CAN I ASK THAT?: HELPING WELL-MEANING MEDIATORS PREVENT COMMON CAPACITY ASSESSMENT PITFALLS

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ABSTRACT

One of the initial conundrums presented to mediators upon intake is evaluating a party's capacity to participate in the mediation. Are the parties fearful of each other? Is there an improper power dynamic present? Might they be impeded from being able to make a decision? Mediators have a duty to ensure parties have the capacity to participate. This means ensuring they can understand what is going on, use reason to explore a decision, appreciate how it impacts them, and freely express a choice. How does a mediator go about evaluating a party's capacity appropriately?

It may seem tempting to ask questions about a party's potential disability, but the Americans with Disabilities Act (ADA) protects both people with disabilities and those who are "regarded as" having disabling health conditions from experiencing discriminatory treatment—including protection from inappropriate inquiries about possible disabilities. Although the industry standard is varied across subject-matter, sometimes there are policies and practices that inappropriately link capacity assessments to disabilities.

This Article evaluates the ethical and legal considerations surrounding capacity determinations. Through a foundational understanding of clinical and legal definitions of 'capacity,' this Article considers the various forms of capacity assessments and the mistakes that often befall these processes. The Article will provide practical tools and recommendations to stay within ethical boundaries when assessing the capacity of parties in any mediation.

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INTRODUCTION

Mediators frequently encounter situations when they are not sure whether they should ask more questions or take some kind of action related to a party's capacity to mediate:

- During an intake, one party says, "You shouldn't trust anything they say—they have been hospitalized with a mental illness."
- While in session, a mediator notices that one person seems afraid of the other and is willing to do whatever the other says.
- One party arrives earlier than the other and mentions to their mediator, "You know there's no reasoning with her, she's a *narcissist*."
- Before hiring the mediator, a party mentions that they have a psychiatric disability and asks for accommodations.

Whether a mediator is noticing a possible problem, a party is self-disclosing their own situation, or an opposing party is levying some kind of accusation; additional clarity would best serve the profession to ensure that mediators practice ethically when dealing with questions about party capacity.

Mediators have a long-established duty to ensure parties have the capacity to participate in mediation. Although the inherent presumption is that all parties can exercise self-determination and have access to services, mediators engage in different intake activities, including formal screening procedures, to ensure party autonomy, quality, and safety. Because of common misunderstandings about the nature of capacity and the appropriateness of certain kinds of questioning, there are times when these intake and screening processes are inappropriate.

Family mediators may have the longest history of using formal screening protocols,[1] but capacity assessments are relevant across all types

1. *See, e.g.*, Kelly Browe Olson, *Screening for Intimate Partner Violence in Mediation*, 20 DISP. RESOL. MAG., Fall 2013, at 25, 25 ("Screening parties for intimate partner violence (IPV) before

of mediation. In practice, some mediators make case assessments in advance of every mediation; others never do so; and others use assessment techniques selectively.[2] Many mediators also engage in less formal assessments, judgments, and screenings that can impact how they treat the parties they serve.[3]

Positive law and ethical guidelines impose limitations on these assessments, and mediators must be careful when asking screening questions. Specifically, the Americans with Disabilities Act (ADA) protects both people with disabilities and those who are "regarded as" having disabling health conditions from experiencing discriminatory treatment—including protection from inappropriate inquiries about possible disabilities.

This Article evaluates ethical and legal considerations regarding capacity determinations for mediators. Section I explores clinical and legal definitions of capacity, as well as ethical standards for mediators in making these assessments. Section II considers research discussing how mediators are assessing capacity in their daily practices, including common mistakes. Section III discusses biases present in capacity assessments and how mediators may overcome those biases. Finally, Section IV provides practical tools for mediators to conduct ethical capacity screenings and assessments. The research in this Article helps clarify important ethical boundaries related to capacity assessments and provides resources that help practitioners apply these lessons, helping them to practice ethically.

I. CAPACITY STANDARDS AND THEIR IMPLICATIONS

This Section considers capacity generally, as well as legal definitions of capacity across multiple contexts, and how those various definitions apply to mediators—who must be respectful of their clients' dignity in

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mediation is a necessity in any case where the parties have had a close personal relationship.").

2. *See, e.g.*, Yishai Boyarin, *Court-Connected ADR—a Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993, 1010 n.79 (2012) ("Indeed, many mediation programs screen for and continuously monitor capacity issues and are required to do so under various professional codes."); Laurel Wheeler, Comment, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L. REV. 559, 572 (2002) ("In an ideal world, all judges and lawyers would be well trained, and would constantly screen for domestic violence.").

3. *See* DAN BERSTEIN, MENTAL HEALTH AND CONFLICTS: A HANDBOOK FOR EMPOWERMENT 152 (2022) (discussing a survey suggesting at least 80% of mediators have encountered capacity-related challenging behaviors such as a difficulty understanding the process, over 85% responded to challenging behaviors on a case-by-case basis, and over 60% expressing interest in having clearer policies).

navigating this terrain without violating the ADA.

A. Defining Capacity

While many definitions exist for capacity across different disciplines, the concept denotes someone's ability to make decisions. Standards vary for different settings, including informed consent,[4] consent to treatment,[5] testator capacity,[6] capacity to appoint a power of attorney,[7] contractual capacity,[8] and the capacity to convey real property,[9] among others.[10] In guardianship or conservatorship arrangements, a guardian has the authority to make decisions on behalf of a person about the person, their property, and their legal decisions.[11]

Experts advise that capacity analyses should be decision-specific and time-specific.[12] Capacity determinations should also be made based on

4. *See generally* Jeffrey P. Spike, *Informed Consent Is the Essence of Capacity Assessment*, 45 J.L. MED. & ETHICS 95 (2017) (discussing standards for capacity assessment based on informed consent and autonomy); Michelle Biros, *Capacity, Vulnerability, and Informed Consent for Research*, 46 J.L. MED. & ETHICS 72 (2018) (discussing informed consent as a requirement to participate in research).

5. *See generally* Scott Lamont, Yun-Hee Jeon & Mary Chiarella, *Assessing Patient Capacity to Consent to Treatment: An Integrative Review of Instruments and Tools*, 22 J. CLINICAL NURSING 2387 (2013) (studying and discussing a variety of ways to assess capacity to consent to treatment).

6. *See generally* K.M. Kennedy, *Testamentary Capacity: A Practical Guide to Assessment of Ability to Make a Valid Will*, 19 J. FORENSIC LEGAL MED. 191 (2012); Reid Weisbord & David Horton, *The Future of Testamentary Capacity*, 79 WASH. & LEE L. REV. 609 (2022) (discussing the history and the future of testamentary capacity).

7. *See generally* BERNA COLLIER, CHRIS COYNE & KAREN SULLIVAN, MENTAL CAPACITY: POWERS OF ATTORNEY AND ADVANCE HEALTH DIRECTIVES (2005) (discussing power of attorney in Australia).

8. *See generally* Eliza Varney, *Redefining Contractual Capacity? The UN Convention on the Rights of Persons with Disabilities and the Incapacity Defence in English Contract Law*, 37 LEGAL STUD. 493 (2017) (exploring contract law capacity in the context of imperatives to not conflate capacity and disability).

9. *See generally* J.F. Dolan, *The UCC Framework: Conveyancing Principles and Property Interests*, 59 B.U. L. REV. 811 (1979) (setting forth multiple conveyance rules in the Uniform Commercial Code).

10. *See generally* Antonio Martinez-Pujalte, *Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms*, 8 LAWS 1 (2019) (discussing supported decision-making and goals for reform).

11. *See generally* Kahli Zietlow et al., *Guardianship: A Medicolegal Review for Clinicians*, 70 J. AM. GERIATRICS SOC'Y 3070 (2022) (reviewing guardianship including capacity assessment and decision-making).

12. *See generally* Laura L. Sessums, Hanna Zembrzuska & Jeffrey L. Jackson, *Does This Patient Have Medical Decision-Making Capacity?*, 306 JAMA 420 (2011); Derick T. Wade, *Determining Whether Someone Has Mental Capacity to Make a Decision: Clinical Guidance Based on a Review of the Evidence*, 33 CLINICAL REHAB. 1561 (2019).

observed behaviors rather than assumptions about conditions. When researchers specify criteria, they typically link them to four primary standards: understanding, reasoning, appreciation, and choice.[13] In addition, capacity can be affected by the relational history of the parties.

Family mediators are, perhaps, most aware of capacity dynamics because of situations involving intimate partner violence (IPV).[14] In intimate partner relationships, "domestic violence" can be defined as "pattern of coercive behavior used to control" the other.[15] The coercion involved removes the party in the weaker position from making free and informed decisions. The coercion can also impact the victim's inability to articulate or express their own needs, meaning they may be lacking in certain contexts.[16] While IPV concerns may appear most common in families, relational capacity issues can arise in cases involving other situations, such as disputes between business partners, employees, and non-romantic family disputes, like small business cases, will contests, and elder disputes.[17]

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13. *See generally* Jacob M. Appel, *A Values-Based Approach to Capacity Assessment*, 42 J. LEGAL MED. 53 (2022) (beginning with "[t]he dominant approaches to assessing patients for decisional capacity in the clinical setting, the 'four skills' and 'sliding scale' models, emerged in the 1970s and 1980s against a backdrop of medical paternalism and reflect their origins in law and forensic psychiatry.").

14. Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision-Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 151 (2003) (defining "domestic violence" as a form of control). *See, e.g.*, Megan G. Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good Faith Standard*, 86 OR. L. REV. 599, 599–600 (2007) (noting that many victims of domestic violence participate in mandatory family mediation programs).

15. Ver Steegh, *supra* note 14, at 151.

16. Dafna Lafi, *Til Death Do Us Part?!: Online Mediation As an Answer to Divorce Cases Involving Violence*, 16 N.C. J.L. & TECH. 253, 268 (2015) ("The victim is liable to become obsessed with pleasing the husband and doing his will out of a desire to avoid provoking another alleged reason for an outburst."); Susan L. Pollet, *Mediating Domestic Violence: A Potentially Dangerous Tool*, 77 N.Y. STATE BAR ASSOC. J. 42, 43 (2005) (articulating reasons to prohibit the use of mediation in cases of domestic violence because of capacity implications from abusive power and control). *See also* Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 439–40 (2011) (questioning whether victims of domestic violence could stand up to intimidation by either the abuser partner or the legal system).

17. Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 639–40 (2000) (discussing the possibility of capacity issues in cases involving elderly parties, particularly in cases involving guardianship issues). *See, e.g.*, Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 646–47 (2002) (noting the possibility of a protected adult lacking capacity and therefore unable to make free and informed decisions in the

The law places guardrails on how mediators can assess capacity. Importantly, the ADA prohibits discrimination on the basis of disability, and it prohibits discrimination against those "regarded as" disabled, even if they are not. Disability laws also often prohibit inquiries into whether someone has a disabling condition.

A person may lack capacity at all times, or only at certain times in their life, with the general emphasis being that capacity is a decision-specific construct. The requisite level of capacity differs from legal activity to activity, although these tests share many of the same characteristics.

The Restatement (Second) of Contracts differentiates between "total incapacity" and "partial incapacity."[18] A person suffering from total incapacity never has the capacity to provide assent, such as cases of extreme impairments.[19] Conversely, capacity may be partial, meaning that an impairment (physical or mental disability, extreme power and control, infancy, intoxication, etc.) is temporary.[20]

The standard for contractual capacity is quite low. Although the test varies from state to state, the relevant question centers on whether a person understands the agreement they are making at the time.[21] California, for instance, allows for a rebuttable presumption of incapacity if a person is generally "unable to manage his or her own financial resources or resist fraud or undue influence."[22] A person who has been adjudicated to be legally incapacitated does not have the legal ability to enter into a contract on their own.[23]

The capacity to execute a will or deed is lower than that required to

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mediation process).

18. RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. a (A.L.I. 1981).

19. *See id.* ("Incapacity may be total, as in cases where extreme physical or mental disability prevents manifestation of assent to the transaction.").

20. *See id.* (distinguishing total from partial incapacity).

21. Gen. Motors v. Jackson, 900 P.2d 345, 349 (Nev. 1995) ("Where one of the parties, for any reason, is *incapable of understanding* the force and effect of the alleged agreement, there is no contract; but mere mental weakness falling short of such incapacity will not invalidate a contract." (quoting 17 C.J.S. CONTRACTS § 133(1)(a) (1963))). *See, e.g.*, *In re* Guardianship of O'Brien, 847 N.W.2d 710, 715 (Minn. Ct. App. 2014) ("Mere mental weakness does not incapacitate a person from contracting. It is sufficient if he has enough mental capacity to understand, to a reasonable extent, the nature and effect of what he is doing." (internal citation omitted)).

22. Algo-Heyres v. Oxnard Manor LP, 305 Cal. Rptr. 3d 296, 301 (Cal. Dist. Ct. App. 2023) (quoting CAL. CIV. CODE § 39(b) (West 2025)).

23. *See* Rogers v. Household Life Ins. Co., 250 P.3d 786, 789 (Idaho 2011) (holding that a person who is adjudicated to be incapacitated lacks all capacity to contract under Idaho state law).

contract.[24] This lower requirement reflects a policy that a person shall be freer to dispose of their own property, particularly if they are ill or facing death.[25] A diagnosis of a cognitive impairment, such as dementia, is not sufficient to prove that a person lacked capacity at the time of executing a testamentary instrument—keeping with the understanding that the presence of a health condition is not the appropriate standard for assessing capacity.[26] Instead, the test for testamentary capacity usually involves an understanding that the person is making a testamentary instrument, an appreciation of the person's property, and an understanding of who would ordinarily have a claim to the property, such as family members.[27]

These legal standards demonstrate that the baseline for legal capacity is purposefully low. Because one of the outcomes of mediation is an agreement between the parties, knowledge of capacity is useful, but mediators need to be mindful that people at most times in most cases have the requisite contractual capacity.

B. Mediator Ethical Standards for Capacity

Capacity, as an ethical matter, is important in the mediation context for two primary reasons. First, a person must have capacity to participate in the process. Second, a person must have capacity to enter into a settlement

24. Indeed, the capacity to marry is even less than the capacity to enter a will. *See Algo-Heyres*, 305 Cal. Rptr. 3d at 301 ("[T]he determination of a person's mental capacity is fact specific, and the level of required mental capacity changes depending on the issue at hand [sic] . . . with marital capacity requiring the least amount of capacity, followed by testamentary capacity, and on the high end of the scale is the mental capacity required to enter contracts." (internal citation omitted)).

25. *See* 95 C.J.S. WILLS § 10 (2025) ("A will is not a contract. . . .The minimum level of mental capacity required to make a will is less than that necessary to make a contract or a deed, because a will is a unilateral disposition of property, sometimes made by a person who is ill and facing death."); *see also* Ivie v. Smith, 439 S.W.3d 189, 204 (Mo. 2014) (en banc) ("[T]he mental capacity required to make a contract is higher than the mental capacity required to make a will or trust" because a contract involves an arms-length transaction, rather than a disposition of one's own property).

26. *See*, *e.g.*, *In re* Estate of Flowers, 88 N.E.3d 599, 618 (Ohio Ct. App. 2017) ("Thirdly, appellants argue that proof of dementia alone is insufficient to establish a lack of testamentary capacity. We agree.").

27. *Id.* at 621 (noting that, under Ohio law, the test is: "First, to understand the nature of the business in which he is engaged; Second, to comprehend generally the nature and extent of his property; Third, to hold in his mind the names and identity of those who have natural claims upon his bounty; [and f]ourth, to be able to appreciate his relation to the members of his family."). *See also* Bach v. Hudson, 596 S.W.2d 673, 675–76 (Tex. Civ. App. 1980) (applying the test of whether "he appreciated the effect of what he was doing and understood the nature and consequences of his acts and the business he was transacting").

agreement.[28]

Capacity is closely related to the concept of self-determination, a central tenet of mediation practice. Professor Nancy Welsch described self-determination as the "fundamental core characteristic of the mediation process."[29] The Model Standards of Conduct for Mediators (Model Standards), adopted in 2005 by the American Bar Association (ABA), the Association of Conflict Resolution (ACR), and the American Arbitration Association (AAA) state: "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."[30]

Unlike other processes, mediation asks parties to make free and informed decisions as to both the *outcome* (i.e., the resolution of the dispute) and the *process* (how the mediation is conducted).[31] For this reason, Professor Omer Shapira articulated that the component parts of self-determination include: "the competency of the parties (i.e., the *basic capacity to perceive information and understand it*), voluntariness, and relevant information."[32] Capacity, then, is necessary for self-determination.

From a legal standpoint, if the mediator allows a party to agree to a mediated settlement agreement without proper capacity, the party claiming lack of capacity can appeal to a court to rescind the agreement.[33] Thus,

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28. *See* Timothy Hedeen, *Mediation as a Contact Sport?*, DISP. RESOL. MAG., Winter 2009, at 24, 25 (discussing that scholars have provided advice to mediators regarding capacity issues for many decades).

29. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 3 (2001). *See also* Fran L. Tetunic, *The Irony of Mediator as Problem-Maker: Mediator Misconduct Setting Aside Mediated Agreements*, 23 HARV. NEGOT. L. REV. 177, 179 (2017) ("Mediation is unique among dispute resolution processes in the level of self-determination afforded the parties.").

30. *Model Standards of Conduct for Mediators*, AM. ARB. ASS'N, AM. BAR ASS'N & ASS'N. FOR CONFLICT RESOL. § 1.A (2005), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/MODEL_STANDARDS_OF_CONDUCT.pdf [https://perma.cc/Q73H-KSEL].

31. *Id. See also* James J. Alfini, *Mediation as a Calling: Addressing the Disconnect Between Mediation Ethics and the Practices of Lawyer Mediators*, 49 S. TEX. L. REV. 829, 831 (2008) ("Indeed, I believe there would be general agreement among mediators that party self-determination is mediation's guiding principle. It is the one value that distinguishes mediation from other dispute resolution processes.").

