



Fulfilling Your Obligations on Mediation Capacity

by Judith Cohen

mediate.com
Supporting Effective Agreement

This article is a part of a collection on "Capacity to Mediate" that is posted at www.mediate.com/adamediation.

The mediation is going smoothly . . . the attorneys are cooperating . . . but the mediator is starting to get the feeling that the plaintiff is not following the proceedings. The plaintiff looks confused, and the few comments that he has made indicate that he doesn't understand the mediator's role . . . although the plaintiff's attorney is fully engaged in the mediation, he is not being particularly responsive to his client.



Mediators need to be concerned when parties face obstacles to self-determination, a core value in mediation. When a party appears to have difficulty comprehending the mediation process, or seems unable to participate actively, the mediator needs to step back and explore those obstacles with the party. As mediation has moved into the legal arena, where parties are normally represented by counsel, the mediator may be less concerned about the party's self-determination and informed decision-making.

But mediator codes of ethics consistently refer to the mediators' obligations to the parties – not to the representatives. Regardless of whether the parties are represented, the process is still there for them, not for the advocates.

The mediator described the first paragraph needs to caucus and check in with the confused party. If no adjustment can be made to enable the person's participation to a reasonable level, the mediator may need to postpone or terminate the session.

The five articles and the recommendation on ethical codes in this collection, respond to the issue of diminished mediator consideration of self determination. (Three of the articles were originally published in *Alternatives*, Vol. 21, No. 6, June 2003.)

[Kathleen Blank](#) leads off by discussing the danger of narrowly identifying capacity to mediate as a disability issue. Blank writes that associating disability with impaired capacity is rooted in a societal bias that people with disabilities are dependent and incompetent. She asks us to consider how bias leads to inaccurate capacity assessments when mediators lack the experience or comfort level to assist parties with cognitive or psychiatric disabilities appropriately. The flip side of the coin is that people without disabilities rely no less on mediators to support their capacity to mediate with various accommodations, including process adaptations.

[The recommended revision](#) of the Model Standards of Conduct, submitted by the ADR Committee and the Committee on Legal Issues Affecting People with Disabilities of the Association of the Bar of the City of New York, addresses the current bias that mediation

capacity has a primary impact on people with disabilities. The recommendation points out that when capacity issues arise, whether disability-related or not, the mediator has an ethical obligation to explore the issues with the party.

[Timothy K. Hedeem](#) , assistant professor of conflict management at Kennesaw State University, in Kennesaw, Ga., writes that the “maintenance of disputant self-determination is among the most important and defining characteristics of mediation . . . disputants must possess the capability to participate effectively in the process.” In his article, “Ensuring Self-Determination through Mediation Readiness: Ethical Considerations,” posted at the Web site noted above, Hedeem warns that “the mediation community should remain vigilant in promoting informed participation. . . . The assessment of mediation readiness, or mediation capacity--and the subsequent planning of process adaptations or whatever other methods will ensure such capacity--is an ethical obligation of the mediator.”

“There may be a ‘sliding scale of capacity,’” suggests [Erica Wood](#) , associate staff director of the American Bar Association Commission on Legal Problems of the Elderly continues: “[A] lower level of understanding might be required for consent to a flu shot than consent for chemotherapy or withdrawal of a respirator.” She cautions that “mediators should begin by assuming capacity and should be loathe to exclude a party based on lack of capacity . . . Yet mediators also must ensure that if a conflict is mediated, a party in fact can understand the process and abide by the outcome.” Wood’s article, “Addressing Capacity: What Is the Role of the Mediator?”

The awareness in the mediation field about accommodating people with disabilities, however, can translate into mediator skill in enhancing the mediation capacity of any party. In her article, [Patricia “Pattie” Porter](#) , identifies tools that mediators can use to help parties ensure their full participation in the mediation.

Finally, [Ellen Waldman](#) wrestles with the difficult question of mediator responsibility when a surrogate is charged with representing a disputant’s interests, but appears to be pursuing a different agenda. Mediation offers a valuable opportunity for people to exercise decisional autonomy. But when a disputant is reliant on a surrogate decision-maker who appears to be acting contrary to the disputant’s best interests, what is the mediator’s responsibility? Do we then view self-determination through a different prism? Waldman shares some valuable insights from the bioethics arena where such dilemmas are common.

Judith Cohen biography and additional articles:

<http://www.mediate.com/people/personprofile.cfm?auid=6>

July 2003

View this article at:

www.mediate.com/ADAMediation/editorial5.cfm

This article is provided by Mediate.com, the most visited dispute resolution site on the Web.

Mediate.com offers:

- Over 4,000 Free Articles
- Locate A Mediator
- Dynamic Web Site Systems



Designed & Developed by
[Resourceful Internet Solutions](#)
Home of [Mediate.com](#)

- MediatorDirect Area Code Placements
- Dynamic Statewide Banners See www.mediate.com