USES OF MEDIATION IN ASSISTED LIVING– AND SOME ADVICE THROWN IN

An Ombudsman Training Module

Prepared by National Association of State Units on Aging

NATIONAL LONG TERM CARE
OMBUDSMAN RESOURCE CENTER
NATIONAL CITIZENS COALITION FOR NURSING HOME REFORM
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National Long Term Care
Ombudsman Resource Center

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INTRODUCTION FOR THE WORKSHOP LEADER

Conflict. *n. Sharp disagreement or opposition, as of interests, ideas, etc.; clash*
Contention. *n. Heated verbal strife or dispute*
Dispute. *vt. To discuss pro and con (argue a question); to question the truth of; doubt; to oppose in any way; resist*

In assisted living, as in life, there is always the potential for conflicts. In fact, virtually every interaction between people requires negotiation, and assisted living is no exception. Losses and changes, fears and anxiety, vulnerabilities, threats to safety and well-being, a clashing of personalities, role and power conflicts, overburdened staff and managers, problems of understanding, boredom, embarrassment, impatience, and demeaning intolerance — all can give rise to anger, misunderstandings and difficult situations.

Uses of Mediation in Assisted Living—And Some Advice Thrown In is an opportunity for long-term care ombudsmen to explore and appreciate the major risk factors for disputes with relation to assisted living, and how mediation fits into the picture. Strategies for identifying and untangling underlying problems, opening a dialogue, and negotiating "gain-gain" solutions are examined via role play and group discussion.

At the end of this workshop, participants will be able to:

- Describe assisted living mediation's potential for giving voice to residents in the solution of problems.
- Interpret situations where collaborative dispute resolution methods may work best.
- Recognize when ombudsmen need to maintain their advocacy stance, use a more neutral community resource for mediation or consider co-mediation.

The program can be presented in two or three hours.

Why It Is Important

When assisted living residents, families, administrators, and long-term care ombudsmen cannot communicate and negotiate effectively about residents' likes and needs, requests and concerns, conflict is sure to occur.

Assisted living facilities are regulated differently from state to state. Regulations may not address all aspects of care and are not usually as specific as nursing home regulations. Therefore, using the regulations to resolve problem situations may not always work to the resident's benefit. In addition, the agreement or contract signed by the resident upon entry to assisted living may be confusing or even contain requirements that do not jibe with the state's regulations.

There is almost universal agreement that mediation for conflict resolution is a very powerful tool for shedding the emotional armor and empowering disputants to find solutions. In the assisted living context, it may be helpful to focus the parties - both residents and providers - on searching for the right answers, the answers that will promote the highest quality of life and care.

The ombudsman's primary concern always is the resident. In many assisted living situations, however, there may be a conflict between the resident's right to self-determination and her right to receive care that meets her needs. As advocates, ombudsmen must walk a tightrope - pushing for what the resident says she wants on the one hand, and on the other, working to ensure that the resident receives quality services that protect her health and safety.

A mediator is expected to maintain absolute neutrality. While neutrality is not possible for the ombudsman, there may, nevertheless, be situations in which a mediative approach may be used by the ombudsman to resolve particular conflicts. There also may be situations in which the ombudsman recommends the use of an outside mediator.

In a mediation involving assisted living residents, the ombudsman may play many roles. As such, the ombudsman may:

- use mediation skills in resolving selected problems;
- serve as a resource in the mediation session;
- support and advocate for residents and families in the mediation session;
- present factual information on the regulations and residents' rights;
- speak for residents who cannot or are uncomfortable speaking for themselves.

Goal

This workshop aims to enrich the ombudsman’s understanding of assisted living mediation strategies and appreciation for the critical decisions.

Who Should Attend

It is assumed that the professional ombudsmen and volunteers attending this information session will know the basics about assisted living, their responsibilities in this arena, and how assisted living is regulated in their state.

This program is intended as Intermediate or Advanced Level Training for the experienced ombudsman.

Learning Objectives

- To gain information about the long-term care ombudsman's role in assisted living conflict resolution and experience how a "collaborative" rights-based mediation intervention can be a viable tool for resolving all kinds of care conflicts.
- To appreciate the difficulties and challenges that ombudsmen must deal with in conflict prevention and resolution.
- To gain insight as to specific kinds of cases when mediation may (*or may not be)* appropriate for reconciling problems and differences in the assisted living context and why.
- To begin to think about how mediation skills can be put to work in ombudsmen's own situations.

APPROACH TO TRAINING

Using this Guide

The skill to do comes from doing.
—Ralph Waldo Emerson

- **Training Methods**

Lecture with overheads and handouts, Panel of Experts, Q & A, group discussion, role-play, peer feedback.

- **How to Use This Leader Guide**

We designed a format for this module that will let you get the information you need quickly and easily. The guide offers brief background about assisted living and dispute resolution, as well as ombudsman resources and references. Familiarize yourself with the module's contents. For quick reference, scan the **trigger words** in **bold face** type.

- **What Is Inside**

The module includes an opening short talk, key messages, wrap up debriefing points, two scripted role-plays with leader's notes, questions for group discussion, handouts, and overheads.

I Setting the Stage: The Ombudsman as Advocate in Assisted Living

Short Course on Assisted Living

Conflict Resolution Overview

Short Course on Mediation

II Expert Panel: How Might Mediation Work (or Not Work) in Assisted Living?

To Mediate or Not?

Laws and Regulations

Roles The Ombudsman Might Play

Q & A Session

III "Step into the Role" of an Assisted Living Dispute

Role Play #1: "Working It Out"

Role Play #2: Part 2: "Three Years Later"

The module's two role-plays are:

SCENARIO for "Working It Out." A group exercise designed to help participants **uncover what the real problem and interests are**. The complaint is unsatisfactory food service. But is that the real issue to be negotiated? Mrs. S., a diabetic, likes her new apartment and neighbors, but has complained to her daughter about the meal service. Her daughter is very upset and complains to the assisted living administrator. A misunderstanding results, due to underlying fears that none of the three are aware the other has. The three have agreed to meet to discuss the situation.

SCENARIO for "Three Years Later." A multi-issue discussion exercise designed to **spark thought and suggestions on breaking a virtual impasse**. Mrs. S.'s diabetes has gotten worse because she has not followed her diet. She's been hospitalized twice and she's confused and agitated. The assisted living management is concerned that the resident is a "danger

to herself," and that the problem has gone on too long. A discharge notice is issued. Mrs. S.'s daughter is threatening to sue. At question: Can Mrs. S.'s needs be met at the assisted living facility or does she need to go to a nursing home?