32. Omer Shapira, *The Challenge of Developing Genuine Pluralism in Mediation Ethics: A Reply to Professor Robert A. Baruch Bush*, 36 OHIO ST. J. DISP. RESOL. 311, 329 (2020) (emphasis added).

33. Guthrie v. Guthrie, 577 S.E.2d 832, 835 (Ga. Ct. App. 2003) (finding genuine issue of material fact whether parties had a meeting of the minds regarding a divorce settlement when the husband "suffered anxiety attacks" and consumed "at least four doses of Valium" during the mediation); Leher v. Leher, 2000 WL 567020, at *2–3 (Tex. App. May 3, 2000) (finding genuine issue of material

mediators have a basis in law and ethics to be mindful of capacity issues.

Recognizing the connection between self-determination and capacity, many mediator ethical codes include standards or guidelines regarding capacity. For example, the Model Standards for Mediators imposes a duty to explore "circumstances and potential accommodations, modifications or adjustments that would make possible the party's *capacity to comprehend, participate and exercise self-determination*."[34] The Model Standards of Practice for Family and Divorce Mediation promulgated by the ABA Family Law Section, the Academy of Family Mediators, and the Association of Family and Concilation Courts, strictly requires that "A family mediator shall facilitate the participants' understanding of what mediation is and *assess their capacity to mediate* before the participants reach an agreement to mediate."[35]

Other ethical codes imply the importance of mediator recognition of

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fact that party could not "understand or comprehend" the mediated agreement due to "physical and psychological ailments as well as medication he was taking"). *See, e.g.*, Olam v. Congress Mortg. Co., 68 F. Supp. 2d 1110, 1143 (N.D. Cal. 1999) (allowing testimony that the party to the mediation agreement felt "very weak, was in extreme pain, felt dizzy, and felt like passing out").

34. *Model Standards of Conduct for Mediators*, AM. ARB. ASS'N, AM. BAR ASS'N & ASS'N. FOR CONFLICT RESOL. § VI(A)(10) (2005), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/MODEL_STANDARDS_OF_CONDUCT.pdf [https://perma.cc/Q73H-KSEL] (emphasis added). *See also Mediator Standards of Conduct*, MICH. OFF. OF DISP. RESOL. § VII(A)(2) (2013), https://www.courts.michigan.gov/4a3782/siteassets/court-administration/standardsguidelines/dispute-resolution/med-soc.pdf [https://perma.cc/5S2C-9YFT] ("A mediator shall facilitate the presence of the appropriate participants and their understanding of the mediation process, continuously assess the parties' capacity to mediate, and structure the mediation process to facilitate the parties' ability to make decisions."); *Standards of Conduct for New York State Community Dispute Resolution Center Mediators*, N.Y. STATE UNIFIED CT. SYS. DIV. OF PROF'L & CT. SERVS. § VI cmt. 8 (2009), https://ww2.nycourts.gov/sites/default/files/document/files/2018-07/Standards_of_Conduct.pdf [https://perma.cc/MM8T-QW8G] ("If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, 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.").

35. *Model Standards of Practice for Family and Divorce Mediation*, ASS'N OF FAM. AND CONCILIATION CTS. § III(C) (2000), https://www.afccnet.org/Portals/0/PDF/Model StandardsOfPracticeForFamilyAndDivorceMediation.pdf?ver=ykuc9AnD6m4jf9IZs4PhkQ%3D%3D [https://perma.cc/J9GW-5YQA].

> The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

Id.

capacity, even implicitly. For example, the Florida Rules for Certified and Court Appointed Mediators note, "[i]f, *for any reason*, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation."[36] In the private mediation sphere, JAMS requires: "[i]f the mediator perceives that a party is unable to give informed consent . . . due to, for example, the impact of a physical or mental impairment, the process should not continue until the mediator is satisfied that such informed consent has been obtained from the party" or their representative.[37] However, language linking the mediator's perception to speculating about a disability impairment may run the risk of inadvertently encouraging people to link capacity assessments to disabilities. In the federal sphere, the Federal Mediation and Conciliation Service's "Shared Neutrals" program, which provides neutral parties to mediate disputes across federal agencies, noted the following regarding consent, without tying capacity concerns to disabilities:

> Where a party appears to be acting under coercion or fear, or without capacity to comprehend the process, issues or options for settlement, the shared neutral must explore the circumstances with the party and, unless the party objects, discontinue mediation. If the party insists on continuing, the shared neutral may do so, but should continue to raise the question and check for willingness to proceed.[38]

These examples show that mediators are generally assumed to have an ethical duty to understand capacity, as well as the ability to monitor capacity to ensure that the parties can make decisions based on self-determination.

The ethical duty to address capacity can also be found implicitly in other standards. For example, the ABA/AAA/ACR standard regarding the

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36. *Florida Rules for Certified & Court Appointed Mediation*, FLA. DISP. RESOL. CTR., Rule 10.310 (2025), https://www.flcourts.gov/content/download/1998036/file/FRC&CAM_01.2025%20ADA.pdf [https://perma.cc/X2AV-EZF9] (emphasis added).

37. *Mediator Ethical Guidelines*, JAMS § I, https://www.jamsadr.com/mediators-ethics/ [https://perma.cc/UN6N-AWMT] (last visited Oct. 10, 2025).

38. *Standards of Practice for Shared Neutrals*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/wp-content/uploads/2018/11/Shared-Neutrals-Standards-of-Practice.pdf [https://perma.cc/9Z4E-V7KU] (last visited Oct. 10, 2025). Note that, as of this writing, the Shared Neutrals program has been discontinued due to lack of funding. *See Shared Neutrals*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/sharedneutrals-2/ **[**https://perma.cc/4SFS-MJZ2**]** (last visited Oct. 10, 2025).

Advancement of the Mediation Practice notes that mediators should "strive to make mediation accessible to those who elect to use it."[39] Accessibility can be understood as offering options to help support parties with different perspectives and needs to ensure that they can fully engage in the mediation process. Further, the standard on "impartiality" explains that while mediators are honoring their duty to be impartial, they must not "act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."[40] This means that even if a mediator believes a party is showing possible signs of a physical or mental health problem, the mediator is still duty-bound to provide an impartial process.

C. Inappropriate Disability Inquiries

While mediators have legal and ethical responsibilities to ensure capacity, they must also abide by the Americans with Disabilities Act (ADA) when making assessments. Specifically, mediators should be mindful to refrain from making unnecessary inquiries into a disability (which generally means avoiding disability inquiries as part of capacity assessments).[41]

Mediation offices are likely places of public accommodation,[42] making

39. *Model Standards of Conduct for Mediators*, AM. ARB. ASS'N, AM. BAR ASS'N & ASS'N FOR CONFLICT RESOL. § IX(A)(2) (2005), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/MODEL_STANDARDS_OF_CONDUCT.pdf [https://perma.cc/Q73H-KSEL].

40. *Model Standards of Conduct for Mediators*, AM. ARB. ASS'N, AM. BAR ASS'N & ASS'N FOR CONFLICT RESOL. § II(A) (2005), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/MODEL_STANDARDS_OF_CONDUCT.pdf [https://perma.cc/Q73H-KSEL] [hereinafter AAA Model Standard II(A)].

41. The Equal Employment Opportunity Commission, Department of Justice, and National Council on Disability emphasized the importance of avoiding unnecessary inquiry in their joint document: "Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)." They write "Mediators can avoid unnecessary inquiry about an individual's disability by simply describing the process and asking what accommodations might be needed," "Avoid making assumptions about whether a party is unable to participate in mediation due to an emotional or cognitive limitation," and "rather than focusing on the disability, it is most useful for mediators to focus on communicating with all parties about their needs throughout the process, and on being prepared to modify the process as needed to enhance the parties' participation." *Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)*, U.S. EQUAL EMP'T COMM'N, NAT'L COUNCIL ON DISABILITY & U.S. DEP'T OF JUST., https://archive.ada.gov/ada_mediators.html [https://perma.cc/KA55-PKE8] (last visited Sept. 5, 2025).

42. The ADA does not specifically enumerate "mediation" offices as places of public accommodation, but the statute includes "office of an accountant or lawyer, pharmacy, insurance office,

ADA's Title III guidance applicable to them. The ADA Title III Technical Assistance Manual states: "Unnecessary inquiries. The ADA prohibits unnecessary inquiries into the existence of a disability." The document further provides illustrations showing a nexus between the service provided and the medical information sought. For example, it provides illustrations that a camp may ask for some medical information if they "demonstrate that each piece of information requested is needed to ensure safe participation in camp activities" and do not use it for screening, but a store cannot ask for medical history when approving an applicant for a store-credit card.[43] ADA regulations also place limits on the types of questions that can be asked when someone has a service animal or mobility device.[44]

Similarly, the Equal Employment Opportunity Commission (EEOC) provides guidance on permissible and impermissible inquiries in the employment context, suggesting questions about whether someone ever had a disability, how they became disabled, the nature or severity of an impairments, broad questions about impairments, or asking someone else about their disability may be considered disability-related inquiries and thus impermissible.[45] Although EEOC guidance applies in the employment context, mediators may find the guidance helpful for their use with their parties.

