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The Challenges of Mediating Disputes Involving Elders

ELDERS COME TO THE MEDIATION TABLE in a wide range of civil and probate disputes. In these cases, mediators and lawyers must keep several considerations in mind. While the term "elder" may be statutorily defined for some purposes as a person over 65 years of age,[1] an elder in the mediation context is simply an older adult who may be demonstrating certain mental and physical debilities that naturally occur with advancing age.

Elders have varying degrees of capacity to participate in the mediation process and make informed decisions affecting their financial affairs and physical well being. They may have no impairment whatsoever and be able to competently make binding decisions concerning their affairs. Or, they may participate with a court-appointed conservatorship or an appointed agent pursuant to a power of attorney. Elders may be capable of protecting their own interests but may need support persons—such as relatives, caretakers, or professional advisers—who can provide emotional support, serve as sounding boards, and assist with special needs.

The mediator and counsel should be alert to the issue of whether an elder party requires some form of legal or court-supervised representation. For example, while many aging parents with serious physical or mental impairments are cared for by their children, without any form of legal representation an elder parent may lack the capacity, and children the requisite authority, to proceed on the elder's behalf. Maximizing the ability of an impaired person to participate and helping the parties focus on the special needs of the elder is the special charge of the mediator in elder disputes.

The Los Angeles Superior Court routinely orders cases to mediation under the court-supervised mediation program that was established pursuant to Code of Civil Procedure Section 1775.5 as an alternative to judicial arbitration.[2] The court's ADR office administers a pro bono panel of qualified mediators for civil cases through which a mediator serves for three hours without charge and charges agreed-upon hourly rates thereafter. Parties are always free to select their own private mediator or one from the court's party-pay panel.[3] The court adopted a special set of probate mediation rules for ordering contested estate, trust, and conservatorship disputes to mediation, which include a special private-pay probate mediation panel administered by the court's ADR office[4] and the express power to order parties to mediation on a repeated basis.[5] However, since the recent California appellate decision in *Jeld-Wyn* v. *Superior Court*, the probate court has reportedly refrained from ordering participants to mediation under its special rules, successfully encouraging the use of mediation on a voluntary basis or referring participants to the court's regular pro bono mediation panel.[6]

California Rules of Court 3.850 et seq. set forth the minimum rules of conduct for mediators who serve on panels in court-connected mediation programs. The rules are intended to guide the conduct of mediators in these programs, to inform and protect participants, and to promote public confidence in the mediation process and the courts.[7] The rules apply to attorney mediators on the court's panels for either general civil or probate cases.[8] The rules are not applicable to retired judges, but retired judge mediators are encouraged to follow them.[9] Private mediators not serving through the court panels are not subject to the Rules of Court but are guided by the widely used standards of practice for mediations upon which the Rules of Court are based.[10] Counsel can expect good mediators to employ these rules and can insist upon their implementation in appropriate circumstances. Mediator conduct rules that are especially pertinent to elder cases include those that involve the principles of voluntary participation, self-determination, and a procedurally fair and balanced process.

Capacity

Determining whether an elder who appears at a mediation session has the legal capacity to enter into a settlement agreement raises several interesting issues for the mediator and counsel. For example, consider an action in which the elder is the intestate beneficiary of a son's estate, but a friend of the son is the designated beneficiary in a contested holographic will offered for probate. The attorney for the elder takes the mediator aside and confidentially asks for help to assess whether the attorney's elder client has the requisite capacity to settle the matter. Counsel is concerned because the client seems to be overly influenced by a live-in caretaker, and the elder's mind sometimes wanders. Counsel questions whether the elder can make good decisions.[11] What should the mediator do?

California Rules of Court 3.853 provides that "a mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties."[12] The mediator thus has an obligation to make sure that the elder party is capable of participating. This obligation is bolstered by Rule 3.857(i)(2), which permits a mediator to terminate the mediation when he or she believes that a participant is unable to participate meaningfully in negotiations.[13] It is quite possible that the mediator and a party's counsel could determine that the elder party is capable of participating meaningfully in the mediation, yet lack certainty that the elder has the capacity to enter into a binding contract.[14] Elders may freely and fluently participate, artfully articulating their wants and needs, all the while masking diminished mental functioning.

