

MEDIATION ADVOCACY IN ELDER ABUSE CASES

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(Originally published in 2000 in the Santa Barbara County Bar Journal "The Quibbler". Updated in 2003.)

Skillful advocacy in mediation is every bit as critical to the successful resolution of a case, as is the quality of advocacy in trial. This is especially true in Elder Abuse disputes, brought under the Elder and Dependant Adult Civil Protection Act (*Welfare & Institutions Code* " 15600 *et seq.*). These cases typically involve an alleged wrongful injury or death to an elderly or severely disabled adult, while in the care of a nursing home or residential care facility. The stakes are very high, and the emotional component is explosive. What should advocates understand about Elder Abuse mediation, to maximize the opportunity for achieving a good settlement? What are the legal pitfalls to be aware of, especially in the area of confidentiality?

This article outlines the unique features of the Elder Abuse case, presents several keys to successful mediation advocacy, and addresses the developing law of mediation confidentiality in Elder Abuse cases.

UNIQUE FEATURES OF ELDER ABUSE CASES

There are several unique characteristics of Elder Abuse cases which must be understood, if advocates are to use the mediation process wisely.

Plaintiff Issues: Plaintiffs are usually the family members of an elder or disabled person, who has died or been severely injured while in a nursing home. The family naturally experiences grief and anger, as in any serious injury or death case. In Elder Abuse cases, the grief is typically compounded by a deep sense of guilt. Our society is ambivalent about the common practice of placing elders in an institutional setting, when caring for them becomes too difficult. The family feels guilty about the decision long before injury occurs. When their worst fears are realized, in the form of perceived abuse with tragic consequences, they feel deeply that they have let down the elder at the time of greatest need. The guilt may be unstated or unconscious, but it is inevitably present.

Family guilt is one of the toughest barriers to settlement, because compromise feels like another failure to stand up for the loved one, who was made to suffer at the hands of strangers. Fighting for the loved one in litigation, therefore, has great emotional value for the family. It represents (1) standing up for the loved one (even if deceased); and (2) deflecting guilt. Settlement requires plaintiffs to let go of the guilt and anger - to put the battle behind them.

Defense Issues: Defendants face daunting legal and practical challenges that make it difficult to avoid liability. There are no more sympathetic plaintiffs (or decedents) than the elderly and severely disabled. Every juror will think of the loved ones that are, or

will be, in institutional care.

The “Elder and Dependant Adult Civil Protection Act” (EADACPA or “Elder Abuse Act”), *Welfare & Institutions Code* “ 15600 *et seq.*”, is a powerful tool for plaintiffs. It provides for enhanced damages upon proof of reckless or malicious conduct, including: (1) general damages of up to \$250,000 for suffering before death; (2) attorney fees; and (3) punitive damages. The Act applies to anyone 65 and older, or with “physical or mental limitations that restrict [the] ability to carry out normal activities.” (*W. & I.* “ 15610.23) A broad range of conduct is prohibited within vague definitions of “abuse, neglect or abandonment.” Recklessness may not be hard to prove, when the foreseeable consequence of insufficient care is serious injury or death. Defendants do not have the full protections of MICRA (*Civil Code* “ 3333.2) if more than negligence is established. (See, *Delaney v. Baker* (1999) 20 Cal. 4th 23).

The volume and complexity of state and federal regulations of skilled nursing facilities rivals that governing the nuclear power industry. Well-run nursing homes are routinely cited for minor violations, which is awkward to explain to juries. Funding for the care of infirm patients through private insurance or governmental sources is usually minimal, causing many operators to struggle with staffing deficiencies. Low wage employees may not be highly committed to the welfare of the patients. Many patients suffer from dementia, chronic pain, and depression, are combative, and are prone to injury. Many will die within weeks or months of admission, to the horror of their inquiring families. Allegations of serious abuse can threaten licensing and lead to criminal penalties. Adverse publicity can destroy a nursing home business.

Advocacy with a Human Touch: With these powerful factors driving many Elder Abuse cases, ordinary mediation advocacy (highlighting trial risks and costs) is not enough. Advocates should look for opportunities to acknowledge the difficult issues facing the other side, to generate a spirit of understanding and problem solving. Plaintiff=s counsel should usually avoid the temptation to collectively demonize the defense. Clearly present the legal consequences of specific objectionable conduct, while supporting the *people* representing the defendant in the difficult task of finding a solution. Defense counsel can usually find ways to emotionally validate the plaintiff family, while objectively presenting the facts helpful to the defense. With patience, a skillful mediator and a well-conceived process, unproductive tension is relieved, and a fair settlement becomes possible.