Mediators may intend to be helpful when offering unsolicited "assistance" to those who may or may not have a disability, but this can feel paternalistic, invasive, and hostile. A study, by researchers Richard M. Keller and Corinne E. Galgay collected data on microaggressions that people with disabilities experienced.[46] They discovered that many "well-

professional office of a health care provider, hospital, *or other service establishment*." 42 U.S.C. § 12181(7)(F) (emphasis added).

43. U.S. DEP'T OF JUST., ADA TITLE III TECHNICAL ASSISTANCE MANUAL: COVERING PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES § III-4.1300 (1993), https://archive.ada.gov/taman3.html [https://perma.cc/9HD9-9UD9]. The ADA prohibits discriminatory exams which could include any kind of assessment of someone's cognitive ability or potential mental impairment. *See id.*

44. *See generally* U.S. DEP'T OF JUST., ADA TITLE III REGULATIONS (2012), https://www.ada.gov/law-and-regs/regulations/title-iii-regulations/ [https://perma.cc/N7RE-3PTX] (providing detailed information regarding these situations).

45. U.S. EQUAL EMP'T COMM'N, ENFORCEMENT GUIDELINES ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA (2000), https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees [https://perma.cc/N7RE-3PTX].

46. *See generally* Richard M. Keller & Corinne E. Galgay, *Microaggressive Experiences of*

intentioned" people who offer to help people with disabilities exhibit a "lack of attention to boundaries, and their lack of concern for the cost" for others.[47] Further, the questioned party may feel "forced to take responsibility for managing the uncomfortable feelings of the [other] and to bear the burden of correcting problems brought about by the dominant culture."[48] Research suggests that, from the perspective of the questioned parties, microaggressions are "overwhelmingly negative, intense, and long lasting" in effects.[49]

The ADA prohibits disparate treatment based upon a mere guess that someone has a disability-related impairment, regardless of whether they actually have a disability. In fact, the law defines "disability" to include an individual who is "regarded as having" a disability.[50] The ADA evaluates discrimination based on whether the perpetrator *believed* the victim has a disabling physical or mental impairment. This is called "regarded as" discrimination.[51] Avoiding unnecessary or inappropriate disability inquiries can protect mediators from potential liability from "regarded as" discrimination by keeping the record clear of events where it might look like they are guessing that a party may be disabled.

D. Remedies at Law

Although the law prohibits discrimination in places of public accommodation,[52] the remedies available for a violation under Title III are limited. In civil cases, i.e. cases brought by private parties, remedies include forward-looking injunctions, equitable relief, and civil penalties.[53] In cases brought by the government, additional monetary relief may be available.[54]

People with Disabilities, *in* MICROAGGRESSIONS AND MARGINALITY: MANIFESTATION, DYNAMICS, AND IMPACT (Derald Wing Sue ed. 2010).

47. *Id.* at 252.

48. *Id.*

49. *Id.* at 253.

50. 28 C.F.R. § 36.105(a)(1)(iii) (2016).

51. *See, e.g.*, Sharan E. Brown, *What Does It Mean to Be "Regarded as Having an Impairment" Under the Americans With Disabilities Amendments Act (ADAAA)?*, ADA KNOWLEDGE TRANSLATION CTR. (2021), https://adata.org/legal_brief/regarded-as-having [https://perma.cc/Y8EA-4SYC].

52. Legal offices are explicitly covered as a place of public accommodation under the ADA. 42 U.S.C. § 12181(7)(F) (including the "office of an accountant or lawyer").

53. 42 U.S.C. § 12188 (limiting remedies to injunctive relief, equitable relief, civil penalties, and monetary damages "when requested by the Attorney General").

54. 42 U.S.C. § 12188(b)(2)(B) (allowing a court to award "such other relief as the court

The Department of Justice enforces the ADA, and each administration has different enforcement priorities. For instance, as part of their Barrier-Free Healthcare Initiative, the Department of Justice enforced ADA claims against a variety of health providers who made it difficult for people with certain conditions to access their services.[55] During the Biden administration, the Department of Justice settled cases with MedStar Health for $440,000 in advocating for claimants with disabilities who were denied the ability to bring their support person when receiving medical treatment.[56] Johns Hopkins agreed to pay $150,000 for the same conduct.[57] These cases may be of particular interest to mediators because mediation ethics often dictate that a party have access to support persons at mediation sessions.[58] Because enforcement priorities shift from administration to administration, mediation offices are not immune from governmental scrutiny.

In addition to government cases, private parties may also sue for violations of the ADA. Civil cases against mediators are rare.[59] Those that do exist demonstrate some of the challenges in bringing a civil ADA claim.

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considers to be appropriate, including monetary damages to persons aggrieved *when requested by the Attorney General*") (emphasis added).

55. *See Barrier-Free Health Care Initiative*, U.S. DEP'T OF JUST., https://archive.ada.gov/barrierfreehealthcare.htm [https://perma.cc/FJJ8-RP75] (last visited Oct. 10, 2025). Some of these settlements did involve monetary damages for the claimants, including $37,500 to the complainant and a $5,000 civil penalty in a case against an OB/GYN doctor who refused services to a person with HIV. *See generally* Consent Decree, United States v. Chibuike Enyereibe Anucha, MD, PC, No. 1:21-CV-00055-EPG (E.D. Cal. 2022), https://archive.ada.gov/anucha_cd.pdf [https://perma.cc/YJE7-TWFE]. Also, $30,000 to a woman with HIV who was refused dental care. *See* U.S. DEP'T OF JUST., JUSTICE DEPARTMENT SETTLES WITH NORTH CAROLINA DENTAL OFFICES OVER HIV DISCRIMINATION (2021), https://archive.ada.gov/night_and_day_sa.html [https://perma.cc/VX2B-8ZNY].

56. U.S. DEP'T OF JUST., JUSTICE DEPARTMENT SECURES AGREEMENT WITH MEDSTAR HEALTH INC. TO PROVIDE PEOPLE WITH DISABILITIES EQUAL ACCESS TO MEDICAL CARE (2024), https://www.justice.gov/archives/opa/pr/justice-department-secures-agreement-medstar-health-inc-provide-people-disabilities-equal [https://perma.cc/GP8E-2UTD].

57. U.S. DEP'T OF JUST., JUSTICE DEPARTMENT SECURES AGREEMENT WITH JOHNS HOPKINS HEALTH SYSTEM TO PROVIDE PEOPLE WITH DISABILITIES EQUAL ACCESS TO MEDICAL CARE (2024), https://www.justice.gov/archives/opa/pr/justice-department-secures-agreement-johns-hopkins-health-system-provide-people-disabilities [https://perma.cc/233U-CMGF].

58. The Uniform Mediation Act specifically provides that all mediation parties have the right to bring a support person—attorney or non-attorney—to the session. UNIF. MEDIATION ACT § 10 (UNIF. LAW COMM'N 2003).

59. Mediators have enjoyed very limited liability, in part, because of presumptions of immunity. *See* Michael Moffitt & Sharon Press, *On Professional Practice: Against Quasi-Judicial Immunity for Mediators*, AM. BAR ASS'N (Feb. 14, 2024), https://www.americanbar.org/groups/dispute_resolution/resources/magazine/2024-february/professional-practice-against-quasi-judicial-immunity-mediators/ [https://perma.cc/F7YQ-XWA4].

Consider the case of *Novak v. Litchfield Cavo, LLP*.[60] Novak had severe hearing and vision loss[61] and brought claims against a condominium organization. On some occasions, such as when his deposition was taken, the defendant's attorneys provided Communication Access Realtime Translation (CART) services to allow for Novak's full participation.[62] The parties mediated their claims before Gulth Mediation where they decided not to use CART services.[63] In litigation, Novak claimed that the parties "failed to accommodate" his disability "throughout the mediation, ultimately forcing him to assent to a settlement that he did not fully understand."[64] Rather than analyzing the merits of the claims under the ADA, the Northern District of Illinois dismissed the case on standing grounds.

The court found that Novak "failed to satisfy the injury-in-fact element of standing."[65] Because the ADA is limited to injunctive relief, "Plaintiff must allege facts demonstrating a likelihood that [the mediator and opposing counsel] will repeat these offenses in the future."[66] Because Novak failed to allege facts that either the mediator or opposing counsel would discriminate against him in the future, he could not show an injury-in-fact.[67] Other courts

60. *See generally* Novak v. Litchfield Cavo, LLP, 2014 WL 7330925 (N.D. Ill. Dec. 22, 2014).

61. *Id.* at *1.

62. *Id*. ("Upon Plaintiff's prompting, Litchfield Cavo arranged for and provided Communication Access Realtime Translation (CART) services at the deposition to accommodate Plaintiff's hearing disability and, as a result, Plaintiff was fully able to participate in the deposition.").

63. *Id.* ("Guth provided Plaintiff with general details about how the mediation would proceed and ensured Plaintiff that the hosts would be accommodating to his requests. In response, Plaintiff informed Guth that CART services would not be required.").