Whether or not a person has capacity depends upon many facts and circumstances. An assessment by a geriatric psychiatrist or other medical professional may be required. The court has the power to determine the issue of legal mental capacity under Probate Code Sections 810 through 813. A finding of lack of capacity requires evidence of one of the deficits in mental functions set forth in Probate Code Section 811, and the particular deficit must correlate to the decision to be made.[15]

In particular, Probate Code Section 812 provides that:

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> [A] person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:
> (a) The rights, duties, and responsibilities created by, or affected by the decision.
> (b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision.
> (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The parties and their lawyers, not the mediator, should make the threshold determination that the elder has the requisite capacity to proceed. The mediator's primary role is as a facilitator to assist the participants in jointly, or separately, determining that issue. Mediator standards of conduct suggest that the mediator refrain from giving legal advice or forming legal opinions.[16] On the other hand, if the mediator strongly suspects or reasonably believes that the elder party cannot either meaningfully participate or make a binding decision, the court rules would suggest that the mediator terminate the mediation.[17]

To begin to address the capacity issue, the mediator may initiate a separate conversation with the elder client and the elder's counsel to help the participants obtain a sense of the elder's ability to comprehend the nature of the proceedings, discuss the issues, and make informed decisions about the subject matter of the dispute. This assessment may include a conversation with the elder's live-in caretaker and the elder about how they customarily interact. Many times, other support persons can assist in the decision-making process.

If the mediator (or attorney and elder) feels that the elder is capable of meaningfully participating in the process, but there is still an issue of capacity, the next step is to consider whether the other party needs to be advised that there is an issue as to the elder's ability to enter into a binding contract. The mediator should encourage disclosure to the other party because of Rule of Court 3.857(b), which requires that the mediation process be conducted in a procedurally fair manner. "Procedural fairness" means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions.[18] Proceeding without informing the other party could cause harm to the other party, who might later find out that the settlement agreement obtained through arduous negotiations was unenforceable. Rule 857(i)(3) provides that a mediator may terminate the mediation when the mediator suspects that continuation of the process would cause significant harm to any participant or third party.[19]

Whether the mediator raises the issue of capacity in the presence of the elder or in a sidebar with both counsel is an issue of discretion. If either or both counsel agree that the elder party has the requisite capacity to make a binding decision, then a writing should be created to memorialize that fact. This could be as simple as a statement of agreement that all parties have assessed the elder's capacity to enter into the settlement agreement. If this conclusion was based upon observations, counsel may record their observations in a separate memorandum that could be lodged in the file or presented to the court for a determination of capacity or for court approval of the settlement agreement.

The documented assessment of capacity protects the interests of all parties, because it helps preclude a party from alleging that the elder party's lack of capacity is a ground for nullification of the mediated agreement. It is important that the written capacity assessment contain an express agreement making it admissible. Evidence Code Section 1122(a)(1) provides that a written document (such as the capacity assessment) prepared during the course of a mediation is admissible if an express written agreement to admit it is signed by all mediation participants, including the mediator. Otherwise, the provisions of Evidence Code Sections 1115 et seq. make mediation communications, including writings made in the course of mediation, inadmissible. Alternatively, the capacity assessment could be contained in the settlement agreement itself and made admissible by Evidence Code Section 1123, if the settlement agreement is made expressly admissible by its terms or contains words to the effect that it is binding or enforceable.

A lawyer who believes the elder client lacks the requisite capacity to enter into a settlement agreement should take measures that may include seeking appointment of a guardian ad litem[20] or conservator or creation of a special needs trust.[21] The lawyer should be mindful that the client's consent to these steps may be needed, lest the lawyer violate the ethical rules prohibiting the divulgence of client secrets.[22]

Participants and Process Considerations

When the representative, a conservator, or the agent under a power of attorney attends the mediation, the lawyers and the mediator should assess whether the represented party elder has sufficient knowledge, interests, or understanding of the situation that he or she should also attend. New Probate Code Section 2113 requires a conservator to "accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate." This suggests that the conservatee, as well as the conservator, should be at the mediation when the conservatee is capable of providing input to the process. In these situations, the mediator should be aware of the inherent tension between the expressed wants of the conservatee elder and the conservatee's needs or best interests, which the conservator must consider in making a decision on behalf of the conservatee. A mediator can often facilitate a dialogue between conservator and conservatee that provides meaningful participation by the elder.

Other support persons—such as a relative, significant other, or financial advisor—may need to be present to assist the elder. And, prior to convening a joint session, the mediator should assess whether a joint session is desirable. In abuse cases, putting the alleged abuser into the same room with the alleged victim-elder can create or exacerbate feelings of discomfort and vulnerability.

