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DEFINING A THRESHOLD FOR CLIENT COMPETENCE TO PARTICIPATE IN DIVORCE MEDIATION

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The ultimate aim of court-ordered divorce mediation is to produce settlement agreements. Once ratified by the court, these agreements are legally binding and extremely difficult to modify. Courts assume that everyone is adequately equipped to mediate and, with increasing frequency, order litigants into mediation. Nonetheless, commentators have acknowledged that at least occasionally, a party may be unable to proceed. Currently, no standard exists for determining when a party lacks sufficient understanding and ability to participate in mediation, yet the legally binding outcomes of mediation are too important to leave a determination of competence up to chance. In this article, the authors propose a new legal standard, with a basis in current law and policy, for competence to participate in mediation.

Keywords: divorce, mediation, competence, family law, domestic violence

For years, proponents of mediation have urged its merits as a substitute for adversarial divorce proceedings. Critics of traditional litigation in divorce disputes have argued that the cases take too long and cost too much, especially when the court's order is not always followed in the end.[1] The lawyer-driven adversarial process often increases the conflict between couples, leading parents to involve their children in the dispute.[2] In mediation, disputing parties come together and are encouraged to air their concerns in front of a neutral third party in a less adversarial forum than a courtroom.[3] Through this process, mediators try to help the couple identify relevant issues and negotiate the solution that is best for their

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[1] Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?,* 22 CONFLICT RESOL. Q. 3 (2004).

[2] Robert E. Emery et al., *Divorce Mediation: Research and Reflections,* 43 FAM. CT. REV. 25 (2005).

[3] CONNIE J. A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS AND FUTURE PROSPECTS 27 (2001). Many aspects of the mediation process can vary state to state and jurisdiction to jurisdiction, such as qualifications of the mediator, presence or extent of lawyer involvement, setting and number of sessions offered, means by which cases are referred, criteria to exclude cases, and behavioral commitments imposed on clients. In some states, lawyers are allowed to attend mediation sessions, whereas in other states, mediators are allowed to exclude lawyers. *Id.* at 11–14.

family circumstances, presumably one that the couple will follow because they have created it.[4] Barring fundamental flaws in the agreement reached by the couple, it is ratified by the court, and the divorce litigation is dropped from the trial docket.

Over the past 2 decades, courts have increasingly ordered litigants to participate in mediation in family law cases.[5] In requiring litigants to mediate divorce cases, judges assume that everyone is adequately equipped to represent his or her own interests in the mediation process. Only through exceptions to mandatory statutes does the legal system imply any consideration of the litigants' ability to mediate. Yet even commentators who are adamant that there should be few limits on parties' direct access to mediation have acknowledged that occasionally a party lacks sufficient understanding for the mediation process to proceed.[6] None of the commentators, however, has proposed a specific standard for determining when a party is incompetent to participate in mediation.

The outcomes of mediation are too important to leave a determination of the parties' competence up to chance. The aim of court-ordered mediation is to produce legally binding contracts known as mediation agreements.[7] Once signed, reviewed by a judge, and ratified by an order of the court, these agreements are extremely difficult to modify.[8] In some jurisdictions, only under exceptional circumstances can a change be requested within a year of the most recent court order.[9]

In this article, we first discuss historical and current conceptions of competence to mediate. We then examine the definitions of competence used in other legal contexts. Next, we discuss the values associated with the competence requirement. Finally, we propose and detail a new legal standard for competence to mediate.[10]

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[4]The styles of mediation are quite varied and include approaches such as therapeutic, evaluative, transformative, structured, legal, labor–management, communication and information, and hybrid processes. *See* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATION (Jay Folberg et al. eds., 2004); BECK & SALES, *supra* note 3.

[5]Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence,* 37 U.S.F. L. REV. 1031, 1031 (2003); Carrie-Anne Tondo et al., Note, *Mediation Trends: A Survey of the States,* 39 FAM. CT. REV. 431, 445–47 (2000). Fifteen of the states with statutes or court rules mandate parties to attend, whereas the remaining 23 states leave it to the court's discretion to order couples to attend mediation. Tondo et al. at 445–47. This mandate requires parties to attend at least an orientation session and at most several sessions in a good faith attempt to resolve their disputed issues. Often, the courts do not allow a court hearing on disputed issues to be scheduled until the couple has attended the required sessions.

[6]Susan H. Crawford et al., *From Determining Capacity to Facilitating Competencies: A New Mediation Framework,* 10 CONFLICT RESOL. Q. 385, 395 (2003) ("Adherence to facilitating competencies does not mean that all mediations should proceed, or that every dispute can be resolved through mediation. Certainly, mediators face situations that present legitimate questions about whether an individual has sufficient understanding of the process, knowledge of options, ability to make choices, and understanding of the consequences.").

[7]Depending on the jurisdiction, these contracts can include mediation, parenting, settlement, or divorce agreements.

[8]Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion,* 47 BUFF. L. REV. 1153, 1240 (1999).

[9]*See, e.g.,* PIMA COUNTY, ARIZ., LOC. R. 8.9 (2000 & Supp. 2005); TEX. FAM. CODE § 156.102 (Vernon 2002 & Supp. 2005).

[10]The structure of this article is roughly derived from the first five steps of a process used for

Historical and Current Conceptions of Competence to Participate in Mediation

The notion of competence to participate in legal proceedings dates back hundreds of years in Anglo American jurisprudence.[11] The application of the concept to mediation is much newer. Feminists articulated initial concerns about the fairness of mediation to domestic violence victims, although they did not adopt the language and concepts of competence. In the context of court-ordered mediation, immediately following statutory changes in the early 1980s that made mediation mandatory in divorce cases in Massachusetts, Connecticut, and California, mediation critics became concerned about the effects of this legal change for women generally and for battered women in particular.[12] Feminist scholars pointed out that women on average have lower earning power than men and tend to have less experience in negotiation.[13] Men's economic and negotiating strength provides them with a distinct advantage in mediation as the underlying assumption is that couples will negotiate their own agreements. Critics have also argued that because of women's strong identity as mothers, they often give up economic security for custody of their children.[14] These concerns did not guarantee that all women were incompetent to mediate; however, feminist scholars were concerned about the potential for unequal bargaining power and the fairness of agreements that would be negotiated as a result. Battering relationships by definition are unequal in power, and feminist scholars argued that the battering then made it impossible for victims adequately to represent their interests and negotiate fair agreements. Thus, the first concerns raised surrounding competence of partici-

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creating "responsible, professional, and objective evaluations" of competence in the context of the execution of a prisoner convicted of a capital crime. Stanley L. Brodsky et al., *Post Conviction Relief: The Assessment of Competence for Execution, in* PROCEEDINGS OF PSYCHOLOGICAL EXPERTISE AND CRIMINAL JUSTICE: AN APA/ABA CONFERENCE FOR PSYCHOLOGISTS AND LAWYERS 189, 195 (1999). The steps detailed by Brodsky, modified for the context of mediation, include the following:

1. Review prior conceptions related to competence to mediate,
2. Review current problems and concerns,
3. Analyze competence criteria in other legal domains,
4. Identify important individual and societal values associated with these evaluations in other domains,
5. Develop a minimum legal standard for client competence to mediate,
6. Develop an interview checklist that can be used to standardize assessments to meet the legal standard,
7. Collect data on issues important to other professionals involved in mediation, and
8. Pilot test the checklist. *Id.*

[11]Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court,* 9 VA. J. SOC. POL'Y & L. 353 (2001).

[12]Harriet Cohen, *Mediation in Divorce: Boon or Bane,* WOMEN'S ADVOC., July 1983, at 1; Richard E. Crouch, *The Dark Side of Mediation: Still Unexplored, in* ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 339 (Howard Davidson et al. eds., 1982); Carol Lefcourt, *Women, Mediation and Family Law,* 18 CLEARINGHOUSE REV. 266 (1984); Mary P. Treuthart, *Mediation, in* WOMEN AND THE LAW 7A-29–7A-39 (Carol Lefcourt ed., 1984, 1989 supp.); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues,* 19 CLEARINGHOUSE REV. 431 (1985).

[13]Lefcourt, *supra* note 12, at 267 (women earn substantially less than men for equal work).

[14]Bryan, *supra* note 8, at 1180.

pants in mediation were centered on the battering victim's capability to negotiate a fair settlement in mediation.

The issue of a party's capacity was also raised in the context of mediation for disputes over violations of the Americans With Disabilities Act of 1990 (ADA).[15] The ADA prohibits employment discrimination against a "qualified individual with a disability," which includes some mental disabilities as well as many physical impairments.[16] The legislation encourages the use of mediation to resolve disputes arising under the ADA.[17] In the late 1990s, an interdisciplinary work group developed the ADA Mediation Guidelines to provide guidance to mediators seeking to address conflicts under the ADA.[18] There is some language in the ADA Mediation Guidelines relevant to competence determinations, but this discussion of client capacity is too general for mediators to know how to make a decision in a specific case.[19]

Today, some mediators and commentators specifically refer to the incompetence or incapacity of a party to participate in mediation. At times, the terms are used interchangeably; however, in some legal domains, they are very different constructs. Most often, *capacity* is a clinical term used to identify a level of psychological functioning. Traditionally, *competence* is a legal term defined by a legal standard applicable to a specific context. It involves determining whether a person's capacities or functional abilities are adequate for the context in which a decision needs to be made.[20] A person has many abilities that bear on any decision-making context; thus, in making a decision concerning competence, a court must consider multiple issues regarding both the person and the context surrounding the decision.[21] Because divorce mediation takes place to resolve a

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[15]42 U.S.C. § 12101 *et seq.* (2000).

[16]*Id.* § 12102(2)(A).

[17]*Id.* § 12212.

[18]Judith Cohen, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward,* 2 CARDOZO ONLINE J. CONFLICT RESOL. (2001), *at* http://www.cardozojcr.com/vol2no2/article01.html

[19]*Id*. The ADA Mediation Guidelines detail two factors relevant to the determination of capacity: understanding (the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, the issues at hand) and ability (to assess options, to make and keep an agreement). The last type of ability, to keep an agreement, differs from the other abilities in that it is prospective rather than current. In other words, an assessment of the other criteria gauges present abilities and understandings. In contrast, measuring the ability to keep an agreement is essentially a predictive exercise about future behavior.

[20]Competence, as a legal term, implies a need to weigh whether the individual's capacities are sufficient to meet the demands of a current situation. One must always ask, "Capacity for what?" Erica Wood, *Addressing Capacity: What Is the Role of the Mediator?* (2004), *at* http://www.mediate.com/articles/woodE1.cfm ("A colleague of mine once said, 'Never put a period after the word "capacity".' That is, always ask 'capacity for what?'"). Capacity relates to a person's functioning in a particular area. People have many capacities, and those capacities change as other factors in a person's life change (e.g., head injury, psychological disorders, age, stress level, medication). Mental health professionals have a long history of assessing capacities within the legal system. THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 2 (2d ed. 2002).

[21]Competence, in general terms, refers to a person's ability to make certain decisions using a rational thought process. Some individuals—for example, children—can be considered incompetent as a matter of law for certain purposes. More commonly, an individual might be considered de facto

legal conflict, this article uses the term competence in defining a legal standard for who is capable of participating in mediation.

On balance, the literature examining competence to participate in family law mediations is relatively scarce. The scholars who have addressed the concept generally have not proposed a clear standard by which to gauge competence. A few sets of standards, however, mention some requirements or criteria.