CHOOSING A MEDIATION PROCESS

There are, broadly speaking, two approaches. (1) *The Case Management Approach*, and (2) *The Limited Mediation Approach*. For significant cases, the first approach is recommended. It can result in large cost savings, and will maximize the potential for settlement.

The Case Management Approach: This approach involves hiring the mediator early to work with counsel on a joint plan to bring the case to mediation with both sides well prepared, with realistic expectations, while controlling costs.

The attorneys and mediator will have a series of conference calls, or pre-mediation meetings, to design the process, including pre-mediation discovery, and to stay on track for the scheduled mediation sessions. The key question to be addressed at the first conference is: *What steps must take place before negotiation to maximize the potential for settlement?* The agreement will involve a focused discovery schedule: informal sharing of documents (or authorizations), and perhaps key depositions. In some cases, having clients or insurance representatives participate in the preliminary conferences helps build cooperation. The parties do not waive any right to pursue complete formal discovery, if mediation fails. The mediation session(s) should be set early enough to allow time for completion of discovery, if settlement is not achieved. Any preliminary conferences are covered by the confidentiality protections of *Evidence Code* " 1115, *et seq.*

The parties may wish to plan for several mediation sessions. This can be critical in Elder Abuse, to allow time for emotional barriers to fall and to evaluate what is learned at the mediation table. For instance, a first session may involve factual presentations and catharsis for the plaintiff family, with no pressure to engage in negotiation. Depending upon the wishes of the parties and the emotional content of the dispute, it may be wise to have some of the defense presentation made only to plaintiffs' counsel, outside the presence of the plaintiff family. Expert opinions may be presented at the first session, or a later one. The final session will focus on negotiation. A multi-step process has the great benefit for both sides of developing a cooperative attitude and some level of trust before trying to negotiate. When counsel are constructively engaged, the spirit of the enterprise tends to rub off on the clients, reducing the emotional tension inherent in Elder Abuse cases.

The mediator should *never* have a decision-making role in resolving discovery disputes. The discovery referee (if needed) should be a different person. Blending the roles reduces candor and cooperation, compromises mediator neutrality, and raises troubling issues about the mediator reporting to the court. *See, Foxgate Homeowners Association v. Bramalea California, Inc.* (2001) 26 Cal.4th 1.

Limited Mediation: This approach leaves pre-mediation planning to counsel, with little mediator involvement. Even with this approach, it is wise to have at least one conference call with the mediator before a negotiation session in a significant case, to be sure your opponent is ready, to share perspectives on the monetary range under discussion, and to agree on who will personally attend the mediation. Controlling expectations on both sides of the table before negotiation begins, and eliminating the potential for unpleasant surprises that destroy trust, are keys to a successful mediation.

The Timing of Mediation

Mediation has become so routine, that some attorneys give little thought to the timing of the mediation. If another lawyer or the court suggests it, many lawyers just get a date and go forward. A more deliberate approach is recommended.

At what point in the development of the case should the parties engage in a

mediated negotiation session? The answer is: *only when the essential preparation has been done*. You must be well prepared to impress your opponent *and your client* with your mastery of the case, and your ability to persuasively present it. Few plaintiffs will significantly compromise on the death or suffering of a loved one, and no defendant will pay large sums of money, without persuasive reasons to do so. Attorneys may not have the client's trust, and client control needed to guide a negotiation, if the opposition is better prepared and makes a stronger presentation at mediation.

Use the mediator to help the parties agree on appropriate timing for the negotiating session. A mediation that is commenced prematurely will usually fail at the initial session, resulting in client aggravation, and reduced potential for settlement.

Preparation, Preparation, Preparation

There is no substitute. Some lawyers waltz into mediation barely knowing the facts, stumbling over party names, and having engaged in no risk analysis with their clients before the hearing. It is hard for a mediator to be supportive of an attorney's performance before the client, when this occurs.

Good preparation should include the following:

1. **All essential evidence must be known.** The essential facts should be known, key documents obtained from the facility and investigating agency, and important witness statements or depositions taken before mediating an Elder Abuse case. Most attorneys will informally share evidence, if there is an understanding that all sides are working toward mediation. Basic expert analysis should be obtained before the mediation. The stakes are high, and the choice to spend perhaps \$10,000 to \$25,000 on an early expert work-up will more than pay for itself.
2. **Prepare your client to participate.** This means explaining the mediation process, and preparing the client to hear unpleasant things from the opposition. Let the client know that it is best to hear these things now, in a more cooperative and informal setting, where they can be evaluated and put in proper context. Explain that the other lawyer has a duty (even in mediation) to be a zealous advocate, and may feel duty-bound to argue unpleasant points which may have little bearing on the negotiation.

