

Power and Elder Mediation: Helping Practitioners Account for Power Issues in Elder Mediation:  
Disputant Autonomy, Capacity, Vulnerability, Dependency and Elder Financial Abuse.

By:

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## **List of Contributors**

This study incorporated contributions from elder law and elder mediation experts from across Canada, the United States, and Australia. The following list of contributors was organized alphabetically by last name.

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*Contributions were also received from several anonymous participants with backgrounds in Elder Law and/or Disability Law.*

***Vision:*** *If mediation practitioners are educated about the possible power-related issues that can arise in elder mediation, they will be better able to mitigate the likelihood of harm impacting both the parties and the mediation process.*

## **EXECUTIVE SUMMARY**

The purpose of this research project is to provide information on power-related issues within elder mediation and recommendations and resources to assist lawyer and mediator practitioners. This report is intended to serve as a reference for practitioners. It will also be as a source and foundation for three deliverables – a PowerPoint presentation and two informational pamphlets – that will serve as practical tools for these practitioners and their clients.

### **Introduction**

Older adults, individuals aged 65 years and above, represent the fastest growing demographic in Canada (CCEL, 2012). Elder mediation (i.e., mediations involving older adults) will become an increasingly pertinent area of study as the Canadian population ages. Power-related issues are particularly important in elder mediation because older adults are a more vulnerable population and are more likely to be victimized than many other demographics (CCEL, 2012).

### **Methodology**

This project is based on an extensive literature review and 13 interviews with elder law and elder mediation experts from across Canada, the United States and Australia. The purpose of the interviews was to gain practical insight into how elder law and elder mediation concepts and issues are interpreted and applied by practitioner and academic professionals. Interview participants were recruited based on their experience and/or expertise in elder law or elder mediation and/or their understanding of power issues. Issues relating to power imbalances typically arise around questions of capacity, disputant autonomy, dependency, vulnerability, and physical, emotional or financial abuse. Research data was analyzed using thematic analysis to identify themes and produce corresponding recommendations.

### **Literature Review**

Elder mediations involve issues affecting individuals aged 65 and above. Age-related issues, such as physical, emotional, social and cognitive limitations are more likely to occur in this older demographic. This has implications for mediator practitioners because these issues may affect a disputant's autonomy and/or safety, capacity evaluations, real and perceived vulnerability, and cases involving abuse. Practical applications from research on family violence are explored in the elder mediation context. Both populations are often dependent on other adult caregivers and both often involve the presence of a disability. Ethnocultural and intergenerational differences, such as religion, ethnicity, country of origin, gender, and generation, are important considerations in elder mediation. The literature suggests that an awareness of ethnocultural and intergenerational differences will assist mediators in working with individuals from a variety of ethnocultural and generational backgrounds.

### **Findings and Discussion**

This section discusses the interview findings in the context of the Literature Review. Six interrelated themes emerged from a thematic analysis of interview findings. They are dependency, financial exploitation and other forms of abuse, parallels to other areas of law; capacity and aging issues, accommodation considerations and degree of customization, and ethnocultural and intergenerational considerations.

## **Recommendations**

This study recommends that techniques used in the disability law context may have some applicability in the elder mediation context. A 2011 American Bar Association pamphlet, *Why Am I Left Alone in the Waiting Room?* is a worthy resource to provide to elder mediation clients. Practitioners should also be aware of the relationship between dependency and risk because risk increases with dependency. Increased dependency should act as a warning sign to practitioners. It is also recommended that practitioners conduct a self-evaluation to assess their views regarding degree of customization because findings suggest this influences their accommodation practices. In order to minimize financial harm to older adults, it is recommended that practitioners provide educational resources about POAs to older adult clients. Practitioners should also try to increase awareness of elder financial abuse to older adult clients. This education may help to reduce the frequency and/ or severity of elder abuse. This study also recommends that practitioners receive education about cross-cultural, intergenerational and aging issues. It is recommended that practitioners be acutely aware of the need to accommodate or make allowances for the frequent and often idiosyncratic physical, cognitive, emotional, mental, and stamina needs and limitations of the elderly. In this respect, mediation is recommended insofar as the elder mediation process is highly flexible, especially in comparison to more formal dispute resolution processes such as litigation. Mediation can also be modified and customized to meet the unique needs of older adult clients.

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## **INTRODUCTION**

This section discusses the project objectives, primary research questions, project client and importance of the research. This section also describes how the report has been organized.

### **Project Objectives**

The purpose of this project is to fulfill the Dispute Resolution 598 Masters Project requirement of the Masters of Arts Dispute Resolution (MADR) program at the University of Victoria and to develop practical resources to aid mediators, particularly those at the South Island Dispute Resolution Centre (SIDRC), in developing best practices for the management of disputes involving older adults, defined as individuals aged 65 and above. This project will produce two deliverables:

1. A report that satisfies the DR 598 Masters Project requirement of the MADR program.
2. A toolkit that will review relevant literature and make recommendations for dispute resolution practitioners, including lawyers and mediators, to effectively identify and respond to power-related issues in the elder mediation context.

### **Project Research Objectives**

The specific project research objectives are:

1. To provide research and existing literature regarding power-related issues in elder mediation to inform practitioners and further expand the literature.
2. To make recommendations, in the form of guidelines and/or best practices, regarding how practitioners can respond to power-related issues in elder mediation.

The information resulting from these research objectives will be discussed in both the report and the toolkit package.

### **Primary Research Questions**

The primary research questions flowing from these project objectives are:

1. How can practitioners best understand power-related issues that occur in the elder mediation context?
2. How can practitioners identify and address power discrepancies as they arise in mediation within the context of elder law?
3. What specific tools are available to manage these power imbalances?

### **Client and Importance of Research**

The project client, SIDRC, is a non-profit dispute resolution center located in Victoria, BC that provides mediation, facilitation and arbitration services, conflict coaching, and training. SIDRC is a source of information, referrals, and serves as a resource to the mediator community. SIDRC also works closely with the MADR program and Faculty of Law at the University of Victoria.

This project is important to SIDRC because elder law and elder mediation issues are present among their mediation files and the areas of elder law and elder mediation are emerging fields in

Canada. SIDRC will include the toolkit deliverable of this project as a resource for its team and community members. The toolkit includes a PowerPoint presentation for practitioners and two informational pamphlets: one geared towards practitioners and one geared toward older adult clients. These resources will assist SIDRC in providing training and information to mediation practitioners and participants to elder mediations. This toolkit will also assist SIDRC by providing it with tangible resources that can be distributed through the website and in-print brochures. These brochures will be available at training and information sessions and the SIDRC office.

### **Organization of Report**

The report is organized into the following sections:

- 1.0 Introduction
- 2.0 Background
- 3.0 Methodology
- 4.0 Literature Review
- 5.0 Findings and Discussion
- 6.0 Recommendations
- 7.0 Conclusion

The Introduction section discusses project objectives, primary research questions, the project client and importance of the research. This section also describes how the report is organized.

The Background section provides context by defining elder law, elder mediation, the construct of power, the changing Canadian demographic and the rationale supporting this research.

The Methodology section outlines the approach taken to the research involved in this project.

The Literature Review explores the major power-related issues in the field of elder mediation, practical applications from research on family violence that translate into the field of elder mediation and cross-cultural and intergenerational considerations that practitioners should be aware of in elder mediation.

The Findings and Discussion section informs the reader of the study findings and provides a discussion of these findings in the context of the Literature Review.

The Recommendation section discusses implications of study findings for practitioners by providing best practice recommendations to elder mediation.

The Conclusion section summarizes findings and discusses next steps.

## BACKGROUND

This section provides supporting information for this report. The background information in this section provides context to the changing Canadian demographics; elder law, elder mediation, the study of power, and project rationale.

### Changing Canadian Demographics

*Older adults*, defined as individuals aged 65 years and older, represent the fastest growing demographic in Canada (CCEL, 2012; Canadian Oxford Dictionary, *n.d.*; as cited by Statistics Canada, 2006). In 2005, older adults accounted for 13.1% of Canada's population; this percentage is expected to almost double from 13.1% to 24.5% from 2005 to 2036 (Statistics Canada, 2006). Statistics Canada (2008a) also estimates that in 2013, the number of persons aged 55 to 64 years will start to exceed the number of persons aged 15 to 24 years. After 2036, the percentage of older adults will continue to grow, but at a slower pace (Statistics Canada, 2008a). This shifting demographic trend can be attributed to Canada's decreasing birth rates, increasing life expectancy, and increasing immigration (Statistics Canada, 2008b; CIA, 2012).

Experts attribute Canada's aging demographic trend to the 'baby boom generation'. Known as *baby boomers*, these individuals were born between the conclusion of World War II in 1945 and 1966 (Krotki, 2012). Baby boomers are (as of 2013) between the ages of 46 and 67, meaning that within the next nineteen years, all baby boomers will be 65 years or above. Elder law will become an increasingly relevant area of law as it affects a greater percentage of the Canadian population.

### Elder Law and Elder Mediation

Elder law and elder mediation can be conceptualized as a customized approach to legal proceedings and mediations involving older adults. An analogy is often made between geriatrics in the medical field and elder law and elder mediation. By offering a customized mediation approach to elder law issues, we can reduce the mistreatment of older adults and help practitioners to conduct safer mediations with older adults.

Elder law is an area of law that addresses issues affecting older adults<sup>1,2</sup>. These issues may include areas of law such as wills and estate planning, caregiving and health law, adult guardianship, and misuse of powers of attorney (POA)—agreements that legally grant another person to make decisions about another person's health or finances, among others (CBA, 2013; CCEL, 2012). Similarly, elder mediation refers to mediation where an elder law issue is being disputed.

A defining characteristic of elder law and elder mediation is the multidisciplinary nature of these fields (Soden, 2005); meaning, elder law and elder mediation issues will often combine legal, financial, social, and health issues. Consequently, lawyers and mediator practitioners may be

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<sup>1</sup> This study uses the same definitions as the Canadian Centre for Elder Law's 2012 Guardianship Mediation report, where 'older adult' is defined as an individual aged 65 years and above, and an 'older old adult' is defined as an individual aged 85 years and above. While elder law technically includes all 'older adults', many issues will be more relevant to the 'older old adult' demographic.

<sup>2</sup> The age used to define elder depends on context; therefore, this age-based definition may vary across countries (Soden, 2005).

required to provide – or have access to - a variety of services to address their older clients’ legal, financial, social, and health needs (Soden, 2005; CCEL, 2012). Elder law therefore requires a holistic, multidisciplinary approach (Soden 2005; BC Adult Abuse Neglect Prevention Collaborative, 2009).

Elder mediations typically involve multiple family members and intergenerational issues. Most elder mediations will involve the direct participation of the older adult, unless mental capacity, health issues, and/or other limitations prevent their participation. According to this definition, elder mediations do not require an older adult to be physically present in mediation sessions. This definition simply requires the mediation to be about an elder law issue. For example, an elder mediation may consist of a family dispute that directly affects an older adult, such as disputes about finances, health, long term care, and living arrangements. However, due to cognitive and/or physical limitations, the older adult may not be directly involved in the mediation process. Even when physical or cognitive limitations are present, it is possible for the older adult to be involved in the mediation *process*, without the requirement to be physically present during the mediation sessions. For instance, mediators may regularly consult with older adults involved in a dispute, even if that older adult is unable to directly participate in mediation sessions. Even though older adults will frequently be able to advocate for themselves, capacity issues relating to deteriorating cognitive abilities associated with illnesses, such as dementia, and physical limitations are more common in this demographic. As a consequence, accommodations may be necessary.

