Legal Corner

Mediation: New Rules for Physicians and Providers

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Mediation is an attempt to resolve a dispute without a trial. In recent years, it has emerged as an effective and increasingly popular tool for physicians and institutional healthcare providers to resolve disputed claims, reduce litigation costs, or possibly avoid litigation altogether. Medical institutions and physician insurance carriers have utilized mediation in an effort to avoid often unpredictable and costly jury verdicts. Different states, even different medical institutions, have used varying methods of mediation, some in response to specific legislative mandates or as part of broader policy attempts to help solve a state's medical malpractice crisis.

For a physician, litigation is often confusing and overwhelming. The mediation process can be equally baffling and requires the physician to be well-informed about the role he or she will have. For this reason, it is important that the physician becomes familiar with the format and process and is prepared for emotional presentations by patients or patients' families.

Mediation Models

Mediation can take many different forms, but often a medical malpractice claimant is brought together with the healthcare provider before a neutral mediator. Attorneys for both sides are typically present. The mediation is confidential and often involves submissions to the mediator outlining each party's position and arguments. These submissions, and any discussions among the parties at mediation, may not be used as evidence if a subsequent trial ensues.

In 1995, the Rush Medical Center in Chicago instituted a voluntary mediation program.[1] The Rush Model has been followed or modified by several major medical institutions. Johns Hopkins University in Baltimore and the Drexel University College of Medicine in Philadelphia have instituted their own mediation programs, which have been successful. In Pennsylvania, the Joint State Government Commission's Advisory Committee on Medical Professional Liability issued a Report that noted that "[m]ediation is growing in popularity in Pennsylvania, partly because of the initial success of the Drexel University College of Medicine program."[2] Additionally, the Pennsylvania Supreme Court, which helped inspire the Drexel College of Medicine program, has encouraged mediation by promulgating rules requiring its consideration.[2]

Most mediation models are voluntary and nonbinding, meaning that a party can choose to participate but is not bound to resolve the matter.

Selecting a Mediator

Both claimants and healthcare providers have an interest in selecting experienced mediators—often times attorneys or retired judges. It is also commonplace that the mediator has some background in medical malpractice or is at least familiar with the applicable state laws regarding medical malpractice. Many times, there is a single mediator. However, formats have been used with 2 or 3 mediators, in which each party selects 1 mediator and 1 mediator is neutral. For example, the Rush Model often allows parties to select 1 attorney from a pool of plaintiffs' attorneys and 1 from a pool of defense attorneys, who serve as co-mediators.[1]

When to Conduct a Mediation

A mediation can occur at almost any time before a jury trial. For example, many institutions believe that an early attempt to resolve a disputed claim is in the best interest of all involved. Hospitals have sought to mediate cases shortly after an untoward event or a medical error is discovered. Mediations can occur pre-suit, anytime during the litigation, and even on the eve of the trial.

Mediation

Once a mediation is scheduled, the mediator will often send a letter to each party advising of the me-

diation format. Confidentiality agreements are typically executed. The parties also submit mediation memoranda to the mediator, and sometimes they will exchange their memoranda with each other. The mediation memorandum is a critical part of the mediation process. It serves as the attorneys' best opportunity to outline the strengths of the case and exploit their opponents' weaknesses. The attorney is typically not bound by evidentiary rules and has great flexibility in developing the theory of defense. Mediation memoranda are often reviewed with the parties. A physician should be familiar with the attorney's arguments and should be prepared to hear the patient's side of the story.

A mediation is typically conducted in a conference room that can accommodate the patient, family, attorneys, physician, insurance representatives, and even IT personnel. The mediation usually begins with an introduction of the parties and counsel. The mediator will usually have already reviewed the memoranda and will know the facts of the case. He or she may allow the attorneys to make presentations or even ask the parties to make statements. For physicians and healthcare providers, this can often be a dramatic and critical moment in the mediation process. A physician may be faced with an emotional family member sitting across the table. The physician should be prepared for these presentations because his or her demeanor during a patient's or family member's presentation can make or break a mediation. The physician's demeanor may also go a long way in dispelling initial hostility that a family member may have when entering the room.

A mediator attempts to be a facilitator and will often use his or her judgment to decide whether interaction between the parties would be constructive to the process. For example, a mediator may ask an insurance adjuster or corporate representative to see a disabled child or dying patient in person. Alternatively, a physician may have an opportunity to discuss the medical procedure at issue, or a hospital may review remedial measures taken as the result of an error. These confidential statements are typically subject to evidentiary arguments in litigation and not admissible as evidence at a trial. However, the mediation process allows for nonconventional means to attempt to facilitate a resolution.

Break-out Sessions

After the presentations by the parties, the mediator often asks the parties to go into different rooms. The mediator then begins "shuttle diplomacy" in attempting to resolve the claim if he or she feels that a middle ground can be reached. This process can take minutes or days and is not a guarantee of settlement. It is often during the break-out sessions that a healthcare provider may feel confused or even helpless. Many times, insurance representatives or corporate personnel begin to take over the proceedings as settlement figures are discussed with the mediator. The physician should be prepared by the attorney that these discussions will take place and that the patient is also engaging in similar discussions during these sessions.

Post-mediation

If the case is resolved, material terms of a settlement are discussed at the conclusion of the mediation. The physician will need to rely on counsel, who can keep the physician informed of the terms of settlement.

Conclusion

Mediation is increasingly used in medical malpractice cases. Many believe that mediation is beneficial to the physician and helps to reduce costs and the danger of excessive jury verdicts. However, the mediation process can be complex and daunting for an unprepared physician. A mediation's informality and loose rules of evidence may create confusion. Moreover, parties who may not have seen each other for years may be surprised to learn that the mediation format requires them to sit across a conference table from each other.

The physician who is considering mediation is well-served to be fully prepared for the process, which if used correctly, can be an important tool in resolving cases without the expenses associated with a trial. Mediation also represents an opportunity for a patient or family member to express his or her side of the story, which may be as important to them as the settlement that they receive. MPM

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