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## **From Determining Capacity to Facilitating Competencies: A New Mediation**

### **Framework**

**Susan H. Crawford, Lewis M. Dabney, Judith M. Filner, Peter R. Maida**

Abstract: To balance the needs of participants while maintaining the integrity of the mediation process, some in the mediation field suggest that mediators should determine whether or not a participant has the capacity to mediate. This article asserts that determining capacity limits parties' access to the mediation process, abridges civil rights, reduces mediator effectiveness, and erodes fundamental principles of mediation. It reviews the literature on determining capacity, explores the implications of this approach, and proposes a framework that centers not on legal or clinical practice, but on the theory and practice of mediation as a distinct field. The article proposes a shift in focus from making capacity determinations to actively facilitating mediation competencies.

## **Introduction**

Mediators have long held that they have a responsibility to determine whether participants have the capacity to mediate. This practice is promoted and commonly occurs in contexts such as workplace, ADA, family, community, landlord-tenant, and guardianship disagreements. Yet it raises practical, theoretical, legal, and ethical concerns that the practice is contrary to the fundamental principles of mediation. This article proposes a solution that focuses on how parties can participate effectively. This shifts the spotlight from the party to the mediator and has universal application across all areas of practice.

As currently used, the practice of determining party capacity evolved primarily from two mediator professions of origin, law and mental health. Capacity signifies something different to each professional group. Interventions based on problem-solving techniques from professions such as the law, mental health, medicine, psychology, human resources, and finance often have goals other than facilitating the ability of the client to participate in a process that relies on self-determination and collaboration. This has left mediators to fend for themselves in addressing questions of party capacity with vague notions about what to look for to determine whether mediation is appropriate. Consequently, mediators rely on their own personal experiences and on frameworks from their professions of origin.

Addressing capacity to mediate in training courses usually consists of a cursory mention of incapacity to mediate and how to terminate a session when one or both parties are not capable. Or, in discussions of diversity of clients, the issue becomes whether the mediator has the competency to mediate because of gaps in her or his understanding of cultural differences. The carry-over of assumptions from professions of origin to determine appropriateness of mediation

is haphazard at best, perhaps violates certain principles of mediation, and jeopardizes the legal rights of parties.

The conclusion that mediators have a responsibility to determine party capacity appears at first glance to be consistent with the Model Standards of Conduct for Mediators, adopted in 1995 by the American Bar Association Section of Dispute Resolution, the American Arbitration Association (AAA), and the Society of Professionals in Dispute Resolution (SPIDR), now the Association for Conflict Resolution (ACR). The Comments section of The Model Standards states that, “A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity” (1995, art. VI). However, rather than viewing this statement in isolation, it should be considered as part of the larger context of the standards consistent with its fundamental principles. Using the Standards as guideposts, this article proposes a shift in focus from the mediator as one who judges incapacity to one who actively facilitates participants’ mediation competencies. The Standards assert that “...mediation is based on the fundamental principle of self-determination by the parties” (1995, art. I). Additionally, “Mediator impartiality is central to the mediation process” (1995, art. II), and the Standards caution, “A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background, or performance at the mediation” (1995, art. II). The Standards require that a mediator “...conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties” (1995, art. VI). The Standards further hold that mediators have an obligation “...to make mediation accessible to those who would like to use it” (1995, art. IX).

This article reviews the literature on the issue of determining party capacity to mediate, explores specific implications of this approach, introduces a new conceptual framework to focus on facilitating mediation competencies, and suggests some initial practice considerations.

### **Review of the Literature on Capacity**

Capacity has been examined extensively in many fields. These efforts have led to the development of specific protocols for determining capacity. For instance, in medicine physicians follow a strict protocol to determine a patient's capacity to make treatment decisions. These often involve multiple reviews. In the field of philosophy of mind considerable attention has been focused on determining the intentionality of others.

