

Serving an Aging Population Through Mediation

by Martha C. Brown and Deborah J. Weider-Hatfield



Americans are living longer, and the elderly are increasing both in numbers and in percentage of the U.S. population.¹ In Missouri, the percentage of the population over the age of 60 is projected to be 26.21% by 2030.² The advanced elder population (those over the age of 85) has grown as well. By 2030, that age segment in Missouri is estimated to increase more than 51,000 people from 2015.³ With this rise in population numbers, disputes about elder care, physical placement, and financial control are likely to increase. As a result, elder mediation has become a growing area in dispute resolution,

evidenced by the founding of National Academy of Elder Law Attorneys (NAELA) in 1987 and the establishment of the Missouri chapter of NAELA in 1998.

Definition of Elder Mediation

Elder mediation is defined not solely as a resolution of a court dispute, but rather as a “mediation process that addresses the health, financial, and other concerns of a senior family member, although the term ‘adult family decision-making’ may provide a better description.”⁴

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Deborah J. Weider-Hatfield earned her Ph.D. at Purdue University in 1978. During her first career, she taught communication and conflict management processes at the University of Georgia and the University of Central Florida. In 1999, she received her J.D. from the University of Baltimore School of Law. Although she planned to practice elder law in Connecticut, she returned to the Metro East in 2003 after her husband’s passing. In 2006, she started her second career as an Assistant Attorney General for the State of Missouri, representing the Missouri Family Support Division and covering cases in eastern Missouri from St. Charles County to the Iowa border. She retired on December 31, 2018, and since then has completed courses in civil, family, online, and transformative mediation. Currently, she is serving as the Secretary for the Association of Missouri Mediators and plans to volunteer as a mediator with the Conflict Resolution Center-St. Louis.

Some commentators, however, take a broader perspective on elder mediation by focusing on

“a wellness model that promotes a person-centered approach for all participants... mindful of the older person(s) while respecting the rights of each person participating. Regardless of the numbers present, each person is unique with his or her own narrative, intrinsic value, strengths and weaknesses. Through the Elder Mediation lens, aging is viewed as part of the continuing process of development and change, rather than just a period of physical and cognitive decline.”⁵

Unlike most mediations, the elder mediation process “often involves the many people related to the issues, such as family members, caregivers, organizations, agencies and a variety of service providers and networks.”⁶

Elder mediation cases include, but are not limited to, the following:

- estate planning
- delegated financial and medical decisions
- will contests
- trust administration
- legacy issues
- conservatorships and guardianships
- elder care responsibility
- elder and medical care services
- facility disputes
- workplace issues
- government benefit issues, including Medicare
- end of life decision making
- family business, operations, and succession
- grandparent visitation
- blended family issues
- intergenerational relationship issues

When to Employ Elder Mediation

As one method of dispute resolution for managing conflicts involving the elderly, mediation has been recognized and employed by lawyers, mediators, and aging and disability advocates since the 1980s.⁷ In the late 1990s, one commentator discussed typical conflicts experienced by the elderly and the need to acknowledge the impact of myths and characteristics of the aging population on the mediation process.⁸ Others have stressed the importance of selecting

qualified elder mediators who provide the best fit for any particular elder care dispute,⁹ and encouraged mediators to “rethink the way they handle interventions involving elders and to be mindful of elders’ rights, including their right to participate in decision making about their lives, directly or indirectly, and with or without capacity.”¹⁰

Choosing the best intervention to manage conflicts faced by elderly clients is a challenge and an important skill for every elder law attorney. Mediation is only one of many options available. Recognition and understanding of the level of conflict present in a family, along with knowledge of the available options for assisting clients and families to reach their goals, is essential to success as an elder law attorney.

In 2010, St. Louis lawyers Debra Schuster and Wesley Coulson discussed how elder law attorneys had come to realize the limitations of serving as “crisis handlers” for their clients.¹¹ They recommended Life Care Planning (LCP) to manage “the complex and intertwined legal, financial, medical, care support, housing, practical, and emotional needs of their clients.” Using the LCP process, an elder law attorney becomes “more proactive and less reactive” because LCP is based on “a holistic, multidisciplinary approach to addressing all of the legal, care, economic, benefit, social and support issues modern elderly clients face.”¹² The LCP process is recognized as a preventative or pre-suit approach for managing low to moderate levels of conflict when parties are generally cooperative, tolerant of differences, and need information and resources.¹³

In high-conflict situations, when a dispute cannot be managed through mediation or when families need assistance after mediation to address subsequent and recurring high-conflict disputes, eldercaring coordination can be an effective and necessary dispute resolution intervention.¹⁴ Eldercaring coordination is defined as

“a dispute resolution process during which an Eldercaring Coordinator (EC) assists elders, legally authorized decision-makers, and others who participate by court order or invitation, to

resolve disputes with high conflict levels that impact the elder's autonomy and safety by

- enabling more effective communication, negotiation, and problem-solving skills,
- offering education about elder care resources,
- facilitating the creation and implementation of an elder care plan,
- making recommendations for resolutions, and
- making decisions within the scope of a court order or with the parties prior approval.”¹⁵

