

ELDER MEDIATION: PROMISING APPROACHES AND POTENTIAL PITFALLS

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ABSTRACT

Elder mediation is a new and growing practice area, which offers great benefit as a dispute resolution method. However, the relevant legal and social issues are very complicated and, unless elder mediators are properly trained they will not be able to ensure the safety and protection of the legal rights of older adult participants. This article provides an overview of best practices and training developed in the elder mediation field to date, and gives examples of Canadian models that demonstrate promising and innovative ways for dealing with elder abuse and capacity issues. The author provides recommendations for further future research and development in the elder mediation field.

I INTRODUCTION

Elder mediation is a new practice area, which is gaining increased attention as a new and promising approach for resolving disputes between older adults and family members or other third parties. However, although this approach has great promise, there are some hidden dangers particularly for older adults with diminished decision-making capacity or who have experienced abuse. These situations can be very complicated. Unless the elder mediator clearly understands the issues and can rely on established best practice guidelines to inform his or her approach to the case, the mediator will not be able to ensure the safety and protection of the legal rights of the older adult participant.

However, if proper safeguards are in place the legal rights of the older adult participant can be protected, and older adults and their families will be able to avail themselves of the positive benefits of this dispute resolution process. Safeguards include the following: research based policies, procedures and best practices for situations where there is abuse or diminished capacity, effective training for elder mediators about abuse and capacity issues, and practice tools such as checklists and step-by-step guides. These will give guidance to elder mediators about how to proceed when specific complex legal and ethical issues arise in the mediation context.

In this article I will provide an overview of relevant literature and best practices and training developed in the elder mediation field to date, and will give examples of Canadian models that demonstrate promising and innovative ways for dealing with elder abuse and capacity issues. I also will make recommendations for further future research and development in the elder mediation field. Although examples provided will be Canadian, the information also will be

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relevant for elder mediators and elder law practitioners in other jurisdictions who face similar challenges.

A Background

Mediation is a term that can refer to quite a broad range of processes and there is no universally agreed upon criteria to determine whether a particular process fits under the mediation umbrella or not. The following definition has been agreed on by several leading organizations:

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.¹

Elder mediation refers to mediation where the dispute involves an older adult and another party, or contains issues that have a particular impact on older adults. Examples of common issues that can be resolved through elder mediation include the following: disputes over care giving responsibilities, disputes regarding future financial planning, and conflicts between older adults and the care facility in which they reside.

Conflicts often arise in families during periods of transition, where there has been a decline in the older adult's health, over matters such as what type of caregiver assistance is needed. For example, family members may disagree with the older adult's decision to decline assistance and may believe that he or she is at risk of harm. Conflict between elders and their families on issues such as these, if not resolved before they escalate, can result in estranged families or unpleasant legal conflicts in court.

B Current Best Practices and Training for Elder Mediators

Elder mediation is a new practice area and academic research regarding best practices within the elder mediation context is sparse. Most existing literature is from the United States where several organizations and leaders in this new field have researched and written on the topic of ethical and training standards for elder mediation.² The only comprehensive Canadian research project on elder mediation, carried out by the Canadian Centre on Elder Law, is summarized in the *Elder Guardianship Mediation Project Report*.³ This research project examined relevant legislation and elder mediation programs throughout North America.

¹ American Bar Association, American Arbitration Association and Association on Conflict Resolution, *Model Standards for Mediators* (2005) <http://www.mediate.com/articles/model_standards_of_conflict.cfm>.

² Association on Conflict Resolution, *Elder Care and Elder Family Decision-Making Mediation Training Objectives* (2011) <<http://www.acrelder.org/2011/09/march-28-2011-teleconference-notes-training-standards/>> ('*ACR Training Objectives*'); ADA Mediation Standards Work Group, *ADA Mediation Guidelines* (2000) <<http://www.mediate.com/articles/adaltr.cfm>>; Kathryn Mariani, 'Briefing on the First National Symposium on Ethical Standards for Elder Mediation' (2007) 28 BIFOCAL 5.

³ Canadian Centre on Elder Law, BC Law Institute, *Elder and Guardianship Mediation Project Report* (2012) <<http://www.bcli.org/ccel/projects/elder-and-guardianship-mediation>> ('*EGM Report*').

Some scholars in this new and emerging field have identified concerns about using elder mediation to resolve elder disputes in certain situations, such as where guardianship matters are in dispute. Some older adults may bargain away their rights in an attempt to preserve relationships with family members who are applying pressure or coercion to obtain access to their assets. Since mediation occurs in the private sphere, older adults do not have the protection that comes with participating in a court hearing where evidence and agreements receive scrutiny to ensure they are fair.⁴

It is important that elder mediators receive appropriate training about guardianship, capacity and elder abuse so that they will have the skills and knowledge necessary to ensure that the legal rights of participants are protected during the mediation process. However, further research is needed to identify core elder mediator competencies necessary to deal with these issues, and the training required to ensure they develop these competencies. In addition, best practices need to be created with specific procedures for situations where abuse or capacity issues are present and elder mediators need to be trained on these.