The mediation field has not developed fully a view of capacity that is consistent with fundamental mediation principles. Some writers (Clement & Schwebel, 1997; Coy & Hedeem, 1998-1999; Gary, 1997; Maida, 1995; Myerson, 2000; Nolan-Haley, 1999; Retzinger, 1990; Wood, 2001) have called for a careful look at how mediators consider the issue. In reviewing mediation literature that discusses capacity, two assumptions emerge. First, questions about capacity are limited generally to cases in which a person's psychological, including cognitive, abilities are questioned because of either some behavioral manifestations or preexisting information about the individual. Sometimes this information emerges in an Americans with Disabilities Act (ADA) complaint, or when allegations of abuse arise. The second assumption is that a mediator "determines capacity" before beginning a mediation session, at intake or some other mediation preparation stage.

Bruce Meyerson's (2000) examination of guidelines for mediators of ADA workplace complaints provides insight into how mediators, particularly those with a background in law, look at party capacity. He defines the capacity a party needs to participate in mediation as the

ability to enter into a settlement agreement or contract knowingly and voluntarily. To achieve this goal, 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’ ” (Meyerson, 2000, p. 5).

According to Meyerson, the guidelines “distinguish the capacity to mediate from legal capacity” (2000, p. 6). Meyerson explains that the guidelines direct that a person “determined to be legally incompetent may be able to participate in a mediation, while a person who has not been adjudicated incompetent may not” (2000, p. 6). At the same time, however, the guidelines suggest that mediators need to determine capacity. Meyerson asks: “Should this determination be made in every case or only when capacity seems to be in issue?” He concludes that the guidelines seem to indicate that a mediator should only make the determination in the latter case (2000, p. 5). Thus, according to Meyerson, the guidelines provide that “ ‘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’ ” (2000, p. 5). The guidelines also “direct the mediator to determine whether the party can assess options and make and keep an agreement. In making this determination, the mediator should not rely solely on the party's medical condition or diagnosis” (Meyerson, 2000, p. 5).

Notably, Meyerson questions whether the mediator is qualified to determine a party's capacity altogether. “Mediators generally are not behavioral health professionals and thus may lack the skills to make an informed decision. When *bona fide* questions arise about a party's capacity that are beyond the mediator's ability to decide, the mediator might consider adjourning the mediation to allow health professionals and others with appropriate backgrounds to contribute to the dialogue” (2000, p. 6).

Others have cautioned about mediator judgments in cases involving mental disabilities. (Clement and Schwebel, 1997; Maida, 1997; Retzinger, 1990). In an article advocating for the use of mediation in probate disputes, particularly those related to adult guardianship and inheritance, Susan Gary (1997) expresses the belief that many factors, including power imbalances, grief, lack of knowledge, anger, hostility, guilt, fear, depression, suspicion, and “fluctuating capacity” of parties, affect the mediation process and make satisfactory resolution of the conflicts difficult (p. 408). Although Gary provides a set of policy recommendations on the use of mediation in probate disputes, her article presents, rather than resolves, the dilemma for mediators to remain consistent with their own ethical obligations while not serving in the role of judge or mental health professional by making a determination of capacity.

Patrick Coy and Tim Hedeem (1998-1999) caution that rushing to judgment on the issue of capacity could jeopardize the principles of individual empowerment upon which the mediation process developed. They suggest that the bar be set too low in order to allow more people into the process, rather than to set the bar too high and preclude mediation (p. 120). Coy and Hedeem advocate the use of minimalist screening criteria and development of service networks to support participants. They distinguish between “making a determination” of capacity, using a medical or legal model, and looking at “mediation readiness” (Coy and Hedeem, 1998-1999, p. 118).

For these authors, the underlying integrity of the mediation process can best be protected if the mediation movement “...fashions a creative, useful tension between protecting the integrity of the mediation process and meeting the conflict resolution service needs of all members of the community” (Coy and Hedeem, 1998-1999, p. 120). To this end they propose a “minimalist” list of disputant capabilities that must exist for the mediation to be an appropriate forum for the parties. These include: how issues are connected; ability to focus on one issue at a

time; understanding cause and effect; taking responsibility for one's own actions; timeliness in scheduling and establishing deadlines; identifying desired outcomes; and understanding the mediator's role (p. 121). The authors report that Sarah Childs Grebe concludes in her 1989 article that a party's capacity to mediate varies throughout the mediation process (1999, p. 117).

