

ARBITRATION vs. MEDIATION

AKA: Alternative Dispute Resolution

By Nancy Johnson

More and more Arkansas nursing homes are asking residents or their representatives to sign an Alternative Dispute Resolutions (ADR) contract at the time of admittance. If you sign it, you may have waived your right to be heard by a jury if you or your family member is harmed through neglect or abuse. Don't sign it without first asking to take the agreement home for 48 hours to read it thoroughly and/or show to your attorney. By law, a nursing home is not allowed to refuse admittance to a person because they refused to sign the ADR. (See "AANHR Tip" below.)*

An ADR may take one of two forms: mediation or arbitration. In mediation the two opposing parties meet with a mediator, a neutral person, who can observe the dispute objectively, and he works with both sides to try to reach a solution which is agreeable to both. The mediator acts as a facilitator to bring about an agreement and does not himself rule on the matter. The goal of mediation is to craft a written agreement between the two parties. If this occurs the agreement is binding and cannot be appealed further. This process is completely voluntary for both parties and either party can pull out at any time prior to signing a final agreement.

Arbitration differs from mediation in that the neutral third party, the arbitrator, will hear both sides of the dispute and then issue a binding opinion. In arbitration there is no attempt to reach an agreement satisfactory to both parties. They must agree to abide by the decision of the arbitrator.

The key to both forms of alternative dispute resolution is the impartiality of the mediator/arbitrator. The Arkansas Supreme Court has formed an ADR Commission which certifies mediators and arbitrators. Certification is not mandatory, however. AANHR highly recommends that anyone going into ADR understand the difference between mediation and arbitration and insist upon certification of the mediator/arbitrator. There will be fees associated with any ADR process for the services of the mediator/arbitrator and to cover costs. Usually, however, this is much less than the costs associated with a court trial.

As previously stated, many nursing homes are now including mandatory arbitration clauses in their admission contracts. Beverly Enterprises has openly announced that their admission contracts will include a binding arbitration clause. By signing a contract containing such a clause, the resident or responsible party is committing themselves to binding arbitration (not mediation) in the event of a dispute or claim against the nursing facility, forfeiting their right to bring a lawsuit should they wish to do so in the

future. There is some dispute whether such a clause can be held to be legally binding. The matter has yet to be decided by the courts. In Arkansas the Office of Long Term Care has taken the position that a binding arbitration clause violates Medicare/Medicaid regulations. However, if the admission agreement is not carefully read and understood prior to signing, a resident or their family may be forfeiting an important right.

AANHR Tips:*

1. Don't sign a contract containing an arbitration agreement until you thoroughly understand it, because it will be legally binding. Ask to take it home for 48 hours to study it or to show it to your attorney.
2. When you sign admittance papers for your loved one, follow your signature with, "attorney in fact" in order to avoid responsibility for the bills. Give the nursing home a copy of your power of attorney.
3. Remember nursing homes cannot lawfully deny admittance because you refuse to sign the arbitration clause. In addition, nursing homes are required to explain the arbitration clause and allow plenty of time to read and reflect upon the document.

*AANHR Tip facts derived from Nursing home arbitration may limit legal alternatives (11/24/03 Ft. Lauderdale Sun-Sentinel) by Diane Lad and H. Cruz