

Mediating with a Party with a Mental Illness/Disability

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Presenter Biography

Shannon Driscoll is an attorney and graduate of the University of New Mexico School of Law. She has been mediating since 2007 and has been a mediation trainer and coach for almost as long. Driscoll is the chair of the State Bar Alternative Methods of Dispute Resolution Committee and serves as the Vice President of the New Mexico Mediation Association Board of Directors. She currently works as a mediator for the New Mexico Workers' Compensation Administration. Driscoll has frequently encountered behavioral health concerns while working as a mediator and has done significant research to understand and address those concerns in mediation.

MEDIATING WITH A PARTY WITH A MENTAL ILLNESS/DISABILITY

Presented by
Shannon
Driscoll

for the

New Mexico
State Bar ADR
Committee
Summer CLE
2018

ETHICAL RESOURCES

- Model Standards of Conduct for Mediators (2005)
 - Adopted by: American Bar Association, American Arbitration Association, Association for Conflict Resolution
 - https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf
- ADA Mediation Guidelines (2001)
 - Developed by ADA Mediation Standards Workgroup
 - <https://www.mediate.com/articles/adaltr.cfm>
- Guidelines for Court-Connected Mediation Services
 - Adopted by NM Supreme Court, September 30, 2016
 - https://adr.nmcourts.gov/uploads/FileLinks/533c1395ac89471d80d5a34b56091cf9/Guidelines_For_Court_Connected_Mediation_Services_September_30_2016.pdf
- New Mexico Rules of Professional Conduct
 - https://www.law.cornell.edu/ethics/nm/code/NM_CODE.htm#Rule_1.14

WHAT ARE OUR ETHICAL OBLIGATIONS AS MEDIATORS?

Can we
mediate if
one party
has a
mental
illness?

Should
we?

If so, how?

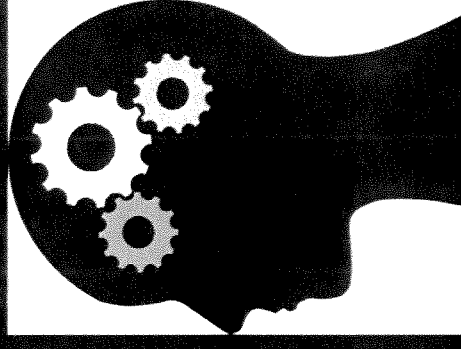
ETHICAL CONSIDERATIONS

ACCESS TO MEDIATION:

- “All litigants should have access to court-connected mediation services without discrimination on the basis of... mental ability.”
 - NM Guidelines for Court-Connected Mediation Services
- “[M]ediation providers should make all aspects of mediation... accessible to persons with disabilities”
- “The broadest definition of disability should be applied, including chronic conditions, episodic symptoms and temporary disabilities.”

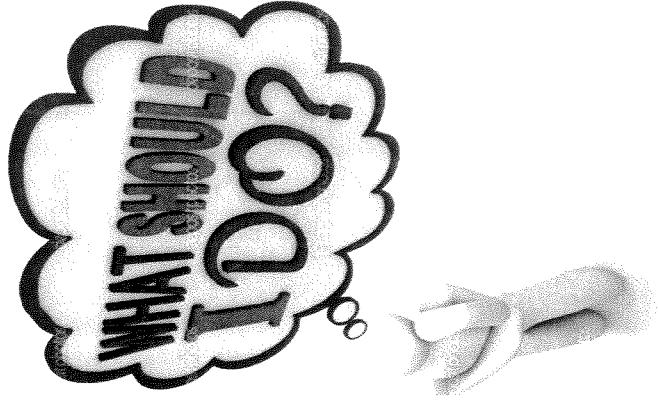
-ADA Mediation Guidelines

WHEN DOES MENTAL ILLNESS POSE A CHALLENGE IN MEDIATION?



SHOULD I MEDIATE?

- Chances are you already have and didn't know it
- Not necessarily non-mediabile
- Cases must be assessed individually
- Mediation may not be appropriate if one or more parties do not have the capacity to mediate



ETHICAL CONSIDERATIONS

CAPACITY TO MEDIATE:

“Mediators and provider organizations...should determine whether the parties in a mediation have the capacity [to mediate].”