Erica Wood (2001) has noted that a bright line to delineate capacity does not exist, leaving a considerable gray area. Observing that dispute resolution and dementia can seem almost like a contradiction in terms, Wood concludes that the mediation process can be adjusted to account for the needs of some parties with dementia.

Nolan-Haley (1999) underscores that capacity is not a fixed condition and that it is impacted by a variety of settings. She states that even if one is adjudicated to have impaired capacity that does not mean that one lacks capacity in all situations. She implicitly uses mediator ethical standards for the analysis of an issue that goes hand in hand with understanding party capacity to participate in mediation. The focus of her article is on the notion of informed consent. She asserts, "The idea of consent is important in mediation and triggers a number of questions about whether that consent is based on a true understanding of what is occurring" (p. 776).

Nolan-Haley believes that in mediation parties make knowledgeable choices about using the mediation process and about accepting the terms of proposed resolutions, "informed consent" (1999, p. 776). Perhaps more than any other analysis, Nolan-Haley's comes the closest to explaining how informed consent is related to whether or not a party has the ability to participate in mediation. She seeks clarification of the concept of informed consent because "The principle of informed consent promotes respect for the fundamental value of human dignity in several aspects of mediation decision making" (1999, p. 791).

Nolan-Haley distinguishes between agreement to mediate, and autonomy in decision-making within the mediation. She believes that “Informed decision-making and the exercise of self-determination in mediation presuppose capacity to choose and knowledge to make choices” (1999, p. 817). But, for Nolan-Haley, as other writers on the topics of self-determination and party capacity have concluded, at least implicitly, party incapacity is still something a mediator determines.

### **Implications of Making Mediation Capacity Determinations**

To safeguard the integrity of the mediation process, most of the literature suggests, with reservation, varying levels of gatekeeping by the mediator in the form of determining party capacity. To perform this function, mediators turned to legal and mental health professions to borrow a framework for determining capacity. However, just as mediation can resolve legal disputes, but is different from litigation and arbitration, so too, mediation can provide a therapeutic benefit, but is distinct from psychotherapy. Using intervention frameworks and concepts from the law and mental health professions may violate the rights of the parties and the ethical standards of conduct for mediators.

Mental health clinicians do not diagnose the broad term “capacity.” They assess specific levels of functioning; clinical assessments in psychology, social work, and medicine occur under specific training and procedural restrictions to ensure a safe environment for those undergoing such assessments. Not all mediators have a clinical background. Moreover, the mediation field generally does not have training, protocols, or assessment tools specifically designed to make determinations of party capacity to mediate.

An in-depth intake process for the purpose of determining party capacity seems inconsistent with a short-term intervention such as mediation, and would not likely provide a

reliable assessment process. Upon initial intake, individuals may not reveal information in areas where they experience vulnerability such as current involvement in domestic violence, medical conditions, physical and mental disabilities, and medication. It is not uncommon in a clinical setting for this information to surface later in a treatment process. Absent adequate training, appropriate assessment tools, and reliable participant information, the mediator faces a significant risk of making an inaccurate determination. Reaching incorrect conclusions can have dire consequences for the parties, and creates issues of liability for mediators.

Moreover, individuals have a right to be aware that they are being assessed. The mediation literature does not clarify this, raising concerns that mediators may make capacity determinations without the knowledge or consent of the parties. This assumes even greater importance in mediation, because of its intersection with the fundamental principle of self-determination of the parties.

In law, when a person is not able to make decisions about their health, well-being, finances, and other important areas, that person can be found incompetent. Only a judge can make a determination of incompetency. This is considered such a serious deprivation of rights that the judge must follow a very high standard of proof that of clear and convincing evidence, to conclude that a person is not competent. The law presumes that all adults have the right to make their own decisions, and are competent until they are proven to be otherwise (O'Sullivan, 1998, p. 12). A mediator is not a judge. Thus, any process that involves the mediator making a determination of party competency or capacity lies outside the scope of mediation.

The concept of capacity implies a static state. While the literature suggests (Coy & Hedeem, 1998-1999; Gary, 1997; Nolan-Haley, 1999; Wood, 2001) that capacity is fluid, it focuses on what mediators should do when a participant's capacity is impaired or diminished.