Prepare your plaintiff client to speak at the mediation, if you have a client that can do so effectively. Letting the plaintiff family speak in front of management, defendant doctors, and insurance representatives is a tremendous catharsis, without which some plaintiffs do not feel that they have been heard. It also allows defense decision-makers to evaluate first-hand the jury appeal of the plaintiffs.

Constructive and sincere comments from the defense can diffuse tension, and help plaintiffs understand the full picture. Prepare the defense client to participate in something more than zealous advocacy. Even if liability is hotly contested, plaintiffs' grief and unspoken guilt are usually genuine. A little conciliation from the defense may help plaintiffs

to make a tough settlement decision. If there are to be apologies or expressions of sympathy, they must be genuine and should not immediately precede or follow strident advocacy by counsel. They may be best expressed informally at breaks, or before a session begins. However, beware of confidentiality issues (see below).

3. **Analyze the case for your client before mediation**, while encouraging the client to have an open mind to learn new information and to hear the perspective of other knowledgeable people. If a client is hearing about a significant risk for the first time in mediation, it may be hard to factor that into the client's settlement expectations.

Insurance and corporate representatives have typically done the analysis before mediation. What the defense decision-makers may not have assessed are the sincerity and credibility of plaintiffs. This can be the single most important factor in evaluating jury verdict potential. Encourage your insurance clients to keep an open mind on critical issues, and to use the neutral to gain a disinterested perspective on how the jury may perceive the plaintiffs. Finally, remind your insurance clients that new information is learned in virtually every mediation, even after extensive discovery.

4. **Be prepared to handle monetary issues**. Have a structured settlement broker present or available by telephone, where appropriate. The defense should come fully prepared to negotiate in a realistic range. A realistic assessment and committee process should precede mediation, with the understanding that the defense must be flexible (up or down) based on what is learned at mediation. If the mediation unfolds as a mere theoretical discussion, with no realistic offer being made, it can make subsequent negotiation much more difficult. If a session is not going to involve serious negotiation, that should be agreed upon beforehand to avoid frustration.

5. **Exchange realistic settlement proposals well in advance of the negotiation session**. If neither side has a clue about the general range under discussion, initial attempts to mediate will go nowhere. Plaintiff expectations must be managed. Corporate defendants and carriers cannot generate significant authority without lead time. If a multi-step process is used, proposals may be exchanged after the initial session(s), but well in advance of the negotiation session. When pre-mediation proposals are dramatically apart (even allowing for posturing), bring the mediator into the discussion to narrow the gap, or assess what further sharing of information is needed to get close enough for a fruitful negotiation.

6. **Bring the real decision-makers**. This point is mentioned under "preparation" because the failure to have the right people in the room often results from a last minute attempt by counsel to secure client attendance. For plaintiffs, this may include non-party family advisors or extended family members who must be consulted. For defendants, it means higher level corporate or insurance representatives. The defense should always bring a high level representative of the defendant facility, even if that party has no say in financial settlement decisions. Plaintiffs invariably want to tell their tale to a real representative of the perceived wrong-doer. In larger cases, there is no upside to either side in not bringing key people personally to mediation. Even if adequate authority is

conveyed to those attending, the opposition will wonder whether a more reasonable position might have been possible if the decision-maker was there to hear from the mediator. This unknown gets in the way of settlement. A decision-maker who is present and says “absolutely no” has far more credibility, than one who digs in heels from afar. A plaintiff’s lawyer without a client, or a novice adjuster who claims to have “full authority” does not cut it.

7. **Brief carefully and share your brief with the opposition.** The goal is to bring the other side to the table fully prepared to evaluate the case in terms of your strengths, and impressed with your level of preparedness. If they hear some of your strong points for the first time at a negotiating session, it is difficult to alter expectations quickly. A “hide the ball” approach makes no sense, if the goal is to achieve a good settlement. If certain features of your investigation must be kept secret, until confirmed in the form of admissible evidence or to save something for trial, brief those separately to the mediator. There is no prohibition against *ex parte* contacts with the mediator. The law in Elder Abuse is quite new and developing rapidly. Many attorneys who practice in the field are not well versed in the law. Do not miss the opportunity to impress the opposition with your mastery of the subtleties of the law.

8. **Prepare a compelling presentation for joint session.** Attorneys sometimes think that a thorough joint session is a waste of time. After all, the opposing attorney has engaged in discovery, has read the mediation brief, has previously discussed the case at length with you, and has certainly reported to his or her client. Why cover old ground, and risk upsetting the other client with your unpopular spin on the case?