Model Standards of Practice for Family and Divorce Mediation (2000)

Between 1982 and 1984, the Association of Family and Conciliation Courts (AFCC) conducted three national meetings with representatives from 30 organizations. The meetings were convened in an attempt to develop a set of model standards for issues specifically related to family mediation.[22] These efforts produced the 1984 Model Standards of Practice for Divorce Mediation. In 1998, the AFCC reconvened meetings using the 1994 Model Standards of Conduct for Mediators created by the American Bar Association (ABA) committee—described in the next section below, *Model Standards of Conduct for Mediators (2004)*—as a starting point for discussion.[23] Over 2 years of meetings produced the Model Standards of Practice for Family and Divorce Mediation (hereinafter Family Model Standards) in August 2000.[24]

The Family Model Standards address client competence to participate in mediation in a general sense. Standard III, Subpart C provides language admonishing the mediator to "be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes that one or more of the participants is unable or unwilling to participate."[25] Standard XI indirectly relates to client capacity, although the standard does not label it as such. The standard states that a mediator should suspend or terminate mediation when she or he "reasonably believes that a participant is unable to effectively participate or for other compelling reasons."[26] The partial list of compelling reasons provided under Subpart A includes threats to harm or abduct a child, substance abuse, mental conditions, an unconscionable agreement proposed by the parents, using mediation to further illegal conduct, or using

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incompetent at a specific point in time for a specific purpose. Competence as a legal concept takes on form only within a specific legal context. Although there are functional capacities that may bridge some of these contexts, there are other capacities that are context specific, and the requisite level of mastery for each capacity depends on the specific context.

[22]Symposium, *Standards of Practice: Model Standards of Practice for Family and Divorce Mediation,* 39 FAM. CT. REV. 121 (2001).

[23]The participants included representatives from the Family Law Section of the ABA and the National Council of Dispute Resolution Organizations, "an umbrella organization which includes the Academy of Family Mediators, the American Bar Association Section of Dispute Resolution, AFCC, Conflict Resolution Education Network, and National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution, and the Society of Professionals in Dispute Resolution." *Id*. at 123.

[24]*Id*. at 121.

[25]*Id*. at 129.

[26]*Id*. at 132–33.

mediation to gain an unfair advantage.[27] Some of the criteria listed in Standard XI—namely, mental conditions and possibly substance abuse—may so affect a parent's functioning as to raise a possibility of incompetence to mediate his or her differences. Nonetheless, the Family Model Standards fail to provide the specificity necessary to guide a mediator seeking to determine whether a specific client falls below the threshold of competence.

Model Standards of Conduct for Mediators (2004)

The original 1994 Model Standards were developed between 1992 and 1994 by a joint committee of delegates from the American Arbitration Association (AAA), the ABA Section of Dispute Resolution, and the Society for Professionals in Dispute Resolution (SPIDR).[28] The standards apply to all types of mediation and are intended to guide mediators, inform the mediating parties, and promote public confidence in mediation.[29] Curiously absent from the 1994 version is any standard directly addressing client competence.[30] Although there is a standard that addresses competence of the mediator (Standard IV), there is no guidance on assessing clients' abilities to participate in mediation.

The 1994 Model Standards have recently undergone three revisions; however, as of October of 2005, the final draft has not been approved by the sponsoring organizations. As they stand, however, the Final Draft Model Standards for Mediators (hereinafter Final Draft Model Standards) represent an improvement in articulating a cognitive standard for competence as they recognize that a party must have the ability to understand the basics of both the process and the substance of the mediation. In the Final Draft Model Standards, the *understanding* component of competence is implicated only when "a party appears to have difficulty comprehending the process, issues or settlement options. . . ."[31] The Final Draft Model Standards discuss general abilities ("difficulty participating in the mediation process") as opposed to the more specific abilities that would be helpful in determining whether a specific party is competent (e.g., assessing options, making and keeping an agreement).[32] The mediator is given much latitude in determining the appropriate actions to take if any of these rather vaguely defined conditions arise. The Final Draft Model Standards state that if a participant's conduct jeopardizes the chances that a mediation can be conducted consistent with the standards, the mediation should not proceed.[33]

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[27]*Id.* at 133.

[28]In January of 2001, the Academy of Family Mediators, the Conflict Resolution Education Network, and SPIDR merged and became one organization, the Association for Conflict Resolution (ACR).

[29]Sharon Press & Terry Wheeler, *Revisiting the Standards of Conduct for Mediation,* ACRESOLUTION, Spring 2004, at 34, 35.

[30]AAA, ABA, & ACR, *Standards of Conduct for Mediators* (1994) [hereinafter 1994 Model Standards], *at* http://moritzlaw.osu.edu/dr/msoc/pdf/original_standards.pdf

[31]AAA, ABA, & ACR, *Model Standards of Conduct for Mediators* 7 (2004), *at* http://moritzlaw.osu.edu/dr/msoc/pdf/dec2004_draft_final.pdf

[32]The ADA Mediation Guidelines provide an example of a more specific definition of relevant abilities. ADA MEDIATION GUIDELINES § I(D)(1–4), *at* http://www.cardozojcr.com/ada.html

[33]Final Draft Model Standards, *supra* note 31, § VI(C).

Need for Clarity

The Family Model Standards state that a mediator has the responsibility to assess the participants' "capacity to mediate before the participants reach an agreement to mediate"[34] but give little direction on what to assess or how to conduct an assessment. Similarly, the Final Draft Model Standards admonish mediators to conduct mediation in a manner that promotes "party competency"[35] but, again, with only a rough idea of how to conduct the assessment. The current state of mediation practice leads to confusion and inconsistent practices around the determination of a party's competence to mediate. Simultaneously, more jurisdictions across the United States are mandating that couples attempt mediation prior to scheduling a hearing on their family law cases.[36]

As noted above, current standards tend to focus on a handful of reasons why a party might be unable to participate in mediation. In reality, there are many reasons why a party may be incompetent to mediate. Conditions internal to the individual—such as mental illness, mental retardation, or acute psychological crisis[37]—may limit the individual's functioning to a level below the competence threshold. In addition, couple-level factors in the relationship between the parties may reduce an individual's ability to function sufficiently well to participate. Much of the literature and screening has focused on domestic violence as a key couple-level factor,[38] but other factors such as control, coercion, intimidation, and fear can also be significant.[39] Because of the many factors that can contribute to incompetence, it is essential to establish a clear legal standard based on a person's

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[34]Family Model Standards, *supra* note 22, at 128 ("A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.").

[35]Final Draft Model Standards, *supra* note 31, § VI(A) ("A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes . . . party competency and mutual respect among all participants.").

[36]Tondo et al., *supra* note 5.

[37]"It would not be rare for a divorce to bring on an acute psychological crisis." Donald K. Granvold, *The Crisis of Divorce: Cognitive–Behavioral and Constructivist Assessment and Treatment, in* CRISIS INTERVENTION HANDBOOK: ASSESSMENT, TREATMENT, AND RESEARCH 650, 655 (Albert R. Roberts ed., 3d ed. 2005). Granvold explained,

> For many, the crisis of divorce is realized during the transition phase, when a resolution of property settlement and child custody or visitation are being sought. This period, after the decision to divorce has been made and before the divorce is legally final, is punctuated by extreme levels of emotion, including acute feelings of loss across many categories (e.g., personal, intimate, moral/ethical, status, lifestyle, financial, physical), rejection and abandonment, hurt, anger, guilt, anxiety, worry, fear, and disappointment. Emotional consequences such as these, coupled with decision making, planning, and the mobilization of environmental and lifestyle change, seriously compromise the coping capacities of divorcing individuals. These individuals are strongly predisposed to psychological crisis.

Id. Divorce has long been widely recognized as one of the most significant life stressors. Thomas H. Holmes & Richard H. Rahe, *Social Adjustment Rating Scale,* 11 J. PSYCHOSOMATIC RES. 213 (1967) (divorce is the second most stressful significant life event; only the death of a spouse ranks higher).

[38]Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators,* 2001 J. DISP. RESOL. 253, 253–54 (2001).

[39]These additional factors were originally developed by the Duluth Domestic Abuse Intervention Project as part of the Duluth Model's Power and Control Wheel, *at* http://www.duluth-model.org/

functional abilities, not on the numerous and changing reasons for deficiencies in those abilities.

As mediation is currently practiced, the mediator has the ultimate responsibility to ensure that clients are capable. Without a clear legal standard, however, it is unclear how mediators should or do make these decisions. To further complicate matters, mediation as a profession is an anomaly in that there are practitioners from many different professional backgrounds. Mediators include lawyers, psychologists, mental health practitioners, social workers, counselors, sociologists, business people, and some individuals with no previous professional training. By virtue of their professional training, some mediators have expertise in assessing client competence in other legal contexts, whereas other mediators do not. Because of the diversity of professionals practicing mediation and the varying jurisdictional requirements for who can participate in mediation sessions, a clear legal standard for defining competence to mediate is needed to ensure fairness for the clients.

Although many authors have argued that there is no bright line for determining competence in mediation, we strongly believe that a clear legal standard for determining threshold competence based on functional abilities would be immensely helpful precisely because there are no bright lines.[40] In discussing the assessment of competence in another legal arena, some researchers have argued that a lack of clear criteria and defined assessment methods can lead to the imposition of the assessor's own values.[41] The standard for incompetence to participate in mediation should be specific and well articulated to protect the rights of all participants and ensure an evenhanded application of the doctrine.

This article establishes a functional standard for competence focusing on the impact of various individual and relational factors on each participant rather than considering the presence of a factor to be an absolute bar to participation in mediation. We delineate the minimum prerequisite of whether a mediation session can proceed: whether all parties meet the legal standard for competence to participate in mediation.[42] Once the legal standard is clear, appropriate guidelines for assessing the capacities needed for a particular decision-making context can be established. Criteria for assessing the different capacities, screening instruments,

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[40]The *bright line* terminology comes from Erica Wood. Wood, *supra* note 20, at 1 ("There is no surefire way to make judgments about capacity—there is no 'bright line' or 'capac-o-meter' and it is often a very gray area. In fact, recent writings suggest that for these reasons the term 'incapacity' (and certainly the older and more global term 'incompetency') be replaced with the term 'diminished capacity' or 'diminished capacities'."); Erica Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785, 808 (2001) ("Just as in the legal arena, there is no 'bright line' for capacity in mediation. Capacity may seem clear in some instances but often is a gray area.").

[41]Stanley L. Brodsky, *Professional Ethics and Professional Morality in the Assessment of Competence for Execution,* 14 LAW & HUM. BEHAV. 91, 92 (1990) ("A rule of thumb may be applied here: The vaguer the goals and criteria are for any given task, the more likely the clinician is to utilize her or his own values. Similarly, the more unstructured and vague the assessment methods are, the more likely it is that values will impose.").

[42]Courts or mediation centers may want to screen for other factors in addition to whether each party is competent to participate. In a separate article, we have addressed issues associated with screening for competence and other factors. Connie J. A. Beck & Lynda E. Frost, Clinical Assessment of Competence to Participate in Mediation (2006) (unpublished manuscript on file with the authors).

and interview protocols can be constructed to standardize assessment and enable all mediators, regardless of professional training, to screen effectively for parties who lack competence to participate in mediation.

Competence and Capacity in Other Legal Contexts

Although there are different types of legal competence, they all share certain fundamental characteristics delineated by scholar Thomas Grisso.[43] A requirement of legal competence to participate in a legal proceeding recognizes that individuals have the right to make decisions and have control of their own lives. It acknowledges that, in some cases, individuals may not have the capacity to make important decisions in their lives and that their incapacity may jeopardize their welfare or that of others who would be affected by their decisions. Competence provides a legal mechanism for identifying individuals for whom the relevant capacities may not exist. When legal incompetence is determined, it allows, obligates, or justifies the state's curtailment of the individual's rights to protect the welfare of the individual. Of critical importance is the consideration of whether the person's capacities are sufficiently impaired to require a legal finding of incompetence. Society has authorized the courts to make these judgments (with the assistance of expert clinical testimony when necessary), although the procedures and criteria may differ depending on the context and across jurisdictions.

