Mediation Basics

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Mediation is an alternative to going to trial. It is a private and informal process by which a neutral person, the mediator, helps the parties reach an agreement. The mediator cannot impose a decision on the parties to settle the case, but usually pushes both sides towards a settlement of the case. Through this process, the mediator helps narrow the issues and works to get each side to agree to an actual amount to resolve the case. Mediations provide a way for the plaintiff and defendant to have a chance to speak their piece about the case. It is not the same as having their day in court, but it can be a very adequate substitute, when appropriate, without the devotion of large amounts of time, energy, and expense required by trial.

Who are the players and who attends?

The defense attorney assigned to the case and the State Volunteer Claims Attorney attend on behalf of the physician and/or practice group. The plaintiff attorney and their client attend, as well as any other co-defendants and their attorneys. The mediator is an attorney with knowledge of medical malpractice cases. The mediator is in a neutral position and

does not represent either side. The mediator's only financial interest is the fee they are paid to conduct the mediation. Before the mediation is set, the defense and plaintiff attorneys choose a mediator that they both believe will be fair and impartial. Each side looks for a mediator with the skills and personality they think will help resolve the case on terms most favorable to their client. The physician may not be required to attend but it is most often quite beneficial when they do so. State Volunteer provides a modest stipend for attendance at a mediation to help offset the physician's time away from work.

When are cases mediated?

Cases are mediated after both sides have had sufficient time to develop the case, which usually means sometime after discovery is completed but before trial. This is usually 2 to 3 years after the case was filed, but it may be earlier in some cases. In some instances, the Court may order the case to be mediated, but this does not necessarily mean that the case is ready for mediation. For there to be a good chance for successful mediation, both sides need to want to participate in the mediation process and the case needs to be ready, or "ripe," to mediate. A looming trial date often gives both sides some interest in mediation no matter how strong they feel their case is.

The Process

In a traditional mediation, all the participants come together in a "joint session." This usually involves everyone introducing themselves briefly. The mediator will outline the process and often let both sides know that the mediation is a way for them to "have their day in Court," but without the expense, commitment of time and uncertainty that would come with going through a jury trial. The mediator may offer that this is an opportunity for those involved in the case to resolve it versus placing their respective fates in the hands of a jury. The plaintiffs then present a summary of their case and outline why they believe the standard of care was breached, how that breach caused injury and the nature of the injury itself. The defense then responds with its summary of why the case is defensible and why the standard of care was not breached. At the conclusion of the "joint session," each side adjourns to its own room.

After the opening session adjourns, the mediator spends some time discussing the case with the plaintiff and then returns to the defendants with an opening demand. Many times, the opening demand is shockingly high and may exceed what the plaintiff's best day in Court might be. At this point, it is easy to get discouraged and frustrated but making a reasoned and rational counteroffer is important because it helps set the trajectory and tone for the mediation. At this point, the difference between the demand and the counteroffer is typically huge and the odds of reaching an agreement seem very low. However, the plaintiffs and defendants continue the process of trading offers and counteroffers. Each side may communicate certain points through the mediator that they feel will push the other side to become more realistic. The mediator may use certain techniques to bring the parties closer together. A common technique is called "brackets." With that technique the mediator gets one side to commit to go to an amount if the other side will go to another amount. For example, "If the plaintiff will come down to $300,000, will you, defendant go

up to $200,000?”

How do parties that are so far apart resolve a case through mediation?

Mediations involve the centuries-old art of negotiation and there are many ways this process leads to a resolution. The process helps each side to find that point where they will not take any less and the other side will not pay anymore. Mediation may give both sides a chance to de-entrench from certain positions and look at a resolution from a new or fresh perspective. Mediation gives an opportunity for the heat and pressure of litigation to give way to the advice and efforts of the mediator. A good mediator “hammers” on both sides to shape a deal that realistically can be accomplished. When a resolution appears “within striking distance,” a new type of pressure emerges, the pressure to bend and give a little more or accept a little less, to bring about an end with certainty to stressful, expensive and time-consuming litigation. The resulting agreement is not usually one that either side is totally happy with, but one that the parties can accept and “live” with. It may resolve a matter that has been pending for years. For the plaintiff, mediation gives an opportunity to convert a claim related to a loss or an injury into a tangible asset that can be used to empower that plaintiff’s life and the lives of their family.

