

# Special Sensitivities Dominate Elder Abuse Mediation

By Alexander S. Polsky

Mediation has its own personality. This is created by the relationship between counsel, settlement positions of the parties, direct participation by the decision makers and the emotional tension surrounding the dispute.

Few areas of alternative dispute resolution contain more emotion than "elder abuse" cases. When a (now grown-up) child entrusts a parent to a facility for the delivery of continued care, most experience the internal tension between guilt and relief. There's tension between a family to manage, a job to go to and other responsibilities that make it impossible to care for a parent whose overall health situation is deteriorating. Is it any wonder that when the parent suffers an injury or death while at the facility, the committing family member is driven to understand why? If there is any hint of negligence, the desire for retribution is concurrent with the need for redemption from guilt. "If only I hadn't put mom in that place." "They killed my mom." In some instances inappropriate care results in untimely, undignified and painful death. In others, death was a byproduct of the parent's medical condition, not of issues at the facility. Often the

line is fuzzy at best.

To mediate elder abuse cases, certain common principles concerning the burden of proof must be remembered. Most importantly, adequate time must be set aside in a structure suitable for the case, and with an interest in managing the emotional nature of the dispute.

The general framework is basic tort theory. However, there are many industry regulations that, if breached, may form the basis for a standard of care issue. (See Welfare & Institutions Code Section 15600(h)). These issues will include staff training, adequacy of medical care and nursing care, and profit motive of the operator. Medical providers often know little of the patient's history, though the attending physician is required to see the patient once every 30 days for the first 90 days and every 60 days thereafter (42 CFR 483.40). There is a running battle as to what constitutes "seeing" the patient versus reviewing the chart notes and talking to staff. Where Medi-Cal is involved, attending physicians often note that the Medi-Cal payment is so paltry that the doctor is not paid to conduct individual full examinations. Is this excuse a defense?

Significant remedies exist pursuant to the Elder Abuse and Dependent Adult Civil Protection

Act and Welfare & Institutions Code Sections 15657 et. sec. Punitive damages may be trebled in some cases. Under the Consumer Legal Remedies Act, punitive damages and attorney fees may be awarded for deceptive advertising in the form of slick brochures touting the wonderful facility and trained staff, when such is demonstrated to be a fiction. That said, because nursing home facilities are generally considered health care providers, MICRA limitations arguably apply, capping recovery for pain and suffering at \$250,000 and legal fees at 25 percent. Thus, counsel for plaintiffs often look to punitive damage exposure before accepting representation in an elder abuse case.

The nature of the case and the goal of pleading and proving punitive damages increase the emotional nature of the claim, and require special sensitivity by the mediator. Mediation structure is very important to these emotional cases. The process may begin with an open caucus. Following the mediator's introduction, each side provides an overview of their case. In an elder abuse case, great care should be taken at the convening stage to determine whether the open caucus format is appropriate. The best practice is individual private meetings, starting first with the plaintiff, to provide credibility building for the mediator and a place to vent for the plaintiff. Joint sessions may be added later, if all parties agree.

Prior to mediation, there should be a conference call between counsel and the mediator. This call will ferret out both the legal and emotional nature of the dispute. The conference will also be used to ensure that adequate time has been reserved and the necessary decision makers will be present. Exchange of briefs and joint session issues should be addressed also.

Briefs should be prepared well in advance. The mediator should be provided adequate time to understand the medical condition of the party who was placed in the institution. This includes time to review the chart notes, relevant medical referrals and other records. It is quite helpful

to create a briefing schedule at the initial conference call, and to reach agreement that briefs will be exchanged with copies to the decision makers before the conference. Items that are for the mediator's eyes only would not be exchanged and would be

mitment having been obtained, the mediator will pronounce the case settled. In this manner, the settlement figure and collateral terms are obtained through dialog. Dialog is far more sensitive to the human and emotional issues than traditional negotiation.

occur at three o'clock the morning after the mediation. It is therefore very important for the mediator to obtain a signed and binding stipulation for settlement (Code of Civil Procedure Section 664.6), executed by the parties and counsel that sets forth sufficient terms to permit a petition to the court in the event a final released document is not signed. The mediator should explain this at the conference call and again during the introduction. In this manner, there will be no surprise.



Dialog is far more sensitive to the human and emotional issues than traditional negotiation.

Often confidentiality is a required term in the settlement of this type of dispute. Special terms such as this should be raised during the prehearing conference call and not after the fundamental terms for the settlement have been agreed. Adding an additional and unexpected term, particularly at the end of a protracted and emotional mediation, runs a substantial risk of derailing the process.

