

*This is the third in a series of training objectives developed by the Training Standards Committee of the Elder Decision-Making & Conflict Resolution Section of the Association for Conflict Resolution.*

## **Mediation in the Long-Term Care Setting: Training Objectives and Commentary**

*Prepared by the ACR Section on Elder Decision-Making and Conflict Resolution  
Committee on Training Standards*

As a result of the aging of the baby boomer generation and advances in medicine that have extended life, more and more people may find themselves needing some type of long-term care, whether in the home or in a facility such as a nursing home or assisted living environment. Disputes that arise in these settings can be stressful for all concerned. While many long-term care disputes lend themselves to informal dispute resolution mechanisms, others may require the assistance of a third party trained neutral, such as a mediator working within the structure of a formal mediation process.<sup>1</sup>

These training objectives are for mediators who want to mediate issues or disputes related to long-term care, whether provided in an institutional or community setting. As with the other categories of *ACR Elder Care Mediation Training Objectives*,<sup>2</sup> these are intended to be of use to both trainers and those interested in participating in long-term care mediation training. Mediation in this context encompasses a broad continuum of potential issues that include but are not limited to disputes about shared living spaces, transfer or discharge, level of care, care plans, activities and services, resident rights, coordination of care, access and visitors. Participants may be family members, staff, medical team members, residents, advocates, state agencies, and others.

Due to the potential complexity of the issues and the potential legal rights implicated, the recommended best practice is that long-term care mediation training be directed to mediators with significant experience, who have completed both basic mediation training and advanced core training in elder mediation.<sup>3</sup> Training programs could benefit from inclusion as trainers of local experts such as long-term care ombudsmen, elder law attorneys, and geriatric care managers.<sup>4</sup>

The training objectives assume that appropriate policies, procedures and safeguards have been established, whether by an individual professional mediator or by a mediation program or office.

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<sup>1</sup> See Karp, N. & Wood, E., *Keep Talking, Keep Listening: Mediating Nursing Home Care Conflicts*, American Bar Association Commission on Law and Aging (October 1997).

<sup>2</sup> See *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary*, hereinafter *ACR Elder Care Training Objectives and Working with Elders in Mediation: Diversity Training Objectives and Commentary*, hereinafter *Diversity Training Objectives*.

<sup>3</sup> Such training should meet the objectives detailed in *ACR Elder Care Training Objectives* <http://acrellder.org/wp-content/uploads/2011/04/ElderCareMediationObjectives2.pdf>.

<sup>4</sup> See *ACR Elder Care Training Objectives* Introduction concerning use of experts in training.

## Long Term Care Mediation Training Objectives

By the end of the training, participants will understand the following issues, and will have developed skills sufficient to competently mediate disputes in the following areas:

1. Understand the long-term care setting and regulatory environment.

### *Commentary*

Training should offer basic background in the kinds of long-term care settings and the way they are regulated under federal, state or provincial, and local law. This includes residential settings such as nursing homes and assisted living, as well as community-based options such as group homes, senior housing, and supported living at home.<sup>5</sup> For example, understanding the differences between a nursing home and assisted living, the overall regulatory framework for each, and the differences in the typical resident population will offer insights into the constraints and basic assumptions that may underlie a dispute.

Mediators also should recognize the various roles of staff including (for a nursing home or assisted living) the administrator, deputy administrator, director of nursing, medical director, licensed and practical nurses, social workers, certified nursing assistants and other direct care staff such as personal care assistants. Mediators should understand the particular titles and duties of staff involved in a conflict. Note that terms may differ by setting, jurisdiction, or corporate entity.

2. Become familiar with the culture of conflict in long-term care including:
  - a. Common conflicts in the long-term care setting;

### *Commentary*

Training should orient mediators to common conflicts they might encounter in the long-term care arena. Examples in training should focus on areas such as staffing, personal care, food, medical issues and residents' rights. Mediators also should recognize that long-term care disputes have ethical dimensions with competing values of autonomy versus beneficence, individual autonomy versus collective interests of the resident group, and lifelong values versus immediate choices.<sup>6</sup>

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<sup>5</sup> Many dispute resolution issues in community settings are included in the *ACR Elder Care Training Objectives*. The long-term care training objectives focus on additional aspects unique to the spectrum of long-term services and supports.