Exercises point out that:

- **Communication is critical** for residents, families, and facilities alike. Difficult problems that seem overwhelming may be handled if communication between the resident and provider is restored.
- With helpful **third party facilitation**, residents may be empowered to present their concerns to providers and assisted living providers and staff may learn to see a problem from another slant. **New acceptable solutions** may be possible when the parties involved in the conflict talk openly about their fears, beliefs and concerns.
- Success is **never an "I win, you lose"** proposition. A skilled mediator can help to pick up on everyone's concerns and focus attention on the things that are most important to the parties in a conflict. The focus is on encouraging people involved in a conflict to work through a problem together to find a **mutually acceptable solution**.
- Mediation should be within the overall framework of laws and regulations -- **"rights based"** -- offering choices within this context.
- Mediation may be useful for addressing situations where the **regulations are not clear or when what the resident wants and what is in the resident's best interest are in conflict**.
- Mediation is **not appropriate in all instances**. Identifying the appropriate cases is key.
- There are **varying roles for the ombudsman** in mediation.

Sample 3-hour Agenda

8:30 a.m.	Coffee and Networking
9:00 a.m.	Opening: Set Stage Welcome • Short Course on Assisted Living • Short Course on Mediation
9:30 a.m.	Panel of Experts *How Might Mediation Work (or Not Work) in Assisted Living?* Q & A Session
10:30 a.m.	Brief break
10:45 a.m.	Role Play #1: Working It Out • Mediator • Resident • Daughter • Assisted Living Administrator Role Play Debriefing, Comments and Questions
11:00 a.m.	Role Play #2: "3 Years Later" Same cast of characters Audience discussion of role play Open floor for Questions
11:30 a.m.	What All This Means to Ombudsmen Closing Remarks and Discussion
12:00 Noon	Adjournment

Working with Adult Audiences

If you want the audience to look at you, look at them.
—Thomas K. Mira

Good training, like good work, is collaborative. Here are a few pointers for effective training

- Know your audience
- Start and finish strongly
- Encourage and ask questions
- Don't read to your audience
- Don't provide too much. Don't provide too little
- Listen intently
- Watch your timing

Know your audience. What do they already know? What interests them? Do some research about your audience, then sculpt your presentation so they feel that it was developed just for them.

Start and finish strongly. Begin with a bang, stating the purpose of your workshop and how you're going to accomplish it. Let your audience know what you want them *to do* with the information you have given them. Why should the audience care? Quickly and clearly state the W.I.F.T.: "What's In It for Them?" The cardinal rule: *Don't make an audience guess.*

Encourage and ask questions whenever possible. Don't forget: your audience is a resource in training, always. The Ask, Pause, Call (APC) method is a classic sequence:

1. *Ask* a penetrating question (avoid simple yes/no questions as they do not advance understanding).
2. *Pause* to allow people a chance to think (about 5 to 15 seconds).
3. *Call* on their experience.

FOR EXAMPLE:

> Here's an open-ended question: "*What strategies can the ombudsman use for encouraging residents to tell us what's really bothering them?" (*Here's a closed question*: Shouldn't the ombudsman try to advise the resident?*

Don't read to your audience. Reading signals a lack of knowledge, a lack of preparation, and a fear of winging it.

Don't provide too much. Don't provide too little. Fight the information overkill urge. Drawn out lectures, stretches of interminable sitting, and absence of practice opportunities rate high on adults' irritation scale.

AS A GUIDE:

> After about 20 minutes, an audience's attention span wanes. **Twenty minutes is the guideline.** If you spend too little time (less than 20 minutes) you may miss important details. From an audience perspective, more than 50 minutes at one time is usually boring and ineffective.

Listen intently. Concentrate fully on listening as well as talking. Tune in to your audience. Maintaining eye contact signals interest and increases people's willingness to speak.

Watch your timing! Pace yourself. You want people to leave with a sense of completion.

Little Things Are Everything

Create a friendly and open atmosphere. Always arrive early (1 to 1 ½ hours before the scheduled start time) to be sure everything you want is in place. Warmly greet people as they arrive. Do not ever arrive late. Be the last one to leave.

Establish rapport. To begin, use something startling, dramatic, or humorous to get their attention. Anecdotes or real-life examples work well because human experiences involve the listener. In the opening minutes, explain what your experience has entailed. Many experts recommend it.

Relieve Tension. Give stretch breaks (brain breaks) every 1 to 1 ½ hours. Circulate around the room as you talk or ask questions.

SETTING THE STAGE:
THE OMBUDSMAN AS ADVOCATE
IN ASSISTED LIVING

Short Course on Assisted Living

It is a fact, one of the most attractive aspects of assisted living is the idea of vulnerable, frail older individuals *aging in place* in a residential setting. The paradox is, despite this common appreciation, the reality is not always so.

As ombudsmen know, assisted living residences vary in who can be served and services vary widely. According to the United Seniors Health Cooperative, assisted living is:

> Virtually everything in between independent living and a nursing home...in some facilities, only meals, housekeeping, minimal assistance and medication reminders are provided. In a more typical situation there would be assistance with one or more activities of daily living, such as getting dressed; all meals; support services such as housekeeping; medication supervision; and 24-hour staff monitoring of the home and residents.[1]

Assisted living can take many forms. A recent report by the U. S. General Accounting Office (GAO) confirms that while assisted living facilities generally offer some combination of housing, meals, and personal assistance, there is no nationally accepted definition or standard upon which to count or compare these facilities.[2]

The Consumer Consortium on Assisted Living defines assisted living simply as:

> Adult group living with help that serves a wide and changing range of needs.

[1] United Seniors Health Cooperative, "Assisted Living," Special Report 47, March/April 1997.
[2] U. S. General Accounting Office (GAO), *Assisted Living: Quality-of-Care and Consumer Protection Issues*, Report Number T-HEHS-99-111, April 1999.

As defined by the Assisted Living Federation of America, assisted living is:

> Any **group residential** program **not licensed as a nursing home** that provides **personal care and support** to people who need help with daily living activities as a result of physical or mental disabilities.