“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”

-ADA Mediation Guidelines §I.D.

CAPACITY TO MEDIATE

ALL PARTICIPANTS MUST BE ABLE TO:

- Recognize their own best interest and represent it accurately
- Advocate for themselves
- Understand what is going on in the mediation
- Understand the consequences of their decisions
- Follow the mediation process
- Be willing to listen and learn
- Problem solve in good faith
- Articulate more than one solution to the problem
- Make decisions
- Enter into and honor an agreement

CAPACITY TO MEDIATE

- If a person appears to lack one or more of these elements:

**CONSIDER WHETHER
TO CONTINUE THE
MEDIATION**

- Even if some capacity is lacking:

Mediation MAY still be appropriate

**WITH SUITABLE
ACCOMMODATIONS**

ETHICAL CONSIDERATIONS

CAPACITY TO MEDIATE IS DECISION SPECIFIC:

“Capacity to mediate may not be the same as capacity to make financial or health care decisions, to vote, to 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.”

-ADA Mediation Guidelines

CAPACITY TO MEDIATE



How do
we
assess
it?

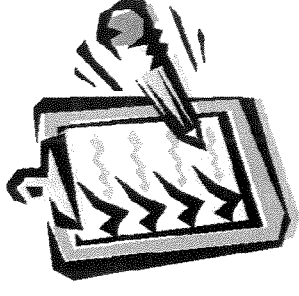
STEP ONE: QUICK ASSESSMENT

If the person is
living on their own,
as a functioning
adult, it is probably
ok to mediate
normally

If the mental illness
or disability
interferes so much
that the person
cannot take care of
themselves, we need
to question capacity

STEP TWO: INTAKE

Incorporate a general question about mental illness as part of your standard intake.



If something turns up:

- Ask Questions of the person, family members, mental health workers and/or support people
- Use the capacity to mediate list

QUESTIONS FOR PARTY/ADVOCATE*

- What happens in daily situations?
- What is the desired outcome?
 - Is another venue more appropriate?
 - Therapy, arbitration, litigation?
- Who else works with the party?
Case Worker? Psychiatrist?

*THESE
QUESTIONS
HELP
DETERMINE
IF
MEDIATION
IS
APPROPRIATE

QUESTIONS FOR ADVOCATE/ MENTAL HEALTH PROFESSIONAL*

- What role would you play in the mediation?
- Who has decision making power?
- What is your opinion of their capacity to mediate?
- Is there anything in the mediation process that could be detrimental to them?
- What is the desired outcome?

*HIPAA MAY
APPLY

STEP THREE: DON'T STOP ASSESSING

- Continue to screen throughout the mediation
- Continue to use the elements of capacity to mediate to assess party participation
- Trust your instincts!

I'M WORRIED THERE IS A CAPACITY ISSUE...

- **Err on the side of caution**
- **Ask questions!**
- **Caucus/Take a break**
- **Talk with your co-mediator/program manager**
- **Consider possible accommodations**



**KNOW YOUR
LIMITATIONS!**



**Yes,
we all
have
them.**

ETHICAL CONSIDERATIONS

Mediator Competency:

“A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.”

- *Model Standards of Conduct
for Mediators*

“[M]ediators should not accept cases for which they are not qualified.”

Where particular background information is required... mediators should acquire legal or disability-related information in order to have sufficient knowledge to mediate the case competently.”

- *ADA Mediation Guidelines*

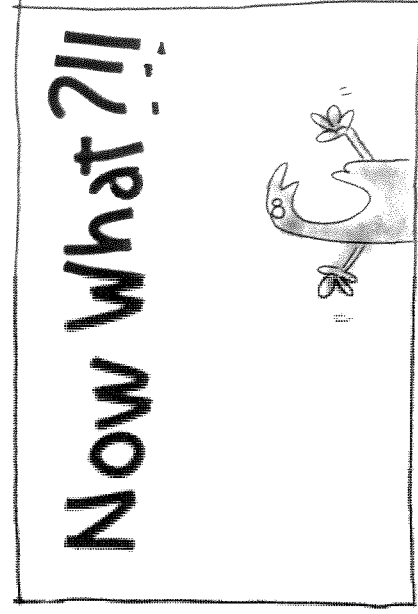
LIMITATIONS OF THE MEDIATOR

- Skill and experience of mediator
- Personal history/preference
- Mediation v. psychological evaluation, et al.

