



DISPUTE RESOLUTION SECTION

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“Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation in the various contexts in which disputes commonly arise.”

Edna Sussman, Chair, NYSBA Dispute Resolution Section

David Singer, Chair, White Paper Subcommittee

THE BENEFITS OF MEDIATION FOR DISPUTE RESOLUTION IN ELDER LAW

By Mark J. Bunim, Barbara Mentz, Leona Beane and Clare A. Piro

“Traditional litigation is a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle... Our system is too costly, too painful, too destructive, too inefficient for really civilized people.” Chief Justice Warren E. Burger of the U.S. Supreme Court

Any litigator will attest that litigation has become a lengthy and expensive proposition. It is a stressful process that destroys relationships. As some disputes will inevitably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution which can avoid much of the delay, expense and disruption of traditional litigation. Mediation, a process which is responsive to party needs in a way that is not possible in a court proceeding, is a frequently utilized form of dispute resolution. It has particular applicability in the field of Elder Law, specifically, mediating end of life issues; mediating guardianship disputes; mediating elder care issues between children/siblings of the parent and getting the elder person’s voice heard.

Mediation and arbitration are no longer *alternate* dispute resolution mechanisms, but have become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation and arbitration are routinely incorporated into contracts as the method of choice for resolving disputes that may arise in the future. They are also routinely used after problems arise and the parties are seeking an appropriate means to resolve their disputes. We review the benefits of mediation generally and how it can serve to improve your client’s experience in resolving disputes in the field of Elder Law and lead to a better outcome.

I. Mediation

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time.” Abraham Lincoln

Mediation is the process in which parties engage a neutral third person to work with them to facilitate the resolution of a dispute. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose. While not every case can be settled, an effort to mediate is appropriate in virtually any subject matter and any area of the law. The advantages of mediation include the following:

1. ***Mediation Works.*** Statistics have shown that mediation is a highly effective mechanism for resolving disputes. The rate of success through mediation is very high. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90% of its cases settle in mediation. Most cases in mediation settle long before the traditional “courthouse steps” at a significant saving of cost and time for the parties.

2. ***Control by the Parties.*** Each dispute is unique, and the parties have the opportunity to design their own unique approach and structure for each mediation. They can select a mediator of their choice who has the experience and knowledge they require, and, with the help of the experienced mediator, plan how the mediation should proceed and decide what approaches make sense during the mediation itself.

3. ***The Mediator plays a crucial role.*** The mediator’s goal is to help the parties settle their differences in a manner that meets their needs, and is preferable to the litigation alternative. An experienced mediator can serve as a sounding board, help identify and frame the relevant interests and issues of the parties, help the parties test their case and quantify the risk/reward of pursuing the matter, if asked provide a helpful and objective analysis of the merits to each of the parties, foster and even suggest creative solutions, and identify and assist in solving impediments to settlement. This is often accomplished by meeting with parties separately, as well as in a group, so that participants can speak with total candor during the mediation process. The mediator can also provide the persistence that is often necessary to help parties reach a resolution.

4. ***Opportunity to Listen and be Heard.*** Parties to mediation have the opportunity to air their views and positions directly, in the presence of all other parties to the dispute. The

process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral authority figure, the parties often feel that they have had “their day in court.”

5. ***Mediation Helps In Complicated Cases.*** When the facts and/or legal issues are particularly complicated, it can be difficult to sort them out through direct negotiations, or during trial. In mediation, in contrast, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. The mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues.

6. ***Mediation Can Save An Existing Relationship.*** The litigation process can be very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. In contrast, in mediation disputes, i.e. in the case of elder care, among family members, in manner that saves a personal and family relationship that, ultimately, the parties would prefer to save.

7. ***Expeditious Resolution.*** The mediation can take place at any time. Since mediation can be conducted at the earliest stages of a dispute, the parties avoid the potentially enormous distraction from and disruption of one’s business and the upset in one’s personal life that commonly results from protracted litigation.

8. ***Reduced Cost.*** By resolving disputes earlier rather than later the parties can save tremendous sums in attorney’s fees, court costs and related expenses.

9. ***Lessens the Emotional Burden.*** Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there typically is much less of an emotional burden on the individuals involved than proceeding in a burdensome and stressful trial. Furthermore, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing an unfavorable business action which gave rise to the dispute. This is avoided in mediation.

10. ***Confidential Process and Result.*** Mediation is conducted in private -- only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved.

