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## How to mediate disputes involving the elderly

Many disputes involving the elderly are appropriate for mediation, as they involve people likely to have ongoing relationships — a situation that always calls for serious consideration of mediation as the dispute resolution forum.

Elder disputes may involve health issues ranging from selecting a particular doctor to end-of-life decisions; financial issues, such as how to handle investments and who should make decisions about money; and, quite frequently, disagreements about living arrangements.

Most elder disputes also involve conflict arising out of the manner in which information is communicated among family members and other interested parties.

Elder mediation can differ from mediation in other types of cases in a number of important respects. Court approval is often necessary to implement mediated agreements.

Also, a mediation process where the mediator conducts extensive meetings or phone conferences with the participants ahead of the joint mediation session is frequently used because of the number of people involved.

While many mediations involve only the elder and two or three of the elder's children, the possible participants may also include siblings, spouses, extended family, any existing guardian of the person or property, accountants or other financial representatives, a new partner of the elder, social workers, caregivers, adult

protective services or other agency representatives, physicians, clergy, neighbors, friends or a guardian ad litem. (It should be noted that the presence of a guardian ad litem at the joint mediation session may impact confidentiality, as the guardian might be asked to report to the court on what occurred.)

Counsel should select a mediator who is experienced in facilitating difficult and often emotional discussions, comfortable with working with the participants in a joint session with limited use of individual caucus meetings and skilled at encouraging constructive communication among the participants to help them generate and evaluate possible options for resolution and lay the groundwork for more effective communications with each other in the future.

One of the most perplexing aspects of elder mediation for attorneys is how to determine whether the elder should be at the mediation.

This decision is not necessarily based on a legal standard such as capacity to enter into a contract or ability to conduct the activities of daily living.

If the elder is completely incapable of expressing any opinion on the issue to be mediated, the answer is easy — the elder would not benefit from being present at the mediation. If the elder is less than fully incapacitated, however, accommodations should be made if possible to allow for participation.

As set forth in the Model Standards of Conduct for Mediators, the mediator and the parties should consider that there may be circumstances where a person may not have the



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legal competence to enter into a binding agreement, but may still benefit from attending the mediation with a representative and participating and providing input to the extent possible.

For example, even if the elder can no longer manage her medications or checkbook, she may still possess a strong opinion about not living with a particular family member.

The Center for Social Gerontology in Michigan has developed a series of questions to help the mediator, lawyers and parties determine if the elder should participate, looking at such factors as history of expressing a consistent opinion; the ability to understand what is being discussed; the ability to identify the participants; the ability to understand the roles of the mediator, lawyers and other participants; the ability to listen and comprehend the concerns of the other participants; the ability to generate and evaluate options; and the ability to understand the consequences of agreement.

It is also critical that the elder has the ability to participate without feeling intimidated by other parties.

Elders may also need a variety of physical accommodations to

participate meaningfully in mediation.

Scheduling the mediation early in the day, limiting the session length, conducting it at the residence of the elder or another easily accessible location, making sure the furniture is comfortable and ensuring that parties will be able to hear one another can all be part of a successful elder mediation.

Mediation is particularly useful in contested adult guardianship cases because the disputes typically involve many issues that are not within the jurisdiction of the court to decide.

Moreover, the best ideas for creative solutions often come from family members and caregivers with intimate knowledge of the particular situation.

As described by Susan D. Hartman in her publications on adult guardianship mediation, mediated resolutions can promote less restrictive alternatives to full guardianship including limited guardianship, single transaction orders, trusts, carefully drafted powers of attorney or advance health-care directives, representative payees, joint accounts with a trusted person, electronic bill paying and deposits or use of community-based services.

Mediation can also preserve relationships and reduce repeat trips to court.

In addition, so long as the mediation process does not undermine the important role of the court in protecting the elder's civil rights, mediation offers a way to preserve the personal dignity of the elder and enhance party self-determination.