The American Association of Homes and Services for the Aging defines assisted living as:

> A philosophy of service that is **consumer-driven,** flexible and individualized, and that **maximizes consumer independence, choice, privacy and dignity.**

Assisted Living Philosophy: Key Points

1. Resident privacy, independence, decision-making and autonomy
2. Ability to meet residents unscheduled (and scheduled) needs for personal assistance
3. "Aging in place," with care services adjusting to residents' changing needs and preferences.

Independence and Risk

> *The philosophy of assisted living is based on "dignity of risk," or the right of the resident to make choices about his or her health and safety even when those choices may be deemed risky by others. The interpretation of this philosophy and the choices available vary among facilities.*
> —United Seniors Health Cooperative

Although assisted living has the almost universal willingness to allow residents to make choices, take risks, and be independent, **some personal choices that inevitably could cause harm** could be possible.

Speaking to this issue, Oregon's assisted living regulations provide a framework for a **managed risk agreement.** Here's a breakdown of the elements of a managed risk agreement required by the state of Oregon and a guide for assisted living facilities:

1. An explanation of the cause(s) of concern
2. The potential negative consequences to the resident and/or others
3. A description of the resident's preferences
4. Possible alternatives to minimize the potential risk associated with the resident's current preferences or action
5. A description of the services the facility will provide to accommodate the resident's choice or minimize the potential risk

6. The final agreement agreed to by all parties

In Oregon, managed risk must be incorporated into the assisted living service plan. The resident's preferences are to take precedence over the preferences of family members. **However, a plan cannot be entered into or continued with a resident who is unable to demonstrate an understanding of the potential risk posed by his or her preference**.

Regulations about Assisted Living

Ombudsmen need to keep in mind that the explosive growth of assisted living has resulted in **fewer and less clear-cut protections for consumers** than are found in nursing homes. The danger is that high-need residents can become particularly vulnerable.

Ultimately, **states set the parameters** within which assisted living facilities operate. **Assisted living regulations in general are fairly minimal**, and vary from state to state in ways as shown below. Appendix D contains an extensive listing of background materials on assisted living.[3]

To make claims about...	**The assisted living facility must...**
Who can be served	Some states simply require facilities to admit and keep residents "whose needs can be met." Others require residents to be ambulatory and able to evacuate without assistance. Criteria may be not serving residents who are bedfast, who have serious nursing needs or need more than minimal help with activities of daily living. Most states' regulations do not address specifically the question of dementia.

[3] Two publications in particular would be useful to consult: *State Assisted Living Policy: 2000*, written by Robert Mollica of the National Academy for State Health Policy (which includes a detailed description of each state's assisted living regulations and policy); and *Advocacy Practices in Assisted Living: A Manual for Ombudsman Programs*, developed by the National Association of State Units on Aging (which includes an "Assisted Living Primer").

Scope (and limits) of service	Typically, states do not require assisted living facilities to offer a minimum set of services, but an almost universal requirement is for residents to be assessed and a plan of care developed. Some states do not allow assisted living staff to provide nursing services at all. In some states, nursing care can be offered but only under certain conditions or for a limited time.
Discharge	Different states have different standards. Even if allowed, some facilities may not choose to offer nursing care. It is always reasonable to double-check a facility's discharge policies, resident agreements, and state regulations.
Staffing qualifications	Steps to ensure administrator qualifications range from no specific requirements, to specific work experience, knowledge and abilities or an advanced degree. Staff training requirements and required staff levels also vary greatly.

What Causes Conflict in Assisted Living?

Although there are many causes of conflict in assisted living, there are a few situations that are a source of conflict for many people.

- False and misleading marketing
- Consumers don't know what they're buying
- Neglectful (or less than optimum) care
- Inappropriate discharges
- Rapid aging in place

False and misleading marketing. "Aging in place" is a big selling point of assisted living, and is what has attracted so many consumers, and the industry makes a point to advertise to that need.

In reality, assisted living practice is often **at odds with the marketing pitches** and slogans. Facilities may promise to provide personal assistance services but the bill can be **expensive.** Many elders (to their dismay) find that their **needs escalate** to the point where the management says they **don't belong there and they must move out**.

Consumers don't know what they're buying. Many consumers are confused about what assisted living is and often don't know what they're buying when they sign an assisted living contract. For instance, residents and their families may have **different understandings of what is meant by certain restrictions.** Some residents and families also charge that there are "hidden costs."

In some places, providers market their congregate residences as "assisted living" even though the facility is offering **no enhanced services**. Family members **don't always understand the safety issues** involved when a person with Alzheimer's or dementia and heavy care needs moves to an assisted living facility.

Neglectful (or less than optimum) care. One large worry is that facilities are **underestimating the level of care needs** their residents have. Ombudsman programs are fielding complaints about serious neglectful care, such as allegations that residents developed multiple stage-4 decubitus ulcers or experienced severe weight loss.

Other examples: Residents **left alone with no staff members** in the facility, facilities often don't provide the services they say are available. It's not just high-need residents who are at risk. Ombudsmen report some facilities are **not delivering the services they promised** even to "low-need" residents.

Inappropriate discharges. Assisted living facilities are assumed to have flexibility in the services they offer. Examples of ongoing ombudsman (and consumer) concerns: Inappropriate discharges; residents who **lack resources** to fight a threatened discharge; **inconsistent discharge decisions**; **lack of specific discharge criteria;** lack of **appeal rights**.

Rapid aging in place. Unfortunately, some residents experience a sudden decline in health or independent functioning due to a catastrophic health event or accident. Their needs for assistance may increase significantly. In some situations a resident's care needs may no longer be adequately met by the facility, or the resident may not be able to afford the cost of additional assistance. Resident's may not want to move if they have lived at the facility for a long time. They may be resistive to leaving the comfort, familiarity, and support of their "home" and their social network.

Conflict Resolution Overview

Methods of Resolving Conflict

Methods of "alternative dispute resolution" commonly include: arbitration, mediation, and negotiation.

Arbitration. This is the most formal dispute resolution process. A dispute is submitted to a neutral third party to render a decision after hearing arguments and reviewing evidence. In binding arbitration, parties must abide by the ruling; in non-binding arbitration, the third party's decision is only arbitrary.

Mediation. In a classic mediation**,** a trained neutral assists disputants in framing issues in a conflict, enhances communication between parties, helps parties come up with possible solutions, and aids them in reaching mutually acceptable agreements.

Negotiation. This is a voluntary, usually informal, unstructured process used by disputants to reach a mutually acceptable agreement.