This implies that either a party has the capacity to mediate or not. The term “capacity” may mislead mediators, and make a complex individual unidimensional. It centers solely on the party, not the mediator’s abilities, the relationship between the mediator and the parties, nor the inter-relationship of the parties.

Discussion about capacity in mediation usually focuses only on disempowered individuals, thereby keeping them forever captive by the terms used to describe their incapacity. Focusing on individual capacity has other implications. It creates an over-simplification not only of the individual, but also the relationship between the party and the mediator. An individual’s capacity in mediation is interactive. That is, the capacity of an individual is often intertwined with the relationships that individual has with others in the mediation. Optimally, mediation practice acknowledges and incorporates multiple competencies, individual and group, as well as procedural or dynamic processes. The role of the mediator is to facilitate these multiple competencies. Focusing on whether a party has capacity limits the mediator in assisting the parties to exercise self determination, autonomy, and collaboration.

Another complication associated with determining capacity arises when mediators might not have the authority to stop mediation on the basis of their opinions about participant capacity. For example, when a court decides to use mediation to resolve a disagreement, the court usually assigns a mediator with the expectation that mediation will proceed.

A determination that a party has impaired or diminished capacity may create bias, threaten mediator impartiality, and undermine party self-determination. In addition, mediators have an obligation under the Americans with Disabilities Act (ADA) not to discriminate on the basis of disability. Discussion of withholding mediation services from individuals because of a determination of diminished capacity raises a giant red flag with respect to discrimination. Just

as mediators caution against the unauthorized practice of law, mediators must recognize that the diagnosis of mental conditions lies outside the practice of mediation. The presence of a mental or physical disability, as noted by Meyerson (2000), does not mean that a person lacks capacity or has impaired capacity. Current practice lacks assessment tools, adequate participant information, and expertise. A high probability exists that mediators will rely on misinformation, bias and stereotypes to determine capacity significantly increasing the potential for unlawful discrimination.

The issue of capacity seems to take on greater importance when disagreements involve a high level of emotional expression. If mediators make capacity determinations only when they perceive that a capacity issue exists, this conclusion may stem from prejudice and stereotype or the mediator's inability to work in an emotionally charged environment. To conduct a determination of capacity only for some parties by an in-depth intake process subjects those individuals to undue inquiry and unequal treatment, both contrary to the ADA. In addition, mediators are not permitted to require an individual to disclose specific information about a disability. Without a process applicable to every participant, appropriate assessment tools and accurate intake information, the integrity of the mediation process is compromised. The challenge is to construct a framework specific to the principles and ethical standards of mediation.

### **Proposed Conceptual Framework**

In mediation literature, the terms capacity and competency are used interchangeably and describe the ability or inability of a person to participate in mediation. In the sections that

follow, we introduce the term competencies to refer to the myriad of abilities used to access mediation.

We propose a semantic and conceptual shift given the limitations and potential hazards of “determining capacity” in the context of mediation. Mediators have an ongoing legal obligation under the ADA to make their services accessible to persons with disabilities, and thus need to develop non-discriminatory language to describe the actions of every person in mediation without singling out people with disabilities. As a start, we propose a re-orientation away from “determining capacity” to “facilitating competencies.”

First, a striking difference between “capacity” and “competencies” is that the latter is plural. Capacity (or competency) connotes a fundamental one-dimensional ability or failure to measure up to a particular norm, while competencies immediately suggests a variety of proficiencies with respect to the norm. Additionally, capacity and competency have definitional implications in law and mental health that create a mind-set for mediators that encourages them to make assumptions that the mediator should “determine capacity.”

Competencies may shift over time. Facilitating competencies requires constant and ongoing engagement on the part of the mediator. Thus, facilitation is a process continuing throughout the mediation, not just at intake or before a session begins. Capacity implies an authoritarian power hierarchy based on objectification born of measurement. Facilitating competencies emphasizes the mediator’s primary role, that of a facilitator, who acts, not as an authority over the parties nor as an equal partner in mediation, but as a catalyst for the parties to actuate their self-determination and collaboration competencies. By facilitating competencies mediators address issues of power imbalance. A detailed discussion of facilitating competencies and balance of power issues requires further exploration beyond the scope of this paper.