<sup>6</sup> See *ACR Elder Care Training Objectives*, I-9, on ethical issues in elder mediation.

b. Parties to long-term care disputes;

*Commentary*

Training materials, exercises, and role plays should recognize the variety of parties in long-term care disputes including residents, families, management staff, direct care staff, agency representatives, and health care professionals. Training should provide simulations that involve institutional, resident and family situations. Disputes can be between and/or among residents, family members, staff, or involve multiparty issues with an array of actors. See also discussion of surrogates in Objective 3.

c. Existing dispute resolution mechanisms; and

*Commentary*

Training should discuss the multiple existing mechanisms outside of mediation (or which could incorporate mediation) to address long-term care issues and complaints, including staff resolution, the care planning process, grievance procedures, resident and family councils, chaplains, direct care associations, ethics committees, the long-term care ombudsman, state licensing and certification agencies, administrative law procedures and union procedures. Mediators should know the resources that exist in their local area. Mediators should appreciate the appropriateness, advantages, and disadvantages of using mediation as an alternative to -- or as a technique in conjunction with -- these dispute resolution options. See Objective 5 below.

d. Barriers to resolution.

*Commentary*

Training should prepare mediators for the challenges they will face in resolving disputes in the long-term care setting. Most important, mediators should understand the challenges in convening mediation. Residents and families may fear perceived retaliation, and may be reluctant to voice complaints or to participate in mediation. Such fears might include discharge, failure to re-admit after a hospital stay, or attempts to isolate residents from family members who may have voiced concerns, as well as a reduction in the quality or frequency of care. Fear of retaliation can have a chilling effect on dispute resolution efforts.

Additional barriers include: (1) the corporate hierarchical nature of many long-term care providers, precluding an agreement by the administrator without approval from corporate offices; (2) staff turnover, which can erode facility buy-in to a mediative approach; (3) cultural and language

differences,<sup>7</sup> which can reduce effective communication among staff, residents and families; and (4) capacity and surrogacy issues. See Objective 3 below.

3. Understand factors affecting capacity to mediate and the role of surrogate decision-makers. Training should emphasize the following:
  - a. Basic concepts of capacity;

*Commentary*

Training issues concerning capacity to mediate are outlined in *ACR Elder Care Training Objectives*.<sup>8</sup> “Capacity to mediate” refers to a person’s ability to participate in the mediation process safely and effectively. Because a significant proportion of individuals in long-term care settings, especially nursing homes, may have diminished capacity, addressing questions of capacity is critical.

Mediators should understand that “capacity” is not global but is both contextual and task-specific. For example, a party may lack capacity to manage finances, but still have capacity to mediate. In addition, the resident in a long-term care setting may be better able to participate in a mediation at certain times of the day, in personally comfortable places in the residence, and/or with the appropriate aids, such as a hearing aid or glasses. Training should highlight context as an important part of preparation and process. The goal is to facilitate contextually, so that the level of capacity to mediate is enhanced.

Incapacity is not synonymous with medical and psychological conditions such as dementia or schizophrenia; rather such conditions may contribute to a lack of functional ability in certain areas. Mediators should begin with a presumption of capacity but be alert to indications of problems. Finally, mediators should recognize that diminished capacity can be reversible or temporary, when caused by factors such as side effects of medication, malnutrition, stress, grief, and transfer trauma.

- b. Laws related to personal and financial surrogacy;

*Commentary*

Long-term care mediation often involves working with surrogates for the long-term care resident. Therefore it is important that participants

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<sup>7</sup> See *ACR Elder Care Training Objectives* and *Diversity Training Objectives*.

<sup>8</sup> See *ACR Elder Care Training Objectives* Objectives and Commentary I-5 and I-6 for a basic discussion of capacity issues in elder care mediation, as well as Objectives and Commentary II-1, II-2 and II-5 under Adult Guardianship Mediation.

understand the role and authority of a range of legal surrogates, and whether a mediation must include a surrogate. Training should include reference to relevant statutes and regulations on surrogacy issues in the jurisdictions represented in the training. Mediators should become familiar with laws concerning guardianship and conservatorship, trusts, financial and health care powers of attorney, default medical consent, and representative payment in their jurisdictions. This portion of the training may benefit from presentation by a local elder law attorney or other knowledgeable expert.

c. Standards of surrogate decision-making;

*Commentary*

The training should cover the “substituted judgment” and “best interest” surrogate decision-making standards, how these standards work, and when they may be required or appropriate. Mediators should understand that there is no bright line between these two standards, and that sometimes a thoughtful decision or agreement could draw on both.

d. Surrogate relationship to resident;

*Commentary*

Training should emphasize the mediator’s role in understanding the surrogate’s relationship with the resident. Mediators should inquire into the surrogate’s history and familiarity with the individual over time and the likelihood that surrogate decisions will reflect resident values and preferences, or at least best interests.