The need for specialized training for elder mediators was identified in previous research along with necessary training topics. For example, the *EGM Report* provides a detailed list of recommended training issues for elder mediators practicing in British Columbia, Canada. These recommendations are based on an extensive literature review and interviews with leaders in the elder mediation field. The findings of the *EGM Report* concur with recommendations for training outlined in the *ACR Training Objectives*, a document that was created by a committee of experts in the elder mediation field.

The *ACR Training Objectives* set out 22 different objectives for training.⁵ There are some differences between the training issues noted in this document and those listed in the *EGM Report*. However, both agree that the following topics should be included in training for elder mediators:

- 1) Family dynamics,
- 2) Power imbalances,
- 3) Effects of ageing,
- 4) Capacity,
- 5) Elder abuse,
- 6) Pre-mediation meetings,
- 7) Determining who should participate,
- 8) Ethics,
- 9) Adult guardianship laws,
- 10) Multi-party mediations,
- 11) Community resources.

⁴ Mary Radford, 'Is the Use of Mediation Appropriate in Elder Guardianship Cases?' (2002) 31 *Stetson Law Review* 611.

⁵ *EGM Report*, above n 3; *ACR Training Guidelines*, above n 4.

What the *EGM Report* and the *ACR Objectives* have in common is that recommendations are based on consultations with experts, not just in North America but in other regions as well. Additional support for these findings can also be found in research carried out at a national level in several countries. For example, in 2009 Craig Ward carried out a survey of 74 solicitors and 26 non-solicitors on training for elder mediators in the United Kingdom.⁶ There is an overlap between the training topics identified by respondents to Craig Ward's survey and those identified in the *ACR Training Objectives* and the *EGM Report*. The four training topics identified in all three sources are: ageing, decision-making capacity, elder abuse and adult guardianship laws.

As a further example, a document created by a national mediation organization in Canada similarly identifies the need for mediator training. The *Code of Professional Conduct for Mediators Specializing in Issues of Aging*, which has been endorsed by Family Mediation Canada and several other mediation organizations, identifies many of the same training issues as those listed above.⁷

C Identified Advantages of Elder Mediation

Abuse of older adults is a serious concern, and one that is complex to deal with. Older adults who have experienced abuse commonly do not want to lay criminal charges against the person who abused them, and often place a high value on their relationship with the person who is perpetrating the abuse.⁸ This imposes severe limitations on what options for response will be acceptable to the older adult victim. Processes such as mediation, which offer an alternative to the court system, are appealing to the older adult and to family members alike. This rationale served as the impetus for launching a restorative justice project in the Waterloo-Kitchener area of Canada. Program developers were aware that older adults are reluctant to use the justice system in situations where abuse is occurring and wanted to create an alternative. This project will be discussed further below.

Similarly, families in conflict over concerns about an older adult's decision-making capacity prefer not to use the formal legal process to resolve the matter. Although families have the option to seek a guardianship order in court in situations where they believe that an older adult is incapable of understanding financial or health care decisions, this option is expensive and adversarial. Furthermore, even if the court application is successful there is likely to be a negative impact on family relationships. For that reason, alternative approaches, which are cost effective and preserve family relationships, have considerable appeal for families dealing with these issues.

II CONCERNS: PROTECTION OF PARTICIPANT'S RIGHTS

⁶ Email from Craig Ward to Joan Braun, 9 August 2012. Craig is a solicitor in the United Kingdom and author of *Lasting Powers of Attorney: A Practical Guide* (Law Society, 2nd ed, 2011).

⁷ Judy McCann-Beranger, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* (Elder Mediation Canada, 4th ed, 2012).

⁸ See, eg, Arlene Groh, *Restorative Justice: A Healing Approach to Elder Abuse and Mistreatment* (2003) <<http://www.olderadultabuse.mb.ca/resources-tools-for-service-providers.cfa>>.

Nonetheless, the potential benefit of mediation is negligible if the legal rights of the older adult participant are not protected throughout the process. The possibility that a vulnerable older adult may have his or her rights compromised through participation in elder mediation has been duly noted in the literature.⁹ It is important to take every measure possible to ensure this does not occur.

It is particularly important that elder mediators be trained to recognize situations where subtle coercion of older adults by other mediation participants is occurring. Likewise, elder mediators must be able to recognize situations where it will be unsafe for the older adult to participate in a joint session with the person who is abusing him or her.

A Abuse and Vulnerability

Elder abuse is a pervasive problem in modern society. It is inevitable that mediators working in this area will encounter it. There is a very real danger that older adults experiencing abuse will bargain away their rights during mediation. In order to ensure that this does not occur the elder mediator must understand what elder abuse is as well as signs that it is occurring.

A definition of elder abuse provided by the World Health Organization is ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’.¹⁰ Types of abuse include physical, sexual, financial and emotional abuse as well as neglect.

