

Mediation and the Medical Malpractice Case

By Joseph F. Ricchiuti

For a variety of reasons, mediation in medical malpractice cases is becoming more common. In a hotly contested case, settlement discussions outside of mediation can break down over rigid positions, and an unwillingness of either side to be the first to show what might be perceived as weakness. Further, the expense and risk of a trial is something both plaintiff and defendants often seek to avoid. For medical professionals, the thought of spending two weeks sitting in a courtroom rather than practicing their profession is distressing. Add to this concerns about the venue where the case will be tried, along with various scheduling issues, and the thought of mediation often becomes more attractive to attorneys, their clients and representatives.

Because mediations are becoming more frequent — and compulsory mediation is becoming the norm in certain venues — counsel must increase their knowledge about how to use the process to achieve the best results for their clients.

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PRE-MEDIATION PREPARATION

In scuba-diving, a basic rule is, "Plan your dive; dive your plan." On the other hand, an ancient Chinese quote about warfare is, "No battle plan survives contact with the enemy." These conflicting guides summarize the difficulty in preparing for mediation.

Many advocates have received some basic training in the mediation process, or have attended a seminar where mediation techniques were discussed. The trainers may have made it sound uncomplicated. But the temptation to employ a technique mentioned at a seminar, but which counsel does not fully understand, must be avoided. For example, one technique frequently used by advocates is to try to "anchor" their position. They start negotiations with either an inappropriately high demand, or an equally inappropriately low offer. The parties then change their positions only slightly during subsequent negotiation rounds. They believe this technique will move the final number more in their direction than in their opponents'. However, this simplification of a valid technique usually acts exactly as an anchor is designed to work; it prevents movement. Unfortunately, it can prevent meaningful discussion, cause resentment and anger, and potentially lead to a failed mediation. The parties might never get to true impasse, as neither side moves into an area where settlement is reasonably possible.

SPECIFIC STRATEGIES

If a party intends to employ a specific strategy, he or she should consider either alerting the mediator about that intention

in a confidential memorandum, or doing so during an early caucus. Keeping the intended plan from the mediator might occasionally be appropriate, but also may well make the mediator's job much more difficult.

When planning a strategy, counsel should make sure their client understands and agrees with it. The client should also be advised that the battle plan may have to be altered, as flexibility in a mediation is crucial. Ensuring the client understands and agrees to the proposed strategy prior to the mediation can keep counsel from embarrassing discussions with the client during the mediation about why significant alterations in the plan have become necessary.

MEDIATION PARTICIPANTS

It is imperative that counsel learn who the other side(s) intends to bring to the mediation. Plaintiff's counsel may know he will have the individual plaintiff attend, along with a spouse or a trusted friend. However, he has no idea if the other side is bringing the defendant physician, a representative from the hospital, or an insurance adjuster. It can be difficult for counsel to determine if his opponent's decision makers will be attending. Without knowing who will be present from the other side, counsel cannot determine whether a presentation of some type would be appropriate at the initial joint session.

This issue is one the attorneys should consider discussing with the mediator well before the scheduled date of the mediation. The mediator may be able to assist in encouraging the appropriate indi-

viduals to attend. Also, if counsel believes the presence of a particular individual at the mediation would serve to hinder the process, this problem can be discussed with the mediator prior to the event. In this way, an unwanted confrontation may be avoided. If the presence of a potentially disruptive participant is deemed essential, counsel and the mediator can collaborate on methods to minimize any potential problem.

THE CONFIDENTIAL MEMORANDUM

One of the best ways for a lawyer to assist the mediator is by submitting an effective confidential memorandum. The confidential memorandum outlines the party's case, but it also may include further information that can be helpful to the mediator. Defense counsel might advise the mediator of the plaintiff's anger and resentment at the way he was treated, his current need for money, and any other factors that might affect his receptiveness to settlement. Conversely, the analysis by plaintiff's counsel of problems with defendant's case, and reasons why an institution might want to quietly resolve the conflict, can provide the mediator with useful information. On either side, an analysis of opposing counsel's personality, negotiating style or perceived willingness to settle can greatly assist the mediator when negotiations become difficult. The confidential memorandum should go beyond setting out a party's position, and should discuss the interests and needs of all sides.

OPENING JOINT SESSION

It has become common in malpractice mediations for the parties to agree to forgo a significant opening joint session. In such cases, counsel explain that each side knows the other's position, and the mediator has been provided with adequate memoranda. They may choose this route because they believe an aggressive opening session by either side could poison the mediation at the outset, by angering and upsetting the parties.

Interestingly, in mediations involving other types of cases, counsel frequently present detailed opening statements,

along with diagrams, photographs and videos. The attorneys in these cases believe a carefully structured presentation can be extremely effective, as it is the first time decision-makers for each side come together, and the first time those representatives have been confronted with a sample of their opponent's trial presentation. Counsel who opt for this scenario are often reluctant to let such an opportunity be missed, and strongly believe it increases chances of settlement.

In deciding whether or not to make an initial presentation, counsel must consider the fact that plaintiffs may never have truly understood how hard the doctors tried to save their loved one, how complicated the treatment issues were, or how badly the physicians feel about losing a patient. It is also probable the insurance adjuster never met the plaintiff, and may have not fully evaluated certain elements of damages, or confronted the weaknesses in the defense's case. Advocates must carefully evaluate whether a joint session will be helpful or not, and if any potential benefits are outweighed by the risk of harm. A pre-mediation conference between the attorneys and the mediator can be extremely helpful in making this determination.

If an opening presentation is to be given it must, in order to be effective, be carefully planned, and accomplished with a tone that will encourage discussion, rather than cause anger and resentment. Each side must make an effort to convince their opponent that they are attending in good faith, with an honest desire to resolve the case, and a willingness to work hard to do so.

THE PARTIES' TURN

At mediation, there are usually two opportunities for the clients to speak. The first is at an opening joint session, and the second is to the mediator during a caucus. However, in certain cases, counsel and the mediator should consider a third option. If the case involves particularly emotional issues, such as the death of a child, it can be extremely beneficial for the mediator to meet the parents before the mediation is scheduled to begin.

The parents can then discuss their feelings without time constraints, and the mediator can begin the process of developing a relationship with them. The importance for such individuals of having an opportunity to express their anguish to an active and concerned listener simply cannot be overestimated. Equally important may be the opportunity for the healthcare provider involved in the treatment to have an opportunity to be heard in a similar fashion. Accomplishing these tasks before the mediation proper begins can permit the mediation to proceed at a somewhat faster pace.

PATIENCE IS A VIRTUE

Achieving a settlement in mediation takes time. This is actually one of the strengths of the process. The mediator is not in a rush, and unlike a judicial settlement conference, there are no other parties waiting for their chance to be heard.

Counsel should advise their clients that the process may be lengthy, and that the first thing required of those taking part in a mediation is patience. Defense counsel should tell an out-of-town representative that scheduling an early flight home is counterproductive, and may stop a mediation that is just beginning to move toward resolution.

CONCLUSION

Mediation presents a unique opportunity to achieve a settlement. But in order to reach the maximal result, attorneys must understand the unique processes involved, and be sure to work with the mediation process, and the mediator, with the same effort and imagination they employ at trial.