How long does mediation last?

Most mediations will last a full day. For the physician who wants to attend but cannot stay the entire day flexibility exists. Arrangements can be made for the physician to remain involved by phone on key decisions.

Are all mediations done in person?

No. Some are done by video conferencing. However, personal participation and its requisite commitment tends to be more effective in bringing about an agreement.

What if the case does not settle at mediation?

Many cases that ultimately settle, do not settle on the day of mediation. For one, both sides are in unfamiliar territory—conducting intensive back and forth negotiations on a matter that is very significant and deeply personal to them. This type of negotiation is stressful, tiring and foreign to most plaintiffs and defendants. Both sides are being hit with lots of information and both sides are trying to grapple with the emotions of resolving a case. On the surface it may seem only about money, but it goes far deeper for both sides. Each side may have to address a “new” reality that they did not have prior to the mediation. For example, the plaintiff may have to come to the realization that their case does not appear to be worth as much as they thought, or the defendant may have to face that the case is worth more than they thought. Walking away may give a participant some time to let this new reality sink in or for a participant to realize that resolving the matter through mediation offers a distinct advantage over the uncertainty of going to trial. For cases that do not settle at mediation, the mediator often stays in touch with the participants’ attorneys and, if desired, continues to convey offers and counter offers and possible

solutions for the case.

Pros and Cons of Mediation

A positive for both sides is certainty. No matter how well each side is prepared juries can be very unpredictable and may simply not see the case the way the parties see their case. A jury could return a very large award for the plaintiff that the defense did not anticipate or award an amount that is much lower than the plaintiff expected or could have been realized at mediation. The jury could also find the physician not negligent and award nothing. Resolving a case through mediation gives each side certainty and control over the outcome that they will not have in front of a jury. So, for as significant and cherished a jury trial is to American jurisprudence, the saying that the litigants are in the best position to resolve the case amongst themselves versus putting this decision in the hands of a jury bears some truth. This is true IF it can be resolved as some cases simply cannot be resolved by mediation. Another positive for the litigants is the savings in terms of time, lost revenue, expense, and the emotional toll of a trial. A medical malpractice trial will take anywhere from a few days to a few weeks depending on how much evidence is presented. This does not include the time needed for preparation.

For the physician, there are some negatives to settling a case. Most importantly, by settling you are giving up the opportunity for a complete win. A settlement will usually result in a National Practitioner Databank Report and in some states a report to the particular state's medical board that tracks such payments. That state's health department or board of medical examiners may conduct an investigation into the lawsuit. A settlement is also part of the physician's insurance history and must usually be addressed in credentialing. For all these reasons, the decision to go to trial versus settling the case requires careful consideration and depends on the facts of the particular case.

Is my consent required to settle a case?

Written consent is required most of the time before SVMIC can pay any amount of money on the physician's behalf. Consent does not have to given prior to attending the mediation. The physician may decide to give consent or withhold consent depending on how the mediation develops. If a court orders mediation, it is not compelling payment, but rather attendance and participation in the mediation process.

Is mediation confidential?

Specific statements made in a mediation are usually not admissible in Court and are confidential amongst the litigants. However, each party will be exposed to information that they can use to their advantage even though it is not admissible. Parties can and do share information with the mediator which the mediator does not share with the opposing side if requested not to do so.

Conclusion

Mediation is a tool that can be used to settle a case. Whether it is the right tool depends on a thorough and careful analysis of the particular case.
