

Equal Justice and Empowerment Through Mediation: Where Do We Stand?

Presenters:

Erica Wood
ABA Commission on Law and Aging
202-662-8693
ericawood@staff.abanet.org

Cheryl Cutrona
Good Shepherd Mediation Program, Philadelphia
Phone: 215-843-5413
ccmed8r@aol.com

David Mandel
Senior Legal Hotline
Legal Services of Northern California
Phone: 916-551-2145
dmandel@lsnc.net

Kathryn Mariani
Elder Mediation Program
Montgomery County Mediation Center
Phone: 610-277-8909
eldermediation@verizon.net

Harvey F. Strauss
Legal Aid of Southeastern PA
Phone: 610-275-5400
hstrauss@lasp.org

Brief Description:

The workshop will present recent initiatives in resolving conflicts through mediation, with an emphasis on conflicts of elders but applicable to the needs of other legal services clients. The session will use role play/interactive techniques and panel presentations to explore working relationships between legal programs and mediation resources. How does mediation empower parties in conflict? Can it erode rights? What are the barriers to ready use of mediation? What should a legal services - mediation referral protocol include?

Topical Outline:

- I. What Is Mediation?

- a. Dispute resolution spectrum – adjudication, arbitration, *mediation*, ombudsman, negotiation, other dispute resolution mechanisms.
- b. Mediation = informal process in which trained neutral assists disputants in framing issues in dispute, enhances communication between parties, helps parties develop possible solutions and aids parties in reaching mutually acceptable agreements. “Assisted negotiation.”
- c. Stages of Mediation Process:
 - i. Screening of case
 - ii. Explanation of process to parties
 - iii. Telling of story by each party
 - iv. Information exchange; restating of issues
 - v. Option building or brainstorming
 - vi. Evaluating of options; reframing
 - vii. Defining and drafting of agreement
- d. Key Qualities of Mediation Process
 - i. Voluntary
 - ii. Collaborative
 - iii. Confidential
 - iv. Empowering -- parties create solution
 - v. Impartial
- e. Roles of Mediator
 - i. Listening
 - ii. Questioning
 - iii. Observing
 - iv. Caucusing with individual parties
 - v. Reframing issues; refocusing problems
 - vi. Managing interaction
 - vii. Building momentum for solution
 - viii. Assisting in drafting of agreement
- f. Kinds of Mediation
 - i. Rights based vs interest based
 - ii. Settlement-oriented or problem-solving (with primary goal of generating mutually acceptable settlement) vs transformative (with primary goal of empowerment and mutual recognition of parties involved)

- II. Problems of Low/Moderate Income Legal Clients That Might Be Addressed Through Mediation
- a. Landlord-tenant
 - b. Other housing
 - c. Consumer problems
 - d. Debtor-creditor
 - e. Employment
 - f. Divorce
 - g. Custody/visitation
 - h. Health care disputes
 - i. Disability rights; accommodations
 - j. Probate
 - k. More

III. Recent Initiatives in Elder Mediation

- a. Guardianship and caregiver mediation. Pilot projects and training by The Center for Social Gerontology.
- b. Americans with Disabilities Act mediation. ADA encourages use of “alternative means of dispute resolution,” 42 U.S.C. §12212; 28 C.F.R. §§35.176, 36.506 (1999). Department of Justice sponsors mediation program.
- c. Efforts underway to test use of mediation in resolving bioethical disputes. See Dubler & Liebman, *Bioethics Mediation*.
- d. Long-term care mediation project by University of Texas-Houston, Center on Aging. Pilot program offers mediation services to residents of participating nursing homes and assisted living facilities in Harris County TX.
- e. CMS Medicare Mediation Program – Since 2003, state Quality Improvement Organizations offer mediation for resolving clinical quality of care beneficiary complaints.
- f. Montgomery County Mediation Center’s Elder Mediation Program
- g. Mediation project of Senior Legal Hotline, Legal Services of Northern California
- h. Maryland Department on Aging Senior Citizen Mediation Project, funded through Maryland Judiciary’s Mediation and Conflict Resolution Office
- i. February 2006 formation of National Elder Mediation Network, through The Center for Social Gerontology.

- j. Listserve through ABA Commission on Law and Aging, on aging, disability and dispute resolution, “collaborate.”

IV. Pros and Cons of Mediation; Barriers to Use

- a. Pros
 - i. Quick, flexible, inexpensive, convenient
 - ii. Humane, empowering
 - iii. Confidential
 - iv. Allows parties to talk to each other in setting that is constructive and secure.
 - v. Solutions more creative, tailored to individual needs
 - vi. Parties may adhere better to solutions they have designed.
 - vii. High satisfaction by parties
 - viii. Especially useful where long-term relationship anticipated – “shadow of the future.”
- b. Cons
 - i. Possible erosion or jeopardizing of legal rights?
 - ii. “Half a loaf” when entitled to whole?
 - iii. Is mediation “second class justice”? Yet “it is ironic that today the concern about second class justice may be the opposite of what early poverty advocates feared” in that often large corporations have access to mediation and other forms of ADR, but often poor do not. See Houseman; Meili & Parkard.
 - iv. Difficulties for disenfranchised groups?
 - v. Not open to public scrutiny.
 - vi. Inhibit class actions; not result in legal precedents?
 - vii. Often difficult to get parties to “come to the table.”

V. How Can Mediation and Legal Services Programs Best Work Together?

- a. Which clients and which cases? No ready litmus test for use of mediation, but several factors important
 - i. Ongoing relationship involved
 - ii. Weighing of client’s values and priorities
 - iii. Speed of settlement
 - iv. Alternatives to negotiated agreement
 - v. Readiness of parties
 - vi. Law reform potential
 - vii. Complexity of legal issues
 - viii. Balance of power
 - ix. Client capacity

- x. Accommodating special needs
- b. Role of legal services programs
 - i. Identify and monitor local mediation options
 - ii. Develop intake and support systems for referrals to and from mediation programs
 - iii. Include mediation considerations in priority setting process and case reviews
 - iv. Discuss mediation options with clients
 - v. Reciprocal training of legal services and mediation staff
 - vi. Community education incorporate information on mediation

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Websites – Mediation in general

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Association for Conflict Resolution -- <http://www.acrnet.org/>.

www.mediate.com

Websites – Mediation & Aging, Disability, Health Care

CMS Medicare Mediation Program -- <http://www.cms.hhs.gov/BeneComplaintRespProg/Downloads/3a.pdf>

Department of Justice ADA Mediation Program, www.usdoj.gov/crt/ada/mediate.htm.

The Center for Social Gerontology, “Mediation and Aging” -- <http://www.tcsg.org/>.

Harris County Long-Term Care Mediation Project -- <http://199.239.237.115/faq1.htm>