Power is a relational construct that can be obtained through means such as nonverbal behaviour, language, education, financial resources, age, gender, and/or racial differences (Christopherson, 2009; Linton, 2012; Waldman, 2011). Blalock (1989) highlights a distinction between “potential power” and “power in its actual form”, stating that just because a power imbalance exists, does not mean that that an empowered party will actually exercise his or her power over the other party (as cited by Kelly, 1995). *Relationality*, the relationships between people, is a defining characteristic in the study of power. Michel Foucault, for example, views expressions of power as “an inseparable component of social relations” (Sadan, 2004, p.71). This relational power aspect incorporates research from *social psychology*, the study of an individual in a group setting, making it pertinent to the study of mediation.

Social psychologists generally agree that there are three inter-related sources of power: (1) power from oneself, (2) power from relationships, and (3) power from social structures. This means that power can be created through oneself, through relationships or through social structures. *Power from oneself* refers to attributes such as knowledge, appearance, and physical strength, while *power from relationships* claims that power must be applied to someone else in order for it to exist. *Power from social structures* refers to one’s perceptions of social structures affecting beliefs and values, such as religious and political social structures (Cotler-Wunsh, 2005).

In the mediation context, Mayer’s model of power (2000) asserts that there are two general categories of power: personal and structural. *Personal power* refers to power arising from an individual’s personal characteristics, such as knowledge and communication skills. *Structural power* refers to power derived from relatively permanent situations, such as one’s legal or political background. In relation to the theory asserted by social psychologists, Mayer’s (2000) definition of *personal power* essentially combines the (1) *power from oneself* and (2) *power from*

*relationships* components. Additionally, Mayer's (2000) definition of *structural power* is roughly equivalent to (3) *power from social structures* in the social psychologists' definition. Mayer's (2000) theory also suggests that mediators are more likely to be able to influence personal- rather than structural- forms of power.

The mediator also has power through the mediation process, often derived from his or her role and status (Shapira, 2009). Types of power available to the mediator are: expert power, coercive power, reward power, referent power (i.e., emphasizing similarities, normalizing small talk), position power (i.e., court connected mediators), informational power (i.e., information about other cases), environmental manipulation power (i.e., determining time, location, format, and procedure of mediation), and third party power (i.e., colleagues or known associates). Mediators should be cognizant of the power perceived by mediation clients and the power that clients project onto them as mediators.

In this study, the construct of *power* was operationalized with the following elder mediation issues: capacity, disputant autonomy, dependency, vulnerability and elder abuse, such as elder financial abuse. These issues are discussed in more detail in the Literature Review section.

### **Project Rationale**

Power imbalances will always be present in mediations (Waldman, 2011), but the mere existence of a power imbalance does not automatically disqualify mediation. The presence of safety concerns and any impact on party's ability to self-advocate are the primary factors in determining appropriateness of mediation. Most of the mediation research on power focuses on cases involving high levels of power imbalance, or 'extreme situations', where cases would be unsuitable for mediation. For example: violence causing intimidation might restrict an individual's ability to self-advocate in mediation. Practitioners are trained to use screening procedures to detect significant levels of power imbalance that would make a case unsuitable for mediation (Waldman, 2011). Although this type of research is valuable, additional research is needed to inform practitioners about how they can address cases suitable for mediation involving moderate power imbalances (Peci, Vieira & Clegg, 2009). This study will respond to that need by providing practitioners with more information to assist in responding to power-related issues that exist within the elder mediation context.

Mediation is still a relatively new alternative to litigation. Since its onset in the early 1980s, mediation has been growing in popularity (CBA, 1998). Similarly, the elder law field is still in its infancy. Elder law has been recognized as a distinct field of law in Canada since 1999 (BCLI, 2008). As a result, a limited amount of research has been conducted on elder mediation and even less research has specifically examined power-related issues. In 2012, CCEL completed the "first Canadian in-depth study into the recent phenomena of elder and guardianship mediation" (CCEL, 2012). Although this study is a valuable resource, it contains limited research pertaining to power-related issues. This project will expand on the CCEL's (2012) report regarding power-related issues in elder mediation.

Practitioners need to be prepared for the growth of the Canadian elder population and the resulting growth in the fields of elder law and elder mediation. This project will consolidate information and generate recommendations that will help practitioners conduct safe elder

mediations by educating them about power-related issues that practitioners should be cognizant of in elder mediations.

## **METHODOLOGY**

The research design for this project consists of a literature review and interviews with experts. The literature review explores three key questions:

1. What are the major power-related issues in the field of elder mediation?
2. Are there practical applications from research on family violence that translate into the field of elder mediation?
3. What are the cultural and intergenerational considerations?

The exploration of these questions will provide a foundation of knowledge about the pertinent issues that exist in the fields of elder law and elder mediation. This framework was used to conduct interviews with industry experts.

### **Sample**

Interviews were conducted with elder law and elder mediation practitioners and academics. Expert sampling was used because participants were required to have specific knowledge (Research Methods Knowledge Base, 2006). Participants were recruited based on their experience and/or expertise in the field of elder law and/or elder mediation, and their knowledge of power issues. Expert sampling occurred primarily with individuals who attended the 2012 Canadian Centre for Elder Law conference in Vancouver, BC, and the 2013 Northwest Dispute Resolution Conference in Seattle, Washington. Recruitment occurred in June 2013 through email and phone recruitment scripts, which were approved by the ethics committee.

Thirteen interviews were conducted with participants located across Canada, United States, and Australia. Canadian participants were from British Columbia, Alberta, Saskatchewan, Ontario and Quebec. American participants were from Washington State and California, and Australian participants were from Queensland and New South Wales. The rationale for including participants across a wide geographic range is that elder law and elder mediation are more developed in the United States, and Australia is recognized by many practitioners as being more progressive in dispute resolution methods.

Participants were categorized into two groups. The first group was academics with legal backgrounds working at a legal organization or educational institution. The second group was practitioners with legal and non-legal backgrounds who were lawyers or mediators, often having a background in social work, with experience practicing or mediating elder law issues (i.e., wills and estates, health care and retirement home disputes) and/or conducting elder mediations. Of the thirteen participants three were academics and ten practitioners. As anticipated, there was some overlap between participant categories.

### **Instrument**

Semi-structured, open open-ended interviews were conducted with the participants. This interview format was selected to allow interviews to resemble a conversation. This format also allowed the interviewer to deviate from the standardized interview questions and ask additional questions as needed, depending on the direction of the conversation. Eight standard interview questions were prepared as discussion points (see Appendix A for interview questions), but because of the interview format, not every participant was asked all eight questions. Ethics permission was obtained for this methodology.

The purpose of the interviews was to gain practical insights into how elder law and elder mediation concepts and issues are interpreted and applied by practitioners and academics. Therefore, interview questions discussed elder law and elder mediation themes, issues, screening techniques, and accommodation requirements and anecdotal evidence was discussed with interview participants. (See Appendix A: Interview procedures and questions). Anecdotal information, such as discussions of past cases, was particularly useful because it helped to illuminate research themes with practical examples. These examples allowed for increased insight and understanding about how elder law and elder mediation concepts are being applied on a practical level. This helped to identify where gaps exist in practice as well as best practices, all of which informed the recommendation section.

### **Interviews**

Interviews were conducted over a four-week period between June and July 2013, using an Internet phone. Internet phones allow for conversations to be recorded and reduce long distance costs. In order to use this method, the researcher had to purchase Bria3, an Internet phone, and establish a contract with Broad-Connect Telecom, an Internet phone service provider. Interviews data were recorded using audio recordings and hand-written notes, in order to assist with recalling conversation details and themes from interview data.

Participants were informed that conversations were being recorded and were asked to avoid sharing any confidential information. Also, since interviews were being conducted through an Internet phone, participants were informed that some calls might disconnect due to Internet failure. In this case, the researcher would call the participant back at the phone number they provided. Participants were also reminded at the start of every interview about how power issues were defined in this study, in order to ensure a consistent interpretation of the power construct. This initial information helped to manage expectations about technical Internet phone difficulties that may arise and how they would be resolved. This initial information also reminded participants about the power issues they could expect to discuss. Participants had already read background information about the study in the consent form, but this initial information helped to remind them about the project topic.

Interview participation was voluntary and informed written consent was obtained from all participants. As part of the consent document, participants were given the option to waive their confidentiality. Eleven participants waived confidentiality; the names of these participants are included in this report in the list of contributors. Additional written consent was obtained from participants who are individually quoted in the body of this report.

### **Analysis**

Interview data was used to conduct a thematic analysis (Woods, 2011). Thematic analysis allows for consistent notation and insightful data analysis and is most useful when the researcher is familiar with the data (Howitt & Cramer, 2010). The researcher explored several ways to present the thematic findings. Braun and Clarke (2006) suggest there are two types of thematic analysis: inductive and theoretical. This study used an inductive thematic analysis where there are no pre-conceived coding themes. The analysis was data-driven rather than based on a specific theoretical approach. An inductive approach allows for richer data analysis than a theoretical-based approach (Braun & Clarke, 2006). The thematic analysis of interview data is built on the knowledge acquired in the literature review.

## **Limitations**

While the methodology was appropriate for the research goals, several limitations exist. Limitations of this study were: small sample size (13 participants), potential for interviewer bias, and limitations of open open-ended interviews.

Small sample size affects the generalizability, or external validity, of the study findings. The small size can partially be attributed to the choice of methodology. Interviews are a time-intensive approach, requiring more time to administer than other methods, such as surveys. Feasibility constraints, such as available time and financial resources, limited the number of interviews that could be conducted.

Interviewer bias was another possible limitation. Since this research was completed by an inexperienced interviewer, potential exists for interviewer bias to unintentionally influence interview conversations or the interpretation of interview data. However, audio recordings of interview data allowed the researcher to re-listen to interview data multiple times, which contributed to an accurate interpretation of participants' information.

Two limitations of open open-ended interviews affected the comparability of interview data. First, as every participant had their own specialties, some questions were not relevant to all participants. Therefore, participants were not always asked the same questions as other participants. Secondly, participants would sometimes respond to a question, without actually providing an answer to that question. This made it difficult to compare answers to interview questions across participants. As a result, it was not possible to compare interview data across all thirteen participants.

## LITERATURE REVIEW OF POWER ISSUES IN ELDER MEDIATION

The purpose of this section is to review findings from pertinent elder mediation literature, exploring the answers to three key questions:

1. What are the major power-related issues in the field of elder mediation?
2. Are there practical applications from research on family violence that translate into the field of elder mediation?
3. What are the cultural and intergenerational considerations?

First, this paper reviews identified power issues in the field of elder mediation: disputant autonomy, capacity, vulnerability, and elder abuse. Then, practical applications of family ('domestic') violence research to elder mediation are explored. Finally, some cultural and intergenerational considerations unique to elder mediation are discussed. This section provides background information that will act as the foundation for the results and discussions section.

