



AN INTRODUCTION TO MEDIATION: WHAT PHYSICIANS AND DENTISTS NEED TO KNOW

The Medical Protective Company

When thrust into a lawsuit, physicians and dentists often feel uncomfortable — even vulnerable — particularly the first time they are sued. Highly trained professionals, accustomed to the role of caregiver and authority figure, are often ill at ease in an environment in which they have little control.

For many doctors, the process feels like nothing more than a maddening swirl of unfamiliar events, punctuated by cruelly ineffectual periods of delay, annoyance, and the dread of awaiting an ultimate jury finding.

Often, parties attempt to gain some control over the litigation by entering into mediation. Mediation is an informal process wherein litigants agree to meet with an unbiased third party — a mediator. Both parties present their side of the dispute in hopes that the mediator will be able to help them reach an amicable resolution.

One or both of the parties to a dispute may suggest mediation. Other times, a court will order parties to mediate. Whether mediation is voluntary or court ordered, it can be a valuable opportunity to consider the strong and weak points of one's own case, as well as that of the opposing party. Mediations typically involve several steps, as detailed below.

Selecting a Mediator

Great care should be taken in selecting a mediator. Sometimes judges will mediate cases themselves or select a mediator for the parties. In voluntary mediations, the parties themselves agree to a mediator.

Typically, mediators are attorneys. They should be knowledgeable about the relevant law and subject matter that is the focus of the dispute. They should also be familiar with the jury tendencies in the venue where the case is pending.

Defense counsel, plaintiff's counsel, and insurers are usually familiar with potential mediators, and most often agree on one with minimal difficulty.

Providing Written Submissions

Each side will submit a mediation statement in advance of the mediation. The lawyers who represent the doctor (defendant) will work with the lawyers who represent the patient (plaintiff) to prepare these statements.

The lawyers (called counsel) will draw upon information they have obtained from their clients. The process includes (a) conversations and interviews, (b) review of medical/dental records, (c) consultation with medical/dental experts who have reviewed the case, and (d) "discovery," including a series of depositions during which the involved parties and witnesses are interviewed.

The insurance company also will evaluate the case in order to develop a resolution plan. Counsel, insurers, and doctors should be open with one another in discussing their perceptions of a case's settlement value. These interactions are valuable in crafting a mediation statement, which will form the basis of the defense's strategy. While very useful to the doctor and the defense team, it is unlikely that the mediation statement will be shared with the mediator.

Participating in the Mediation

Parties (defendant, plaintiff, counsel, and insurers) will physically meet. The meeting(s) may occur at the office of one of the attorneys or the mediator. During the initial phase of mediation, all parties will meet in a conference room. The mediator will introduce himself or herself and explain to the parties how the process works.

Next, the plaintiff's attorney will make a statement regarding the case from the plaintiff's perspective. Then, defense counsel will state the side of the defense. Following these statements, the mediator will often ask the parties if they have anything to add. At this point, it usually is best to rely upon the statements of counsel.

Upon completion of the opening statements, the parties will proceed to separate rooms. At this point, the mediator most often will first meet with the plaintiff's team and discuss the case with them. Following this meeting, the mediator will meet with the defense. It is during this phase of the mediation that the physician/dentist has the opportunity to describe what occurred during his or her involvement with the case, educating the mediator about the salient points.

Importantly, the physician/dentist should be open to hearing what the mediator has to say about the case as well. The mediator may introduce issues that previously have not been introduced or considered. As a neutral observer, the mediator offers valuable perspective.

During this initial meeting with the defense, the mediator will usually convey the plaintiff's "demand" — that is, the dollar figure that they want to resolve the case. If the

physician/dentist has consented to settle the case, the claims representative who is present will propose an offer.

The mediator will go back and forth between the parties, exchanging not just dollar figures, but also working through the remaining issues that are important to the various parties. This discussion will focus on what offers/concessions the parties believe are necessary to resolve the case.

The participating parties should be candid during mediation, as the process is designed to facilitate discussion. To encourage open discussion, most courts do not allow any of the statements made during this time to be used against either party in trial.

The mediation process frequently results in case resolution. At times, cases do not settle that day, but may settle later if the parties desire. Neither mediations specifically, nor negotiations in general, are just about money. They are about timing, disputed issues, and ultimately about self-interest.

Parties who believe it is in their best interests to resolve a dispute will do so. Those who do not see any value in the resolution are unlikely to settle. Thus, mediation is a valuable tool that doctors can use as a "magnifier" that focuses on the disputed issues, sometimes showing them from a number of perspectives and helping the various parties determine whether it is in their interests to settle the dispute.

Conclusion

The wheels of justice turn slowly, the saying goes. Insiders sometimes add that they also grind fine. Mediation — when properly prepared for and conducted — may reduce inherent friction and empower involved parties to resolve the dispute, thus eliminating the time and expense of a trial.

This article was produced by the clinical risk management and claims teams at Medical Protective, the nation's oldest professional liability insurance company dedicated to the healthcare professions. For additional information, please contact Laura Cascella at laura.cascella@medpro.com or visit the Medical Protective website at <http://www.medpro.com/>.

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