Experts are agreed that elder abuse is a significant problem, but they are not agreed on the exact prevalence of elder abuse. The prevalence rate of abuse of older adults varies from study to study due to differences in the methodology used.¹¹ Three significant American studies reported estimates of elder abuse and neglect ranging from 1.2 – 5.6% of all older adults.¹² If prevalence levels in Canada are similar then the number of abused seniors in Canada is between 53 500 and 249 500 individuals. In one well-known Canadian study, 2008 randomly selected seniors were interviewed. This study found that that 4% of seniors surveyed had experienced one or more types of abuse.¹³ In a recent Canadian article Lynn MacDonald summarizes the related research to date and argues that a major prevalence study must be completed in order to definitively resolve this question.¹⁴

Regardless of the exact number of victims, the effect of abuse on the victims is immense. Although elder abuse has often been attributed to caregiver stress, more recent research has revealed that the stressed caregiver model does not apply in many situations. Commonly, abuse, neglect and exploitation are driven by greed, narcissism and the desire to exercise control over

⁹ Radford, above n 5.

¹⁰ World Health Organization, *Aging and Life Course* <http://www.who.int/ageing/projects/elder_abuse/en/>.

¹¹ For example, definitions of abuse vary, as do the period of time captured and the ages of participants.

¹² Cynthia Thomas, ‘The First National Study of Elder Abuse and Neglect: Contrast with Results from Other Studies’ (2000) 12 *Journal of Elder Abuse and Neglect* 1.

¹³ Elizabeth Podeneiks et al, *A National Survey on Abuse of the Elderly in Canada* (Ryerson Polytechnical Institute, 1990).

¹⁴ Lynn MacDonald, ‘Elder Abuse in Canada: The Glass is Still Half Full’ (2011) 30 *Canadian Journal on Aging* 437.

the victim.¹⁵ Similar dynamics of power and control often exist in abuse situations regardless of whether the abuse is financial abuse, domestic violence or sexual assault.¹⁶

An untrained mediator may not recognize dynamics of power and control present in the mediation session, or realize that the older adult may be afraid. The older adult may be scared of retaliation for stating an opinion in the session that is contrary to the abuser's views. An older adult may also be afraid of being punished in more subtle ways such as losing contact with grandchildren as a result of speaking honestly in mediation. The older adult may give away his or her rights during the mediation setting out of a desire to preserve relationships with family members or caregivers. In order to accurately assess the situation the mediator needs to be aware of common dynamics and to consider the relationship between the abuser and the victim within its broader context.

If financial abuse is occurring there are potentially some very complex issues for the mediator to deal with. Issues such as financial or estate planning often are the stated reason for referral to mediation and mediators need to be aware there may be underlying issues and hidden agendas. An abused older adult may be under great pressure to give other parties access to his or her assets. Some common tactics used by financial exploiters may seem insignificant if single actions are taken in isolation. However, these individual actions have a tremendous impact on the victim when experienced cumulatively. Some scholars have drawn a connection between undue influence and vulnerability to abuse and exploitation.¹⁷ There always is a possibility that vulnerable older adult participants may be influenced into giving up control of assets even when they are not aware that this is happening.

B *Decision-Making Capability*

Another challenge elder mediators face is how to deal with allegations that an older adult participant has diminished capacity. At law, adults are considered to be capable until proven otherwise. Although older adult participants are entitled to choose to limit their own decision-making autonomy as part of a mediation agreement, this does not change the fact that, until proven incapable, the older adult has autonomous decision-making rights, which cannot be taken away against the older adult's wishes. If the older adult's capability is challenged he or she has the legal right to be heard by a court and for the court to determine capability based on the evidence presented.

It should be noted that there is no single uniform test or definition for legal capacity in Canadian law. It is not a global determination and a person may be capable of making some types of decisions but not others. As well, differing levels of capability are required for different transactions or decisions. Despite the different tests for mental capacity, there are similarities between these tests in that they incorporate two basic requirements: the ability to understand

¹⁵ M Quinn and C Heisler, 'The Legal Response to Elder Abuse and Neglect' (2002) 14 *Journal of Elder Abuse & Neglect* 61.

¹⁶ B Brandl, C Hesler and L Steigel, 'The Parallels Between Undue Influence, Domestic Violence and Sexual Assault' (2005) 17 *Journal of Elder Abuse & Neglect* 37.

¹⁷ See, eg, *ibid*; Margaret Hall 'Equity Theory: Responding to the Financial Exploitation of the Vulnerable but Capable' in Israel Doron (ed), *Theories of Law and Aging: Jurisprudence on Elder Law* (Springer, 2009).

relevant information and the ability to appreciate reasonably foreseeable consequences.¹⁸

In situations where an adult does not have the legal capacity to make a financial or personal care decision a legally appointed substitute decision maker will make the decision on the adult's behalf. In situations where a substitute decision maker does not exist, a court order may be needed to appoint one. However, as noted by Mulamed, Doron and Scnitt, protection of rights in the guardianship process is very important:

Guardianship may be necessary to protect a person with mental disorders who lacks the capacity to care for himself but it may potentially abuse the person's civil rights and autonomy and should therefore be implemented only as a last resort'.¹⁹

If the court process should only be used as a last measure after other problem solving approaches have been tried, then it is imperative that the older adult's rights also be protected in any alternative dispute resolution process. In mediation, faced with pressure from family and friends, an older adult may agree to abide by restrictions that would not likely be ordered by a court. It would be highly unfortunate if, as a result of participating in elder mediation, an older adult is legally disadvantaged, or gives up his or her right to decision-making autonomy.