Dispute Resolution Is in Itself Advocacy

Dispute resolution can be a type of advocacy. Depending on the circumstances, the ombudsman may play a number of "helping roles" to facilitate resolution of disputes involving residents and families. Examples of helping roles that might be contributive:

- Encouraging (persuading in a friendly but impartial way) contending parties to resolve their differences, or at least to meet and talk (helping disputants reconcile).
- Arranging for mediation between the administration and resident and/or family members by a professional (or volunteer) community mediator (brokering, facilitating).
- Informing a facility about the exact meaning of a law or regulation (fact-finding, educating).
- Championing the resident (making sure residents are not left out of discussions).

Other Tools

If parties to a dispute reach an impasse, or are unhappy with a solution which was worked out, **traditional legal channels** with the full panoply of protections may offer another recourse.

Short Course on Mediation

> *Mediation is a voluntary, non-binding process in which a trained facilitator helps parties reach a negotiated agreement. The mediator assists the parties in improving communication, moving away from rigid positions, expanding options for settlement, and arriving at a consensus on a creative solution.*
>
> —Naomi Karp and Erica Wood, American Bar Association Commission on Legal Problems of the Elderly[4]

Mediation is an increasingly popular way which people are choosing to deal with conflict. Mediation is an **"Everybody Wins**" process. In a collaborative approach, everybody gains. The parties themselves negotiate the solutions. In the end, the choice is theirs. Everybody walks away feeling comfortable about the conclusion. Everybody's opinion is treated with dignity.

Not always successful but **always worthwhile as an effort,** mediation also can be **quicker, less expensive, more private, and less stressful than going to court**. Most commonly it is voluntary. Courts in more than 20 states, however, may in some instances order parties to try mediation.

Roles of the Mediator

Successful mediators, like long-term care ombudsmen, come from many different backgrounds. Important skills and abilities include **neutrality, ability to communicate, ability to listen and understand, and ability to define and clarify issues.**

The mediator:

- Acts as a catalyst
- Does not judge or take sides
- Maintains neutrality
- Helps people look at what is actually going on, step out of their deadlock
- Re-frames the problem
- Establishes and enforces the rules
- Engenders trust
- Is sensitive to differences
- Does not make the decision

[4] Naomi Karp and Erica F. Wood, *Keep Talking, Keep Listening: Mediating Nursing Home Care Conflicts*, American Bar Association, Commission on Legal Problems of the Elderly, October 1997.

In addition the mediator identifies **power imbalances** and takes actions to **level the playing field.** Examples of ways this occurs: A mediator might encourage a resident to bring along a support person or ask the resident to speak first.

What Ombudsmen Should Be Aware of

While ombudsmen sometimes act as mediators, their primary mandate is to serve as advocates for long-term care residents. Mediation has the **potential of freeing ombudsmen to fulfill their advocacy role** yet enable the resident to have the benefits of a collaborative dispute resolution as well. Each situation should be evaluated to determine whether using mediation is the right approach. Mediation is simply **another option** ombudsmen may use to resolve difficult disputes.

EXAMPLE:

> If the central issue in a dispute is the relationship between the resident and a staff member, it might be less productive for the ombudsman to ask the staff member to change his or her behavior than to bring both parties together and mediate. This way the two parties have the opportunity to build their relationship in a constructive way.[5]

In some situations, ombudsmen may opt to refer the parties to a neutral third party to mediate the case. Ombudsmen may also use mediation in a variety of ways to address resident problems, including:

- using mediation skills to resolve selected problems;
- serving as an expert resource on the regulations and residents' rights in a mediation conducted by an outside mediator;
- supporting and advocating for residents and families in a mediation session.

Pros and Cons of Mediation[6]

Let's look at the promises and potential pitfalls of mediation.

The promises include**:**

- Mediation is a way for all parties to understand each other's concerns. This process is **voluntary and confidential**, **neutral, balanced and safe**. It is a way to involve vulnerable residents and their families in constructive decision-making that improves care.

[5] Hoy Steele, *Communication and Conflict Resolution. Skills for Nursing Homes: A Training Series in Five Modules*, National Institute for Dispute Resolution, 1992.
[6] Naomi Karp and Erica Wood, *Keep Talking, Keep Listening: Mediation Nursing Home Care Conflicts,* American Bar Association, Commission on Legal Problems of the Elderly, October 1997.

- In sorting out difficulties, **solutions can emerge from a fresh vantage based on what's fair, not on demands.** Nothing can be imposed on anyone.
- Mediation is the wave of the future. Compared to litigation, mediation is faster and less costly. It provides **an alternative to formal grievance,** though the right to file a formal grievance is still available.
- When done right, the mediation complaint process **can handle many disputes** to the satisfaction of affected parties, without the time, expense, and emotional toll exacted by other means of dispute resolution.
- Mediation **leaves open the opportunity to pursue legal action** if negotiations stall.
- Mediation is **not the same thing as compromise**. Mediation empowers the parties to reach **mutual agreements** of their own making, not the mediator's, and makes a **win-win solution** possible.
- Mediation may help **repair and strengthen on-going relationships** between the parties, hopefully making it easier to resolve future concerns.

Some of the potential pitfalls are:

- Mediation takes time so it **must be used selectively**. **It may not work well in extremely time sensitive situations.**
- Mediation **may not work when there is an extreme imbalance of power** and the resident does not have a good support system.
- Mediation **may not work well when residents' rights might be compromised** and an advocacy stance by the long-term care ombudsman would better serve.

ABA Nursing Home Dispute Resolution Model

Assisted living mediation draws on research from the American Bar Association Commission on Legal Problems of the Elderly which confirmed the potential benefit of applying **mediation in resolving care disputes in nursing homes.** The American Bar Association's work built on earlier efforts in nursing home mediation by the National Institute for Dispute Resolution.

The ABA conflict resolution model was tested in 25 nursing facilities in the greater Washington, DC area.

Kinds of Disputes for Mediation

Mediation cases can cover a wide range of conflicts in assisted living and might involve a range of players. Examples:

Conflicting Parties

- Resident vs. family
- Resident vs. facility staff
- Resident vs. resident
- Family vs. facility staff
- Family/resident vs. facility staff
- Family member vs. family member

Kinds of Conflicts

- Care planning and communication
- Care conflicts
- Family-staff tension
- Abusive or offensive language
- Autonomy, choices and concerns
- Missing personal items
- Resident safety
- Resident too confused, incapacitated
- Dietary restrictions
- Transfer and discharge[7]

Capacity to Mediate

When does a person lack capacity to mediate? For frail or confused assisted living residents, the answer is often unclear. The American Bar Association Commission on Legal Problems of the Elderly recommends that the following issues be considered.