64. *Id.* at *2. Novak raised concern with the following: 1) Novak could not read the mediator's lips based on the arrangement of the room, 2) the opposing party kept papers with revisions such that Novak could no longer keep track of edits, 3) the failure of the opposing party to provide for 20 days "review and approve" a final settlement, 4) comments by the mediator "attack[ing]" him for his disability status, and 5) inability to access defendant's law office with a service animal. *Id*.

65. *Id.* at *4. In order to find an injury-in-fact under the standing doctrines, the plaintiff must prove: "that he has suffered an injury in fact, defined as the invasion of a legally protected interest that is both (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Jefferson v. Stinson Morrison Hecker LLP, 249 F.Supp.3d 76, 80 (C.D. Cal. 2017) (citing Lujan v. Defenders of Wildlife, 504 U.S. 560 (1992)).

66. Novak v. Litchfield Cavo, LLP, 2014 WL 7330925, at *3; *see also Jefferson*, 249 F.Supp.3d at 81 (noting that a plaintiff seeking injunctive relief, "must allege a likelihood of future violations of [his] rights . . . , not simply future effects from his past violations." (internal citation and quotation marks omitted)).

67. The court noted that a lawyer's office is a place of public accommodation under the ADA. Novak v. Litchfield Cavo, LLP, 2014 WL 7330925, at *3 (citing 42 U.S.C. § 12181(7)(F)). However, because the law office had a history of making requested accommodations in the past—such as providing

deciding cases involving allegations of discrimination at law offices reached similar conclusions.[68] That said, there is case law at the circuit court-level suggesting standing is not always a difficult barrier in ADA Title III cases—for instance, when the Sixth Circuit overturned a district court's dismissal of a case because it did not seem likely the plaintiff would return to the state in the future to use a non-compliant bathroom in the store.[69] In that case, the Court made it clear that standing did not require a definitive plan to return.

Given the limited remedies in private enforcement cases, plaintiffs may have a difficult time finding a lawyer to bring these cases.[70] However, the possibility of liability still exists. An administration may one day bring cases for violations against lawyers, mediators, and other service providers. In the meantime, the law is presumed to deter unlawful conduct. Even outside of legal compliance and legal action, the market may dictate that mediators engaging in discriminatory conduct will lose business, particularly in a climate where some disability discrimination claims are on the rise.[71]

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requested CART services, the court was not convinced that the office could not make reasonable accommodation in the future. *Id.* The mere fact that a person will return to the place of public accommodation is insufficient. *Jefferson*, 249 F.Supp.3d at 81.

68. *See, e.g.*, Stanek v. St. Charles Comm. Unit School Dist. #303, 2020 WL 1304828, at *2 (E.D. Ill. Mar. 19, 2020) (finding no ADA violation when deponent had not challenged access to the office, but finding one to the form of the deposition); *Jefferson*, 249 F.Supp.3d at 81–82 (finding no injury-in-fact alleged regarding law office when no facts demonstrated that the party would be returning to the law office for another deposition).

69. *See, e.g.*, Mosley v. Kohl's Dep't Stores, Inc., 942 F.3d 752, 760 (6th Cir. 2019) (holding "[n]or do we require plaintiffs to have visited the accommodation more than once" in a case involving a non-compliant bathroom in a store in a state different than the one where the plaintiff lived).

70. Some research suggests that most litigation under Title III is brought by a small number of lawyers and only within a handful of jurisdictions. *See generally* Casey L. Raymond, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions Under Titles II and III*, 18 TEX. J. C.L. & C.R. 242 (2013) (finding ADA Title II and III cases to be highly concentrated in a limited number of judicial districts).

71. According to the Equal Employment Opportunity Commission's Enforcement and Litigation Statistics, mental health-related disability claims have increased. *Enforcement and Litigation Statistics*, U.S. EQUAL EMP'T COMM'N, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 [https://perma.cc/3RJ6-6JLM] (last visited Oct. 10, 2025). *See also EEOC Wants to Curb Mental Health Discrimination*, SHRM (Oct. 2, 2023), https://www.shrm.org/topics-tools/news/inclusion-diversity/eeoc-wants-to-curb-mental-health-discrimination [https://perma.cc/5R5C-GNZQ]; Jourdan Day, *Mental Health Claims on the Rise: New Normal for Disability-Related Charges?*, EMP. LAW REP. (Apr. 12, 2022), https://www.employerlawreport.com/2022/04/articles/workplace-discrimination/mental-health-claims-on-the-rise-new-normal-for-disability-related-charges/ [https://perma.cc/535M-5XAN].

II. HOW MEDIATORS ASSESS CAPACITY

Having discussed the law, ethics, and some social science regarding capacity, we turn to the issue of how mediators assess capacity in practice. Mediators often assess capacity during the initial portions of the mediation session. In a 2021 study, Professors Roselle L. Wissler and Art Hinshaw found that in roughly 43% of civil mediations and between 62-75% of family mediations, the mediator assessed party capacity during the beginning stages of mediation.[72] Unfortunately, this study only asked whether mediators assessed capacity and not *how* mediators assessed capacity during the opening portions of a mediation. Nevertheless, this study does show that capacity assessments are being conducted in some form with regular frequency.[73]

Many mediators, particularly family mediators, receive training on how to screen parties for power and control dynamics that may impact parties' free decision-making. Depending on the jurisdiction or the program, parties who have a history of *past* abuse may still be permitted to mediate.[74] In some programs, such as Nebraska's, the screener must assess whether the parties have the capacity to mediate at the time of the session, rather than in the past.[75] However, the Nebraska program involves additional mediation safeguards for cases involving past abuse.[76]

Mediators should conduct screening in the same way for all parties in all cases,[77] using a tool developed by those with expertise in issues of power

72. Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARV. NEGOT. L. REV. 1, 16, 18 (2021) (reporting self-disclosed data from mediators).

73. *Id.* at 19.

74. *See* Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 YALE J.L. & FEMINISM 97, 129–30 (2010) (advocating that screening should not focus "exclusively or even primarily on a history" of abuse, but on whether the parties can engage in "meaningful participation" in the mediation).

75. NEB. REV. STAT. § 43-2939(1) (2010) (requiring screening for all cases involving parenting time).

76. NEB. REV. STAT. § 43-2937(2) (2010) (allowing mediation for couples with past domestic intimate partner dispute under specialized protocols such as meeting with the parties at different dates or times).

77. Research on the issue of screening in mediation is sparse; however, some research shows that screening occurs at significant rates, particularly in the areas of family and elder law. Landrum, *supra* note 16, at 450–51 (noting that upwards of 80% of mediation programs for domestic relations cases involved screening). *See also* Mary Helen McNeal & Maria Brown, *Elder Restorative Justice*, 21 CARDOZO J. CONFLICT RESOL. 91, 115 (2019) (recommending that mediators conduct pre-mediation interviews or assessments with all parties in cases of elder abuse); Adkins, *supra* note 74, at 115–16

and control in addition to other types of capacity concerns.[78] Many mediators meet with and screen the party who is likely in the weaker power position first. In family cases, mediators often screen a female party prior to a male party, based on the statistical evidence that most victims of domestic violence are women.[79] However, that gender-based assumption can be problematic because a mediator should never assume that any party is a victim based on gender or other characteristics. In addition to initial screening, mediators are often taught to remain vigilant regarding power and control or self-determination throughout the mediation.

Mediators should be mindful of whether parties can engage in understanding, reasoning, appreciation, and choice during the mediation based on the parties' behaviors. Commonly cited behaviors indicating a party's lack of capacity based on coercive power include: 1) indecisiveness, 2) indications of choosing an option solely to please the other side, 3) emotional outbursts, including crying and yelling, 4) relying on someone else to speak for them instead of speaking for themself,[80] and 5) the perception they are not following along with the conversation.

The four most common times mediators assess capacity are: 1) intake, 2) at the beginning of the mediation, 3) at agreement signing, and 4) when challenging behavior begins to occur. Intake is a common place for mediators to conduct a capacity assessment. In family mediation, some jurisdictions have laws that require meeting with the parties individually to assess the parties' ability to make decisions.[81] The mediator should use the same criteria for every intake, and the criteria should be based on observed

(describing the protocols in the 80% of mediation programs that require screening).

78. *See, e.g.*, Kristine Paranica, *The Implications of Intimate Partner Violence on Ethical Mediation Practice*, 88 N.D. L. REV. 907, 917–18 (2012) (describing the screening tool developed in Michigan and used by mediation programs across the United States). Many jurisdictions use a screening tool based on the "power and control" wheel to screen for multiple types of abuse. *See* Domestic Abuse Intervention Programs, *Wheel Information Center*, THE DULUTH MODEL, https://www.theduluthmodel.org/wheels/ [https://perma.cc/NRD7-6TB8] (last visited Oct. 10, 2025).

79. *See, e.g.*, *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://ncadv.org/STATISTICS [https://perma.cc/A85S-6X9Z] (last visited Nov. 5, 2025) (summarizing that roughly one in four women and one in nine men "experience severe intimate partner" violence or stalking).

80. Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 LOY. J. PUB. INT. L. 37, 50 (2003) (discussing that one result of power and control is the "inability to speak up" for oneself).

81. *See, e.g.*, NEB. REV. STAT. § 43-2939 (2010) (requiring mediators to meet with parties individually to assess whether parties can "negotiate freely and make decisions").

behaviors and avoid any disability inquiries as part of the assessment. Intake is also a time when a mediator may hear parties raise known or suspected mental health concerns related to the *other party*. In those instances, the mediator should acknowledge any behavior-based issues raised by the party without letting any of their unsolicited mental health speculation bias or alter the normal screening process.

Because parties must meet a minimum legal requirement for capacity,[82] some mediators choose to assess capacity at the time the parties sign an agreement. As with all screening mechanisms, mediators ascribing to this practice should be consistent across all cases. Post-mediation challenges to mediated agreements based on capacity may be entertained by courts in jurisdictions adopting the Uniform Mediation Act (UMA).[83]

Other mediators may take a more ad hoc approach to assessing capacity, such as trying to make the determination when troubling behaviors occur. This strategy, however, can be problematic because the mediator may not act consistently from case to case. Mediators subscribing to this philosophy should, at a minimum, do a capacity assessment every time a behavior appears in their cases, not only during a portion of the times that a behavior appears. These mediators must be careful when determining what a "problematic" behavior may be. Ad hoc determinations can be inappropriately influenced by the mediator's subjective determination of what is—or is not—helpful conduct during a mediation. Resources exist to help mediators make these determinations, including resources from BiasResistentCourts.org[84] and new safety guidance from the ACR.[85] The ACR Safety Guidance includes general safety protocols and guidance about how to develop plans for responding to challenging behaviors and acting on feelings while maintaining a bias-resistant approach. BiasResistantCourts.org offers several relevant one-page worksheets to

82. *See infra* Section I.

83. The UMA contemplates that standard contract defenses may invalidate a mediated settlement agreement. The UMA, however, provides that a mediator may not be forced to testify in any action trying to rescind a mediated settlement agreement on contractual grounds. *See* UNIF. MEDIATION ACT § 6(c) (UNIF. LAW COMM'N 2003).

84. *Trauma-Informed and Bias-Resistant Resources*, BIASRESISTANTCOURTS.ORG, https://biasresistantcourts.org [https://perma.cc/Y6C2-VDNV] (last visited Oct. 10, 2025).

85. *Guidance for Physically Safe Conflict Resolution: A Bias-Resistant Approach*, ASS'N FOR CONFLICT RESOL. (Mar. 4, 2025), https://cdn.ymaws.com/acrnet.org/resource/resmgr/safe_and_bias-resistant_-_ma.pdf [https://perma.cc/8U94-WSD8] [hereinafter *Guidance for Physically Safe Conflict Resolution*].

help mediators, including one to "Respond to Challenging Behaviors Consistently, Safely, and Without Acting on Backstories."[86]

Within the field of dispute resolution, some mediation programs and guidance still suggest questions or screening on the basis of mental illness or disability, without recognizing that the ADA limits these kinds of inquiries. For instance, a 2010 study by John Lande and Forrest S. Mosten found that most collaborative law books (7 out of 8) at the time suggested denying service to parties who appeared to have mental health problems and it recommended screening based on "whether a party has a mental illness."[87] The ADA Mediation Guidelines, developed by a working group and posted online in 2000 by the Cardozo Journal of Conflict Resolution, suggested that if a mediator has concern about party capacity, "the mediator should determine whether *a disability* is interfering with the capacity to mediate."[88]

There are also times when parties may be subjected to informal assessments and quasi-examinations, only to be provided a different type of mediation practice based on perceived impairments. For example, a 2021 book called *Mediating High Conflict Disputes* promulgates a model of mediation that uses fewer discussions of insights, feelings, and the past based on the private working theory that a party may be a "high conflict person." It explains that a "high conflict person" or "high conflict personality" shows signs of possible personality-disorder-related mental impairments, which the authors write are associated with five clinical personality disorders.[89] Their rationale for providing these clients perceived

86. *See Trauma-Informed and Bias-Resistant Resources*, *supra* note 84.

87. John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 OHIO ST. J. ON DISP. RESOL. 347, 358, 421 (2010) (Table 1 on page 358 shows books using mental illness as a factor, and page 421 suggests "(e) whether a party has a mental illness" as a screening factor).

88. *See generally* Melissa Brodrick et al., *ADA Mediation Guidelines*, CARDOZO J. CONFLICT RESOL. (2000), https://www.cardozojcr.com/ada-mediation-guidelines (2000) [https://perma.cc/QG2H-VWZ2]. This section has been the subject of some controversy, as described in Dan Berstein, *Mistakes? Tools for Publishers and CLE Providers to Prevent Discriminatory Dispute Resolution Guidance*, 42 ALTS. HIGH COST LITIG. 4, 61 (2024) (detailing how Yeshiva University fielded a complaint about the document leading to its temporary removal in 2021 and its eventual resurfacing with a disclaimer and the removal of language saying the Kukin Program was its "institutional home").

89. *See generally* BILL EDDY & MICHAEL LOMAX, MEDIATING HIGH CONFLICT DISPUTES: A BREAKTHROUGH APPROACH WITH TIPS AND TOOLS, AND THE NEW WAYS FOR MEDIATION METHOD (2021). The book describes "four fuhgeddaboudits" when dealing with people that appear to potentially have high conflict mental impairments who are therefore presumed not to be able to handle insight, feelings, or the past. *See generally id.* For a more detailed discussion of how this work, and other work in dispute resolution, treats parties differently based on personality disorder labeling and proxy labels,

as potentially having "high conflict personality" impairments with a different type of mediation process is explicitly based on the assumption that these disabling mental impairments render the party unable to function well in normal mediation processes.

There have also been recent updates to protocols and guidance to improve how mediators are addressing these issues. In 2023, the State Court Administrative Office in Michigan updated its mediator standards of conduct and domestic relations screener, removing questions asking about mental health problems and linking them to safety risks.[90] That same year, the ABA also removed some content labeling parties as "high conflict people" or "high conflict personalities" and targeting them for different treatment based on the speculation that they have a disability.[91] In 2025, the MASIC-S screener for domestic violence concerns removed a question asking if they have any concerns about the other party having mental health problems.[92] That year, the ACR also published their aforementioned new safety guidance emphasizing being bias-resistant and warning mediators not to profile any party based on mental health conditions.[93]

Mediators often do assess capacity to meet their ethical responsibility to ensure parties exercise self-determination. That being said, mediators can also fall into questionable conduct when they look for diagnoses rather than behaviors, make disability inquiries, or screen parties in an inconsistent, ad hoc way.

Guidance for mediators has been changing to remove problematic language, but some sources containing problematic advice are still being disseminated, adding to the confusion as to what is appropriate. Section IV will provide tools to help mediators practice effectively and avoid mistakes.

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see Dan Berstein, Hannah Diamond & Philip T. Yanos, *Ending the Epidemic of Accidental Personality Disorder Discrimination by Well-Meaning Mediators*, 2024 J. DISP. RESOL. 1, 7–10 (discussing how proxy labels are used to refer to personality disorder symptoms and traits) [hereinafter *Ending the Epidemic*].

90. *See* Dan Berstein, *Ending Mental Illness Discrimination in Dispute Resolution and Beyond: Some 2023 Updates,* MEDIATE.COM (Jan. 3, 2024), https://mediate.com/ending-mental-illness-discrimination-in-dispute-resolution-and-beyond-some-2023-updates/ [https://perma.cc/J5TL-QBZV].

91. *Id.*

92. *See Mediator's Assesment of Safety Issues and Concerns-Short*, ODR.COM, https://odr.com/masic-s/ [https://perma.cc/8CVR-NGKA] (Jan. 2025) (recognizing that past guidance may have encouraged people to "focus on actual or fictional mental health problems").

93. *See Guidance for Physically Safe Conflict Resolution*, *supra* note 85, at 9–10.

III. CHALLENGES ASSESSING CAPACITY

This Section addresses common challenges in capacity screening. First, we explore how capacity screenings can be biased even when undertaken by medical experts. Then, we discuss ways mediators can mitigate those biases when they approach capacity assessments, before introducing tools to help them do that in Section IV.

A. Understanding and Addressing Biases in Capacity Assessment

Capacity assessment can be difficult because it frequently includes subjective elements, and the guidelines as to when and how to conduct them can be open-ended and vague. One survey of psychiatrists examined the prevalence of practitioners making a number of inappropriate assumptions, including, but not limited to: 1) global assumptions that someone lacks capacity based on their type of health condition, 2) finding that if someone lacked capacity for one type of decision they lacked capacity for all decisions, 3) practitioners failing to give people enough information and accommodations to support their having capacity, 4) practitioners assuming people have capacity based on their agreeing with the practitioner, and 5) practitioners finding a lack of capacity when they dislike the person.[94] "Capacity ratings were also associated with clinician values regarding patient involvement in medical decisions, clinician-patient mismatches on such values, and emotional reactions to patients."[95]

One way of improving capacity assessments is by relying on standard instruments. There are many different instruments that researchers have created.[96] Most tools employ structured forms and interviews and are tailored to certain decisions. However, these tools are often not used.[97] For

94. *See* Linda Ganzini et al., *Pitfalls in Assessment of Decision-Making Capacity*, 44 PSYCHOSOMATICS 237, 238–40 (2003).