In one of the few scholarly articles on adult guardianship mediation Radford points out the potential for infringing on older adult rights:

Although adult guardianships typically do not involve 'public rights' (e.g., the right to non-discrimination in employment), they often do include parties of traditionally disenfranchised groups (the elderly, the poor) whose basic autonomy rights may become the subject of private negotiation.²⁰

As noted by Radford, these concerns are not limited to elder mediation, but exist whenever there are participants who are vulnerable. In a discussion on this point, Yvonne Craig notes the validity of a particular scholarly critique of mediation as a second-class form of justice in comparison to the formal legal system. However she also points out the benefits of elder mediation, such as the preference older adults have for resolving disputes through non-adversarial processes.²¹

From a practitioner perspective, it is important for mediators to realize that older adults may understate or minimize their wishes in mediation out of a desire to preserve family relationships. For example, an older adult may enter into an agreement about where to live or how to spend money even though the agreement is not the older adult's preference, and despite the fact that he or she has the legal right to decide otherwise. The older adult may make such an agreement out of a desire to avoid conflict with family members and due to a lack of information about his or

¹⁸ Michael Beck and Lana Kerzner, *A New Paradigm for Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010) <<http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>>.

¹⁹ Yuvel Malamed, Israel Doron and Dan Scnitt, 'Guardianship of People with Mental Disorders' (2007) 65 *Social Science and Medicine* 1118, 1118.

²⁰ Radford, above n 5, 621.

²¹ Yvonne Craig, 'Elder Mediation: Can it Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Carers' (1994) 6 *Journal of Abuse and Neglect* 83.

her own rights. In addition, family members may place considerable pressure on the older adult to come to this decision, which is sometimes subtle and not immediately obvious.

Conflicts over guardianship, capacity and substitute decision-making can be very complex and challenging to resolve in the mediation context. Experts state that mediators should not assess the decision-making capacity of participants but should assess capacity to participate in the mediation. Wood, for example, advises that a mediator must determine the understanding of the parties regarding participation in mediation by considering factors such as whether the party understands the nature of the mediation and the issues at hand.²²

However, the level of understanding needed by participants to understand the issues at hand will vary from mediation to mediation, depending on the complexity of the matters under discussion. This introduces some ambiguity into the assessment, as do questions about how to proceed when an older adult may be capable of participating but not of entering in to an agreement, or when there is controversy or ambiguity regarding who is the appropriately authorized substitute decision maker.

C The Intersection of Vulnerability and Capability

It is important that elder mediators receive appropriate training on elder abuse and capacity issues. Without sufficient substantive knowledge on these topics, elder mediators will be unable to ensure that the legal rights of older adult participants are protected.

One common point of confusion among professionals working with older adults, where training is advised for those practicing in this area, is the meaning of *vulnerability* and *capability*.²³ Many see these as completely interconnected issues. However they are distinct as it is possible for an older adult to have one of these qualities but not the other. For example, although cognitive challenges can be a risk factor for abuse this is not always the case. An older adult can have significant cognitive difficulties while still being in a safe environment where he or she is safe from abuse. On the other hand, an older adult can be socially isolated and can have many of the risk factors for abuse but still be completely cognitively capable.²⁴

In the elder mediation process, if the older adult's legal rights are to be protected, it is important that the elder mediator understand the conceptual difference between vulnerability and capability. A capable older adult can choose to refuse help and assistance even if this places him or her at risk. However, if an older adult is not capable a legally appointed substitute decision maker may need to make a decision on behalf of the older adult, even in situations where the older adult does not want intervention or involvement.

²² Erica Wood, 'Addressing Capacity: What is the Role of the Mediator?' in Rhudy and Rodis (eds), *Elder Mediation Today: Manual and Resource Guide* (Senior Mediation and Decision-Making, 2009) 86.

²³ Evidence that there is confusion among practitioners on these issues is mainly anecdotal. However, comments by hospital social workers interviewed in a recent research project reveal the challenges social workers face interpreting these terms. See Louise Holland, *Abandonment or Autonomy: How do Social Workers Know the Difference?* (Masters of Social Work Thesis, University of British Columbia, 2011).

²⁴ BC Abuse and Neglect Prevention Collaborative, *The Provincial Strategy Document* (BC Abuse and Neglect Prevention Collaborative, 2009) <<http://www.bcli.org/ccel/publications/provincial-strategy-document-vulnerable-adults-and-capability-issues-bc>>.

III EXISTING BEST PRACTICES FOR RIGHTS PROTECTION

A Literature Review

Although concerns have been expressed about using mediation to resolve elder disputes in situations where the older adult participant is vulnerable or incapable, these concerns can be ameliorated by implementation of best practices recommended in the elder mediation literature. Two of these best practices will be discussed in this next section.