Incompetence is the legal finding that a person's capacities are not adequate to meet the demands of the context in which a decision must be made or to participate in the decision-making process. According to Grisso, clinicians assessing competence follow five maxims:

1. Legal incompetence is related to, but not the same as, impaired mental states;

2. Legal incompetence refers to functional deficits;

3. Legal incompetence depends on functional demands;

4. Legal incompetence depends on the consequences of the decisions that need to be made; and

5. Legal incompetence can change over time and based on new circumstances.[44]

Although divorce mediation differs in significant respects from litigation, it is fundamentally a legal process. The parties make long-term legal decisions (called parenting agreements or settlement agreements), which have far-reaching legal, financial, and emotional consequences. In assessing the competence of the parties to participate in divorce mediation, it is therefore logical to examine notions of competence in other legal contexts. Thus, to appreciate the broad range of

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[43]GRISSO, *supra* note 20, at 2.

[44]THOMAS GRISSO & PAUL S. APPELBAUM, ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS 10–11, 18–27 (1998). These maxims are not necessarily legal maxims but are consistent with notions of incompetence.

elements that may apply to competence to mediate, we review the legal concept of competence in other contexts prior to discussing competence in the specific legal context of divorce mediation.

Standards for Establishing Competence in Criminal Contexts

Extensive research and scholarly writing have examined competence in the context of criminal proceedings. Because the potential for a criminal defendant to lose liberty and other rights is so great, particular attention has focused on the capacities a defendant must have to participate in a criminal proceeding.

Adjudicative competence. Adjudicative competence (more commonly known as competency to stand trial)[45] refers to a constitutional due process requirement that a criminal defendant be competent to move through the legal procedures that constitute part of the criminal justice process. The legal standard, set out by the U.S. Supreme Court in *Dusky v. United States,* requires that the defendant have "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of proceedings against him."[46] The inquiry focuses on present abilities and looks both at cognitive abilities to understand elements such as the charges, possible penalties, and courtroom procedures and at volitional abilities to work collaboratively with defense counsel and behave appropriately in the courtroom.[47] If a criminal defendant is found to be incompetent, the defendant typically must enter treatment to restore that individual to the requisite level of functioning. The restoration process is successful in the large majority of cases nationwide, and most incompetent defendants eventually proceed to trial (or successfully enter a plea bargain).[48]

The societal values underlying the competence requirement are grounded in a concern for fundamental fairness. The notion of fundamental fairness is rooted in respect for the autonomy of the defendant, a desire to preserve the dignity of the courtroom and the criminal justice process, and an aim of maximizing the accuracy of the proceedings.[49] The constitutional requirement of competence is a

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[45]For an explanation of the preference for the term *adjudicative competence, see* NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 40 (2002).

[46]Dusky v. United States, 362 U.S. 402, 402 (1960). The standard for competency to stand trial differs significantly from the various state standards for successfully raising an insanity defense. Because they do not have constitutional stature, the requirements of an insanity defense vary across jurisdictions. Uniformly, though, the insanity standard focuses on the time of the offense (rather than the current time or the time of trial) and requires a threshold showing of a mental disorder or mental retardation that led to the lack of capacity at the time of the offense. Most states have a cognitive standard that examines whether the defendant understood the nature and character of his or her actions at the time and/or whether he or she knew that these actions were wrong. Some states also have a volitional component that questions whether the defendant could control his or her actions at the time of the offense. *See* HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 36–41 (1993).

[47]The Group for the Advancement of Psychiatry has developed a list of 21 abilities affecting a defendant's competency. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 124 (2d ed. 1997). *See also* FLA. R. CRIM. PROC. § 3.211(a) (West 1999).

[48]MELTON ET AL., *supra* note 47, at 154. Most defendants are restored in 6 months or less. *Id.*

[49]POYTHRESS, *supra* note 45, at 43.

personal right; the presence of a defense attorney does not change the necessity that the defendant personally exhibit the functional abilities that constitute adjudicative competence. Under certain circumstances, even defendants with attorneys can be forcibly medicated to restore their competence and proceed to trial.[50] Furthermore, even though a skilled and sensitive defense attorney can help compensate for limitations on the part of the defendant, the judicial inquiry into a client's competence does not consider the characteristics of the defense attorney or the quality of the attorney–client relationship.[51]

The requirement of adjudicative competence in a criminal proceeding has many elements that are helpful in constructing a substantive standard for competence to mediate. As with adjudicative competence, competence to mediate should focus on current levels of functioning and require minimum cognitive abilities, such as the ability to understand the mediation process and the factual and legal issues to be decided, as well as volitional abilities to abide by the ground rules of the mediation and to maintain a level of emotional stability necessary for the communicative and decision-making processes. A party lacking these requisite abilities could be provided services designed to develop the missing skills or therapy to create structure and support that might eventually permit mediation at a later point in time.

Competence to be executed. The U.S. Supreme Court has determined that the Eighth Amendment prohibits the execution of an insane person because this would constitute cruel and unusual punishment.[52] Although the Court used the term *insane,* which typically refers to a defendant's mental state at the time of the offense, in this context it signifies the defendant's mental capacity at the time of the legal proceeding (i.e., competence). The Court listed a number of reasons why the Constitution forbids an execution under the challenged statutory scheme, including a failure to provide for meaningful participation of the defendant in any challenge to the sentence.[53]

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[50]Sell v. United States, 539 U.S. 166 (2003).

[51]The lawyer's role in the context of adjudicative competence would be much more appropriate to examine than the mediator's role in competence to mediate. The lawyer has an active role with a single client, and the quality of this relationship can be observed. The mediator's role is much more complex, and because nearly all mediation sessions are confidential, the mediator–client relationship cannot be observed. A mediator is to be a neutral third party who assists both clients, rather than assisting just a single client. The quality of the mediator–client relationship can thus be different for the individual parties. The mediator bumps up against the concept of neutrality if she or he becomes too actively involved with compensating for the limitations of one client, particularly if the compensation disadvantages the other party. Tobey et al. discussed ways attorneys assist the competence of their juvenile clients:

> Raising the question of competence to stand trial was not the only way to respond to their questionable capacities as trial defendants. Another response, the one typically preferred by these attorneys, was to try to augment youths' capacities by providing structure, support, or other mechanisms to create what might be called "assisted competence." Sometimes this assistance helped, but the attorneys also provided many examples of instances in which it did not solve the problems faced.

Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225, 238–39 (Thomas Grisso & Robert Schwartz eds., 2000).

[52]Ford v. Wainwright, 477 U.S. 399 (1986).

[53]*Id.* at 406–09, 413–16.

The Court did not explicate a clear standard for measuring competence, although Justice Powell found it problematic that a death-row inmate might be unaware of the nature of the impending punishment and the reasons for it.[54] Many states have codified a standard that substantially reflects Justice Powell's concerns that people who do not have the mental capacity to understand the nature of and reasons for their upcoming execution should not be subject to the death penalty.[55]

The context of impending execution is clearly different in magnitude from that of divorce mediation. Nonetheless, the contexts are similar in that they both value the individual's ability to understand the nature and consequence of the proceedings and to actively protect his or her legal interests.

Competence to waive rights. The U.S. Supreme Court has held that the standard for competence to stand trial is the same as other competency standards in the criminal justice process, such as competence to plead guilty or competence to represent oneself at trial.[56] These other competencies, however, implicate (and are distinct from) the legal doctrine of waiver.[57]

Criminal defendants have a host of constitutional rights, including the right to be free of unreasonable searches and seizures, the privilege against self-incrimination, the right to an attorney, the right to confront witnesses, and the right to testify on one's own behalf. Yet a defendant need not exercise all those rights; for example, by pleading guilty, a defendant waives certain rights including the privilege against self-incrimination, the right to a jury trial, the right to confront witnesses, and the right to testify. Although the standard for competence to plead guilty is the same as that for competence to stand trial, the defendant must also meet the criteria for a valid waiver of rights. To meet constitutional standards, the waiver must be knowing, voluntary, and intelligent.[58]

For a waiver to be knowing, the defendant must understand the nature of the right and the consequences of giving it up.[59] For a waiver to be voluntary, it must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception," although certain types of coercion are permissible.[60] For a waiver to be intelligent, it must be the product of a rational thought process that has weighed various alternatives.[61] The requirements for a valid waiver thus apply additional cognitive requirements above and beyond the elements of competence to stand trial. To protect the defendant, the Supreme Court has established a presumption that a waiver did not occur and has required a court to conduct a

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[54]*Id.* at 422.

[55]*See, e.g.,* TEX. CRIM. PROC. CODE ANN. § 46.05(h) (Vernon Supp. 2005).

[56]Godinez v. Moran, 509 U.S. 389, 397–98 (1993).

[57]*Id.*

[58]*Id.* at 401; Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (a waiver must be "an intentional relinquishment or abandonment of a known right or privilege").

[59]Moran v. Burbine, 475 U.S. 412, 421 (1986).

[60]*Id.* Types of permissible coercion vary according to the nature of the right being waived. In the context of a confession, the waiver of the privilege against self-incrimination must be free from police coercion, although it can be the result of mental illness and command hallucinations. In contrast, a waiver of other rights in the context of a guilty plea must be free of all types of coercion, whether from official sources, private citizens, or mental illness. Colorado v. Connelly, 479 U.S. 157, 170 (1986).

[61]North Carolina v. Alford, 400 U.S. 25, 31 (1970).

thorough inquiry into the particular circumstances and the "background, experience, and conduct" of the defendant.[62]

The elements of the doctrine of waiver are relevant in assessing the competence of parties ordered to engage in mediation. A party who resolves a dispute through mediation effectively waives the right to take the case to a judge or a jury through a contentious hearing. Before mediating a case, the parties should know the role of mediation in the legal process and understand the consequences of reaching a mediated agreement. They should understand that, although in some contexts a court may require parties to a dispute to participate in a mediation process, any agreement resulting from the mediation must be signed on a voluntary basis. In deciding whether to sign an agreement, the parties must be capable of weighing their options in a rational manner.

Standards for Establishing Competence in Regulatory Contexts

We now move our inquiry out of the criminal context and examine issues of competence in regulatory and civil contexts. In these arenas, the issues generally focus on the requirements an individual must meet to perform some legal act or to make a legally relevant decision.

A very distinct form of competence determination occurs in the context of licensing and state regulation. The state determines who may perform a variety of actions ranging from operating a motor vehicle to practicing professions such as medicine and law. The capacities required in these contexts are a combination of intellectual mastery of a body of knowledge and the practical utilization of associated skills. The concerns driving state regulations include public safety issues, market regulation interests, and, in the case of professional licensing, compliance with professional ethics codes and responsiveness to pressures from professional organizations.[63]

The regulatory context, in many respects, is distant from the legal context of mediation. It does, however, establish consideration for the protection of third parties as a public safety concern. In a divorce proceeding, the court protects the children and attempts to realize their best interests in child custody disputes. In mediation, the parties adopt some of the functions of the judge in developing a proposed resolution to the conflict, and therefore, they are called on to take into consideration the interests of the children. This need to consider third-party interests adds some complexity to the abilities a participant in custody mediations must have.

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[62]*Johnson,* 304 U.S. at 464; Von Moltke v. Gillies, 332 U.S. 708, 722 (1948).

[63]*E.g.,* Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 589 (Tex. 1947) ("an examination of our statute requiring operators of automobiles to have licenses discloses that its principal purpose is to insure a minimum of competence and skill on the part of drivers for the protection of persons who might be injured or have their property damaged by negligent or reckless operation of motor vehicles on the highways"); Palmer v. Unauthorized Practice Committee of State Bar, 438 S.W.2d 374, 376 (Tex. App. 1969) ("the practice of law is affected with a public interest, and it is the right and duty of the state to regulate it and control it so that the public safety and welfare will be served and promoted").

