there also are reasons to be cautious. Some experts have expressed concerns about mediating disputes with older adult participants who are incapable or vulnerable. These experts have warned that some older adults are disadvantaged in elder mediation and may bargain away their legal rights. Further research is needed to confirm whether or not these concerns have any merit. However, in the interim, elder mediators must adopt sound ethical practices that safeguard elders throughout the mediation process.

The specific questions answered in this thesis are:

1. What professional responsibilities does an elder mediator have towards a vulnerable or incapable older adult participating in mediation?
2. What ethical issues commonly arise in elder mediation?
3. How should elder mediators proceed when they face these ethical issues?

I have deliberately chosen to examine elder mediation in North America rather than focusing solely on Canada. Elder mediation is in a very early stage of development in Canada, with few practitioners and quite limited scholarly writing. In contrast, elder mediation is a robust and flourishing field in the United States, with established experts and a broader range of scholarly sources. For this reason I draw extensively from American sources in the thesis. However, my primary intended audience is Canadian. On many points, the American literature is applicable to the Canadian context, and where there are differences I highlight these. Given that the relevant legal framework is very different in Canada than it is in the United States, implications for elder mediation practice arising from the differences are outlined.

This thesis is divided into four sections:

I. Introduction;

II. Literature review including overviews of elder mediation practice, elder abuse dynamics, decision-making capacities of older adults<sup>1</sup>, power dynamics in elder mediation, policy options related to abuse and capacity legislation and relevant Canadian laws;

III. Overview of ethical provisions for elder mediation identifying the gaps in available resource material and presenting a scenario incorporating elder abuse, capacity and power dynamics. This section also includes discussion of how a ten-

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<sup>1</sup> In the literature, the term capacity is often used interchangeably with capability. In this thesis I also use both words interchangeably.

<sup>2</sup> For example, in 2012 *Continuing Legal Education* hosted an elder law mediation conference in Vancouver, which was attended in person by more than 40 lawyers. That same year the *Continuing Legal Education*'s dispute resolution conference included one session on elder mediation.

<sup>3</sup> See Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse* 2



step ethical decision-making process used by Canadian psychologists could be applied in elder mediation contexts;

IV. Recommendations and summary of findings.

## **Section II: Literature Review and Relevant Laws**

This section, comprised of five chapters, contains a review of literature relevant to the thesis and a summary of laws on capacity and elder abuse. The first chapter contains a review of literature about elder mediation. The second chapter provides definitions of elder abuse, vulnerability and capacity as well as contextual information about related policy considerations. In the third and fourth chapters I provide additional information about elder abuse and capacity and explain relevant Canadian laws. I also give examples of some of the ethical issues that arise in elder mediation related to these topics. I conclude this section with a fifth chapter that contains a literature review on the topic of power dynamics in elder mediation, including a discussion about relevant ethical considerations.

## **Chapter 1: The Mediation and Elder Mediation Fields**

Although elder mediation is a new practice area, and still small in Canada, it is an area in which many lawyers and non-lawyers alike have shown interest.<sup>2</sup> Most elder mediation is carried out by lawyers who offer elder mediation as a compliment to other service offerings, particularly within a wills and estates or elder law practice, and few non-lawyer mediators practice in this area.<sup>3</sup> In the United States, by contrast, elder mediation is growing quickly and both lawyers and non-lawyers work as elder mediators. In many U.S. jurisdictions, elder mediation is annexed to the court, or is at least offered as a referral source. This provides a stream of work for elder mediators in the United States that does not exist in Canada.

In this chapter, I provide an overview of the mediation field generally, including elder mediation. This includes a discussion of the history and purpose of elder mediation, and common characteristics of practice. I conclude the chapter with examples of ongoing debates about ethical questions in the elder mediation field.

### **A. Mediation – History and Background**

Mediation has been used to resolve disputes in diverse professional fields and in a broad range of settings. Although mediation is now a common area of legal practice, there are many mediators who are not lawyers. This diversity has resulted in a multi-disciplinary field with a wide range of philosophies, styles and models. Despite its range

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<sup>2</sup> For example, in 2012 *Continuing Legal Education* hosted an elder law mediation conference in Vancouver, which was attended in person by more than 40 lawyers. That same year the *Continuing Legal Education*'s dispute resolution conference included one session on elder mediation.

<sup>3</sup> See Judy McCann-Beranger, *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse* (Ottawa: Department of Justice, 2010) [McCann-Beranger].<sup>4</sup> G Savoury, H Beals & J Parks, "Mediation in Child Protection: Facilitating the Resolution of Disputes" (1995) 74 *Child Welfare* 743.

of uses and diversity, most would agree that mediation is a structured process in which a neutral third party assists the disputants in finding a mutually acceptable resolution to a dispute.<sup>4</sup>

Within this broader definition, many different types of process are referred to as *mediation*.<sup>5</sup> Ironically, according to Gerwurz, “despite...[mediation’s] tremendous growth...and despite the prolific scholarship in the field over the last two decades, there remains little consensus with regard to what this process is actually all about. This is perhaps even truer today than it was twenty years ago”.<sup>6</sup>

Not only does the mediation process vary from one setting to another, but there are also differences in mediator style. The three styles most commonly cited in the mediation literature are as follows: 1) directive-evaluative, 2) interest-based/facilitative, and 3) transformative. A directive/evaluative mediator evaluates the strengths and weaknesses of a case and may even offer a recommendation based on how strong the legal positions are perceived to be. An interest-based/facilitative mediator acts as a mediation facilitator, helping the parties to identify their underlying interests and to work creatively towards a solution. The interest-based mediator does not try to direct the mediation. In both interest-based/facilitative and evaluative/directive styles, the mediation goal is to reach a settlement. In transformative mediation, the mediator assists with the mediation process and helps the parties identify ways to enhance empowerment and recognition. However,

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<sup>4</sup> G Savoury, H Beals & J Parks, “Mediation in Child Protection: Facilitating the Resolution of Disputes” (1995) 74 *Child Welfare* 743.

<sup>5</sup> Laurence Boulle & Kathleen Kelly, *Mediation: Principles, Process and Practice* (Vancouver: Butterworths, 1998) [Boulle & Kelly].

<sup>6</sup> Ilan Gerwurz, “(Re) Designing Mediation to Address the Nuances of Power Imbalance” (2001) 19 *Conflict Resolution Quarterly* 135 at 136 [Gerwurz].

the goal of the mediation is to transform the relationship; settlement of the specific dispute may or may not result from the mediation.

It is common for mediation cases to proceed through several different stages. However, there are no regulated standards, and different stages may be used by different mediators or in different contexts. According to Boulle and Kelly:

The number of stages and other features of the mediation process depend not only on the model of mediation being used but also on: the background, training, and style of the mediator; the nature of the dispute and dispositions of the disputants; the background of the disputants and/or their advisors; the participants at the mediation inclusive of specific needs, the availability of funds and other resources; and external factors such as the existence of statute regulating the mediation.<sup>7</sup>

Some mediators meet participants individually in advance of a mediation session with all the parties present. This is most commonly done when the issues in dispute relate to family. Pre-mediation meetings may be less common in some other types of mediation. Regardless of which approach is used, mediation usually continues with a joint session with all parties present. During the joint session, each party has the opportunity to describe his or her goals for mediation and the nature of the dispute. This is an opportunity to exchange information, explore interests and generate options with the assistance of the mediator.

A common mediation technique is to hold individual meetings – known as a caucus – especially if the process reaches an impasse. Mediators might also hold a caucus prior to moving into an exploration of settlement options. The balance of time between joint sessions and caucuses is a matter of mediator style, with some mediators holding

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<sup>7</sup> Boulle & Kelly, *supra* note 4 at 99.

caucuses infrequently and other mediators spending the majority of time in separate meetings.<sup>8</sup>

## **B. What is Elder Mediation?**

Elder mediation is one form of mediation that is used to resolve disputes between older adults and family members or caregivers. Issues vary, but are often about care issues for aging parents. In this section, I provide an overview of the elder mediation field and issues that are characteristic of this area of practice.

### **i. Overview**

Elder mediation can be defined either as mediation in which one of the participants is an older adult or mediation where the issues in dispute are of particular significance to older adults. In both cases, elder mediation has certain unique challenges and qualities, mainly due to the participants' specialized needs. For example, it is common for older adult mediation participants to have disabilities or health issues related to aging. As well, because the issues in dispute usually impact the entire family, it is common for these mediations to include the extended family, thus constituting multi-party mediation.

The following definition of elder mediation is posted on the *Elder Mediation Canada (EMC)* website:

Elder Mediation is a cooperative process in which a professionally trained elder mediator helps facilitate discussions that assist people in addressing the myriad of changes and stresses that often occur throughout the family life cycle. Elder mediation typically involves larger numbers of participants including older people, family members, friends and others who are willing to give support. Depending on

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<sup>8</sup> A caucus is a meeting with individual mediation parties. At the end of caucus the mediator can reconfigure participants back into a joint session or can continue to meet separately with the parties.

the situation it is not uncommon to include paid caregivers, hospital staff, nursing home and or community care representatives, physicians and other professionals.<sup>9</sup>

Examples of issues that can be addressed in elder mediation include:

- Health and personal care arrangements.
- The appointment of an attorney pursuant to a power of attorney, or a representative (for healthcare and personal decisions).
- Admission to long-term care.
- Standards of care in a care facility.
- Problems with other residents in a care facility.
- Division of caregiving responsibilities among family members.
- Inheritance expectations.
- Home share arrangements.
- Guardianship.
- Conflict with care providers.

Elder mediation is used in many different situations. In Canada elder mediation is provided primarily by lawyers, and almost exclusively within elder law practice. The disputants are most often family members. In this thesis I focus primarily on elder mediation within the family context, as this is the area that is the most relevant to Canadian's at present. Elder mediation can be used to resolve a broader range of disputes, but these opportunities remain untapped at present.

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<sup>9</sup> Judy McCann-Beranger, "What is Elder Mediation" an excerpt from A Caregiver's Guide to Alzheimer and Related Diseases (Elder Mediation Canada), online:<<http://www.eldermediation.ca>>.

In contrast, in the United States elder mediation is used to resolve disputes in many contexts. Following are a few examples: 1) Families hire mediators to resolve elder care disputes. 2) Probate courts refer families to elder mediation as an alternative to litigation. 3) Care facilities hire mediators to resolve conflict between residents. 4) Hospitals hire mediators to resolve conflict between the hospital and elderly patients and their families.

There are many possible reasons why the elder mediation field remains small in Canada in contrast to the United States. However, I provide two examples:

1) There are significant differences in health care coverage. Canada has extensive government funded health supports in contrast to the United States. American families are more often required to pay for elder care services, and allocation of costs among family members can become very contentious. Families are willing to hire an elder mediator to resolve this in a timely way.<sup>10</sup> 2) Canada has a Public Guardian and Trustees system, whereas American jurisdictions do not. Some cases that are resolved through the office of the Public Guardian and Trustee in Canada, end up as contested guardianship cases in the United States. This results in a higher volume of contested guardianship cases in the United States and courts refer to mediation to manage the demand placed on them.

Whereas elder mediation refers to any dispute involving an older adult, elder guardianship mediation is a subset of elder mediation and refers to disputes where the decision-making capacity of an older adult is at issue. Given the increased prevalence of dementia with age, capacity concerns commonly arise in elder mediation cases, even where the dispute itself is not specifically about guardianship.

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<sup>10</sup>DeLila Bergan, "Introduction to Elder Mediation" (a lecture delivered at the *Association on Conflict Resolution's* Annual Conference in Reno, 9 October, 2015) [unpublished] [Bergan].



Guardianship is a court procedure that is designed to protect the welfare of incapable adults. When a court determines that the adult is legally incapable of making financial, personal or health decisions the court will appoint a guardian to make decisions for the incapable adult. An alternative to this court process is guardianship mediation. Even though capability cannot be mediated, the parties can reach settlement by agreeing on other issues, such as family responsibilities related to the provision of care. Guardianship mediation may be court connected or mandated under statute, or it can occur in the private sector.

Guardianship mediation is a diverse field, with various service delivery options. For example, disputants may contract with a mediator in private practice to provide mediation. In other jurisdictions elder mediation may be court connected. However, even in that instance specific process and procedures may vary. In some jurisdictions a statute exists that mandates mediation for all disputed court applications for guardianship. In some jurisdictions, governments or courts have established an elder mediation program that functions as an option for families but is not required under statute.

## **ii. Rationale for Elder Mediation**

The population in North America is aging, and governments and service providers must be prepared to meet the emerging needs of this population. For example, in the 1920s, approximately 5% of all Canadian adults were over age 65. Today, 13.1% of all adults are over 65, and by 2036, it is projected that 24.5% of all adults will be over 65.<sup>11</sup>

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<sup>11</sup> M Turcotte & G Schellenberg, *A Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2007).

Given Canada's current population of 34,000,000, approximately 4,454,000 adults in Canada are over age 65.

Issues related to aging will place increased demand on all systems, including the healthcare and legal systems. It is important to establish programs and processes to address this population's growing demand on resources. Elder mediation should be seen within this context, as a process for resolving healthcare and legal disputes involving the older population in a timely manner. It also may offer cost savings in comparison to going to court, although more research is needed to determine if this is true and in what circumstances.

Older adults often develop health problems, as they advance into the older old stage of life, a term coined by scholars to identify older adults well beyond retirement age. When this occurs, there is an increased possibility that the older adult will require care and support from family members. Unfortunately, older adults and their families often do not plan for this situation in advance. When care issues arise, conflict often ensues because family members do not agree about who will provide care or how costs will be managed.

Older adults can plan ahead and appoint a substitute decision-maker (SDM) prior to losing cognitive ability through an advanced planning document such as a *Power of Attorney* (for finances) or a *Representation Agreement* (for health).<sup>12</sup> If an adult does not appoint a SDM prior to becoming incapable, the only remaining option for many families

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<sup>12</sup> It is common for jurisdictions to have different documents for health and for finances. The SDM documents have different names in different provinces. These are the British Columbia examples. See *Power of Attorney Act*, RSBC 1996, c 370; *Representation Agreement Act*, RSBC 1996, c 405.

is to seek a guardianship order in court. If family members do not agree about who should be appointed guardian, this can quickly become adversarial and litigious.

Some research suggests that older adults prefer to resolve disputes with their family members through mediation, rather than in an adversarial manner such as going to court. This is often the case even where the conflict is serious and elder abuse is occurring; older adults may not report crimes against them, instead favouring alternative approaches more likely to preserve relationships with extended family.<sup>13</sup> In a recent Canadian study, researchers interviewed elders who were the subject of police abuse reports as well as the police themselves, concluding that many older adults are reluctant to lay charges against their children and refuse to cooperate with police.<sup>14</sup>

### **C. Characteristics of Elder Mediation**

Experts have noted unique features of elder mediation including the “complexity of issues involved and the involvement of multiple parties who are often family members”.<sup>15</sup>

Elder mediation frequently involves: 1) multiple parties with complex and often conflictual histories, 2) complicated interpersonal dynamics between vulnerable older adults and other participants, 3) participants with potentially diminished cognitive capacity and 4) participants who may be experiencing elder abuse. Mediation, in these cases, must be adapted to accommodate disabilities and complexities. Below, I provide a

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<sup>13</sup> See Yvonne Craig, “Elder Mediation: Can it Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Carers?” (1994) 6 *Journal of Abuse and Neglect* 83 [Craig]. Also see Arlene Groh, *Restorative Justice: A Healing Approach to Elder Abuse and Mistreatment* (2003-2005) *McMaster Journal of Theology and Ministry*, online: <mcmaster.ca/mjtm5-1b.htm> [Groh].

<sup>14</sup> Lisa Ha & Ruth Code, *An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Unit of the Ottawa Police Services* (Ottawa: Department of Justice Canada, 2013) [Ha & Code].

<sup>15</sup> Canadian Centre on Elder Law, *Elder Guardianship Mediation Report* (Vancouver: BC Law Institute, 2012) at 23 [Elder Guardianship Mediation Report].

short overview of these issues and relevant law and literature; I expand on issues of capacity and abuse in the next two chapters.

### **i. Multiple Parties**

There are some elder mediation cases where the dispute is not multi-party. For example, a conflict between a care home and the older adult's SDM may only require two parties to be present. However, when the conflict is about elder care responsibilities and decisions within the family the resulting mediation often has multiple parties. In those situations extended family members and support persons often attend mediation with the older adult and immediate family.<sup>16</sup> This affects mediation dynamics because the interpersonal relationships often may be very complicated.

In 2007, the *First National Symposium on Ethics in Elder Mediation* (the *Symposium*) was held at Temple University. Panelist Nancy Solnick noted that “loss, stress and change in circumstances as we age may be the true axis around which elder mediation turns”.<sup>17</sup> According to Solnick, by the time a family enters mediation numerous issues often have accumulated and the entire extended family may be involved in the dispute. Thus, elder mediation is likely to be multi-party, multi-generational and multi-issue.

In 2012, Canadian researchers examined elder guardianship mediation in Canada. Their report explains that the multi-party aspect means that, “the mediator is presented

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<sup>16</sup>See Training Standards Committee of the Elder Decision-Making and Conflict Resolution Section, *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary* (Association for Conflict Resolution, 2012), online: <acrsection.weebly.com> [*Training Objectives*] (committee members included several well-known elder mediators from the United States. Resa Eisen from Ontario provided a Canadian perspective. Resa is a practicing elder mediator and offers elder mediation training).

<sup>17</sup> John Bertschler & Patricia Bertschler, *Elder Mediation: A New Solution to Age Old Problems* (Seven Hills Ohio: NSC Publishing, 2009) at 472 [J Bertschler & P Bertschler].

with the challenge of determining who should participate in the mediation. A mediated agreement may be undermined or become ineffectual if a necessary party is not included".<sup>18</sup> The multi-party aspect of elder mediation produces complex dynamics when family members often have long-standing conflicts.<sup>19</sup> Such issues may be exacerbated by the crisis that brought them into mediation and entrenched family dynamics may escalate into even more difficult conflicts. The *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary [Training Objectives]* identify this as an area where elder mediators must be trained to be effective:

Training should prepare mediators to handle multiple parties, and a complex mix of legal/medical/psycho-social/spiritual issues. Elder mediation is often multi-issue, multi-party and multi-generational. Trainees should be made aware of how family issues, which may have been unresolved for many years, may impact the mediation. Death or illness of a spouse or caregiver, declining health, new relationships, change of roles within the family, loss of resources, or other serious life changes may compound existing family dynamics.<sup>20</sup>

## ii. Complex Power Dynamics in Elder Mediation

Elder mediation experts agree that the power dynamics between the parties in elder mediation are complicated. However, elder mediation scholars have not provided details about this. Instead, existing explanations of these dynamics can be found in the writings of practitioners, and are anecdotal rather than research based.<sup>21</sup> Some examples include:

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<sup>18</sup> *Supra* note 16 at 47.

<sup>19</sup> In mediation the term *party* refers to the individuals or entities that the dispute is between. In elder mediation persons other than the parties often attend, such as support persons or care workers.

<sup>20</sup> *Supra* note 17 at s. 1.1.

<sup>21</sup> See, for example, Arlene Kardasis et al, *Mom Always Liked You Best: A Guide for Resolving Family Feuds, Inheritance Battles & Eldercare Crises* (Norwood, MA: Agreement Resources, 2001). Kardasis is a well elder mediator and trainer in the United States and is considered a pioneer in the field. She also was a founding co-chair of the Elder Decision-Making and Conflict Resolution Section of the *Association for Conflict Resolution*.

- Long –standing family alliances, where family members take the same position regardless of the issue.
- Historical resentments, where one sibling believes the elderly parent favoured another siblings. Patterns of behaviour resulting from this resentment can appear in mediation.
- Hidden family hierarchies, with one family member held in high esteem, while another has family disapproval. Family member may be predisposed to accept one person’s opinion but not the other.
- Family members participating in mediation may have personal problems, such as drug use or chronic unemployment with the family having developed patterns of relating to hide or manage these issues.

There is no existing empirical research about managing these dynamics in the elder mediation context and there has been very little scholarly writing on the topic in general.

However, there are commonalities between child protection mediation and elder mediation. Similarities between the two types of mediation identified in the *Elder Guardianship Mediation Report* include that, in each of them:

- multiple parties are present and may include extended family members;
- participants with mental health problems and diminished capacity are common attendees;
- support workers and agency representatives may be present.<sup>22</sup>

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<sup>22</sup> *Supra* note 15.

The literature on child protection mediation is more robust and can be consulted to examine ways to manage power complexities that may also apply to elder mediation.

In an earlier study, I interviewed and surveyed mediators qualified to conduct child protection mediation in British Columbia. My interviewees stated that the dynamics become more complicated as more parties are involved. Mediators interviewed in this study described a multi-party process that regularly included extended family members and support persons. Mediators interviewed in this study also noted that mediation participants regularly include persons with experience of abuse or with diminished capacity. This also is similar to elder mediation, where issues of capacity and abuse may exist.

According to interviewees, child protection mediations often have many participants resulting in complicated power dynamics and a process one interviewee described as akin to “herding cats”.<sup>23</sup> According to interviewees, it becomes more complicated to manage power with more participants. Nonetheless, mediators mentioned several strategies for managing these dynamics including effective use of pre-mediation meetings.

Managing power dynamics in multi-party mediation is quite different from two-party mediation. Gregory Firestone, an expert in the family and child protection mediation, suggests that child protection mediators have options for managing power that

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<sup>23</sup> Joan Braun, *Child Protection Mediation: Mediator Strategies for Managing the Process* (MSW Thesis, University of BC Faculty of Social Work 2007) at 44 [unpublished].

do not exist in divorce mediation, in part because of the multiple parties.<sup>24</sup> For example, they may be able to caucus in smaller groups or ask participants with power related to education or eloquence to speak on behalf of someone less able.

Most literature on child protection mediation assumes that parents are disadvantaged parties while social workers have more power. Thoennes, an early scholar in the child protection mediation field, notes that “when the terms ‘empowerment’ or ‘balance of power’ are used in child protection mediation, the intent appears to be ensuring that parents’ concerns and interests are fully heard and considered, and that all parties are treated with respect and dignity.”<sup>25</sup> However, more recently Alan Barsky argued that, although it is sometimes true that parents to have less power in mediation, this is not always the case. According to Barsky:

[In child protection mediation] the mediator has a duty to ensure the process is fair. Balanced negotiations and private ordering cannot be assumed. . . . Child protection agencies and workers tend to benefit from power advantages in negotiating with family members: better resources, familiarity with the system, judicial support and communication skills training to name a few. Family members are not without power and. . . [child protection workers] do not always exploit their power. However, power imbalances are inevitable in. . . [child protection] mediation and need to be taken into account by mediators.<sup>26</sup>

Similarly, many elder mediation experts have stressed the disadvantage that older adults may face in mediation, although this is not always the case. When an older adult

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<sup>24</sup> Gregory Firestone, “AFCC’s Child Protection Mediation Guidelines” (a lecture delivered at the *Association on Conflict Resolution’s* Annual Conference in New Orleans, 13 September 2012) [unpublished].

<sup>25</sup> Nancy Thoennes, “Mediation and the Dependency Court: The Controversy and Three Courts’ Experiences” (1991) 29 *Family and Conciliation Court’s Review* 246 at 252.

<sup>26</sup> Alan Barsky, *Essential Aspects of Mediation in Child Protection Cases* (PhD Thesis, University of Toronto Faculty of Social Work, 1995) at 131 [unpublished].



participant is vulnerable or has less power, the mediator must determine how to address the power imbalance.