Lawyers who are overprotective of their clients present a challenge to the mediator when they make it difficult for the mediator to interact with the client. In the case of an elder who is claiming abuse under the Elder Abuse Act,[23] the elder's special vulnerability does not render the elder incapable of making good decisions or participating in a mediation. While the lawyer may use his or her legal judgment to assist the elder in making an informed choice, the attorney must respect the client's right to make informed decisions; the final settlement terms are within the control of the client.[24]

Does the mediator have an obligation to insist on speaking with the client or abort the process if the mediator cannot speak with the client? The mediation conduct rules regarding voluntary participation and self-determination[25] would so dictate. The mediator can ensure compliance with this rule of conduct by announcing at the beginning of the process that the mediator will be speaking with the parties as well as their counsel.

The Elder Abuse Act provides that certain defined persons, or mandated reporters, must report instances of elder abuse to the appropriate authorities. A mandated reporter is "any person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not he or she receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, clergy member,

or employee of a county adult protective services agency or a local law enforcement agency...."[26]

There is no indication that a mediator is required to report, but a party who is a mandated reporter would be required to report if he or she learns facts of abuse during the mediation. Even though mediation communications and writings prepared for mediations are inadmissible in a subsequent adversarial proceeding, facts that are discoverable independent of the mediation are not rendered inadmissible solely because of their introduction at the mediation.[27]

The mediator and counsel should be aware that confidentiality provisions in settlement agreements in which there is evidence of elder abuse under the Elder Abuse Act are generally not enforceable, except to the extent of prohibiting disclosure of the monetary amount of the settlement.[28]

The Needs and Interests of the Elder

A common elder mediation dispute involves the proper care of an elder and management of the elder's assets. This might arise under a trust or power of attorney, contested estate planning documents recently changed by an elder's child, or a contest for appointment of conservator. For example, one sister may charge that an in-home care situation is insufficient for her mother who has declining mental functioning and mobility and that another sister who possesses the power of attorney over the mother's assets is unnecessarily spending money on home improvements and expensive 24-hour individual nursing care. Communications break down as demands are made and responses stop coming. The mediation briefs are filled with incendiary allegations of improper care, breach of fiduciary duty, failure to account, and the like.

The mediator has an opportunity to address the relationship between the sisters and refocus the discussion, reminding them that their mother is still alive with ample financial means for her care, as well as two daughters to look after her. Refocusing the dispute into a problem-solving session, the mediator can help the parties find common ground by agreeing that the care of the elder is their common goal, and identifying the underlying needs and interests of all concerned. This focuses the dialogue on what the sisters can accomplish collaboratively. A joint care and financial management plan might be arranged, with a method to ensure future communications. Often a family member, such as another sibling, a cousin, niece, or nephew is the natural peacemaker and can be appointed to serve as mediator.

A powerful mediation technique in family disputes involves the use of acknowledgements and thank yous. In this sibling dispute, the mediator can coach each sister in a private caucus to tell the other that she appreciates the efforts and contributions made. The parties may balk at this, but coaching them is the right strategy, because the making of the statement to the other, whether heartfelt or not, almost always breaks the ice, if not melts it completely. The shift in energy in the room is usually palpable. The mediator uses the acknowledgement to build a series of agreements, keeping the parties focused on the interests of the elder and creating the opportunity for the sisters to rebuild their fractured relationship around their common cause. The repair of their relationship alone can be sold as a powerful dose of medicine for the elder, whether known by the elder or not.

Another powerful technique in family squabbles is the nonadmission apology. The mediator coaches each party to say to the other, "I'm sorry if any of my actions in managing our mother's monies caused you concern, but my intentions were good, and I am here at this mediation to help resolve our differences." Said directly to each other, or conveyed by the mediator, statements such as this often soften the parties and break impasses.

Mediators and lawyers will benefit from awareness of a variety of special issues applicable to elders. These include assuring maximum participation of the elder, addressing and documenting capacity issues, dealing with confidentiality and reporting issues for disputes under the Elder Abuse Act, and employing collaborative problem solving techniques to aid the parties in addressing the needs and interests of impaired elders. ■

[1] For example, under the Elder Abuse and Dependent Adult Civil Protection Act, WEL. & INST. CODE §§15600 *et seq.*, elders are defined as persons over 65 years of age. *Id.* at §15610.27.

[2] CAL. R. OF CT. 3.871, 3871(a).

