



## **Mediation Promotes Relationships, Dignity and Choice**

*ROXANNE J. CHANG, JD, MS LLP, is an attorney specializing in elder and special needs law. She is also a Limited Licensed Psychologist, with a Graduate Certificate in Gerontology. Ms. Chang has experience in consultation and advocacy for persons with dementia, developmental disabilities, and other individuals with special needs. She also provides conflict resolution services, including mediation and conflict coaching. Ms. Chang has a solo private practice in Plymouth, Michigan.*

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**Roxanne J. Chang, JD, MS, LLP**

*Fostering circles of support by building and maintaining relationships with family, friends, and paid support and service providers is crucial to the well-being and quality of life of an individual living with special needs. At the same time, meeting the needs and wishes of an individual living with a disability can be very complex and issues and disagreements can arise that are emotionally charged because they involve those family, friends, and providers on whom the individual depends for support. It is therefore important that any disputes that do arise are resolved as quickly as possible and in a manner that honors and maintains important personal relationships.*

*Disputes can create negative feelings and break down circles of support. These disputes may lead to litigation or other contested proceedings. Seeking resolution of these conflicts by an independent third party, such as a judge, can take control away from the individual with special needs, families, and other involved parties. Conflicts often do not only involve legal matters but are complicated by a complex history, emotions, power dynamics, and threats to a person's identity. Frequently, third-party decision makers do not have the ability to gain a full understanding of the complexities, as well as the wishes, needs, and interests of each of the parties involved.*

*Settling disputes by giving a third party the authority to impose a decision or declare a "winner" can be, in reality, a losing proposition for all parties and have a negative lasting impact on these valuable relationships. Resolving conflicts through a process called "mediation" is often a better alternative in these situations.*

### **What is Mediation?**

*Mediation is a voluntary process to allow individuals to resolve their own conflicts. Mediators typically use what is called “facilitative mediation.” in which a neutral facilitator guides the parties involved in the conflict to identify the issues, needs, interests and wishes of the parties, and assist the parties to develop and identify a resolution to the conflicts that is satisfactory to all those involved.*

*It is not the role of the mediator to issue opinions or judgments regarding the conflict. Mediators are required to keep all discussions and information in the mediation process confidential, even if the parties are involved a court proceeding.*

*The term “mediation” can be intimidating to some, as it implies a legal contest. Mediation, however, is often effectively applied in a less formal manner to resolve non-legal issues and can be referred to in such terms as a family meeting, an intervention, peacemaking or a peace conference.*

### **When is Mediation Helpful?**

*Mediation frequently is seen as an alternative option for conflict resolution during litigation or a contested matter (e.g., guardianship or estate disputes) that is already before a court. Mediation also is encouraged to resolve disputes in the context of special education, [divorce involving children with special needs](#), and the provision of supports and services (e.g., government-funded mental health services). Mediation, however, can also be used as an early intervention option to prevent further disputes which may lead to future litigation and court intervention, or to settle disputes that may be of a more personal nature. Many cities have free community mediation programs that assist individuals to resolve disputes without any court involvement.*

*Mediation can assist individuals with special needs, their families and friends, and other support providers, with conflicts that can arise such as:*

- *What supports and services does this person want and need (e.g., financial, medical, daily activities, psychosocial)?*
- *How should a dispute between a trust beneficiary and the trustee be resolved?*
- *How should supports and services be provided to help them lead a life that is meaningful to the individual with special needs?*
- *How is the individual supported when what they want can seem to be in direct contradiction with what they need i.e., dignity of risk and autonomy versus safety?*

- *Who should assist the individual with decision-making if needed e.g., financial decisions under a power of attorney, health care decisions under a health care power of attorney, or decisions via a guardianship?*
- *What level, scope, and type of supports and services will be provided?*
- *Who will care for the individual and when?*
- *How are supports and services to be paid?*
- *Where will the person live?*
- *How will finances be managed?*

*Not all conflicts are appropriate for mediation, such as disputes based on a strictly legal or factual question (for example, does this person's needs and level of ability meet the legal definition of "incapacity"), or relates to possible abuse or exploitation. Moreover, because mediation is primarily a voluntary process, unless it is ordered by a court, it is best used when all parties are genuinely interested and motivated in resolving conflicts.*

*Nevertheless, mediation can be considered a less restrictive way to resolve conflicts that leads to a more satisfactory result for all parties involved.*

### **Who Does Mediation?**

*Mediators in general have special training and knowledge in conflict resolution techniques. Each state has its own rules and regulations with respect to mediators. Mediators can be attorneys or non-attorneys (such as social workers).*

*Mediators assisting individuals living with special needs should have specialized knowledge of the individuals' needs, interests, services, and goals, as well as the legal matter at hand, such as special education or guardianship law. Mediators also should have the skills to maximize communication and participation of individuals with special needs in the process, particularly those who are non-traditional communicators or living with cognitive disabilities.*

*The parties involved must agree to the use of and selection of a mediator. Fees are charged typically at an hourly rate by the mediator and the fees are split between the parties involved. However, there are certain circumstances where the mediation may be paid by one of the parties. For example, the state is required to pay for special education mediation under the Individuals with Disabilities Education Act (IDEA). Some community mediation programs provide free or reduced fee mediation, see e.g.: <https://www.nafcm.org/> The parties, if agreed, can bring their own attorneys.*

*The role of attorneys in mediation is minimized; the focus is on the parties. However, attorneys can be very helpful to provide ongoing advice and assistance, particularly on legal matters.*

### **Why Use Mediation?**

*Unlike litigation and contested legal proceedings, mediation:*

- *Permits the individual with special needs to be involved with the process to the greatest extent possible;*
- *Allows the individual with special needs to participate in important life choices that may seem out of their control;*
- *Improves communication and cooperation;*
- *Improves empathy and understanding;*
- *Keeps the focus on the future needs and wishes of the individual and is goal-directed;*
- *Keeps matters private and confidential;*
- *Minimizes court costs and attorney fees;*
- *Empowers the parties to identify creative problem-solving and solutions;*
- *Creates solutions that are individually tailored to the needs and interests of those involved; and*
- *Allows for the possibility of a “win-win” situation for all parties.*

*When disputes arise, the mediation process should be explored before problems escalate in order to maintain important relationships, promote self-determination and independence, protect dignity, and improve the quality of life of individuals living with special needs.*

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