### Elder Mediation Power Issues

This section discusses power issues in the field of elder mediation relating to disputant autonomy, capacity, vulnerability, and elder abuse.

Ethical issues, such as disputant autonomy and capacity, will often overlap with power issues in elder mediations (CCEL, 2012; Waldman, 2011). *Disputant autonomy*, also known as the ability to self-advocate, is an ethical requirement of mediation (Waldman, 2011). Safety considerations and any factors that may potentially disrupt disputant autonomy are important considerations by mediators in every field. However, issues relating to disputant safety are more likely to be present in elder mediations because older adults often experience social conditions making them vulnerable persons. For example, a family dispute regarding living and care arrangements of an older old adult will sometimes directly affect an older adult's safety. Regardless of age, individuals are entitled to autonomy, especially while legal capacity is still present. However, family members may express valid safety concerns that contradict an older adult's preference. Practitioners mediating these types of issues should expect to encounter disputes that require them to balance safety concerns with autonomy concerns, between parties (CBA, 2013; CCEL, 2012). Mediators should also be mindful of their own personal biases in order to avoid using a paternalistic approach when working with older adults.

Capacity is another issue central to both the study of elder law and the ethical practice of mediation (CCEL, 2012; Waldman, 2011). Watts (2009) and CCEL (2012) assert that *capacity* refers to the ability to understand and appreciate both the nature of a decision and consequences associated with a decision. Waldman expands the determining capacity criteria by adding a third element: communication. Waldman (2011) argues that practitioners should assess three functions: understanding, appreciation and communication. Parties should be able to *understand* the purpose and process of the mediation, *appreciate* the importance of their decisions, and *communicate* their thoughts to other participants (Waldman, 2011). Capacity can be situational and/or influenced by abuse (Watts, 2009). Additionally, while tests of legal capacity are different than medical practitioner's test of medical capacity (Waldman, 2011), these evaluations will sometimes overlap, especially in elder mediations. However, the criteria that mediators use to determine capacity varies depending on jurisdiction and the code of ethics or organizational

body that governs that mediator (e.g., Mediate BC for non-lawyer mediators and/or the Canadian Bar Association for lawyer-mediators). Watts (2009) also makes the important distinction (regarding capacity assessment) that: mediator practitioners “must assess the *ability* to make decisions, not the decision itself”.

Older adults may also be more vulnerable for a variety of reasons: increased presence of mental and physical disability, increased dependency on adult caregivers, and capacity issues, among others. For instance, mental capacity may diminish with age and while this is not always the case for older adults, there is still the perceived image of diminished capacity. This vulnerability—both perceived and actual—makes older adults more likely to be victimized (CCEL, 2012). Controversy exists around the definition of “vulnerability” in the elder context. Around 1990, the term “vulnerability” moved away from the age-based definition towards an “age-neutral disability model” where vulnerability was determined by individuals that experience societal challenges (BC Adult Abuse Neglect Prevention Collaborative, 2009, p.14). This definition was still problematic, so the Vanguard Project developed a new definition, stating that vulnerability is both relative and relational, not reducible to a disability issue (i.e., presence of disability does not necessarily indicate vulnerability, and persons may be vulnerable even when there is no disability present)(BC AANPC, 2009). Furthermore, vulnerability is a social condition, which could rise out of factors such as poverty, lack of education, isolation, language barrier, housing instability, mental illness diagnosis, gender or sexual identity, and/or history of abuse (BC AANPC, 2009). In order to conduct safe elder mediations, practitioners should be aware of factors that increase older adults’ vulnerability. Rather than simply labeling somebody as vulnerable following an incident of elder abuse or neglect; this definition was intended to encourage a preventative approach.

In a more general legal context, Mandelstam (2008) defines a *vulnerable adult* as a “person who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him- or herself, or unable to protect him- or herself against significant harm or exploitation” (Department of Health, 2000; as cited by Mandelstam, 2008, p.15). *Dependency* is also inherent in the definition of vulnerability. Social isolation can also make adults feel more vulnerable (CCEL, 2012). Regardless of the cause of vulnerability, mediators have a duty to accommodate parties, wherever possible (Mediate BC, 2009); meaning, participants should be aware of accommodation requirements of clients and methods of accommodation

Mediators must also be cognizant of potential abuse or coercion that could be occurring between an older adult and their child. The presence of elder abuse would impact an individual’s autonomy and potentially disqualify the affected party from mediation (Waldman, 2011). *Elder abuse* includes physical, emotional, sexual, financial and health care abuse and neglect (Trevitt & Gallagher, 1996; Hunsaker & Hunsaker III, 2012; Robinson, Benedictis, & Segal, 2012). The *BC Adult Guardianship Act* defines “abuse” as,

The deliberate mistreatment of an adult that causes the adult (a) physical, mental or emotional harm, or (b) damage or loss in respect of the adult's financial affairs, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors. (1996; as cited by the Queen’s Printer, Victoria, BC, Canada, 2013).

The Department of Justice (2012) states that in 2009, 7,900 older adults were victims of violent crimes, which were either committed by a family member (35%), a friend or acquaintance (35%), or by a stranger (29%). Similar to other forms of abuse, the prevalence of elder abuse is difficult to estimate due to under-reporting (DOJ, 2012).

Risk factors for an abusive caregiver, such as health care provider or adult child, include: substance abuse and alcoholism, psychiatric and personality disorders, depression, and financial, legal and emotional dependence on the older adult (Lachs & Pillemer, 1995, Freeman, Martin & Schoeni, 2002; as cited by Hunsaker & Hunsaker III, 2012; Robinson, Benedictis, & Segal, 2012). When suspected mistreatment of older adults exists within Ministry of Health, ICBC, or Public Guardian and Trustee oversight, the Ombudsperson can be a good point of contact (BC Ombudsperson, 2012; Hunsaker & Hunsaker III, 2012).

Experts have developed indicators of elder abuse and neglect. Academics have created resources to educate nurses (Trevitt & Gallager, 1996), General Practitioners (Moore & Newton, 2012), financial institutions (Canadian Bankers Association, 2012a) and lawyers/mediators (Heisler, 2003) regarding elder abuse warning signs and methods of intervention. In the medical realm, starvation, malnutrition, and dehydration are indicators of neglect (Hunsaker & Hunsaker III, 2012). Health care providers should also look for visible indicators of physical or sexual abuse and/or neglect. In the financial industry, a recent appointment to Power of Attorney (POA), legally giving the right to somebody to act on behalf of somebody else, followed by unusual banking activity is often an indication of financial abuse (Suzanne Michaud, personal communication, November 19, 2012; Canadian Bankers Association, 2012a). These indicators are also important to legal professionals. For example, lawyers and mediators should be aware that financial abuse often occurs when a POA arrangements exists (Canadian Bankers Association, 2012b). Elder abuse is an issue that will sometimes require a holistic approach, involving financial advisors, health care providers and lawyer-mediators (Soden, 2008).

### **Practical Applications of Family Violence Research to Elder Mediation**

There may be practical applications of family violence research on power-issues and safety screening procedures to elder mediation research. Family violence research discusses the safety screening procedures used for family mediations. For example, divorce mediation practitioners are instructed to conduct pre-mediation safety screening with parties *separately*, in case there is anything they do not feel comfortable disclosing in front of their partner (Girdner, 1990). Furthermore, an extensive amount of research has been conducted regarding issues of power-imbances between intimate partners and their implications for safety screening in the mediation context. Research exploring the types of family violence and the implications for mediation screening procedures has practical applications for screening procedures being used in elder mediations.

Mediation researchers generally agree that there are four primary types of family violence<sup>3</sup> (formerly referred to as “domestic violence”): coercive controlling violence, mutual violence (most common type), violence sparked by crisis (e.g., separation-instigated violence), and violence resistance (e.g., self-defense)(Kelly & Johnson, 2008; Johnston & Campbell, 1993, as

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<sup>3</sup> This paper uses the term *family violence*, referring to domestic violence. Domestic violence has also previously been referred to as spousal abuse or ‘wife battering’. However, modern literature discusses this topic using the term ‘family violence’; therefore, this is the terminology that is also used in this report.

cited by Waldman, 2011). However, some researchers (i.e., Johnston & Campbell, 1993) also include another category to account for; external factors, such as mental disorder or substance abuse (as cited by Waldman, 2011). Researchers agree that ‘coercive controlling power’ is the most dangerous type of power (Johnson, 2008, as cited by Kelly & Johnson, 2008; Graham-Kevan & Archer, 2003; as cited by Kelly & Johnson, 2008). Coercive controlling violence includes many forms of control: “intimidation; emotional abuse; isolation; minimizing, denying, and blaming; use of children; asserting male privilege; economic abuse; and coercion and threats” (Pence & Paymar, 1993; as cited by Kelly & Johnson, 2008). Coercive controlling power is also most likely to make the case unsuitable for mediation because of its effects on party autonomy (Waldman, 2011).

Research used to suggest that whenever there is a history of violence, the case is not suitable for mediation; however, modern research (i.e., Kelly & Johnson, 2008; Waldman, 2011) recognizes that a history of violence does not automatically eliminate mediation as a viable option. Waldman (2011) asserts that the important factor is the effect of the violence on party autonomy, rather than the extent of actual physical violence. Evidently, these mediation principles used to screen for the presence of family violence in a couple or family may have practical applications to screening for the presence of family violence occurring between an older adult and their adult caregiver.

Family violence research has been conducted since the mid-1970s (Kelly & Johnson, 2008), whereas elder mediation research is still in its infancy. Similarities often exist between individuals being abused by their partner in a family violence context and older adults: both populations are considered vulnerable populations, both are frequently dependent on other adults, both often involve the presence of a disability, and both populations can be the victims of abuse and neglect. In the mediation context, both populations - victims of family violence and older adults - would raise issues of sufficient capacity and autonomy required for mediations. Since elder mediation is a subcategory of family mediation, and given the similarities between the two populations, practical applications of family violence research to elder mediation are worth considering to help inform practitioners of safe practices for elder mediations.

### **Cultural and Intergenerational Considerations**

Cultural and intergenerational differences are important considerations in all types of mediations. Culture may refer to: religion, ethnicity, country of origin, gender, and generation. Considerations regarding intergenerational differences are especially important in elder mediations. These intergenerational and cultural differences may influence parties’ opinions, viewpoints and expectations regarding process and outcome, and other elements of the mediation. For example, older adults who are ‘traditionalists’, born between 1922 and 1945, were raised in a culture where people were encouraged, “not to air their dirty laundry” or raise any possible concerns (Resa Eisen, Elder Mediation webinar, hosted by the ADR Institute, March 20, 2013; Value Options, *n.d*). Mediators should be aware of these cultural, intergenerational differences and accommodate them, as needed.