### **iii. Diminished Capacity in Elder Mediation**

A common characteristic of elder mediation is the presence of older adult participants with diminished cognitive capacity. Even when cognitive deficits are minor, these may have a profoundly negative impact on the older adult's abilities and relationships. In some cases, impairment may be so significant that the older adult no longer has legal decision-making capacity. It may be difficult for the elder mediator to assess whether the older adult has sufficient decision-making capacity to engage in a mediation process. Capacity to mediate must be determined according to recognized legal tests.

Research on capacity commissioned by the *Law Commission of Ontario* found that all tests for capacity incorporate two basic requirements:

- the ability to understand relevant information; and
- the ability to appreciate reasonably foreseeable consequences.<sup>27</sup>

This two-pronged test is incorporated into provincial legislation in many jurisdictions. Although the test for capacity may be further defined by case law, or modified by statute in certain contexts, its basic elements remain the same. While this test seems straightforward, it is not always easy to apply in day-to-day mediation situations. Mediators often have to perform their own assessment of the older adult's capacity

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<sup>27</sup> Michael Beck & Lana Kerzner, *A New Paradigm for Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010), online:<<http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>> [Beck & Kerzner].

without the benefit of training on how to do this and with limited medical or other information.

The leading expert in North America about legal capacity and elder mediation is Erica Wood. Wood writes that similar complexities arise for lawyers determining clients' capacities to give legal instructions and assessing if clients have capacity to mediate.<sup>28</sup> Lawyers are ethically bound not to take instruction from clients who lack the capacity to give it. Nor can lawyers represent clients who lack the capacity to enter into a given transaction. These principles are summarized in an American Bar Association Handbook (the "*ABA Handbook*").<sup>29</sup> The *ABA Handbook* provides the following explanation:

The law generally presumes that adults possess the capacity to undertake any legal task unless they have been adjudicated as incapacitated in the context of guardianship or conservatorship, or the party challenging their capacity puts forward sufficient evidence of incapacity to meet a requisite burden of proof. The definition of 'diminished capacity' in everyday legal practice depends largely on the type of transaction or decision under consideration. Depending on the specific transaction or decision at issue, as well as the jurisdiction in which one is located, legal capacity has multiple definitions, set out in either state statutory and/or case law.<sup>30</sup>

The following are some examples of transaction-specific issues where a lawyer must assess client capacity: testamentary functions, contracts, powers of attorney, making health decisions, conveying real estate mediating. Of course, the elder mediator's first job is to determine if the older adult has sufficient capacity to participate in mediation.

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<sup>28</sup> Erica Wood, "Symposium Article: Dispute Resolution and Dementia: Seeking Solutions" (2001) 35 Georgia Law Review 785 [Wood, "Symposium Article"].

<sup>29</sup> For a Canadian legal perspective, see Barbara Buchanan, *Practice Watch: Acting for a Client With Dementia* (Vancouver: Law Society of BC, 2015), online, <[https://www.lawsociety.bc.ca/docs/bulletin/BB\\_2015-01-Spring.pdf#watch](https://www.lawsociety.bc.ca/docs/bulletin/BB_2015-01-Spring.pdf#watch)>.

<sup>30</sup> American Bar Association's Commission on Law and Aging & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (Washington: American Bar Association and American Psychological Association, 2005) at 6.

Although Wood stresses the importance of assessing capacity to mediate, she also acknowledges that capacity assessment involves grey areas.<sup>31</sup> Still, Wood and others provide little practical advice about how to proceed. One practitioner-focused resource that is particularly useful is a manual from the *Centre on Social Gerontology* (the “TCSG”)<sup>32</sup>, which lists specific questions that an elder mediator might use when considering capacity to mediate. The *Adult Guardianship Mediation Training Manual* (the “TCSG Training Manual”) gives the following examples of questions to assess capacity:<sup>33</sup>

- Can the respondent understand what is being discussed?
- Does he or she understand who the parties are?
- Can the respondent understand the role of the mediator?
- Can the respondent listen to and comprehend the story of the other party?
- Can he or she generate options for a solution?
- Can he or she assess options?
- Is the respondent expressing a consistent opinion or position?
- Can he or she make and keep an agreement?<sup>34</sup>

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<sup>31</sup> Wood, “Symposium Article”, *supra* note 28.

<sup>32</sup> The *Centre for Social Gerontology* is located in Ann Arbor Michigan. It is a non-profit organization with a mandate to promote the individual autonomy of older persons and advance older adult well-being. Penelope Hommel, is the executive director. More information can be found at <http://www.tcsg.org/>.

<sup>33</sup> Susan D. Hartman, *Adult Guardianship Mediation Training Manual* (Ann Arbor, Michigan: The Center for Social Gerontology, 2002), Module 3 at 54 [Hartman].

<sup>34</sup> These are useful questions. However, it often will be impossible to answer many of these early in a mediation session. As a result, these questions have limitations.

#### **iv. Elder Abuse in Mediation**

Elder abuse is a pervasive problem in modern society, and the possibility of abuse is a component of elder mediation. Mediators working with older adults and their families regularly encounter situations where abuse is occurring. Elder abuse refers to situations where an older adult is experiencing serious harm through the actions of another person. Abuse may be physical, sexual, financial or emotional, and may also include neglect.

##### ***a) Prevalence of Abuse***

Experts agree that elder abuse is a serious societal problem, but statistics on its prevalence are difficult to obtain, as they vary from study to study.<sup>35</sup> Three significant American studies reported estimates of elder abuse and neglect ranging from 1.2-5.6% of all older adults.<sup>36</sup> In one well-known Canadian study, 2008 randomly selected seniors were interviewed. Researchers concluded that that 4% of the seniors surveyed had experienced one or more types of abuse.<sup>37</sup> Other Canadian research has shown that the prevalence of elder abuse in Canada is anywhere from 4% to 10%.<sup>38</sup>

There is no universally accepted definition of elder abuse in Canada, or of the age at which a person qualifies as an elder, although diverse definitions exist. There also are variations between the definitions used in provincial laws and in government documents. One well-known definition provided by the *World Health Organization (WHO)* refers to

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<sup>35</sup>For example, definitions of abuse vary, as do the period of time captured and the ages of participants.

<sup>36</sup>Cynthia Thomas, "The First National Study of Elder Abuse and Neglect: Contrast with Results from Other Studies" (2000) 12 *Journal of Elder Abuse and Neglect* 1.

<sup>37</sup>Elizabeth Podeneiks et al, *A National Survey on Abuse of the Elderly in Canada* (Toronto: Ryerson Polytechnical Institute, 1990).

<sup>38</sup>Government of Canada, *Report of the National Seniors Council on Elder Abuse* (Ottawa, ON: Minister of Human Resources and Social Development, Minister of Health, and the Secretary of State for Seniors, 2007).

abuse as “a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person”.<sup>39</sup>

The *WHO* definition includes the criteria that the abuse occurs “in a relationship of trust”, though this requirement is typically not included in provincial statutes or government documents. The definition excludes abuse by strangers, but this does not imply that abuse by strangers is insignificant. In some cases, stranger aggressions may qualify as crimes.<sup>40</sup>

The *WHO* definition, although widely used, captures all actions or lack thereof that cause distress to an older adult, a very subjective test. Some older adults may experience incidents that are isolated or fairly minor, while others may be severe enough to meet the criteria of a crime. Cases where there are more serious incidents or where there is ongoing abuse are, of course, more likely to result in ethical questions for the elder mediator. These issues are discussed in the next chapter.

### ***b) Choosing the Appropriate Response Where Abuse is Present***

Experts agree mediators should take appropriate steps in the case of abuse, including terminating mediation where necessary. However, the literature yields no consensus about what steps are appropriate, including how to identify risk or how soon mediator intervention is indicated. For example, the *TCSG Training Manual* states that:

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<sup>39</sup> World Health Organization, *Aging and Life Course* (Geneva: World Health Organization, 2012), online:<[http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/)> (WHO).

<sup>40</sup> Peggy Edwards views this as a matter of categorization. Although abuse by a stranger is not termed as elder abuse according to this definition, it falls under the rubric of a crime, such as theft, physical assault, rape, and burglary. See, Peggy Edwards, *Elder Abuse in Canada: A Gender Based Analysis* (Ottawa: Public Health Agency of Canada, 2011).

Mediation is usually not appropriate in a case in which there are allegations of serious physical, emotional, or financial abuse of the respondent by another party. Because of the likelihood of coerced agreement, arising from fear or threat from the abuser, the true voluntariness and fairness of agreements reached in these situations are doubtful.<sup>41</sup>

However, the *TCSG Training Manual* gives no guidance about how to distinguish a serious allegation from a less serious one, nor does it provide criteria to assess whether an allegation is credible or not. I contend that this assessment will be particularly difficult in situations where financial abuse is occurring. The dynamics of financial abuse are subtle and undue influence may be a factor. This is discussed in more detail in Chapter 3.

The authors stress the importance of mediators remaining aware of a range of subtle dynamics when there is abuse, beyond the safety of the victim. They state:

[The issue of ability] to mediate...may also be raised when there are allegations or other evidence of elder abuse....[This may] create feelings of fear, threat, or duress and may affect a person's ability to use the mediation process.... Mediators must be able to screen for [abuse] ...[and know how] to respond appropriately.... Mediators need training in the use of mediation strategies to creatively enhance each person's capacity to engage fully.<sup>42</sup>

### ***c) Promising Approaches When There is Abuse***

Some experts suggest that elder mediation can be used as an effective elder abuse intervention tool. Several models developed by mediation pioneers have been specifically designed for situations where family conflict and elder abuse co-exist.

For example, Yvonne Craig developed an innovative elder mediation program in the UK in the 1990s based a review of elder mediation pilot programs in England. Craig concluded that elder mediation “can be a most useful intervention at early stages of

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<sup>41</sup> Hartman, *supra* note 33 at Module 3-59.

<sup>42</sup> *Supra* note 17.

relational conflict between elders and their carers and can be a deterrent in the etiology of elder abuse”.<sup>43</sup>

Craig’s *Elder Mediation Project* was founded on the belief that older people do well when they have the opportunity to develop skills and manage their own conflicts. She maintains that mediation in elder abuse situations is beneficial especially when used in conjunction with counselling and other interventions. Mediation promotes empowerment because it uses a respected, arm’s length third party to balance power relationships. Craig stresses that her research shows that older adults have a preference for non-adversarial processes such as mediation.<sup>44</sup>

In the past decade, several Canadian elder mediation programs have been developed. Two were designed to resolve conflicts where there also is elder abuse. Both programs developed policies and procedures – including screening procedures – aimed at protecting victims.

The *Elder Mistreatment Mediation Project (EMMP)* is operated by the University of Windsor Mediation Services in partnership with two other Windsor based organizations. Gemma Smyth, explains the program:

Several elements supported the potential of older adults to participate meaningfully including: providing multiple chances during intake to tell their story, but the option to tell it only once; the option of using a social work advocate during some or all of the mediation process; extensive preparation of the older adults for mediation; use of a screening tool/intake guide, multiple points of follow up and a voluntary model of mediation.<sup>45</sup>

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<sup>43</sup> *Supra* note 14.

<sup>44</sup> *Ibid.*

<sup>45</sup> Gemma Smyth, “Mediation in Cases of Elder Abuse and Mistreatment: The Case of the University of Windsor Mediation Services” (2011) 30 Windsor Review of Legal and Social Issues 121 at 140.

Smyth notes that older adults who are reluctant to disclose abuse may be able to do so if they are connected with supports and if they are in a safe environment. To that end, the *EMMP* program purposefully entitles older adults to bring an advocate to mediation from one of the partnering agencies. The advocate's role is to assist the older adult and to ensure that his or her voice is heard and interests are protected.

Another Canadian alternate dispute resolution program specifically designed to serve older adult abuse victims was a pilot project in the Waterloo-Kitchener area of Ontario in 2000. Funded by the Trillium Foundation of Ontario, the *Restorative Approaches to Elder Abuse Project (Restorative Justice Project)* began as a collaborative effort of seven regional agencies. The founders of the program created this program as an alternative because older adult abuse victims are often not comfortable pursuing criminal charges against perpetrators.<sup>46</sup> The project's goal was "to provide an opportunity for change and for healing for those affected by elder abuse".<sup>47</sup> Although the *Restorative Justice Project* shares philosophies with the broader restorative justice movement, its focus on elder abuse is unique.<sup>48</sup>

There is overlap in how the *EMMP* and the *Restorative Justice Program* approach elder abuse situations. Both programs conduct screening at the outset to determine what services should be provided and both incorporate support persons for the older adult.

Even though elder mediation is still in an early stage of development, innovative programs such as these show great promise. As mentioned earlier, some research shows that older adults prefer to retain relationships with family members even in situations

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<sup>46</sup> Groh, *supra* note 14.

<sup>47</sup> *Ibid* at 14.

<sup>48</sup> *Ibid*.



where those family members are mistreating them.<sup>49</sup> Programs such as these are thus very important in providing ways to address issues outside an adversarial forum.

## **v. Accommodating Disabilities**

Another feature of elder mediation is the necessity of adapting the process to accommodate disability and health issues, either cognitive or physical. Specific adaptations will depend on the nature of the disability. Of course, not all older adults participating in mediation have disabilities, though it is more common for adults to have health and disability issues as they age. For example, while dementia is not a normal part of aging, its prevalence does increase with age. Although dementia rarely appears in persons under 60, it affects 6 of 100 people over age 65 and 20 in 100 of people over 80.<sup>50</sup>

While elder mediators must accommodate both physical and cognitive disabilities, cognitive issues present the greatest challenges for elder mediators. In these cases, the mediator must assess whether the older adult has capacity to mediate as well as what type of accommodation is necessary for the older adult to participate meaningfully.

### **a) Dementia**

Dementia is the most common cause of diminished capacity in older adults. This illness involves progressive cognitive function loss over time. Persons with dementia may be confused, may not be able to remember things, or may lose the ability to perform normal daily activities. Dementia is not only progressive, but may be severe. Even though

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<sup>49</sup> See Ha & Code, *supra* note 15. Also see Craig, *supra* note 14; Groh, *supra* note 14.

<sup>50</sup> Harry Cayton, *Alzheimer's and Other Dementias: The 'At Your Fingertips' Guide': The Fully Updated and Comprehensive Reference Book For Alzheimer's and Other Forms of Dementia* (London: Class Publishing, 2002) [Cayton].

loss of cognition may be minor at first, eventually a person with dementia will not recognize family members or friends and may display agitated behaviour.<sup>51</sup>

Dementia is not a single illness. Rather, it is a syndrome associated with the decline of cognitive functions. Dementia actually includes over 100 brain disorders that cause a loss of brain function. The most common are Alzheimer's disease, vascular dementia and Lewy Body dementia.<sup>52</sup> Different types of dementia affect different areas of the brain. For example, where the dementia is caused by Pick's disease there will be frontotemporal lobar degeneration resulting in a loss of executive function. A person with Pick's disease will lose the ability to organize, plan and problem solve.<sup>53</sup>

Given that dementia progresses over time, there may be periods of time where the afflicted person has capacity and other times when he or she does not. For example, it is common for an adult with dementia to be able to make decisions at certain times of the day and not at others. As well, a person with dementia may be able to make some decisions but not others because some decisions require more complex intellectual reasoning.

Some circumstances may cause an older adult to lose capacity temporarily, before regaining it again. Elder mediators must be aware that older adults may exhibit cognitive difficulties that will disappear with medical treatment. Some examples of factors that can cause a temporary loss of capacity include:

- the effect of medications and/or forgetting to take them;

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<sup>51</sup> NHS Choices, "Guide to Dementia" (Health A-Z website), online: <<http://www.nhs.uk/Conditions/dementia-guide/Pages/about-dementia.aspx>>.

<sup>52</sup> Cayton, *supra* note 50.

<sup>53</sup> Bergan, *supra* note 10.

- diabetes and fluctuating blood sugar levels;
- exhaustion and time of day; and
- alcohol or drug use (especially when combined with illness and/or medication).

### ***b) Choosing the Specific Accommodation***

In situations where the older adult participant has a disability, whether physical or cognitive, the mediator should consider whether the older adult requires supports to participate meaningfully. Rhudy and Rhodis note the following:

The primary focus of elder mediation training and practice is the potential need to make appropriate accommodations within the mediation process for possible physical, mental, cognitive or social limitations that may accompany aging so as to promote maximum effective participation of the parties to make informed self-determination.<sup>54</sup>

A mediator should first assess whether the older adult has sufficient capacity to mediate on his or her own. If there is doubt, the mediator should consider whether the older adult has the capacity to mediate with support or accommodation.<sup>55</sup> Little guidance and no existing standards help mediators determine what supports may be necessary. Most mediators do not have medical training, so must make the determination drawing on their life experience and what guidance is available.

Mediation experts suggest practical assessment methods are preferable to medical or empirical ones. Cohen recommends that mediators speak to the older person with

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<sup>54</sup> Robert Rhudy & Carolyn Rhodis, eds, *Elder Mediation Today: Manual and Resource Guide* (Baltimore: Senior Mediation and Decision Making, 2009) at 1 [Rhudy & Rhodis].

<sup>55</sup> See, Erica Wood, “Addressing Capacity: What is the Role of the Mediator?” in Rhudy & Rhodis, *supra* note 54 at 86 [Wood, “Assessing Capacity”].

disabilities to determine what may be necessary.<sup>56</sup> Of course, this approach has obvious limitations. An older adult may not be aware of what supportive options exist or the scope of his or her ability. An elder mediator may lack sufficient training in health related issues to know what questions to ask to make this assessment.

Also problematic is that some psychiatric and cognitive disabilities are very difficult to detect. As Cohen observes, there may be “hidden disabilities that may interfere with the person’s ability to communicate. A person with an auditory processing disorder...may have difficulty following what people are saying and/or putting his own thoughts into logical sequence.” Cohen suggests that mediators meet with older adults alone to determine how to “facilitate more effective communication”.<sup>57</sup>

Some specific examples of accommodations for disabilities described by Cohen include:

- changing the length or timing of sessions (for example, to minimize fatigue);
- adapting written material so that it is easily readable;
- making hearing aids available for those with hearing impairments; and
- including an older adult’s support person in mediation.<sup>58</sup>

Cohen does not specify how to accommodate specific common behaviours caused by dementia in the mediation setting, and I have been unable to find other literature on this specific issue.

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<sup>56</sup> Judith Cohen, “Making Elder Mediation Accessible to People with Disabilities” in Rhudy & Rhodis, *supra* note 54 at 29.

<sup>57</sup> *Ibid* at 32.

<sup>58</sup> Although I am not aware of any other author who has written on this point DeLila Bergan, an elder mediator and a medical ethicist, teaches a nine-session course at the University of Texas Southwestern Medical School in Dallas, which includes a module about clients with dementia in mediation.

### ***c) Situations When the Older Adult Should Not Attend***

There may be some instances when it is not appropriate for an older adult with a profound cognitive impairment to attend a mediation session. For example, an older adult with a severe cognitive deficit with a designated SDM may be better off not attending, especially if she finds the upsetting. It may be preferable for the older adult to communicate his or her wishes to an SDM in advance. At the same time, it is important for the older adult to have a voice in elder mediation whenever possible.

Different perspectives about how to accomplish this characterize the literature. For example, although most elder mediators interviewed by the *CCEL* agreed that it is important for the older adult's voice to be heard in mediation, not all agreed that the older adult always must be present. Some opined that when the older adult has a significant cognitive impairment, the mediator should ensure that the older adult's voice is heard in other ways.<sup>59</sup> As stated above, a mediator can invite support workers familiar with the older adult's wishes to share information about the older adult.

The *Training Objectives* suggest that, while self-determination is paramount, a range of options should be considered including “the older person's physical presence....or the inclusion of the older person's expressed wishes and long-standing values [through others' voices]”.<sup>60</sup>

However, although it is important to include incapable older adults in the process to the degree possible, when it comes time to make the decision in mediation, in situations where the older adult is not capable the legally authorized SDM will make the decision

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<sup>59</sup> Elder Guardianship Mediation Report, *supra* note 16 at 48.

<sup>60</sup> *Supra* note 17 at 1.

for the older adult, in accordance with the scope of his or her authority. For example, if the SDM is appointed to make financial decisions then he or she cannot make health decisions.<sup>61</sup>

#### **D. Ethical Standards in Elder Mediation**

Even though elder mediators regularly face complicated ethical dilemmas, limited ethical guidelines exist, and no coordinated steps are currently being taken to develop ethical standards. Leaders in the field, including representatives from the *Commission on Aging* and the *TCSG* along with other attendees at the *2007 Symposium* engaged in vigorous debates about how to respond to emergent ethical issues.<sup>62</sup>

The first organization to examine ethical issues in elder mediation was *TCSG*, which published the *TCSG Training Manual* in 2002.<sup>63</sup> Following this, the *American Bar Association's Commission on Aging* and its assistant director Erica Wood drew attention to the ethical dilemmas common to elder mediation through research and writing on the topic. The *Symposium* in 2007 was an important event for elder mediation practitioners and experts. However, since the *Symposium* there has been little further discussion of ethical standards among leaders in the elder mediation field, other than in the *Training Objectives*.<sup>64</sup> These objectives are intended as standards for training, and each of the 15

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<sup>61</sup> In each jurisdiction there are statutes that give authority to the advanced planning documents used for health and personal and financial decision-making. The SDM can only make decisions within the scope of the authority set out in these statutes, within any limitations drafted into the documents themselves.

<sup>62</sup> Kathryn Mariani, "Developing Ethical Standards for Elder Mediation: Questions Along the Way" 28 (2007) *Bifocal* 85 [Mariani]. Unfortunately, a full transcript of the *Symposium* has not been published and articles such as Mariani's do not explain the ethical issues discussed in detail.

<sup>63</sup> Hartman, *supra* note 33.

<sup>64</sup> *Supra* note 17.

objectives is accompanied by commentary including relevant ethical issues.<sup>65</sup> Decision-making capacity and elder abuse are two of the complex issues identified in the *Training Objectives* as requiring in-depth training for elder mediators. I discuss these two issues in the next two chapters.

## **E. Conclusion**

In this chapter I presented expert opinion on key issues relevant to elder mediation. I began with an overview of the elder mediation field, identifying key characteristics of this area of practice. I also provided an introduction to the foundational topic of ethics in elder mediation.

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<sup>65</sup> The committee included several of the early pioneers in the elder mediation field, such as Caroline Rhodis and Susan Hartman, who drafted the *TCSG Training Manual* published in 2002 (Hartman, *supra* note 33).

## Chapter 2: Capacity and Elder Abuse – Policy Considerations

Ethical issues may arise in elder mediation for myriad reasons. Elder mediators must particularly understand laws and policies in their jurisdiction relevant to elder abuse, capacity and power dynamics. It is not easy to balance the competing values of autonomy and safety in elder mediation practice.<sup>66</sup>

### A. Introduction

As discussed previously, elder mediators must make hard calls when an older adult participant is experiencing abuse or has diminished cognitive capability. A consideration of ethical implications is central to making these decisions. Decisions must be made on a case-by-case basis according to each situation. Therefore there is no one protocol that applies in all circumstances.<sup>67</sup>

In this chapter, I both broadly and narrowly analyze relevant laws. The breadth provides a detailed analysis of laws relating to elder mediation across jurisdictions.<sup>68</sup> I do focus in by limiting my examination to legal aspects most relevant to elder mediation. I also discuss relevant policy considerations and, where appropriate, demonstrate how policy considerations may inform ethical decision-making in mediation.

