First and foremost, welcome to our new members of the Elder & Special Needs Law Section who have joined us this year! We’re so glad you’re here. A huge thank you is also owed to our returning members who contribute so much to our Section and all of the projects that we have underway at any given time. I am excited to be serving as your Chair and am looking forward to working with all of you this year.

Our Section continually strives to enrich and improve the lives of the elderly and those with disabilities, and we can do that best when we support and are supported by those with the same goal. I encourage each of you reading this to make the most of your membership and find a way to be actively involved in the Section this year. Whether you are a veteran practitioner or brand new to this practice area, we value your perspective, time, and ideas. We have several committees and projects underway already, and a few upcoming items to get you started are:

- **Law School Table Talks** – Our Membership Committee Chair, Jennifer Roden, is heading up efforts to ensure that law students know about our Section and the benefits of joining. She would love your help! If you are an alum or in the area, please register for one of these events on the NCBA website.

- **Upcoming CLE Opportunities** – We have a ROCKSTAR CLE committee this year (chaired by Nicki Applefield, Kara Gansmann and David Silver),

Mom, recently widowed and now living alone, fell and broke her hip. As Dad always took care of the details, Mom was just getting used to managing on her own. Now she can’t.

Her two older children live in other states; her youngest lives nearby. There is little agreement among any of the four family members about what to do now, though the two out-of-town siblings share the belief that their baby brother cannot be relied upon to provide for Mom’s care.

Situations like this can be extremely difficult for a family to manage. When a family emergency involves an elderly member, disruption often ensues – family roles are switched, old lingering scores may reemerge, and long-established sibling roles can create conflict, while the elder struggles to retain independence.

Elder mediators help families come together to discuss such difficult issues. Trained in conflict resolution, the elder mediator uses techniques that allow families to find common ground. Elder mediation offers an alternative in which family members are given voice to express their concerns and issues in a safe and neutral forum. In the process, elder mediation helps the family preserve and build relationships while avoiding the risk of constant bickering, impasse, or litigation. Elder mediation introduces new tools for effective communication and models skills essential to managing the inevitable challenges aging brings to families.

The best time for elder mediation is before it’s really needed. How can the children and mom agree when it’s time for mom to stop driving? Is there enough money for mom and dad to live out their lives comfortably? Which siblings will contribute to caretaking, and how will they divide their responsibilities? Do mom and dad even want their children involved, or would they prefer for any help to come from outside the family?

A facilitated discussion, which is essentially a mediation, affords the family the opportunity to create plans and develop methods of communication for managing issues as they emerge. Regardless of whether an advanced plan has been devised, at the time of a crisis elder mediation is a life line for constructive problem solving.

This article discusses the process of elder mediation. It is intended for families needing assistance, or professionals, advisers and clergy who have clients who do.

Of course, there is no one protocol for elder mediation. Described here is a five-step co-mediation model that provides an effective framework for productive family discussion and decision-making. The steps are: introductory interviews, private sessions with each stakeholder, mediation planning, family mediation and follow-up.

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Introductory Interviews

The introductory interviews, typically conducted by telephone, are, in this model, free of charge. The purpose is to explain the mediation process, identify the stakeholders, and gauge willingness to participate. The list of interviewees begins with suggestions from the person who first contacted the mediators. As the interviews proceed, other stakeholders may be identified and contacted, including financial, legal, health care or spiritual advisers, friends, or even former family members. In these discussions, the mediator assesses if there is a willingness of the key people to participate. Those willing are asked to sign an Agreement to Participate, which articulates the tenets of mediation such as neutrality and confidentiality, the role and limits of the mediator and the role of the participant. When a stakeholder is unwilling, the mediator and the family ascertain whether to proceed. The question hinges on assessing the limits and strength of decisions made without the stakeholder or perhaps the value of a discussion in the absence of a stakeholder. Indeed, a central issue may be devising ways to work with or without the family member who declines the mediation.

A key issue is whether the elder participates. Often this hinges on the elder’s emotional and cognitive capacity. Including the elder is preferred. Even with somewhat diminished capacity and inability to help with decisions, the voice of the elder may be valuable. A geriatric social worker or mental health professional may be helpful in determining the capacity of an elder to participate in the mediation. These professionals often attend the mediation to represent the voice of an elder lacking capacity to participate directly.

Private Sessions

This phase begins after securing participation agreements from the essential stakeholders. Extensive interviews, mostly by telephone, delve deeply into issues, concerns and goals for the mediation. The elder, if possible and practical, is interviewed in person. This avoids any difficulty an elder may have with telephone conversations. It also may help ease any concerns the elder might have with the mediator and the mediation process. Once interviews have been completed, a picture of the family dynamics begins to form.

During the interviews, the lead mediator screens for evidence of elder abuse or neglect. If suspected, the mediator must act decisively. Mediation may be deemed unsafe to the elder, family members or the mediator. When there is suspicion of unlawful abuse, the mediator determines whether to report it to the appropriate authority. This ethical responsibility is never taken lightly and can be one of the most difficult decisions a mediator has to make. If it is appropriate to proceed, the mediator must determine how to handle the issue and behaviors that may become problematic.

Meeting Planning

At this stage, the lead mediator briefs the co-mediator about the case. Together they prepare a proposed agenda and a topic list; these items are prepared without attribution in order to preserve the confidentiality of the stakeholders. Both items are sent to the participants, usually by email, for comment and approval.