Eldercaring Coordination begins with the parties' request that a case be referred to that process by a stipulated agreement, or by the court's identification of a high-conflict case. An Order of Referral to Eldercaring Coordination is entered and processed, and the court appoints an EC.¹⁶ “Eldercaring coordination focuses on reducing conflict for families so that court proceedings can flow smoothly, without constant disruptions involving nonlegal issues, which may jeopardize the care and safety of elders.”¹⁷

Ethical Issues

An elder mediator should be guided by the Model Standards of Conduct for Mediators and the Elder Mediation International Network (EMIN) Code of Ethics for Elder Mediators. The Model Standards for Mediators provide direction for conducting mediations in all types of cases and include standards for self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of process, advertising and solicitation, fees and other charges, and advancement of mediation practice.¹⁸ The EMIN Code of Ethics for Elder Mediators offers extensive guidance for the practice of elder mediation. In particular, the EMIN Code lays out 16 professional responsibility guidelines for members of EMIN:

- management of pre-existing personal or professional relationships between participants and the elder mediator,
- duty to maintain impartiality,
- exceptions to duty to maintain confidentiality and guidelines for sharing information about these exceptions with participants,
- duty to assess and foster participants' ability to

- participate in the mediation process,
- need for cultural sensitivity in providing mediation services to participants,
- need to respect and invite complementary inter-professional relations,
- guidelines for the proper course of action when abuse is identified or suspected,
- responsibility to foster fair negotiations,
- duty to encourage decisions based upon information, knowledge, and advice, along with the desirability of independent legal advice throughout the process,
- steps in explaining the mediation process before the mediator and participants agree to mediate,
- responsibilities of the mediator regarding multi-party mediation and the use of technology for participants who cannot attend in person,
- preparation of the written summary of agreements reached,
- duty to suspend or terminate the mediation whenever continuation of the process is likely to harm one or more of the participants,
- explanation of mediation fees, outreach and promotional activities, including the prohibition against making reference to “success rate” in mediations,
- responsibility to allow for the inclusion of an appointed advocate for a vulnerable person.¹⁹

Both the Model Standards and the EMIN Code of Ethics make clear that elder mediation creates special ethical issues regarding impartiality, self-determination, diminished capacity, the role of support persons, confidentiality, participant safety, and mediator competence.²⁰ Elder mediators can assure participant safety by employing the Elder Abuse Screening Tool²¹ in addition to their regular screening for the appropriateness of mediation in each case. The Screening Tool includes the following sections:

- An introductory section with information related to the pervasiveness of elder abuse, the role of the elder mediator, and an overview of the elder mediation process,
- A guide to the intake process with lists of emergency referrals, professionals, and services that an elder mediator may need to consult,
- A chart summarizing signs of physical abuse, sexual abuse, emotional/psychological abuse,

- abandonment neglect, self-neglect, and financial exploitation,
- A list of questions for family members and other participants in the mediation process,
- A list of initial questions for the elder,
- An interventions action chart outlining how and when to address identified abuses and observations.²²

The Screening Tool also lists research or evidence-based risk factors that may increase the likelihood that abuse, neglect, or exploitation may be taking place when present:

- women over the age of 80 may be 2 to 3 times at greater risk of abuse, neglect, or exploitation,
- family member controlling the elder's finances or living with, dependent on, or caring for the elder (90% of elder abuse is perpetuated by family members),
- history of violent relationships or bullying,
- abuse of power and control present in an elder's significant relationship,
- weapons in the home,
- caregiver without employment or financially dependent,

- cognitive impairment,
- mental health concerns or substance misuse by elder and/or caregiver.²³

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Missouri does not identify attorneys or mediators as mandatory reporters of suspected abuse.²⁴ Although many care providers, medical service providers, social services providers, and religious service providers are designated as mandatory reporters, elder law attorneys and mediators who become “aware of circumstances that may reasonably be expected to be the result of, or result in, abuse or neglect of an eligible adult may report to the [Department of Health and Senior Services].”²⁵

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Choosing an Elder Mediator

Elder mediation is a specialized dispute resolution process. The mediator should have “some background in elder law, or knowledge of where to find the expertise”; “a familiarity with the basics of the long-term care regulatory setting, or knowing where to find the basics”; an ability “to recognize the signs of elder abuse, neglect, and exploitation and know how to report to adult protective services”; “an understanding of, or access to information on, the aging network and community resources”; and sensitivity to and ability “to confront the capacity conundrum.”²⁶

For attorneys interested in practicing elder mediation, two organizations offer certification procedures worth investigating. NAELA offers Certified Elder Law Attorney (CELA) training, and EMIN offers both basic and advanced Certified Elder Mediator training.