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<sup>66</sup> In a typical elder law practice in Canada, lawyers are retained to assist with wills, estates, guardianship matters, civil disputes related to quality of care and similar other matters. Any of these issues may arise in elder mediation. However, issues of elder abuse and capacity are the two that most commonly result in ethical dilemmas for the elder mediator, and thus are the focus of the next three chapters.

<sup>67</sup> The interpersonal dynamics will vary from case to case. For example, there is a different dynamic in families where spousal abuse has existed for years than a situation where an adult child is stealing an elderly parent's money to pay for a drug addiction. Regardless, elder abuse occurs in families, with abuse by spouses more common than abuse by adult children. See M Lundy & S Grossman, "Elder Abuse: Spouse and Intimate Partner Abuse and Family Violence Among Elders" (2004) 16 *Journal of Abuse and Neglect* 85.

<sup>68</sup> See e.g. Canadian Centre on Elder Law, *A Practical Guide to Elder Abuse and Neglect Law in Canada* (Vancouver: Canadian Centre on Elder Law, 2011) [CCEL, "Guide to Elder Abuse Law"].



## **B. Defining Capacity and Vulnerability to Abuse**

Vulnerability and capacity are complicated concepts, resulting in confusion about the definition of these terms.<sup>69</sup> Some practitioners assume that if an older adult is not cognitively capable, then they are at risk of abuse. Yet, this is not true in every case.

While capacity and elder abuse are distinct, they sometimes intersect in policy and in law. Governments and experts agree that vulnerable adults should be protected from abuse and that the state has role to play in protecting them. All jurisdictions have laws to protect vulnerable adults, but there is considerable variation in how vulnerability is defined. In some jurisdictions, laws offer blanket protection for all abused older adults beyond a certain age. In other jurisdictions, laws only apply when an adult is both abused and incapable. Still other jurisdictions define vulnerability according to specific criteria and legislate protection for those that meet these criteria.

Below, I provide a brief description of both concepts and discuss through examples how they may be part of older adult's lives. As well, I explain how these concepts relate to mediation.

### **i. Capacity**

*Capacity* is a legal concept. Many medical professionals use this word to refer to the medical assessment of ability. However, while medical assessments can provide evidence of capacity or incapacity, a medical doctor does not have the authority to declare someone legally incapable; only a court can make that determination. Even so,

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<sup>69</sup> Evidence of this confusion is mainly anecdotal. However, some social worker interviewees in a study by Louise Holland demonstrated a lack of clarity on some points. See Louise Holland, *Abandonment or Autonomy: How Do Social Workers Know the Difference?* (MSW Thesis, University of British Columbia Faculty of Social Work, 2011).

practitioners often rely on medical evidence when they are deciding whether a person requesting services is competent to participate in the requested service.

Tests for capacity, based on statute and case law, vary across jurisdictions. Tests vary within jurisdictions depending on the specific decision being made. Some decisions require a greater level of understanding than others, and an adult may be capable of making some decisions and incapable of making others.<sup>70</sup> Regardless of these differences, the legal test for capacity features certain common elements.

***a) Test for Capacity to Mediate***

As stated earlier, elder mediators regularly face situations where they need to determine if a participant has capacity to mediate. Because no existing case or statute law modifies the basic legal test in relation to mediation, the standard two-pronged test applies. Mediators should consider whether the participant with diminished capacity has: 1) the ability to understand information relevant to the decisions to be made in mediation, and 2) the ability to appreciate reasonably foreseeable consequences of these decisions. While the test appears simple, for mediators its application is far from clear. Clarity is only perfect where there has been a court determination of incapability.

How should a mediator deal with allegations that an older adult participant is not able to make decisions about his or her own affairs? At law adults are presumed to be capable in the absence of a finding to the contrary. Therefore mediators should presume capability unless there is strong empirical counter evidence. Still, there will be situations where an older adult lacks the cognitive ability to make decisions in the absence of a

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<sup>70</sup> For example, a higher standard is necessary for capacity to make a will than capacity to get married.

medical assessment or a legal determination of incapacity. In these instances, mediators must assess elders' capacity themselves.

### ***b) Assessing Capacity to Mediate***

It is important to note that, in assessing an older adult's capacity, a mediator is not making a legal determination. Rather, she is following ethical rules to fulfil professional ethical obligations. Mediators must ensure that older adults with diminished cognition understand the matters being discussed and the terms of any agreements he or she enters into. I discuss capacity to mediate in more detail in chapter 4.

## **ii. Vulnerability**

*Vulnerability* refers to being at risk of abuse. In some jurisdictions, vulnerability is associated with age and all persons above a certain age are considered to be vulnerable and in need of protection under the law. While this approach is common in the United States, it has been strongly criticized by several Canadian legal scholars who argue that vulnerability is not an inherent age-related characteristic but is caused by social circumstances that generate a risk of abuse.<sup>71</sup>

Scholars have identified various risk factors for abuse, though there is far from an accepted standard list. Based on a recent literature review, Lachs and Pillemer conclude that there are only five risk factors for abuse that have been widely substantiated. They are:

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<sup>71</sup> Law Commission of Ontario, *The Law as it Affects Older Adult: A Draft Framework for an Anti-Ageist Approach to the Law* (Toronto: Law Commission of Ontario, 2011) [Law Commission of Ontario]. BC Abuse and Neglect Prevention Collaborative, *The Provincial Strategy Document* (Vancouver: BC Abuse and Neglect Prevention Collaborative, 2009) online: <<http://www.bcli.org/ccel/publications/provincial-strategy-document-vulnerable-adults-and-capability-issues-bc>> [Provincial Strategy Document].

- 1) Shared living: people living alone are at lowest risk. Financial abuse is the exception to this pattern; most financial abuse victims do live alone.
- 2) Social isolation: particularly in cases of domestic violence. Victims are more likely to be isolated from friends and relatives than non-victims.
- 3) Perpetrators with access to the elder: who exhibit pathological characteristics, including mental illness, depression and alcohol misuse.
- 4) Dependent perpetrators: who rely on the older adult they are mistreating. These perpetrators may be resistant to leaving the relationship or losing parental support.
- 5) Dementia: although the connection between dementia and abuse is unclear. This risk factor may be limited to those with dementia who display aggressive behaviours.<sup>72</sup>

Of course, the presence of risk factors is not determinative of abuse in any one case.

Life circumstances may place an elder at risk, while others may be protected by their circumstances.

### **iii. Intersection Between Vulnerability and Incapability**

Some older adults may be both vulnerable and incapable, though this is not necessarily the case. For example, while dementia is a risk factor for abuse, many older adults with dementia are not abused.<sup>73</sup> An older adult can have significant cognitive difficulties while still being in an environment in which he or she is safe from abuse. On

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<sup>72</sup> See Mark Lachs & Karl Pillmer, "Elder Abuse: How Would You Like to be Treated When You Are 75?" (2005) 364 *Lancet* 1263 [Lachs & Pillmer].

<sup>73</sup> *Ibid.*

the other hand, an older adult who is capable but socially isolated may be at high risk for abuse, especially if he or she associates those identified in the risk factors listed above.<sup>74</sup>

Even in situations where a particular adult is vulnerable and incapable, these factors may exist to varying degrees, as vulnerability and capability are each on a continuum.

The intersection of capability and vulnerability was the subject of a two-year British Columbia-based legal research project.<sup>75</sup> This research supported the view that vulnerability is based on social factors rather than inherent qualities. The authors posit that vulnerability and capability are distinct concepts, with each existing on a continuum.

The following illustrations were provided in the report:

Mary...is 75 years old and lives in a rural community. Mary has multiple sclerosis, but has no cognitive impairments. She has a history of being domestically abused, having been regularly assaulted by her long-time husband. Mary has low self-esteem and no friends or close family to support her. When her husband died, Mary's son moved back in with her. He begins to physically and emotionally abuse her and begins "gas-lighting" her (the purposeful intent to make a person think they are 'crazy'), causing Mary to believe she is going insane. Mary's son takes advantage of her mental distress and forces her to sign a power of attorney, giving him control of all her finances. In this instance, although Mary is highly capable, she is nevertheless highly vulnerable due to her circumstances.

Indira...is 80 years old and lives in an excellent residential care home in an urban setting. Indira suffers from late stage Alzheimer's but has no significant physical impairments. Despite her high level of dementia, Indira's family and friends maintain very close ties with her, visiting her often and trying to include her in their lives to her fullest degree. Her caregivers respect Indira's values, wishes, and beliefs, as much as she is able to express them now, or where she is not able to currently express them, by using her pre-existing, pre-expressed values, wishes, and beliefs, in her care and lifestyle choices. Indira's comfortable assets are held in trust and cannot easily be accessed improperly by others. In this instance, while Indira

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<sup>74</sup> *Ibid.* Provincial Strategy Document, *supra* note 70.

<sup>75</sup> The research was commissioned by the *BC Abuse and Neglect Prevention Collaborative*, which retained the *Canadian Centre on Elder Law* and Charmaine Spencer from the *Simon Fraser University Gerontology Research Centre* to do the research.

has low capability because of her significant dementia, she has comparatively low vulnerability as her social conditions support her very well.<sup>76</sup>

Mary is cognitively capable, and therefore has the legal right to remain in a situation where she is being harmed if she wishes to do so. However, although she has the legal right to make this choice, if she stays it may not be because she wants to do so or because she is exercising her legal right. She likely does not have the resources necessary to leave. She is isolated, has health problems and needs physical support and assistance from those mistreating her. These are the very circumstances that make her vulnerable to abuse.

Mediators need not have expert understandings of vulnerability and capability, but they must be able to recognize when either or both of these are present and relevant, applicable laws.

#### **iv. Legislative Options for Protecting Vulnerable Adults**

The definition of vulnerability, as well as appropriate mechanisms for protecting vulnerable people has been the subject of significant debate among legislators and scholars. Williams provides this summary:

Vulnerable adult abuse raises complex and sensitive issues relating to the balance between the rights and freedoms of the individual, and the powers and duties of the state. Should the abused person dictate the pace and level of intervention whatever the severity of the abuse, or does there come a point when the state should impose a duty on local authority social services departments to intervene to protect? Central to this debate is the role of law.<sup>77</sup>

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<sup>76</sup> Provincial Strategy Document, *supra* note 70 at 19.

<sup>77</sup> John Williams, "Public Law Protection of Vulnerable Adults: the Debate Continues and so Does the Abuse" (2002) 2 *Journal of Social Work* 293 at 293.

As noted above, the United States and Canada have taken very different approaches to balancing two policy objectives: preserving individual decision-making autonomy and protecting vulnerable persons. Canadian laws favour respecting the decision-making autonomy of older adults, while many U.S. laws accent protection over autonomy. In Canada, unless older adults fall within fairly narrow criteria in provincial statutes, they have the right to choose whether or not to accept help even when they are in danger of harm. In contrast, most American adults over a certain age are deemed to be vulnerable. Members of the U.S. public are required to report abuse of adults older than this specified age, and state agencies have legislated authority to intervene. The specific intervention and scope of authority varies across states.

Most states have mandated agencies to respond to elder abuse reports, usually called *Adult Protective Services (APS)*.<sup>78</sup> These laws may extend beyond elder abuse, but elder abuse is often included in statutory provisions. According to Mixson, “*APS* programs [have] struggled over how to broaden their focus to the totality of the vulnerable population without diluting the attention [solely] to elder abuse.”<sup>79</sup> Mixson also explains that some states established *APS* to be eligible for federal transfer payments that require programs “preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests”.<sup>80</sup>

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<sup>78</sup> Nina Kohn, “The Lawyer’s Role in Fostering an Elder Rights Movement” (2010) 37 *Wm. Mitchell L. Rev.* 49. According to Kohn, forty-five of the fifty American states had mandatory reporting laws in 2010. Kohn argues that these laws constitute a civil rights violation.

<sup>79</sup> Paula M Mixson, “Public Policy, Elder Abuse and Adult Protective Services: The Struggle for Coherence” (2010) 22 *Journal of Elder Abuse & Neglect* 16 at 18 [Mixson].

<sup>80</sup> *Ibid* at 19.

The public policy rationale for establishing *APS* is to protect vulnerable adults has been criticized. Some U.S. experts have insisted that although vulnerability should be the criteria for protection, vulnerability is not synonymous with age. Unfortunately, it is more difficult to define vulnerability if it is not based on the criteria of age. Mixson provides the following example:

Policy makers from time to time...[have] informally discussed changing eligibility for *APS* in Texas from age 65 to an impairment-based standard for adults, regardless of age...[however this change was not made because], expediency won out. Accepting a report based on a person's age was considerably simpler than having to determine if the person met additional criteria.<sup>81</sup>

Although American policy makers have been reluctant to adopt an impairment-based standard for vulnerability, Canadian policy makers have not shown a similar reluctance. Several Canadian jurisdictions have legislation that authorizes intervention in situations where a vulnerable adult is being abused according to defined criteria without explicitly connecting age with vulnerability. For example, in British Columbia, health authorities have a statutory mandate to intervene when an abuse victim is unable to seek help and assistance on his or her own due to mental defect or other indicators.<sup>82</sup>

In some provinces, professionals have a statutory mandate to report abuse of certain populations, such as adults living in care facilities. In the two provinces where all members of the public are required to report abuse, the requirement is not based on age but on specific impairment-focused criteria. For example, Nova Scotia's *Adult Protection Act* states:

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<sup>81</sup>*Ibid* at 23.

<sup>82</sup>*Adult Guardianship Act*, RSBC, 1996, c 6 [*AGA*].



s. 5(1) Every person who has information...indicating that an adult is in need of protection shall report that information....<sup>83</sup>

s. 3(b) ‘Adult in need of protection’ means an adult who, in the premises where he resides,

(i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his protection therefrom.<sup>83</sup>

Newfoundland’s *Neglected Adults Welfare Act* also requires members of the public to report cases of adult neglect, again in situations where the adult is “incapable of properly caring for himself or herself by reason of physical or mental infirmity”.<sup>84</sup>

These American and Canadian examples provide two contrasting approaches to balancing autonomy with safety. In my opinion, laws that require the public to report abuse of adults over a certain age and mandate APS to investigate reports of abuse, unacceptably interfere with the autonomous decision-making and privacy rights of older adults.

In order to illustrate this point I provide one American example. A domestic violence victim may actively choose to stay in an abusive situation for many years only to be subjected to an elder abuse investigation due to passing a certain age. If the older adult does not want help, then this is likely to be interpreted as an invasion of privacy. In contrast, Canadian laws preserve the autonomy of older adults to a greater degree by limiting adult protective investigations and interventions to situations where adults are vulnerable based on specific impairment-focused criteria rather than age.

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<sup>83</sup>*Adult Protection Act*, RSNS, 1989, c 2-5.

<sup>84</sup>*Neglected Adults Welfare Act*, RSN, 1990, c 3, s 2.

## **v. Implications for Mediators**

A *vulnerable* person is generally defined as a person who is at risk of abuse. In the elder mediation context, the risk of abuse may come from many sources, even from participation in mediation itself. This could include, for example, feeling pressured into giving up legal rights. The elder mediator has an ethical responsibility to ensure that this does not occur, and to ensure that during the mediation process the legal rights and autonomy of capable older adults is preserved.

### ***a) Understanding Legal Obligations***

It is not necessary for elder mediators to have an expert understanding of vulnerability and capability. However, to be effective, elder mediators must be able to recognize situations where mediation participants are vulnerable or incapable, and to understand the difference. This is particularly true in Canadian jurisdictions where there are statutes that extend protection to abuse victims in situations where they are also incapable.<sup>85</sup>

### ***b) Choosing a Course of Action***

It is not easy to accurately identify capacity or abuse issues. Although experts agree that vulnerable participants should be protected from harm in mediation, they do not agree on the definition of harm, what measures should be taken to protect vulnerable participants, or the specific circumstances in which protection should be extended.

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<sup>85</sup>Terminology other than incapability is used in some of these statutes, such as mental infirmity. There also are differences from province to province on how to interpret or apply these terms.

At the *Symposium*, a panel with scholars Robert Baruch Bush and Nancy Neveloff Dubler revealed philosophical differences among attendees, prompting a robust debate.

As described by a mediator in attendance:

[the] dialogue heightened questions...that loomed over the symposium, such as ‘what is the mediator’s responsibility when a *vulnerable person* is involved in the dispute?’ ‘What defines vulnerability?’ ‘Are all parties vulnerable at some level?’ ‘How should a mediator respond when efforts are made to exclude someone whose body and life are directly impacted by the mediation?’ ‘Are outcomes of such a mediation process legal or ethical?’ The symposium scratched the surface of the pressing issues associated with these questions.<sup>86</sup>

In my opinion, a misguided intention to protect vulnerable adults has resulted in American laws and policies that are highly intrusive into the lives of older adults. It is difficult to balance the equally important values of safety and autonomy for vulnerable older adults. However, it is important not to privilege safety over autonomy even in instances of possible abuse, and this is something that the elder mediator should keep in mind when developing his or her practice. The older adult may prefer to live at risk, despite concerns expressed by other mediation participants. For example, an older adult may prefer to continue to reside with an abusive caregiver if the only alternative is loss of autonomy. In Canada, a cognitively capable older adult has the legal right to make this choice.

### **C. Conclusion**

In this section I defined and explained vulnerability and capacity and discussed policy considerations related to vulnerability. As I noted, in every jurisdiction there are

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<sup>86</sup>*supra* note 62 at 87.

laws that extend protection to vulnerable adults. However, the degree to which these laws allow intrusion into the lives of autonomous older adults varies considerably.

Accurate legal understandings must inform process decisions when vulnerable older adults are attending mediation. The tension between preserving decision-making autonomy for the capable older adult as well as attending to the older adult's safety may be difficult to balance. Family members may worry about the safety of an older relative and push for less autonomy, if the older adult with failing health wants to live independently as long as possible, their wishes should be given effect when possible. Elder mediators will be better equipped to discuss these issues with families if they understand the underlying issues.

## Chapter 3: Elder Abuse

In the previous section, I discussed policy objectives affecting laws to protect vulnerable or abused adults and contrasted U.S. and Canadian approaches. In the following section, I offer a more in-depth discussion of elder abuse. First, I describe ethical issues that arise in relation to financial abuse of older adults, which can be difficult to identify. Applicable Canadian laws are outlined, followed by an in-depth discussion of ethical practice in relation to abuse.

### A. Financial Elder Abuse

Financial abuse of the elderly, also commonly referred to as financial exploitation, is common. Financial exploitation is defined below:

FE [financial exploitation] has been defined as the illegal or improper use of a vulnerable older adult's funds or property for another person's profit or advantages....In practice FE may be difficult to detect for a variety of reasons. For example, the onset is often gradual and insidious and lacking oversight, subtle deception may mimic legitimate transactions and escalate over time. Differentiating FE from legitimate transactions is challenging in that there may be indications of consent by the older adult, for example, a signed document or a gift when in fact the perpetrator has used psychological manipulation or misrepresentation ....Differentiating FE from legitimate gift giving is especially difficult when an older adult is not a reliable reporter because of cognitive impairment, coercion or concern about what will happen to the suspected abuser.<sup>87</sup>

A recent study carried out by Ha & Code of 581 elder abuse files from the Ottawa Police Service found that the most common type of abuse was financial (62%) with men being victimized more often than women. In instances of financial abuse, the victim was most often a family member or friend of the person misappropriating the money.<sup>88</sup>

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<sup>87</sup>KJ Conrad et al, "Self- Report Measure of Financial Exploitation of Older Adults" (2005) 50 Gerontologist 758 at 759.

<sup>88</sup> *Supra* note 15.

Although this study is regional and cannot be generalized to all of Canada, it does suggest that financial abuse of older adults by family members or friends is a significant aspect of elder abuse.

Mediators should ask careful questions when the reason for referral to elder mediation is financial. The person making the referral may be expressing a legitimate concern about an older adult's management of money out of a sense of concern. But this is not always the case. When financial or estate planning are involved, the mediator should be alive to possible hidden agendas including possible pressure on an abused older adult to give others access to his or her assets. In some cases, financial exploitation may be disguised as a family conflict.

This is important because financial exploitation has a profound effect on older adults who experience it and may even lead to them being deprived of the resources needed for the necessities of life.<sup>89</sup> Kemp and Mosqueda describe this in the following words:

The effect of elder financial abuse on older people is devastating. In addition to robbing them of their economic resources, it often causes extreme emotional distress or depression, increased dependence on others, a change in residence, decreased resources for medicines and health care, and a diminished quality of life.<sup>90</sup>

Financial abuse indicators may be subtle. When an elder agrees during mediation to allow a family member to assist with money management or hand over assets, mediators should be particularly vigilant about whether this is being done willingly and not because

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<sup>89</sup> *Supra* note 15.

<sup>90</sup> B Kemp & L Mosqueda, "Elder Financial Abuse: An Evaluation Framework and Supporting Evidence (2005) 53 JAGS 1123 at 1123. In the article they also note that 33% of all incidents of elder abuse in the United States are financial, based on the results of a national study. There has been no similar Canadian study.

of manipulation.<sup>91</sup> Ha & Code found that 48% of the victims of financial abuse in their study were unaware that the abuse was occurring.<sup>92</sup>

Elder abuse situations are very diverse, and the line between financial exploitation and family conflict over money can be very thin. The mediator will not always be able to immediately discern the intentions of the parties. In situations where financial exploitation is masked as a family financial dispute, a motivating factor may be greed.<sup>93</sup> As well, when financial exploitation is present, other complicated dynamics may exist. Some experts have argued that there are parallels between power and control dynamics in financial abuse cases and in domestic violence situations. In some instances, financial abusers may groom and target the victim.<sup>94</sup> The elder mediator should do a careful assessment in situations where a relative has recently befriended an adult and is assisting him or her with banking or other financial matters. Another possible financial exploitation situation involves an older adult willingly gifting another person with money. Such transactions may fit within the equitable doctrine of undue influence. According to Hall, undue influence arises through the intersection of personal

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<sup>91</sup> There have been no empirical studies that have examined whether this occurs in the elder mediation context. However, it can safely be assumed this occurs since this dynamic occurs when seniors and their families are receiving professional services in other settings.

<sup>92</sup> *Supra* note 15. In this study, examples of financial abuse were provided. These included fraud, failure to pay bills, acceptance of large gifts and stolen property.

<sup>93</sup> D Rabiner, J O’Keeffe & D Brown, “A Conceptual Framework of Financial Exploitation of Older People” (2004) 16 *Journal of Elder Abuse and Neglect*, 53.

<sup>94</sup> See, M Quinn & C Heisler, “The Legal Response to Elder Abuse and Neglect” (2002) 14 *Journal of Elder Abuse & Neglect*, 61; B Brandl, C Heisler & L Steigel “The Parallels Between Undue Influence, Domestic Violence and Sexual Assault” (2005) 17 *Journal of Elder Abuse & Neglect* 37. But see Joan B Kelly & MP Johnson, “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 *Family Court Review* 476 [Johnson & Kelly] (Kelly & Johnson only found power and control some typologies of domestic violence; Ha & Code, *supra* note 15 found that coercive tactics were present in only 25% of elder abuse cases they reviewed.

characteristics with the relationship and social context. Hall distinguishes undue influence from other influence in the following words:

In everyday life people constantly seek to influence the decision of others...and in the normal course of events the law will not intervene to even the playing field. We are all entitled to make mistakes, even those we later regret. Influence becomes “undue,” for the purposes of equity, when it impairs or vitiates the ability of the one so influenced to give free or genuine consent.<sup>95</sup>

As Hall explains, some older adults are susceptible to undue influence due to personal vulnerabilities:

Undue influence may therefore be exerted both intentionally and unintentionally. Indeed, the good son who acts only in his mother’s best interests, described by the Court as “honest, reliable, very reserved and anything but aggressive and demanding” may nevertheless exert undue influence over his mother through her “confidence and trust” in him, justified though that be.<sup>96</sup>

Other experts have also drawn a connection between vulnerability and susceptibility to undue influence.<sup>97</sup>

In the mediation context, based on the paradigm presented by Hall, some older adult participants may be vulnerable to undue influence. Due to undue influence an older adult may could conceivably hand over assets to another participant, without realizing that they are not making an informed and genuine choice.