1 Pre-Mediation Meetings

One strategy for protecting older adult participants, which has been adopted by some Canadian mediation programs, is the practice of holding meetings between the mediator and individual mediation participants prior to any joint sessions where all the parties are present. These meetings, commonly called pre-mediation meetings are used in a broad range of mediation contexts, not exclusively elder mediation. However, this practice is specifically recommended for elder mediation because these meetings give an opportunity for the mediator to find out about family dynamics and to identify abuse prior to holding a joint session with all parties. Both the *ACR Training Objectives*²⁵ and the *EGM Report*²⁶ state that elder mediators need training about how to conduct pre-mediation meetings.

2 Screening for Abuse

Experts would agree that it is essential to screen for abuse. Elder abuse needs to be identified at the outset in order to ensure that the rights of vulnerable older adults are protected. If, for example, the older adult participant is dependent on an abusive adult child the older adult will find it very difficult, if not impossible, to express interests contrary to the opinion of that adult child. Regardless of the importance of identifying abuse, there is a paucity of research about screening in the elder mediation context or the validity of screening tools for this setting.

Kelly explains the importance of screening in the following words:

The mediator should always make the final decision on whether a case is appropriate or not. ... Cases that are generally not appropriate for mediation include when the power differential between parties is great and cannot be overcome or compensated for by the involvement of a proxy or an advocate. ... Cases involving older adults and people with disabilities where mediation is not appropriate are when there is a history of abuse within the family, elder abuse including financial exploitation, substance abuse or a history of intimidation of any kind.²⁷

Unfortunately, it is not a simple matter to develop effective screening procedures. There are complex challenges because of how difficult it can be to identify elder abuse. In the words of Gemma Smyth:

²⁵ See Association on Conflict Resolution, above n 3.

²⁶ See Canadian Centre on Elder Law, above n 4.

²⁷ Elizabeth Kelly, 'Mediation of Disputes Involving Older Adults and People with Disabilities' in *Colorado Elder Law Handbook* (Colorado Bar Association, 2004) s 7.3.1.

The hidden crime [of elder abuse] makes it difficult for professionals to spot and manage. The reasons behind under-reporting often lie with older adults themselves. They may avoid reporting abuse, wanting to protect the abuser who is statistically likely to be a caregiver. The potential social stigma or shame associated with abuse may serve as a further deterrent.²⁸

Given the lack of research on the effectiveness of specific tools and protocols for screening in the elder mediation context, mediators should not rely overly on screening as the sole measure they implement to protect the older adult participant. Mediators need to be cognizant of this issue in all aspects of service delivery. For example, program policies and procedures for dealing with abuse issues should be developed for all stages of the mediation. This is necessary if the elder mediator is to carry out his or her ethical responsibility to ensure that no harm comes to any of the participants in mediation.

Existing research suggests that mediation can be used effectively as a preventative tool. For example, based on her review of elder mediation projects, Yvonne Craig concludes that elder mediation, if used in the early stages of conflict, can be of value in preventing elder abuse.²⁹ It is important to note that Craig is focusing on the use of elder mediation as a preventative process, and is not advocating its use if abuse is present.

B Examples of Canadian Programs and Models

There are two well-known Canadian programs, which have been designed for use in situations where elder abuse has occurred. Both have policies and procedures intended to protect victims including screening procedures. I will briefly describe these programs and will discuss the applicability of policies and procedures within these programs to other mediation contexts.

1 Elder Mediation Mistreatment Project

The Elder Mistreatment Mediation Project is operated by the University of Windsor Mediation Services in partnership with two other Windsor based organizations. This project produced an elder abuse mediation intake guide, and an abuse-screening tool. These tools were used during the project to determine what services should be provided in each case referred. Former program director, Gemma Smyth, in an article that discusses this project, draws the following conclusion:

Several elements supported the potential of older adults to participate meaningfully including: providing multiple chances during intake to tell their story, but the option to tell it only once; the option of using a Social Work Advocate during some or all of the mediation process; extensive preparation of the older adults for mediation; use of a screening tool/intake guide, multiple points of follow up and a voluntary model of mediation.³⁰

²⁸ Gemma Smyth, 'Mediation in Cases of Elder Abuse and Mistreatment: The Case of University of Windsor Mediation Services' (2011) 30 *Windsor Review of Legal and Social Issues* 121, 127. Smyth is the former director of University of Windsor Mediation Services that offers elder mediation services that will be discussed later in this paper.

²⁹ Yvonne Craig, *Elder Abuse and Mediation: Exploratory Studies in America, Britain and Europe* (Hants, 1997).

³⁰ Smyth, above n 29, 140.

Smyth notes that older adults who are reluctant to report may be able to do so in the context of a dispute resolution program if the program connects the older adult with supports and provides a safe environment for disclosure.³¹ To that end, the program purposefully entitles older adults to bring an advocate with them to the mediation sessions. Advocates are available through one of the partnering agencies. The advocate's role is to assist the older adult, including ensuring that his or her voice is heard and interests protected.

