

Choosing a Mediator for Your Medical Malpractice Case: One Size Does Not Fit All

Medical professional liability cases can be complex, expensive to prosecute and defend, trigger substantial emotions and be quite unpredictable in terms of outcome. Mediation can be particularly valuable and effective in securing acceptable outcomes for all parties. Choose wisely.

The Legal Intelligencer, Medical Malpractice Supplement

March 28, 2023

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Medical professional liability matters are among the most frequently tried to verdict and often present a host of challenges that can impede nontrial resolutions. Such cases typically involve serious personal injury, impairment and even death, and frequently carry a heightened emotional investment on the part of plaintiffs coupled with high expectations for recovery. On the other hand, defendants include professionals who take pride in caring for their patients and often consider adverse outcomes to be unfortunate complications resulting from complex medical situations rather than negligence. With liability generally hotly contested and highly credentialed experts providing support to both sides, parties can become deeply entrenched in their respective positions. Even in cases with a consensus favoring settlement, the involvement of multiple defendants with competing views regarding relative contribution toward settlement can impede resolution.

Mediation with a qualified neutral can be particularly helpful in overcoming these complexities in order to help facilitate settlements. In selecting mediators for medical

professional liability cases, particular consideration should be given to mediators who employ a facilitative approach; mediators who are respected and trusted by party opponents; mediators with specific experience (including trial experience) with medical liability matters; mediators who are patient; and mediators with interpersonal qualities that lend themselves toward successful outcomes.

Facilitative Approach vs. Evaluative Approach

Individual mediators have their own characteristic style or approach to the process. Some tend to be more evaluative, developing their own view as to the value of a case and then attempting to draw the parties toward resolution based upon that evaluation. Evaluative mediators frequently espouse their opinions regarding a case and may even express opinions regarding the actual settlement value relatively early in the process. While this method can be helpful in some situations, it has drawbacks that can actually exacerbate complexities common in medical professional liability cases and can prove counterproductive to the ultimate goal of reaching a settlement.

First, if the expressed value placed upon the case by the mediator is perceived by one of the parties to be particularly high or low, that party can feel alienated and become defensive. This can rather quickly result in a loss of trust in the mediator and even cause the party to perceive an adversarial relationship with the mediator. On the other hand, the party who is a perceived beneficiary of this valuation can feel overconfident and become resistant to re-evaluation and/or compromise. This is a recipe for early roadblocks and even abrupt termination of the mediation.

Second, an evaluative mediator can actually alienate both parties by espousing an early opinion regarding settlement value that neither party wishes to contemplate at that early stage. This too can result in a sense on the part of both parties that further mediation would be futile and similarly result in an early termination of the process.

In contrast, a facilitative approach has several benefits. Given that the facilitative mediator tends to avoid expression of overt opinions regarding the relative merits of the parties' respective cases and refrains from placing a specific numeric value, he or she can more effectively maintain neutrality and retain the trust of all parties. Armed with this respect and trust, the facilitative mediator can effectively engage in discourse with the parties, asking questions designed to encourage the parties to re-evaluate their positions without becoming adversarial with them. The mediator can become a catalyst, assisting the parties in the pursuit of compromise based upon their respective evolving positions, as opposed to the evaluative mediator whose own position essentially becomes the focus of the process. In addition, by maintaining a facilitative

approach, the mediator can more effectively soften the messaging between the parties without doing harm to the substance of the message itself. This alone can be of value in keeping the discussions going even when they seem to be at an impasse.

This approach can be of particular value in the medical professional liability context with the potential for high emotions, helping to avoid emotion-based reactions or early termination of discussions. The facilitative mediator also helps to keep the parties engaged, which is especially important in complex matters involving multiple defendants that may take substantial time and effort for successful resolution.

Consider a Mediator Who Is Trusted by Party Opponents

In mediation, the neutrality of the mediator is of paramount importance to gain the respect and trust of all parties. Many attorneys understandably seek to retain mediators whom they feel will be most sympathetic to their case or client, hoping that will translate into securing significant concessions from party opponents. While seeking a sympathetic neutral may be a wise approach in selecting an arbitrator, it may not ultimately prove effective in the mediation context.