LeBaron and Pillay (2006) identify six cultural “starting points” (Hampden-Turner & Trompenaars, 2000) that can assist mediators in their cultural awareness. These starting points are:

- *High context- low context* affects communication styles: high context cultures emphasize nonverbal communication; whereas, low context cultures emphasize verbal and direct communication (Hall, 1976; as cited by LeBaron & Pillay, 2006).
- *Individualistic – Communitarianism* affects one’s self identity: Individualistic cultures view themselves as independent beings; whereas, communitarianism or ‘collectivist’ cultures view themselves as being part of a group (Hampden-Turner & Trompenaars, 2000; as cited by LeBaron & Pillay, 2006).
- *Universalism – particularism* describes broad orientations and specific orientations, respectively. Universalist cultures believe in equality, generalizations and standardization; while, particularist cultures believe in exceptions, uniqueness and special privileges.
- *Specificity – diffuseness* describes people’s specific or general orientations, respectively. Specificity refers to individuals with a specific, detail-oriented, outcome-based focus; whereas, diffuseness refers to individuals who are more general, process-focused, using a holistic orientation.
- *Sequential – synchronous* refers to people’s orientation with time. Sequential time is linear, also known as “clock time” or by the expression “time is money”. Punctuality, for example, is very important for people with a sequential time orientation. Synchronous time, in contrast, is more cyclical, episodic, and recurrent and people tend to value flexible schedules (Hampden-Turner & Trompenaars, 2000; as cited by LeBaron & Pillay, 2006). Geert Hofstede’s (1984) theory of power distance explains power differentials and how comfortable people are accepting unequal power structures.
- *High-power distance* cultures consist of hierarchical structures, clear authority figures, special privileges and the expression, “old money”. In contrast, *low-power distance* cultures consist of structures based on equality, shared authority, and the expression, “rags to riches” (Hofstede, 1984; as cited by LeBaron & Pillay, 2006). These dimensions should be interpreted on a continuum, rather than dichotomies.

These cultural starting points can sometimes help explain where confusion or misunderstandings are occurring between people of different cultural backgrounds. Mediators’ knowledge of cultural and intergenerational considerations will be an asset when conducting elder mediations.

### Summary

Elder mediations involve issues affecting an older demographic. Physical, cognitive, emotional and social limitations are more likely to exist in this demographic. These age-related considerations may have implications for mediation practitioners. Areas of particular concern are related to pressures to disputant autonomy from family members who are concerned for the disputant’ safety, overlapping capacity evaluations, real and perceived vulnerability and abuse.

Practical applications from research on family violence may translate into the elder mediation context. Similarities exist between individuals being abused by their partner in a family violence context and older adults who are in a vulnerable position. Both populations will often be dependent on other adults and both often involve the presence of a disability. In the mediation

context, both populations might raise issues of sufficient capacity and autonomy required for mediations.

Cultural and intergenerational differences are important considerations in elder mediation. Culture may refer to: religion, ethnicity, country of origin, gender, and generation. These cultural and intergenerational differences may influence parties' opinions, viewpoints and expectations regarding process and outcome, and other elements of the mediation. Awareness of cultural and intergenerational differences will assist mediators in working with individuals from a variety of cultural and generational backgrounds.

## **FINDINGS AND DISCUSSION**

This section presents the findings from 13 interviews conducted with 10 practitioners and three academic participants and discusses these findings within the context of the literature. The purpose of the interviews was to gain practical insight into how elder law and elder mediation concepts and issues are interpreted and applied by practitioners and academic professionals. Six interrelated themes emerged from a thematic analysis of interview findings. They are: dependency, financial exploitation and other forms of abuse, parallels to other areas of law, capacity and aging issues, accommodation considerations and degree of customization, and ethnocultural and intergenerational considerations. Based on this thematic framework, each of the sections below opens with the interview results and then interprets these findings based on information presented earlier in this report and literature findings.

### **Dependency**

Findings suggest that as dependency increases, vulnerability also increases, which increases the risk of financial exploitation or other mistreatment towards older adults. Two practitioner respondents provided an example of an older couple where the man, who handled all financial matters, passed away forcing his wife to seek assistance in financial matters, thereby increasing her level of dependency as well as increasing the risk of financial exploitation. Another participant provided the example of an immigrant family where the older adult was not fluent in English, requiring a family member to translate and communicate their wishes to the practitioner. Another participant raised the example of older adult clients who have created joint accounts with their adult children. Two participants raised points about geographical location of older adults' adult children.

Participants noted that when one adult child lives near the older adult and the other children live in other provinces, the older adult will often be dependent on the adult child who lives geographically closest to the senior. One participant also added that older adults who are dependent on only one primary caregiver can sometimes increase opportunities for that primary caregiver to take advantage of the older adult. Two participants also raised points about when a relationship of dependency exists the other way around: from adult children to older adult parents. Two participants raised the example of an adult child, in their 30's or 40's, who is living in their older parent's basement. However, both participants noted that an adult child in this position often has other issues, such as a mental illness or drug addiction, causing the adult child to be dependent on their older parents. One respondent pointed out that these dependent adult children often cause harm to their older adult parents through financial exploitation or other forms of abuse.

Dependency can exist in many forms, such as caretaking needs, day-to-day living requirements, and managing finances. Caregivers are typically adult children or other family members, family friends, or health care providers. Dependency on those adult caregivers increases the vulnerability of an older adult. The literature (BC AANPC, 2009) and interview findings both suggested that increased vulnerability or dependency on others increases likelihood of harm to older adults. This trend can be attributed the fact that increased dependency on others to manage ones finances, for example, results in more opportunities for that individual to experience some form of financial abuse.

The Vanguard definition (2009) of vulnerability also makes the distinction that it is not the age of older adults that makes them more vulnerable, but rather social conditions, such as social isolation, that make them more vulnerable. Practitioners should be aware of specific factors that may cause older adults to be more susceptible to harm. These factors are: poverty, lack of education, social isolation, language barriers, housing instability, mental illness diagnosis, and/or history of abuse (BC AANPC, 2009). Practitioners should use these risk factors as warning signs, or red flags, of potential financial abuse or other harm that an older adult may be experiencing, as a result of increased dependency. Even though these factors are not necessarily indicative of harm, they may help practitioners to identify elder abuse or neglect. Identification is important for mediators because, as identified by Waldman (2011), the presence of elder abuse impacts an individual's autonomy, which may disqualify the affected party from the mediation.

The literature and interview findings both also identified that when a high level of dependency exists in the opposite direction, such as: a 30 or 40- year old adult child who is highly dependent on their older adult parents, abuse is also more likely. The literature (Hunsaker & Hunsaker III, 2012) indicates that any dependency—whether financial, legal, or emotional— demonstrated by a caregiver to an older adult is a risk factor of abusive caregivers. The literature also identified other risk factors of abusive caregivers to be: substance abuse and alcoholism, psychiatric and personality disorders and depression (Lachs & Pillemer, 1995; Freeman, Martin & Schoeni, 2002, as cited by Hunsaker & Hunsaker III, 2012; Robinson, Benedictis & Segal, 2012). This information is useful to practitioners because these risk factors may alert practitioners to the potential issues that the practitioner may need to address in the elder law or elder mediation case.

### **Financial Exploitation and Other Forms of Abuse**

Four interview participants indicated that financial abuse was the most common form of abuse occurring in elder law and elder mediation cases that they encountered. . Participants also noted that when one form of abuse (i.e., financial) exists, there are typically other forms of abuse (i.e., physical, emotional, sexual, or neglect) occurring too. For example, one academic participant made the observation that whenever she responded to a case involving financial exploitation of an older adult, there was usually also psychological abuse occurring at the time.

Three participants identified that financial abuse often occurs through the misuse of POA agreements. Practitioner participants indicated that it is usually an adult child of an older adult who is committing financial abuse through a POA agreement. Another practitioner provided the example of adult children wanting to transfer ownership of the older adults' house into the adult child's name. Another similar example provided by another participant was when older adults are buying a new house or condo, but the adult child registers the house in his or her name, rather than the parents' name.

Practitioners indicated that they were usually alerted about these types of cases by siblings of the suspected abuser, who are suspicious about financial activity occurring on their parents' banking history. An academic participant identified that, in Canada, there are very few organizations or resources available to mediators that offer the information and training of specific micro-skills about how to interview for and identify elder abuse and neglect. This same respondent asserted that the lack of available training of specific micro skills to elder mediators in explains why practitioners are incorporating skills from other more-developed fields. Another participant

commented on the limited number of validated screening tools available to elder mediation practitioners.

The literature review discussed different types of elder abuse, briefly discussing elder financial abuse. However, interview findings suggest that the frequency of financial disputes and elder financial abuse may be more common than the literature suggests. This may be related to the fact that elder financial abuse, like any form of abuse, is typically unreported (DOJ, 2012). Elder financial abuse may also be unreported because many perpetrators are close friends or family members of the older adult. The Department of Justice (2012) estimates that 70% of elder financial abuse perpetrators are family members (35%) or friends and acquaintances (35%) of the older adult. Interview participants also identified that many forms of abuse occurring conjunction with one another. Meaning that when one form of abuse is raised, such as physical abuse, it is reasonable for practitioners to suspect other forms of abuse, such as financial abuse, may also exist.

Interview participants and the literature (i.e., Canadian Bankers Association, 2012b) both identified POA arrangements as being a possible indicator of elder financial abuse, because POA agreements are often used as one method, or vehicle, of financial abuse. In BC, there are four types of POA arrangements: regular, enduring, springing and limited (BC Centre for Elder Advocacy and Support and CCEL, 2010). *Regular POA* agreements are activated immediately, but become inactive when the donor loses capacity. *Enduring POA* agreements are also active immediately, but they continue when the grantor (i.e., older adult) loses capacity. *Springing POA*'s only become active upon the occurrence of a triggering event, such as a car accident or a stroke causing sudden incapacity. *Limited POA*'s limit either the attorney's authority or the type of decisions the attorney can make, such as when a POA has permission to make decisions relating to the donor's day-to-day banking and bill payments, but not for larger decisions, such as: investments or mortgage restructuring (BC CEAS and CCEL, 2010).

Enduring POA's are the most common type of POA agreement (BC CEAS and CCEL, 2010). When practitioners refer to POA agreements, they are usually referring to *enduring* POA agreements, unless they specify otherwise. POA arrangements allow caretakers, such as a relative or family friend, to assist older adults with financial obligations, such as paying their bills. Despite their utility, complications often arise and when multiple POA's exist. For instance, banks will often request that their standard POA form be completed, even if a lawyer has already prepared a POA agreement. Once a bank's standard POA form has been completed, the bank's POA form then overrides the previous POA agreement for all banking activity that occurs at that specific bank. This bank practice can be problematic because discrepancies often exist between these POA agreements. Banks policies do not formally require them to make their customers complete *their* standardized form (Stephen Alsace, CIBC Legal Counsel, personal communication, September 2013; Linda Routledge, Canadian Bankers Association, personal communication, October 6, 2013). However, the banks front-line staff will often request that clients use the bank's standard POA form for ease of administration and/or when any required information is missing from the original POA agreement. Complications can also arise when capacity issues are raised about an older adult, such as when capacity issues first became present and discussions about if capacity was (or was not) present when POA documents were signed.

