ALTERNATIVE DISPUTE RESOLUTION

WHEN IS MEDIATION THE BEST PROCESS TO RESOLVE A DISPUTE?

by: Regina A. Casey, Esq.

Mediation is a process in which a third party or mediator assists parties in a dispute to resolve a conflict. The process is private, voluntary, informal and non-binding. There are circumstances when mediation may be a better method of dispute resolution than direct negotiations between the parties, arbitration or litigation.

SUCCESS WITH DIRECT NEGOTIATIONS IS UNLIKELY DUE TO THE PERSONALITIES OF THE PARTIES

The negotiating style of one of the parties may be so adversarial that direct negotiation may diminish the likelihood of a reasonable timely settlement. A party may be extremely emotional, irrational, suspicious or simply uncomfortable with the negotiation process. The mediator ca provide an environment in which the parties can communicate constructively and reduce the tension often created when there is a conflict. Through active listening and guided questioning, the mediator can often diffuse a highly emotionally charged situation so the parties can reach a reasoned decision rather than an emotional one.

IMBALANCE OF POWER BETWEEN PARTIES

There may be a wide disparity in the level of education, sophistication and knowledge of the parties that results in the imbalance of power. When there are considerable power imbalances between the parties, direct negotiation may benefit the stronger parties who tend to take advantage of their superior power, knowledge or communication skills to coerce their weaker adversaries. A mediator's obligation with regard to negotiation power is to ensure that each party in mediation had sufficient capacity to effectively represent their interests in the mediation. Each party must have a certain threshold of negotiation effectiveness to be able to appropriately take part in the mediation. It is a mediator's ethical obligation to be impartial, that is to not favor any party over any pother party, and be neutral, which is not favoring any particular result. Therefore, it is not the mediator's role to level the playing field and balance bargaining power, but the mediator can capacitate each mediating party and determine whether each mediating party has sufficient capacity to effectively represent his or her interests in the specific mediation.

ATTEMPTS AT DIRECT NEGOTIATIONS FALL

Many times the parties who have attempted to negotiate directly come to an impasse. To break this stalemate, a mediator is required to diffuse the controversy by encouraging parties to generate options. The mediator can serve as a catalyst who focuses the parties on their interests rather than the conflict. Sometimes it is not even apparent to the parties what their true interests are as their thinking is clouded by anger or other emotions. The mediator may assist the parties in brainstorming

options to resolve their dispute based on their underlying interests. The mediator is in a position to identify the obstacles to settlement and guide the parties in overcoming these obstacles.

ADVANTAGES OVER LITIGATION AND JUDICIAL DETERMINATION

Mediation has many advantages over litigation, including more control by the parties of the cost, time, process, and outcome of the dispute. Not only does mediation reduce time and expense associated with litigation, it gives the parties control of the process. The parties chose the mediator, when and where to mediate, what information is to be exchanged and the outcome. Through the mediation process, communication can be improved so that trust is built and the bitterness often associated with adjudication can be avoided. Mediation can provide a basis for future negotiations between the parties and generally support an ongoing relationship between the parties, which is important when the dispute is between a facility and a resident who is still residing at the facility or when the dispute is between a contracted vendor and the facility and there is a desire to continue the business relationship.

About the Author:
A shareholder at Wroten & Associates, Regina Ann Casey has been defending physicians, hospitals and various other healthcare providers for over 20 years. Previously serving as a litigation partner at an East Coast firm with offices in Maryland and Washington D.C., she then worked with a West Coast medical malpractice defense firm. She has been with Wroten & Associates since it was founded.

Ms. Casey has successfully defended medical malpractice cases in federal and circuit courts in Maryland. She has also tried cases in the U.S. District Court and Superior Court for the District of Columbia, and in California's Superior Court. She has participated in a number of arbitrations and is a mediation specialist. She has represented physicians in administrative hearings before the Medical Board in Maryland and at hearings to defend physicians' hospital privileges.

She graduated magna cum laude from Duke University earning a Bachelor of Science in Nursing in 1975. After working as a nurse at the University of Virginia and Georgetown University Hospitals, she earned her Master of Science in Nursing at Catholic University America, where she was a member of the Nursing Honor Society, Sigma Theta Tau. She graduated with honors from the University of Maryland Law School and was admitted to the Maryland Bar in 1986; the District of Columbia Bar in 1987, and the California Bar and U.S. District Court for the Central District of California in 2001.