The goal of mediation is not so much to "win" but to reach compromise. While a party may feel more comfortable securing a supportive mediator, this could ironically prove counterproductive as such a mediator may be perceived as adversarial by the other party and result in resistance to the mediator's overtures. Since an important part of mediation is convincing the parties to rethink their positions, strong considera-

tion should be given toward mediators who are respected and trusted by the opposing party. Indeed, the better the relationship a mediator has with an opponent, the more effective that mediator may be in encouraging the opponent to reconsider and perhaps compromise his or her position. While it is obviously important for both parties to trust the mediator and feel that the mediator respects their individual positions, efforts should be made to select a mediator who is readily accepted by the opposing party.

The Importance of Substantive Health Care Experience

In a medical professional liability matter, there is really no substitute for a mediator with substantial experience in health care cases. These cases characteristically involve extensive focus on complex medical concepts including the applicable standard of care and medical causation. As a routine, there are highly qualified experts on all sides expressing conflicting opinions. If a chosen mediator lacks a fundamental understanding of the medicine involved, he or she may well have a very difficult time engaging in meaningful discourse with well-prepared and experienced attorneys, much less initiating the type of discussions that can effectively prompt the parties to undertake meaningful re-evaluation of their respective positions. These mediations can quickly become one-dimensional distributive bargaining sessions.

On the other hand, mediators with substantial experience in medical liability matters can readily digest and master details regarding the medicine at issue; can effectively address the strengths and weaknesses of the parties' respective cases pertaining to

both liability and damages; and can credibly address how these issues might play out in a courtroom. These are the very types of discussions that can promote realistic consideration and compromise by the parties. Mediators who have experience representing clients in medical liability cases will also have appreciation and perspective on the sometimes unrealistic expectations of the parties and may help bring them together simply by providing a dose of reality having actually experienced unexpected outcomes that are common in medical liability cases.

Another dynamic that can pose a challenge to resolving medical liability matters is the presence of liens that must be addressed in a settlement. These liens can impact the ultimate value of settlement as well as the perception of demands or offers. Mediators who not only understand the impact of liens but have experience with developing creative solutions involving them can actually enhance the value of settlement and thereby promote effective resolutions.

Patience Is a Virtue

Mediation in the context of medical professional liability cases can be time consuming and sometimes such matters are not conducive to rapid settlement or even resolution during a single mediation session. That does not, however, mean that the mediation process is without significant value. Even in circumstances in which an immediate resolution is not reached, the parties may have gained valuable perspective regarding their own positions and/or that of the other parties. Despite a lack of prompt resolution, parties may have made some breakthroughs and even moved closer to settlement. For this reason, it is important that mediators in medical cases should be patient and encourage the parties to

continue the process even if settlement is not immediately reached. Perhaps a global number is within reach, but co-defendants require time to reach a consensus regarding apportionment. In some instances, there may be one or more parties who desire more time to consider a particular demand or offer. Whatever the reason, as long as the parties remain willing to continue, the mediator should promote ongoing mediation whether by reconvening in person or via follow-up telephone communication.

Interpersonal Qualities

Mediation is a very personal process and choosing the right person as a mediator is important. The mediator should be a person of integrity who is respected and trusted by all parties. Beyond that, the parties should consider a mediator who is able to forge relationships with all; can get along equally well with both sophisticated and unsophisticated participants; and can find a way to identify and communicate effectively with parties as well as their legal counsel.

Communication is perhaps the most important part of a mediation process. Developing the confidence of the actual parties, not just in the mediator but in the process itself, is paramount. Given the emotional component of these cases, it is important for the mediator to understand the emotions of the parties and display an appropriate level of empathy while maintaining and projecting neutrality. In order to be a good communicator, a mediator should not only

be a good speaker, but an active listener and have the judgment to know when and how to utilize those skills to help enhance the overall quality of communication that he or she is facilitating among the parties. Poor communication between parties may well be one of the underlying reasons why a particular case has not previously reached resolution. Enhancing the quality of communication may prove pivotal in resolving differences.

Conclusion

During the past decade, and certainly during recent COVID-19-induced court closures, the role of mediation in resolving cases has increased. Medical professional liability cases can be complex, expensive to prosecute and defend, trigger substantial emotions and be quite unpredictable in terms of outcome. Mediation can be particularly valuable and effective in securing acceptable outcomes for all parties. Choose wisely.



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