## **B. Elder Abuse Laws**

In some cases, mistreatment of an older adult will meet the elements of a crime. In that instance it may be possible for the abuser to be criminally charged. In other

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<sup>95</sup>Margaret Hall, “Equity Theory: Responding to the Financial Exploitation of the Vulnerable but Capable” in Israel Doron, ed, *Theories of Law and Aging: Jurisprudence on Elder Law* (New York: Springer, 2009) at 110.

<sup>96</sup> *Ibid* at 110.

<sup>97</sup> See e.g. Sherif Soliman, “Capacity Considerations for the Eldercaring Coordination Process” (a lecture delivered at the inaugural *Eldercaring Coordination Training*, Columbus Ohio 9 July 2015) [unpublished].



instances, the abuse may fit the definition of abuse within a provincial statute. Some provincial statutes provide protection to elder abuse victims in certain circumstances. Elder mediators should be aware of the laws, and of how elder mediation participants may be able to avail themselves of those laws. For example in a situation where serious abuse has occurred it may be appropriate for the mediator and mediation participants to discuss reporting the matter to the police.

### **i. Criminal Law**

In Canada, elder abuse is not a criminal offence; Canada has no age-specific crimes other than those aimed at protecting minors. In the U.S., many jurisdictions characterize elder abuse as a crime.<sup>98</sup> Elder abuse will only constitute a crime in Canada if it fits the elements of a criminal offence, for example:

- Uttering threats (s. 264.1)
- Physical assault (s. 265)
- Sexual assault (s. 271)
- Theft by Power of Attorney (s. 331)
- Forgery (s. 342)
- Theft (s. 334)
- Fraud (s. 380)<sup>99</sup>

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<sup>98</sup> See Laura Watts & Leah Sandhu, “The 51<sup>st</sup> State – The ‘State of Denial: A Comparative Exploration of Penal Statutory Responses to ‘Criminal’ Elder Abuse in Canada and the United States” (2006) 14 *Elder Law Journal* 207; Canadian Centre on Elder Law, *Moving from Safety to Strategy: An Analysis of Key Canadian Elder Abuse and Neglect Cases* (Vancouver: Canadian Centre on Elder Law, 2011).

<sup>99</sup> *Criminal Code*, RSC 1985, c 46 <[www.laws-lois.justice.gc.ca/eng/](http://www.laws-lois.justice.gc.ca/eng/)>.

When criminal charges such as the above are proved to victimize an older adult, the victim's age may be a factor in sentencing under s. 718.2(a)(i). This is underlined in a CCEL report, "if a person who has been convicted of a crime has intentionally targeted an older adult because she was perceived to be vulnerable or weak, or victimized a community of older adults, then sentencing might be harsher."<sup>100</sup>

In addition to *Criminal Code* offences that apply to elder abuse, there also are offences involving neglect; these are not age-related. S. 219 of the *Criminal Code of Canada* reads:

- (1) Everyone is criminally negligent who,
    - (a) in doing anything, or
    - (b) in omitting to do anything that it is his duty to do shows wanton or reckless disregard for the lives or safety of other persons.
- Definition of 'duty'
- (2) For the purposes of this section, 'duty' means a duty imposed by law.

The above section applies to those who have a legal duty to care for someone, including someone contracted care for an older adult with physical disabilities who needs assistance.<sup>101</sup>

## **ii. Civil Laws**

Relevant civil laws are provincial, so they vary across Canada. Civil laws typically extend protection for adults who meet certain criteria. Some of these statutes apply to a fairly narrowly defined population, such as adults living in a care home.<sup>102</sup>

Other laws apply to all adults in the province, as long as they meet specific criteria. For

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<sup>100</sup> CCEL, "Guide to Elder Abuse Law", *supra* note 66 at 9; also see Ha & Code, *supra* note 15.

<sup>101</sup> In this example, the caretaker assumes a responsibility to provide care when he or she enters into the contract, and could be found negligent if he or she fails to provide that care.

<sup>102</sup> See e.g. *Long-Term Care Homes Act*, SO, 2007, c 8, online: <[www.e-laws.gov.on.ca](http://www.e-laws.gov.on.ca)>.

example, British Columbia legislation protects adults who are abused and unable to seek help and assistance on their own.<sup>103</sup> In many provinces, family violence laws include provisions for protection orders when elder abuse is occurring in a family context. A comparative analysis of civil laws across Canada is beyond the scope of this paper, and has been covered by other scholars.<sup>104</sup>

I have chosen two examples of civil laws for illustrative purposes. The first is an adult protection law. When mediators are looking for legal remedies for mediation participants, they should first determine if there is an adult protection law in their jurisdiction. If not, they should look for other relevant laws that apply to the situation.

***a) A Broadly Based Canadian Adult Protection Law***

British Columbia's adult protection law applies to all adults in the province and establishes a mandated response in situations where adults are being abused and are not able to seek help and assistance on their own. This is set out in Part 3 of the *AGA*. Section 44 explains the purpose of Part 3:

The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of

- (a) Physical restraint;
- (b) A physical handicap that limits their ability to seek help; or
- (c) An illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.<sup>105</sup>

B.C. health authorities have been designated as mandated responders under the s. 44 of the statute and must investigate allegations.<sup>106</sup> If the health authority's investigation determines that the adult is able to seek help and assistance on his or her own, then the

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<sup>103</sup> *AGA*, *supra* note 81.

<sup>104</sup> See e.g. CCEL, "Guide to Elder Abuse Law", *supra* note 66.

<sup>105</sup> *AGA*, *supra* note 81.

<sup>106</sup> *Designated Agencies Regulation*, BC Reg 19/ 2002.

health authority has no further mandate to stay involved. If the older adult may not be able to seek help and assistance due to a cognitive disability, then the health authority can arrange for a capacity assessment. When an adult has legal capacity then he or she can refuse assistance or intervention in situations where abuse is occurring. To make this determination, the two-pronged test applies: Does he or she understand that abuse is occurring and the potential consequences of continuing to live at risk by refusing help?<sup>107</sup>

### ***b) An Example of Protection under a Canadian Family Violence Statute***

In some jurisdictions, statutes provide legal remedies to victims of family violence. The definition of *family* may include the older adult even when the violence is not between spouses. For example, in Alberta, the *Protection Against Family Violence Act* 1(b)(iii)<sup>108</sup> applies to violence between spouses and between other family members, which include those in interdependent relationships, according to the definition set out in statute.<sup>109</sup> In Alberta, elder abuse victims may get a protection order under these provisions. Other provinces have similar provisions.<sup>110</sup>

## **C. Challenging Issues for Mediators**

Elder abuse is challenging, in part, because there are many instances of alleged abuse that neither meet the criteria for a *Criminal Code* offence nor fit definitions of abuse set out in provincial statute. Abuse may occur without breaching any laws; in such

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<sup>107</sup> Deborah O’Conner, Margaret Hall & Martha Donnelly, “Assessing Capacity Within a Context of Abuse or Neglect” (2009) 21 *Journal of Abuse and Neglect* 156 [O’Conner, Hall & Donnelly].

<sup>108</sup> *Protection Against Family Violence Act*, RSA, 2000, c 27, online: <[http://www.qp.alberta.ca/Laws\\_Online.cfm](http://www.qp.alberta.ca/Laws_Online.cfm)>.

<sup>109</sup> *Ibid* at s 1(b)(iii) (for the definition of adult interdependent relationship, see *Adult Interdependent Relationship Act*, RSA 2002, c A 4.5, online:<<http://www.qp.alberta.ca/>>); See also *Family Law Act*, SBC 2011, c 25, s 182-191.

<sup>110</sup> *Ibid* at s 1(b)(iii) (for the definition of adult interdependent relationship, see *Adult Interdependent Relationship Act*, RSA 2002, c A 4.5, online:<<http://www.qp.alberta.ca/>>); See also *Family Law Act*, SBC 2011, c 25, s 182-191.

cases, the mediator's assessment will be based on more subjective criteria.<sup>111</sup> It is not simple to distinguish situations where an older adult victim of abuse may be at risk of harm from situations where harm is unlikely. Mediators are challenged to: 1) identify situations where abuse is occurring, 2) assess the level of risk, and 3) determine how to respond, weighing relevant ethical considerations.

### **i. Identifying Abuse or Potential Abuse**

As mentioned earlier, some experts do not believe that mediation should proceed in cases where elder abuse has occurred. Others stipulate that it should only if specific measures are in place to keep the older adult safe from further harm<sup>112</sup> For example, if a vulnerable older adult stated an opinion during mediation that contradicted the views of the person mistreating the older adult, safety measures may be indicated to prevent “backlash post-mediation”.<sup>113</sup> Elizabeth Kelly also opposes mediation in situations where elder abuse exists. As she notes, “mediation is not appropriate [in cases] are when there is a history of abuse within the family, elder abuse including financial exploitation, substance abuse or a history of intimidation of any kind.”<sup>114</sup>

The *Training Objectives* state that the existence of elder abuse raises ethical issues for mediators, since “mediators need to be trained about how to screen and respond to

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<sup>111</sup> See e.g. WHO, *supra* note 39 (as discussed in chapter one, the definition of abuse provided by WHO is subjective).

<sup>112</sup> See, for example Elizabeth Kelly, “Mediation Disputes Involving Older Adults and People with Disabilities” Susan F Buchanan & D Wayne Stewart, eds, in *Colorado Elder Law Handbook* (Denver: Colorado Bar Association, 2004) [E. Kelly].

<sup>113</sup> Alexander Crampton, “Elder Mediation in Theory and Practice: Study Results From a National Caregiver Mediation Demonstration Project” (2013) 6 *Journal of Gerontological Social Work* 423 at 426 [Crampton].

<sup>114</sup> E Kelly, *supra* note 111 at 7.3.

issues of elder abuse during both the pre-conference stage and the on-going mediation process in a way that is safe for participants”.<sup>115</sup>

Some experts have also argued that power disparities between older adults and their younger family members that do not amount to abuse may still expose the older adult to potential future abuse. Joan Kelly explains that “[a]ge differences in... family mediations between adult siblings and their elderly parent may create the potential for inequitable outcomes.”<sup>116</sup> According to Kelly, these disparities are at least partially attributable to societal stereotypes.

The argument that elder mediation is inappropriate in cases where elder abuse has occurred is similar to an argument made by feminist scholars in the 1990’s regarding the inappropriateness of mediation in cases of domestic violence. In a seminal article on this topic, Tina Grillo outlined these concerns:

- Abuse victims are disempowered and may not be able to advocate for their needs.
- Abuse victims may be unsafe if forced to attend meetings in the same room as an abuser.

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<sup>115</sup> *Supra* note 17 at 5.

<sup>116</sup> Joan B Kelly, “Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention” (1995) 13 *Mediation Quarterly* 85 at 95 [J Kelly].<sup>117</sup> Tina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 *Yale Law Journal* 1545. Also see N Semple, “Mandatory Family Mediation and the Settlement Mission: A Feminist Critique” (2012) 24 *Canadian Journal of Women and the Law* 20.

- Power imbalances will result in mediation agreements that favor the interests of the perpetrator rather than the victim.<sup>117</sup>

Elizabeth Kelly draws attention to situations in mediation where the older adult has less bargaining power than other parties, arguing against mediation in those cases.<sup>118</sup> These cases could involve abuse, but other circumstances can also relate to power imbalances. Similarly, some scholars have argued that women and elders are disadvantaged in mediation because they have less power in society and are socialized against expressing their viewpoints.<sup>119</sup> This raises the question of what a mediator should do in response to non-abuse derived power differentials that may lead to inequitable results. I address this in more depth in chapter 5.

## **ii. Measuring Risk in Abuse Situations**

As stated earlier, it is difficult for elder mediators to accurately identify elder abuse. They cannot assume elder abuse exists whenever it is alleged or suspected, but mediator suspicions of abuse may be accurate. There are no existing empirically tested tools to screen for elder abuse or risk before mediation. Some elder mediator use tools designed to identify domestic violence, but these have not been empirically tested for their effectiveness with elders.

Domestic violence screening tools rely on typologies of abuse developed through social science research. For example, Kelly and Johnson differentiate between *coercive controlling violence*, *violent resistance*, *situational couple violence* and *separation-*

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<sup>117</sup> Tina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 Yale Law Journal 1545. Also see N Semple, “Mandatory Family Mediation and the Settlement Mission: A Feminist Critique” (2012) 24 Canadian Journal of Women and the Law 20.

<sup>118</sup> *Supra* note 111 at 7.3.

<sup>119</sup> See J Kelly, *supra* note 113.

*instigated violence*.<sup>120</sup> Other researchers have developed different categorization systems. In these models, each type of violence is distinct, and some types of violence are identified as generating greater safety concerns in mediation than others. To use Kelly and Johnston's taxonomy as an example, some violence is situational, in contrast to *coercive-controlling violence* that is ongoing. A mediation participant will not be at immediate risk if the violence is situational and the situation no longer exists.

Screening tools such as these are sophisticated and have been empirically tested for domestic violence. However, it is not known if these tools are transferrable to the elder mediation setting. It also is not known if they are transferrable to Canada, since many of them were developed in the United States.

#### **D. Ethical Issues Related Elder Abuse**

As discussed in this chapter, some scholars have argued that elder mediation should not occur where abuse exists. However, it is my position that it is not appropriate to exclude all elder abuse cases from mediation because the variously defined term *elder abuse* can refer to both incidents that are quite serious and may constitute a crime, and cases where the alleged abuse is subtle and it is not clear if it has occurred or what impact it may have on mediation. Consequentially, a mediator must decide the best course of action on a case-by-case basis.

Elder mediation presents an array of complex dynamics whenever suspected or alleged elder abuse is also present. In these situations, the mediator will be required to make difficult choices, many of them with ethical implications. This is true regardless of

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<sup>120</sup> See, Kelly & Johnson, *supra* note 93.



the type of abuse or severity of abuse. The following scenario provides an example of a situation where an older adult is vulnerable to financial exploitation, but the extent of family pressure over finances is not clear, and the motivations and intentions of family members also are not known.

Herbert is 87 years old and owns a house and other assets. However, his health has deteriorated and he is very dependent on his adult children for physical care. They also manage his finances because his physical problems now prohibit him from accessing his accounts. He has two grandchildren that he cares about very much. He has three adult children, and they are all agreed that Herbert should relinquish all his money to them in exchange for providing care. Herbert has no other family or friends. The adult children are threatening to withdraw care if he does not deposit all his money and assets into joint accounts/joint tenancy with them. Whenever he tries to speak, they interrupt to tell him that he is a burden on them, and that he has never been a good father. According to the adult children, the only way to prove he loves them is to immediately hand over his money. He fears that if he does not they will cut off all contact, and they will place him in a home and cut off contact with his grandchildren. In the mediation session every time Herbert tries to speak other family members interrupt him and tell him that they know what is best for him. When the mediator attempts to intervene, family members say that Herbert is getting tired and that a break is needed. During the break the mediator observes that his adult daughter is speaking to him earnestly and privately.<sup>121</sup>

In this scenario, Herbert appears vulnerable to exploitation. He has physical ailments and is dependent on his children; he may be afraid of losing contact with his grandchildren and of being forced to move into a home.

However, although Herbert has vulnerabilities, the mediator will need to carry out a further assessment to determine whether the other family members are likely to exploit these vulnerabilities, and whether he could be harmed through participation in mediation. Observing that the children are putting pressure on Herbert to give them access to his assets, the mediator may suspect that the children want the assets for their own use. But

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<sup>121</sup> This is a composite of client stories explained to staff answering the Seniors Advocacy and Information Line operated by the *BC Centre for Elder Advocacy and Support* during the 4 years that I managed the organization as executive director and senior lawyer, from 2007-2011.

there may be other explanations for their behaviour. For example, the children may have financial problems and have no money to care for Herbert. Their behaviour may be driven by anxiety. The mediator will have to satisfy herself before proceeding about whether exploitation is present or likely. If Herbert is in danger of entering into an unfair agreement, steps to protect him are needed. An entirely different approach will be needed if the mediator sees that Herbert is able to confidently engage with his children and is not likely to be exploited by them.

## **E. Conclusion**

In this chapter I provided an overview of elder abuse laws in Canada, along with a review of relevant literature illustrating some of the challenges mediators face in situations where elder abuse exists. It is difficult to accurately identify abuse, and it is difficult to assess the risk of an abuse victim being harmed through participation in mediation. In any situation of suspected abuse, the elder mediator should choose an appropriate and ethical course of action. In the last two chapters of the thesis, I provide further examples of ethical issues that may arise in elder mediation in potentially abusive situations.

## Chapter 4: Capacity Laws

Capacity refers to having the cognitive understanding necessary to make the decision at hand; its legal test was covered in the previous chapter. Here, I elaborate on capacity and SDM laws. I conclude by providing examples of ethical issues related to capacity.

### A. The Legal Concept of Capacity

As explained, the legal test for capacity is two-pronged and decision-specific. Adults with diminished cognition may retain sufficient capability to make some decisions but not others. Therefore, when someone inquires if an adult is capable, the appropriate response is “capable to do what?” Does the adult have: 1) the ability to understand information relevant to the decision to be made, and 2) the ability to appreciate reasonably foreseeable consequences of the decision? This basic test may be modified by statute in some jurisdictions. Most capacity issues have not had any judicial consideration and require considerable mediator discretion. O’Conner, Hall and Donnelly provide two examples of areas where the law is not settled:

- 1) Some provinces have legislation establishing a test for capacity related to healthcare decisions that appears to be identical or virtually identical to legislation in other provinces, when in fact what is being assessed at a practice level under that legislation is very different.
- 2) In some jurisdictions the test for capability is to be able to *understand and appreciate* whereas in other provinces the test is simply *to understand*.

Although *understanding and appreciating* may require a slightly higher standard of reasoning, this difference is not simple to apply in practice.<sup>122</sup>

Fortunately, it is not necessary for elder mediators to understand the nuances of these issues theoretically. However, a mediator must understand how to apply the legal test for capacity in mediation.

In some situations, a mediator would be advised to seek a medical opinion or even to ask for a formal medical assessment. Although this information may inform the mediator's assessment of the participant's capacity to mediate, this information is not determinative of whether the older adult is capable. Doctors not only lack the authority to make a legal determination on capacity, but they also may not understand the medical issues or how to apply these to the legal test. They may, for example, consider factors not required for the two-prong legal test when giving an opinion on competence. According to O'Conner, Hall and Donnelly:

The congruence between actual practice and these standards is suspect. While these standards focus on the individual, in practice, notions such as 'tolerable risk'—health professionals' assessment of the situation rather than the person's actual ability to choose—often guides decision-making about capacity. The point here is that standards for assessing capacity differ considerably and need to be articulated, but even when this occurs there remains high likelihood that there still may be diverse interpretations.<sup>123</sup>

This is a challenging area of law for mediators to deal with due to the ambiguities identified in this chapter. In situations where complicated legal issues arise, and where the resolution of these are essential for the mediation to proceed, a mediator should seek legal advice from an elder law lawyer with experience in this area.

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<sup>122</sup> O'Conner, Hall & Donnelly, *supra* note 106.

<sup>123</sup> *Ibid* at 161.

## **B. Substitute Decision-Making and Guardianship Laws**

As described previously, an SDM makes financial or personal decisions on behalf of the older adult when an older adult does not have the legal capacity to make these decisions. A SDM may be authorized pursuant to an advanced planning document, or by a court order.<sup>124</sup>

### **i. Advanced Planning**

Advanced planning refers to planning for future incapability by appointing someone to act as SDM should the adult become incapable in future. The documents that give authority to the SDM include documents such as Powers of Attorney for financial decisions and Advanced Directives for health decisions. As discussed in chapter 1, different documents are required depending on the jurisdiction to authorize SDMs for health decisions or legal and financial matters. Elder mediators should be aware of statutory requirements for advanced planning documents in their own jurisdiction.

### **ii. Guardianship**

If the adult did not appoint a SDM prior to becoming incapable, it is usually necessary to apply to a court for a declaration of incapability and appointment of a SDM. In most jurisdictions the term used is *guardian*. Israel Doron provides the following definition of guardianship:

Guardianship refers to the legal relationship whereby the legal rights, possessions, and decision-making power of one person (the ward) are transferred to another (the

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<sup>124</sup> Although an advanced planning document and a court ordered guardianship both give authority to the SDM to make decisions a court appointment requires a legal determination of incapability, whereas this is not necessarily true of the advanced planning document.

guardian) once a court or other legal authority makes a determination that the ward is incompetent to handle his or her own affairs.<sup>125</sup>

Requirements for court application for guardianship and the scope of authority for guardians are set out in statute in each jurisdiction. For example, in British Columbia, a court-appointed SDM is called a *committee*. The process for appointing a committee is as follows: An application is brought to the court for a declaration of incapability and the appointment of a committee under the *Patients Property Act*. As stated in that statute:

2(1) The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of  
a) mental infirmity arising from disease, age or otherwise, or  
b) disorder or disability of mind arising from the use of drugs,  
incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.<sup>126</sup>

An application under the *Patients Property Act* requires the affidavits of two medical practitioners, and these affidavits must confirm that the criteria set out in s. 2(1)(a) and (b) are met, namely that there a mental disability due to causes such as disease or that there is a mental disorder due to the use of drugs. Based on these criteria, if a court determines that the adult is not capable then the court will appoint a committee, through an order of *Committee of the Estate* (with authority to make financial decisions) or *Committee of the Person* (with authority to make personal decisions), or both.

Mulamed, Doron and Scnitt argue that court applications for guardianship should only be used as a last resort. In their words, “[g]uardianship may be necessary to protect a

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<sup>125</sup> Israel Doron, “Elder Guardianship Kalaedoscope – A Comparative Perspective” (2002) 16 *International Journal on Law Policy and the Family* 268 at 269. Israel Doron is a scholar with expert knowledge of guardianship laws internationally. He completed his PhD at Osgood Hall with a dissertation on capacity and guardianship and now is on faculty at the University of Haifa. For a Canadian article on the topic see, Robert Gordon & Simon Verdun-Jones, *Adult Guardianship Law in Canada* (Scarborough: Carswell, 1992).

<sup>126</sup> *Patients Property Act*, RSBC, c 349, s 2-6.

person with mental disorders who lacks the capacity to care for himself but it may potentially abuse the person's civil rights and autonomy and should therefore be implemented only as a last resort".<sup>127</sup> Mediators also should remain aware that, where there is a dispute over an older adult's cognitive ability, there are important legal rights at stake.

### **C. Challenges for Mediators Related to Capacity Laws**

In the first chapter I described the basic principles related to assessing capacity in mediation. In this section I briefly highlight some of the specific challenges that an elder mediator faces related to assessing capacity.

#### **i. Identifying and Assessing Capacity in Mediation Practice**

It is difficult to apply the legal test for capacity in a practice environment. Although the two-pronged test is fairly straightforward, applying it to the facts at hand is not. Non-medical professionals, such as mediators, do not usually have training about how to accurately identify and assess cognitive impairment.