- The individual's ability to express reasoning.
- The individual's appreciation of the consequences of the decision.
- Whether the decision being considered is irreversible or not.
- The consistency of the individual's decision with what is known about her values over a lifetime.

Ombudsmen may also wish to consult the *ADA Mediation Guidelines* developed to handle disputes arising in relation to the Americans with Disabilities Act. Refer to the **Mediation Sources for Ombudsmen** in Appendix C for information on how to obtain a copy of the guidelines.

To promote full participation, the American Bar Association Commission on Legal Problems for the Elderly suggests mediation accommodations might include:

[7] *Ombudsman Advocacy Challenges in Assisted Living: Outreach and Discharge* (2000), prepared by the National Association of State Units on Aging for the National Long Term Care Ombudsman Resource Center.

- Avoid “talking about” a resident who is not there
- Having a support person (which could include the ombudsman) present. A surrogate, such as a family member or guardian, may serve as a party to the mediation to speak for or support the resident’s interests, when the resident cannot speak for him- or herself. However, it is important to ensure that the surrogate represents the resident's wishes to the extent that they are known.
- Locating the session in the resident’s apartment, room or other quiet place
- Scheduling sessions early in the day
- Keeping the session short (and allowing frequent breaks)
- Using caucuses for the mediator to meet briefly alone with the resident and any support persons.

EXPERT PANEL:
HOW MIGHT MEDIATION WORK (OR NOT WORK) IN ASSISTED LIVING?

When planning this segment, allow about 30 minutes for the panelists you have invited to candidly discuss the possibilities (and constraints) for assisted living mediation and afterwards open the floor for questions and discussion. Everyone participates.

Ask each of your invited panelists to give a short, 5-minute talk using questions (below) as a guide. Each panelist should present their perspective on why mediation would work (or would not work) in assisted living disputes.

Who to Invite

A Real World Collaborative Mediation Team

- Mediator from Community Mediation Center
- Long Term Care Ombudsman
- Legal Services Representative
- Consumer Advocate
- Assisted Living Consumer (a resident or family member if possible)
- Assisted Living Provider
- Licensing Representative

Questions for Panelists:

Long Term Care Ombudsman

- How does mediation differ from the ombudsman's conventional ways of advocacy and problem solving? Is it easier or harder? More or less useful?
- What types of assisted living disputes do you think might be resolved successfully through the mediation process?

Community Mediation Professional

- Who are the local mediators?
- How are we to know whether mediation's the right approach?
- How much does it cost to mediate a matter? Who pays?
- What is a difficult conflict negotiation situation?
- How would mediation be triggered? Who normally would mediate?
- What if someone refuses to negotiate? How can resistance be addressed?
- Suppose people get "stuck." If parties disagree or cannot reach agreement, what should the mediator (or ombudsman) do?

Consumer Advocate

- What are the incentives and disincentives for using mediation?
- Is imbalance of power (as between resident-staff, resident-family, resident-resident) a concern in mediating complex care conflicts? If so, what can ombudsmen do to protect consumers?

Legal Service Representative

- What about laws and rules governing assisted living? What if the mediation results in an agreement that is contrary to law? Might a resident be bargaining away his or her rights?
- What (if any) channels should be exhausted first?
- Who should make decisions for an incapacitated resident? Should someone other than the ombudsman negotiate on the resident's behalf? Can surrogate decision-makers participate in the mediation process? If not, what then?

State Licensing Representative

- What types of disputes would the state licensing authority most particularly want to know about? What situations would the state need to handle?
- Might mediation be useful in resolving state assisted living policy arguments? Why or why not?

Assisted Living Consumer

- What do you think about assisted living mediation? Is it something providers should take seriously? Why or why not?
- Would you be comfortable using mediation? Why or why not?

Assisted Living Provider

- What types of conflicts have surfaced in your facility and other facilities that you've heard about?
- In your opinion is mediation the best way to deal with these situations? Why or why not?
- What benefit do you see in using mediation? Where do you see mediation not being practical or desirable?

STEP INTO THE ROLE OF AN ASSISTED LIVING DISPUTE

Now for the fun part—role-plays! This segment of the program is intended to help participants get a real flavor of assisted living mediation in practice.

Because of the program's relatively short time frame, invite panel members to conduct the role-play (in advance) and assign audience members the role of observer. The cast of actors should be instructed to play their roles as realistically as possible.

NOTE:

If you have more time you may wish to invite trainees to break out into small groups so they can role play and practice negotiating themselves.

Role Play #1: "Working It Out"

Directions

This first role play scenario takes 10 to 15 minutes. The focus of the exercise is on **problem identification and communication.** The case can be used "as is" or you may wish to showcase an actual dispute handled by participants.

To introduce the case:

- Explain that the dispute is about meal service -- or is it?
- Tell participants you would like to test their powers of observation.
- Give each participant a copy of the scenario (below).

Give the role players (panel members) 10 minutes. Remember that this is an abbreviated version for the purpose of demonstration. An actual mediation will probably take considerably longer. Afterwards, open up the floor for discussion. Discuss the possible solutions. Ask participants to share aloud their observations. Debrief for about 5 minutes.

Players

Mrs. Ethel Smith, Resident, Age 78
Mr. Roger Adams, Administrator, Green Acres Assisted Living
Ms. Melissa Clay, Daughter, Age 42
Ms. Nancy Brown, Mediator from Community Mediation Center

Scenario

Mrs. Smith entered the "Green Acres" assisted living facility about six weeks ago. She loves her apartment and likes her neighbors, but has told her daughter that **she's not happy with the meal service**. Her **daughter, Melissa, is alarmed** because her mother is diabetic and **looks like she's losing "more" weight**. When she **complained** to the administrator, Mr. Adams, he expressed surprise that Mrs. Smith had any concerns. **"Why hasn't she come to him herself?"** He suggested mediation to "get a handle on just what the problem is." (Refer to Appendix A for the full role play including instructions for each participant.)

