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Focus

When Care Collapses

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Practitioners of alternative dispute resolution are well aware that mediations have their own unique personalities. This personality is created by the relationship between counsel, settlement positions of the parties, direct participation by the decision-makers and last but not least, the emotional tension surrounding the dispute.

Few areas of alternative dispute resolution contain more emotion than the burgeoning area of "elder abuse" cases. When a child entrusts a parent to a facility for the purpose of delivery of continued care, most children experience the internal tension between guilt and relief. The child usually has a family to manage, a job to go to and sufficient responsibilities that he/she is simply unable to care for a parent whose overall health situation is deteriorating. Is it any wonder that when the parent suffers an injury or death while at the facility that the adult child is driven to understand why? If there is any hint of negligence, the desire for retribution is concurrent with the need for redemption from guilt. "If only I hadn't put mom in that place." "They killed my mom." In some instances, inappropriate care results in untimely, undignified and painful death. In others, death was a byproduct of the parent's condition, not of the facility.

To mediate elder abuse cases, certain common principles concerning the burden of proof must be remembered. Most importantly, adequate time must be set aside in a structure suitable for the case, and with an interest in managing the emotional nature of the dispute. The general framework is basic tort theory. However, there are many industry regulations the breach of which may form the basis for a standard of care issue. See Welfare & Institutions Code Section 15600 (h). These issues will include staff training, adequacy of medical care and nursing care and profit motive of the operator. Medical providers often know little of the history of the patient, though the attending physician is required to see the patient once very 30 days for the first 90 days and every 60 days thereafter, according to 42 Code of Federal Regulations 483.40. There is a running battle as to what constitutes "seeing" the patient verses reviewing the chart notes and talking to staff. Where Medi-Cal is involved, attending physicians often note that the Medi-Cal payment is so paltry that the doctor is not paid to conduct individual full examinations.

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Significant remedies exist following the 1992 amendments to the Elder Abuse and Dependent Adult Civil Protection Act and Welfare & Institutions Code Sections 15657 et. sec. Punitive damages may be trebled in some cases. Under the Consumer Legal Remedies Act, punitive damages and attorney fees may be awarded for deceptive advertising in the form of slick brochures touting the wonderful facility and trained staff, when such is demonstrated to be a fiction. Because nursing home facilities are health care providers, MICRA (Business & Professions Code Section 6146 and Code of Civil Procedure 340.5) limitations generally do apply capping recovery for pain and suffering at $250,000 and legal fees at 25 percent, counsel for plaintiffs often look to punitive damage exposure before accepting representation in an Elder Abuse case.

In short, the nature of the case and the goal of pleading and proving punitive damages increased the emotional nature of the claim, and require special sensitivity by the mediator.

Mediation structure is very important to these and other emotional cases. The process may begin with an open caucus. Following the mediator's introduction, each side provides an overview of their case. In an elder abuse case, great care should be taken at the convening stage to determine whether the open caucus format is appropriate.

Prior to mediation, a conference call between counsel and the mediator should be conducted. This call will ferret out both the legal and emotional nature of the dispute. The conference will also be used to ensure that adequate time has been reserved and the necessary decision-makers will be present.

Before the official start of the mediation, it is often useful for the mediator to schedule a private session with the plaintiff (and counsel). This private session will establish rapport, and will provide an opportunity for venting and the displacement of anger. Often this anger has built up and is approaching a crescendo just as a settlement conference is about to begin. Thus, even if there is going to be an open caucus, an initial private session should be considered.

Briefs should be prepared well in advance. The mediator should be provided adequate time to understand the medical condition of the party who was placed in the institution. This includes adequate time to review the chart notes, relevant medical referrals and other records. It is quite helpful to create a briefing schedule at the initial conference call, and to reach agreement that briefs will be exchanged with copies to the decision-makers before the conference. Items that are for the mediator's eyes only would not be exchanged and would be provided to the mediator in a separate submittal.

Lawyers are familiar with the "distributive" form of negotiation. This is a tit-for-tat approach, where a demand is met with an offer that is met with a counter demand and so forth. This type of negotiation increases emotions. A number of mediators are skilled at "facilitative" negotiation. In this process, the mediator will engage in repeated individual dialogs concerning the claims and defenses. The mediator will

typically point out the risks associated with each side's position in an effort to keep each side focused on risk, and ensure maximum flexibility and compromise. The mediator will discuss specific settlement ranges with each party to the litigation and will work individually and privately to move the case to a point where the mediator has obtained commitment and authority within an acceptable range. The mediator will then secure a commitment to the acceptance of a specific dollar amount within that range from each party. The commitment having been thus obtained, the mediator will pronounce the case settled. In this manner, the settlement figure and collateral terms are obtained through dialog. Dialog is far more sensitive to the human and emotional issues than traditional negotiation.

Closing is as important as getting the deal. The mediator who obtains a verbal settlement, secures a handshake and makes a note in the mediator's file has not fulfilled the duties entrusted by the parties. The mediators' last job is to ensure that the deal does not go south. In emotional disputes, changes of heart often occur at 3 a.m. the morning after the mediation. It is therefore very important for the mediator to obtain a signed and binding stipulation for settlement (Code of Civil Procedure Section 664.6), executed by the parties and counsel, that sets forth sufficient terms to permit a petition to the court in the event a final released document is not signed. The mediator should explain this at the conference call and again during the introduction. In this manner, there will be no surprise.

A final note about collateral terms: Often confidentiality is a required term in the settlement of this type of dispute. Special terms such as this should be raised during the prehearing conference call and not after the fundamental terms for the settlement have been agreed on. Adding an additional and unexpected term, particularly at the end of a protracted and emotional mediation, runs a substantial risk of derailing the process.

Mediation is a facilitated negotiation. The mediator's "client" is the "deal." The "deal" is the common thread that has brought the parties before the mediator. "Deal" does not mean a settlement at all costs. The mediator's primary tool, indeed the mediator's commodity, is risk.

In order to facilitate discussion of risk, the parties should be sensitized in advance to the type of mediation they will encounter, and the mediator should set aside the appropriate time to work on an individual basis with the parties and to discuss risks with a clear awareness of the unique sensitivities applicable to this type of case. Risk does not mean a lack of compassion. Communication of risks, and discussion of interests, brings about resolution of these sensitive and important disputes.

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