2 Restorative Approaches to Elder Abuse Project

The other Canadian alternate dispute resolution program specifically designed to serve older adult abuse victims is a pilot project that operated in the Waterloo-Kitchener of Ontario Canada beginning in 2000. The Restorative Approaches to Elder Abuse Project ('Restorative Justice Project') began as a collaborative effort of seven agencies in this region. As noted by project coordinator Arlene Groh, this program was created in response to the reality that older adults who have experienced abuse are often not comfortable pursuing criminal charges against the perpetrator.³² This project offers an alternative to the criminal justice system, and, according to its mission statement 'provide[s] an opportunity for change and for healing for those affected by elder abuse'.³³

There is a difference on focus between this program and the Elder Mediation Mistreatment Project. Whereas the Restorative Justice Project appears to have more of a focus on relationship transformation, the Elder Mediation Mistreatment Project appears to have more of a focus on resolving substantive issues. This may be because the latter is affiliated with an academic institution. However, despite being operated by a law school and receiving referrals for disputes containing a legal component such as landlord-tenant and contract disputes, there is no requirement that the referral issue have a legal component.³⁴ Despite the differences in how these programs are defined and the stated goals of each program, there is a surprising amount of overlap in the approach to elder abuse situations.

The Restorative Justice Project fits under the umbrella of the broader restorative justice movement. Although the term *restorative justice* is often used to refer to certain practices such as sentencing circles, the term can also refer to approaches that fit within a certain value system as is described in one article on point:

Restorative justice has been conceived in the literature in two broad ways. One is a process conception; the other is a values conception. The process conception is characterized by a process that brings together all parties affected by harm or wrongdoing (e.g., offenders, and their families, victims, and their families, other members of the community, and professionals). ... The values conception is characterized by a set of values, or principles, that distinguish restorative justice from

³¹ Ibid.

³² Groh, above n 9.

³³ Ibid 26.

³⁴ The University of Windsor Mediation Services website <<http://www.uwindsor.ca/mediation/frequently-asked-questions#DisputeNotLegalMatter>>.

traditional punitive state justice. The former values healing and restoration of all affected, the latter values accountability to the state through punishment.³⁵

Although the Restorative Justice Project shares a philosophy with the broader restorative justice movement its focus on elder abuse offences is unique. At the outset of the project the project team conducted an extensive literature review and did not find any existing restorative justice service delivery models specifically for elder abuse situations. After extensive community consultation the project team decided not to create a model, but instead to develop a set of guiding principles to allow for an incident based approach that can be tailored to the needs of each particular case.³⁶

It is interesting to note that, despite the project team's intention not to utilize one model in order to take an incident based approach there still are established procedures for intake and for screening cases. These include a cross-agency referral protocol adopted in 2000. This protocol was agreed to by agencies mandated to respond to elder abuse in the Waterloo Region.³⁷ In addition, the Restorative Justice Project developed its own intake and case management procedures, to be followed in every case. These procedures include having the facilitator³⁸ speak individually with the victim, with the perpetrator and with relevant community support people prior to scheduling a joint session with all parties.

These two programs provide examples of responses to elder abuse in the alternate dispute resolution context. These programs both have procedures to screen for abuse, both encourage including support people for the older adult and both include a preliminary phase in which project staff meet with older adults individually to determine their wishes at the outset. These two programs are not the only elder dispute resolution programs in Canada, but these are notable because they pay specific attention to elder abuse issues.

3 Child Protection Mediation

The development of policies, procedures and service delivery models for elder mediation is in its infancy. However, it is not necessary to create these from the beginning because guidelines and procedures developed for other types of mediation are transferrable. Most notably, there is a direct parallel between elder mediation and child protection mediation. Both processes involve multiple parties, complex dynamics, possible abuse, and participants with cognitive or mental health challenges. Mediators face similar challenges in both contexts and, therefore, some of the policies, procedures and guidelines developed for mediation in the child protection context can very easily be applied to elder mediation.³⁹

³⁵ Brenda Morrison and Eliza Ahmed, 'Restorative Justice and Civil Society: Emerging Practice, Theory, and Evidence' (2006) 62 *Journal of Social Issues* 209, 209.

³⁶ Groh, above n 8. Guiding principles include, for example, autonomy, safety, confidentiality, dignity and respect.

³⁷ Ibid 75.

³⁸ The Restorative Justice Project uses the term facilitator to refer to the person who facilitates meetings during the process. In my view, the choice of the term facilitator rather than mediator reflects the philosophical difference between the two programs. Mediator reflects the importance of reaching a mediated agreement, whereas facilitator places the priority on the relational aspect.

³⁹ By drawing a comparison between child protection service delivery models and elder mediation service delivery models I am not suggesting a connection between protection of children and protection of older adults. Children do

For example, several of the best practices outlined in the recently released guidelines for child protection mediators published by the Association of Family and Conciliation Courts would be beneficial to elder mediators dealing with abuse or capacity issues.⁴⁰ The *AFCC Guidelines* are very specific in setting out principles that mediators should follow when dealing with abuse and capacity issues in child protection mediation.