If some topics appear to require specific information or expertise, the mediators may suggest that participants invite professional advisers, consultants or advocates to attend the mediation.

Care is taken to find the right location. Consideration is given to the neutrality of the venue, and its comfort and accessibility to the elder. Lighting and acoustics are also important as well as access to rest rooms, break out space for private caucuses should they be needed, and a place for refreshments.

Scheduling the mediation is often a challenge. Time allotted for mediation is dictated by the family's needs, including the complexity of the issues they plan to discuss. If families are geographically dispersed, travel may become an issue. Weekends or holidays may be the best option. Video or telephonic participation, though not preferred, may be necessary. In most cases, it is advisable to reserve a full day, though it may not be needed. At other times, one session is not enough. If anticipated, the mediator may suggest contingently scheduling a meeting the following day.

Family Mediation

Because the group has been introduced to the mediator who conducted the intake interviews, when the mediation begins the co-mediator welcomes the participants individually. The co-mediator reviews the principles of mediation, underscoring that it is voluntary and affirming the duties of the mediator to maintain confidentiality, impartiality and neutrality, as well as any exceptions to these duties. The co-mediator also explains the mediation process, including the importance of active listening and keeping an open mind.

Next, the participants, all of whom were asked at the private session to prepare to share with the group their interests, concerns and goals for the mediation, are offered five minutes to do so, one at a time. In order to produce a “safe space” for the speakers, these comments proceed without interruption, cross-conversation, or criticism from other participants, and the mediators also refrain from asking questions, summarizing, or reframing.

The group is then asked if they wish to establish ground rules for the meeting. Ground rules might address how participants wish to handle interruptions or personal attacks – for example, whether they should be discouraged, and, if so, how actively and by whom, a mediator or family member? The mediators may also offer suggestions about rules they have found to be helpful in past discussions.

When the group has agreed about how they should proceed, the next step is reviewing the topic list which they helped create in the planning stage. Topics that are approved are recorded and displayed on a flip chart or a white board so the entire group is able to view the list at the same time, together. Topics are not usually listed in any particular order of importance since they may change as the conversation proceeds. The group is then asked where to start. The mediators may suggest starting with a topic that might be easier to resolve in order to acclimate the family to the process, but, again, the decision is up to the participants.

Participants explore each topic by sharing their respective interests and concerns, which the mediator also lists. The purpose is to channel attention to the intricacies of the problem rather than focusing only on solutions. Greater understanding of the issue gives rise to more creative solutions and diverts family members from pressing strongly held positions on the subject.

After individual interests are fully explored, the discussion turns to proposals. A proven method is to ask the group to list any option that comes to mind. That list is displayed alongside the one for interest and concerns. Once ideas are exhausted, the mediator facilitates a discussion of the merits of the proposals.
A test often used to assess group agreement is called the Consensus Building Model, developed by Lawrence Susskind and Jeffrey Cruikshank. Each participant is asked to rate their support of a proposal. One can wholeheartedly agree with a proposal, merely think it is a good idea, or simply agree that they can live with it. Otherwise, one can have reservations or serious concerns about a proposal and want or need to talk about these with the rest of the group. Finally, one may completely disagree with the proposal and wish to block it. Those who cannot support the idea are asked to explain their concerns and suggest constructive alternatives. A consensus is reached when everyone is able to at least live with the idea.

Another, more streamlined version of the method is the “Yes-No-Maybe” approach, in which for each proposal the stakeholder has three options: “yes,” “no,” or “maybe. A proposal is approved only when it receives all “yes” votes and rejected with a single “no.” A “maybe” voter must offer an amendment that would change their “maybe” into a “yes.”

After agreement is reached, the discussion turns to implementation – that is, how will the agreement be accomplished? This discussion centers around questions such as who will do what, and when; whether there are any costs involved and how they will be paid; are there time constraints and will a schedule be advisable or even necessary. The mediators may be more active during this phase, asking questions to help the group develop a plan that is reasonably achievable. And, if needed, they may use either of the two models described above to aid the family to achieve a consensus about how to go forward.

At the end of the mediation, the mediators may assist in drafting a summary of the session. This summary simply lists any understandings reached throughout the mediation, preferably using the group’s own words. The summary is not signed by any of the participants and states expressly that it is not intended to be a binding contract, but may be used by legal counsel to prepare one if the group desires.

Follow Up

Following up with the family can be extremely valuable, knowing that mediators will be checking progress adds motivation to continue working. Mediators ask the family at the end of the meeting for permission to follow up. This service is without charge. If the family agrees, a mediator will contact a designated family member to discuss progress and to offer advice and referrals as needed. Over time, if new issues emerge, families may choose to participate in additional mediation; follow up contact can help with this decision as well. (For later sessions telecommunication may be a more practical approach when the family members are geographically dispersed and the cost of travel is a concern. Familiarity with the process and skills learned in the first mediation can make this a more viable option than for the initial mediation.)

Conclusion

Elder mediation can be extremely beneficial to families planning proactively for the care of aging family members, or to those who are experiencing age-related family crises. It requires commitment of time, emotion, resources and patience, but that commitment can be well-rewarded. When families work hard together and find resolution to their concerns the experience is empowering. Elder mediation strives to foster communication and strengthen relationships, and it offers a model for families to later resolve – perhaps on their own, without a mediator – new issues that are likely to arise in the future.