This was an issue that received considerable attention among experts attending the *Symposium*. This discussion was precipitated by a presentation by Dr. Robert Roca, an expert in medical decisional capacity. He explained that a medical diagnosis for incapacity does not exist. Capacity cannot be based on a medical diagnosis, but rather on whether the particular individual can make a particular decision at a particular point in

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<sup>127</sup>Yuvel Malamed, Israel Doron & Dan Schnitt, "Guardianship of People With Mental Disorders" (2007) 65 *Social Science and Medicine* 1118 at 1118.

time. According to Roca, when it is unclear whether symptoms affect decision-making, then the gravity of the decision and level of impairment should be considered.<sup>128</sup>

In response to Roca's presentation, Charlie Sabatino, the director of the *ABA Commission on Law and Aging*, pointed out that there are practical considerations for the elder mediator. A mediator is unlikely to be able to arrange a medical determination, and must be able to make a decision about whether or not to proceed in the absence of medical evidence.<sup>129</sup>

This presents a difficult challenge for elder mediators. Based on the law, the mediator should assume capacity. However, at the same time a mediator has an ethical responsibility to ensure that older adult participants do not enter into agreements they do not understand. How a mediator should balance these two considerations may depend on the circumstance. For example, in some instances it may be safe to presume capability and to continue with mediation. In others, such as where there is strong evidence of incapability or where the consequences of entering into an agreement will be serious, it may be advisable to err on the side of caution and to end the mediation. These issues and decisions have ethical considerations.

## **ii. Legal Rights of the Participant with Capacity Issues**

As discussed briefly in chapter 1, some experts have expressed concerns that older adults with diminished capacity will bargain away their legal rights during mediation.<sup>130</sup> Older adults with diminished decision-making capacity may be less able to represent

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<sup>128</sup> Mariani, *supra* note 61.

<sup>129</sup> *Ibid.*

<sup>130</sup> Mary Radford, "Is the Use of Mediation Appropriate in Elder Guardianship Cases?" (2002) 31 *Stetson Law Review* 611 [Radford].



themselves in mediation, which becomes a concern when other family members take advantage by “elevat[ing] their own interests above that of the adult”.<sup>131</sup> Nonetheless, capable older adults have the legal right to make decisions about matters that affect them.

### **iii. Overlapping Substitute Decision-Makers**

Adults can appoint someone to act as SDM in advance of incapability. However, in the elder mediation context, even when a SDM has been appointed, the mediator may still face legal uncertainty about who has the authority to make decisions. The following hypothetical scenario illustrates some of the practical challenges a mediator may face working in this area.

The Browns live in a jurisdiction that requires a different document to appoint a SDM for health than the document required to appoint a SDM for finances. Mr. Brown, who now has dementia, appointed his son as SDM for health decisions and his daughter, who is an accountant, to be SDM for financial decisions. The entire family is in mediation because Mr. Brown’s health is declining, and he requires a new living arrangement. Mr. Brown has cognitive challenges, but it is not easy to determine if he is legally incapable of making some or all of the decisions at hand.

The mediator will face several very complicated issues due to questions of capacity and the existence of two SDMs. To illustrate the complexity of this situation, below are examples of possible implications:

- 1) If Mr. Brown is capable of making legal and financial decisions:
  - He has the legal right to make all decisions that arise in mediation.
- 2) If Mr. Brown is capable of making health decisions, but not financial decisions:
  - He can decide what healthcare services he wants, but he cannot decide whether to pay for it. That decision is his daughter’s.

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<sup>131</sup> *Ibid* at 651.

3) If Mr. Brown is capable of making financial decisions but not health decisions:

- The son has the authority to decide what healthcare services Mr. Brown should receive, but he cannot authorize payment. Financial decisions fall under Mr. Brown's decision-making authority.

4) If Mr. Brown is not capable of making health or finance decisions:

- His son has the authority to decide what healthcare supports he should receive, and his daughter has authority to decide whether to authorize payment for services.

Unless Mr. Brown is capable of making both health and financial decisions, it will be necessary to have the agreement of at least two other people to resolve the issues in dispute. This is not an easy situation for a mediator to manage.

#### **D. Ethical Issues Related to Capacity**

This is a challenging area of practice for mediators. A professional who suspects a client lacks capacity does not have the legal authority to declare that person incapable. At the same time, the elder mediator has an ethical responsibility to ensure that mediation participants do not enter into agreements they do not understand, which could harm them. Such agreements may dispose of their rights and it may be a breach of the mediator's professional ethics to facilitate an agreement in such a case.

Radford explains the harm that older adults with diminished cognitive ability may experience in mediation. In her words:

An adult who is the subject of a guardianship case is most likely suffering from a diminution in his or her physical or mental capabilities. This may lead to feelings of fear, confusion, and anxiety that make the adult particularly vulnerable to outside influences. Thus, an adult guardianship case is replete with opportunities for a variety of individuals to exert power or control over the adult. Foremost among

these is the family member who has filed or threatened to file a petition for guardianship. To the degree the adult is aware of the potential for a complete deprivation of his or her rights, this family member is in a unique position to influence the adult to make concessions that the adult would not otherwise be willing to make. Another potential exertion of control may come from a caregiver or family member upon whom the adult has become increasingly dependent due to his or her own diminishing abilities. The mediator of an adult guardianship case must remain alert to such power imbalances and take appropriate measures to neutralize them.<sup>132</sup>

As Wood notes, mediators have an ethical responsibility to ensure that the parties have sufficient understanding of the process to be able to follow any agreed upon outcomes.<sup>133</sup> To be able to do this, the mediator must identify cognitive disabilities as accurately as possible, but this is not necessarily easy. There are many questions that are hard to answer in this practice area. For example:

- How can a mediator recognize and assess cognitive difficulties effectively?
- What criteria should be used to identify situations when other mediation participants are taking advantage of an older adult with cognitive deficits?
- Does the mediator have an ethical duty to intervene in situations where there is a cognitive defect?

The following scenarios are examples of how these types of questions arise in practice. In the first version, the mediation may proceed. In the second version, the mediation reaches an impasse and cannot proceed:

The Singh family comes to mediation. It is clear to the mediator that Mr. Singh has diminished capability. However, he has never been assessed, and there has been no legal determination on the matter. He appointed his son Jasjeet as SDM for finances and health several years ago.

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<sup>132</sup> *Ibid* at 651.

<sup>133</sup> See, Wood “Addressing Capacity”, *supra* note 55.

Scenario One: The mediator is unable to determine if Mr. Singh is capable of participating in mediation. However, Mr. Singh and family members all agree that Jasjeet and Mr. Singh can act as co-decision-makers and they will co-sign any agreement reached. The mediation can proceed. It is not necessary to determine if Mr. Singh is capable. Even if Mr. Singh is not capable, the agreement will still be valid because it was signed by the SDM. If he is capable then it is valid because he signed on his own behalf.

Scenario Two: When Mr. Singh appointed Jasjeet as SDM, he ensured that a clause was included in the power of attorney document stating that this power will only be activated when Mr. Singh becomes incapable. It does not specify how that will be determined. In mediation, Mr. Singh claims he is capable and does not want Jasjeet's help. He displays significant cognitive impairment in his interaction with the mediator. However, the mediator is unable to determine if Mr. Singh is legally capable. In this scenario, the mediation cannot proceed at the present time. Mr. Singh may not have sufficient capability to mediate or to enter into an agreement and the SDM's authority may not yet be valid.

In this scenario, there is only one advanced planning document. In other situations there may be more than one type of SDM document. Regardless, in all instances the mediator must determine which decisions the SDM is authorized to make and in what circumstance. This is important because SDM authority comes from many sources, including court orders and advanced planning documents authorized under statute.

In any jurisdiction there may be several different relevant pieces of legislation, each setting out a different scope of authority. For example, the SDM may be authorized to make decisions on behalf of the older adult without consultation, or only to make decisions with the adult involved as a co-decision-maker. The mediator must consider what decisions can be made by the SDM, under what circumstances and under what authority.

## **E. Conclusion**

In this chapter I provided an overview of capacity and guardianship laws and highlighted practical challenges mediators face. Through the scenarios, I demonstrated

the difficulty of managing capacity-related. I will return to the topic of ethical decisions related to capacity issues in more detail in the last two chapters of this thesis.

## **Chapter 5: Power Dynamics in Mediation**

As stated previously, vulnerable older adults may be disadvantaged in mediation due to power imbalances, but this is not always the case. Some situations including elder abuse were discussed in chapter 2 as instances of challenging power dynamics. For example, as discussed in that chapter, financial abuse may occur in situations where undue influence exists. The older adult is vulnerable to abuse because the presence of undue influence creates a power imbalance. As discussed in chapter 3, older adults with diminished cognition may also have less power in mediation.

In this chapter, I discuss elder mediation power dynamics in situations other than those involving abuse or capacity issues. Several experts have raised concerns that older adults may enter into agreements that are not fair due to power differentials in mediation.<sup>134</sup> Most of the literature in the field focuses on whether an elder mediator has an ethical obligation to balance power to ensure that agreements are fair. I explain that debate and elaborate on ethical implications. In this chapter, I first review existing literature, then present recent theories of power in mediation. I conclude this chapter with case examples of unequal power.

### **A. Circumstances Affecting Vulnerable Elders in Mediation**

In some families, the older adult is not disadvantaged and may even function as a strong matriarch or patriarch figure. However, in other cases older adults have

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<sup>134</sup> Most scholars making this argument do not provide a definition of fair. Presumably an agreement that falls short of an older adult's legal entitlements may not be fair, and an agreement that does reflect the actual wishes of the older adult also may not be fair.

circumstances which result in these older adults having less power in mediation. Power imbalances are problematic, particularly when an older adult:

- 1) has diminished capacity;
- 2) is abused, or vulnerable to abuse; and
- 3) is at a negotiating disadvantage due to his or her circumstances.

Social factors and circumstances other than abuse or capacity issues also may contribute to a power disadvantage for older adult participants in mediation. Mediation scholar Joan Kelly lists several factors that may increase the power of an individual in mediation. According to Kelly the following can increase the power of one party over the other in mediation:

- personality and character traits;
- history and dynamics of relationships;
- cognitive style and disabilities;
- knowledge base;
- economic self-sufficiency;
- gender and age differences;
- cultural and societal stereotypes and training;
- institutional hierarchies.<sup>135</sup>

Although these factors contribute to the relative power of the parties in mediation, multiple power sources are available, and relative power may shift during mediation. However, in elder mediation, specific aspects may result in less power for the older adult:

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<sup>135</sup> See J Kelly, *supra* note 113.

- dependence on other family members to provide care and support where the elder has physical or cognitive disabilities;
- societal stereotypes, depicting older adults as frail and in need of care and support;
- an older adult's desire to preserve his or her relationship with other family members.<sup>136</sup>

As well, in situations where mediation is occurring in the family setting, long-standing feelings and conflict can escalate. This is because of established family power structures. Bertschler and Bertschler explain:

the presence of greater power and lesser power...[between parties in the mediation] leaves great potential to skew a discussion. What starts out as a discussion of how best to take care of our elder relative morphs into one-upmanship on the one side and excessive deference on the other. Both sides are breeding grounds for resentment and a host of other disruptive emotions. These in turn make decision-making more difficult.<sup>137</sup>

The CCEL's *Elder Guardianship Mediation Report* also highlights some of the circumstances that may result in a power disadvantage for some older adults in elder mediation. As the report explains:

Mediators must always be aware of power imbalances between disputing parties in mediation. This is particularly true in elder and guardianship mediation. Older adults may have cognitive challenges or may rely on an adult child for care. An older adult who is overtly or covertly dependent on an adult child may find it very difficult, if not impossible, to express interests contrary to the interests expressed by the adult child.<sup>138</sup>

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<sup>136</sup> See Crampton, *supra* note 113.

<sup>137</sup> J & P Bertschler, *supra* note 17 at 335.

<sup>138</sup> *Supra*, note 16.



However, even if an older adult has less power due to circumstances such as the ones described above by Crampton and by the *CCEL*, this will not necessarily lead to harm for the older adult or to an unfair result. For example, other parties may deliberately make efforts to ensure that the views of the older adult are fully heard and respected in mediation. As Kelly points out,

[i]t is important to note that having greater power in a relationship does not automatically lead to an exercise of that power to the other party's disadvantage. There is a useful distinction between power potential and power in its action form....The more powerful party may not recognize his or her position, may believe in a fair and equitable result, or may see benefits to the self in a mutually satisfactory outcome for both parties. To benefit from a power position, one must be willing to assert it. Conversely, the absence of power may not, in itself, affect the outcome unless the other party exercises power for personal advantage."<sup>139</sup>

Nonetheless, in any situation where there is a possible power imbalance between the older adult and other family members, the mediator should carefully assess the situation in order to determine the best course of action.

## **B. Power Balancing in Elder Mediation**

In elder mediation situations where power imbalances exist, many scholars and practitioners consider balancing power as necessary in order to be effective. In a recent study interviewing elder mediators about mediation power dynamics, respondents primarily used the balancing metaphor in their responses. One mediator explained, "a good mediator...sets the environment and tone by making ... [sure] that everyone is on equal footing so that no one comes into a mediation with more power than another. In a family someone always has the upper hand"<sup>140</sup> If a mediator does not do this, then the

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<sup>139</sup> J Kelly, *supra* note 113 at 87.

<sup>140</sup> Crampton, *supra* note 113 at 431.

result may be problematic. For example, one scholar cautions that older adults may enter into “unfair agreements regarding financial support or inheritance distribution.”<sup>141</sup>

Although several scholars contend it is the mediator’s responsibility to ensure that agreements reached in elder mediation are fair, not all experts agree.<sup>142</sup> There is general agreement that mediators should intervene when there is a serious risk of harm, but there is no consensus about how to proceed where the older adult is at a negotiating disadvantage but not necessarily at risk. As explained by one scholar:

Whether mediators should attempt to correct power imbalances between the parties and the degree to which they should do this are issues debated in the mediation literature...[however] there is general agreement that the mediator should direct the mediation process....A mediator who fears that one party might take advantage of the other should be able to stop the mediation and even refuse to continue.<sup>143</sup>

The debate surrounds how soon a mediator should intervene and when. If a mediator intervenes too actively or too soon, he or she may lose the appearance of neutrality. How should mediators discharge their responsibility to ensure that participants do not enter into unfair agreements? To date, very little has been written about techniques for managing power in elder mediation. One exception is found in a book by Bertschler and Bertschler, who suggest the following as useful techniques for managing power:

- choose a neutral location;
- include support persons;

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<sup>141</sup> J Kelly, *supra* note 113 at 95. Kelly does not explain what criteria to use to determine if an agreement is fair. Presumably an agreement would be unfair if the older adult received considerably less than he or she is entitled to. Kelly is not alone in her failure to provide a definition of an “unfair agreement”. Other scholars writing on this topic similarly mention unfairness as a concept, but do not explain how this is to be measured.

<sup>142</sup> Crampton, *supra* note 112 at 431.

<sup>143</sup> Jordi Agusti–Panedera, “Power Imbalances in Mediation: Questioning Some Common Assumptions” (2004) 59 *Dispute Resolution Journal* 24 at 28.

- use caucus or shuttle mediation especially if abuse is present;<sup>144</sup>
- make a public note of body language ('I saw you shake your head. Can you tell me what that means?');
- offer a carrot and stick (citing the benefits of settling and consequences of failure to do so); and
- increase power through knowledge - provide information to the person in the mediation who does not have expert knowledge.<sup>145</sup>

These recommended techniques are similar to recommended practices in general mediation practice.

## **C. Theories of Power in Mediation**

Even though the elder mediation literature about power focuses almost exclusively on power balancing, this will not be the primary focus in all elder mediation cases. In many elder mediation cases power dynamics will be more fluid or equally allocated between the parties. I now describe the literature on power in mediation outside the elder mediation field. Scholarly literature on power in the mediation generally provides some nuances applicable to elder mediation.

### **i. Foundational Mediation Values**

Early mediation experts identified *neutrality* and *impartiality* as foundational to the practice of mediation. These terms often appear in mediator codes of conduct, however

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<sup>144</sup> Shuttle mediation is where the mediator meetings with parties individually and presents proposals or messages on behalf of one party to the other, rather than meeting with all the parties together in one room.

<sup>145</sup> J Bertschler & P Bertschler, *supra* note 17.

the definitions of these terms vary from code to code. For example, the terms *impartiality* and *neutrality* are used interchangeably by some mediation organizations and other times they have different meanings. In its *Elder Guardianship Mediation Report*, CCEL reviewed definitions of the term impartiality as used in mediator codes of conduct and concluded that, “according to many such definitions, impartiality means freedom from favouritism, bias or prejudice, or from the appearance of favouritism, bias or prejudice, either in word, action or association.”<sup>146</sup> The various definitions of neutrality are discussed below. Early mediation experts also identified *fairness* as a core value.<sup>147</sup>

## **ii. Early Views of Power**

Some early experts espoused the view that when a significant power imbalance exists, the mediator’s responsibility is to balance power to ensure the result is fair. However, it was not long before scholars realized that balancing power could detract from neutrality given tension between these concepts. By the early 1990s, core mediation concepts such as neutrality, impartiality and fairness were being discussed in the mediation literature, as well as the tension between power balancing and neutrality.

For example, in 1991 Rifkin and Cobb carried out a study in which they examined how mediators used the term neutrality.<sup>148</sup> They interviewed mediators and asked ‘can you recount an instance where neutrality was a particular problem or concern for you?’ They also reviewed training materials in the mediation field. Based on this review and the

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<sup>146</sup> *Supra* note 16. Also see J Berschler & P Bertschler, *supra* note 18 (the latter referring to a study examining the meaning of impartiality, fairness and other core mediation concepts in mediation codes of conduct. The study found that the meaning of these words varied from code to code).

<sup>147</sup> See, J Bertschler & P Bertschler, *supra* note 17.

<sup>148</sup> Sara Cobb & Janet Rifkin, “Foundation Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16 *Law & Social Inquiry* 35 at 39.

interviews, they argued that there are two definitions of neutrality in the field. These definitions are: 1) *neutrality* as ‘impartiality’ and 2) *neutrality* as ‘equidistance.’<sup>149</sup> Rifkin and Cobb provide these definitions in a co-authored article with Millen:

Neutrality...[is] traditionally understood as incorporating two qualities that a mediator ought to be able to employ. The first is impartiality....The second quality of neutrality is what we refer to as equidistance. Equidistance identifies the ability of the mediator to assist the disputants in expressing their ‘side’ of the case. To ensure that information is disclosed, the mediator must sometimes temporarily align herself or himself with individual parties as they elaborate their positions....Equidistance works to the extent that the mediator can assist each person equally. In contrast to impartiality, where neutrality is understood as the ability to suspend judgment, equidistance is the active process by which partiality is used to create symmetry.<sup>150</sup>

Both meanings of neutrality are intended to ensure that the mediator treats all parties equally and is not biased. However, these two definitions are very different, and require different mediator practices and interventions. A mediator practicing impartiality remains more distant and removed from the process, and avoids directing the parties in one direction or another. The mediator practicing equidistance will align with individual parties to help them express their interests. This “creates symmetry” or, in other words, balances the mediation.

In the elder mediation context, with any vulnerable or disadvantaged older adult participant, there is tension between these two concepts. Cobb, Rifkin and Millen note that the mediator is able to retain overall neutrality if each party receives assistance equally. However, in a situation where an older adult participant requires considerable assistance and the other parties do not need assistance, this may not be possible. In that

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<sup>149</sup>*Ibid.*

<sup>150</sup>Janet Rifkin, Jonathan Millen & Sara Cobb, “Toward a New Discourse for Mediation: A Critique of Neutrality” (1991) 9 *Mediation Quarterly* 151.

situation, the mediator is in danger of losing the appearance of neutrality. Thus, a mediator who attempts to balance power asymmetries to ensure fairness is at risk of losing parties' confidence in their neutrality.

### **iii. Current Views of Power in Mediation**

Numerous articles have been written about power in mediation before and after Rifkin and Cobb. Unlike earlier articles, recent articles present power as a nuanced force that shifts and flows between the parties in mediation, rather than a dichotomous entity that is distributed between the parties.<sup>151</sup> It is not static or stationary, nor does it rest with one party and not with the other parties. Instead it is a product of the relationships between the parties in the mediation setting, including the mediator.

#### ***a) Power Between the Parties***

Even in situations where the older adult participant faces some circumstantial disadvantages, this is not the sole determinant of how much power the older adult has in mediation. An older adult may be financially dependent on an adult child, but may still be able to get his or her needs met in mediation. For example, other family members may be genuinely very concerned about "mom's wishes" and eager to find a resolution to the conflict that addresses her interests.

As Gerwurz explains:

an individual's power does not rest entirely in her person. Rather, it depends upon the other parties in relation to whom she is empowered as well as the broad context in which she is interacting. Consequently, power dynamics do not depend purely upon actual distribution of resources (economic, psychological, or otherwise); instead, they are inherently linked to the perceived strength of each party. In a

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<sup>151</sup> See Gerwurz, *supra* note 6.

social context, perception often plays a greater role in determining power dynamics than does the underlying reality.<sup>152</sup>

Power arises from circumstances, as well as the relationships between the individuals in the mediation. Joan Kelly explains this in the following words:

The concept of power is indispensable in analyzing conflict and its resolution yet it and related concepts of empowerment and power imbalance are rather slippery to pin down. Power is not a characteristic of a person, exercised in a vacuum, but is instead an attribute of a relationship. Within the mediation context, power can be defined as the ability of a person in a relationship to influence or modify an outcome. Power is the measure of the degree to which one can get one's needs or goals satisfied.<sup>153</sup>

Power in mediation is thus a product of the relationship between the parties, and power dynamics may shift and change over time in mediation, or even within one setting. At different points during the mediation, as these shifts occur, different participants may have more strength to influence the result of mediation to meet their own needs.

Of course, the mediator also has power, given that they can influence outcomes.<sup>154</sup> Historically, mediators were reluctant to acknowledge that they have power during mediation because power was equated with coercion or manipulation, and experts debated whether mediators should exert power.<sup>155</sup> Now the question is how mediators should use the power they have.

#### **D. Ethical Issues for Elder Mediators Related to Power Dynamics**

There are ethical issues that arise in elder mediation when power imbalances exist. In that situation the mediator must determine what steps to take to ensure that the

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<sup>152</sup>*Ibid* at 138.

<sup>153</sup>J Kelly, *supra* note 113 at 87.

<sup>154</sup> *Ibid.*

<sup>155</sup>See, Luke Heemsbergen & Asaf Sneeveer, "New Routes to Power: Towards a Typology of Power Mediation" (2011) 37 *Review of International Studies* 169.

agreement is fair. The mediator's ethical responsibilities in this regard are far from clear, and is a matter of debate in the field. As explained by Gerwurz:

[O]ne contentious issue among the many debates surrounding mediation...is the question of mediation's strengths and weaknesses in dealing with power imbalance. The issue of power is complex, involving tangible and intangible resources. Though there is general consensus that the most extreme cases of power imbalance should not be mediated at all, there is little agreement as to when "sufficient power imbalance" places a conflict beyond the pale. Furthermore, there is no consensus on how to address power imbalance under normal circumstances, when it is not excessive.<sup>156</sup>

I discuss this issue further in the next chapter.

## **E. Conclusion**

In this chapter, I provided an overview of the literature on power dynamics in elder mediation. Power dynamics in elder mediation are complex, and include imbalances due to elder abuse, older adult incapacity or other circumstances. However, as I explained, the older adult is not always at a power disadvantage in mediation. Expert views on power in mediation describe power as a force that is the product of the relationships between the parties as well as external circumstances. Power is fluid and may shift between the parties during any mediation, including elder mediation.

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<sup>156</sup> Gerwurz, *supra* note 6 at 136.