LIMITATIONS OF THE MEDIATION PROGRAM

- **Laws regarding enforcement of mediation agreements?**
- **Possible Accommodations?**
- **Mediation v. therapy**

THERE IS A CAPACITY
ISSUE AND MEDIATION
IS NOT APPROPRIATE.



THERE IS A CAPACITY
ISSUE AND I THINK WE
CAN MEDIATE.



ETHICAL CONSIDERATIONS

Rule 16-114 Client Under a Disability:

“When a client’s ability to make adequately considered decisions in connection with the representation is impaired... the lawyer shall, as far as reasonable possible, maintain a normal client-lawyer relationship with the client.”

-NM Rules of Professional Conduct

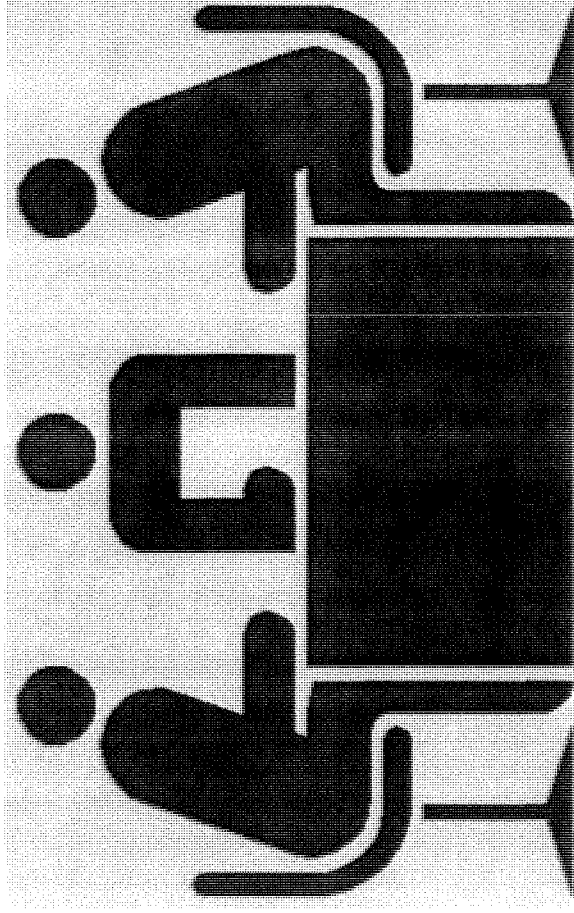
ETHICAL CONSIDERATIONS

Accommodations:

When there is a capacity issue: “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.”

- *Model Standards of Conduct for Mediators*
- *NM Guidelines for Court-Connected Mediation Services*

PROCESS ACCOMMODATIONS



When in doubt, SLOW DOWN!

CAPACITY IS AN ISSUE

SOME COMMON ACCOMMODATIONS:

- Advocate
- Caucus and/or separate rooms
- Frequent or planned breaks/Signals
- Pre-mediation
- Flexible scheduling
- Follow up mediation
- Other: ASK THE PARTY/ADVOCATE

CAPACITY IS AN ISSUE

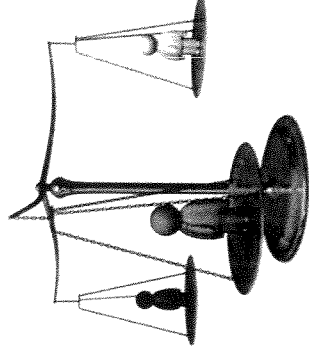
WHO CAN BE AN ADVOCATE?

- Parent, sibling, adult child, case worker, social worker, attorney, court appointed guardian, mental health professional, etc.
- The advocate must have the capacity to mediate
- If you have concerns, address them!