There are several false assumptions in this reasoning. Opposing counsel has interpreted discovery through the lens of his client’s interests, and may not have focused sufficiently on the critical evidence. Decision-makers across the table may have heard a distorted version of reality through their attorney, or may not be well informed about the key evidence. Even if we assume that all sides have the same perception of reality, and that counsel have evaluated it objectively for their clients (a monumentally optimistic assumption), there is great benefit to framing all issues clearly as a prelude to negotiation. The opposition needs to see you in action, and to see your client. A skillful mediator will help clarify where the key issues lie, where there are points of agreement, and will help diffuse unproductive tensions through the joint session process. Consider using visual aids, including power-point presentations. It can be highly effective, if the case warrants it and the drama is not overdone. The defense showing a video of what a facility is like (a defense “day in the life”), if the facility is impressive, can be persuasive. Plaintiffs showing photos or videos which highlight tender moments with the deceased is very effective. When an audio-visual presentation is planned, alert the mediator and opposing counsel well in advance of the session. Attorneys and parties occasionally take offense at slick presentations, when they have not prepared something comparable.

If the opposing party leaves the joint session knowing that you are totally prepared to try this case, are enthusiastic about your prospects, have carefully evaluated the strengths of their position, and can tell a compelling story, your client will see a better result.

9. Consider bringing key witnesses and experts to the mediation. This has much more impact than summarizing a deposition, or telling the opposition what a key undeposed witness might say.

10. Defense: Be conciliatory and acknowledge genuine grief. This costs you nothing, and often helps the mediator work privately with plaintiffs. The suffering is usually genuine. Plaintiffs will not be able to recognize the wisdom of your position, if you do not show them that you see the reality of their experience. This does not preclude you from stating your legal and factual points persuasively, and negotiating aggressively.

Confidentiality Concerns

Confidentiality is the cornerstone of mediation, especially in Elder Abuse. Confidentiality encourages candor and a willingness to compromise. Without it, direct client involvement is minimized, attorney posturing is the norm, and settlement rates are much lower. Unfortunately, there are gaps in the current law of confidentiality, and gray areas which the courts have yet to clarify. **Be aware of the limitations on confidentiality, and advise the clients accordingly.**

The California Mediation Act (*Evidence Code* “ 1115 *et seq.*) provides that communication in mediation (including documents generated for mediation) are not admissible in a *civil* trial or arbitration, and that the mediator may not report anything to the court about the mediation. *Evidence Code* ‘ 703.5 states that a mediator is not competent to testify about what occurs in mediation. California law does not preclude a court from compelling testimony in a *criminal case* about what occurred in a civil mediation. See, *Evidence Code* ‘ 1119; and *Rinaker v. Superior Court* (1998) 62 Cal. App. 4th 155. In the realm of Elder Abuse, criminal liability is a concern in some cases, and frank statements in mediation may damage a defendant=s prospects in a criminal trial.

Even in purely civil cases, appellate courts have occasionally fashioned exceptions to the confidentiality promised in the California Mediation Act. The California Supreme Court took a very strong stand in support of confidentiality in *Foxgate, supra*, noting that the statute provided for “no exceptions.” Also in that decision, however, the court approved exceptions articulated in two recent cases: *Olam v. Congress Mortgage Company* (October 1999) 68 F. Supp. 2d 1110 (mediator compelled to testify regarding consent to a mediated settlement agreement); and, *Rinaker v. Superior Court* (1998) 62 Cal. App. 4th 155 (right to confront and cross-examine witnesses in juvenile hearing takes precedence over confidentiality). The California Supreme Court is currently reviewing *Rojas v. Superior Court* (2002) 102 CA 4th 1062, in which the Court of Appeal ruled that production of certain documents, produced for mediation with the assurance of confidentiality, could be compelled in a later litigation. The Court of Appeal employed a privilege analysis, balancing competing policies and equities after an *in camera* review of the documents. There is a strong public policy protecting the elderly and dependent from abuse. The important public policy favoring mediation confidentiality is still new territory for most courts, and may not be given the same weight when the two policies conflict.

What does all of this mean for the practitioner? Advise your clients carefully about the true scope of confidentiality in Elder Abuse mediation. In egregious cases, where aggressive administrative agency involvement or criminal prosecution is likely, client communication must be carefully monitored. In most cases, the advantages of full participation in mediation far outweigh the risks.

Conclusions

Mediation has made it possible to resolve a high percentage of Elder Abuse cases, with greater client satisfaction and lower cost. Wisely used, the benefits far outweigh the risks. Attorneys who carefully prepare, and use the full range of their advocacy and interpersonal skills, will reap great rewards for themselves and their clients.

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