11. ***Avoiding the Uncertainty of a Litigated Outcome.*** Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions as the predictive abilities of parties and their counsel are unclear at best. Attorney advocates may suffer from “advocacy bias” -- they come to believe in and overvalue the strength of their client’s case.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of \$1.1 million -- when they did make the wrong decision.¹

A mediator without any stake in the outcome or advocacy bias can be an effective “agent of reality” in helping the parties be realistic as to their likely litigation or arbitration alternative.”

12. ***There are no “winners” or “losers.”*** In mediation, the mediator has no authority to make or impose any determination on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties and will only come about if all parties feel it is to their satisfaction.

13. ***Parties Retain Their Options.*** Since resolution during mediation is completely voluntary, the option to proceed thereafter to trial or arbitration is not lost in the event the mediation is not successful in resolving all matters.

14. ***The pro se litigant.*** Mediation can be very helpful when a party does not have an attorney and is therefore representing him/herself *pro se*. Court litigation can be very difficult for the *pro se* litigant who is unable to navigate the complexities of the court process and trial. With the downturn in the economy, studies showed that fewer parties are represented by counsel and that lack of representation negatively impacted the *pro se* litigant’s case.² Dealing with a *pro se* litigant in court can also create difficult challenges for the party that is represented by counsel. However, in mediation, the parties can more easily participate in the process and benefit from the involvement of an experienced mediator.

15. ***More creative and long-lasting solutions.*** Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular interests rather than being limited by the remedies available in court or arbitration. Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be satisfying and adhered to by the parties.

16. ***Timing.*** An advantage in elder law disputes is that mediation can be flexible in terms of scheduling the resolution session to meet the needs and considerations of the elderly. Time slots of 2-3 hours each, or late afternoons or weekends are not uncommon. Such flexibility is not available in the courthouse.

¹ Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, (Springer Science + Business Media LLC New York publ.) (2010)

² Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary), ABA Coalition for Justice, July 12, 2010, available at <http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf>

II. Arbitration

Arbitration is the process in which parties engage a neutral arbitrator or panel of three arbitrators to conduct an evidentiary hearing and render an award in connection with a dispute that has arisen between them. Unlike mediation, arbitration is similar to a private non-jury trial, except that the rules of evidence are rarely followed. As arbitration is a matter of agreement between the parties, either pre-dispute in a contract as is generally the case, or post-dispute when a difference arises, the process can be tailored to meet the needs of the parties. Arbitration is almost never used for Elder Law matters.

Benefits of the Use of Mediation in Elder Law Related Disputes

SIBLING DISPUTES CONCERNING CARE OF A PARENT

By Mark J. Bunim

These are the facts of a case I recently mediated. A brother and sister were involved in a long running dispute concerning the care of their elderly mother. The brother and sister are in their 60s and the mother in her mid-90s. The mother lives in New York, the brother in Seattle and the sister in rural Pennsylvania. The mother's faculties are fading fast and the sister has always been much closer to the mother and wants the mother to come live with her.

The brother is a wealthy business executive and the sister has very little money. Neither is married although they have lived in companions. It is safe to assume that in addition to the brother and sister truly disliking each other, the companions do as well. The sister owes the brother about \$1 Million for loans he has made to her over time. The brother is financially savvy but the sister has a lot of trouble dealing with money and budgets.

The mother needs 24/7 care. The sister wants to be paid a salary to take care of the mother [they now have full time aids]. The aids are paid by the mother's assets which will run dry if the mother lives more than another year. The mother's only non-liquidating asset is her large home in suburban New York City. If the mother moves to live with the sister, they could sell the house but that would also dissipate the mother's estate. The brother will not agree to pay the sister anything for caring for the mother and he wants her to stay in her New York home.

The sister runs the mother's business which involves the management and collection of royalties from the mother's career. She wants to continue doing that and to receive a stipend for her hours.

The mother's will divides everything 50/50, but there are, by subsequent agreements set-offs in favor of the brother for sums owed to him. The brother also holds the second mortgage on the sister's house.

The sister comes to New York every two-three weeks to see the mother, supervise her care and work with the aids. She wants to be reimbursed for her travel from the mother's "pot". The brother comes to visit about twice per year.

The sister is seeking a reduction in her loan balance [from her 50% of the estate] for her "care-giving time", in addition to the dispute concerning the location of their mother's residence going forward and decision making authority regarding the mother's finances and health care.

The brother was threatening to go to court to have a guardian appointed for the mother unless the sister agreed to his plan of action. Realistically the sister did not have the funds to fight the brother in court.