Mediation is a facilitated negotiation. The mediators "client" is the "deal." The "deal" is the common thread that has brought the parties before the mediator. "Deal" does not mean a settlement at all costs. The mediator's primary tool, indeed the mediator's commodity, is risk. In order to facilitate discussion of risk, the parties should be sensitized in advance to the type of mediation they will encounter, and the mediator should set aside the appropriate time to work on an individual basis with the parties and to discuss risks with a clear awareness of the unique sensitivities applicable to this type of case. Risk does not mean a lack of compassion. Communications of risks, and discussion of interests, bring about resolution of these sensitive and important disputes.

Closing is as important as getting the deal. The mediator who obtains a verbal settlement, secures a handshake and makes a note in the mediator's file has not fulfilled the duties entrusted by the parties. The mediator's last job is to ensure that the deal does not go south. In emotional disputes, changes of heart often

provided to the mediator in a separate submittal.

A number of mediators are skilled at "facilitative" negotiation. In this process, the mediator will engage in repeated individual dialogs concerning the claims and defenses. The mediator will typically point out the risks associated with each side's position in an effort to ensure maximum flexibility and compromise. The mediator will discuss specific settlement ranges with each party to the litigation and will work individually and privately to move the case to a point where the mediator has obtained commitment and authority within an acceptable range. The mediator will then secure a commitment to the acceptance of a specific dollar amount within that range from each party. The com-



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## Family Law Neutral's Demeanor Aids Cases

Continued from page 1

"I had to make quick decisions as a judge. I'm sure there were mistakes," Murphy said. "Now, I have the opportunity to reflect on what is going to be coming before me and, hopefully, not make many mistakes."

San Diego attorney Gordon Cruse has known Murphy since he was a family law judge serving in the Vista and downtown San Diego courthouses. Cruse still takes clients to the retired judge for mediations and private trials.

Cruse admitted that he's stolen a line that Murphy often uses at the beginning of his mediations: "My job is create doubt about your case. I want you to bring your case to a resolution today under your terms and not because of what some judge tells you to do."



**Thomas R. Murphy**  
Age: 74  
Affiliation: JAMS  
Location: San Diego  
Area of specialty: Family law

Here are some of the lawyers who have used Murphy as a mediator, arbitrator or private judge: Bruce M. Beals, San Diego; Lesa Christenson and Sharon Blanchet, Ashworth Blanchet Christenson & Kalemkarian, San Diego; Gordon D. Cruse, San Diego; Jeffrey C. Fritz, Basie & Fritz, San Diego; J. William Hargreaves, Hargreaves & Taylor, San Diego; James A. Hennenhofer, San Diego; Steven E. Briggs, Newport Beach; Judi A. Curtin, Santa Ana; Michael Fisher, Santa Ana; Saul M. Gelbart, Stegmeier & Gelbart, Newport Beach; Mark E. Minyard, Minyard Morris, Newport Beach; Gerald J. Phillips, Phillips Whisnant Gazin & Gorczyca, Newport Beach; Brian G. Saylin, Orange;

Philip Seastrom, Seastrom & Seastrom, Newport Beach; Susan Carter, Bruce Cooperman and Dennis Wasser, Wasser Cooperman & Carter, Los Angeles; Neal Raymond Hersh and Joseph Mannis, Hersh Mannis & Bogen, Beverly Hills; Daniel J. Jaffe, Jaffe and Clemens, Beverly Hills; Robert S. Kaufman, Kaufman Young Spiegel Robinson & Kenerson, Beverly Hills; and Stephen J. Wagner, Dick & Wagner, Sacramento.

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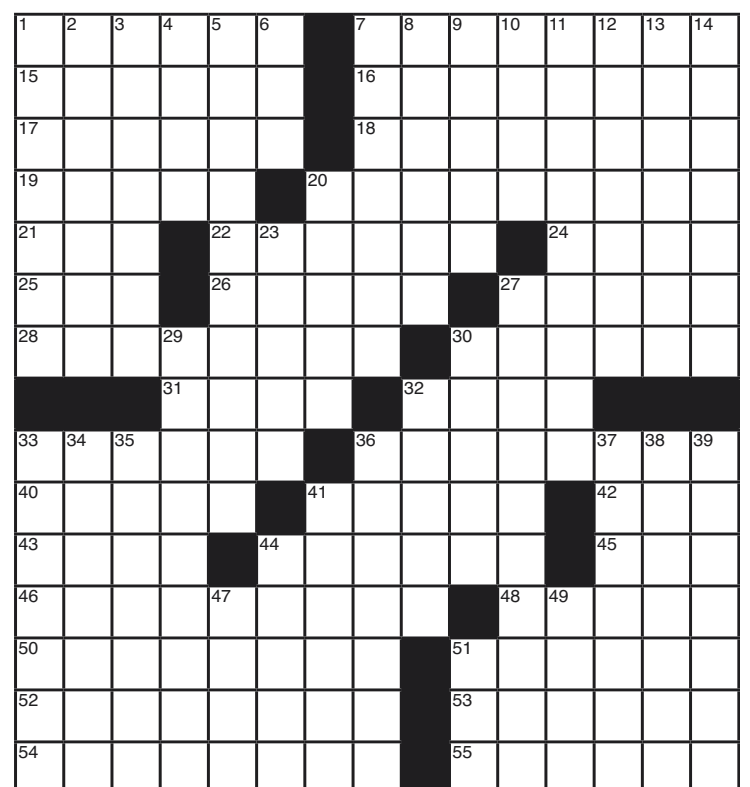
### The New York Times Crossword