Mediation is an ideal process for resolving a variety of conflicts involving the elderly. No elders want poorly managed conflict to be a part of their lives. A successfully mediated outcome is one where the quality of care and the quality of relationships have been maximized for all participants, especially the involved elder. ♣

- ¹ U.S. DEPT. OF HEALTH & HUMAN SVCS., ADMIN. FOR COMMUNITY LIVING, PROFILE OF OLDER AMERICANS (2020) <https://acl.gov/aging-and-disability-in-america/data-and-research/profile-older-americans>.
- ² DIVISION OF SENIOR AND DISABILITY SERVICES, MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES, MISSOURI STATE PLAN ON AGING 2020-2023, 2 (2019).
- ³ *Id.* at 2.
- ⁴ Roselyn L. Friedman, *Focus on Facilitative Mediation: What Estate Planners and Fiduciaries Need to Know*, in MEDITATION FOR ESTATE PLANNERS: MANAGING FAMILY CONFLICT 21 (Susan N. Gary ed., 2016).
- ⁵ Judy McCann-Beranger, “What Is Elder Mediation” (citing The Elder Mediation International Network (EMIN) Code of Ethics (2018)), <https://elder-mediation-international.net/what-is-elder-mediation/>.
- ⁶ Dale Bagshaw, *Elder Mediation: An Emerging Field of Practice*, in COMPARATIVE DISPUTE RESOLUTION 203 (Maria Federica Moscati, Michael Palmer, Cheng Yu Tung, & Marian Roberts, eds., 2020).
- ⁷ Erica F. Wood, *Dispute Resolution and Aging: What Is the Nexus and Where Do We Stand?* BIFOCAL: JOURNAL OF THE ABA COMMISSION ON LAW AND AGING, Vol. 36, No. 3 (Jan.-Feb. 2015), at 73-77.
- ⁸ Suzanne J. Schmitz, *Mediation and the Elderly: What Mediators Need to Know*, MEDIATION QUARTERLY, Vol. 16, No. 1 (1998), at 72-84.
- ⁹ Ellie Crosby Lanier, *What is Quality in Elder Care Mediation and Why Should Elder Law Advocates Care?* BIFOCAL: JOURNAL OF THE ABA COMMISSION ON LAW AND AGING, Vol. 32, No. 2 (Nov.-Dec. 2010) at 1, 16-19.
- ¹⁰ Bagshaw, *supra* note 6, at 202.
- ¹¹ Debra K. Schuster & Wesley J. Coulson, *The Evolving Practice of Elder Law . . . Life Care Planning*, ST. LOUIS BAR JOURNAL, Vol. 56, No. 4 (Spring 2010), at 6.
- ¹² *Id.* at 7.
- ¹³ Linda Fieldstone & Sue Bronson, *Eldercaring Coordination in Your Community or Your Law Practice: New Approaches to Dealing with High-Conflict Families*, NAELA JOURNAL, Vol. 14, No. 1 (Spring 2018), Table 1, p. 8.
- ¹⁴ *Id.* at pp. 6-7; Sarah J. Gross, *Eldercaring Coordination: A Dispute Resolution Option for High Conflict Elder Disputes in California*, SOUTHERN CAL. INTERDISC. L.J., Vol. 29 (2020) at 311.
- ¹⁵ The Association for Conflict Resolution [ACR] Guidelines for Eldercaring Coordination, October 2014; ACR Elder Justice Initiative on Eldercaring Coordination, National Adult Protective Services Association Annual Conference, Milwaukee, Wisc., 2017, at 5-6.
- ¹⁶ Gross, *supra* note 14, at 315.
- ¹⁷ Fieldstone & Bronson, *supra* note 13, at 2.
- ¹⁸ The Model Standards of Conduct for Mediators (2005) were approved by the American Bar Association’s House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005, and the Executive Committee of the American Arbitration Association on September 8, 2005. The original version of the Model Standards was prepared and approved in 1994.
- ¹⁹ The Elder Mediation International Network (EMIN) Code of Ethics for Elder Mediators (9th edition, September 2018) was endorsed by Family Mediation Canada, Mediation PEI, Inc., Alzheimer Foundation PEI, Ontario Association for Family Mediation, Mediator’s Institute of Ireland, The Mediation Association of Switzerland, and Elder Mediation Australasian Network.
- ²⁰ Barbara Foxman, Kathryn Mariani & Michele Mathes, *A Mediator’s Ethical Responsibility in Elder Mediation: What Is at Stake?* ACRESOLUTION: THE QUARTERLY MAGAZINE OF THE ASSOCIATION OF CONFLICT RESOLUTION, Summer 2009, at 3-8.
- ²¹ Zena Zumeta, *About the ABA Dispute Resolution Section Task Force Elder Abuse and Neglect Screening Guidelines for Mediators*, BIFOCAL: JOURNAL OF THE ABA COMMISSION ON LAW AND AGING, Jan.-Feb. 2021, vol. 42, no. 3, pp. 65-67.
- ²² ABA Dispute Resolution Task Force on Elder Abuse and Neglect Screening Guidelines for Mediators (2020) at 1-9.
- ²³ *Id.* at 4.
- ²⁴ Section 192.2405(1), RSMo. (2017) lists the mandatory reporters of suspected harm or bullying.
- ²⁵ §192.2405(2), RSMo.
- ²⁶ *Id.*