[3] *See* ADR processes: How Much Does It Cost?, *available at* http://www.lasuperiorcourt.org/courtrules.

[4] L.A. SUP. CT. R. 10.200 *et seq.*

[5] L.A. SUP. CT. R. 10.205, 10.208.

[6] Jeld-Wyn v. Superior Court, 146 Cal. App. 4th 536 (2007). In *Jeld-Wyn*, the court held that a case management order requiring parties in complex cases to attend and pay for mediation was not authorized because it was not encompassed by the statutory scheme set forth in CODE CIV. PROC. §§1775 *et seq.* and the accompanying Judicial Council rules.

[7] CAL. R. OF CT. 3.850(a).

[8] CAL. R. OF CT. 3.851(a); L.A. SUP. CT. R. 10.209(b).

[9] CAL. R. OF CT. 3.851(d) and Advisory Committee comment thereto.

[10] *See* Standards of Practice, *available at* http://www.cdrc.net (a set of guidelines published by the California Dispute Resolution Council (CDRC) based upon a collaborative effort of major California dispute resolution providers and mediators); Model Standards of Conduct for Mediators, *available at* http://www.aba.org (a set of guidelines jointly developed by the American Arbitration Association, the American Bar Association Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution).

[11] Counsel for the elder may be breaching the ethical obligation to keep secrets of the client confidential. In practice counsel often confidentially seek the mediator's assistance in helping resolve internal issues with the client. *See* discussion at n.22 *infra*. The capacity issue could be raised as well by opposing counsel or by the mediator during the course of the mediation.

[12] CAL. R. OF CT 3.853(1) and (2) specifically provide that a mediator must inform the parties that any resolution will be by voluntary agreement of the parties and must respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw.

[13] *See also* CAL. R. OF CT. 3.852(3) and (4). A "participant" includes a party as well as a lawyer for a party. CAL. R. OF CT. 3.852(3).

[14] *See also* PROB. CODE §2113 and discussion in text *infra* about including the wishes of conservatees in decisions affecting them.

[15] PROB. CODE §811.

[16] A mediator should refrain from giving legal advice or legal opinions, although weighing in and assisting the parties in determination would be part of the facilitation role. *See* CDRC Standard 3, *available at* www.cdrc.net. *See also* CAL. R. OF CT. 3.856(d) ("A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.").

[17] CAL. R. OF CT. 3.857(i)(2).

[18] CAL. R. OF CT. 3.857(b).

[19] *See also* CDRC Standard 3, *available at* www.cdrc.net ("If a Mediator believes that the continuation of the process would harm any participant or a third party (such as children in a marital dissolution matter), or that the integrity of the process has been compromised, then the Mediator shall inform the parties and shall discontinue the mediation, without violating the obligation of confidentiality.")

[20] PROB. CODE §1003(a)(2).

[21] PROB. CODE §3604. Note that a lawyer does not have authority to act on behalf of someone who lacks capacity. Sullivan v. Dunne, 198 Cal. 183 (1926).

[22] *See* State Bar Formal Opinion No. 1989-112 (1989) (providing that it is unethical for an attorney to institute conservatorship proceedings contrary to the wishes of the client because to do so would be to reveal client secrets, including observation of the behavior of the client leading to the lawyer's conclusion of incapacity; withdrawal may be necessary). For a contrary result, *see* ABA MODEL RULES OF PROF'L CONDUCT R. 1.14 (providing that a lawyer may seek a guardian, conservator, or take protective action when the lawyer believes that the client cannot adequately act in his or her own interest, but the lawyer must be careful in divulging only the observation of the client's incapacity).

[23] Elder Abuse and Dependent Adult Civil Protection Act, WEL. & INST. CODE §§15600 *et seq.*

[24] Decisions affecting client's substantive rights must be made by the client. *See* Blanton v. Womancare, Inc., 38 Cal. 3d 396, 403-05 (1985); Steward v. Preston Pipeline, Inc., 134 Cal. App. 4th 1565, 1581-82 (2005). *See also* ABA MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

[25] CAL. R. OF CT. 853.

[26] WEL. & INST. CODE §15630(a).

[27] *See* EVID. CODE §1120(a); Rojas v. Superior Court, 33 Cal. 4th 407 (2004).

[28] CODE CIV. PROC. 2017.310. If there is evidence of elder abuse under the Elder Abuse Act, a confidentiality provision could still be enforceable if the information is privileged or there is a showing of a substantial probability of prejudice. *Id.*