- Across**
- 1 Prepares for the trophy room, say
  - 7 "That greeny flower" in a William Carlos Williams poem
  - 15 Husband of Denmark's Queen Margrethe
  - 16 Italian cooking style
  - 17 Maker of Emporio White perfume
  - 18 Dr. Eric Foreman's portrayal on "House"
  - 19 Con artist's crime
  - 20 Carol king
  - 21 Cheap roofing material
  - 22 Wartime bridge builder
  - 24 Prevailing character
  - 25 Sargasso Sea spawner
  - 26 Undomesticated
  - 27 Justicialist Party founder
  - 28 Arid area agriculture
  - 30 A belligerent arguer may grab them
  - 31 "Los Olvidados" director Buñuel
  - 32 El Misti's location
  - 33 Limited release
  - 36 Walks aimlessly
  - 40 Crack
  - 41 Tibiae
  - 42 Delighted expression
  - 43 Pushes (off)
  - 44 Ambulance chaser's prize
  - 45 The Fighting Tigers, for short
  - 46 Item first marketed under the name
  - 48 She won three Grammys for her 1989 album "Nick of Time"
  - 50 What phorid flies are imported to prey on
  - 51 Green stuff
  - 52 Accurate
  - 53 Got ahead of
  - 54 Not worry
  - 55 Oktoberfest souvenirs
- Down**
- 1 Given a raw deal, slangily
  - 2 Popular rat-baiting dog in Victorian England
  - 3 Weak and craven
  - 4 \_\_\_\_\_ Blücher (forbidding "Young Frankenstein" character)
  - 5 Is critical
  - 6 Word with pole or jump
  - 7 They reproduce via mitosis
  - 8 \_\_\_\_\_ cake (marzipan-covered dessert)
  - 9 Follow the leader?
  - 10 A leveret is a young one
  - 11 Bruce Springsteen ballad
  - 12 Censure
  - 13 Catalán relative
  - 14 Moderates
  - 20 Goes up a degree or two
  - 23 Like freakish coincidences

#### ANSWER TO PREVIOUS PUZZLE

C O N D E M N S T E L L A S  
A N T A R I O W I P E O U T  
C H R I S T M A S S T O R Y  
L E S T S A I T H M M I X  
E D Y S H A D E  
M I S D O A S S R I C O H  
I P O R A N I B I N A R Y  
C A N M I A S M A L P I E  
A N N E A L S I L L R O N  
H A Y D N Q I X E D I N A  
A T E U P O R I  
S A K S M O P U P S H I A  
T R A N S I T I O N P O I N T  
A U R E O L E M I D W E S T  
G N A R L E D O N A N D O N

Edited by Will Shortz No. 0806



Puzzle by Patrick Berry

- 27 Pete Dexter novel whose title character is an unrepentant murderer
- 29 It sometimes covers first-time performers
- 30 Singer Rimes
- 32 Dug for gossip
- 33 Appear to be, to most eyes
- 34 Base found in DNA and RNA
- 35 "So's your old man!" and others
- 36 Seeking relief from a pitcher?
- 37 Composer who tutored Mozart's son
- 38 Roll film inventor
- 39 They're home 24/7
- 41 Schoolhouse needs of yore
- 44 Kind of line
- 47 Display
- 49 Michelangelo work
- 51 Salon selections

For answers, call 1-900-285-5656, \$1.49 a minute; or, with a credit card, 1-800-814-5554. Annual subscriptions are available for the best of Sunday crosswords from the last 50 years: 1-888-7-ACROSS. AT&T users: Text NYTX to 386 to download puzzles, or visit [nytimes.com/mobilexword](http://nytimes.com/mobilexword) for more information. Online subscriptions: Today's puzzle and more than 2,000 past puzzles, [nytimes.com/crosswords](http://nytimes.com/crosswords) (\$39.95 a year). Share tips: [nytimes.com/wordplay](http://nytimes.com/wordplay). Crosswords for young solvers: [nytimes.com/learning/xwords](http://nytimes.com/learning/xwords).

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