Clearly this situation cried out for mediation. It is not atypical of a sibling dispute over the care of an elderly parent. While each case has its own nuances, the pent-up emotions of years of rivalry come to the fore in these types of disputes. In sibling disputes concerning a parent the emotional levels and complexities that are routine in stranger-based civil litigation, only escalate. To promote a dialogue that will result in a resolution, the formalities and strictures of an adversary proceeding in a court, are certainly against the best interest of the parties.

Family disputes are rarely black and white. They are inherently filled with gray and thus solution creativity that mediation can bring about is appropriate. On top of this, mediation is quick, certainty results and participants own input results in formulating the outcome. Most mediations take months; not years. A mediator will devote as much time as needed to helping the parties achieve an Agreement that will be beneficial. Good mediators are persistent and creative and do not give up until a settlement is reached.

Benefits of Using Mediation to Resolve End-of Life Disputes

By Barbara Mentz

As lawyers, we are always seeking to provide our clients with a win. But, what does it mean to "win" for a client in an end-of life dispute and how can mediation by a well-trained neutral

mediator qualified to mediate end-of-life disputes be of benefit to lawyers representing a client in such disputes.

The benefit of early mediation by a qualified neutral mediator in an end-of-life dispute is perhaps best illustrated by the infamous debacle of over six years of litigation involving Terri Schiavo, who was in a persistent vegetative state being kept alive by a feeding tube. Although Terri Schiavo was a young woman, the issue involved whether to remove the feeding tube which would result in her death, an issue that also arises in end-of-life disputes involving elderly patients. The lengthy and protracted litigation in the Schiavo case involved, among other things, the Florida State Courts, petitions to the United States Supreme Court, a stay by the governor of Florida overriding a Florida court's order to remove the feeding tube, intense media scrutiny, intervention by interest groups and worst of all seven years of agony and tearing apart family relationships.

End-of-life disputes involving the elderly can arise in situations such as the Schiavo situation, or its mirror image, whether to insert a feeding tube to sustain life as well as whether to have a life saving operation or whether to engage in a course of treatment such as radiation or chemotherapy.

Those embroiled in end-of life disputes in addition to the patient, whose interest is paramount, can include family members, guardians, friends, hospitals, hospital ethics committees, doctors, caregivers and political, religious and other organizations. These emotionally charged and complex disputes may pit any combination of parties against each other, each with his, her or its own agenda involving conscious and subconscious interests, feelings and concerns. The benefits of mediation in end-of life disputes make mediation a most appropriate method to resolve these disputes.

Mediation offers the parties the opportunity at the earliest stages of an end-of-life dispute, where time is truly of the essence, before litigation begins and the parties are entrenched in their positions, to come to a timely resolution that is in the best interest of the patient.

The mediation process can afford the parties the necessary privacy, rather than having a case proceed under public scrutiny through the court system, in a protracted adversarial proceeding, often at significant financial costs and fractured family relationships.

A skilled and well-trained **neutral** mediator, qualified to mediate end-of life-disputes, who should be trained in bioethics, encourages the parties, including a competent patient, to identify the feelings, interests and concerns that really underlie their positions. These may involve anger

or frustration, feelings of guilt, fear of loss, differing ideas about death with dignity, different interpretations of a non competent patient's actions, exhaustion of a caregiver, religious beliefs, moral values, ethical issues, financial costs of life sustaining treatment, cultural differences between generations of family members or between family members and physicians or hospitals, a misunderstanding of the medical condition, treatment or prognosis, a mistrust of physicians or hospitals, a hospital or physician's concerns over liability, sibling rivalries, or a combination of these and many other feelings or concerns.

Most courts and family members support a competent patient's right of autonomy and self-determination to choose. Where disputes arise, whether because of family members or a doctor who declines to undertake life sustaining procedures or declines to withdraw life sustaining procedures, the mediation process can provide a competent patient with the opportunity for autonomy and self determination short of litigation. Absent mediation, the patient may never express his or her true feelings that the choice being made is out of fear of being a burden to others, financial concerns over treatment or costs, mistrust of the medical profession, a misunderstanding of the medical prognosis or life sustaining treatment or other reasons.

When a patient is not competent, the mediation process allows the parties to the dispute to focus on the patient's best interest. The mediation process affords the parties the opportunity to express and discuss their emotions, interests, values and concerns in a considerably less contentious atmosphere than a litigation setting. A mediator, having heard the participants and observed their personalities and attitudes, can facilitate the parties' understanding of each other's interests and concerns, including ethical and moral issues and religious beliefs, facilitate the parties understanding of the medical information and remove mistrust.

