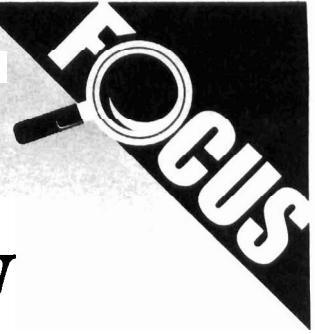


ESTATE and ELDER LAW



Elder mediation

"Peace is not the absence of conflict, but the presence of creative alternatives for responding to conflict."

— Dorothy Thompson

By Donald D. Vanarelli

Aging is a time of transition. With Americans living increasingly long lives, coping with the physical, emotional and cognitive changes attendant to the aging process is a challenge faced by a growing number of elders and their loved ones. How a client deals with the transition brought by the aging process can have a lasting effect on the client's well-being, and on the well-being of family members and loved ones. Often the changes experienced by aging parents lead to disagreements among family members.

Disputes involving the elderly may reach the point at which adult siblings feel their only hope of resolution is through litigation. When such conflicts have reached a crisis — ideally, well before that point — attorneys may wish to recommend their client consider the option of elder mediation to resolve the conflicts.

What is elder mediation?

Elder mediation, like elder law, is defined by the client to be served. Elder mediation is the mediation of any dispute that involves elders, their families or others in their lives. Elder disputes often possess traits that may make elder mediation a particularly attractive option for elders and their loved ones.

For example, elder disputes routinely involve members of an immediate or

extended family who wish to maintain a long-term relationship. In spite of the current conflict, family members often recognize that litigation may lead to the destruction of close family relationships. As a result, an alternative to litigation that may help resolve the conflict is particularly attractive.

The successful resolution of family disputes involving elders is much more complex and requires a more creative solution than the "win-lose" principles embodied in traditional litigation. These disputes often involve issues, emotions and conflicts that may have been underlying family relationships for many years, involving much deeper issues than the parties themselves may understand, such as unspoken and unacknowledged beliefs and feelings. By acknowledging the complex background of a particular family conflict and providing a forum to address these complex issues, elder mediation offers a more creative way of resolving the issues.

Mediation is less expensive and less time-consuming than litigation. In addition, because disputes regarding the elderly often involve very private personal, family, medical or financial issues, mediation offers a private dispute resolution alternative to the public disclosure required in litigation.

The opinions of the elderly family member often tend to be either disregarded as unrealistic or overshadowed by the opinions of well-meaning relatives. For this reason, central to the successful practice of elder mediation is the recognition that the elder is the most important participant: His or her voice must be heard, and respected, if the conflict is to be resolved.

Goals

Elder mediation provides a forum for family decision-making designed to achieve the following goals:

- To hear the concerns of the elder, the service provider and the family, and to develop a plan that will

address those concerns in the most positive and practical way;

- To provide a forum for siblings to discuss how they will share the responsibilities for care of their parents. Mediation can help families discuss the division of labor and the management of finances;
- To allow families to create workable and mutually acceptable solutions to their difficult disputes;

- To develop communication strategies to enable families of elders to successfully work together to make important decisions in the future;
- To avoid litigation of family disputes that have reached the point where court proceedings have begun or have been threatened.

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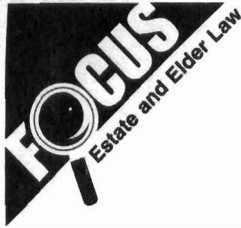
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Elder mediation

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The process

As opposed to litigation, mediation is a voluntary process in which a neutral third party helps guide the parties in conflict toward an understanding of their dispute; control of family issues and emotions; compromise and resolution of that conflict; and, perhaps, toward a new way of relating to family members.

The elder mediation process typically involves the following stages:

1. PRE-MEDIATION (INTAKE)

(a) Determine if the case is appropriate for mediation; and (b) identify those who should attend the mediation. Not just family members, this may include trusted advisors, friends and financial planners.

2. FORUM WITH ALL PARTIES

The mediator strives to ensure the voices of all interested parties, particularly those of the elder/disabled person, are heard and respected.

3. CAPACITY EVALUATION AND NEEDS ASSESSMENT BY GERIATRIC CARE MANAGER.

4. IDENTIFICATION AND ANALYSIS OF THE ISSUES

Elder disputes often involve issues, emotions and conflicts that may have been underlying family relationships for many years. The mediator guides the parties toward confronting, overcoming and resolving these disputes in a more creative and comprehensive way.

5. MEDIATION SESSIONS

Mediation sessions may occur with all parties together, or may "caucus" into smaller groups. The parties brainstorm and generate a range of options for solving the problem. If the mediator believes the parties would benefit from the involvement of other professionals — such as a financial consultant, family counselor or geriatric care manager — these outside professionals may be included in the mediation sessions.

6. MEMORIALIZING THE AGREEMENT

The mediator will draft a Memorandum of Understanding which will identify the issue(s) addressed and the parties' resolution of those issues.

7. POST-MEDIATION SESSIONS

The elder mediation process often leads participants to strengthened family relationships in which future conflicts can be resolved easily.

Issues that may benefit

Elder conflicts typically involve disputes among adult siblings about issues surrounding an aging parent's changing care needs and medical treatment; the independence issues that accompany the aging process, including housing and living arrangements; and issues regarding financial management and the elder's estate plan.

CARE ISSUES

• How will the family members divide responsibility for the elder's care needs?

If one family member is more actively involved in the elder's care, will the primary caregiver be compensated by the elder or other family members? Will the family contribute financially toward the elder's needs and, if so, in what proportions?

- If the family contributes financially toward the elder's needs, will those contributions be somehow equalized at a later date?
- Who are to be the elder's health care providers and who is in charge of directing care providers?

INDEPENDENCE/HOUSING ISSUES

- Will the elder remain living at home, or move to a child's house, an assisted living facility or a nursing home?
- Is it time to address the elder's continued control of his or her finances, or his or her driving?
- Can the elder's increased needs be addressed through a part-time or full-time home health aide, or other support services at home? Who will oversee or coordinate such services?
- Is there a need for a geriatric assessment and the involvement of care managers?

ESTATE/FINANCIAL/INHERITANCE ISSUES

- Can the family openly address the elder's present financial condition and future needs? Are there sufficient assets to pay for future care needs and, if not, how will care be paid for?
- Can the family address the elder's estate plan, and understand the reasons for seemingly unequal distributions, to avoid conflicts later?
- Can the elder's care needs be provided for while preserving estate assets for the family and other loved ones? Who decides what actions are appropriate in seeking the most effective use of limited assets?



Defining success

Success in elder mediation is broadly defined and may be acknowledged when any of the following is achieved:

- Giving aging parents a voice, even if they lack legal rights.
- Helping families to create successful communication systems for the future.
- Resolving some issues in mediation, anticipating that the family will continue to work as a team to resolve the remaining issues.
- Providing a safe space for people to hear each other, to voice their interests and feelings and to be heard.

After the mediation

Of course, the primary focus of elder mediation is the resolution of a particular family conflict. However, a more valuable long-term benefit often evolves when family members engage in the mediation process, providing the parties with the necessary tools to forge new relationships with family members and help the participants deal more effectively with future transitions and conflict involving the elderly family member. As a result, elder mediation is a valuable resource that should be considered for elder clients in family conflict. ©

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