The term “competencies” suggests two things. That a person may have many abilities, and that an individual ability may vary. As mediators manage change, parties can strengthen their mediation competencies. Implicit in this more dynamic formulation is this prescriptive role for the mediator. To facilitate competencies suggests collaborative work with parties to support their abilities to mediate based on the principle that competencies can emerge and develop. With this orientation the mediator is actively engaged in supporting the mediation process. A shift occurs in focus from detached analysis to supportive engagement. One is not simply measuring parties’ abilities, but checking in regularly as the process unfolds to register how those abilities shift, and then taking steps with the party to support behaviors that are conducive to mediation. Perhaps a participant may need additional time to process questions of math. Perhaps an advocate is needed. Perhaps having regular breaks would give all parties the space to maintain composure.

Important differences distinguish the words determining and facilitating. Fundamentally, a determination reaches a conclusion while facilitation supports a process. Determination can reify a state by giving it greater permanence than it may have while facilitation invites exploration and allows for change. Facilitating in this manner creates a space between perception and conclusion. The mediator observes a behavior, and rather than reaching a conclusion as to a party’s fundamental state, the mediator notes the behavior and initiates an interaction with the party to support the party’s self-determination.

Deciding for a party that they do not have the requisite capacity creates a disconnect within the mediator’s primary role to facilitate a process of collaboration and self-determination by the parties. The mediator sets a tone that promotes respect and safety, which are prerequisites for supporting self-determination and collaboration so that parties are able to create with the

mediator options appropriate for them. Although parties may not initially self-disclose information about which they may be vulnerable, the mediator, by remaining congruent in a facilitation role throughout the mediation process, creates an environment in which a party may be safe enough to begin to discuss difficult topics.

The party and the mediator work together actively and cooperatively to enhance mediation competencies. For example, a mediator facilitates a party's decision to take additional time in order to comprehend financial information. A mediator supports an individual's self-determination when the party decides to take a break after a strong emotional exchange. A mediator and a hostile, positional attorney may review the distinctions between litigation and mediation so that the attorney transitions toward cooperation to generate solution options.

Mediators may cultivate their own competencies to reflect party behavior without leaping to conclusions, and work to strengthen parties' competencies to optimize their satisfaction in a voluntary, informed agreement. Facilitating competencies defaults to inclusion in the process in a way that determining capacity does not. Adoption of a practice of facilitating competencies can apply to every individual, regardless of personal characteristics, every dispute, regardless of complexity, and every mediator, regardless of philosophical approach or style of practice. This framework provides for a consistent and congruent process utilized by the mediator from intake through completion of an agreement. Coy and Haydeen (1998-1999), Meyerson (2000), Wood (2001), and Nolan-Haley (1999) pointed to the direction this framework should take. The framework builds on the principles contained in the Model Standards of Conduct for Mediators, focusing on article I, self-determination, and article VI, quality of the process.

Adherence to facilitating competencies does not mean that all mediations should proceed, or that every dispute can be resolved through mediation. Certainly, mediators face situations that

present legitimate questions about whether an individual has sufficient understanding of the process, knowledge of options, ability to make choices, and understanding of the consequences. However, facilitating competencies reinforces the development of self-determination and collaborative activities. In many situations, parties do not initially present these competencies, but through the expertise of the mediator, parties can begin to develop and express their mediation competencies.

Persons with mental disabilities, who are often excluded in a capacity determination framework, can develop and exercise self-determination and collaboration competencies through an interactive facilitative process with a mediator. Individuals with mental disabilities articulate what supports, if any, they would like in order to make their own decisions, including when to postpone a session, when to take a break, and when to stop the process altogether.

The mediator and a party do not always reach a mutual understanding of a party's mediation competencies nor develop mutually acceptable supports to build these competencies. In such situations, a mediator withdraws from or suspends the mediation. This step is not taken because of a unilateral, external determination of incapacity, but because the mediator and the party did not create an understanding as to how to proceed. This outcome is anticipated to occur much less frequently using a competencies facilitation framework than following the current trend in practice of determining capacity.

