

**MEDIATION UPDATE:
CONTINUING DEVELOPMENTS IN ADR**

The Pennsylvania Rules of Civil Procedure now contain mediation provisions pertaining to the pre-trial procedure of medical professional liability actions:

Regarding confidentiality of the mediation process, 42 Pa.C.S.A. §594 provides for the Confidentiality of Mediation Communication(s) and Documents:

Whether via the new procedural rules above, initiation by the MCARE Fund, Drexel University's mediation program model or the recently developed "early intervention program" of UPMC, there is no further any doubt that mediation is rapidly becoming the preferred approach to traditional professional liability litigation - December 2004 marks the beginning of required mediation procedure in every County with the Commonwealth of Pennsylvania.

A very recent CLE seminar presented by the Philadelphia Bar Association - in conjunction with the PBI - on "Advanced Issues in Medical Malpractice" addressed the above by way of an elite panel of professional liability attorneys who uniformly agreed that there has been "an awful lot of activity" promoting and securing mediation's place within the mainstream of medical professional liability litigation. Referred as "the" hot topic within the PBI, the panel acknowledged that, just one year previously, only one hour of CLE time was allotted to mediation while, last summer, a one half day program was presented and,

in February of 2005, the Pennsylvania Bar Association will be presenting a “full day” mediation program consistent with the efforts of the Supreme Court, Governor Rendell and, in particular, Chief Justice Cappy and Justice Lamb, the most noted advocates pushing for professional liability mediation resulting in the new rules County mediation programs.

In that the presenting panel had each participated in recent Philadelphia County mediations and/or otherwise served as the mediator, all agreed that, in many cases, the mediation involves a “two stage” process where, in the very least, all “defense” issues were resolved and/or otherwise removed from the table so as not to interfere with the desired settlement of the plaintiff’s case. As I have seen in my own medical malpractice mediations, the inability of the multiple defendants to agree upon a percentage share of liability often prevents meaningful settlement negotiations when the defendants otherwise collectively agree on the settlement “number” - which the plaintiff is willing to accept but for the continuing defendant liability dispute. In any event, the panel declared an 80 - 90% resolution rate for those cases recently mediated to date.

Explaining the need for changes and the early successes of mediation, the panel first noted that the “legal” aspect of the litigation process merely addressed who was “right or wrong” as well as the “business” considerations (the cost of litigation, the calculation of damages and “where the money is coming from - who pays what?”)

Aside from the above, however, more importance is now seemingly being placed upon the “human dimension” involved in a medical malpractice situation where the current system simply can not deal with “what is important to the parties” such as the “feelings” of both the patient and the doctor, the “need” for information (what happened?) as opposed

to the adverse event followed by the doctor and patient immediately “cut off” from each other. An additional concern is the now recognized need for an “apology” or “acknowledgment” which is often emotionally important to the patient as well as the provider. The panel further noted that litigation is simply too limited by its design and structure to address the patients claim that “what happened to me shouldn’t happen to anyone else!”

The seminar further addressed the obvious differences between the traditional settlement conference and pre-trial conference first acknowledging the “time commitment” where Judges often simply do not have the time to devote toward the resolution of a claim that often takes a full day if not two complete sessions. As further explained by the panel, too often a presiding Judge is faced with extensive memoranda from multiple attorneys where, in time restraints, the Judge “puts a number” on the case - and “evaluative” process does not allow the participants to “express themselves” and/or otherwise provide the defense carrier an opportunity - for the first time, to evaluate a plaintiff first hand observing the often presented emotional component it does not translate well in defense counsel’s reports to the company.

In addition to the above, the panel noted the obvious weaknesses of the settlement conference is that it involves lawyers and Judges (no clients) where appearance by the insurance representatives is the exception rather than the rule. The mediation process, on the other hand, is not limited by time restraints and, in practical terms, as noted by the one of the plaintiff attorneys on the panel, mediation means there is a recognition that the case should be resolved - that the case has probable liability and there is an interest on the carrier “to pay.” Similarly, plaintiff counsel noted that there really is no mediations

unless primary carrier(s), M-care and excess carriers are on board and that, frequently, the mediations process ultimately results in people “changing their minds” on the positions that they had taken so strongly earlier in the session. Bottom line to this panel - the traditional settlement conference is not a process and, in the words of one panel member, amounts to “fifteen minutes of justice.” Mediation, in the other hand, is proving itself to be a facilitative process where, sitting across the table from “the other side” can really grab you.

The panel further discussed the emotional component coming from the defense side where, most often, the doctor has not seen the patient and/or the family since the event. The “other victim” presentation by the doctor who - via mediations - can now show how badly he or she feels about the event, that it has been weighing on them, that they can now unload the burden upon them by an apology, that they have suffered as well, etc. are now seemingly as important to many of the doctors as it is to the patients and their families. Given the above and many other examples, the panel universally agreed that the “human dimension” of the mediation can be most powerful where, for example, the plaintiff is not bound by evidence and may offer to the physician/hospital, “how would you like to get up four - five times a night to feed this child?”

The panel also discussed how the litigation process via the settlement conference is somewhat of a “lawyers club” with the courtroom, corridors, no clients, etc. where the mediation process seldom separates the clients and otherwise empowers the clients to be involved in the process forcing all involved to value the case in a “different way”.

Consistent with well-accepted mediation principals, the panel outlined the obvious advantages to mediation versus litigation as follows:

MEDIATION

- Parties control own destiny in predictable setting
- Remedies include non-monetary possibilities (apology/acknowledgment)
- Private conclusion
- High resolution percentage
- Controlled/reduced time costs
- Solution oriented
- Open/direct dialogue and information exchange
- Emotional concerns of all parties addressed
- Emphasis on opportunity to be heard

LITIGATION

- Third party decision/unpredictable
- Sole remedy is dollar award/rights based
- Public/precedence
- Win or lose only
- Substantial time and costs
- Divisive process procedurally
- Limited/structured testimony
- Emotional concern of patient/plaintiff only
- Emphasis on result

Now that mediation is coming your way, isn't time you invest some time into the presentation of the plaintiffs case at a profession liability mediation session? Call now to reserve your place at the February 2005 PBI Mediation Seminar - it just may help you settle your next medical malpractice claim.