

# Daily Journal

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PERSPECTIVE

## Consider mediating your nursing home case

By Adrienne Publicover

More than 10,000 baby boomers are turning 65 every day. According to Forbes, by 2050, the number of Americans over the age of 65 is expected to double to 81.7 million. As the population ages, there is an increasing need for long-term care and consequently, litigation could increase as well.

There are a variety of cases which fall under the umbrella of long-term care, one of the fastest growing areas of health care. These cases may involve suits against nursing homes or assisted living facilities for abuse, neglect, mistreatment, negligence or wrongful death. They may or may not include physicians or individuals employed by the long-term care facilities.

Nursing home cases can be challenging to resolve, yet trial presents risk for both sides. The damages at stake may be significant. While nursing home litigation often involves relatively small amounts of economic loss, the cases generally include claims for punitive damages, and verdicts for successful plaintiffs can exceed seven figures.

Mediation remains a viable option and should be considered to resolve these disputes for several reasons.

### 1. Mediation Helps the Parties Avoid Stress.

Lawsuits can be stressful for all involved. The plaintiffs in these cases often are new to the unfamiliar territory of litigation and the strain that it can cause.

And these individuals may be even more vulnerable due to age and/or medical condition. Depositions, discovery, and trial all can serve as constant reminders for the loss that one has already endured.

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On the defense side, it is never easy to be the target of a lawsuit. Corporate reputation plays an important role in achieving business objectives. Physicians too have reputations and licenses to protect. And the individual employees sued may have no prior experience with litigation and good reason to want to avoid the associated stress.

Mediation alleviates this tension. Unlike a trial, private mediation is conducted in a more informal setting. The parties have an opportunity to meaningfully participate. And if settlement is achieved, it provides certainty and closure.

### 2. Litigation Takes Time and Money.

Litigating long-term care cases is expensive. Matters involving elder abuse often have a heightened burden of proof. Depending upon the jurisdiction, a plaintiff may have to show substantial evidence of neglect or even recklessness.

Extensive case preparation is required, including discovery, depositions and experts. For plaintiff's counsel, this may entail an investment of significant resources. Cost of defense similarly can easily exceed six figures.

The typical trajectory of a litigated suit may involve anywhere from one to three years from inception to trial. Trials then often lead to appeal, necessitating additional time.

Mediation, on the other hand, generally involves one day, and it can be conducted at any stage in the litigation, often before the beginning of protracted discovery. Even a lengthy mediation, which might

last more than a day, will be a small fraction of the cost of going to court.

### 3. Mediation Allows Parties to Maintain Privacy and Avoid Negative Publicity.

Mediation also allows the parties to preserve their respective confidentiality concerns. The claimed injuries in these types of cases sometimes can be disturbing, and both sides may benefit from the privacy afforded the mediation process.

For the plaintiff, even small scale violations of medical privacy can cause substantial harm. From the defense side, reputational harm can be devastating to a business. Physicians and other employees who may be part of a suit often also have an interest in protecting their privacy and personal reputation.

In a trial, the record is public. By contrast, the entire mediation process is protected by state or federal evidentiary rules. If settlement is achieved, the result often is confidential as well.

### 4. Creative Settlements Can Address Myriad of Complex Issues.

Long-term care litigation can be complex and, given the age of individuals involved, the damages models often differ from traditional injury or negligence cases. Work with the other side(s) to share necessary information. Protective orders may be used to address privacy and confidentiality concerns.

It is important that your mediator engage early in the process, seek to understand the damages claimed to be at issue, and give thoughtful consideration of evidence and ex-

pert reports. All of this information will assist your mediator in crafting creative solutions.

Money is not always the driving force in a settlement. Sometimes the catalyst will be a simple, yet sincere, apology or even an explanation as to the events that transpired. Other settlement terms have included memorials for family members who have passed away, opportunities to train employees, and donations to charity.

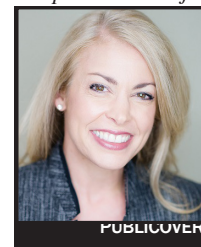
Suits sometimes involve an ongoing care situation. A creative mediator can work with the parties to resolve these issues, as well.

Be open to joint sessions — not for the purpose of table pounding and argument — but to collaborate on resolution strategies. The parties are the ones closest to the dispute and play a valuable role in successful settlements.

### Conclusion

As this area of health care litigation continues to grow, there are a myriad of reasons to consider mediating of your dispute. Mediation can help the parties avoid stress, preserve their privacy, and achieve a timely and efficient resolution of their claims.

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