Privacy regulations are an important consideration. Even if banks suspect financial abuse of older adults, privacy regulations restrict banks from providing information about bank accounts

to anybody other than the client. As a result, when banking institutions suspect misuse of an older adult's POA agreement, privacy regulations restrict them from alerting family members. The Canadian Bankers Association (CBA) is lobbying at the federal level to have the privacy regulations amended. The purpose of this CBA initiative is to empower banks to have the right to notify a family member (i.e., next of kin) when banks believe suspicious activity may be occurring on an account (CBA, 2007; Linda Routledge, CBA Director, Consumer Relations, personal communications, October 7, 2013). The CBA is not requesting that client's personal bank account details be shared, but rather permission to notify client's next of kin if the bank identifies suspicious activity on a client's account by a third party. Currently, the primary recourse is to restrict account activity (i.e., to freeze an account), except for the payment of mandatory expenses. Therefore, banks will only allow bill payments for essential services, such as mortgage payments, phone bills, and/or long-term care facilities, until the issue has been resolved in-person at a bank branch (Stephen Alsace, CIBC Legal Counsel, personal communication, September 2013). When a POA arrangement is used, a relationship of dependency clearly exists between the principal and the POA designated individual, which increases risk and creates opportunities for financial abuse.

Many elder financial abuse cases involving POA's are often unintentional, or begin innocently and gradually increase in severity. Examples include: impatience with inheritance (i.e., an attitude that the money will eventually be the adult child's money through inheritance anyway), and assumptions by adult children regarding loans without receiving explicit permission from their parents (i.e., justifications like, "Mom would loan me the money anyway, so why bother asking"). Much existing literature (i.e., Heisler, 2003) seems to assume that financial abuse is committed with malicious intent, often failing to account for the financial abuse cases that begin innocently or unintentionally or out of ignorance of the law and then escalates gradually. This research supports the finding that many elder financial abuse cases occur because adult children are unaware of the restrictions that limit their authority as a designated POA. This research concludes that if adult children and others designated under a POA were educated about their role and its obligations and restrictions it would help minimize the severity and/or frequency of unintentional elder financial abuse cases.

### **Parallels to Other Areas of Law**

Seven interview participants identified parallels between elder law and elder mediation to other areas of law, such as family law, child abuse and child protection laws, disability law, and family violence cases occurring between domestic couples. One participant who works as a disability lawyer explained several similarities between elder law and disability law. Firstly, older adults may have an age-related physical or cognitive disability. Secondly, older adults may also be in a position with various social conditions, such as dependency on adult caregivers, low-income and social isolation, that classify them as a vulnerable person. Another practitioner identified similarities between elder law cases and family law. This individual provided an example of elder law cases requiring vulnerable persons protection orders. This interviewee also noted that in some jurisdictions, the process of obtaining a protection order for an older adult is virtually identical to the process of obtaining a protection order for a victim of a family violence case in the context of a domestic partnership. One academic participant explained that he or she had previously written a paper comparing elder law in the United States and Canada, using a

geriatric medical model as the basis of their comparison. However, on a practitioner-client level, the same academic participant asserted that micro skills from other disciplines are not transferable to elder law contexts. This respondent acknowledged that techniques used in other areas of law may be a useful starting point, but are not completely transferrable because of the nuances of power and control problems in the elder mediation context.

The literature review identifies the parallels between elder mediation and family violence research. For example, Girdner (1990) suggests that divorce mediation practitioners are instructed to conduct pre-mediation safety screening with parties separately, in case there is anything they do not feel comfortable disclosing in front of their partner. Interview findings confirmed that elder law and mediator practitioners routinely use the same approach for the same rationale, as identified by Girdner (1990). Interview data expanded on this comparison suggesting that parallels exist in disability laws, child abuse and vulnerable person protection laws. The underlying characteristic among parallel fields refer to some aspect of vulnerability or dependency on caretakers. These paralleling features seem to occur in situations where individuals are labeled as vulnerable persons. Interview participants made the analogy between child abuse and elder abuse because in both cases, individuals affected are dependent on an adult caregiver. Interview findings suggest that both practitioners and academics apply analogies from these related fields to the practice and study of elder law and elder mediation.

Interview findings suggest that other fields might have applicability as well. For example, some practitioner participants report using specific micro skills, such as disability law skills like asking open-ended questions to ensure understanding and considerations to external factors, like medication or time of day that may be influencing client's responses. However, the major problem – as identified by one very informed academic participant – is that these possible tools have not yet been validated for use in the elder law and mediation context. At this point, it appears that the practical applications between fields are mainly conceptual. Interview findings suggest that when practitioners encounter a situation that is unfamiliar in an elder law or mediation context, they will use information they have learned from other fields to inform their decisions regarding how to proceed in that situation. Testing of specific transferrable skills would be necessary in order to validate their generalizability in the elder mediation context.

### **Capacity and Aging Issues**

Interview participants reported that capacity and aging issues are frequently encountered in the fields of elder law and elder mediation. One participant offered the analogy that the issue of capacity is a curve ball that exists within the field of elder law. Two academic participants identified that people often have very paternalistic views of older adults and will often presume incapacity. Two other participants raised considerations about time of day that you are meeting an older adult. These participants pointed out that if questions or concerns about capacity are raised, practitioners should not assume incapacity, but rather suggest meeting with the older client at a different time of day or in an alternative setting where they may feel more comfortable. These participants also acknowledged that capacity exists on a continuum and fluctuates depending on the day and that there are different levels of incapacity. For example: some older adults can still manage day-to-day banking, but may need assistance with larger financial or living decisions, such as: purchasing a new house or moving into a long-term care facility. Another academic participant also pointed out that many individuals feel uncomfortable talking to lawyers, this respondent offered the analogy of going to the dentist; this respondent

suggested that practitioners could mistake this discomfort or nervousness as being a capacity issue. This participant, like others, reminded practitioners to not presume incapacity, but rather try to find ways to maximize older adult's capacity.

Ageism, or the discrimination of somebody based on their age, is another issue identified through interview findings. One academic participant asserted that ageism exists towards older adults not only on an individual level, but also on a structural level. This academic participant identified ageism occurring on an individual level by people making assumptions of incapacity about older adults. This academic participant also identified that ageism is inherent with individuals and within structures and organizations on a systematic level. This academic participant, as well as a second practitioner participant, identified court systems as not being age friendly to older adults, because the court system does not take into account stamina issues and fluctuating mental capacity of older adults. This second participant also pointed out that mediation itself is an accommodating method that is more age friendly to older adults, in comparison to other dispute resolution methods.

Dementia presents a unique challenge for elder law and elder mediation practitioners. Two practitioner participants identified difficulties that dementia can present in the elder mediation context. One respondent raised the question: how practitioners empower older adults with diminished capacity? Another respondent provided an example of a very controlling older man with dementia and resulting limited capacity. The respondent noted that it can be very frustrating for individuals with dementia or capacity issues who are used to being in control, but are now unable to be as involved due to capacity limitations. Additionally, this participant noted that rational conversations will not always be possible with individuals with advanced dementia. This participant suggested that practitioners should focus on emotional considerations; such as if an older adult needs to move into a long-term care facility, the older adult may feel a loss of control. In terms of accommodation, this respondent recommended using a validation technique, where the practitioner acknowledges the emotional distress that decisions may be causing to the older adult.

The literature (Waldman, 2011; CCEL, 2012) outlined individual components necessary to evaluate capacity. However, there seems to be an assumption that practitioners routinely conduct formal capacity assessments. Interview findings indicate the opposite, suggesting that capacity assessments are usually conducted informally in the initial consultation meeting and through one-on-one meetings with older adult clients. Most practitioner participants routinely request private meetings with an older adult, where family members are separated. Clients and their family members are often skeptical about the rationale for these one-on-one consultations. Appendix B provides the link to a pamphlet, titled "*Why Am I Left Alone in the Waiting Room?*" that practitioners can provide to clients to explain why individual consultations are necessary. Interview data also suggest that formal capacity assessments, such as assessments conducted by medical practitioners, are only requested and used by lawyers and dispute resolution practitioners when there is a need to prove incapacity, such as when trying to prove the older adult did not have capacity to enter into a new contract, or re-adjust their will. Watts (2009) also reminds mediator practitioners that, they "must assess the *ability* to make decisions, not the decision itself" when conducting capacity evaluations.

Another observation from interview data was that practitioners do not appear to be certain about how they are expected to conduct initial capacity evaluations and any subsequent reevaluations.

Interview data also suggests that practitioners rely almost exclusively on their own subjective evaluations of capacity. Practitioners appear to presume capacity, unless certain cues exist that suggest possible incapacity. Cues might include forgetfulness or confusion. However, capacity fluctuates depending on the time of day, which makes conducting accurate and consistent capacity evaluations difficult. Interview data and the literature both highlight several factors that may account for incorrect incapacity evaluations, such as considerations about the time of day, forgetfulness due to the fact that they are nervous, and the fact that capacity can be situational and/or influenced by abuse (Watts, 2009). While the development of a specific tool, such as a screening checklist to evaluate capacity, might be useful, it seems that given the nuances of fluctuating capacity and the number of considerations that may contribute to an incorrect evaluation of incapacity, the development of such a tool might not be possible. Other considerations are whether it is ethical to conduct routine capacity assessment screenings only to adult's aged 65 and above. Practitioners should not employ ageist processes, so an alternative, more objective measure may be for practitioners to learn more about age-related illness, such as dementia, that may cause incapacity.

### **Accommodation Considerations and Degree of Customization**

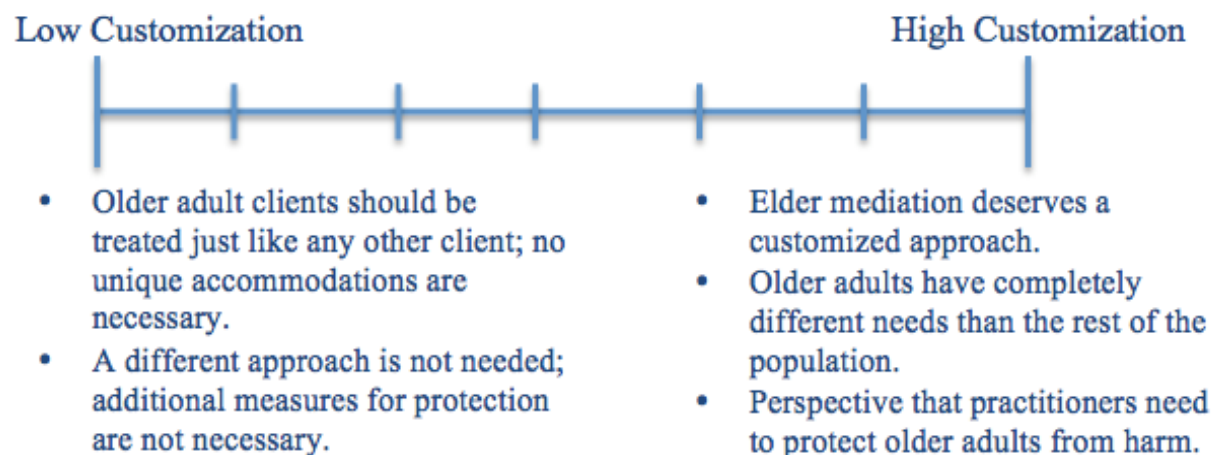
Interview findings suggested that when capacity issues are present, older adults should be involved in the actual mediation sessions as much as possible. As articulated by Judge Watness, practitioners should “know how to involve the elder in the process [even given] physical, emotional and intellectual limitations that might be present”. This participant suggested accommodation options, such as short mediation sessions, house visits, and consideration of the time of day when meetings are scheduled. Two participants also indicated that older adults cannot handle a full day of mediation due to physical, emotional, or mental (stamina) reasons. These same two participants and another participant said that if the older adult cannot be directly involved, such as when the mediation session would be too strenuous for the individual, then mediators can accommodate the older adult through periodic check ins or updates.