95. Michelle Braun et al., *Are Clinician's Ever Biased in Their Judgments of the Capacity of Older Adult's to Make Medical Decisions?*, 33 GENERATIONS 78, 78 (2009).

96. *See generally* Miroslav Radenković, *Importance of Decisional Capacity Tools in Obtaining Informed Consent in Clinical Settings*, 37 BIOETHICS 146 (2023) (discussing clinical instruments including the MacCAT-T, HCAT, SICIATRI, and CAT).

97. *See* Craig Barstow, Brian Shahan & Melissa Roberts, *Evaluating Medical Decision-Making Capacity in Practice*, 98 AM. FAM. PHYSICIAN 40, 40–41 (2018) (describing how intuitive assessments are the norm as "[c]apacity is assessed intuitively at every medical encounter and is usually readily apparent," recommending the use of formal evaluation tools, and citing that "an analysis of eight studies showed that physicians could identify only 42% of patients with incapacity as determined by a formal

instance, in the world of testamentary capacity, current assessment procedures rely mainly on clinical judgments and concerns for the aforementioned biases involved in capacity assessments have led to calls for courts to develop some kind of standardization and objective assessment process that could improve accuracy.[98] This kind of effort is complex because there are no clear-cut standards for capacity assessment, leaving many practitioners to believe that case-by-case assessments are the only option.[99]

Another way to address these biases and problems is to ensure that practitioners are doing all that they can to support party capacity. This is not a new idea in the field of mediation. Authors Susan H. Crawford, Lewis Dabney, Judith M. Filner, and Peter R. Maida introduced a mediation framework focused on facilitating competencies rather than determining capacity back in 2003.[100] Ample research exists suggesting that even when there appears to be a lack of capacity, there are ways to provide support so the parties still may reach it. For instance, systemic reviews of research surrounding psychiatry inpatients dispelled stereotypes about their ability to have capacity and also concluded that supported decision-making can help patients with impairments improve their capacity.[101] Studies also found that certain capacity problems are temporary and non-global; further finding that making improvements in terms of how forms are structured and presented can make a difference in supporting party capacity.[102]

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evaluation").

98. Amanda Kenepp et al., *A Comprehensive Approach to Assessment of Testamentary Capacity*, 12 FRONTIERS IN PSYCH., Dec. 2021, at 4 (2021) ("[C]urrent assessment procedures predominantly rely heavily on the use of clinical judgment when determining TC. While clinical judgment is a valuable tool in decision-making, it is not infallible, and that judgment based on objective, validated data is consistently more accurate than that based on judgment alone.").

99. *See* Marina Gasparini et al., *The Evaluation of Capacity in Dementia: Ethical Constraints and Best Practice. A Systematic Review*, 57 ANN IST SUPER SANITÀ 212, 212 (2021) ("The results indicate that the concepts of capacity, competence and decision-making need to be better clarified, ad-hoc devised tools are required and a multidisciplinary, clinical and legal approach to assessments of capacity needs to be adopted.").

100. *See generally* Susan H. Crawford et al., *From Determining Capacity to Facilitating Competencies: A New Mediation Framework*, 20 CONFLICT RESOL. Q. 385 (2003).

101. *See, e.g.*, Aoife Curley, Carol Watson & Brendan D. Kelly, *Capacity to Consent to Treatment in Psychiatry Inpatients-A Systematic Review*, 26 INT'L J. PSYCHIATRY CLINICAL PRAC. 303, 303 (2022); Silvia Marcó-García et al., *Decision Making Capacity for Treatment in Psychiatric Inpatients: A Systematic Review and Meta-Analysis*, 54 PSYCH. MED. 1074 (2024).

102. *See generally,* A. Calcedo-Barba et al., *A Meta-Review of Literature Reviews Assessing the Capacity of Patients with Severe Mental Disorders to Make Decisions about Their Healthcare*, 20 BMC

Efforts have also been underway to address practitioners' stigmas that influence their capacity assessments. For clinicians, there are workshops to help them learn to improve their decision-making capacity assessments across fifteen core competencies, including preventing pitfalls that lead to improper assessments and learning skills to improve comfort in making these decisions.[103] There is also work being done to mitigate stigmas affecting certain populations, such as older people and individuals with conditions connected to inappropriate stereotypes of incapacity.[104] One experimental study, showing vignettes after the capacity assessors received training in how to do a capacity assessment, suggested that this kind of training might mitigate age biases.[105] By understanding these common problems with assessments, mediators can work towards using bias-free screening.

B. Mitigating Biases in Mediator Capacity Assessments

Because no one-sized-fits-all process exists for conducting a capacity assessment, bias may nevertheless creep in. Across capacity assessment instruments in many different contexts (mostly medical), some trends emerge that may be helpful for mediators to follow:

- Focusing on understanding, reasoning, appreciation, and choice.
- Considering decision-specific capacity—not a lack of capacity for all decisions.
- Using assessments that are time-specific.

PSYCHIATRY 339 (2020) (reviewing eleven publications exploring capacity of people with severe mental disorders).

103. *See* Lesley Charles et al., *Decision-Making Capacity Assessment Education*, 69 J. AM. GERIATRICS SOC'Y E9, E10 (2021) (discussing "15 core DMCA concepts").

104. Ana Saraiva Amaral et al., *Healthcare Decision-Making Capacity in Old Age: A Qualitative Study*, 13 FRONTIERS PSYCH. 1, 12 (2022) (discussing recommendations to "decreas[e] frequent misconceptions regarding age, neurocognitive disorders, and their relationship with capacity . . . and consequently diminish stigma").

105. *See generally* Melisa Minciocchi Urban, Karen A. Sullivan & Kelly Purser, *Age-bias in Assessments of Medical Decision-Making Capacity: A Cross-Sectional Experimental Vignette Study*, 32 PSYCHIATRY PSYCHOLOGY L. 423 (2025).

- Using assessments that are flexible to include how the information is presented and whether the person uses aids to augment their capacity.

Understanding how challenging it is to do a capacity assessment in a non-biased and non-problematic way, Section IV provides an overview of tools that help mediators to avoid inappropriate inquiries while performing assessments.

When assessing capacity, mediators should remain agnostic as to any stated diagnoses, whether self-reported or alleged by another party. Instead, they should focus on noticing observable behaviors related to a party showing understanding (comprehension of relevant information), reasoning (comparing alternatives in a rational manner), appreciation (relating information to their own personal situation), and choice (expressing a clear and consistent decision). The next Section provides takeaway tools and checklists mediators can use to improve their assessments.

As noted above, the most important thing is for mediators to be consistent.[106] If a party self-discloses any issues that may affect the party's capacity, the mediator would then be free to ask whether the party needs any support to make mediation more comfortable or effective. *The mere mentioning of a disability or condition should not be considered as a reason to check capacity*, in contrast to the raising of specific behaviors or issues related to agency and comprehension. Common types of support to help someone with a capacity concern could include providing more time to make decisions, caucus-style mediation, or the use of a support person (including an attorney) during the mediation, among others.

IV. TOOLS TO ASK APPROPRIATE QUESTIONS

To help mediators prevent inappropriate inquiries while conducting assessments, this Section shares three tools: a checklist for conducting capacity assessments, a chart on preventing "regarded as" discrimination, and talking points for overcoming objections to behavior-based screening (as opposed to targeting health conditions).

106. *See generally* NEB. REV. STAT. § 43-2939 (2010) (requiring screening in all cases); *see also* UNIF. MEDIATION ACT § 6(c) (UNIF. LAW COMM'N 2003); AAA Model Standard II(A), *supra* note 40.

A. The Can I Ask That? Checklist

The "Can I Ask That?" Checklist is a tool that dispute resolvers can use to better understand the limits of what kinds of questions may be legally acceptable—or unacceptable—to ask when engaging in capacity assessments.[107]

The checklist is not a mandate or a recommendation that mediators should frequently assess capacity. It is a harm reduction tool to help ensure that, if there is a capacity assessment, practitioners are careful as to when and how they ask these questions.

The goal is to conduct these assessments in a universal, impartial, and legal manner without inadvertently engaging in any illegal inquiries or disparate treatment.[108]

CAN I ASK THAT? CHECKLIST

REMINDERS

- Capacity is decision-specific. It can be affected for non-medical reasons (ex. intimate partner violence, intoxication, a bad day).
- It is not the mediator's role to inquire into someone's undisclosed medical condition, or the severity of a disclosed one. Focus on how observed behaviors impact the mediation process.
- Capacity assessments are biased, especially when professionals disagree with the person or find them unpleasant.
- Screen everyone the same way—either as part of a universal process or with consistent criteria.