Training should further address dilemmas that may occur if the resident’s wishes appear contrary to those of a surrogate, and include discussion of appropriate strategies should this arise in the course of screening or during mediation.

e. Surrogates and support persons; and

*Commentary*

It is important that mediators understand the difference between a “surrogate” who has authority to make decisions on behalf of another, and a “support person” who has no decision-making authority but who can enhance a party’s capacity to participate in mediation. Mediators should be alert to participant confusion in this area in order to enhance the voice of the older person. Training should emphasize the importance of clarifying roles and exploring issues around the presence of support persons and surrogates.

- f. Approaches to maximize capacity to participate in mediation, even when a surrogate is involved.

*Commentary*

Inclusion of the resident in a way that maximizes his/ her ability to participate in mediation and to have his/her voice heard underlies all these objectives. As discussed in *ACR Elder Care Training Objectives*, certain accommodations may be necessary to maximize a party's ability to participate in mediation.

4. Understand the role of the long-term care ombudsman as a resident advocate, as established under the Older Americans Act.<sup>9</sup> The ombudsman attempts to resolve conflict on a resident's behalf.<sup>10</sup>

*Commentary*

As noted in the commentary for the objective on the continuum of collaborative problem solving services (See Objective 5), a long-term care ombudsman's role is always to advocate for the resident. In doing so the ombudsman may employ a wide range of conflict resolution skills. The ombudsman's role as advocate may involve supporting a resident's participation in mediation, particularly when a resident may have cognitive impediments, may fear retaliation, or may simply need support to participate effectively. In addition, ombudsmen are trained in national and state/provincial regulations and can help the resident evaluate a proposed solution. Finally, ombudsmen often have existing relationships with administrators and direct care staff, which would facilitate referrals to independent mediators in the community.

Mediators of long-term care disputes should be comfortable with the role of ombudsman as resident advocate. Ombudsmen are experienced in working with residents, family members and surrogate decision-makers who are in conflict among themselves. Also, ombudsmen in the United States have federal and state guaranteed access to facilities and residents. Mediators should understand that sometimes advocating is simply stating the resident's legal rights. This may result in securing an agreement that the right will be respected and observed in practice by administration and staff or by family members or surrogate decision-makers, any of whom may be in conflict with the resident.

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<sup>9</sup> 42 USC 3058g. In these Objectives, the term "ombudsman" is used to refer to the long-term care ombudsman under this act.

<sup>10</sup> Note that other jurisdictions, such as Canada, may not have an equivalent role for the long-term care ombudsman.

5. Review continuum of services to support the use of collaborative problem solving in long-term care settings.

*Commentary*

Training should include an overview of the spectrum of processes for conflict resolution already available to ombudsmen, residents, and facilities in the long-term care setting. Mediators need to be aware that there may be several conflict resolution mechanisms already in place. See Objective 2.c, Existing Dispute Resolution Mechanisms.

In addition, there may be mechanisms outside of mediation that a mediation program can provide through collaboration with long-term care stakeholders. These may range from facilitation of early-stage conflict by long-term care staff, such as a social worker, to involvement by an ombudsman in a mid-stage conflict.

Training should discuss the benefits of providing conflict resolution skills training for long-term care stakeholders and staff, and education about when an “outside” neutral mediator can be most useful. Mediators should understand the differences in the roles of ombudsmen and mediators in conflict resolution. See Objective 4, Role of the Long-term Care Ombudsman in Mediation.

6. Increase skills through role play practice and debrief. Role play skills include but are not limited to:
  - determining whether mediation is appropriate,
  - working with individuals with diminished capacity (see Objective 3),
  - identifying any accommodations that may be needed,
  - identifying who needs to participate and their roles,
  - working with multiple parties, including staff, surrogates, and support persons, and
  - addressing relevant laws and regulations.

*Commentary*

Skills training in long-term care mediation should allow sufficient time to focus on skills that are unique or especially useful in this setting so trainees can apply the information learned. Multiple role plays or exercises may be needed to cover skills used in both the pre-conference and the conference stages of mediation. Role plays and exercises should provide trainees with practice in working with individuals who may have diminished capacity, in recognizing the need for and establishing accommodations, addressing fear of retaliation, and in maximizing individuals’ abilities to participate and engage effectively in the process.

Training should also offer practice in working with staff and other stakeholders, to identify who may participate, to overcome any resistance to the mediation process, and to encourage a collaborative problem-solving approach. Role plays should enable trainees to understand the roles of surrogates and ombudsmen and to understand ways to work with them. Role play examples should include the opportunity to understand the effect of relevant local, state/provincial, and national laws and regulations (or lack thereof) on the mediation process.<sup>11</sup> If possible, including participants from local long-term care facilities as role players can enhance the learning experience.

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<sup>11</sup> See Objective I-10 and Appendix of *ACR Elder Care Training Objectives* for further discussion of best practices in skills training.