Tying It All Together

The challenge: Figuring out what the real problem is. Remind the audience that the point of the story is to see **how well they can separate the underlying issues**. If the group is very unfamiliar with mediation, you may want to use this role play exercise to show the steps of mediation.

After the role-play, plan to launch discussion about what's going on by posing an intriguing question or a dilemma to the audience. For example, you might ask:

- How serious a problem is this?
- What problem is really the issue?
- What is causing the problem? Why has this problem arisen?
- Why hasn't the situation been resolved so far?
- Can mediation fix the problem? Why (or why not)?
- How would you go about finding a fair solution? What would you say? What would you ask?
- What are some possible options for solving the problem?
- What would be most helpful to the resident personally? What about the daughter? What about the administrator?
- What are some important things for the mediator to do?
- What mediation techniques or strategies were productive? Unproductive?
- What follow-up is necessary or wise?

As an alternative to Q & A, run a brief brainstorm session. For example, say:

> Let's generate a list of five to ten questions we as ombudsmen could be asking ourselves about this situation.

Use a flip chart to capture the questions.

Key Points

1. In real life, negotiations often do not go well at first. Not all parties will share the same assessment of a problem.
2. Without a good understanding of the challenge, it would be hard to agree on a strategy for solving it.
3. Important skills and abilities for mediating a problem include:
    - Neutrality
    - Ability to communicate
    - Ability to listen
    - Ability to define, clarify and reframe issues
    - Awareness of options (and the probable consequences of options)
    - Awareness of assisted living laws and regulations

Role-Play #2: Three Years Later

Directions

This role-play should **go farther than the first**, as far to finding a resolution as possible, given time limits. It allows participants to consider how they would handle a longer, more complex care dispute. It **demonstrates what mediation can achieve** and can help participants see how events might work out. To use the case:

- Give each participant a copy of the scenario (below). Allow some time for them to read it.
- Allow 10 to 15 minutes for the panel members to role-play the scene. Remember that this is an abbreviated version for the purpose of demonstration. An actual mediation will probably take considerably longer. (Ask role players to come up with the best possible solutions for dealing with the resident's situation.)
- Allow another 15 minutes for debriefing the activity and audience questions.
- Discuss problem solving, values, perceptions, or other themes that may arise from the role-play.

Players

Mrs. Ethel Smith, Resident, Age 81
Ms. Melissa Clay, Daughter, Age 45
Mr. Roger Adams, Administrator, Green Acres Assisted Living
Ms. Nancy Brown, Mediator from Community Mediation Center

Scenario

Let's imagine that **things haven't improved much in three years**. In fact, they've gotten worse. Mrs. Smith's diabetes *has* worsened. Now she is on insulin and has to have shots twice a day. Her arthritis affects her hands and she cannot give the shots to herself, so that's why the assisted living nurse administers the shots.

The problem is, Mrs. Smith **doesn't always follow her diet**. She's a picky eater and, if the food served is something she doesn't like, she won't eat. She often treats herself to desserts and has been known to hide cookies in her apartment.

Mrs. Smith was **hospitalized** twice in the past two months. The first time, she went into diabetic shock; the second time, her toe was amputated (the doctor said her foot might also have to be amputated if her diabetes isn't stabilized soon). In recent weeks, on three occasions, staff members have seen the woman eating sweets. When they call Mrs. Smith to task, they say she **denies she has cheated on her diet**. It's possible she doesn't remember. An additional problem, she **often seems confused** and at times even **agitated.** The other day she walked out of her apartment in her slip without realizing it. When told what she had done, she broke down into a flood of tears and "hysterically" denied it.

Concerned that she's a "**danger to herself**," and deciding this is a problem which has gone on too long, the assisted living facility issues a **discharge** notice scheduled to take effect in 30 days.

NOTE:

The mediation takes place **20 days after the discharge notice** was issued. The mediation includes the resident, the resident's daughter, the assisted living facility administrator, and a mediator.

(Refer to Appendix A for the full role play including instructions for each participant.)

Tying It All Together

Afterwards, ask participants to **reflect individually about this case.** Moving around the room to listen, ask for volunteers to share their insights. Ask a *volunteer* to note the ideas on a flip chart.

- As the ombudsman, what would you have done? What would you have said?
- How is this case a challenge for the assisted living facility? Who can summarize the conflicting points of view?
- What are the positives in this situation?
- What priority should the mediator give to each of the parties' concerns?
- Suppose there's an impasse? What next? What should the ombudsman do?
- Where were the people in agreement? At what point did disagreement arise? In the end, what mattered?
- Do we all agree that the daughter's concerns are important? Why? Is there any reason why the assisted living facility could not provide additional services? What's practical? What good is likely to result? Does everybody believe that discharge (or a lawsuit) is the most likely outcome of this mediation? Are we comfortable assuming that Mrs. Smith's deteriorating health will rule out her staying at the facility?
- Ask the group to focus on what the solution *should not be.* Shift their attention to what *won't work.* By eliminating non-solutions, slowly participants may begin to focus on what a real solution might be.

To Help Clarify the Problem

Put two easels side by side. Use one to list the points on which parties agree—which may be useful in defusing the conflict—and the other to list points of disagreement or open issues. Open up the floor for discussion. Pick a vocal group member and ask them to summarize the dilemma.

WRAP UP & CLOSING DISCUSSION

The goal here is to summarize what has been learned, close on a positive note, and leave everyone with a sense of accomplishment. As a guide and a reference, brainstorm:

I. **Why mediate?** Examples:
- Empowerment
- Improved relationships
- A means to better care
- Better customer satisfaction
- More tailored, creative solutions
- Avoidance of litigation in some cases

II. **What specific kinds of cases might be appropriate for informal or formal mediation?** Examples:

- Non-regulatory problems
- Aspects of care planning
- Matters that arise between family members
- Day to day disputes between residents and staff
- Grievances
- Policy issues
- Discharge issues

III. **How might the tools of collaborative mediation be put to work in the assisted living setting?** Examples:

- Identifying alternatives
- Establishing solid links with community dispute resolution programs

IV. **How can ombudsmen best be involved?** Examples:
- Referral
- Care planning
- Informal mediation
- Interactions with families, residents, staff over care

V. **What issues are of special concern in assisted living mediation? What needs to be considered?** Examples:
- A resident's capacity to mediate
- Rights-based orientation

VI. **Recognize that there is tension between the ombudsman as an advocate for the resident and the neutral role of the mediator.**