Standards for Establishing Competence in Civil Contexts

Competence considerations in a civil context are important in a wide range of circumstances. Determinations of competency in these contexts have a fundamental impact on the individual's liberty and ability to exercise control over major life functions. Civil commitment and guardianship proceedings are two events that broadly affect an individual's life. Other competence questions such as the ability to make medical decisions, sign a will, or form a contract address a narrower range of decisions.

Civil commitment. A common and high-stakes context for a capacity determination is a civil commitment proceeding. Civil commitment determinations differ from competence determinations in that, in essence, the determination is the purpose of the proceeding rather than a prerequisite for some further legal act such as signing a will or proceeding with a criminal trial. A person found to meet commitment criteria in a civil commitment proceeding faces loss of liberty and placement in a psychiatric hospital or, at a minimum, provision of mandatory treatment in a controlled community environment.[64]

The legal standard for civil commitment has been refined through a series of Supreme Court cases and requires that the state establish that the individual exhibits a certain level of impairment. Standards vary from state to state, but generally, to commit an individual, the state must show that because of a mental illness, the individual needs to be hospitalized for his or her own safety or the safety of others.[65] In broad terms, the inquiry differs from a determination of adjudicative competence in the criminal context in that the latter looks at present functioning, whereas civil commitment is based on a calculation of future risk and harm. In many states, though, the protocol blurs as the prosecution must show a recent overt act to prove dangerousness to self or others, thus requiring not only evidence of a deficit in ability to act within certain bounds of safety in the future but also at least one example of a failure to exercise the compromised ability in the recent past.[66] The legal standard for civil commitment differs from many other competence standards in that it requires an impaired ability to perform future acts in addition to evidence of past failures and focuses on actions rather than cognitive processes.

In significant ways, the civil commitment context differs from that of parties entering divorce mediation. For example, the civil commitment competence standard adds an element not found in most other standards: a threshold requirement of mental illness. This requirement has been added because an incompetence finding leads to a restriction of the person's liberty so as to provide treatment for the mental illness. In most contexts, including that of mediation, the cause of a person's impaired capacity is not a necessary criterion of the competence standard, although diagnostic information can be useful in determining the genuineness and extent of a person's impairment. Furthermore, the civil commitment

[64]MELTON ET AL., *supra* note 47, at 310–11; *see also* Addington v. Texas, 441 U.S. 418, 425 (1978).

[65]*E.g., Addington,* 441 U.S. at 420. A number of states also permit involuntary commitment for individuals unable to care for themselves. *See generally* MELTON ET AL., *supra* note 47, at 309–13.

[66]*See* MINN. STAT. § 253B.02 subd. 13 (2003); PA STAT. ANN. tit. 50, § 7301(a) (West 2004).

standard, like regulatory restrictions for licensing, has an element designed to protect third parties that can be relevant in the context of a divorce mediation involving children.

Guardianship. The competence concerns in guardianship proceedings are broader than in many other civil contexts because the question before the court is not whether the individual is competent to make a specific legal decision (e.g., accept medical treatment, make a will) but whether the individual is competent to make a host of decisions in his or her daily life. Some individuals, such as children, are generally considered to be incompetent as a matter of law and require guardians (in the case of children, usually parents) to make many legal decisions.[67] For other individuals, a determination of incompetence necessitating a guardianship is based on the particularized circumstances of the case. One form of limited guardianship addresses an inability to manage one's estate,[68] whereas another focuses on an inability to take care of oneself.[69] Frequently, both concerns are merged in a general, or plenary, guardianship.[70]

The legal standard for incompetence in the context of guardianship proceedings has never been elaborated in detail. Many states require that the individual be unable "to care properly for oneself or one's estate."[71] Other states, drawing from the Uniform Probate Code, consider an incapacitated person to be "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age . . . or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."[72] The first standard focuses on inabilities reflected in a person's actions (or lack of actions), whereas the more modern standard based on the Uniform Probate Code is a cognitive standard requiring a causal link between some underlying condition and the impaired decision-making skills.

Guardianship proceedings, like divorce mediations, address situations that vary widely in terms of complexity. The guardianship inquiry (similar to an assessment of adjudicative competence) is fact specific and must examine the degree of complexity required in the decision-making process. In other words, an extensive estate (or a capital murder case) may require a higher level of functioning and decision making from the individual. Similarly, some mediation cases entail more involved and complicated issues than ones concerning short-term marriages, minimal property, and no children. As in the guardianship context, an examination of competence to mediate must consider the circumstances of the specific case.

Testamentary capacity. The question of testamentary capacity is usually raised retrospectively, when a will is challenged by individuals who would have received more benefits from an earlier will or through intestate succession (i.e.,

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[67]MELTON ET AL., *supra* note 47, at 339.

[68]*Id.* Most states distinguish between conservatorship (over property) and guardianship of the person.

[69]*Id.*

[70]*Id.*

[71]*E.g.,* DEL. CH. CT. R. 180-C (2003).

[72]UNIF. PROB. CODE §§ 1-201, 5-101 (2004).

where no will is found for the decedent). Individuals signing a will must be "of sound mind," which is usually interpreted by courts to mean functioning cognitively at a minimum level of competence.[73] Individuals must understand that they are making a will and know the nature and extent of their property, the "natural objects of [their] bounty," and the manner in which the will distributes the property.[74] In a typical case in which the testator is deceased, the inquiry is a complicated, retrospective assessment based on collateral sources.

In a significant sense, assessing competence to mediate should be easier than gauging testamentary capacity because it should generally be a present-time assessment measuring current capacities to comprehend and act. The baseline knowledge required for determining testamentary capacity is similar to the knowledge required for assessing competence to mediate property issues in a divorce, although in some cases, additional knowledge related to child development may be required to resolve custody and visitation issues.

Competence to make medical decisions. Usually the question of whether an individual is competent to make medical decisions is not raised unless the individual involved is a child, mentally ill, mentally retarded, or experiencing cognitive deficits related to age, trauma, degenerative neurological disorder, or a prolonged illness.[75] In each of these circumstances, there may be reason to question a party's competence, but a mere diagnosis is not, in itself, sufficient to declare a party incompetent to make medical decisions. There are several suggested standards for determining competence in this context. One standard is that an individual is competent if he or she merely expresses a preference regarding the medical decision at issue.[76] More detailed standards require some demonstration of understanding or appreciation regarding the factors involved in the decision.[77] More detailed still is a standard that requires the decision-making process to be reasonable, with the proposed patient not only understanding the factors involved but also weighing the information rationally.[78] A more physician-centered standard would declare the patient competent if the decision itself is reasonable, that is, the decision is one a reasonable person would have made.[79]

The notion of competence in the context of medical treatment decisions is related to the tort law doctrine of informed consent. Informed consent requires three elements:

1. *Competence* of the person making the decision,

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[73]Bracewell v. Bracewell, 20 S.W.3d 14, 18 (Tex. App. 2000).

[74]CAL. PROB. CODE § 6100.5 (2004); N.Y. MENTAL HYG. LAW § 81.21 (Consol. 2004)

[75]GRISSO, *supra* note 20, at 392.

[76]MELTON ET AL., *supra* note 47, at 347; BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 349 (1997).

[77]MELTON ET AL., *supra* note 47, at 348; WINICK, *supra* note 76, at 349.

[78]*See* MELTON ET AL., *supra* note 47, at 348; WINICK, *supra* note 76, at 349.

[79]*See* MELTON ET AL., *supra* note 47, at 348; WINICK, *supra* note 76, at 349. Although this standard is framed in objective terms, in practice the treating clinician is frequently central to assessing the reasonableness of the decision. This standard is widely discredited today: "Virtually all legal and ethical perspectives on competence to consent to treatment agree that whether a patient's choice would be considered wise by most people is not a requirement for competence to consent to treatment." GRISSO & APPELBAUM, *supra* note 44, at 33.

2. *Disclosure* of pertinent information by the service provider to the individual, and

3. *Voluntariness* of the decision made.[80]

Without obtaining informed consent from the proposed patient, a service provider runs the risk of being sued for the torts of battery or negligence.[81]

Law professor Jacqueline Nolan-Haley has argued for the application of informed-consent doctrine to the context of mediation.[82] Some of her concerns about fairness in mediation proceedings could be addressed by a competence requirement similar to informed consent. She argued that this standard would guarantee a necessary level of understanding and disclosure. However, Nolan-Haley chose to focus on only two of the three elements of informed consent (i.e., disclosure and consent loosely related to the element of voluntariness) but ignored the requirement of competence.

The doctrine of informed consent has its limits in consideration of family mediation cases. The focus of informed consent centers on the disclosure of information rather than on the comprehension of the information.[83] Although we agree that disclosure of pertinent information concerning the mediation process and voluntariness by the parties in signing agreements are very important to mediation, our concern is that the third and most important element of informed consent (competence) is omitted. Failure to assess whether the party is competent enough to actually understand the information presented, manipulate it, and appreciate its relevance renders the disclosure and voluntariness requirements hollow.

Our second concern is that mediation operates within a paradigm of equality between the parties and neutrality on the part of the mediator, whereas the notion of informed consent presupposes one actor with power, knowledge, and information who wants to do something to another person who is relatively disadvantaged in terms of power, knowledge, and information. Informed consent serves as a mechanism for the relatively disadvantaged person to give permission to the advantaged person to do as he or she wishes to the disadvantaged person. Although a mediator guides the dispute resolution process and must explain the nature of mediation to the participants (disclosure) and the parties must give their permission to proceed (voluntariness), the parties do not necessarily give the mediator permission to proceed with his or her proposed plan of action or conception of the agreement the parties should sign. Mediation clients must carry

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[80]WINICK, *supra* note 76, at 347–68; William H. Reid, *Competence to Consent*, 7 J. PSYCHIATRIC PRAC. 276 (2001).

[81]Washington v. Glucksberg, 521 U.S. 702, 724 (1997); Harrison v. United States, 284 F.3d 293, 296 (1st Cir. 2002).

[82]Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking,* 74 NOTRE DAME L. REV. 775 (1999).

[83]GRISSO & APPELBAUM, *supra* note 44, at 8. A 1960 Kansas Supreme Court decision was one of the first court decisions on informed consent. It detailed a list of information to be disclosed that remains essentially the same today: the nature and purpose of the proposed treatment, its potential benefits and risks, and any alternative approaches along with their benefits and risks. Natanson v. Kline, 350 P.2d 1093, 1106 (Kan. 1960).

out the action themselves (negotiate) as opposed to passively receiving an action (proposed medical treatment). In addition, without obtaining informed consent from the proposed patient, a medical service provider runs the risk of being sued for the torts of battery or negligence.[84] There is no such parallel for mediation practitioners.