### **Section III: An Ethical Process for Elder Mediators**

Elder mediators regularly encounter complicated issues in mediation, particularly where there are abuse or capacity issues. In the earlier chapters of the thesis I demonstrated that the elder mediation field does not have existing guidelines or practice standards for mediators dealing with ethical questions related to these issues. Furthermore, experts in the field do not agree on how to develop or apply ethical standards.

In the next chapter, I examine ethics in elder mediation in more detail. I present a scenario illustrating common issues in elder mediation, then analyze how three different mediator codes of conduct might apply to the scenario. Although these codes of conduct provide some helpful ethical guidance, many issues are left addressed. I conclude that these documents do not provide sufficient guidance for elder mediators in many practice decisions.

In the second chapter in this section, I present a ten-step ethical decision-making process developed by the *Canadian Psychological Association (CPA)* and argue that it provides elder mediators with helpful guidance. I contend that elder mediators will be better equipped to make effective ethical decisions when they follow the *CPA* process. The ethical decision-making process acts as a “checklist” of questions for the mediator to consider before making ethical decisions. By using this process the mediator will be able to ensure that he or she has weighed all relevant considerations before making a decision about how to proceed.

## **Chapter 6: Existing Ethical Standards for Elder Mediators**

As is clear from the previous chapters, elder mediators regularly run into very complicated ethical issues. In this chapter I discuss existing ethical guidelines and demonstrate areas where these guidelines do not provide guidance to mediators regarding issues that typically arise in elder mediation.

I begin by providing a scenario illustrates common elder mediation issues.

### **A. Illustrative Scenario**

Mrs. Green is an 85 year-old woman. She lives by herself in a small apartment. Recently she fell and was alone for many hours before a neighbour heard her cry for help. She has four adult children. She also has a grandson, Charlie, with whom she has lately spent a lot of time. For the past four months, he has been helping her with banking, and recently she agreed to put his name on her bank accounts to make it easier for him to help. Charlie claims that Mrs. Green often forgets to pay bills and loses track of money in her account. According to her grandson, Mrs. Green would not be able to manage without him. Charlie's mother (Mrs. Green's daughter, Mary) is proud of the help Charlie is giving. However, Mrs. Green's other adult children dislike Charlie and believe he is irresponsible. Two of the adult siblings suspect that Charlie is pocketing some of Mrs. Green's money and that Mrs. Green is capable of managing her own affairs. However, Mary and her brother Tom do not believe Mrs. Green is safe living on her own. They believe that she is 'losing her mind', and is no longer capable of taking care of herself.

When Mrs. Green fell, she hurt her shoulder very badly and is now unable to dress herself. However, Mrs. Green is insistent that she wants to continue to live in her home. She wants to hire a homecare worker to facilitate this. She says that she appreciates Charlie's help and doesn't mind him helping. Mary has offered to let Mrs. Green move in with them and is also willing to provide a place for Charlie so he can help out. She says that if Mrs. Green does not agree, she will go to court for an application to have Mrs. Green declared incapable and ask to be appointed as guardian. The other family members are very upset about this threat and think that it was made because of Charlie's influence over his mother. Moreover, they feel that Charlie's motive is to have access to Mrs. Green's money.

The significance of the family conflict led Tom to insist that the family come to mediation. The mediator met separately with each of the adult children, Mrs. Green and Charlie. In the private session, Mrs. Green advised that she did not want to continue with mediation and stated that if her family pressured her to attend mediation, she would sit quietly and not participate. She also told the mediator that

she has been giving Charlie money because he is “always crying about how poor he is” and she feels sorry for him. She does not want any of her children to know this and insisted that the mediator not pass on this information. She also stated that she is not willing to consider moving out of her home.

The mediator noticed that there were some things Mrs. Green did not understand during the individual meeting, and that the information she gave at some points of the meeting contradicted what she said at others. The mediator suspects that Mrs. Green forgot information, which is why she did not present it consistently. In private, two of the adult children told the mediator that they are worried because Mrs. Green is growing increasingly forgetful, and that she is no longer able to manage her affairs. The mediator obtained permission from the adult children to speak to Mrs. Green and to convey their concern about her forgetfulness. When the mediator spoke to Mrs. Green a second time she said, “they are trying to force me to move out of my home. I will give them money or anything else they want, but I don’t want to talk about moving. I just want to stop fighting about this”.

The mediator then asked Mrs. Green if anyone other than her children have expressed concerns that she is forgetful. Mrs. Green disclosed that she spoke to her doctor about this and that her doctor said he was worried about her memory. Her doctor suggested she consider an assisted living home. Mrs. Green told the mediator that her doctor “doesn’t know what he is talking about anyway”. She was not able to explain to the mediator why she had the appointment with the doctor or what he based his concern on.<sup>157</sup>

The following are some ethical issues arising from this scenario:

- Does Mrs. Green have the capacity to mediate, and how can the mediator determine this?
- If Mrs. Green does not have the capacity to mediate, what next steps should the mediator take?
- If the mediator decides to terminate the mediation due to Mrs. Green’s incapability, does the mediator have any responsibility to ensure Mrs. Green’s safety after termination of the mediation?

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<sup>157</sup>This is a scenario based on a composite of client situations reported to the *BC Centre for Elder Advocacy and Support* during the time I was executive director and senior lawyer (2007-2011).

- Is Charlie financially exploiting Mrs. Green and, if so, does the mediator have a responsibility to intervene?
- If Mrs. Green continues to refuse to actively participate in joint mediation sessions, should the mediator cancel the mediation, or propose shuttle mediation?
- Does Mrs. Green have less negotiating power in mediation due to her circumstances and, if so, what implications are there for the mediator?
- Will Mrs. Green be able to represent her own interests in the mediation session, and if not what assistance should the mediator give?
- Does the mediator have a responsibility to ensure Mrs. Green doesn't enter into an agreement that is unfair? (for example, “contrary to her wishes” or “less than her legal entitlements”).

## **B. Analysis of Three Mediator Codes of Conduct**

I now examine three documents setting out practice, or ethical, standards for mediators (collectively the “*Three Mediator Codes of Conduct*”), focusing on provisions related to elder abuse, capacity and power dynamics. Although the *Three Mediator Codes of Conduct* provide useful direction about ethical issues for elder mediators, they do not provide answers to all the questions arising from the Mrs. Green scenario. Later in the chapter, I return to the scenario to demonstrate this.

### **i. Introduction to the Three Mediator Codes of Conduct**

The *Three Mediator Codes of Conduct* are:

1. The *Model Standards of Conduct for Mediators* (the “*Model Standards*”). These standards have been accepted by the leading mediation organizations in the

United States and represent a consensus of current thinking on ethical approaches in mediation.

2. The *Americans with Disabilities Act Mediation Guidelines* (the “*ADA Mediation Guidelines*”). These guidelines are the most comprehensive on issues related to mediating where there are capacity issues and have been endorsed by leading mediation organizations.
3. The *Elder Mediation Canada Code of Professional Conduct for Mediators Specializing in Issues of Aging* (the “*EMC Code of Conduct*”).<sup>158</sup> This is the only code of conduct specific to mediating elder issues. It also has been endorsed by major mediation organizations and contains considerable substantive information on abuse, power and capacity.

## **ii. Model Standards**

The *Model Standards* were prepared in 1994 by the *American Arbitration Association*, the *American Bar Association*’s Section of Dispute Resolution and *SPIDR*.<sup>159</sup> A joint committee consisting of representatives from the successor organization, the *Association for Conflict Resolution*, revised the *Model Standards* in 2005. Both the original 1994 version and the 2005 revision have been approved by each

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<sup>158</sup> *Model Standards of Conduct*, online: < [http://www.mediate.com/articles/model\\_standards\\_of\\_conflict.cfm](http://www.mediate.com/articles/model_standards_of_conflict.cfm)>; *ADA Mediation Guidelines*, online < <http://www.mediate.com/articles/adaltr.cfm>>; *Code of Professional Conduct for Mediators Specializing in Issues of Aging* (Waterloo: Elder Mediation Canada, 2011), online: <<http://www.eldermediation.ca/page5/page5.html>>.

<sup>159</sup> The *Association for Conflict Resolution* was formed through a merger of the *Academy of Family Mediators*, the *Conflict Resolution Education Network* and the *Society of Professionals in Dispute Resolution (SPIDR)*. *SPIDR* was the third participating organization in the development of the 1994 Standards.

participating organization.<sup>160</sup> Many of the provisions in the *Model Standards* are directed at more general ethical issues including impartiality and confidentiality. However, there are two provisions relevant to elder mediation: one is applicable to situations of abuse and a second is applicable to questions of capacity. These two clauses fall under Standard VI, *Quality of the Process*, and provide:

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.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.<sup>161</sup>

***a) Capacity to Mediate – Standard VI Section 10***

How effective are these provisions for mediators who must assess whether a participant has capacity to mediate? As noted earlier, the two-pronged capacity test requires the mediator to ask whether: 1) the older adult understands information relevant to mediation, and 2) the older adult understands the reasonably foreseeable consequences of participating in mediation. Section 10 provides recommended questions to inquire about capacity to mediate that essentially restate the two-prong test:

- 1) The mediator should explore whether the participant has difficulty comprehending the process, or issues (Prong One: Does the participant understand information relevant to participating in mediation?).

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<sup>160</sup> *Model Standards*, *supra* note 158.

<sup>161</sup> *Ibid.*

- 2) The mediator should explore whether the participant has difficulty understanding settlement options (Prong Two: Does the participant understand the reasonably foreseeable consequences of participating in mediation?).

In addition to providing examples of questions mediators can use to assess capacity to mediate, section 10 also explains what mediators should do when a participant does not have capacity to mediate. In that instance, mediators 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”. This incorporates expert views that accommodations should be made when possible. However, this provision does not explain how to determine if an older adult can mediate with support or how to determine what type of support is needed.

***b) Dealing with Abuse – Standard VI Section B***

According to section B, when a mediator becomes aware of domestic violence or abuse among the parties, he or she should take appropriate steps. This includes, “if necessary, postponing, withdrawing from or terminating the mediation”. This direction merely states a well-accepted mediation principle. However, it does not provide guidance about how a mediator should decide what steps are necessary in any specific case.

For example, section B does not provide a definition of the word ‘appropriate’, nor does it state the goal of taking appropriate steps. Is it to keep victims safe from further violence to ensure that they are not coerced into signing an unfair agreement, or is there another purpose? Without clarifying the underlying reason that appropriate steps should be taken, it is impossible to gauge whether any particular steps are appropriate. Are steps appropriate if the victim’s safety is protected, or must these steps also ensure that there is

no power disadvantage? For these reasons, the provisions provide insufficient assistance to elder mediators who encounter abused parties.

### **iii. ADA Mediation Guidelines**

The *ADA Mediation Guidelines* address issues that commonly arise under the *Americans with Disabilities Act* and similar laws to eliminate discrimination against persons with disabilities.<sup>162</sup> A working group tasked with drafting these guidelines reviewed existing mediator codes of conduct at the outset of their work to ensure that the *ADA Mediation Guidelines* were in keeping with standards already accepted in the field.<sup>163</sup> The *ADA Mediation Guidelines* have lengthy provisions regarding capacity to mediate, set out in their entirety in *Appendix A*.

#### ***a) Relevant to Capacity to Mediate - D(1)***

Section D(1) provides that the assessment of capacity to mediate should be carried out on a case-by-case basis, and should not simply rely on medical diagnosis. Thus, the provision aligns with laws regarding capacity. In the absence of a court ruling that a person is incapable, a mediator (or any other professional) should never rely on a medical decision alone as a determination of global incapacity. As we have seen, capability is a decision-specific determination and a party may be capable to make some decisions but not others.

#### ***b) Relevant to Capacity to Mediate - D(2)***

This section addresses capacity to mediate and proposes specific questions the mediator can use when making an assessment. These questions are different than the ones

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<sup>162</sup> *Americans with Disabilities Act* of 1990 – ADA – 42 U.S. Code Chapter 126.

<sup>163</sup> *ADA Mediation Guidelines*, *supra* note 158.



suggested in section 10 of *Model Standard VI*. However, they serve a similar purpose in that they enable a mediator to gather the information needed to answer the two-prong test.

According to s. D(2):

- 1) The mediator must determine if the 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” (Prong One: Does the participant understand relevant information about participating in mediation?).
- 2) The mediator must determine if the party “can assess options and make and keep an agreement” (Prong Two: Does the participant understand the reasonably foreseeable consequences of participating in mediation?).

This section also distinguishes between capacity to mediate and capacity to enter into a contract. The provision indicates that a party who lacks capacity to enter into the agreement may need a surrogate. Since capacity is decision-specific, it is possible for a participant to have capacity to participate in mediation but to have insufficient capacity to sign a legal agreement.

***c) Relevant to Capacity to Mediate with Support - Sections D(4) and D(5)***

These sections correspond with both section 10 of *Model Standard VI* and experts’ opinions. A mediator should determine if a party who lacks capacity to mediate has sufficient capacity with the assistance of a support person or some other type of accommodation. Since Canadian human rights provisions and American disability laws both require service providers to accommodate disabilities, this is a necessary step as well as a practical one. If an older adult has the legal capacity to make a decision with the

assistance of a support person, then it is not necessary for the mediator to look for a legally authorized SDM to make decisions.

***d) Relevant to Lack of Capacity to Mediate - D(6)***

This section explains that a legally authorized SDM is required when a party lacks capacity to mediate even with accommodation. Section D(6) rightly points out that state (and provincial) laws stipulate who has the legal authority to be the SDM. Mediators must determine the law in their jurisdiction. In Canadian jurisdictions, SDMs are usually appointed through an advanced planning document or by a court order.<sup>164</sup>

***e) Analysis of Sections D – Discussion of All Sections***

The information contained in the *ADA Mediation Guidelines* Sections D(1) – (6) accurately reflects laws on capacity and also provide useful guidelines for mediators. This document is a good starting point, providing as it does the most comprehensive set of guidelines for mediators dealing with capacity issues. However, the provisions are drafted broadly as is typical in conduct codes, and therefore do not cover many specific challenges such as intra-family disputes about who has been appointed as a substitute decision-maker?<sup>165</sup> Mediators faced with dilemmas such as this one have serious ethical challenges.

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<sup>164</sup> There are some exceptions. See e.g. *Health Care (Consent) and Care Facility (Admission) Act*, RSBC, 1996, c 181 (this is a British Columbia example of a statute that gives family members authority to make some decisions where a substitute decision-maker has not been otherwise appointed).

<sup>165</sup> This could occur, for example, if more than one advanced planning document exists and it is not clear which one is valid. As a second example, this also could occur if there is more than one SDM and the SDM's do not agree about the scope of their respective roles.

#### **iv. EMC Code of Conduct**

*Elder Mediation Canada (EMC)* is a division of *Family Mediation Canada (FMC)*, a well-recognized, nationwide organization. *EMC*, which has hosted international conferences on elder mediation, has the only existing certification program for elder mediators in Canada and is the publisher of the *EMC Code of Conduct*.<sup>166</sup>

The *EMC Code of Conduct* was developed in response to needs identified by the *Alzheimer Society of Prince Edward Island (PEI)* and *Family Mediation PEI*, organizations that jointly pioneered elder mediation in PEI. This Code is now in its fourth edition, and is recognized in *EMC*'s mediator certification process. The certification process shares some similarities with the *FMC* certification for family mediators.<sup>167</sup>

When compared with other mediation codes of conduct, the *EMC Code of Conduct* provides more detailed guidance on ethical decision-making about power, capacity and abuse. However, the tone of the provisions in the *EMC Code of Conduct* is more aspirational than the other documents. The provisions are reproduced in *Appendix A*.

##### ***a) Relevant to Ability to Participate – s. 4(d)***

Section 4(d) of the *EMC Code of Conduct* addresses participant ability to engage in mediation. Whereas the *Model Standards* and the *ADA Mediation Guidelines* provisions on capacity to mediate closely mirror the legal tests for capacity, s. 4(d) of the *EMC Code of Conduct* is more general and does not include criteria for assessing capacity. The section provides that mediators must include the older adult “or their representatives in

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<sup>166</sup> *EMC Code of Conduct*, *supra* note 158.

<sup>167</sup> Both require similar levels of training, with prescribed courses, an exam and relevant practice experience.

decision-making as appropriate” but it does not clarify what *appropriate* or *representative* mean.

The section further provides that if the older adult is unable to participate *meaningfully* when “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”. This clause implies that the mediator has the option of continuing with mediation in situations where there is no SDM as long as the parties agree about who will take on the role of spokesperson for the older adult. However, this may be legally misleading. If the adult is incapable, and there is no legally appointed SDM, the other parties do not have the legal right to appoint someone to make decisions on behalf of the older adult.

In contrast, this section gives very specific guidance about what steps a mediator should take when it is not clear if a participant has capacity or who the SDM is. These steps include:

1. referring the parties to outside professional help or outside resources; and
2. reviewing documents and statutes related to substitute decision-making to determine the scope of authority of the advocate assisting the older adult.

***b) Relevant to Managing Power – s. 4(e)***

According to the *EMC Code of Conduct*, s. 4(e) mediators “have a clear duty to ensure balanced negotiations” and they should not permit “manipulative or intimidating tactics”. This duty is based on a mediator responsibility to ensure procedural fairness, as is also mentioned in this section. This clause addresses situations where parties use their positions of power to coerce less powerful parties. In particular, this clause specifies that the elder mediator has a duty to ensure:

- that the participants reach agreements with informed consent, freely, voluntarily, and without undue influence;
- procedural fairness – giving each participant an opportunity to speak, to be heard and to articulate their own needs, interests and concerns; and
- balanced negotiations, not permitting manipulative or intimidating tactics by any participant.

These broadly drafted guidelines are helpful, but it will still be necessary to make ethical decisions that are not clear from these provisions alone. For example, the mediator will need to determine if the behaviour exhibited by one of the parties is manipulative, and when intervention is indicated. How soon should the mediator intervene and what interventions are appropriate? These decisions are important, reflected in ongoing elder mediation debates about neutrality and how it is balanced with the need to sometimes intervene on behalf of an older adult.

***c) Relevant to Termination of the Mediation – s. 4(j)***

Mediation experts agree that there are times where it is appropriate for mediators to terminate mediation, but do not agree on the timing. The *EMC Code of Conduct* section 4(j), provides specific direction about when a mediator should terminate:

- It is the duty of the elder mediator to suspend or terminate mediation whenever continuation of the process is likely to harm one or more of the participants, such as when mediation is being misused:
  - to dissipate or conceal assets; or
  - where, in the opinion of the elder mediator, one or more participants are acting in bad faith.

- The elder mediator may withdraw from mediation when they believe that any agreement being reached by the participants is unconscionable.

These provisions impose a duty on elder mediators to terminate when a participant may be harmed or if one of the participants is acting in bad faith. The mediator also may choose to withdraw if the agreement is unconscionable. Not all experts would agree that mediators have a duty to ensure agreements are fair, but this Code takes a clear position: if the mediator is not able to ensure that the agreement will be fair, the mediator should not continue with the mediation and should withdraw services.

***d) Relevant to the Issue of the Mediator's Role – s. 5(c)***

One debate in the elder mediation field is the extent to which a mediator should try to ensure that the older adult's interests are fully represented in mediation. As discussed earlier, some experts believe this is necessary to ensure fairness, while others argue that the elder mediator will alienate other parties and will lose neutrality if he or she advocates too strongly on behalf of the older adult.<sup>168</sup> Section 5(c) of the *EMC Code of Conduct* takes a strong position on this issue, endorsing an advocacy role for elder mediators. It begins with the following statement: "Advocacy refers to speaking or acting on behalf of a group or persons to ensure their rights are protected". Section 5(c) reads:

- Upon request, an elder mediator may from time to time act as advocate for a vulnerable person if it is apparent that the vulnerable person is being denied a full hearing or voice.

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<sup>168</sup> This was one of the issues debated by attendees at the *Symposium on Ethics in Mediation*. See J Bertschler & P Bertschler, *supra* note 17.

- An elder mediator must not continue with the mediation process until all participants are assured of a fair voice and must advocate for equity regarding input into the mediation process.
- An elder mediator may also act as advocate on behalf of the mediation process when that process is not understood by a group, person or organization.

Although these provisions are very specific, they may be difficult to apply in practice. How does a mediator determine if a client is vulnerable or assess whether an older adult has had a full hearing? How soon should the mediator do his or her advocacy hat? These clauses are intended to protect vulnerable participants from harm. However, in the absence of definition or measurement tools, it is always a risk that a mediator may assess the situation inaccurately.

***e) Relevant to Elder Abuse – s. 8***

The *EMC Code of Conduct's* s. 8 contains a lengthy section on elder abuse. Its complete provisions are in *Appendix A*. This section provides very clear instructions about what an elder mediator should do when encountering abuse. Recommended measures include avoiding face-to-face meetings, obtaining special training, informing all participants that the mediator is not neutral, ending mediation if intimidation occurs and making sure all agreements are genuine rather than coerced. This level of specificity about what to do in situations of elder abuse is unique compared with other mediator codes of conduct discussed here. It is important to remember, as discussed in chapter 3, that at present there are no empirically tested screening tools and it is difficult to accurately identify abuse.

## C. Analysis

The *Three Mediator Codes of Conduct* provide general ethical guidelines for mediators on issues of abuse, capacity and power. Codes of conduct cannot give specific detailed guidance addressing every issue that may arise in practice, but provide a good resource for mediators facing ethical issues in these specific areas. Following are a few examples of each.

### i. Issues with Clear Direction

In my view, the *Three Mediator Codes of Conduct* provide the clearest guidance to mediators on the issue of assessing capacity to mediate. The two-prong legal test for capacity to mediate was explained in chapter 1 of the previous section. The *ADA Mediation Guidelines* and the *Model Standards* provide useful questions that mediators can use to assist them when making this determination.

Prong One: Understanding information relevant to participating in mediation:

- The mediator should explore whether the participant has difficulty comprehending the process and issues (*Model Standards*).
- The mediator must determine if the 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 (*ADA Mediation Guidelines*).

Prong Two: Understanding the reasonably foreseeable consequences of participating:

- The mediator should explore whether the participant has difficulty understanding settlement options (*Model Standards*).



- The mediator must determine if the party “can assess options and make and keep an agreement (*ADA Mediation Guidelines*).

The provisions in the three mediator Codes of Conduct also provide clear guidance about capacity issues in circumstances where a mediator believes a participant lacks capacity to mediate. They specify that the mediator should consider whether that person will have capacity if support or accommodation are added.

A third area where the provisions in the three Codes provide clear guidance to elder mediators is on issues of violence and abuse. The provisions in the *Model Standards* and the *EMC Code of Conduct* clearly state that the mediator has a duty to take action in situations where abuse is identified. Both documents agree that, in those situations, the mediator should take appropriate steps, such as terminating the mediation or keeping the parties separate. However, the documents do not provide direction about how to identify abuse or to decide which steps are appropriate.

## **ii. Issues with Less Clarity**

The three Codes are weakest on ethical issues related to power in mediation, providing little guidance about situations of power asymmetries. The *EMC Code of Conduct* takes a strong position on this issue, and states that a mediator has a duty to balance power. However, as discussed in chapter 5, not all elder mediation experts agree with that position. The *ADA Mediation Guidelines* and the *Model Standards* are silent on ethical issues related to power in elder mediation, and the *EMC Code of Conduct* leaves many unanswered questions. For example, does this duty only apply in serious cases, or in all cases?

## **D. Mrs. Green - Possible Ethical Questions**

My analysis of the three Codes highlighted some of the documents' gaps and weaknesses. In all cases, the clauses are broadly drafted, and in some instances are more aspirational than directive. The most helpful and specific clauses are the ones on capacity to mediate. As a further illustration of ethical gaps not covered by the three Codes, I provide some examples of ethical issues from the Mrs. Green scenario.