Degree of customization was discussed in terms of accommodation of older adults, presumptions of incapacity, and analogies made between older adults and children. Three respondents offered analogies comparing older adults to children, however they all clarified that they did not mean this comparison in a disrespectful way, but rather they were referring to incapacitated individuals and the dependency of some older adults on their caregivers.

Discrepancy existed between some participants about whether elder law and elder mediation requires a holistic, multidisciplinary approach or whether a traditional one-dimensional approach was acceptable. For example, one respondent stated that older adults who live alone and experience social isolation are more vulnerable, suggesting that older adults need regular support from social workers and periodic check-ins from their lawyer. Other participants employed a more traditional, transactional approach to older clients, treating them no differently than other adult clients. Three practitioner participants also asserted that it is important to remember who the client is, whether it is an adult child or the older adult. Participants maintained that if one's client is the older adult, then practitioners should not ask family members or friends to make any decisions on their behalf unless a legal POA agreement exists granting that decision-making power on an older adult's behalf.

Mediate BC (2009) indicates that mediators have a duty to accommodate. However, interview findings suggested that some discrepancy exists regarding the degree of customization that practitioners demonstrate when accommodating their clients. *Degree of customization* is a phrase the researcher developed to describe the observation about a distinct area of disagreement that exists in the field regarding the level of protection, or customization, that professionals are expected to provide to clients). The degree of customization that practitioners employ has implications in terms of accommodation and practitioner's approach to elder law and elder mediation, such as whether or not they employ a customized approach to older adult clients. Figure 2 shows a spectrum used to articulate the two contradicting perspectives.

Figure 1. Degree of Customization continuum scale



The degree of customization notion has two implications to the fields of elder law and elder mediation on a small and large scale. On a small-scale level, practitioner's views regarding degree of customization influences decisions regarding day-to-day interactions with clients, such as decisions about how practitioners should accommodate older adult clients. Degree of customization also has large-scale implications to the fields of elder law and elder mediation. This disagreement was observed most notably amongst interview participants who influence the elder law and elder mediation fields on a large scale, through involvement in steering committees and regulatory organizations. This observation has important implications for the field of elder law and elder mediation, because, as noted elsewhere in this report, these fields are still in their infancy. Therefore, discussions on these committees and committee members' views

regarding degree of customization will influence future directions of the elder law and elder mediation fields.

### **Ethnocultural and Intergenerational Considerations**

Two practitioner participants raised generational concerns about older adults not being familiar with modern technology, which will sometimes result in increased dependency on other individuals for assistance. One of these practitioner participants said that when working with older adult clients, they sometimes communicate with them through traditional print mail, rather than email. This is one accommodation option available for communicating with older adults who are more comfortable communicating through print medium.

Several participants acknowledged the difference of life experiences, cultural backgrounds and intergenerational considerations. One participant pointed out that many individuals raised in the traditionalist generation or in other cultures, were raised with subordinate views towards women. Another practitioner participant raised a point about family history and cultural norms that exist within a family. This respondent raised the example of an elder mediation case where the respondent believes the family operated on a patriarchal system where men were more valued than women in their family. In this case, the father had passed away, and since the family operated with these patriarchal values, the power shifted to the oldest son, rather than the mother, because this was the cultural norm established in this family. The same practitioner participant also pointed out that North American culture tends to undervalue and exclude older adults, and that treatment of older adults varies with culture.

The literature review and interview data both emphasize the importance of lawyer and mediator practitioners having an awareness of issues and considerations relating to ethnocultural and intergenerational differences. Interview findings indicated that cultural expectations where, for example, the first-born son makes the decisions even if he has not been formally identified in the POA role, could have important implications in mediation. Traditionalists may have also been raised with gender stereotypes, where women have less power within domestic relationships. These cultural and generational influences may have important implications in the mediation context. If an older couple is divorcing, for example, the husband may be accustomed to making decisions for both parties; however, this behaviour would not be appropriate in a mediation context because Waldman (2011) identifies disputant autonomy is an important ethical consideration in mediation.

This information may help practitioners to understand where power discrepancies are occurring and then respond to those power discrepancies. Mediators who are able to recognize where power imbalances are occurring may help practitioners to address the issues, such as unequal speaking power, by introducing a normalizing technique, such as a talking stick, which gives each individual equal talking opportunities. This approach allows the practitioner to respond to issues of inequality. Many practitioner participants reported received some previous training about cultural and generational issues, but both the amount and type of training received was inconsistent amongst practitioners.

### **Summary**

Dependency arose as an overarching theme from the study findings. Participants offered many examples of cases in which when dependency increases, the older adults vulnerability also

increases, which makes it more likely that the older adult will experience harm, such as financial exploitation. Findings indicated that financial abuse was the most common type of abuse, often occurring through POA agreements and committed by the older adult's adult children. Participants suggested that financial abuse also occurs in conjunction with other types of abuse. Furthermore, participants offered analogies between elder law and other paralleling areas of law, suggesting some techniques may be transferrable to elder law and elder mediation. Degree of customization was discussed in terms of accommodation of older adults with capacity issues, older adults as vulnerable persons, and analogies made between older adults and children. Capacity, dementia, ageism and accommodations issues were all points of considerations raised by interview participants. Cultural and intergenerational considerations were also raised regarding technology, patriarchal cultures and difference of cultural views towards older adults.

## RECOMMENDATIONS

This section provides best practice recommendations to assist practitioners working in the fields of elder law and elder mediation. These recommendations should help practitioners to minimize and respond to power-related issues that arise in elder mediations. These recommendations are useful to SIDRC because SIDRC would like to better inform their practitioner training sessions.

1. **Applicability of techniques from other fields of law:** Additional research into disability law skills and techniques may prove useful as a starting point for incorporating other specific, possibly transferrable, skills into elder mediation. Techniques used by disability law practitioners that might assist elder mediators include asking open-ended questions to explore or verify an elderly person's level of comprehension, and recognizing that external factors such as effects of prescription medications or the time of day, may affect capacity. These techniques would likely be applicable to capacity issues that impact disputant autonomy. Additional testing would be necessary to confirm the transferability of additional disability law skills into the elder mediation context. Nonetheless, this approach would provide a good starting point for elder mediation practitioners to reference until more tools are developed specifically for the elder mediation context.

Interview findings indicated that there are a limited number of validated micro skills, such as skills used for safety screening, developed for elder practitioners. Family violence research (i.e., Kelly and Johnson, 2008; Johnston & Campbell, 1993, as cited by Waldman, 2011) that discusses four types of family violence (coercive controlling violence, mutual violence, violence sparked by crisis, and violence resistance), indicating that only coercive controlling violence would make the case unsuitable for mediation due to its affect on party autonomy. Therefore, this study recommends that practitioners be aware that only one type of violence-coercive controlling violence- makes cases unsuitable for mediation. Similar to family violence screening, interview respondents also recommended conducting separate screening with older adults.

This study also recommends that mediations practitioners use the Elder Abuse Assessment, Prevention and Intervention toolkit developed by the NICE Network (see Appendix B). This toolkit recommends that practitioners acknowledge suspicions of abuse and accumulate documentation, acknowledge barriers (i.e., fear of retaliation), assess urgency (i.e., potential risk of physical harm), screen client's by assessing a person's physical, emotional and mental capacity to help themselves, empower the person through education about their rights and available resources (also see Appendix B for resources available to older adult clients). The NICE Network tool also recommends practitioners refer clients to seek support from other professionals. This resource provides lists of indicators for physical, psychological, financial abuse and neglect, institutional abuse, and domestic abuse (NICE, *n.d.*). The NICE Network tool also provides a five-step interview plan, discussion of possible interventions and privacy legislation safety plan for practitioners, and possible interview questions. This resource also recommends the following local resources: victim services, shelter, seniors organizations, information/crisis/abuse line, legal services/legal aid, healthcare/home care provider, mental health, government pensions, immigration/ language services, and public guardian and trustee (NICE, *n.d.*).

2. **ABA Pamphlet:** The 2011 pamphlet<sup>4</sup> titled “*Why Am I Left Alone in the Waiting Room?*” developed by the American Bar Association would be useful to provide to older clients and family members to explain why individual consultations are necessary for safety screening purposes<sup>5</sup>. SIDRC can provide this pamphlet prior to meeting with parties to family mediations and elder mediations; this will help practitioners to manage party’s expectations. The pamphlet will allow for smoother screening period because parties will understand the rationale for meeting separately with the mediator. This resource would also be useful to share with other mediation practitioners, especially if SIDRC decides to develop an elder mediation training course.
  
3. **Awareness of dependency relationships:** Practitioners should develop an awareness of the correlation between dependency and risk: as the level of dependency increases, the opportunity or risk for mistreatment of older adults also increases. Practitioners should be aware of this relationship, as awareness of the correlation between dependency and risk may help alert practitioners to potential areas or opportunities for mistreatment of older clients. Several situations of dependency that should indicate potential warning signs (red flags) for mediation practitioners, are:
  - When one adult child lives near the older adult, but all other adult siblings live further away geographically, such as in another province or another country.
  - When one spouse has recently (i.e., within a couple of years) passed away, Depending on the context of the mediation, it might be appropriate for mediators to ask who managed the finances in the relationship. If it was not the surviving spouse, he or she might be at increased risk of financial exploitation.
  - When older adults experience social conditions that increase their vulnerability, such as: poverty, lack of education, social isolation, language barriers, housing instability, mental illness diagnosis, and/or history of abuse (BC AANPC, 2009).
  - Later in life marriages or new ‘friends’ who recently befriended an older adult, often referred to as ‘black sheep’. These people often appear as the older adult is losing capacity and may manipulate or exploit the older adult. For example, they may they may try to influence or pressure the older adult to restructure their will, leaving assets to the new friend.

When older adults have a 30- or 40-year-old highly dependent child still living with them or still financially dependent on them, often there will be a mental or substance abuse issue also present in the dependent individual. Dependent adult children will not always be a source of abuse, but this should act as a warning sign to practitioners for potential abuse.

- When caregivers have substance abuse problems, alcoholism, psychiatric and personality disorders, or depression (Lacks & Pillemer, 1995; Freeman, Martin & Schoeni, 2002, as cited by Hunsaker & Hunsaker, III, 2012; Robinson, Benedicts & Segal, 2012), this should be a warning sign (red flag) to practitioners. If such issues arise in mediation through individual screening meetings, the practitioner might want to inquire further by

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<sup>4</sup> Available from: [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_4c\\_broch\\_jul\\_25\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_4c_broch_jul_25_2011.authcheckdam.pdf) . Full information about this pamphlet is available in Appendix B, on page 49 of this report.

<sup>5</sup> SIDRC may need to request permission from the American Bar Association in order to reproduce this pamphlet.

asking safety screening questions, such as: is there any thing else you would like to discuss about your caregiver?

- When one form of abuse (i.e., financial) exists, there are typically other forms of abuse (i.e., physical, psychological, emotional, sexual, or neglect) also occurring. Therefore, if mediators become aware of one form of abuse, that should be an indicator, or red flag, to alert the mediator to the possibility of other forms of abuse.