Capacity to contract. Another significant legal context is that of the formation and enforcement of a contract. Long-standing contract law has recognized certain conditions that impair an individual's ability to contract: immaturity and mental disorder or retardation.[85] Children under a specified age (originally 21 years old, but now, often 18) are, as a matter of law, treated as incapable of forming a binding contract.[86] This arbitrary standard is applied regardless of other indications of maturity on the part of the individual or changes in legal status such as marriage or emancipation.[87] Generally, a minor's contract is treated as voidable at the request of the minor but as binding to the other party.[88] A minor can disaffirm a contract while still underage or after reaching majority. An adult also has the option of ratifying a contract formed as a minor.[89] An individual who disaffirms a contract made while a minor could be required to provide restitution to the other party, at least for "necessaries" provided to meet the minor's basic needs.[90]

Although age presents a clear basis for determining a lack of capacity to contract, incapacity due to mental disability is less clear.[91] The incapacity may be caused by a variety of sources: mental illness, mental retardation, age-related dementia, or alcohol or drug abuse. Traditional contract law requires a cognitive evaluation, asking whether the individual understood the nature and consequences of the contract at hand and whether the party was able to know what he or she was doing at the time and to appreciate the effects of those actions.[92] The traditional standard focuses on the impaired individual and does not ask whether the other contracting party knew or should have known about the impairment. Some scholars have proposed adding a volitional test to the standard, asking whether the individual lacked effective control over his or her actions.[93] A treatise by a group of leading contract law scholars presented a standard with a modified volitional element, asking "if by reason of mental illness or defect [the individual] is unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of his condition."[94] This proposed standard also makes voidable a contract formed by an intoxicated party only if the other party knew of the intoxication.[95] One oft-cited scholar has argued that in practice, judges enforce the

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[84]*Glucksberg,* 521 U.S. at 724; *Harrison,* 284 F.3d at 296.

[85]Until the 19th century, marriage also legally impaired a woman's ability to formulate a contract. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS 442–443 (3d ed. 2004).

[86]*Id.* at 443–444.

[87]*Id.* at 443.

[88]*Id.* at 446.

[89]*Id.* at 447.

[90]*Id.* at 451.

[91]*Id.* at 456–457.

[92]*Id.* at 457.

[93]*Id.* at 458.

[94]RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (2004).

[95]*Id*. at § 16(a).

contract in question as long as "the court sees the particular transaction in its result as that which a reasonably competent man might have made."[96] This focus on outcome mirrors the physician-centered approach to determining capacity to make medical decisions.

Various competing policies underlie the law of capacity to contract. Paternalistic interests move to protect incapacitated parties from their own decisions. Societal interests require predictability and reliability in the contract formation and enforcement process. One renowned authority on contract law, E. Allen Farnsworth, has posited that "case-by-case analysis of incompetency may be too costly and too productive of uncertainty. Arbitrary rules may be better suited. . . ."[97]

A mediated settlement agreement in a divorce case is a type of contract, so it is not surprising that many of the principles underlying competence to contract have relevance in the context of mediation. In mediation, the cognitive element of a competency standard could encompass not only an understanding of the nature and consequences of the final agreement but also a capacity to understand the factual elements (such as the assets, debts, and income of the parties and the needs of any children) relevant to the legal issues in the case. A hotly debated issue is whether parties in mediation also need an understanding of legal entitlements.[98] We argue that an actual understanding of the facts or law (as opposed to a capacity to understand them) is part of a determination of whether mediation is appropriate in the specific instance but does not constitute part of the competence determination.[99] Parallel to contract law, the volitional element of a competence to mediate standard could address whether a party is able to comply with the ground rules of the mediation (e.g., not interrupting, using respectful language, keeping emotionally stable).

Values Associated With the Competence Requirement

A cluster of interests and values runs through the different legal contexts described in the section above, *Competence and Capacity in Other Legal Contexts.* Bonnie and Grisso have explicated key values associated with competence

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[96]Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise,* 53 YALE L.J. 271, 307 (1944).

[97]FARNSWORTH, *supra* note 85, at 443.

[98]Jordan Leigh Santeramo, Note, *Early Neutral Evaluation in Divorce Cases,* 42 FAM. CT. REV. 321, 323–24 (2004) (footnotes omitted) ("There are some valid arguments for avoiding ADR [alternative dispute resolution]. Some contend that 'settlement necessarily involves a compromise of legal entitlements, which is of particular concern when there is a sharp power disparity between the parties.' Under this view, ADR is society's way of preventing the disadvantaged from asserting their legal rights. ADR only allows parties to try to settle their case, not put forward a legal idea, and provides no guarantee of due process. However, 'in actuality . . . most "minor" disputes are shunted aside or mass-processed by the judicial system' so that even in court there are no guarantees that these disputants 'would receive . . . procedural protections and [a] full-blown trial.' In the end, a decision must be made whether litigation or ADR is the best way to achieve the results that individual or institutional defendants are looking for."); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody,* 80 CAL. L. REV. 615, 617, 627 (1992); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN 180 (1990); Jeremy A. Matz, Note, *We're All Winners: Game Theory, the Adjusted Winner Procedure and Property Division at Divorce,* 66 BROOK. L. REV. 1358 (2001).

[99]We have addressed these additional factors in another article. Beck & Frost, *supra* note 42.

in a criminal justice context.[100] Starting with a basis in fundamental fairness, they found three independent values: dignity, efficiency, and autonomy. These values, which represent both individual and state interests, are essential for understanding the nature of competence.

Individual Interests

Autonomy or self-determination is a key individual interest in a range of competence contexts. Autonomy is respected when the participants are capable of reasoning and making their own decisions about the process and when an individual's sovereignty is restricted only with clearly stated reasons and through fundamentally fair procedures.

Sovereignty over one's physical being is at stake in civil commitment hearings, medical decision-making questions, and some guardianship proceedings. The determination of competence affects the individual's freedom of movement and control over unwanted physical intrusions. Because of the high value society places on this type of sovereignty, the legal showing required to overcome the presumption of liberty and autonomy is demanding.

Sovereignty over one's decisions is at issue in many contexts: adjudicative competence, capacity to waive rights, testamentary capacity, guardianship hearings, and competence to contract. The quality of the ultimate decision is not the issue; courts protect an individual's right to make a bad decision.[101] Rather, the quality of the decision-making process is the focus of the legal inquiry. For example, under the ABA Model Rules of Professional Conduct, attorneys are not permitted to substitute their judgment for that of their clients; they can determine the means of pursuing the legal goal, but the client must define what the end goal of the process is.[102]

State Interests

Several of the values discussed by Bonnie and Grisso are state interests. The dignity of the judicial process is reflected not only through appropriate demeanor of participants but also through a basic belief that the proceedings have meaning for the participants. If a defendant does not possess a fundamental moral understanding of criminal proceedings, the process takes on the tenor of a show trial or a sham, without true justice being dispensed.

Sometimes, a legal requirement of competence is rooted in a concern for judicial efficiency. The efficiency and accuracy of a criminal proceeding would be jeopardized without the effective participation of the defendant, who, when

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[100]Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73, 76 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[101]*Compare* Faretta v. California, 422 U.S. 806, 834 (1975) (court will respect the decision of a competent individual to represent himself at trial even when he lacks the skills to do so effectively). For this reason, a reasonability standard for medical decision making has fallen out of favor. *See supra* note 79.

[102]MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002); *see also* Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent,* 14 WASH. U. J.L. & POL'Y 327, 344–45 (2004).

competent, has valuable knowledge about relevant facts. An assessment of adjudicative competence may prevent later challenges to the validity of the entire criminal proceeding. A determination of incompetence leading to the establishment of a guardianship can avoid future challenges to impaired decisions by the ward. Efficiency concerns can expand beyond an interest in effective judicial proceedings to an interest in avoiding unnecessary court appearances altogether. Compliance with the requirements of informed consent prior to medical treatment can deter later litigation over unwanted treatment. Competence determinations of this nature can save money and provide more predictability in daily interactions and transactions.

Some state interests can compete with individual autonomy interests. At times, the state's objective of protecting its citizens can override an individual's autonomy and liberty interests. In a civil commitment hearing, a determination that an individual presents a danger to others can justify restricting that individual's liberty in a psychiatric hospital. In contract formation, concerns about predictability and reliability lead to a threshold requirement for who may sign a contract, restricting the ability of some individuals to enter into a contract to eliminate possible future challenges to those contracts and thus form a dependable base for civil society.

In addition to the more generalized public safety and welfare concerns, the state at times acts out of an interest in protecting specific third parties. In the context of will drafting, the state acts to protect the legal heirs of a decedent from decisions made by an impaired testator. In the context of family mediation, children, grandparents, stepparents, and other parental figures may be worthy objects of protection.

The societal value of protecting vulnerable individuals supports a legal requirement of competence. In the civil realms of contract formation, will drafting, guardianship proceedings, and medical decision-making situations, a competence requirement protects incapacitated parties from their own impaired decisions. In a criminal context, the requirement of a valid waiver of rights ensures that an impaired criminal defendant receives constitutionally mandated protections.

Values Applied to Divorce Mediation

The values noted above apply to the specific context of mediation. They are detailed in the Family Model Standards[103] and are reflected in the scholarly literature concerning mediation.[104] Although these values may be central to mediation rhetoric, they are not always respected in practice. For example, voluntariness is at issue when, in many jurisdictions, clients are mandated to attend mediation if they cannot resolve disputes concerning custody and visitation of their children.[105] Clients do not always understand the distinction between being forced into mediation and being forced to reach an agreement in mediation. This confusion is facilitated by coercive techniques used to keep clients mediating until a settlement

[103]Family Model Standards, *supra* note 22.
[104]Nolan-Haley, *supra* note 82.
[105]BECK & SALES, *supra* note 3, at 12; Tondo et al., *supra* note 5.

is reached.[106] Taking coercion (or lack of voluntariness) a step further, in some California counties, the mediator makes recommendations to the court if the parties cannot reach an agreement.[107] The mediator becomes the de facto arbitrator in these cases. Serious questions have been raised concerning the voluntariness of agreements arrived at under these conditions.[108] At a minimum, the higher stakes in these jurisdictions make a competence requirement all the more essential.

In the context of divorce mediation, the significance of the various values reflected in individual and state interests varies depending on the content and complexity of the issues to be negotiated in the mediation. The main contextual variable determining the complexity of the divorce mediation is whether (a) the mediation involves issues regarding children or (b) property division is the sole area of concern.

Divorce mediation regarding property only. For divorcing couples without children, mediation centers on issues of property division. In general terms, the individual interest in autonomous decision making predominates. State interests including a paternalistic concern for weaker parties and an efficiency concern for avoiding subsequent legal challenges to highly unfair divisions underlie state legislation and case law providing outer limits for the equitable distribution of property and debt. Nonetheless, the parties are allowed wide latitude to calculate their own division of assets and debt. This model of divorce negotiation closely resembles the framework for contract formation, in which the parties are assumed to be worthy adversaries negotiating out of a position of informed self-interest. In the mediation context, a determination of competence to mediate would assess the capacity to enter the mediation with sufficient skills and abilities to interact in the same manner.

The level of capacity needed to participate adequately in the mediation varies depending on the complexity of the financial situation of the parties. Spouses with few property issues (e.g., some equity in their home and several credit card debts) require a lower level of sophistication and mastery to participate capably in mediation. Spouses with diverse (and potentially hidden) assets and complex liabilities, such as when one or both partners are self-employed and can readily disguise income, need far greater capabilities to work adequately toward a mediated settlement agreement.

Divorce mediation regarding children. In divorce mediation in which there are children of the marriage, additional values come into play. The same individual autonomy interests and state interests in efficiency and paternalistic pro-

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[106]Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary Than Others,* 26 JUST. SYS. J. 273–91 (2005); Sally E. Merry, *Disputing Without Culture,* 100 HARV. L. REV. 2057, 2066 (1987) (book review) ("there is a clear distinction between coercion into mediation and coercion in mediation"); Frank E. Sander et al., *Alternative Dispute Resolution Symposium: Judicial (Mis)use of ADR? A Debate,* 27 U. TOL. L. REV. 885, 886 (1996).

[107]CAL. FAM. CODE § 3183 (2004). Thirty-nine of California's 58 counties allow mediators to make recommendations to the court when clients do not resolve disputed issues. Telephone interview with George Ferrick, Supervising Court Services Analyst, Administrative Office of the Courts Center for Families, Children & the Courts (Nov. 15, 2005).