VII. **Mediation is a complex skill. In what situations is it advisable to call on an outside mediator? When should the ombudsman get involved in co-mediating a dispute? What would be the ombudsman's role (if any) when an outside mediator is used?**

Appendix A

ROLE PLAYS

Role-Play #1

Players

Mrs. Ethel Smith, Resident, Age 78
Mr. Roger Adams, Administrator, Green Acres Assisted Living
Ms. Melissa Clay, Daughter, Age 42
Ms. Nancy Brown, Mediator from Community Mediation Center

Scenario

Mrs. Smith entered the "Green Acres" assisted living facility about six weeks ago. She loves her apartment and likes her neighbors, but has told her daughter that **she's not happy with the meal service**. Her **daughter, Melissa, is alarmed** because her mother is diabetic and **looks like she's losing "more" weight**. When she **complained** to the administrator, Mr. Adams, he expressed surprise that Mrs. Smith had any concerns. **"Why hasn't she come to him herself?"** He suggested mediation to "get a handle on just what the problem is."

Instructions to Players

Role Play #1
Resident - Mrs. Ethel Smith

You are happy at Green Acres and already you have made friends with the staff and other residents. The meals are not great, but when you don't like what is served you simply don't eat it. However, you don't like the fact that the coffee is always served at the beginning of the meal and by the time you want to drink it, it's too cold — **that's what you meant when you complained about the "meal service."** You've asked the waitress to bring the coffee at the end of the meal, but so far, no one has listened. You don't like being **ignored**. What can you do? Goodness sakes, you don't want to be **branded a complainer.** What's really **vexing**, the arthritis in your hands has gotten so painful you can't fix your own coffee in your own apartment. This is starting to make you **irritable,** since you're a lifelong coffee drinker and need at least three cups a day!

Instructions to Players

Role Play #1
Daughter - Ms. Melissa Clay

You've noticed in the last couple of weeks that your **mom seems out of sorts** when you visit. Since she normally has such a sunny personality, you're **concerned that she's not feeling well**, despite her protests that she's fine. You're **worried** that her diabetes is not being managed well at Green Acres. You **still feel guilty** that when your mother lived with you her diabetes became uncontrollable because she didn't always follow her diet and she lost ten pounds. You're always watching what she eats! So when she mentioned she's not satisfied with the food service, it sent you into a **panic** for fear that your mom wouldn't be able to get the care she needs at the assisted living facility. **Your aunt died in a nursing home** last year, and **you swore you'd never do that to your mother**. The **management had better fix this**...if not, you don't know what you'll do!

Instructions to Players

Role Play #1
Administrator - Mr. Roger Adams

Although you like Mrs. Smith, who always seems so pleasant, you're thinking her daughter is rather **meddling** and might be a **potential problem**. No sooner had Mrs. Smith arrived at Green Acres her daughter **insisted** on sitting down with you and the nurse to talk about her mother's medical problems. On top of that she wrote a 5-page letter of care instructions. The **problem is**, Mrs. Smith's daughter doesn't seem to understand that **her mother can speak for herself** and that the **facility's policy is to follow the resident's wishes** — not necessarily the family's wishes. Now her daughter has **threatened** she'll go to the **local ombudsman** if you can't resolve this issue right away. Mediation has worked before...You hope this mediator knows what she's doing and can get this **troublemaker** off your back! As administrator, you **don't have a lot of time** to spend on this "trifling" issue, so that's why you scheduled a meeting right after the mediation (in 30 minutes).

Instructions to Players

Role Play #1
Mediator - Ms. Nancy Brown

You notice that Mrs. Smith's daughter has a **strong personality**. She tends to speak before her mother has had a chance to gather her thoughts. Mrs. Smith is a very friendly, pleasant woman, but **clearly something is bothering her.** You intuitively feel Mr. Adams just wants *you* to **make this problem go away**! You need to draw out from Mrs. Smith the **real reason** the food service is unsatisfactory. This is the issue that needs to be resolved first. However, you also need to pay attention to the **daughter's worries.** Food may not be the primary issue, but because Mrs. Smith is diabetic it needs to be explored. You question, is Mrs. Smith following her diet?

Role-Play #2: Three Years Later

Players

Mrs. Ethel Smith, Resident, Age 81
Ms. Melissa Clay, Daughter, Age 45
Mr. Roger Adams, Administrator, Green Acres Assisted Living
Ms. Nancy Brown, Mediator from Community Mediation Center

Scenario

Let's imagine that **things haven't improved much in three years**. In fact, they've gotten worse. Mrs. Smith's diabetes *has* worsened. Now she is on insulin and has to have shots twice a day. Her arthritis affects her hands and she cannot give the shots to herself, so that's why the assisted living nurse administers the shots.

The problem is, Mrs. Smith **doesn't always follow her diet**. She's a picky eater and, if the food served is something she doesn't like, she won't eat. She often treats herself to desserts and has been known to hide cookies in her apartment.

Mrs. Smith was **hospitalized** twice in the past two months. The first time, she went into diabetic shock; the second time, her toe was amputated (the doctor said her foot might also have to be amputated if her diabetes isn't stabilized soon). In recent weeks, on three occasions, staff members have seen the woman eating sweets. When they call Mrs. Smith to task, they say she **denies she has cheated on her diet**. It's possible she doesn't remember. An additional problem, she **often seems confused** and at times even **agitated.** The other day she walked out of her apartment in her slip without realizing it. When told what she had done, she broke down into a flood of tears and "hysterically" denied it.

Concerned that she's a "**danger to herself**," and deciding this is a problem which has gone on too long, the assisted living facility issues a **discharge** notice scheduled to take effect in 30 days.

NOTE:

The mediation takes place **20 days after the discharge notice** was issued. The mediation includes the resident, the resident's daughter, the assisted living facility administrator, and a mediator.

Instructions to Players

Role Play #2
Resident - Mrs. Ethel Smith

You still like Green Acres and **start to cry when you think about leaving** your friends. You try to stick to your diet but when you're hungry (whether because the entree isn't cooked right or they serve a vegetable you don't like) you just have to eat *something* **or your daughter will start to complain** that you're losing weight again! You're not a complainer and have always been able to get along with everyone. But the **new aide** who serves lunch and dinner at your table is **nasty** to anyone who criticizes the food or even asks her a question (you and three of your friends always eat at the same table). She always serves you dessert too. **It's so hard to resist** when it's right there in front of you!