The purpose of these warning signs is to alert practitioners to warning signs (red flags) that may indicate financial exploitation or abuse. When suspicions of elder abuse arise in mediation, the 2010 Department of Justice report, entitled *Exploring the Role of Elder Mediation in the Prevention of Elder Abuse*, states that, “the mediator’s role is to gently assess for the presence and extent of such abuse” (Attorney General, 2013, p.2). The report also states:

The level and type of abuse and neglect, suspected or alleged will determine whether mediation will ever be considered. Elder mediators should inform all participants that mediators are not neutral in issues of abuse or safety and have a legislative duty to report past and present abuse if a vulnerable person is in need of protection under relevant legislation and there is threat of future abuse or harm. When in doubt, the proper course of action is always to assume mediation will not be appropriate. Alternatives to mediation—such as “shuttle” mediation—may be offered in serious abuse cases but only by practitioners who have specialized education and training in this area. (Attorney General, 2013; Elder Mediation Canada Code of Professional Conduct, 2010, as cited by Attorney General, 2013, p.2).

If practitioners in BC become aware of the presence of elder abuse, they can also encourage the older adult (and/or a concerned family member) to contact one of the following resources.

- BC Seniors Abuse and Information Line (SAIL): 604-437-1940 or toll-free: 1-866-437-1940 or visit <http://bcceas.ca/contact-us/>. A TTY Teletype phone number is also available for persons who are hearing impaired, at: 604-428-3359 or 1-855-306-1443.
- Public Guardian and Trustee at: 604-660-2421 (Vancouver, BC), 250-387-6121 (Victoria, BC), 1-800-663-7867 (other areas of BC) or [www.trustee.bc.ca](http://www.trustee.bc.ca)
- You can also provide the victimized adult with contact information for 24-hour crisis telephone line, counseling and translation services (BC Centre for Elder Advocacy and Support, 2010), available at: 1-888-562-1214.
- Both lawyer and non-lawyer mediators may wish to recommend independent legal advice (BC Centre for Elder Advocacy and Support, 2010). For information on lawyer referrals see: [http://www.cba.org/bc/Public\\_Media/main/lawyer\\_referral.aspx](http://www.cba.org/bc/Public_Media/main/lawyer_referral.aspx)
- In emergency situations, practitioners may need to contact the police at: 9-1-1. Non-emergency police phone numbers are available at: <http://www.ecomm911.ca/non-emergency-calls/non-emergency-numbers.php>. However, contacting the police is only recommended in situations where the practitioner is concerned about immediate physical or sexual harm, because the police usually do not have the resources to respond to non-emergency elder abuse situations.

The Department of Justice (2010) also noted that it is not uncommon for elder mediations to involve friends or other supporting individuals, such as social workers, paid caregivers, hospital staff, community care representatives and other professionals (Attorney General, 2013). If these individuals are present when concerns are raised, it may be appropriate to involve them in discussions about the suspected abuse. The mediator will need to use their judgment depending on the situation and depending on who is present.

4. **Accommodating older adults:** While many older adults will not require any accommodation, practitioners should be aware of the possible accommodation requirements amongst this demographic and provide accommodation when necessary. It is recommended that older adults be involved as much as possible in the actual mediation sessions. As articulated by Judge Watness, practitioners should “know how to involve the elder in the process [even given] physical, emotional and intellectual limitations that might be present” (personal communication, July 9, 2013).

Fortunately, elder mediation itself is an accommodating alternative to litigation because it provides more flexibility to mediator practitioners, allowing them to accommodate older adult clients as needed. In fact, Ian Hull (personal communication, July 18, 2013) maintains that “mediation gives you the broadest range of options” when dealing with nuances (i.e., diminished capacity, increased sensitivity, dependency), inherent in elder mediation.

Accommodation options, as discussed in the Findings and Discussion section, include: short mediation sessions and/or house visits, and consideration of the time of day when meetings are scheduled. However, some older adults (especially, ‘older old’ adults) cannot handle a full day of mediation due to physical, emotional, or mental (stamina) reasons (Judge Watness, personal communication, July 9, 2013). Waldman (2011) also noted that when elder abuse affects party autonomy, mediation may not be appropriate. Judge Watness (personal communication, July 9, 2013) also noted that mediations may simply be too strenuous for an individual. When older adult clients cannot be directly involved, mediators can accommodate the older adult through periodic check-ins or updates (Judge Watness, personal communication, July 9, 2013).

Practitioners should also communicate with their clients in plain, jargon-free language. Clear communication is especially important when working in a context where aging issues, such as cognitive deterioration diseases, are more likely to be present. Practitioners can better ensure client understanding by asking open-ended questions and/or asking the client to summarize or paraphrase important information. Many interview participants asserted that practitioners should not exclusively rely on closed-ended questions (i.e., yes or no questions) because clients may agree out of courtesy or etiquette, even if they do not understand the message content. Generational and educational differences may also affect communication. Other considerations, such as using large fonts on documents and business cards, and ensuring a quiet meeting space that has adequate lighting and minimizes background noise will also enhance communication.

5. **Self-evaluation of degree of customization:** In order to increase professional self-awareness, it is recommended that practitioners conduct a self-assessment to evaluate where they rank on the degree of customization continuum. Practitioners can ask themselves

questions, such as: Do I offer different accommodations to older adults and are they justified or am I assuming incapacity? This self-evaluation will help them to recognize their own degree of customization regarding decisions (or patterns of decisions) they make with older adult clients; this evaluation could also indicate whether practitioners are paternalistic with some customization approaches. This self-awareness testing could also help them to avoid unintentional ageism in future mediations where they are working with older adult clients. This self-evaluation may create awareness of the style of decisions, accommodations and recommendations they make to parties in elder mediations. Several participants also indicated that it is important for elder practitioners to ask themselves: Who is my client? If your client is an older adult, then practitioners should not be asking friends or family members, such as: adult children, to make decisions on behalf of the older adult, unless there is a valid POA present. The BC CEAS and CCEL (2010) offers the following best practices for professionals in the justice system:

- **“1. Speak directly to the older adult:** Try to meet with the older adult alone [separate from family members or loved ones that may be accompanying the older adult.] Questions to ask include: What does the older adult want to do? Does the older adult have any reservations or concerns? What are the reasons for giving decision-making authority to a particular person?” (BC CEAS and CCEL, 2010).
- **“2. Communicate to build trust:** [For example,] schedule meetings at the time of day that best suits the older adult; schedule short, multiple appointments instead of lengthy interviews; consider using a language interpreter, minimize background noise and other distractions; look at the client while speaking, speak slowly and distinctly (particularly if the person is hearing impaired); arrange seating to encourage easy conversation, allow time for responses, start with simple questions, discuss one issue at a time, check for comprehension (repeat, paraphrase, summarize), allow for rest and breaks in conversation, provide written materials with a large font, and go slowly” (American Bar Association Commission on Law and Aging & American Psychology Association, 2005 and 2006; as cited by BC CEAS and CCEL, 2010).
- **3. “Assume that the Older Adult has Capacity:** Assume that the older adult has the ability to make the decision. Do not assume that an adult is incapable of making a decision simply because of age, disability or illness” (BC CEAS and CCEL, 2010).
- **4. “Respect Older Adults Beliefs and Values:** Recognize cultural and spiritual beliefs [...] Questions to ask include: What are the older adult’s beliefs and values? [...] Is the substitute decision-maker aware of these beliefs and values? Will the substitute decision-maker be able to respect decisions that are based on these beliefs and values?” (BC CEAS and CCEL, 2010).
- **5. “Watch for Indicators of Abuse or Neglect:** Questions to ask include: Does the older adult show signs of being abused or neglected? Are there other people in the older adult’s life who would be better to appoint as a decision-maker?” (BC CEAS and CCEL, 2010).
- **6. “Identify the Abuser-Victim Relationship:** In order to identify whether or not an incident is financial abuse, you will need to look at the broader context of the incident and the nature of the relationship between the older adult and the abuser. For example, a family member might be socially isolating or manipulating the older adult in order to access money or property. If you have concerns about the actions of a substitute decision-maker, contact the PGT” (BC CEAS and CCEL, 2010).

- **7. “Offer Non-Intrusive Forms of Support:** Offer the least intrusive form of support. Promote an older adult’s safety and security by providing information about the risks of financial abuse, referral to independent legal advice, [and] access to support services. [...] Questions include: How can you provide the most effective but least intrusive support? Has the older adult been given correct and adequate information to make a decision? Have you provided an opportunity to ask questions and raise important concerns?” (BC CEAS and CCEL, 2010).
  - **8. “Refer to Support Services:** If you believe that an older adult may be the victim of abuse or neglect, make a referral to support services. It is best to provide this information directly to the older adult. Do not discuss your concerns with the potential abuser. A discussion with an abusive friend or family member who accompanied the adult to your meeting could cause the older adult to be further victimized” (BC CEAS and CCEL, 2010).
  - **9. “Report Abuse of Neglect:** Financial abuse is often connected to other forms of abuse or neglect, many of which are often difficult to discuss with a stranger. If there is evidence of financial abuse, explore whether there are also other forms of abuse and neglect. If the older adult is in a situation where she or he is not able to access appropriate assistance or support, make a report to a designated agency [such as, PGT]. If there is evidence of criminal activity, make a report to the police.” (BC CEAS and CCEL, 2010, pp.53-58).
6. **Provide educational resources about POAs:** POA agreements are the most frequently used method to financial exploit older adults (Laura Tamblyn Watts, personal communication, December 2, 2013). Given the frequency of abuse, elder mediators should provide clients with educational resources about POA. An example of user-friendly POA educational resources for BC residents are available from the BC Trustee resource titled *It’s Your Choice, Personal Planning Tools* available at: [http://www.trustee.bc.ca/pdfs/STA/It%27s Your Choice-Personal Planning Tools.pdf](http://www.trustee.bc.ca/pdfs/STA/It%27s%20Your%20Choice-Personal%20Planning%20Tools.pdf). Ontario also provides a comprehensive question-answer resource for layperson education of POAs that could be used as a good starting point for persons in all provinces. This resource is available from the Attorney General entitled *Power of Attorneys “Living Wills”, Some Questions and Answer* at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/livingwillqa.pdf>. These resources and other resources for clients are available in Appendix B.
7. **Educating older adults:** Practitioners should educate older adults wherever possible. Interview data showed that education of older adults would be beneficial to increase awareness of elder financial abuse. Education, such as information about what is (and is not) acceptable behavior by a designated attorney, may help to reduce financial abuse. Education can occur through pamphlets made available to clients at the start of the mediation. Educational materials, such as pamphlets, can also be available in the mediator’s office for clients reference. Practitioners should also encourage parties to fully discuss any existing financial arrangements. Mediators can remain neutral by recommending that party’s clarify financial arrangements amongst themselves. For example, if an older adult loans an adult child \$80,000 for a start-up business venture, mediator practitioners should encourage their older adult client to clarify if these funds are a gift or a loan intended to be reimbursed. Practitioners should also encourage parties to make their agreements explicit by asking each

other questions to clarify their arrangement. Additional clarification may also be applicable to Memorandums of Understanding drafted by the mediator during the mediation.

