Mediating Nursing Home Care Disputes: A Workable Option?

by Naomi Karp and Erica Wood

Conflicts over thorny nursing home care issues range from "mundane" problems such as roommate arguments to aspects of care planning to life-sustaining treatment disputes such as insertion of a nasogastric tube. Parties to these conflicts vary as well—residents, family members, facility administration, staff, attending physicians and long-term care ombudsmen all may be involved. From May 1994 to July 1997 the American Bar Association (ABA) Commission on Legal Problems of the Elderly conducted an innovative pilot project testing the use of mediation to resolve such nursing home care disputes. The pilot project and the lessons learned are discussed in this article.

I. American Bar Association Nursing Home Mediation Project

Mediation is a voluntary, nonbinding process in which a trained facilitator helps parties reach a negotiated agreement. The mediator assists the parties in improving communication, moving away from rigid positions, expanding options for settlement, and arriving at consensus on a creative solution. By developing and testing a mediation model adapted to the unique characteristics of the long-term care setting, the ABA Commission on Legal Problems of the Elderly hoped to explore new ways to empower residents in the decision-making process and push the institutional culture toward more collaborative, less combative approaches.

The ABA project was supported by the American Association of Retired Persons' Andrus Foundation and the Commonwealth Fund. It built on an earlier effort by the National Institute for Dispute Resolution, as well as work on mediation and aging, mediation and disability, mediation and long-term care ethics committees, and mediation in

1 Oscar Goodman & Nancy Hanawi, Care and Conflict in Nursing Homes, NIDR Forum 26 (Summer–Fall 1991).
acute care. In the project, Washington D.C. area nursing facilities with ethics committees were recruited to participate. Ethics committee members (mainly nursing home staff) were trained in dispute resolution, bioethical principles, and relevant legal issues to ensure that mediation would be within the framework of nursing home law. These “in-house” mediation trainees were teamed with experienced volunteer “mediator mentors” to mediate cases together. The comediation model aimed to blend the substantive knowledge of the facility mediators with the dispute resolution skills and neutrality of the mentors. ABA staff conducted extensive outreach—explaining the project at staff in-service sessions, ethics committee meetings, resident and family councils, in newsletters, and to long-term care ombudsmen and appropriate community agencies.

II. Using Mediation
The project mediated a total of 27 cases. While four were staffing disputes, the remaining 23 concerned many facets of resident care—care planning, use of nasogastric tubes, mobility, medication, diet, resident-staff patterns of interaction, room transfers, placement and discharge, restraints, smoking, loss of personal items, and conflict between roommates. As often occurs with mediation, in many cases discussion of the presenting problem revealed a range of other issues and uncovered the parties’ real interests that were not at first apparent.

Who were the disputing parties?
The largest numbers were resident-staff disputes (8) and family-staff disputes (8). Others were family-family conflicts (3), staff-staff (4), resident-family (1), family-physician (1), and resident-resident (2). Residents attended the mediation in 16 of the cases and were active parties in 13. Long-term care ombudsmen referred or were involved in several of the cases. The average mediation session lasted 1.5 hours. What were the results? Agreement was reached in 24 of the 27 cases—8 written and 16 oral. Whether these agreements were fair, workable, and durable is more difficult to evaluate, but the mediators rated them as adequate to excellent. Within the timeframe examined, the rate of compliance with the agreements was very high.

Individual cases demonstrate the potential of using the mediation process in addressing care problems:

- An 82-year-old resident with Alzheimer’s disease had several incidents of violent behavior. The daughter and the facility argued over care, and the facility issued a notice of discharge based on risk to other residents. A mediation involving the daughter, daughter’s husband, administrator, director of nursing, and social worker resulted in an agreement to withdraw the discharge notice pending changes in the medication, as well as attention to the resident’s mobility, urinary infection, dentures, and the mode of communication between the daughter and the staff.

- An elderly incapacitated resident had a nasogastric tube, yet the family members had been feeding and giving him water while visiting. When this came to the staff’s attention, they were concerned that the resident would aspirate and choke or get pneumonia. The family wanted to continue feeding. A mediation involved two family members, the charge nurse and assistant charge nurse, director of nursing, and nutritionist. The doctor was not there, but his notes indicated that he thought feeding would be acceptable. The parties resolved that the tube would remain, but the resident would be fed twice daily. The resident gained weight and was cut back to one feeding per day. Staff and family were satisfied.

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A young paraplegic resident had an electric wheelchair through Medicaid but never used it. He had no desire to get out of bed. He wanted to go home but had no support there. The staff and volunteers working with the resident were very frustrated by his lack of progress. A mediation included the resident, the resident’s brother, a facility social worker, and two volunteer visitors. The social worker agreed to work toward getting the resident into a separate rehabilitation program, begin therapy at the facility, and get the wheelchair fixed. The resident agreed to make efforts to get out of bed daily.

III. Lessons Learned
The success of the cases mediated confirms that mediation offers a viable tool for addressing a wide range of care disputes in nursing homes. It appears to facilitate communication surrounding complex care conflicts in a way that strengthens long-term relationships and helps empower residents. Yet this positive outcome has problematic aspects.

A. Incentives for Use
The ABA caseload was low. One barrier to more widespread use of mediation was a lack of access to residents and families to inform them about the project. Also, the ABA’s evaluators suggested that greater involvement of the homes in designing useful dispute resolution systems and more tailoring to the particular circumstances of different homes may be necessary for real buy-in by the home’s administration. Dispute resolution design experts note that “buy-in is an ongoing process of gaining trust and must be cultivated and nurtured from the very beginning, with meaningful participation and influence from the top down, the bottom up, and sideways.” Nursing homes must see benefit in changing the way they look at disputes and be involved in structuring new ways.

B. Staff Turnover
The project was plagued with high staff turnover in the participating facilities. A system with more in-depth buy-in throughout the whole institution would be less dependent on individuals.

C. In-house Mediators?
Despite being paired with neutral outside mediators in most cases, the facility mediator trainees lacked sufficient and/or perceived neutrality in many instances. Moreover, their training and experience often were inadequate for them to serve in a real mediator role and to promote the concept of mediation. More training for in-house mediators might help, but linkage with community dispute resolution resources and/or more mediation training for long-term care ombudsmen might provide the best solutions. Still, strengthening the communication skills of facility staff may have boosted their informal day-to-day problem-solving skills and made them more aware of the interests of disputing parties.

"Of all the settings where a meditative approach to resolving conflict might be introduced, the nursing home stands as one of the most challenging." The ABA project took on this challenge, demonstrated successful mediation approaches, advanced the field—and posed new questions for the future.

7 Goodman & Hanawi, supra note 1, at 26.