[108]DENNIS P. SACCUZZO ET AL., MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN (2003).

tection of the parties are present, but the state concern for the protection of third parties (namely, the children) significantly alters the balance. In many jurisdictions, the best interests of the children govern the court's decisions on custody and visitation. Although child support is not infrequently viewed by the paying parent as cash income for the other spouse, in most jurisdictions the child has an independent interest, and the parties alone cannot decide to eliminate child support.[109] Effectively, concerns about the children's interests trump the values of autonomous decision making and judicial system efficiency.[110] Although a lack of familiarity by the parties, the mediator, and the judge regarding research on the effects of different custody and visitation arrangements on children of divorced parents[111] may diminish the positive impact a successful mediation has on the children, the value of protecting the children clearly predominates. Recently, concerns over the interests of additional third parties (e.g., grandparents, stepparents, biological parents from previous marriages or relationships) have complicated the issues, although the concern for the children still remains paramount.[112]

As with mediation sessions addressing only property issues, the level of capacity required of the participants varies depending on the complexity of the contested issues. The need to consider the well-being of the children requires more sophistication and emotional maturity than the self-interested negotiation of property issues. Because of these numerous demands, many divorce mediations involving children require a higher threshold of competence than do most property-only mediations with few or no assets or debts. Nonetheless, ultimately it is the court that is required to protect the interests of the children. The parties need the capacity to understand the relevant legal standard, but they are not required to take selfless positions to be considered competent to participate in mediation.

Proposed Standard for Competence to Mediate

Competence to Mediate: A Legal and Mental Health Framework

Although the techniques used to resolve divorce disputes differ, these disputes are legal conflicts that yield legal resolutions.[113] The ultimate aim of the mediation process, particularly in the case of court-ordered divorce mediation, is to produce legally binding contracts. Nonetheless, mediations are more effective if they acknowledge the highly emotional context of legal divorce disputes. Substantial research has revealed that families in the process of a divorce are often in psychological crisis, particularly in the first couple of years postseparation.[114] Fortunately, there are decades of research related to the emotional processes of

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[109]*See, e.g.,* TEX. FAM. CODE ANN. § 154.124 (2002) (court must find that parties' agreement is in the best interest of the child).

[110]BECK & SALES, *supra* note 3, at 198.

[111]*See, e.g.,* Scott, *supra* note 98.

[112]*See, e.g.,* Troxel v. Granville, 530 U.S. 57 (2000).

[113]James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law,* 54 ARK L. REV. 171 (2001).

[114]ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE 58 (2005); E. MAVIS HETHERINGTON, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 43–66 (2002).

divorce and to psychological assessment, diagnosis, and treatment interventions for families in crisis. It is reasonable, then, to assume that policymakers designing a legal system that processes legal disputes for clients in psychological crisis would benefit from the knowledge bases in both law and mental health research. To create a new conception of competence in mediation grounded in neither would be shortsighted. Although some have deprecated using a legal framework for conflict resolution regarding families and divorce,[115] divorce remains a legal process with long-term legal consequences for those involved, whether resolving the conflict includes mediation or not. Consequently, we ground our standard in contract law and turn to mental health theory and practice to elaborate the details.

Basis in Contract Law

Contract law—specifically, the doctrine of capacity to contract—provides the best basis for developing a standard for competence to mediate. A mediated settlement agreement is, by law, a contract. Although mediators may inform parties to the mediation that an agreement can change their legal rights, the parties may not understand that they are signing a legally enforceable agreement that, when ratified by the court, becomes a judicially affirmed contract enforceable by finding the breaching party in contempt of court. If, after the fact, a party challenges a mediated settlement agreement on the basis that the client was incompetent at the time of the mediation or the signing of the agreement, the court must make a retrospective determination of competence. The relevant law differs from jurisdiction to jurisdiction, but many courts turn to contract law to determine whether the settlement agreement should be upheld.[116] In many jurisdictions, a party must file a separate suit alleging breach of contract to challenge a mediated settlement agreement. Thus, the doctrine of capacity to contract fits naturally into the mediation context.[117]

Despite the overlap between capacity to contract and competence to mediate,

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[115]*See* Crawford, *supra* note 6, at 386.

[116]Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality,* 35 U.C. DAVIS L. REV. 33 (2001).

[117]When one examines other factors relevant to whether mediation is appropriate, there is much conceptual overlap between standard procedures in a mediation and in traditional contract law doctrines. Mediators and some state statutes require the parties to participate in good faith, just as parties to a contract are required to negotiate in good faith. In both a mediation and a contract negotiation, the parties need a certain amount of information to negotiate effectively in a self-interested manner (e.g., factual information, statutory requirements, and legal entitlements). Mediators review their cases to identify signs that a party is suffering from duress or undue influence; similarly, a contract is void(able) if produced as a result of duress or undue influence. Another way of formulating this requirement is to say that a mediation agreement should be signed voluntarily even if the participant has been court ordered to participate in the process. A contract must be signed on a voluntary basis. Third parties such as children, biological parents, grandparents, and stepparents can play significant roles in family mediations, sometimes as required parties and sometimes as parties who are important to the successful resolution of the conflict. In contract law, third parties may have legal rights depending on whether they are the intended or unintended beneficiaries of the contract. This differs from the mediation context, though, in that contract law presupposes self-interested parties, whereas divorce mediation assumes parents can get beyond their selfishness to consider options that are in the best interest of their children. Finally, many mediators may refuse to finalize an agreement they view as abusively one-sided, just as a court can overturn some

however, there are some differences in the two contexts that lead to distinctions between the two standards. One primary difference is that, typically, nobody is forced to participate in contract negotiations. In contrast, many divorcing parents are ordered by the court to try mediation.[118] Although the parties are not legally required to reach an agreement, that subtlety may be lost on some parties and on some mediators.[119] Coercion to continue with mediation until an agreement has been produced is well documented.[120] The mandatory nature of mediation in some jurisdictions necessitates a more rigorous process to ensure that the participants can protect their own interests.

A second significant difference from the contract law context is that, generally, no independent party oversees the formation of a contract. Sometimes, the two parties develop a contract themselves, and sometimes, they consult with lawyers, but there is no neutral party monitoring the contract formation process. In contrast, the mediator plays an active and crucial role in guiding the conflict resolution process during the course of a family mediation. As a result, although it may be too unwieldy to screen for incapacity on an individual basis in the contract formation process[121] (hence, the reliance on absolute standards such as age), in a mediation it is cost-efficient and practical to screen for incompetence in each case. Such individualization does not engender too much uncertainty in the process (in contrast to the contract context) because individuals have a viable alternative: When an individual is incompetent to mediate, the parties can proceed through a judicial process in which attorneys, rights, and procedures are designed to protect their interests.

Proposed Legal Standard

Taking into account the above information and historical developments in the legal realm of divorce mediation, we come to our proposed legal standard that mediators can uniformly use to determine competency in the mediating process.

> A person is incompetent to participate in mediation if he or she cannot meet the demands of a specific mediation situation because of functional impairments that severely limit
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> 1. A rational and factual understanding of the situation;
> 2. An ability to consider options, appreciate the impact of decisions, and make decisions consistent with his or her own priorities; or
> 3. An ability to conform his or her behavior to the ground rules of mediation.

A close look at the language of the standard helps explain the ideas underlying this standard. The first clause,

> A person is incompetent to participate in mediation if he or she cannot meet the demands of a specific mediation situation,

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contracts for unconscionability. *See generally* FARNSWORTH, *supra* note 85 (overview of contract law doctrine).

[118] *See supra* notes 101 & 122 and accompanying text.

[119] *See* Bryan, *supra* note 8.

[120] *See* Hedeen, *supra* note 106.

[121] *See supra* note 112 and accompanying text.

illustrates that the standard is related to a specific mediation situation. Competence is not a global concept; a person may be incompetent for one purpose but very competent for another. The relevant context here is the specific mediation. Is the subject of the mediation complex or straightforward? A contested custody case or a dispute over complex financial arrangements generally requires more skills than a case seeking to resolve a summer visitation schedule. Has the individual hired an attorney, or is she or he proceeding *pro se*? Individuals proceeding *pro se* may confront complex issues without an understanding of the legal consequences of various decisions.[122] In addition, there are differences across jurisdictions regarding whether the clients' lawyers can (or are required to) participate in mediation sessions.[123] States and local jurisdictions vary widely in the procedural requirements for divorce mediation.[124] Consideration of various aspects of the context is essential. This review of the abilities of the litigant in a specific situation is very similar to a guardianship determination; questions focus on the present ability of the litigant and the complexity of the decision-making context.

Our proposed standard adds

> because of functional impairments

to emphasize that an individual is incompetent not because of diagnosis but because of a level of functioning below that required for a specific decision-making situation. There is no required condition or mental impairment for someone to be incompetent. To gauge competence, a screener must examine the individual's functional capabilities within a specific context. This consideration is reminiscent of determinations of competence to stand trial. A specific diagnosis does not ensure that a litigant is not competent to stand trial or to mediate. It is the functional abilities of the person, not the diagnosis, that are critical. Many people diagnosed with a serious mental illness function very well if they are receiving proper treatment and medication. There is also a temporal nature to the divorce adjustment process,[125] and early in the adjustment process, particularly for a person who does not want a divorce, stress levels may be such that cognitive processing of information is difficult to impossible and cooperative decision

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[122]For example, one study found that *pro se* litigants were less likely to obtain assistance, tax advice, and answers to their questions than were attorney-represented litigants. Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?,* 37 ST. LOUIS U. L.J. 553, 602 (1993).

[123]SARAH R. COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE 6–26 (2d ed. 2001) ("In divorce or custody mediation, some states have permitted prohibition or limitation of lawyer participation or attendance. . . . Some states have taken the opposite approach, prohibiting the exclusion of lawyers or even requiring attorney attendance.").

[124]Many mediation procedures vary from state to state and jurisdiction to jurisdiction. Significant differences include how mediation is defined legally, attendance requirements, confidentiality of sessions, issues to be resolved in mediation, criteria to exclude cases, behavioral commitments imposed on clients (good faith requirements), qualifications of the mediator, and the presence or extent of lawyer involvement. *See* BECK & SALES, *supra* note 3, at 12–14. In addition to the variations in state statutes and local court rules, there are also variations in local customs concerning how mediation should be done.

[125]ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 17–44 (1994).

making nonexistent.[126] Again, the key task is not to define the specific stage of adjustment but to identify any significant functional impairments.

The impairments must be ones

> that severely limit.

The vast majority of mediation clients are competent to mediate. The competence requirement does not mandate that an individual be ideally suited to mediation or even be a skilled participant. He or she must simply operate above a very low floor of functioning. In criminal cases, less than 10% of defendants are referred for a competence evaluation, and less than a third of those are found incompetent to stand trial.[127] Of those defendants found incompetent, the vast majority are restored to competence within months and may then be prosecuted for their alleged offenses.[128] Given the elevated rate of mental retardation and mental illness among criminal justice populations,[129] one might expect a higher rate of incompetence to stand trial in the criminal context than incompetence to mediate. Because any impairments must severely limit a party, it should be relatively rare to find a party incompetent to participate in mediation.

An individual's functional impairment must affect his or her cognitive or volitional abilities. Someone's cognition might be impaired in several ways. To participate in mediation, an individual must have

> 1. A rational and factual understanding of the situation.