Because the mediation process encourages the parties to discuss with each other their concerns and feelings, it allows the parties to feel that they have been heard and their positions acknowledged. This process can facilitate the parties achieving a resolution that is best for the patient while alleviating some of their own fears, concerns and feelings. These candid and open discussions can also aid the grieving process which may well have begun before the patient dies.

Not all mediations involving end-of life disputes will be resolved through the mediation process, and compromises on ethical and legal issues involving laws, rules or regulations cannot always be made. Even if there is no resolution short of litigation, having engaged in the mediation can provide a win for your client. The result of having first utilized the mediation process may be a shortened, less adversarial litigation. More importantly, mediation can serve as an effective method for all participants to work through their feelings, interests and concerns, to focus on the patient's needs, desires and autonomy and to deal with the grieving process.

GUARDIANSHIP DISPUTES

By Leona Beane, Esq.

Guardianship proceedings pursuant to Article 81 of the Mental Hygiene Law can become extremely contentious as it is an adversarial proceeding; the extensive litigation can get out of hand, requiring the parties to pay excessive fees as part of the litigation. The tool of mediation should be considered to assist in the resolution of a litigated guardianship proceeding.

A court is limited to statutory solutions – should a guardian be appointed; what powers should be granted pursuant to article 81 of the MHL. Mediation focuses on solving the problem, and allows the persons involved to search for more creative responses. Before appointing a guardian, the court must determine the appointment is necessary to provide for the personal needs and/or to manage the property and financial affairs of the “alleged incapacitated person” (AIP), and in addition, that the AIP agrees, or that the AIP is “incapacitated”. The determination of “incapacity” is based on clear and convincing evidence that the AIP is likely to suffer harm because the AIP is unable to provide for their own personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of such inability. To prove by clear and convincing evidence is a very high standard. In many situations the guardianship proceeding can become embroiled in convoluted contentious litigation. Sometimes the ward (AIP) really needs a guardian, but because of the extensive litigation, the petitioner was not able to meet that standard, and thus a guardian was not appointed, when perhaps it would have been beneficial to have a guardian who would provide assistance to the ward.

The issue of incapacity itself should not be decided by mediation, because this is a legal issue requiring a decision by a judge. Thus, there must be a court determination of incapacity before a guardian is appointed. But, if all the other issues are resolved by a mediated agreement, any necessary hearing should proceed quite smoothly.

With the use of mediation, there may be additional alternatives for the court, such as a very limited guardianship, authorized to provide whatever is needed to assist the AIP, and nothing further, and there does not have to be a determination of “incapacity”.

Sometimes there is a “power struggle” among members of a dysfunctional family, seeking to acquire control over the elderly or disabled person. Quite frequently there are many ongoing disputes among family members. The legal issues presented in court are usually not the underlying issues causing the family turmoil. Sometimes there are no contested legal issues, but there are still family disputes or concerns that need to be addressed.

In a family situation, even though there may be many disputes between the siblings or other relatives (nieces, nephews, cousins, etc), they may still prefer to keep it “private” – they don’t want to air all their family disputes in a courtroom in a litigated court proceeding. Many of these individuals have never been involved in any court proceeding, and this is their first encounter – involving guardianship for their mother. In such situations, mediation may provide the necessary tool to address the concerns of all the family members.

Guardianship proceedings are quite different from other proceedings in court. In most other proceedings, once a decision (court Order or Judgment) is rendered, the court is finished with that case, but not so with guardianships. A guardian is required to file an annual report each year (which might create controversy over expenditures); any major expenditure of the guardian may require a further hearing, such as e. g. purchase of a house, sale of a house, purchase of major equipment for the ward; changes in the living conditions if at a specific nursing home, and for many other proceedings within the guardianship. Each of these proceedings seeking further court permission may entail further litigation between the relatives. Also, at the termination of the guardianship, the guardian must file a final report and account with notice to interested parties. That proceeding many times entails further litigation, regarding the expenditures that were or were not made, the investments, and everything else.

Mediation can be extremely useful whenever any of those proceedings are instituted with contentious litigation.

Many times courts appoint co-guardians . Sometimes there is contention between the co-guardians, that could provide for litigation. Mediation can be very useful in this situation as well, if it is provided that the co-guardians are required to proceed with mediation first before making any application to the court.