Practitioners should also encourage older adults to ask the “what if” questions, like, ‘When can I be expected to be reimbursed for this loan?’; and, ‘What will happen if this business is unsuccessful?’ (See Appendix B: Resources “the Nice Network” for more information). By encouraging these types of conversations, practitioners can help reduce the amount of harm to older adults that results from such financial arrangements. Practitioners should also educate their clients about resources and services available to them (see Appendix B: Resources). Practitioners may also want to recommend that their client seek independent legal advice.

8. **Formal training in aging issues:** Practitioner should seek formal training in aging issues, such as dementia, in order to be better prepared for working with older adults (Medford, *n.d.*, as cited by Attorney General, 2013). Given that elder law and elder mediation practitioners are working with a demographic where aging issues, such as cognitive deterioration diseases, are more prevalent, practitioners working in this field should receive formal training about relevant aging issues. Lawyer and non-lawyer practitioners could receive formal training about aging issues could occur through annual continuing education credits. Training should include education about cognitive diseases (i.e., dementia) that includes indicators of the disease and information about its implications in mediation, such as its effect on decision-making and capacity. This specialized training will help practitioners screen for capacity issues and assist them in conducting safe mediations with older adults. As indicated in the Findings and Discussion section, there is limited validated training and screening tools available to elder practitioners in Canada. The development of additional training tailored to the needs of elder practitioners would benefit the Canadian elder law and elder mediation fields. Marathon Mediation currently offers *Canada’s First Elder Mediation Training Program (EMTP)*, a comprehensive two-day course specializing in elder mediation and elder family conferencing. EMPT information available at: [http://www.adrontario.ca/media/ELDER\\_MEDIATION\\_TRAINING\\_PROGRAM.pdf](http://www.adrontario.ca/media/ELDER_MEDIATION_TRAINING_PROGRAM.pdf). Elder mediators should also actively seek new information for elder mediation groups in Canada and sign-up for their newsletters, when possible. Elder mediation groups in Canada include: Elder Mediation Canada (<http://www.eldermediation.ca/>), Canadian Bar Association National Elder Law section ([https://www.cba.org/CBA/sections\\_Elder/main/](https://www.cba.org/CBA/sections_Elder/main/)), Canadian Centre for Elder Law (<http://www.bcli.org/ccel>), National Initiative for Care of the Elderly (NICE) Network (<http://www.nicenet.ca/>), among others.
9. **Sensitivity to ethnocultural and generational differences:** Practitioners should develop recognition of and sensitivity towards cultural and intergenerational differences. Practitioners must recognize a difference of values across other generations and cultures and avoid judgment. For example, two parties make an oral agreement and decide that they will not document it or commit it to writing. This preference may indicate a cultural preference or a reflection of that individual’s values or belief system. However, limitations to cultural sensitivity exist when cultural considerations increase vulnerability of an involved party. In the example, the practitioner should encourage parties to document their agreement. Practitioners must err on the side of caution to protect vulnerable persons. For example, in cultures where woman are subordinate to men, the mediator must maintain fairness in the

mediation process by allowing all party's to speak equally. In this example, mediators can use a talking stick to achieve fairness in the mediation process, while respecting cultural backgrounds.

### **Application of Recommendations**

SIDRC, the project client, can use the above recommendations in training and educational sessions that SIDRC provides to dispute resolution practitioners. A summary of these recommendations will be provided in the deliverables.

## **CONCLUSION**

This report is intended to serve as a reference for lawyer and mediator practitioners working in the context of elder mediations. This report has also been used to create practical training tools for practitioners, such as informational pamphlets and a condensed PowerPoint version of this report. The next steps are to develop more formalized training program that can be delivered on a standardized, Nation-wide scale to practitioners conducting elder mediations across Canada; therefore, ultimately increasing the quality of service delivered to older adult clients.

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## APPENDICES

### Appendix A: Interview Procedure and Questions

This document outlines the interview procedure and suggested interview questions.

#### Interview Procedure

At the start of each interview, there were several administrative tasks (such as: read verbal script, as per ethics requirement), before starting to discuss the interview questions.

1. **Greetings:** Hello, how are you?
2. **Ethics Requirement:** Read the mandatory ethics verbal script. Any questions before we begin?
3. **Internet Phone:** Also, before we get started, I should say that I am using an Internet phone, so if we get disconnected at all, I will give you a call back, okay? Okay, great.
4. **Remind participants of how ‘power issues’ are being defined in this study:** Before we begin, I should say that, when I refer to “power issues” within elder mediation, I’m referring to issues, like: capacity, disputant autonomy, dependency, vulnerability, and elder abuse (such as, elder financial abuse); Essentially, anything that could create a power imbalance between the parties in elder mediations.

#### Interview Questions

The below questions provide a guideline for questions to ask interview participants. Some questions are only relevant to practitioner participants and may (or may not) be relevant to academic participants.

*As approved by the researcher’s HREB ethics approval, many interview conversations will vary from the below script because the researcher received approval to conduct open open-ended interviews; meaning, the researcher could treat each interview more like a natural conversation.*

1. **Participant Experience:** Could you please briefly explain your experience with elder law, elder mediation, and/ or power-related issues (i.e., capacity, dependency, etc.)?
2. **Elder Law Issues:** In your experience as a lawyer/ mediator and/or academic, practicing elder law, what are the most important elder law issues or issues that create power imbalances that arise in elder mediations/ elder law?
3. **Screening Procedures:** Do you conduct any sort of: routine screening procedure? If so, what does this screening procedure look like?

4. **Unique:** In your opinion, what are the features that make elder law & elder mediation most unique from other types of law/ mediation?
5. **Techniques:** What are the elder mediation issues you most frequently encounter? And how do you respond to these issues? For example, in your experience, what techniques work well and which techniques don't work well?
6. **Older Adults(Seniors):** Regarding Elder Mediation, (a) what makes working with older adults different? (b) Also, are you able to estimate how often older adults are actually involved with the actual mediation? (i.e., all of them, half of them, 70%, none of them?)
7. **Legal Trends:** Also, as a more general question, Are there any legal trends that you've noticed, that relate to: elder law, elder mediation, power issues (i.e., dementia, capacity, dependency, etc)?
8. **Advice for Novice Practitioners:** Lastly, do you have any advice that you would like to share with novice practitioners, or maybe lawyers or mediators, who are new to the field of elder law? (For ex, perhaps advice that you wish you knew when you first started)?

**Thank you for participating in this study.** The data collected will be used to create: (1) my Masters Project report, (2) a PowerPoint presentation for practitioners, and (3) informational pamphlets. Would be interested in receiving this information upon study completion? (i.e., in a couple of months?)

*All interview participants indicated Yes, they would like to receive this information upon completion.*

## Appendix B: Resources for Practitioners and Clients

This appendix provides a list of resources available for elder mediation practitioners and clients.

### Resources for Practitioners:

- **Guidelines for working with Adults with Diminished Capacity (Ann Soden):**
  - Soden, A. (2005). Guidelines for working with Adults with Diminished Capacity. Book: “Advising the older client”. LexisNexis Canada. Retrieved from: <http://store.lexisnexis.ca/store/ca/catalog/booktemplate/productdetail.jsp?prodId=prd-cad-00448#>
- **Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers:**
  - American Bar Association (ABA): Commission of Law and Aging. (2005). Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (Book). Retrieved from: [http://www.americanbar.org/groups/law\\_aging/publications/capacity\\_assessment.html](http://www.americanbar.org/groups/law_aging/publications/capacity_assessment.html)
- **Elder Abuse Assessment, Prevention and Intervention Toolkit (NICE Network):**
  - NICE Network. (*n.d.*). Elder Abuse Assessment, Prevention and Intervention Toolkit. Retrieved from: <http://www.nicenet.ca/detail.aspx?menu=52&app=218&cat1=691&tp=2&lk=no>
- **Fact Sheets on Abuse of Older Adults:**
  - BC Centre for Elder Advocacy and Support (BC CEAS). Fact Sheets on Abuse of Older Adults. Retrieved from: <http://bcceas.ca/wp-content/uploads/FACT-SHEETS-ENGLISH-LONG.pdf>
- **CCEL: Elder and Guardianship Mediation (report):**
  - Canadian Centre for Elder Law (CCEL). (2012). *Elder and guardianship mediation*. Retrieved from <http://www.bcli.org/ccel/publications/elder-and-guardianship-mediation-report>
- **Understanding Dementia: Signs, Symptoms, Types, and Treatment:**
  - Wayne, M. Monika White, M. & Smith, M. 2013. Understanding Dementia: Signs, Symptoms, Types, and Treatment. HelpGuide.org: A Trusted Non-Profit Resource. (2013). Retrieved from [http://www.helpguide.org/elder/alzheimers\\_dementias\\_types.htm](http://www.helpguide.org/elder/alzheimers_dementias_types.htm)
- **Financial Literacy 102: A Knowledge Based Approach to Preventing Financial Abuse of Older Adults: A Guide for Professionals (report):**
  - BC Centre for Elder Advocacy Support (BC CEAS) and Canadian Centre for Elder Law (CCEL). (2010). Retrieved from <http://bcceas.ca/financial-literacy-102-a-knowledge-based-approach-to-preventing-financial-abuse-of-older-adults-a-guide-for-professionals-2/>

- **Exploring the Role of Elder Mediation in the Prevention of Elder Abuse:**
  - Attorney General. (2013). Exploring the Role of Elder Mediation in the Prevention of Elder Abuse. *Department of Justice*. (2010, November 30). Retrieved from <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/mp-pm.pdf>

**Resources for Practitioners to Provide to their Older Adult Clients and their Families:**

- **The "40-70 Rule®" (informational video and free downloadable PDF booklet):**
  - Caregiver Stress. (2010, December). Caregiving Resources: The 40-70 Rule. Retrieved from: <http://www.caregiverstress.com/family-communication/40-70/40-70-rule/>
- **The Four C's of Elder Law Ethics: Why am I left in the waiting room? (Pamphlet).**
  - American Bar Association (ABA): Commission of Law and Aging. (2011). The Four C's of Elder Law Ethics: Why am I left in the waiting room? (pamphlet). Retrieved from: [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_4c\\_broch\\_jul\\_25\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_4c_broch_jul_25_2011.authcheckdam.pdf)
- **BC Centre for Adult Advocacy. Seniors Abuse & Information Line (SAIL):**
  - Available at: 604-437-1940 | 1-866-437-1940 (toll free) and <http://bceas.ca>
- **Financial Abuse: What Seniors Need to Know:**
  - Canadian Bankers Association (CBA). (2013). Financial Abuse: What Seniors Need to Know. Retrieved from: <http://www.cba.ca/en/consumer-information/42-safeguarding-your-money/483-financial-abuse-what-seniors-need-to-know>
- **Power of Attorney Educational Resource (BC):**
  - BC Trustee. *It's Your Choice, Personal Planning Tools*. Retrieved from [http://www.trustee.bc.ca/pdfs/STA/It%27s\\_Your\\_Choice-Personal\\_Planning\\_Tools.pdf](http://www.trustee.bc.ca/pdfs/STA/It%27s_Your_Choice-Personal_Planning_Tools.pdf)
- **General Power of Attorney Educational Resource (Ontario):**
  - Attorney General. *Power of Attorneys "Living Wills", Some Questions and Answer*. Retrieved from <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/livingwillqa.pdf>