A factual understanding necessitates the ability to comprehend basic facts (including basic information about the case such as family assets) and the legal rules governing the case. Many gaps in factual understanding can be bridged by the assistance of an attorney or some other informed professional, but the individual

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[126]Stress can negatively affect memory, possibly to the extent that effective reasoning is impaired. *See* Granvold, *supra* note 37; Sonia J. Lupien & Martin Lepage, *Stress, Memory, and the Hippocampus: Can't Live With It, Can't Live Without It,* 127 BEHAV. BRAIN RES. 158 (2001) (stress hormones [corticosteroids] are involved in the endocrine response to stress and play a critical role in memory formation); E. Ron de Kloet et al., *Stress and Cognition: Are Corticosteroids Good or Bad Guys?,* 22 TRENDS IN NEUROSCIENCE 422, 422 (1999) ("Corticosteroid effects on cognition can, however, turn from adaptive into maladaptive, when actions via the two corticosteroid-receptor types are imbalanced for a prolonged period of time"); Clemens Kirschbaum et al., *Stress- and Treatment-Induced Elevations of Cortisol Levels Associated With Impaired Declarative Memory in Healthy Adults,* 58 LIFE SCI. 1475, 1481 (1996) ("not only chronic but also acute elevations of cortisol levels can impair memory performance in human subjects"). Moderate stress levels can also detrimentally affect memory function. One study found that a onetime dose of corticosteroids hindered retrieval of memories. Dominique J. F. de Quervain et al., *Acute Cortisone Administration Impairs Retrieval of Long-Term Declarative Memory in Humans,* 3 NATURE NEUROSCIENCE 313, 314 (2000) ("On the basis of our results, it seems probable that elevated glucocorticoid levels may induce retrieval impairments in such stressful conditions as examinations, job interviews, combat and courtroom testimony."). We have addressed these cognitive and psychological processes in depth in a separate article. Beck & Frost, *supra* note 42.

[127]MELTON ET AL., *supra* note 47, at 135.

[128]*Id*. at 154.

[129]PAULA DITTON, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999); NATIONAL ALLIANCE FOR THE MENTALLY ILL & PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CRIMINALIZING THE SERIOUSLY MENTALLY ILL (1992).

must have the capacity to learn and retain the basic information. A rational understanding of the process is one free of false beliefs caused by psychosis, paranoia, or extreme psychological states.[130] That understanding is not a reflection on the quality of the decision but instead concerns whether reality is reflected in the underlying decision-making process.

In addition, a participant's cognitive processes must include

> 2. An ability to consider options, appreciate the impact of decisions, and make decisions consistent with his or her own priorities.

Not only must the individual understand the situation but he or she must also reason and weigh options. The ultimate decision need not be the best decision according to some other actor, but it must be the product of a reasoning process. People are free to make bad decisions, but these must be reasoned decisions nonetheless. Note also that the criterion requires an ability, not a willingness. If an individual is capable of considering options but chooses to use another process to reach a resolution (i.e., flipping a coin, consulting a psychic), the individual would still be competent.

A competent individual must also appreciate the impact of his or her decisions. In ultimately reaching a mediated agreement, the parties must exhibit understandings similar to the requirements of informed consent and waiver of rights noted above. The litigants must knowingly, voluntarily, and intelligently agree to a mediation agreement, understanding which rights they give up as a result of settling the dispute (e.g., taking the case to a judge or a jury).

In some instances, particularly in some cases with domestic violence, a participant may be capable of considering options and may understand the impact of the decisions but may be too terrified to make decisions that are consonant with his or her values and priorities. Domestic abuse is a significant factor that has been extensively addressed in the mediation literature as potentially impacting self-interested decision making.[131] The presence of domestic violence is certainly an issue that should raise caution for the mediator, but it is the functional ability of the victim to make decisions reflecting his or her priorities that is the determining factor concerning competence, not the fact that abuse occurred.[132]

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[130]Granvold, *supra* note 37.

[131]Penelope Eileen Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power,* 40 BUFF. L. REV. 441 (1992); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases,* 46 SMU L. REV. 2117 (1993); Trina Grillo, *The Mediation Alternative: Process Dangers for Women,* 100 YALE L.J. 1545 (1991); Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases,* 42 FAM. CT. REV. 411 (2004); SACCUZZO ET AL., *supra* note 108.

[132]Overall, the cognitive prongs (1 and 2) of our standard elaborate on some of the elements contained in § 1(D) of the ADA Mediation Guidelines, *supra* note 32, in an abbreviated form. The ADA Mediation Guidelines refer to the ability "to understand the process and the options under discussion." Our standard elaborates the elements to be understood, addressing "a rational and factual understanding of the situation" and "an ability to consider options [and] appreciate the impact of decisions." Our standard clarifies not only that the participant must be informed and provide voluntary consent but also that the participant must understand the facts of the case and the mediation process and have a view of the process not unduly influenced by false beliefs caused by paranoid or other distorted thinking. We also add that the participant must do more than understand

A party to a mediation also must have sufficient volitional control for the situation, namely,

3. An ability to conform his or her behavior to the ground rules of mediation.

If an individual is so impaired by mental illness, traumatic brain injury, or, more commonly, an extreme psychological state as to be incapable of acting appropriately in the mediation, that individual is not competent to mediate. If the person is simply unwilling to behave properly and perhaps strategically declines to follow the ground rules, that person is competent and is responsible for failing to participate in good faith.

Consequences of Proposed New Standard

Procedural Issues

A determination that an individual lacks competence has different consequences depending on the context. In some instances, such as in the context of adjudicative competence, waiver of rights, testamentary capacity, or contract formation, a legal process cannot continue because of the individual's incompetence. In other instances, a form of substituted decision making is permitted as in the medical decision-making and guardianship contexts. In a divorce mediation, if a client is suspected of being incompetent in the mediation screening interview or during the process of mediation, the mediator could postpone the mediation process until any concerns about competence are satisfactorily resolved. There is a host of choices available to assist the incompetent party in regaining competence. We frequently use the term *restoring competence* because there is extensive literature in both the legal and mental health fields that directly relates to and informs this work regarding restoration to competence.[133] There is a long history of treatment programs for restoration to competence for criminal defendants and a relatively shorter history with juvenile defendants.

Depending on the nature of the incapacity and the resources of the jurisdiction, several options might be available for potential participants in mediation. If

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options; he or she must be able to weigh different options and understand the different impact of the decisions.

The ADA Mediation Guidelines add a requirement that the participant's consent to an agreement be voluntary. In our opinion, the conception of voluntariness is relevant to the appropriateness of mediation, particularly regarding psychological coercion often found in relationships in which there has been domestic violence, but it is separate from the competence determination. Our competence requirement includes that the participant be able to reach decisions consistent with his or her priorities.

Our standard contains a volitional prong, a requirement that the participant be able to conform his or her behavior to the ground rules, which is not contained in the ADA Mediation Guidelines. Divorce is often a traumatic experience for one or both parties. EMERY, *supra* note 125. As a result, it may be that some parties are incapable of containing their emotions in the mediation context. There may be additional reasons why a party lacks the ability to contain emotions (e.g., mental illness, substance abuse, traumatic brain injury). In these cases, the party would be incapable of acting appropriately in the mediation and thus would not be competent to mediate.

[133]Redding & Frost, *supra* note 11, at 394–95; *see also* Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients With Mental Disability,* 68 FORDHAM L. REV. 1581, 1585–86 (2000).

the incompetence is identified in a screening interview prior to mediation, a party could retake the mediation orientation session or be provided additional materials to educate him- or herself on the mediation process. Parties could be referred to therapy to regain psychological stability[134] or to an expert who could provide advice on financial or child development issues. In large jurisdictions with specialized conciliation courts, often the court has therapists who can provide crisis counseling or time-limited marital therapy, and there are experts in child development who conduct custody evaluations. Some jurisdictions have a state-sponsored mental health service that can provide short-term therapy and employs counselors with expertise in child development. In tight budgetary times, however, these resources may be scarce. The court could also appoint a pro bono attorney or work with law school clinical programs to advise the incompetent party or even participate in mediation sessions with the party.

It may also be that a party simply needs to have a support person attend the mediation to provide emotional support during mediation sessions. The concept of providing a support person to help an individual make an important decision is not new. In juvenile determinations of competence to stand trial, "supported competence" has been discussed as a means of ensuring adequate decision making when the juvenile is less than fully competent on his or her own.[135] Several mediation scholars have suggested these measures as viable options for mediation parties who need additional assistance in sessions.[136] Using support persons to enable competence in mediation has been included in the ADA Mediation Guidelines and used with both mentally impaired and older claimants.[137] Various state statutes permit or require the use of a support person with victims of domestic violence.[138]

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[134]*See* Granvold, *supra* note 37.

[135]Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 243, 253 (Thomas Grisso & Robert G. Schwartz eds., 2000); Tobey et al., *supra* note 51, at 238–40 (role of attorneys and parents in promoting "assisted competence").

[136]Ann L. Milne, *Mediation and Domestic Abuse,* in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 304, 325 (Jay Folberg et al. eds., 2004); HOWARD H. IRVING & MICHAEL BENJAMIN, THERAPEUTIC FAMILY MEDIATION: HELPING FAMILIES RESOLVE CONFLICT 99 (2002); Zylstra, *supra* note 38, at 266.

[137]ADA MEDIATION GUIDELINES, *supra* note 32, § I(D)(3); Cohen, *supra* note 18 (at times, a support person who understands the thinking process and communication abilities of a person whose capacity is impaired can help the impaired person complete the initial screening and understand the process); Wood, *supra* note 40, at 814 ("One critical accommodation is to provide a support person such as a relative, friend, or advocate, to accompany the party at the mediation").

[138]Delaware requires domestic violence cases to be excluded from mediation unless the victim, who is represented by counsel, requests mediation. DEL. CODE ANN. tit. 13, § 711A (2000). Other states, including Alabama, Hawaii, and Tennessee, require that, in addition to the victim giving consent, the mediator must be specially trained. Alabama and Hawaii also permit the victim to be accompanied by a support person. ALA. CODE § 6-20(f) (2001); HAW. REV. STAT. § 580-41.5 (2000) (in addition to requiring the victim's consent, mediation can proceed only where the mediator is specially trained in domestic violence and the victim is allowed to bring a support person to the mediation); TENN. CODE ANN. § 36-4-131 (2000). Kentucky and Tennessee require a judge to make specific findings before a domestic violence victim's consent to mediation can be given effect. KY. REV. STAT. ANN. § 403.036 (Banks-Baldwin, 2000) (court must make finding that the victim's request is voluntary and not the result of coercion and that "mediation is a realistic and viable alternative to or adjunct to the issuance of an order sought by the victim of the alleged domestic

Beyond domestic violence victims, permitting support persons for other participants in mediation to ensure that they function at a sufficiently high level would be a minor, but effective, extension of existing law.

If the intervention works and restores the party to competence, the case can return to mediation and proceed. If the intervention does not work and the party is not restored to competence, alternative legal processes would be necessary. Again, in large jurisdictions, many of these processes already exist. Referral back to a traditional court proceeding (with its inherent protections), referral to a private or court-sponsored custody evaluation, or other types of judicial oversight might be appropriate. In some jurisdictions, a parenting coordinator (PC; also known as a special master or family court advisor) can be appointed to oversee the case.[139] In other jurisdictions, a system of differentiated case management can be utilized to assist divorcing parties through the process.[140] A similar system has been widely used in the federal courts for managing complex civil litigation cases.[141] Ultimately, if questions about competence linger, the case should proceed under the supervision and oversight of the judge, who can play a more active role in protecting the rights of both parties in a divorce mediation.

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violence and abuse"); TENN. CODE ANN. §§ 36-4-131, 36-6-107, 36-6-305. *See also* Zylstra*, supra* note 38, at 266.

[139]PC programs were developed to aid the family courts in working with parents who continue to litigate elements of their parenting plans postdivorce. PCs are generally lawyers, former judges, or mental health professionals who are given limited quasi-judicial authority to assist parties in implementing their parenting plans. The authority of PCs excludes determinations regarding permanent changes in custody, child support, relocation, or substantial changes to the parenting plan; however, their authority includes day-to-day parenting issues (e.g., pick-up and drop-off times, exchanges, medical and dental care issues). PCs facilitate dispute resolution, provide education, make recommendations to the parties, and file these recommendations with the court. Either party can request that a PC be appointed, or the court can appoint a PC on its own initiative. The term of appointment is generally 1 to 2 years. Christine A. Coates et al., *Parenting Coordination for High Conflict Families,* 42 FAM. CT. REV. 246 (2004).