Many guardianships are commenced for improper motives. I was once involved in a proceeding wherein the elderly lady had 4 children – the 4 children were arguing over the mother’s estate plan. When one side was very unhappy, the son commenced a guardianship proceeding against his mother. That proceeding entailed very large amounts being unnecessarily expended. The dispute was really a pre-probate dispute among the children. But, the guardianship proceeding unnecessarily brought the mother into the dispute, causing her great grief, and causing everyone to expend large sums of money. That proceeding was very suitable for mediation.

Benefits of Mediation in Elder Care Law –Hearing the Voice of the Elder Person

by Clare A. Piro

Other parts of this article address the benefits of mediation in guardianships, meeting end of life decisions and in resolving disputes as to care of the elder person among family members. They all have in common the fact that the process of mediation insures that the family actually hears the voice of the elder person.

How many of us have had meetings with our clients and their children where the children completely take over the session, speaking for, and even over, their parent, often as if the elder person is not even present? Mediation takes the exact opposite approach and emphasizes that the client is the elder person who has a voice which deserves to be heard and respected.

First, the mediator needs to address the issue of the elder person's ability to make decisions, keeping in mind that not all decisions should be treated the same. Just because a person may not be competent to make financial decisions or live independently, he or she still has valid opinions as to where to live, with whom to live and who should be appointed to care for them. These opinions deserve to be heard and respected even if they are not determinative.

Second, the mediator will conduct the mediation in the manner in which it is most advantageous to the elder person. This means that the mediation needs to be scheduled in a place where the elder person would feel most comfortable, such as the home or nursing home, so as to minimize confusion. The mediation must also be scheduled at the time of day when the elder person is most cognitive and alert, typically morning. Finally, the mediator should ask the elder person if he or she wants a person there who will be there to offer support. Not surprisingly, that person is often a paid caregiver with whom the elder person has developed a relationship as opposed to a child or other relative.

Finally, since elder care mediations are usually multi-party sessions consisting of the elder person, a support person, children and possibly the children's spouses, you can imagine it is difficult to hear the voice of anyone except the most aggressive person in the group. That is why the mediator employs a policy of checking in with the elder person. The mediator always remains aware of the elder person's reactions, and if the mediator feels that the elder person is not hearing what is being said (both literally and figuratively), the mediator checks in with him or her and uses the mediation skills of reframing and restating what has been said to insure that the speaker's meaning is understood by all parties. Thus, the mediator is there to support each party's deliberation and efforts to understand the other's perspective without encouraging any party to adopt any particular point of view or resolution but always insuring that the elder person is part of the conversation. Given the number of participants, it is common that elder care mediation will be facilitated by co-mediators.

If you are familiar with mediation in general, elder care mediation may be very different from what you might expect. For instance, in divorce mediation, there are terms which need to

be discussed and resolved in order for the parties to enter into a separation agreement, and the focus of the mediation typically is on reaching agreement. In elder care mediation, however, a primary focus is on the communication between the parties and the empowerment of the elder person. This will ultimately lead to the elder person's willingness to accept an outcome in which he or she participated in the decision making process while the other family members are able to actually hear and respect the wishes of the elder person. Thus, mediation provided more than just a resolution in that it gave the elder person a voice and respect that he or she may not have achieved in an adversarial process.

Financial transactions between the parent and children

By Leona Beane

There are many situations where disputes arise when there are financial transactions, between a parent and children, and later there is a dispute as to whether the financial transaction was a "gift" with no expectation of its return, or whether it was a "loan", where there was an expectation of repayment with interest.

Many of these transactions are entered into without the advice of counsel and without any supporting documents to determine whether there was a "loan" or a "gift".

Mediation would be extremely useful in these situations.

Quite frequently, these types of transactions come to the surface in a guardianship proceeding. Sometimes these types of transactions also come to the surface via use of a power of attorney – questions being, did the agent under the power of attorney make proper disbursements, or was there breach of a fiduciary duty.

All of these situations are ripe for Mediation because they involve interpersonal disputes with extreme emotional conflict. The courts really can't handle such disputes in ways that will be beneficial to all. With mediation, quite frequently the end result is beneficial to all because creative solutions are being considered.

END-NOTE

There are additional areas of Elder Law that lend themselves very well to mediation, such as disputes involving senior housing, neighbor disputes, assisted living issues, grandparents and grandchildren, elder abuse, insurance issues, etc. Many of these are being mediated by community based free mediation centers, such as the one in Dutchess County.

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