The *AFCC Guidelines* speak to the importance of designing and structuring mediation programs with these issues in mind. As noted in the *AFCC Guidelines*:

[Mediators should] address safety and capacity concerns, provide appropriate accommodation, and promote engagement of individuals with diminished capacity and/or disabilities. This notwithstanding, if an individual is unable to exercise self-determination, or if another impediment to mediation exists that cannot be remedied, a case may need to be excluded from mediation. Mediators should continue the safety and capacity assessment process throughout the course of mediation. ... CPM programs should develop clear protocols that are designed to protect everyone's safety. When screening for safety concerns, programs should seek to identify what, if any, accommodations can be offered to enable an individual to participate or whether mediation should take place.⁴¹

The *AFCC Guidelines* suggest several modifications to the format of the mediation sessions that mediators can implement to create safety in situations where there is violence or abuse. These include meeting with participants individually rather than together and allowing the victims to bring a support person. These modifications can easily be incorporated in to the elder mediation context as well. In fact, some of the recommended practices described in the *AFCC Guidelines*, such as bringing a support person, are used in existing elder mediation programs such as the Elder Mediation Mistreatment Project.

The *AFCC Guidelines* speak specifically to the issue of capacity, an issue that will regularly arise in the elder mediation setting. The *AFCC Guidelines* provide the following advice on point:

[T]he mediator should assess whether a person is able to meaningfully participate and exercise self-determination and informed decision-making on his or her own behalf as well as the mediator's ability to accommodate the participation and engagement of all participants. A determination of incapacity need not preclude a person from participating in mediation, as it may be possible to include a court appointed guardian, surrogate or other advocate to provide support to the incapacitated person... Some factors to consider... include whether he or she is able to understand the dispute, the facts relevant to the dispute, assess consequences to alternatives, freely make decisions, understand the mediation process and be motivated to seek a positive outcome.⁴²

The parallel between elder mediation models and child protection models has also been noted in earlier research. The *EGM Report* recommends that any future elder guardianship mediation

not have decision-making autonomy whereas older adults do until such a point that they are proven to be legally incapable of making the decision at hand. I am speaking of service delivery models.

⁴⁰ Association of Family and Conciliation Courts, *Guidelines for Child Protection Mediation* (2012) <<http://www.afccnet.org/ResourceCenter/PracticeGuidelinesandStandards>> ('*AFCC Guidelines*').

⁴¹ *Ibid* s 5.4, 5.4.1.

⁴² *Ibid* s 5.4.3.

program in British Columbia be modelled after the government funded Child Protection Mediation Program.⁴³

An integral and essential aspect to British Columbia's child protection mediation model is the pre-mediation meeting, also called an *orientation session*. The pre-mediation meeting is described in detail in the training manual for British Columbia's child protection mediators.⁴⁴ It is interesting to note the similarity between the use of pre-mediation meetings in child protection and the individual meetings that precede joint sessions in the Restorative Justice Project.

The findings of a recent study, in which child protection mediators in BC were interviewed about their work, show that child protection mediators attribute success in mediation to effective use of pre-mediation meetings. According to the child protection mediators who participated in the study, goals for the pre-mediation sessions include setting a tone to manage difficult family dynamics and power imbalances, using education and coaching to help all parties participate effectively in the joint session, and making decisions about who to include in the joint mediation session.

The importance of carefully choosing which support persons and extended family members should participate in the joint session was a major theme arising out of the child protection study. Participating mediators gave examples of cases that resolved successfully because of choices that they made regarding who should be there, with certain support persons who attended being very helpful to the process and others being detrimental. Mediators stated that including persons in the mediation who did not understand their role or acted to undermine the process could prevent a successful resolution of the case.⁴⁵

There is direct application of the findings of this research project to the elder mediation context. Both processes inevitably have multiple parties and complex dynamics. With some types of mediation it is rare for support persons to attend in addition to the parties, but it is very common in both child protection and elder mediation. For example, experts in elder mediation have suggested that including a support person for the older adult in the mediation session is an effective way of accommodating disabilities or challenges.⁴⁶ Given these similarities, it is likely that success in resolving elder mediation disputes will be affected by the mediator's choice of who should attend, as is the case in child protection mediation.

Pre-mediation meetings can be used to assist the elder mediator in identifying whether any participants might have diminished decision-making capacity and, if so, to find out whether a legally authorized substitute decision maker exists. As well the elder mediator can use the pre-mediation session to identify the dynamics between the parties and whether there are any abuse or power imbalance concerns. British Columbia's Child Protection Mediation Program model

⁴³ *EGM Report*, above n 3.

⁴⁴ Dispute Resolution Office, *Ministry of the Attorney General, Child Protection Mediation Handbook for Mediators* (2008) ('*CPM Handbook*').

⁴⁵ Joy Anne Braun, *Child Protection Mediation: Mediator Strategies for Managing the Process* (MSW Thesis, University of British Columbia, 2007).