Consequently, the competencies facilitation focus provides a congruent role for the mediator from intake through completion of the mediation. This framework clearly delineates the role of the mediator from the role of an attorney or a psychotherapist. It has a specific frame of reference rooted in the fundamental principle of party self-determination, and provides for consistent expectations on the part of participants.

## **Practice Considerations**

Most mediators would agree that in order for mediation to take place, certain conditions must be present: parties must understand the role of the mediator; they must understand the mediation process; they must be able to identify their own interests and understand the expressed interests of other parties; they must understand and be able to carry out their agreements. However, practitioners realize these conditions seldom obtain. It is not a matter of determining whether a party has these competencies; the mediator's effectiveness is enhanced by facilitating the development of these competencies in all parties.

Facilitating competencies results in exposing a variety of opportunities that parties, including the mediator, can consider in order to meet their needs in the problem solving process. The mediator has a choice, and every party has a choice. Although facilitating competencies is important throughout the mediation it is crucial at the beginning of the mediation for several reasons. First, the mediator avoids the trap of determining capacity. Second, if parties routinize their interactions with the mediator early on, they learn that they have a distinct right to assess whether the access to the process is sufficient. Mediators have many skills. What follows is a discussion of some presenting issues and the mediator skills used to facilitate competencies. The list is not intended to be all-inclusive. Also, for analytical purposes these activities have been isolated; in actuality, the activities are interwoven making facilitating competencies seamless.

What behaviors and situations would a mediator recognize as indicators to begin or continue the competencies facilitation process? The prompts may arise from the presentation of parties before or during the mediation, and from the context of the mediation. Presenting behaviors include, for example, confusion, anxiety, apprehension, anger, adversarial

confrontation, intimidation, highly charged emotional interaction, intellectualization to the exclusion of emotional realities, and a party's lack of knowledge about his or her rights and options. Indicators also may appear in contexts involving potentially disempowering situations, such as, the care of an elderly person, homelessness, domestic violence, and self-identification of mental disability. The mediator does not stop the process at this point because of "diminished capacity"; rather, these presenting issues and behaviors serve as a flag to alert the mediator to focus on facilitating the development of competencies of all the parties.

The first mediator activity in the competencies facilitation process is the *ongoing needs assessment*. Participants in mediation do not have static needs. Mediators must be prepared to assess what can be done at any point in the mediation to facilitate the competencies of the parties in a manner that helps the mediation reach a common goal that the parties wish.

*Reflecting back* represents another component of facilitating competencies. Mediators may take the parties through a review of what has happened in the mediation to determine if any impediments to access to the process developed in the near past. The mediator will also be reflective about what has occurred in the interaction between everyone in the mediation. A past-generated impediment may need some focus for the mediation to proceed.

*A discussion of the possibilities* provides the opportunity for parties who have questions about what is happening or who demonstrate difficulty with the process to determine what they wish to do. Just as a mediator will help parties develop options in the mediation process itself, facilitating competencies involves looking for options that open the process for parties who may not have access. The mediator may utilize option building or brainstorming, in caucus or in joint session, not about how to resolve the disagreement, but about what a party might need to continue with the process. The mediator or any other person can be a resource to provide clarity

and safety if needed. For example, a homeless individual with cognitive difficulties requests that the cook in his facility attend the mediation with him. That resource person serves as a trusted and helpful support to the person throughout the mediation.

*Removing barriers to party choice of options* is an important part of facilitating competencies. The role of the mediator consists of removing barriers to the operation of individual choice. These barriers can be personal or external to the individual. A distinction exists between self-determination and removal of barriers to party choice. The profession has focused on the importance of self-determination but less on the specific role of the mediator when a party self-determines. One of the best ways to identify barriers that exist is to ask a party to describe why a decision may be difficult to make. The mediator, without compromising impartiality, makes inquiries as to what is necessary for the party to make a decision.

*Time considerations* play an important role in mediation. Different parties have different needs with respect to time. Facilitating competency may involve reconsidering the needs of the parties. What may appear as resistance in mediation may have much to do with the needs of a party for more time to process information or be more secure with the task. Certain transaction costs occur when facilitating competencies, and may increase the amount of time for a mediation session. Yet, when the mediation meets the needs of the parties, time is no longer a barrier to access.