### ***a) Examples of Ethical Issues Related to Capacity***

In the Mrs. Green scenario, the mediator must find answers to a number of questions. Here are a few examples:

- Does Mrs. Green have the capacity to mediate?
- How should the mediator determine if she has capacity?
- What course of action should the mediator pursue if Mrs. Green does not have capacity to mediate?

These are all important questions, and must be answered ethically. If Mrs. Green is not capable, the mediator should carefully consider how specifically to proceed and the potential consequences of the course of action on all parties. The three Codes provide ample guidance about how to assess capacity to mediate, including providing questions to assist mediators making this assessment. They also make it clear that, if Mrs. Green is not capable to mediate on her own, the mediator should determine if Mrs. Green has the capacity to mediate with support.

However, the Codes provide very little guidance regarding how a mediator should proceed if Mrs. Green is not capable of mediating with support. These documents do mention including a representative or surrogate, but in elder mediation there will be many

instances where it is not clear who that person is. If Mrs. Green does not have capacity to mediate, even with support, the mediator must decide on next steps. The mediation cannot proceed with Mrs. Green as a party, because she does not have decision-making capacity. The mediator has ethical considerations about whether to terminate the mediation and how specifically to terminate it.

Option A: The mediator could propose proceeding with mediation with a revised agenda that does not require any decisions by Mrs. Green. This agenda would be limited to issues related to the conflict between the adult children, rather than between the children and Mrs. Green. However, before suggesting this option, the mediator would need to assess if this was feasible and if there would be a benefit. The family may not be interested in mediating within this limited scope and, if they were, they may not be capable of keeping the conversation within the scope of the new agenda.

Option B: The mediator could terminate the mediation. However, the mediator would first need to consider his or her ethical duties upon termination, including these dimensions:

- The mediator should consider what follow up is appropriate upon termination. At a minimum, she should provide the family with referrals to other services or relevant resources before terminating as provided in the *EMC Code of Conduct*. However, caution is needed when selecting referrals. It may be appropriate to refer Mrs. Green for a medical assessment. It is normally good practice to send parties for independent legal advice. However, in this situation, the mediator should carefully consider whether this referral should be made. One family member is already threatening legal action to obtain a guardianship order. If the

mediator proposes independent legal advice, it is likely to result in some family members seeking advice and others not, with the situation becoming more litigious. Mrs. Green is unlikely to seek independent advice because she does not want conflict with her children. Also, because of her diminished capacity, she may have difficulty retaining counsel.<sup>169</sup> This would expose Mrs. Green to a high level of family conflict in which she likely would not be represented.

- There is a possibility that Mrs. Green is being financially exploited. If she is not capable, she may not recognize that this is happening, and therefore is unlikely to seek help on her own. If the mediator decides to terminate mediation, then he or she will need to decide if a legal obligation exists to intervene, such as reporting to outside authorities or telling other family members.
- Does the mediator have any responsibility to ensure that Mrs. Green does not come to physical harm after mediation? Mrs. Green will return to her home, where she may not be safe. For example, she may fall again. Does the mediator have any responsibility to ensure some safety measures are put in place? In my view, this depends on whether Mrs. Green is cognitively capable of understanding the risk of living alone. If she is, the mediator has no further ethical duty. If not, the mediator should weigh his or her ethical responsibilities carefully.

### ***b) Examples of Ethical Issues Related to Abuse***

In this scenario, Mrs. Green may be experiencing financial exploitation by Charlie. She also may be experiencing emotional abuse by other family members, who are

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<sup>169</sup>As well, lawyers may be concerned that she does not have sufficient capacity to give instructions, and may decline to represent her out of an abundance of caution.

pressuring her to make decisions that she does not want to make. The mediator should assess the situation further to determine if Mrs. Green will be harmed by participating.

Some examples of questions that could be asked by the mediator are:

- 1) Might Mrs. Green be exposed to emotional abuse if she participates in mediation?
- 2) Might the other parties use mediation to pressure or manipulate Mrs. Green into entering an agreement that is not in accordance with her wishes?

The *Model Standards* and the *EMC Code* both state that the mediator should intervene in situations where a participant is experiencing abuse or is being manipulated in mediation. According to the *EMC Code*, the “elder mediator must not permit manipulative or intimidating tactics on the part of any participant”.

This clause is drafted broadly and does not explain how much intimidation must exist before a mediator should intervene, nor what specific steps are allowable when a mediator is intervening. However, this also leaves room for a mediator to do further assessment and to base any decision on the facts at hand. On these facts, it appears the risk of further abuse in mediation is small, so the mediation should likely proceed.

***c) Examples of Ethical Issues in the Scenario Related to Power***

Mrs. Green may have less bargaining power than others in this situation. Charlie may try to use the mediation setting to further his possible financial exploitation, and the other circumstances including the family dynamic may make it difficult for Mrs. Green to

represent her interests. It is also possible that Mrs. Green may enter into an agreement that is not fair.<sup>170</sup> The indications that Mrs. Green may have less negotiating power are:

1. Mrs. Green stated that she would give away assets she is legally entitled to in order to keep peace with her children and to stay in her home.
2. There is some evidence that Charlie is financially exploiting Mrs. Green, but Mrs. Green doesn't believe this to be the case and is still willing to have Charlie help.
3. Family members have stated that they plan to apply to court to have Mrs. Green declared incapable.

The *Three Mediator Codes* supply very limited commentary about how mediators should proceed in situations where there are no safety issues, but an older adult has less negotiating power. Of the three documents discussed above, the only one that specifically addresses this type of situation is the *EMC Code*, which states that the elder mediator has “a clear duty to ensure balanced negotiations” and an obligation to guarantee that “each participant has an opportunity to speak, to be heard and to articulate their own needs, interests and concerns”. In the Mrs. Green scenario, if a mediator follows with the *EMC* provisions, the mediator will need to consider questions such as:

- What criteria should a mediator use to determine if an agreement between Mrs. Green and her family is fair?
- If there is a possibility that an agreement between Mrs. Green and her family may not be fair, under what circumstances should the mediator intervene?

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<sup>170</sup> Which, for the sake of this example, I am defining as “an agreement that provides Mrs. Green with less than she is legally entitled to, or that is contrary to her true wishes and interests”.

- To what degree can the mediator provide help and assistance to Mrs. Green without losing the appearance of neutrality?

These are difficult questions, which a mediator must answer based on the specific facts, and by weighing out the possible consequences of each option. In the next chapter, I present an ethical decision-making process that will provide valuable assistance to mediators facing complex questions like these.

## **E. Conclusion**

I began the chapter with a scenario illustrating ethical issues that arise in elder mediation. I then examined provisions from three mediator Codes of Conduct on issues of abuse, capacity and power dynamics and showed how these provisions apply when making ethical decisions related to the Mrs. Green scenario. I demonstrated that these codes of conduct provide clear direction on some issues, but not on others.

In the next chapter of this thesis, I present an ethical decision-making process. I argue that elder mediators should adopt this process, and that doing so will improve their ability to make sound ethical decisions.

## Chapter 7: Proposition for an Ethical Decision-Making Process

In this chapter, I describe a ten-step ethical decision-making process to better equip elder mediators to make effective ethical decisions. I begin with a rationale for thinking systematically about ethical decision-making, and follow with a description of an *Ethical Decision-Making Process* published by the *Canadian Psychological Association* (the “CPA’s *Ethical Decision-Making Process*”).<sup>171</sup> I argue that elder mediators should adopt this process, and that it can be used effectively in the elder mediation context. In order to illustrate how this process can be adapted to elder mediation, I apply it to ethical questions from the Mrs. Green scenario.

### A. Rationale for Ethical Practice

As I have established, even though it is essential for mediators to perform their work in an ethical manner, it is not always easy to do so. Many complex, ambiguous situations arise in mediation, particularly when participants have experienced abuse or have diminished capability. In these situations, there often are competing or unclear ethical considerations. The preamble from the *Training Objectives* recommends that elder mediators bear in mind the unique and complicated issues in this practice area and encourages mediators to take steps to deal effectively with ethical dilemmas:

[Mediators must understand the] ethical issues and the unique challenges of elder mediation....The best practice is to acknowledge that ethical issues exist on every level/facet of the mediation process, and mediators should be trained to identify ethical issues that might arise at any point, from intake to closure....[Mediators must be able to] examine a variety of situations where there are competing ethical values and weigh the benefits and risks of continuing or halting the mediation

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<sup>171</sup>This process is described in the Canadian psychologists’ code of ethics. See, Canadian Psychological Association, *Canadian Code of Ethics for Canadian Psychologists*, 4<sup>th</sup> ed (Ottawa: Canadian Psychological Association, 2000) [*CPA Code of Ethics*].



process and whether there are strategies to address or minimize the impact of the dilemma.<sup>172</sup>

Mediators must often make ethical decisions in situations where the facts are not completely known or are contentious, and in which the possible consequences of any decision may not be fully known. This is unavoidable, and is the main reason that a clear process of ethical decision-making needs to be followed.

Mediators and psychologists both face complex ethical issues in the course of their work. The *Code of Ethics* published by the CPA explains this: “some ethical issues (particularly those in which ethical principles conflict) are not easily resolved, might be emotionally distressful, and might require time-consuming deliberation.”<sup>173</sup> This applies equally to elder mediation.

To briefly illustrate this point, assume that a mediator develops a personal code of ethics for his own practice and prioritizes as a guiding principle that he refers to as “do no harm”. What happens in a situation where taking steps to avoid harm results in the mediator failing to fulfill competing ethical duties? Should the mediator only avoid doing harm if the amount of harm is significant, or does avoiding harm apply even in situations where the potential harm is small? This depends on the nature of the competing ethical duty and the consequences of not fulfilling either duty. When clients are affected, ethical decision-making is a weighty matter. If there are competing ethical duties, the mediator should consider the implications and consequences of prioritizing one duty over another. This is a challenging judgment that professionals should hone over time.

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<sup>172</sup> *Supra* note 17 at 6.

<sup>173</sup> *CPA Code of Ethics*, *supra* note 171.

Ethical decisions usually are made on a case-by-case basis as facts and circumstances vary. Often, a mediator may be unaware of some of the relevant facts or issues. Sometimes these facts may remain hidden. Nonetheless, the elder mediator must consider ethics in the context of what can be known and make the best possible decision.

As well, professionals must consider their own values when faced with ethical problems. For example, the *CPA Code of Ethics* states that the “responsibility for ethical action depends foremost on the integrity of each individual psychologist; that is, on each psychologist’s commitment to behave as ethically as possible in every situation.”<sup>174</sup> This is true of mediators as well.

Some mediators have developed personal tools to help them with this. For example, Sharpe argues that practitioners must develop a personal code of ethics to guide them, but she also acknowledges that it would not be possible to draft a code of conduct that provides for every possible ethical issue that might arise in alternate dispute resolution practice. According to Sharpe, the personal integrity of the professional is an essential ingredient to ensuring that choices are made in an ethical manner.<sup>175</sup>

Mediators also will benefit from having a reliable process to guide them when making decisions with ethical implications. To date, the mediation field generally has not developed or adopted an ethical decision-making process, but the *CPA* has done so. These provisions provide process guidance to psychologists, and also protect them from liability. As aptly explained by the *CPA*:

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<sup>174</sup> *Ibid* at 6.

<sup>175</sup> Susan Sharpe, *Walking the Talk: Developing Ethics Frameworks for the Practice of Restorative Justice* (Langley: Fraser Valley Community Justice Initiatives Association, 2011).

...psychologists are expected to engage in an ethical decision-making process that is explicit enough to bear public scrutiny. In some cases, resolution might be a matter of personal conscience. However, decisions of personal conscience are also expected to be the result of a decision-making process that is based on reasonably coherent ethical principles and can bear public scrutiny. If the psychologist can demonstrate that every reasonable effort was made to apply the ethical principles of this Code and resolution of the conflict has had to depend on the personal conscience of the psychologist, such a psychologist would be deemed to have followed this Code.<sup>176</sup>

In this chapter I argue that elder mediators should adopt the *CPA's Ethical Decision-Making Process*, and that by doing so, they will be better equipped to make effective decisions in situations where there are ethical implications.

## **B. Ethical Decision-Making Process**

The *CPA Code of Ethics* sets out a ten-step ethical decision-making process to guide the difficult choices professionals must make. The prescribed sequence is:

1. Identification of the individuals and groups potentially affected by the decision.
2. Identification of ethically relevant issues and practices, including the interests, rights, and any relevant characteristics of the individuals and groups involved and of the system or circumstances in which the ethical problem arose.
3. Consideration of how personal biases, stresses, or self-interest might influence the development of or choice between courses of action.
4. Development of alternative courses of action.
5. Analysis of likely short-term, ongoing, and long-term risks and benefits of each course of action on the individual(s)/group(s) involved or likely to be affected

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<sup>176</sup> *CPA Code of Ethics*, *supra* note 171 at 4.

- (e.g., client, client's family or employees, employing institution, students, research participants, colleagues, the discipline, society, self).
6. Choice of course of action after conscientious application of existing principles, values, and standards.
  7. Action, with a commitment to assume responsibility for the consequences of the action.
  8. Evaluation of the results of the course of action.
  9. Assumption of responsibility for consequences of action, including correction of negative consequences, if any, or re-engaging in the decision-making process if the ethical issue is not resolved.
  10. Appropriate action as warranted and feasible, to prevent future occurrences of the dilemma (e.g., communication and problem solving with colleagues; changes in procedures and practices).<sup>177</sup>

## **ii. Application to Ethical Issues in Elder Mediation**

Below, I demonstrate that elder mediators can effectively use the CPA's *Ethical Decision-Making Process* by applying it to the Mrs. Green scenario. However, I first summarize a few of the outstanding ethical questions not answered by the provisions in the three mediator conduct Codes.

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<sup>177</sup>*Ibid* at 5.

***a) Example – Capacity***

In the scenario, it is not clear if Mrs. Green has capacity to mediate. The mediator should apply the two-prong test for capacity to mediate, and has the option of using questions set out in the three mediator Codes to assist in making this assessment.

For the purpose of this illustration, I will assume that the mediator decides Mrs. Green does not have capacity to mediate on her own and also that she will have capacity with the help of a support person. At this point, the elder mediator encounters a number of ethical questions.

- What if Mrs. Green and the mediator agree about the choice of a support person, but the other family members do not agree with this choice?
- What if they refuse to mediate unless someone else is chosen?
- What course of action should the mediator choose then?

If these or similar questions arise, the mediator will be required to choose an appropriate course of action. The *Three Mediator Codes of Conduct* do not offer specific guidance on such issues, so the elder mediator must use her judgment after weighing the options, and the ethical implications of each choice. After due consideration, the mediator will choose the course of action that he or she believes is best. I argue that the mediator will be better equipped to decide on a course of action if the mediator follows the *CPA's Ethical Decision-Making Process* because it directs attention to multiple facets of the decision in a systematic way.

***b) Example - Elder Abuse***

In this scenario, there is evidence that Charlie may be exploiting Mrs. Green. She has been giving him money, and she does not want the mediator to divulge this to

anyone. Does the mediator have any responsibility to intervene? Should the mediator terminate the mediation, disclose the abuse to other family members or take other steps?

As noted with the last example, the three mediator Codes do not offer any guidance on these issues. As with the previous issue, the mediator will need to exercise judgment and will find the *CPA's Ethical Decision-Making Process* of assistance.

***c) Example – Management of Power Dynamics***

Mrs. Green's vulnerability to manipulation during mediation may increase due to several of the circumstances discussed earlier. If the mediator believes that Mrs. Green is being manipulated, and that she may enter into an unfair agreement, how should he or she proceed? The mediator will need to first make a decision about the extent of his or her ethical responsibility to ensure fairness, and second what course of action to take.

Following the *CPA's Ethical Decision-Making Process* will increase the possibility of making the best ethical decision possible under the circumstances.

**iii. Applying the CPA's Ethical Process to Elder Mediation.**

Below, I apply the *CPA's* ten-step ethical decision-making process to the Mrs. Green scenario. For each step, I provide examples of issues related to power, elder abuse or capacity arising from the scenario and discussed earlier in this chapter or in the previous chapter.

*Step One: Identification of the individuals and groups potentially affected by the decision.*

The persons affected by the decision are: Mrs. Green, her four adult children and Charlie. There also may be an impact on the mediator if he or she is practicing in jurisdiction that requires the mediator to report suspected abuse.

*Step Two: Identification of ethically relevant issues and practices, including the interests, rights, and any relevant characteristics of the individuals and groups involved and of the system or circumstances in which the ethical problem arose.*

The mediator should identify all the issues that may negatively impact Mrs. Green's ability to represent her interests in mediation. In this scenario:

- Mrs. Green wants to remain independent, while at the same time maintaining relationships with the family.
- Her adult children are worried about her safety and want to protect her.
- Charlie's mother will likely have an interest in protecting her relationship with her son, as well as in safeguarding his reputation.
- This is an extended family with long-standing relationship patterns. Some family members may have an interest in changing these, and others may have an interest in maintaining them exactly as they are.

*Step Three: Consideration of how personal biases, stresses, or self-interest might influence the development of or choice between courses of action*

The mediator should be aware of the stereotypes about older adults that are prevalent in society. It is important for anyone working with older adults, including mediators, to check for personal biases that they may not recognise in themselves. As discussed earlier, a common ageist belief is that older adults are frail and that they require assistance with decisions.<sup>178</sup> A mediator may not be aware that he or she has adopted some of these ageist stereotypes, and these may influence him or her to overemphasize the need for safety for Mrs. Green.

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<sup>178</sup> See Law Commission of Ontario, *supra* note 70 at c 3.

*Step Four: Development of alternative courses of action.*

In this situation, there are many different options for the mediator, especially because the mediator must consider more than one question. There are issues related to financial abuse, cognitive capability and power disparities. Following are just a few examples of choices the mediator could make in response to the situation:

- Cancel the mediation.
- Proceed with the mediation but focus only on issues that do not require a decision by Mrs. Green (since she may not be legally capable), such as conflicts between the adult children.
- Report the potential financial exploitation by Charlie to some, or all, family members.
- Inform the family that the mediator plans to take a more active role in the mediation with a view to protecting Mrs. Green's interests, because she is not legally represented and has cognitive challenges.
- Take a "wait and see" approach to mediation. Proceed and assume that Mrs. Green is able to represent her own interests, but watch for evidence to the contrary.

*Step Five: Analysis of likely short-term, ongoing, and long-term risks and benefits of each course of action on the individual(s)/group(s) involved or likely to be affected (e.g., client, client's family or employees, employing institution, students, research participants, colleagues, the discipline, society, self).*

At step five, the mediator must determine the risks and benefits of each potential course of action related to the concerns at hand. Although the mediator is dealing with



ethical issues related to capacity, power and abuse, for steps five through ten I will limit my analysis to ethical issues related to Mrs. Green's diminished capacity.

The mediator has determined that Mrs. Green is not capable to mediate unless she has assistance from a support person. However, if the parties cannot agree about the identity of that support person, it will be necessary for the mediator to choose a course of action. Here are three examples of options:

Option One: The mediator can negotiate with the family and Mrs. Green about who will act as a support person for her.

Possible impact on Mrs. Green:

- This approach may be harmful to Mrs. Green, as she may not be able to effectively express her preferences about who will support her.
- If someone is chosen that Mrs. Green does not trust or who actually favours other family members, that person may not be effective as a support person for Mrs. Green.

Possible impact on the Family:

- If, through compromise, someone who is not considered credible by the rest of the family is chosen to support Mrs. Green, this could present a significant obstacle to negotiations. For example, other participants may not trust the support person, and may discount anything that person says.

Option Two: The mediator can tell the family that he or she is not willing to continue with the mediation unless Mrs. Green is permitted to choose the supporter that she wants.

Possible impact on the Family:

- Other family members may interpret this as mediator bias in favor of Mrs. Green. Even though one of the foundational principles of elder mediation is to ensure that the older adult's voice is heard in mediation, other family members may not understand this value and may assume mediator bias even when the mediator's motivation is supporting the elder. The mediator could avoid this problem by explaining this principle to the parties. However, if the mediator fails to explain the decision and family members wrongly assume bias, trust may be undermined and negatively affect the mediator's ability to facilitate an agreement.

Possible impact on the Mediator:

- If family members see the mediator as being biased, this may make it more difficult for the mediator to win their trust.

Possible impact on Mrs. Green:

- If Mrs. Green is allowed to choose a support person, she may make a poor choice due to her cognitive deficit and that support person may not be able to effectively assist Mrs. Green in expressing her wishes.

Option Three: The mediator can agree to proceed with mediation but only on those issues that do not require a decision by Mrs. Green. If the mediator chooses this approach, the focus of the mediation would be narrowed, restricted to issues in dispute among the adult children. Other issues in dispute between Mrs. Green and her family would be removed from the agenda.

As noted above, this option may not be feasible. If the issues are too tightly intertwined, it may be impossible to contain the discussion within the smaller framing.

However, for the purpose of this illustration, I will assume the mediator determines that this option is feasible.

Possible impact on the Family:

- Family members may be disappointed. The family came to mediation to resolve the issues related to care for Mrs. Green. Although it might be useful to resolve conflict among extended family members about how to deal with the situation, ultimately the family may be dissatisfied with the results of a mediation that is far more limited in scope than what they were hoping for.
- This approach raises questions about the purpose of mediation. The parties came to mediation to resolve issues that have legal implications. That goal is far removed from resolving interpersonal conflict among some family members. As an alternative, the mediator could refer family members to other professionals to resolve the interpersonal or psychological issues. This could include counsellors or psychologists. It also could include a referral to lawyers who use a collaborative law approach.

Possible impact on the Mediator:

- The family may be unhappy with the outcomes of mediation, and they may criticize the mediator and the mediation process.

Possible impact on Mrs. Green:

- Mrs. Green will be excluded from mediation, and the conflict between her and the adult children will not be resolved.
- She may be left with the belief that the mediator has sided with her children.

- She also may be disadvantaged if her children use the mediation to agree on options or approaches to the situation that Mrs. Green is opposed to.<sup>179</sup>

*Step Six: Choice of course of action after conscientious application of existing principles, values, and standards.*

Since this is a hypothetical scenario, there is no opportunity to gather more information from family members. Therefore, it is impossible to know which of the above choices would be best. For the purpose of this analysis, we will assume the mediator chooses Option #2: The mediator tells the family that he or she will not continue to provide mediation services unless Mrs. Green is permitted to choose a support person. The mediator chooses this option because it aligns with and prioritizes one of the key values of elder mediation: ensuring that the older adult's voice is heard in mediation.

If this option is chosen, the mediator will need to take steps to explain this decision to the family and to demonstrate to the family of the benefits of allowing Mrs. Green to choose her support person. Assuming the family agrees, this approach will ensure that Mrs. Green has a support person with whom she is comfortable.

*Step Seven: Action, with a commitment to assume responsibility for the consequences of the action.*

There are several possible consequences of choosing option #2.

- Family members may be left with the impression that the mediator is biased in favor of Mrs. Green.

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<sup>179</sup> In my view, if the mediator allowed this to happen it would be an ethical problem. This illustrates one of the potential dangers of excluding the older adult from mediation. However, some elder mediators do proceed in this fashion. At the *Association for Conflict Resolution Conference* in New Orleans in 2012, I participated in several small group discussions where elder mediator attendees acknowledged mediating when the older adult is not present.