Lately, you just have not felt like yourself. **You haven't told anyone** but **sometimes you feel very dizzy** and literally have to hold onto the furniture when you walk around your apartment. You just couldn't have walked out of your apartment in a slip. At least, **you don't remember** doing so. And you've always been a very modest person. Now your **daughter is upset** and says she's going to sue. **Can't this be resolved peacefully?** You don't like to make trouble, but **your daughter has always enjoyed a fight** – just like her father!

Instructions to Players

Role Play #2
Daughter - Ms. Melissa Clay

You've already hired a lawyer. If this can't be worked out you'll get your mother to file an appeal. Doesn't Mr. Adams think watching out for your mother and avoiding a medical crisis is **part of the assisted living facility's job**? You told him in no uncertain terms that if you plan to report this problem to the ombudsman and that if it isn't resolved soon, your mother will appeal and you'll see to it that the lawyer files a lawsuit, too. **You're so tired of having to push and prod the staff** at the assisted living facility to respond to your mother's needs!

Why doesn't someone stop your mother from eating dessert? After all, it's been three years. Why hasn't the supervisor of food services figured out how to make diabetic desserts at least once in awhile? Your mother has become so unlike herself lately. You're **afraid she's going to need someone to be with her all the time**. You thought Green Acres was a place where she **would be cared for no matter what** or how much help she needs (at least that's what the marketing brochure says). **You'll do *anything* to prevent your mother going into a nursing home.** A lawsuit is not out of the question, although you know your mother is mortified that you've even talked to a lawyer. You know the state permits some wiggle room with regard to discharge, but the assisted living facility has just not been willing to live up to the **promise in their brochure** to provide additional personal supervision when it's needed. The state will just have to make them do more! You know your mother is willing and **able to pay** more if necessary for her to stay at Green Acres.

Instructions to Players

Role Play #2
Administrator - Mr. Roger Adams

When you called your lawyer, she said you should get in touch with the **state licensing office**. That way you **won't be liable** no matter what happens to Mrs. Smith. As usual, the state licensing office was "wishy-washy," pointing out that the **regulations are vague** on the discharge issue and decisions should be made on a **case-by-case** basis. You already knew that!

You like Mrs. Smith (she's certainly a genteel lady of the old school) and you'd **really like to keep her**. Even so, **she seems to have changed** lately. You honestly believe discharge is the **simplest and easiest solution** to the problem.

Now her **gorgon of a daughter is threatening** to get the ombudsman involved – something you hope to avoid since the **ombudsman has been on your case lately**. Not only that, she's talking about a lawsuit (so much for legal advice) and corporate headquarters doesn't like this kind of trouble! You haven't slept well for the past three nights and your ulcer is acting up.

Of course, the mediator just has to explain to Mrs. Smith's daughter that you have **no choice but to discharge** her mother. It is your **only answer** to head off any legal action. Besides, you have other problems on your plate. Residents have voiced **a lot of complaints about the quality of the food service** since the new supervisor came on board a month ago. Your job isn't easy. All day yesterday the ombudsman was at the facility "investigating," and you sure don't want her to come back anytime soon.

Instructions to Players

Role Play #2
Mediator - Ms. Nancy Brown

You have a big job! When you start the mediation process, you'll first have to try to resolve the **discharge issue** before this conflict blows up to an appeal or a lawsuit, or both. The state's regulations are vague. The state does require facilities to look at the **service plan** and see if there's any way that they can **accommodate** resident needs. You realize, of course, this is a **new role** for the facility, and you gather that Mr. Adam's not comfortable with it. When you observe Mrs. Smith, the resident, she seems like she's "out of it." It **should not be ignored**. You must find out what's going as a prelude to **mapping out options**. The problem is, **no one seems to want to go to the next step**. Keep things as positive as possible. If misunderstandings can't be worked out, certainly there'll be a lawsuit or the resident will have to move. Ms. Clay has announced in no uncertain terms that she will push for a legal solution to prevent her mother from going to a nursing home. Mr. Adams says he wants a solution that will cause the least amount of trouble. **Can a "gain-gain" solution be negotiated**?

Major Questions for the Mediator

- What's causing the problem here? Why is this problem happening?
- What is going well? Can we assume that Green Acres can meet Mrs. Smith's needs, or will she have to move to a nursing home where she can be better protected?
- What's going on with Mrs. Smith? Why won't she follow her diet?
- How common is it for the dining room staff to supervise Mrs. S. at mealtime? Is she offered a substitute when others at her table get dessert?
- Are other medical problems exacerbating the effects of diabetes?
- Since the regulations do offer some flexibility, what would Green Acres need to do, and what options would be acceptable both to the state and to the family in order for Mrs. Smith to stay there?
- What are the pluses and minuses of adding services? Is Mr. Adams willing to increase services?
- What about cost? Can Mrs. Smith afford additional charges for more personal care services?
- Suppose the assisted living facility hired better staff instead. What would happen? Would the results be worse or better?
- What is the state's recommendation?

"STATE OF NEW UTOPIA"
ASSISTED LIVING REGULATIONS
DISCHARGE CRITERIA

Reasons for Discharge

- Danger to self or others
- Care needs exceed the capacity of the assisted living facility
- Needs at least 2 hours per day of nursing care for more than 14 consecutive days
- Failure to pay for services

Discharge Procedure

- Assessment by licensing to determine if needs can continue to be met in assisted living
- Oral and written notice 30 days prior to discharge
- Development of discharge plan
- Appeal hearing, if requested, within 30 days

Appendix B

Overheads

Appendix C

MEDIATION SOURCES FOR OMBUDSMEN

MEDIATION SOURCES FOR OMBUDSMEN

ADA Mediation Guidelines. The Kukin Program for Conflict Resolution at the Benjamin N. Cardozo School of Law, 2000. Single copies available by contacting the Benjamin N. Cardozo School of Law, 55 Fifth Ave., New York, NY 10003, telephone: (212) 790-0365, or on-line at: www.cardozo.yu.edu/cojcr/guidelines.htm.

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Appendix D

ASSISTED LIVING RESOURCES

ASSISTED LIVING RESOURCES

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National Association of State Units on Aging. *Assisted Living: The Promise and the Challenge*, March 1994.

National Association of State Units on Aging. *Background Papers for NASUA's Assisted Living Summit*, March 1998.

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