[140]Differentiated case management creates different time tracks and levels of services for cases depending on the level of complexity, need for discovery, need for services, need for protection and safety, and any unusual emotional factors. A single judge and support team are assigned to the family. Court personnel take a family history, match family members with appropriate services, and develop and present a service plan to the court for its approval. A case manager is then assigned as a liaison between the court and the family to ensure the family meets court deadlines and complies with the service plan. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management,* 22 U. ARK. LITTLE ROCK L. REV. 395, 412–13 (2000). One of the recommendations from the Wingspread Conference on high-conflict families was that a professional trained to manage chronic conflicts be engaged to help parents comply with court orders and to protect the children from such families. Sarah H. Ramsey, *High-Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589, 597 (2001); ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 108–09 (2004).

[141]Irving R. Kaufman*, Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts,* 59 FORDHAM L. REV. 1 (1990); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data,* 39 B.C. L. REV. 613 (1998); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging,* 49 ALA. L. REV. 133 (1997).

Ethical Issues in Determining Competence

Requiring a premediation determination of competence in questionable cases potentially places a mediator in a dual role. Although larger centers may have intake staff to conduct a premediation screening, in smaller centers or private practices, the mediator may be required to do the screening him- or herself. When both parties appear to be competent to participate, the mediator would switch roles from determining competence to conducting the mediation.

The issue of dual roles with clients of questionable competence has been reviewed in the context of forensic evaluation of criminal defendants. Scholars have generally agreed that clinicians should avoid serving as forensic evaluators in cases in which they have had a personal or therapeutic relationship with the defendant.[142] Judges, however, rule on the defendant's competence and hear the case on the merits.[143] In a divorce mediation, the mediator serves more as a proxy for the judge than as a clinician. In cases that proceed to trial, the judge is responsible for protecting the individuals' rights and can stop the proceedings if a party demonstrates an inability to participate. With a clearly defined standard for competence, mediators should not (and need not) impose their values on the process of determining whether a party is competent to participate, and making such a determination is not in conflict with the role of an impartial mediator.

Some have questioned whether all mediators are qualified to evaluate a potential client's capacity to mediate.[144] Because many mediators are not mental health professionals, they may lack the requisite skills to make this determination.[145] Nonetheless, a number of screening instruments for other psychological conditions are designed to be administered by nonclinicians.[146] The current lack of such an instrument for assessing competence to participate in mediation could

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[142]KIRK HEILBRUN, PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT 65–73 (2001); WHO IS THE CLIENT? THE ETHICS OF PSYCHOLOGICAL INTERVENTION IN THE CRIMINAL JUSTICE SYSTEM (John Monahan ed., 1981).

[143]Defense attorneys arguably have an ethical obligation to raise the issue of competence when they suspect that their client may be incompetent. Frost & Volenik, *supra* note 102, at 343–50.

[144]Bruce Meyerson, *Guidelines for Mediation of ADA Claims,* ADR CURRENTS, Sept. 2000, at 5, 7.

[145]*Id.*

[146]*See, e.g.,* THOMAS GRISSO & RANDY BARNUM, MASSACHUSETTS YOUTH SCREENING INSTRUMENT—2: USER'S MANUAL AND TECHNICAL REPORT (2003) (self-report measure of youth psychopathology); Marshal F. Folstein et al., *Mini-Mental State: A Practical Method for Grading the State of Patients for the Clinician,* 12 J. PSYCHIATRIC RES. 189 (1975) (a brief, quantitative measure of cognitive status in adults, the Mini-Mental Status Exam); John C. Morris, *The Clinical Dementia Rating (CDR): Current Version and Scoring Rules,* 43 NEUROLOGY 2412 (1993) (Clinical Dementia Rating, a global rating scale for screening older people with a wide range of cognitive function, from healthy to severely impaired); Jacquelyn C. Campbell, *Nursing Assessment for Risk of Homicide With Battered Women,* 8 ADVANCES IN NURSING SCI. 36 (1986) (an instrument developed to assess frequency, severity, and risk for homicide of victims of battering); W. K. Zung, *A Self-Rating Depression Scale*, 12 ARCHIVES GEN. PSYCHIATRY 63 (1965) (self-rating depression scale used to screen for depression, appearing on the World Health Organization Web site in seven languages, *at* http://www.who.int/substance_abuse/research_tools/zungdepressionscale/en/). *See also* Frost & Volenik, *supra* note 102, at 356–58 (checklist of questions for attorneys to screen for juvenile competence).

mean that in complex cases, some mediators might need to consult with professional colleagues.

Others have argued that mediators should move away from a mental health or legal framework for assessing competence and from even attempting to assess a client's capacity to mediate.[147] In a provocative article, Susan Crawford and colleagues argued that mediators should not determine the competence of their clients but instead should focus on facilitating various capacities relevant to the mediation process.[148] Crawford et al. stated that a mediator's determination of competency would (a) negatively impact the mediation process, (b) violate the rights of the participants, and (c) erode basic principles of mediation.

Crawford et al. worried that a competence determination impinges on the impartiality of the mediator because the lack of clear guidance as to when mediation is appropriate forces mediators to rely on their own experiences and training to make the determination.[149] We agree that making a determination without guidance is risky; a clear legal standard for competence to participate in mediation is necessary. Nonetheless, a sole focus on facilitating capacities without a clear legal threshold for competence, as Crawford et al. recommended, would risk a stronger appearance of bias as parties seldom have equal capacities and the mediator would actively work to support the weaker party. As Crawford et al. stated, "a shift in focus occurs, from detached analysis to supportive engagement."[150] A mediator's detachment, in combination with clear legal standards, ensures the fairness of the mediation process. A mediator can be sensitive to the emotional concerns and needs of the parties without losing objectivity.

Crawford et al.'s concern about violating the rights of participants fundamentally misconstrued the rights of those participants. They invented a right to mediation ("all parties have a right to use the services of a mediator")[151] and stated that a competency determination "abridges civil rights"[152] and "jeopardizes the legal rights of the parties."[153] In reality, there is no right to mediation; it is an alternative process available to some as a potentially more efficient substitute for a judicial process. Individuals have a right to appear before a judge, and they waive that right by reaching an agreement through mediation. If an individual lacks competence to participate in mediation, continuing the mediation is the violation of that individual's rights. Crawford et al.'s argument about mediators' "ongoing legal obligation under the ADA"[154] and their concerns about discrimination are equally flawed. Not all mediations are covered by the ADA, which applies to public entities and businesses with 15 or more employees.[155] In the case of court-ordered divorce mediation, to which it would apply, the ADA merely

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[147]Crawford et al., *supra* note 6, at 386.
[148]*Id.*
[149]*Id.*
[150]*Id.* at 393.
[151]*Id.* at 399.
[152]*Id.* at 385.
[153]*Id.* at 386.
[154]*Id.* at 392.
[155]42 U.S.C. § 12111(5)(A) (2000).

prohibits exclusion because of a disability.[156] The mediator can exclude a party who fails to meet "the essential eligibility requirements for the receipt of services."[157] In our proposed competence standard, the focus is not on a label or a diagnosis but instead on specific capacities within a given context, all defined by a clear standard.[158] It is not discrimination to fail to proceed with a process that is beyond the current capabilities of a potential participant any more than it is discrimination to exclude a participant who is severely intoxicated or carrying a firearm. Crawford et al. worried that an incorrect competency determination "creates issues of liability for mediators,"[159] whereas the real liability concern should be ignoring a lack of competence to participate.

Finally, Crawford et al. argued that determining competence is in conflict with fundamental principles of mediation. We have already reviewed existing mediation guidelines and standards to show how a competence requirement is wholly in tune with those principles.[160] Parties have no true self-determination[161] if they do not possess the minimum capacities necessary for competence. A mediator's impartiality[162] is threatened not by making a determination but by making a determination without clear legal criteria for guidance. Even with a competence requirement, mediation is accessible[163] to the vast majority of clients. For those few falling below the required threshold, mediation is simply not a good option.

In fact, Crawford et al. acknowledged that not all mediations should proceed.[164] By failing to accept a standard for competence to participate in mediation, they left the determination of when to stop a mediation up to the mediator and provided no clear standard for making the determination. We propose a clear threshold, providing mediators with criteria to be used in screening all participants.[165] Once a client passes the threshold, facilitating certain capacities may help the mediation proceed smoothly. Competence is context specific, and the

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[156]*Id.* § 12132.

[157]*Id.* § 12131(2).

[158]Another mediator has argued against determining competence to mediate, but he equated a determination of incompetence with the identification of a mental disability and failed to look at specific capacities in a specific context. Peter R. Maida, *Question of Competencies in ADA Mediations,* DISP. RESOL. MAG., Winter 2004, at 9.

[159]Crawford et al., *supra* note 6, at 390.

[160]*See supra* notes 22–33 and accompanying text.

[161]Crawford et al., *supra* note 6, at 386.

[162]*Id.*

[163]*Id.* at 387.

[164]*Id.* at 395.

[165]In practical terms, the possible incompetence of a party is often first detected by nonclinicians involved in the case. With competence in a criminal case, the defendant's attorney is generally the first to raise concerns about competence. In a divorce case, the mediator or the intake person is generally the first to raise concerns, although the other party may also raise questions in an intake interview. If screening occurs at all, it appears that it is dictated by the policies of the mediation programs or conducted in a nonstandardized, idiosyncratic manner by individual mediators. Catherine M. Lee et al., *Lawyers' Opinions Regarding Child Custody Mediation and Assessment Services: Implications for Psychological Practice,* 29 PROF. PSYCHOL.: RES. & PRAC. 115, 119 (1998) ("most screening for mediation is conducted in an unstandardized manner"). Some mediation centers have strict policies regarding client assessment, whereas others have none. Although we have addressed these broader screening issues elsewhere, it is clear that a well-defined legal standard for competence to mediate would simplify the process. BECK & SALES, *supra* note 3.

style and actions of the mediator can affect whether a client reaches and maintains the minimum threshold. Just as lawyers can facilitate a defendant's competence through instruction and relationship building,[166] so can a mediator support a client's competence to participate.

Conclusion

Some mediators have expressed concern that a rigorous standard for competence to participate in mediation could obstruct the process and greatly increase the time required for parties to finalize their divorces. We predict that these concerns are misguided. The competence standard we propose provides a very low threshold. As with other types of competence, the vast majority of parties ordered to mediation will meet the minimum requirements for competence to participate.[167] Similar concerns about obstruction in relation to newly elaborated standards for juvenile competence to stand trial have proven to be without merit.[168] In fact, a well-defined standard may streamline the process by clarifying the role of mediators and providing a guide for efficient screening of mediation clients.

Regardless of the efficiency of the standard, justice demands a clear standard for client competence to mediate. Because of the high stakes in divorce mediation, it would be unfair to push incompetent clients toward a mediated agreement without the protections of the formal judicial process. For mediation to be a viable alternative to litigation, it must recognize the basic prerequisites to a fair legal process. As the U.S. judicial system increasingly relies on mediation to reach equitable agreements in divorce cases, a clear delineation of the requirements for competence to participate can provide a strong framework for a fair and just process.

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[166]*See supra* note 135 and accompanying text.

[167]There may, of course, be other reasons that a case is inappropriate for mediation, such as gross power imbalances caused by domestic violence or ignorance of basic financial and legal matters at stake in the mediation.

[168]Redding & Frost, *supra* note 11, at 394–95.