- Family members may not be willing to allow Mrs. Green to choose the support person, in which case it will not be possible to continue with mediation.
- Mrs. Green may choose someone to act as a support person who does not have appropriate understanding and skill.
- Mary may oppose the mediator's decision to allow Mrs. Green to choose a support person, given her belief that Mrs. Green is not capable of making this choice. She may question the mediator's professionalism on this basis.

*Step Eight: Evaluation of the results of the course of action.*

This step is self-explanatory, but the specifics will vary from case to case depending on the facts at hand. With the current illustration, any of the negative consequences outlined at Step Seven could occur. Evaluation of the results and consequences of choices is important because it ensures personal accountability and learning. Ethical decisions are ultimately personal decisions as well as professional ones, and if a mediator makes a decision with negative consequences, she must take personal responsibility and learn from the situation to improve future practice.

*Step Nine: Assumption of responsibility for consequences of action, including correction of negative consequences, if any, or re-engaging in the decision-making process if the ethical issue is not resolved.*

This follows logically from Step Seven. When the mediator tells the family that he or she will not continue the mediation unless the family allows Mrs. Green to choose the support person, one of two things will happen. Either the family will allow Mrs. Green to choose the support person or the mediation will end. If the mediation continues, the mediator will be required to deal with any difficult interpersonal dynamics that emerge as a result. For example, if family members do not like the support person, they may

interrupt and make it difficult for that person to provide support. The mediator will need to manage those dynamics.

If the family refuses to proceed with mediation, the mediator will need to consider what other supports and referrals would be appropriate in the circumstances. The mediator should not abruptly end the mediation without putting a suitable plan in place. This could include a referral to a family counsellor or to a health support worker. The mediator can ask the family what they feel would be beneficial, and can provide some service or practitioner recommendations to the family.

*Step Ten: Appropriate action, as warranted and feasible, to prevent future occurrences of the dilemma (e.g., communication and problem solving with colleagues; changes in procedures and practices).*

As discussed earlier, elder mediation is a new and evolving field. Therefore, this step is important, not just to the mediator faced with the decision, but to the mediation field. It is important for elder mediators to learn from experience and to make adjustments to their practice as they progress and learn. As mediators engage in this process, and create documentation explaining their own best practices and policies, the entire elder mediation field will benefit from the expansion of existing resources and information.

### **C. Conclusion**

In this chapter, I argued that elder mediators should adopt an ethical decision-making process developed by the *CPA*. I began the chapter with an explanation of why this process will be helpful for mediators who want to practice in an ethical manner. I then explained the process and demonstrated how elder mediators facing ethical issues, such as those in the scenario, can use this process.

It is essential for elder mediators to carry out their work in an ethical manner. However, identifying relevant ethical considerations are, and applying them to specific facts is often far from straightforward. The issues that arise in elder mediation are very complex, especially related to elder abuse, questions of capacity and power dynamics between the parties. In some situations, a perfect solution may not exist and the mediator will be required to choose the best option, but one that may have some negative impacts.

Elder mediators must take ethics seriously, and give full consideration to all the facts, circumstances and implications of each option. The ethical decision-making process that I outlined in this chapter will enable elder mediators to do so. By following this process, they will be better able to take into account the relevant considerations before choosing a course of action. An elder mediator who is following this process will also demonstrate a commitment to ethical practice.

## **Section IV: Summary and Recommendations**

In this final section I summarize the conclusions reached in this thesis. I also highlight some of the issues that require further research and make recommendations.

### **A. Summary**

Elder mediation is a growing practice area and offers a promising approach to resolve disputes between older adults and their family members or caregivers. However, there also are reasons for caution. Some experts have stated that older adults may be disadvantaged in mediation, particularly in situations where there is elder abuse or where the older adult has diminished capacity. This raises a serious concern, as elder mediators have an ethical responsibility to ensure that older adult participants are not harmed through participation in mediation.

In this thesis, I examined literature and laws related to elder mediation, elder abuse and capacity in order to identify situations where ethical concerns are likely to arise. I argued that, although older adults are not always disadvantaged in mediation, this may happen in situations where there is elder abuse or where the older adult has diminished capacity. I also explained that ethical issues may arise related to power differentials in situations where older adults are disadvantaged due to abuse, diminished capacity or external circumstances.

I then demonstrated that neither the law, nor expert opinion, nor existing codes of conduct provide sufficient guidance to mediators dealing with complex ethical issues related to elder abuse, diminished capacity and power dynamics. To remedy this, I argued



that the elder mediation field should adopt an ethical decision-making process. Such a process will assist elder mediators in making informed and justifiable ethical choices.

The highest priority for elder mediators should be to ensure that vulnerable or incapable older adults are not disadvantaged or harmed in mediation. Mediators who have fully incorporated a systematic approach to ethics will minimize the possibility of harm to older adult participants.

## **B. Recommendations for Further Research**

Several issues require further research. For example, elder mediators will be able to make more reliable decisions about when to terminate mediation and when to continue if there are better screening tools to measure risk where abuse is present. Further research is needed before it will be possible to develop these empirically tested screening tools. Here are some examples of other research questions arising from this work:

- Are older adults with diminished capability vulnerable to exploitation in mediation, and, if so under what circumstances is this most likely to occur?
- How should mediators manage power in situations where participants have diminished capacity?
- Do circumstances other than elder abuse or diminished capacity place older adults at a disadvantage in mediation and, if so, what are they?
- What techniques should an elder mediator use to screen for abuse, and how can an elder mediator determine what steps are appropriate in any given situation where abuse is present?
- How does the mediator decide what specific accommodations are necessary in situations where older adults do not have capacity without support?

These are just a few examples of research questions. The field would also benefit from further discussion of ethical issues, at symposiums or think tanks similar to the 2007 *Symposium*.

## **C. Conclusion**

At the outset of this paper, I identified three research questions; below, I briefly summarize answers to these questions.

### **i. Question 1**

*What professional responsibilities does the elder mediator have towards a vulnerable or incapable older adult participating in mediation?*

There is universal agreement in the mediation field that a mediator should intervene when necessary to ensure that participants are not subjected to abuse or manipulation during mediation. However, there are no established criteria for determining when manipulation is happening and there are no empirically based tools for assessing risk in elder mediation. Perhaps if it was possible to more precisely measure risk and consequences, then standards could be developed. Experts continue to disagree about which standards are appropriate, or how to develop empirically based standards. Therefore, the answer to this question is, “It depends on the circumstances, and the mediator must decide on a case-by-case basis”.

### **ii. Question 2**

*What ethical issues do elder mediators commonly face?*

Experts in the field agree that elder mediators face complex ethical issues on an ongoing basis. The most difficult ethical challenges arise when participants have diminished cognitive capacity or are victims of abuse. As well, there may be very

complex power dynamics between the parties in elder mediation. These raise many interlinked ethical questions about the mediator's role when an older adult participant is at a negotiating disadvantage.

### **iii Question 3**

*How should an elder mediator proceed when he or she faces these ethical issues?*

As discussed in the thesis, elder mediators are regularly faced with ethical questions, often with unclear possible results. Elder mediators need a reliable process for making ethical decisions in these situations and so would benefit by adopting the systematic approach to ethical decision-making used by Canadian psychologists. The CPA's ethical decision-making process is a ten-step approach that the elder mediator can use to gather information and weigh factors before deciding. An elder mediator who follows these steps will be better equipped to make the best ethical decision possible in any given circumstance.

## Bibliography

### LEGISLATION

*Adult Guardianship Act*, RSBC, 1996, c 6.

*Adult Interdependent Relationship Act*, RSA 2002, c A 4.5.

*Adult Protection Act*, RSNS, 1989, c 2-5.

*Americans with Disabilities Act of 1990 – ADA – 42 U.S. Code Chapter 126.*

*Criminal Code*, RSC 1985, c 46.

*Designated Agencies Regulation*, BC Reg 19/ 2002.

*Family Law Act*, SBC 2011, c 25, s 182-191

*Health Care (Consent) and Care Facility (Admission) Act*, RSBC, 1996, c 181.

*Long-Term Care Homes Act*, SO, 2007, c 8.

*Neglected Adults Welfare Act*, RSN, 1990, c 3.

*Patients Property Act*, RSBC, c 349, s 2-6.

*Power of Attorney Act*, RSBC 1996, c 370.

*Protection Against Family Violence Act*, RSA, 2000, c 27.

*Representation Agreement Act*, RSBC 1996, c 405.

### SECONDARY

*ADA Mediation Guidelines*, online: < <http://www.mediate.com/articles/adaltr.cfm>>.

Agusti–Panedera, Jordi. “Power Imbalances in Mediation: Questioning Some Common Assumptions” (2004) 59 *Dispute Resolution Journal* 24.

American Bar Association’s Commission on Law and Aging & American Psychological Association. *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (Washington: American Bar Association and American Psychological Association, 2005).

- Barsky, Alan. *Essential Aspects of Mediation in Child Protection Cases* (PhD Thesis, University of Toronto Faculty of Social Work, 1995) [unpublished].
- BC Abuse and Neglect Prevention Collaborative. *The Provincial Strategy Document* (Vancouver: BC Abuse and Neglect Prevention Collaborative, 2009), online: <<http://www.bcli.org/ccel/publications/provincial-strategy-document-vulnerable-adults-and-capability-issues-bc>>.
- Beck, Michael & Lana Kerzner. *A New Paradigm for Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010), online: <<http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>>.
- DeLila Bergan. "Introduction to Elder Mediation" (a lecture delivered at the *Association on Conflict Resolution's* Annual Conference in Reno, 9 October, 2015) [unpublished].
- Bertschler, John & Patricia Bertschler. *Elder Mediation: A New Solution to Age Old Problems* (Seven Hills Ohio: NSC Publishing, 2009).
- Boulle, Laurence & Kathleen Kelly. *Mediation: Principles, Process and Practice* (Vancouver: Butterworths, 1998).
- Brandl, B; C Heisler & L Steigel. "The Parallels Between Undue Influence, Domestic Violence and Sexual Assault" (2005) 17 *Journal of Elder Abuse & Neglect* 37.
- Braun, Joan. *Child Protection Mediation: Mediator Strategies for Managing the Process* (MSW Thesis, University of BC Faculty of Social Work 2007) [unpublished].
- Buchanan, Barbara. *Practice Watch: Acting for a Client With Dementia* (Vancouver: Law Society of BC, 2015), online, <[https://www.lawsociety.bc.ca/docs/bulletin/BB\\_2015-01-Spring.pdf#watch](https://www.lawsociety.bc.ca/docs/bulletin/BB_2015-01-Spring.pdf#watch)>.
- Canadian Centre on Elder Law. *A Practical Guide to Elder Abuse and Neglect Law in Canada* (Vancouver: Canadian Centre on Elder Law, 2011).
- Canadian Centre on Elder Law. *Elder Guardianship Mediation Report* (Vancouver: BC Law Institute, 2012).
- Canadian Centre on Elder Law. *Moving from Safety to Strategy: An Analysis of Key Canadian Elder Abuse and Neglect Cases* (Vancouver: Canadian Centre on Elder Law, 2011).
- Canadian Psychological Association. *Canadian Code of Ethics for Canadian Psychologists*, 4<sup>th</sup> ed (Ottawa: Canadian Psychological Association, 2000).

- Cayton, Harry. *Alzheimer's and Other Dementias: The 'At Your Fingertips' Guide': The Fully Updated and Comprehensive Reference Book For Alzheimer's and Other Forms of Dementia* (London: Class Publishing, 2002).
- Cobb, Sara & Janet Rifkin. "Foundation Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16 *Law & Social Inquiry* 35.
- Code of Professional Conduct for Mediators Specializing in Issues of Aging* (Waterloo: Elder Mediation Canada, 2011), online: <<http://www.eldermediation.ca/page5/page5.html>>.
- Cohen, Judith. "Making Elder Mediation Accessible to People with Disabilities" in Robert Rhudy & Carolyn Rhodis, eds, *Elder Mediation Today: Manual and Resource Guide* (Baltimore: Senior Mediation and Decision Making, 2009).
- Conrad, KJ, et al. "Self- Report Measure of Financial Exploitation of Older Adults" (2005) 50 *Gerontologist* 758.
- Craig, Yvonne. "Elder Mediation: Can it Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Careers?" (1994) 6 *Journal of Abuse and Neglect* 83.
- Crampton, Alexander. "Elder Mediation in Theory and Practice: Study Results From a National Caregiver Mediation Demonstration Project" (2013) 6 *Journal of Gerontological Social Work* 423.
- Doron, Israel. "Elder Guardianship Kalaedoscope – A Comparative Perspective" (2002) 16 *International Journal on Law Policy and the Family* 268.
- Edwards, Peggy. *Elder Abuse in Canada: A Gender Based Analysis* (Ottawa: Public Health Agency of Canada, 2011).
- Firestone, Gregory. "AFCC's Child Protection Mediation Guidelines" (a lecture delivered at the *Association on Conflict Resolution's* Annual Conference in New Orleans, 13 September 2012) [unpublished].
- Gerwurz, I. "(Re) Designing Mediation to Address the Nuances of Power Imbalance" (2001) 19 *Conflict Resolution Quarterly* 135.
- Gordon, Robert & Simon Verdun-Jones, *Adult Guardianship Law in Canada* (Scarborough: Carswell, 1992).

- Government of Canada. *Report of the National Seniors Council on Elder Abuse* (Ottawa, ON: Minister of Human Resources and Social Development, Minister of Health, and the Secretary of State for Seniors, 2007).
- Grillo, Tina. "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale Law Journal 1545.
- Groh, Arlene. *Restorative Justice: A Healing Approach to Elder Abuse and Mistreatment* (2003-2005) McMaster Journal of Theology and Ministry, online: <mcmaster.ca/mjtm5-1b.htm>.
- Ha, Lisa & Ruth Code. *An Empirical Examination of Elder Abuse: A Review of Files from the Elder Abuse Unit of the Ottawa Police Services* (Ottawa: Department of Justice Canada, 2013).
- Hall, Margaret. "Equity Theory: Responding to the Financial Exploitation of the Vulnerable but Capable" in Israel Doron, ed, *Theories of Law and Aging: Jurisprudence on Elder Law* (New York: Springer, 2009).
- Hartman, Susan D. *Adult Guardianship Mediation Training Manual* (Ann Arbor, Michigan: The Center for Social Gerontology, 2002),
- Heemsbergen, Luke & Asaf Sneeveer. "New Routes to Power: Towards a Typology of Power Mediation" (2011) 37 Review of International Studies 169.
- Holland, Louise. *Abandonment or Autonomy: How Do Social Workers Know the Difference?* (MSW Thesis, University of British Columbia Faculty of Social Work, 2011).
- Arlene Kardasis et al. *Mom Always Liked You Best: A Guide for Resolving Family Feuds, Inheritance Battles & Eldercare Crises* (Norwood, MA: Agreement Resources, 2001).
- Kelly, Elizabeth. "Mediation Disputes Involving Older Adults and People with Disabilities" Susan F. Buchanan & D. Wayne Stewart, eds, in *Colorado Elder Law Handbook* (Denver: Colorado Bar Association, 2004).
- Kelly, Joan B. "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention" (1995) 13 Mediation Quarterly 85.
- Kemp, B & L Mosqueda. "Elder Financial Abuse: An Evaluation Framework and Supporting Evidence (2005) 53 JAGS 1123.
- Kohn, Nina. "The Lawyer's Role in Fostering an Elder Rights Movement" (2010) 37 Wm. Mitchell L. Rev. 49.

- Lachs, Mark & Karl Pillmer. "Elder Abuse: How Would You Like to be Treated When You Are 75?" (2005) 364 *Lancet* 1263.
- Law Commission of Ontario. *The Law as it Affects Older Adult: A Draft Framework for an Anti-Ageist Approach to the Law* (Toronto: Law Commission of Ontario, 2011).
- Lundy M & S Grossman. "Elder Abuse: Spouse and Intimate Partner Abuse and Family Violence Among Elders" (2004) 16 *Journal of Abuse and Neglect* 85.
- Malamed, Yuvel; Israel Doron & Dan Scnitt. "Guardianship of People With Mental Disorders" (2007) 65 *Social Science and Medicine* 1118.
- Mariani, Kathryn. "Developing Ethical Standards for Elder Mediation: Questions Along the Way" (2007) 28 *Bifocal* 85.
- McCann-Beranger, J. "What is Elder Mediation" an excerpt from *A Caregiver's Guide to Alzheimer and Related Diseases* (Elder Mediation Canada), online: <<http://www.eldermmediation.ca>>.
- McCann-Beranger, Judy. *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse* (Ottawa: Department of Justice, 2010).
- Mixson, Paula M. "Public Policy, Elder Abuse and Adult Protective Services: The Struggle for Coherence" (2010) 22 *Journal of Elder Abuse & Neglect* 16.
- Model Standards of Conduct*, online: <[http://www.mediate.com/articles/model\\_standards\\_of\\_conflict.cfm](http://www.mediate.com/articles/model_standards_of_conflict.cfm)>.
- NHS Choices, Guide to Dementia* (Health A-Z website), online: <<http://www.nhs.uk/Conditions/dementia-guide/Pages/about-dementia.aspx>>.
- O'Conner, Deborah; Margaret Hall & Martha Donnelly. "Assessing Capacity Within a Context of Abuse or Neglect" (2009) 21 *Journal of Abuse and Neglect* 156.
- Podeneiks, Elizabeth et al. *A National Survey on Abuse of the Elderly in Canada* (Toronto: Ryerson Polytechnical Institute, 1990).
- Quinn, M & C Heisler. "The Legal Response to Elder Abuse and Neglect" (2002) 14 *Journal of Elder Abuse & Neglect*, 61.
- Rabiner, D; J O'Keeffe & D Brown. "A Conceptual Framework of Financial Exploitation of Older People" (2004) 16 *Journal of Elder Abuse and Neglect*, 53.



- Radford, Mary. "Is the Use of Mediation Appropriate in Elder Guardianship Cases?" (2002) 31 *Stetson Law Review* 611.
- Rhudy, Robert & Carolyn Rhodis, eds. *Elder Mediation Today: Manual and Resource Guide* (Baltimore: Senior Mediation and Decision Making, 2009) at 1.
- Rifkin, Janet; Jonathan Millen & Sara Cobb. "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9 *Mediation Quarterly* 151.
- Savoury, G; H Beals & J Parks. "Mediation in Child Protection: Facilitating the Resolution of Disputes" (1995) 74 *Child Welfare* 743.
- Semple, N. "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 *Canadian Journal of Women and the Law* 20.
- Smyth, Gemma. "Mediation in Cases of Elder Abuse and Mistreatment: The Case of the University of Windsor Mediation Services" (2011) 30 *Windsor Review of Legal and Social Issues* 121.
- Soliman, Sherif. "Capacity Considerations for the Eldercaring Coordination Process" (a lecture delivered at the inaugural *Eldercaring Coordination Training*, Columbus Ohio 9 July 2015) [unpublished].
- Sharpe, Susan. *Walking the Talk: Developing Ethics Frameworks for the Practice of Restorative Justice* (Langley: Fraser Valley Community Justice Initiatives Association, 2011).
- Thoennes, Nancy. "Mediation and the Dependency Court: The Controversy and Three Courts' Experiences" (1991) 29 *Family and Conciliation Court's Review* 246.
- Thomas, Cynthia. "The First National Study of Elder Abuse and Neglect: Contrast with Results from Other Studies" (2000) 12 *Journal of Elder Abuse and Neglect* 1.
- Training Standards Committee of the Elder Decision-Making and Conflict Resolution Section. *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary* (Association for Conflict Resolution, 2012), online: <[acrsection.weebly.com](http://acrsection.weebly.com)>.
- Turcotte, M. & G Schellenberg. *A Portrait of Seniors in Canada* (Ottawa: Statistics Canada, 2007).
- Watts, Laura & Leah Sandhu. "The 51<sup>st</sup> State – The 'State of Denial: A Comparative Exploration of Penal Statutory Responses to 'Criminal' Elder Abuse in Canada and the United States" (2006) 14 *Elder Law Journal* 207.

Williams, John. "Public Law Protection of Vulnerable Adults: the Debate Continues and so Does the Abuse" (2002) 2 *Journal of Social Work* 293.

Wood, Erica. "Addressing Capacity: What is the Role of the Mediator?" in Robert Rhudy & Carolyn Rhodis, eds *Elder Mediation Today: Manual and Resource Guide* (Baltimore: Senior Mediation and Decision Making, 2009).

Wood, Erica. "Symposium Article: Dispute Resolution and Dementia: Seeking Solutions" (2001) 35 *Georgia Law Review* 785.

World Health Organization. *Aging and Life Course* (Geneva: World Health Organization, 2012), online: <[http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/)>.

## Appendix A

### ADA Mediation Guidelines Section D

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

The surrogate and the person represented by the surrogate should be present and participate when possible. The mediator should encourage the surrogate to express the party's interests, values and preferences.

## **EMC Code of Conduct – Relevant Sections in Their Entirety**

### Section 4(d)

- 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 must recognize the need to balance the ethical rights of participants to make choices. Elder Mediators need to recognize participants' capacity to give consent or agreement to mediation services.
- The elder mediator must explore whether the participants are cognitively capable of engaging in the mediation process or if there are family members 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 that all voices are represented in the mediation process.
- 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.
- 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).

### 4(e) Fair Negotiations

- The elder mediator must endeavor to ensure that the participants reach agreements with informed consent, freely, voluntarily, and without undue influence.
- The elder mediator has a duty to ensure procedural fairness—that each participant has an opportunity to speak, to be heard and to articulate their own needs, interests and concerns.

- The elder mediator has a duty to ensure balanced negotiations and must not permit manipulative or intimidating tactics on the part of any participant.
- It is a fundamental principle of mediation that competent and informed participants can reach an agreement that may not correspond to legal guidelines contained in the relevant statutes or case law or that does not correspond with general community expectations and standards. However, the elder mediator has a duty to help the participants assess the feasibility and practicality of any proposed agreement in the long and short term, taking cultural differences into account

#### 8. Knowledge Regarding Elder Abuse

- Elder abuse should be an immediate concern when a mediator is asked to mediate an elder issue that involves older family members. It is important to be particularly diligent when the issues center on a family member who may have a cognitive impairment. Therefore, the elder mediator must have the following skills and awareness regarding elder abuse.
- Ability to assess for abuse and evaluate the appropriateness of mediation.
- Competence to take steps to ensure that information about dates, times, locations of abuse assessments, residential addresses and telephone numbers are not disclosed, unless abuse is present, to other family members or participants in cases involving abuse.
- An awareness as to when and if to refer the case to another professional, with expertise in abuse matters, for intake screening and assessment to determine whether abuse has affected a participant's ability to participate effectively in mediation.
- An understanding that mediation of the issue of abuse is never appropriate.

#### Where Abuse is Identified or Suspected

- When in doubt, the proper course of action is always to assume that face-to-face, facilitated elder mediation will be inappropriate cases involving past or present abuse.
- Alternatives to mediation such as shuttle mediation may be offered in serious abuse cases, but only by practitioners who have specialized education and training in this area.

- Elder mediators should inform all participants that mediators are not neutral in issues of abuse or safety and have a legislative duty to report past and present abuse, (if relevant that a vulnerable person is in need of protection under relevant legislation) and threats of future abuse or harm.
- Elder mediators have a duty to step out of a neutral role and to act to protect the vulnerable if a formerly abusive partner engages in intimidation or abuse during a mediation or shuttle negotiation process. Usually such behaviours will result in ending the mediation and referral to a service or process that offers additional protection.
- The elder mediator must take special care to ensure that any agreements reached in a case involving abuse are products of genuine agreement and not merely the product of financial or psychological vulnerability.