107. Note that these tools are provided for mediators who choose to assess capacity, keeping in mind that some mediators find that any standardized capacity assessment may be conducted in a biased manner that singles out people who fit certain behavioral, clinical, racial, or other identity-based stereotypes. *See Trauma-Informed and Bias-Resistant Resources*, *supra* note 84.

108. *See id*.

BEHAVIORS THAT MAY INDICATE DIMINISHED DECISIONAL CAPACITY

1. **Understanding** ***(Are they showing signs they are not comprehending relevant information?)***

- Not showing an awareness or inclusion of new information arising in the conversation.
- Repeating questions that were already answered without acknowledging they had been discussed.
- Not demonstrating a way of distinguishing differences between options.

2. **Reasoning** ***(Are they showing signs they are not comparing alternatives in a rational manner?)***

- Shares inconsistent or nonexistent logic when explaining positions.
- Appears to randomly or superficially agree or disagree with options without expressing a rationale.
- Nonresponsive to questions asking for their reasons for their choices or beliefs.

3. **Appreciation** ***(Are they showing signs they are not relating information to their personal situation?)***

- Asks questions that evidence they are not applying information to their situation.
- Nonresponsive to questions about applying information to their situation.
- Not expressing differences between how alternative options relate to their situation.

4. **Choice** ***(Are they showing signs they are not conveying a consistent decision?)***

- Agreeing to mutually exclusive options.

- Not expressing any decisions at all, i.e., complete withdrawal from the process.
- Expressing choices that are inconsistent from moment to moment.

B. Preventing "Regarded As" Discrimination in Mediation

Research shows that mediators may engage in disparate treatment if they believe a client is showing signs of mental health problems, including assumptions about personality disorders, "high conflict personalities," or other types of aberrant differences.[109] The checklist below can help mediators avoid accidentally engaging in "regarded as" discrimination:

Potential Disparate Treatment Toward Aberrant-Seeming Parties[110]	**How to Prevent "Regarded As" Discrimination**
Avoiding Them	Have a pre-defined list of criteria and follow that list regardless of someone's identity or your assessment of their disability.
Screening Them Out	If you are screening, use universal screening processes (such as a standard IPV screen or capacity screen, or standard criteria related to restraining orders or other criteria as screening barriers).
Regretting Serving Them	Regret is a sign of having biases favoring some parties over others. Take this situation as an opportunity to engage in reflective practices about ways to improve your overall process.

109. *See generally Ending the Epidemic*, *supra* note 89 (examining ways the mediation discourse suggests disparate treatment to parties labeled with personality-disorder-related impairments and other mental impairments and providing tools to focus on behaviors instead).

110. *See id*. at 1–2 (listing types of disparate treatment).

Potential Disparate Treatment Toward Aberrant-Seeming Parties[110]	**How to Prevent "Regarded As" Discrimination**
Bonding Less With Them	Having a preference for one party versus another compromises impartiality. Endeavor to have consistent criteria and norms for communication.
Assuming Their Conflict is Caused by Their Personality	While a relationship may exist between a mental health situation and behavior, follow procedurally fair practices to avoid acting on these kinds of assumptions.
Dismissing Their Disputes As Illegitimate	All parties are entitled to self-determination and to value the dispute their own way. The mediator should not frame a party's values as illegitimate.
Never Asking Them How They Are Feeling	It is okay to use a process that does not rely on discussions of emotion as long as that process is used consistently across your entire practice.
Profiling Them Based on Their Presumed or Disclosed Disorders	Parties with diagnoses should not be treated differently unless it is at their direction or request—wait for people to tell you their specific needs, especially given that mental health problems are not one-size-fits-all.
Manipulating Them By Exploiting Their Symptoms	Treat all parties the same, rather than using techniques "tailored" to some impairment the party may or may not have (unless the party themselves requests different treatment).

Potential Disparate Treatment Toward Aberrant-Seeming Parties[110]	**How to Prevent "Regarded As" Discrimination**
Keeping Secrets From Them	Dispute resolvers should not conceal their practices from parties. They should, where possible, have accessible information describing the process and any standard behavior boundaries.
Communicating Less With Them	Develop norms such that all parties are able to get the same level of communication.[111]
Deliberately Provoking Them to End the Relationship	Develop transparent up-front criteria for the boundaries of expected conduct and use this system to discuss the need to end services.
Threatening Them	Threatening a party is abusive and inappropriate.[112] Use upfront boundaries of what kinds of conduct is unacceptable, such as monopolizing time, communication outside of the work-week, nonpayment, and interpersonal conduct with others.

111. *See Trauma-Informed and Bias-Resistant Resources*, *supra* note 84 (providing trauma-informed communication resources).

112. *See generally "Wheels" Adapted from Power and Control Wheel Model*, NAT'L ON CTR. DOMESTIC AND SEXUAL VIOLENCE (citing P.C Wheeler, *Power and Control: Lawyer-Client Relationship Abuse and Psychological Assault*, NAT'L CTR ON. DOMESTIC AND SEXUAL VIOLENCE, https://web.archive.org/web/20190829222905/http://www.ncdsv.org/images/Power%20Control%20Wheel%20Lawyer%20Client%20by%20P.C.%20Wheeler_2009.pdf [https://perma.cc/BFV3-4D26] (last visited Oct. 20, 2025) ("discussing threats from lawyers to clients")), https://www.ncdsv.org/wheels-adapted-from-power-and-control-wheel-model.html [https://perma.cc/Q88F-VNPB] (last visited Oct. 10, 2025).

Potential Disparate Treatment Toward Aberrant-Seeming Parties[110]	**How to Prevent "Regarded As" Discrimination**
Imagining They Have No Sense of Humor or Assuming They Are Not Human	A mediator having these thoughts should identify the behaviors that lead to these stereotypes.
Scrutinizing Them as Dishonest	The dispute resolver does not determine whose story is true; instead, let the parties decide together what they believe, who they trust, and what they agree to.
Treating Them as a Threat	Feeling threatened by a party is often a sign that boundaries are not clear enough. If you have a fear for your safety, follow a consistent safety planning process.[113]
Becoming More Formal	The level of formality should be consistent across parties. Decide on what is normal for you.

C. Overcoming Common Objections to Behavior Based Capacity Screening

i. "The Law Says That People With Mental Illness May Lack Capacity, So I Have to Determine Who Has a Mental Illness."

Historically, lawmakers conflated capacity assessments with medical conditions and, unfortunately, some of these laws still exist. The ADA is

113. *See generally Guidance for Physically Safe Conflict Resolution*, *supra* note 85.

one of a number of disability laws that prohibit the use of screening based on mental health conditions or other disabilities. The simple way to screen without incurring liability under the ADA is to only use capacity assessments that do not ask about disabilities.

ii. "People May Not Know Whether They Lack Capacity and Have Disability Needs, So I Need to Determine If Anyone With a Disability Needs Help."

Many situations arise where people who lack decisional capacity may not have insight into their own situation, and where observed behaviors indicate the need to assess capacity. However, these situations can arise outside of health-related contexts, too. Instead of assuming someone with a disability lacks capacity, a professional should use the same criteria for everyone.

iii. "By Doing Capacity Screens for People Who I Think May Be Disabled, I Am Protecting Them From Bad Agreements."

Screening to confirm capacity is a way to protect vulnerable people who lack capacity from entering into bad agreements. However, this screening should be conducted universally. Remember that dispute resolution professionals are not "protectors," but people who can empower parties to make their own decisions.

iv. "There Are Certain Mental Health Conditions That Are Known to Be Related to Incapacity, So I Should Take Special Care With Those."

Different mental health conditions are stigmatized in different ways, based on media stereotypes and even stigma within the mental health profession. While data shows that some disabilities may be more or less likely to be linked to cognitive impairment, it is also true that every person has an equal right to be free from discrimination. Again, capacity assessments should either be applied to assess all parties universally or to assess them all by the same criteria of observing clear behavior problems related to capacity.

v. "We Need Tools to Have Effective Boundaries From Clients Who Are Difficult or Toxic."

Anyone can engage in challenging behaviors. Professionals should have boundaries for challenging behaviors without writing anyone off as being difficult, toxic, or high conflict. It is not appropriate for us to be writing anyone off with this kind of judgment or conclusion as to them as a person. Instead, follow consistent and impartial boundaries for challenging behaviors.

CONCLUSION: BE CAREFUL WHAT YOU ASK

When assessing a party's capacity to mediate, mediators may ask inappropriate questions including disability inquiries. Sometimes these questions have appeared in published guidance, or standard intake processes, but nonetheless they may be impermissible to ask. This Article reviewed some of these problems and shared tools mediators can use to engage in impartial behavior-focused assessments in a universal manner to prevent potentially illegal questions and "regarded as" discrimination claims.

Mediators ask themselves a lot of questions when they are deciding how to practice.[114] When planning how to engage parties, as part of making capacity assessments or otherwise, it is important that they be aware of what questions not to ask.

114. *See* Peter Reilly, *The Unfulfilled Promise of Self-Determination in Court-Connected Mediation*, 50 FLA. ST. U. L. REV. 861, 881–901 (2023) (exploring four key process questions mediators ask themselves).