*Balancing cognitive and emotional components of decision-making* is another focus for facilitating competencies. As noted earlier, removing barriers to party choice of options references the mediation principle of self-determination. Not only is this a principle but it is also a competency. Customarily, self-determination is considered from the point of view of how the mediator must allow its expression. Here, this principle is reframed from the point of view of

what a mediator must do to facilitate it. Self-determination, as it applies to parties, has both cognitive and emotional aspects. This means that before self-determination can be expressed, some balance has to be achieved between the emotional and cognitive grounding of the individual. It is the work of the mediator to help parties assess and then achieve the type of balance they need to make the mediation effective. It is important to remember that parties may have individual needs with respect to this balance.

Achieving the balance calls on mediators to use skills already in their repertoire of expertise in the mediation field. Problems can be fractionated for building solutions. It is difficult for parties to see how their cooperation will enhance each other's needs. Communication must be of the collaborative style rather than characterized by battling. Parties must be able to apply principles they both accept to guide their interactions. To collaborate, they must be able to understand each other's interests whether they agree with them or not. Other methods of facilitating competency would include having other people act as facilitators of particular competencies, such as providing information or technical expertise, emotional support, or to serve as an advocate or representative.

The mediator also facilitates the person's desire to have their "world view" integrated into the mediation session or final agreement. The desire to incorporate a worldview into the mediation or the agreement may appear to the mediator as a reason to discontinue the mediation. The challenge for the mediator is to facilitate the competencies in all parties that allow their world view to remain intact at the same time coming to an agreement that represents their mutual interests.

The literature suggests many areas mediators address when determining capacity. Mediators can focus on these same areas to facilitate competencies, rather than determine

capacity. These areas include: party understanding of the nature of the mediation process; who the parties are; the role of the mediator; the parties' relationship to the mediator; the issues being discussed; the story of the other party; opinions about the subject under discussion; possible solutions; and making and keeping an agreement.

Mediators can use many of the questions developed for determining capacity by changing the purpose of the question from gatekeeping to supporting participation. In her training for mediating adult guardianship cases, Susan Hartman proposes circumstances in which the individual, who is the subject of the guardianship consideration, can participate in the mediation session. Hartman provides eight questions for the mediator to consider that are relevant to whether the individual is able to participate. If the answer is "no" to one or more of the questions, she suggests that the mediator "explore physical or communication accommodations" that would enable the respondent to participate. If, however, with accommodations there are remaining "no" answers to the eight questions, she suggests that the mediator explore whether the respondent can communicate well enough with a representative that together they can answer "yes" to the questions. While Hartman's approach moves beyond a static capacity determination, a competency facilitation framework calls on mediators to use an interactive, client-centered approach that builds support for participation and moves away from gatekeeping functions.

Throughout this discussion the question arises as to whether facilitating competencies has any relevance to protecting civil rights. When mediators facilitate competencies they provide access to a process. All parties have a right to use the services of a mediator. Facilitating competencies creates a way to ensure access and protect civil rights at the same time. Practice considerations relate to the ethical duties of a mediator. It is recommended that further

consideration of standards of practice or guidelines for mediators incorporate a competencies facilitation framework.

## **Conclusions**

This article proposes that mediators move beyond the practice of determining capacity to a new framework in which mediators facilitate competencies to mediate. This new framework builds on mediator skills, and is congruent with the unique field of mediation. Facilitating competencies in lieu of determining capacity has inherent consistency with the fundamental principles of mediation practice. Adoption of a practice of facilitating competencies can apply to every individual regardless of personal characteristics, every dispute regardless of complexity, and every mediator regardless of philosophical approach or style of practice. Facilitating competencies may not be easy.

Our purpose is to create awareness of the competency facilitation potential of a mediator's work. We hope this paper will advance the dialogue in the field. Facilitating competencies can become more refined through continually examining the various aspects of a mediator's work. Each of these aspects can be interpreted as a component of facilitating competencies to mediate. Further, we expose the question of how we provide access to mediation particularly among those who stand a great chance of being locked out of the process. We think the consideration of determining capacity limits possibilities particularly for those who are most disenfranchised. On the other hand, facilitating competencies keeps the mediation process going by looking for and unlocking doors to open the process to all.

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