⁴⁶ *ACR Objectives*, above n 3; *EGM Report*, above n 4.

presumes using pre-mediation meetings in advance of the joint session, and this model can be used as a template for developing protocols and procedures for the elder mediation context.⁴⁷

4 Discussion

It is particularly interesting to note the parallel between the model used for delivery of British Columbia's Child Protection Mediation Program and the Restorative Justice Project model. Although the former is intended to resolve a specific legal dispute and the latter to address relational goals as identified by the older adult and other participants, a vital ingredient of both processes are the individual meetings with participants in advance of joint sessions. In both cases the mediator/facilitator has decision-making autonomy to determine who should attend the session and the roles of attendees. In both cases the pre-mediation meeting provides the opportunity for the mediator/facilitator to determine the needs, abilities and capability of individual participants in advance of bringing all the parties together. These individual meetings also provide an opportunity to screen for abuse, to identify power imbalances and to determine whether or not the older adult will be safe if he or she participates in a joint meeting with persons who have mistreated the older adult.

IV PRACTICAL MANUALS AND TOOLS

As part of an ongoing study, I conducted an extensive search for documents that contain tools or step-by-step procedures to guide elder mediators regarding how to proceed when faced with many of the thorny issues that often arise in elder mediation related to capacity and abuse. Although there are existing guidelines, endorsed by leading mediation organizations, which provide broader principles on point, I was unable to find any that also contain practical tools to guide mediators on issues such as the following:

- What information must the mediator gather to assess the risk of holding a joint meeting in situations where abuse is occurring between the parties?
- What steps should the mediator take to determine the validity of claims by a participant who asserts that he or she is the legally authorized substitute decision maker of an incapable older adult?
- What steps should the mediator take to ensure that an older adult who has capacity to participate also has capacity to enter into an agreement before the agreement is signed?

My search for mediator tools and step-by-step guidelines to use when dealing with many of the complex issues that arise in the elder mediation context failed to unearth relevant documents. The search included conversations with attendees at a summit on elder mediation from nine countries⁴⁸ and meetings with several leading elder law practitioners in North America.

V GAPS AND NEXT STEPS

A Gaps in Best Practices

⁴⁷ Braun, above n 46; *CPM Handbook*, above n 45.

⁴⁸ 2012 *World Summit and Symposium on Elder Mediation*, Strathclyde University, Glasgow Scotland, June 11 – 13, 2012.

Elder mediation in Canada is in its infancy as it is in much of the rest of the world. Foundational work and lessons learned during the development of programs such as the Restorative Justice Project and the Elder Mediation Mistreatment Project can inform the development of new programs and projects. However, there is still work to do. Policies, procedures and guidelines for dealing with many of the issues related to diminished decision-making capacity or abuse of older adult participants do not yet exist. For example, experts stress the importance of screening for abuse. However, there is little to guide the elder mediator on practical issues such as how to choose an effective screening tool. Similarly, there is agreement among experts that mediators should assess capacity to mediate, but little information about how to conduct that assessment especially in situations where there has been no legal determination of capacity.

This is a significant gap, especially given the recommendations by leading organizations, such as the Association on Conflict Resolution⁴⁹ and Elder Mediation Canada,⁵⁰ which have stated that elder mediators should be trained regarding elder abuse issues and on capacity and guardianship issues. Training will be theoretical and will have diminished value in the absence of identified best practice procedures and guidelines for dealing with specific scenarios that commonly arise in this area of practice. As discussed above, older adults may have their rights compromised or may be placed in unsafe situations if the elder mediator is unable to identify signs of these dynamics. Best practices must be developed to aid the mediator in dealing with issues of abuse and capacity.

B Gaps in Training

Once guidelines and best practices are developed mediators need to be trained on these. In order to be effective, mediators need training, which provides both substantive information on these complex issues and the practical procedural guidelines discussed above.

C Gaps in Research

Further research is needed before specific guidelines, tools and training can be developed on many of the relevant issues. For example, experts would agree that an abused older adult should not participate in mediation sessions in situations where there is a safety issue, or where the older adult would be unable to express his or her wishes due to a significant power imbalance. In either situation, if the mediation proceeds, the older adult's legal rights are likely to be compromised. To prevent this from happening, research is needed to answer questions such as about which screening tools are effective and what criteria should be used to determine when mediation should proceed and when it should not.

VI CONCLUSION

In this article I have discussed elder mediation, focusing in particular on capacity and elder abuse issues that commonly arise in this context. Some scholars have expressed concern that older adults may be legally disadvantaged by their participation in mediation. In contrast, others have

⁴⁹ See Association on Conflict Resolution, above n 3.

⁵⁰ *Code of Professional Conduct*, above n 8.

suggested that mediation is a preferred alternative because older adults do not want to resolve disputes in an adversarial manner.

While there are valid concerns about the use of mediation in certain situations, mediation is still a preferred option to court. However, in the absence of best practice policies and guidelines for mediators and effective training on these issues, there are potential dangers for the older adult participant. Policies, guidelines and training on these guidelines need to be developed to ensure that the elder mediator is able to create a safe environment and to ensure that the legal rights of older adult participants are protected. Only when safeguards are in place can elder mediation be unequivocally recommended.