CAPACITY IS AN ISSUE

Things to Look Out for During Mediation:

- Pay attention to power imbalance
- Pay attention to other imbalances
- Use appropriate accommodations
- Don't stop assessing capacity



- IF THERE IS AN AGREEMENT:
 - Is it fair/balanced?
 - CAREFUL reality checking
 - Consequences for not following through

A FEW NOTES ON DIAGNOSES

DIAGNOSIS:

- To some extent may help with treatment
- More often used to help people qualify for services

WHEN MEDIATING:

- Use behavioral terms rather than diagnostic or abstract terms
- Help participants identify what they are most concerned about or find most difficult to deal with

RELATED ISSUES

- **Substance Abuse**
- **DV**
- **Physical Health**
- **Children**

SUBSTANCE

ABUSE

- **Frequently co-occurs with other behavioral health issues**
- **Drug use can impair functioning and must be treated as an impairment**
- **Intoxication may invalidate any agreement reached**
- **Accommodations may make mediation possible**

**Continue
to assess
capacity
on a
case by
case
basis**

DOMESTIC VIOLENCE/ABUSE

- Domestic abuse may affect capacity to mediate
- Domestic abuse may influence seemingly unrelated cases
- Accommodations may make mediation possible

Continue
to assess
capacity
on a
case by
case
basis

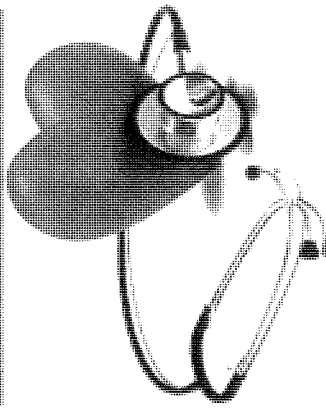
PHYSICAL HEALTH

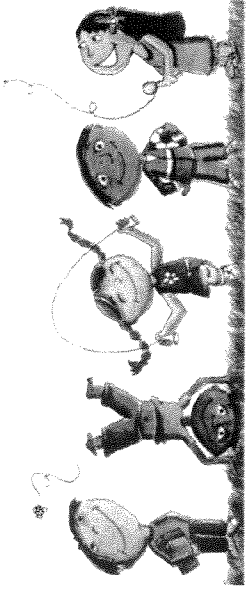
PROBLEMS

- Can lead to mental health issues
- May make medication more difficult
- May have good days and bad days
- May need physical accommodations

Examples:

Chronic pain
Diabetes
Chronic fatigue
Sleep disorder
Parkinson's





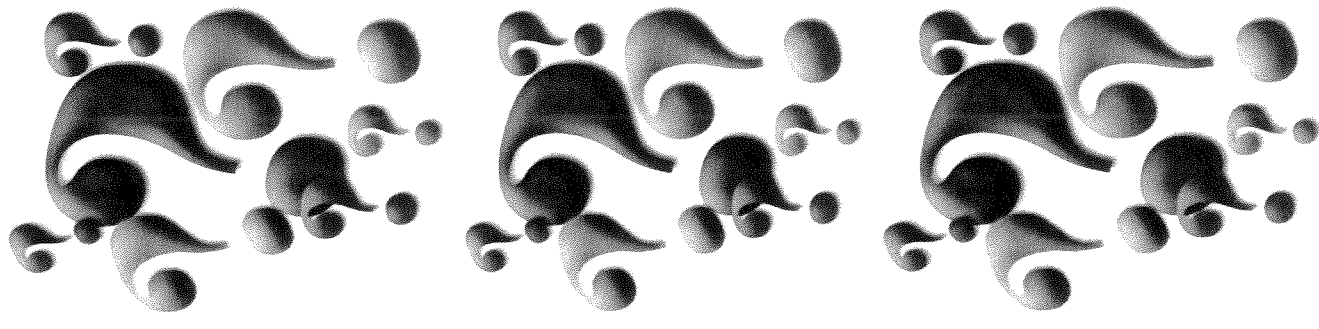
CHILDREN AND ADOLESCENTS

- **Difficult to identify mental illness**
- **Perspective taking may be difficult or impossible**
- **Probably cannot concentrate as long as an adult**
- **Can talk to child about ability to participate**

Even the brains of neuro-typical children and adolescents are not fully developed

QUESTIONS?

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