



MANAGING EMOTIONS WHEN MEDIATING ELDER ABUSE CASES

by: Regina A. Casey, Esq.

Mediation of claims of elder abuse involves more emotion than other types of litigation.

When adult children entrust the care of a parent to a facility and there is an unexpected injury or death, there is often a mixture of strong emotions, including denial, guilt and anger that can make resolution of the matter more challenging. Emotional tension must be managed effectively by the mediator and defense counsel in order to obtain the best possible result at mediation.

Most Plaintiffs are still in the grieving process when a lawsuit is threatened or filed. After the loss of a parent or spouse, the grieving process may last over a year before there is acceptance by some individuals. The stages of grief include denial, anger, bargaining, depression and acceptance. Determining the emotional state of the parties and noting what stage of the grieving process the Plaintiffs are currently in is essential to a successful mediation.

Dealing with Denial

It is common for grieving family members to be in denial. They cannot accept that their parent was at the end of life and that his or her overall health was deteriorating. Many adult children have had little communication with their parent's physicians and are not aware of the extent of their parent's disease or disability which made the injury or death inevitable. Many people use litigation as a way to determine what caused the unexpected event or death. A lawsuit may often be prevented if the family's questions are fully answered at the time of death and family members are made to understand that the outcome is a result of the natural progression of their loved one's disease process rather than neglect or abuse.

Overcoming Guilt

Guilt is another emotion that must be recognized and addressed when mediating a matter. The family often feels guilty because they were no longer able or willing to care for their parent at home and it was their choice to place him or her in the facility. The grieving daughter may think "If only I had not put Mom in that place, she would not have died such a horrible death". She seeks redemption by shifting the blame for the manner of her mother's death from herself to the facility staff. By addressing the daughter's emotion and providing alternative ways to absolve her feelings of guilt, such as a reasonable explanation as to why no one is to blame because the death was inevitable due to forces outside anyone's control, the matter can more likely be resolved to everyone's satisfaction.

Diffusing Anger

Anger is a natural part of the grieving process. Unfortunately, the litigation process often intensifies this emotion rather than provide a remedy. Plaintiff's counsel intentionally includes inflammatory language in the complaint and pleads malice, oppression or fraud in an attempt to obtain enhanced remedies such as attorneys fees and punitive damages under the elder abuse statute. The result is

that Plaintiffs believe their anger is justified and Defendants must be punished. Plaintiff's anger is also fueled in part by poor public perception of the nursing home industry. Many have heard and have adopted Plaintiffs' attorneys' mantra "Profit over people". Deficiencies issued by the California Department of Public Health are referred to by Plaintiff's attorneys to establish that the facility's failure to comply with regulations is evidence of a pattern of substandard care, further enforcing Plaintiff's anger towards the skilled nursing facility.

Managing Emotions Effectively

Once you have identified the predominant emotions that are effecting Plaintiffs, you can devise strategies to help plaintiff's overcome these emotions so a reasonable compromise can be reached. If denial or guilt is the prevailing emotion, educating the parties of the realities of the situation is the first step towards resolution. If anger is clouding the Plaintiff's reasoning, then compassionate listening and patience may be the most effective tools to help Plaintiffs work through their emotion. Apology is a powerful and constructive form of conflict resolution when faced with anger. Webster's Dictionary defines apology as an admission of error or discourtesy accompanied by an expression of regret. Defendants, of course, should never admit fault when there was no mistake or error causing the injury or death giving rise to the litigation. There are, however, different categories of apologies. One does not have to admit wrongdoing to express sympathy or remorse. A sincere expression of sorrow for the Plaintiff's loss or regret for the family's dissatisfaction with the care provided by facility staff may be all that is required to dissipate Plaintiffs' anger.

Conclusion

Defense counsel must develop strategies to recognize, confront and deal with Plaintiffs' emotions that are an impediment to a successful resolution of the matter. Emotions must be contained, but not ignored. Healthcare providers may be able to avoid litigation when an adverse event occurs by applying these same principles that are used in mediation by their attorneys. Sensitivity to what is motivating the family to threaten litigation, compassionate listening and appropriate expressions of concern may be all that is required to prevent a lawsuit.

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.