

ADR LUNCHTIME SERIES

“I’m sorry, mediation may not work for you!”

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[Judith M. Filner](#) – Mediator; Program Manager, Key Bridge Foundation Americans with Disabilities Act Mediation Program (2001-06); Program Officer, National Institute for Dispute Resolution (1991-97).

PROGRAM OUTLINE

I. Introduction

- A. What is the question that we want to address today?
- B. What Framework can we use to decide whether or not to refer someone to mediation or whether or not to end mediation when we encounter someone who just doesn’t seem to be capable of participating productively in the process?

II. Mediator’s Role/Program Manager’s Role

III. Competencies of participants

- A. What competencies does a mediation participant need to have? What skills and abilities does a mediation participant need to have?
 - understand the nature of the mediation process
 - trust the process
 - trust his/her own decision-making
 - make a decision
 - identify interests
 - determine and evaluate interests
 - generate and assess options
 - understand and weigh the consequences of an agreement
 - understand and weigh the consequences of not reaching an agreement
 - ability to understand the issues at hand
 - make an informed decision
 - understand the role of the mediator
 - communication skills
 - manage own emotions
 - gather and organize data

B. In addition to poor abilities in any of the above, what characteristics might you be observing when you are struggling with the belief that this person is not right for mediation? Examples:

- deceit
- lack of empathy (inability to see the viewpoint of the other person)
- failure to show, stonewalling
- inability to make a decision
- blame, overwhelming desire for “vindication”
- paranoia
- repeated inability to focus on an agreed-to topic
- persistent expressions of being confused or not understanding

IV. Mediator Standards of Conduct

STANDARD I. SELF-DETERMINATION

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

STANDARD VI. QUALITY OF THE PROCESS

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

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

V. Framework

Does this participant have sufficient competencies needed for mediation? **Is there a way a mediator or program manager might facilitate the existing competencies to improve or enhance the required competencies?**

- A. Basic Questions:
 - 1. Will participation by an attorney (or other support person) help?
 - 2. Will the approach of the participant with better mediation abilities enhance the process?
 - 3. How can I prepare this participant in advance of the mediation or in a separate session?
 - 4. Are there any adaptations to the process that I can make to facilitate the competencies of this participant?
 - 5. Will the selection of a particular mediator help?
 - 6. What conversation should I have with the mediator in advance?
 - 7. How can I support the mediator during the process?
 - 8. Are there any gender, race, or cultural issues that I can address to facilitate a more effective process?

- B. Facilitating Skill/Competency-Building – Examples for Discussion
 - 1. Stonewalling
 - 2. Inability to make a decision
 - 3. Righteous indignation/extreme emotion/desire for vindication
 - 4. Repeated inability to focus on an agreed-to topic