

## **FORUM MAGAZINE**

**May/June 2010**

Consumer Attorneys Of California

### **Mediation of Medical Malpractice Cases.**

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Most judges readily admit that they have a negative view about most medical malpractice cases that proceed to trial, because they expect that any case that has merit will have been settled prior to trial. This attitude is borne out by the statistic that most medical malpractice cases result in defense verdicts at trial. Since the health care system can do little to reduce the incidence of medical errors, the number of meritorious medical malpractice cases will likely increase in the future. Once a medical malpractice case enters the civil justice system, it is imperative that you understand how to best use the mediation process to get a maximum reasonable recovery for your client.

Obviously, the most important step in handling any medical malpractice case is the initial evaluation. Assuming that a case with the appropriate facts supporting a finding of both negligence and medical causation enters the system, mediation can be the most cost-effective way of resolving the case for both the plaintiff and the defendant. Therefore, the following recommendations assume that the facts of the case are sufficient to not only survive a summary judgment motion, but to interest the defendant's insurance claims representative in resolving the case before trial.

#### 1. How to get the defense interested in mediation

Most defense attorneys have little incentive to resolve a case before they can do sufficient discovery, and bill for the hours spent. Unless the defendant or its insurance carrier instructs the defense attorney to propose an early mediation, it is up to you to get the case into mediation. The best way to do this is by providing the defense attorney, and the insurance claims representative, sufficient factual information about your theory of the case and the supportive medical basis for causation. With rare exceptions, the best time to approach the defense about mediation is after the plaintiff's deposition (if the plaintiff makes a good witness), or after the defendant's deposition (if it includes a line of questioning that makes clear the plaintiff's theory of liability and causation). On rare occasions, setting the defendant's deposition will evoke a response that the defense would like to go to mediation before exposing their client to a deposition.

## 2. What needs to be done before going to mediation

The defense will usually require the plaintiff's deposition before going to a mediation, even if the defense wants a mediation before providing their client for a deposition. While the defense attorney and insurance claims representative may be able to evaluate the defense position on liability without the deposition of the defendant doctor or nurses, it makes little sense to expect a proper evaluation of the case without the plaintiff's deposition. A plaintiff who makes a good witness is in a stronger position at mediation, while a plaintiff who makes a poor witness will be in a better position to understand the risks of trial, which may make it easier for the plaintiff to accept resolution of the case at mediation. While an insurance claims representative will always think that they understand the risks of a trial, it is equally important that a plaintiff understand what is involved with presenting the case to a jury, and a deposition is often the best way of allowing a plaintiff to understand the process.

The deposition of the defendant physician and/or nurses should be taken in any case before going to mediation, unless the defense agrees in advance to not contest or discuss liability at the mediation. This will avoid the problem of the defense wanting a deduction in the damages based on liability issues which they believe would increase the risks of the plaintiff prevailing on liability at trial. If the defense wants to discuss liability at the mediation, then you must take the deposition of any defendant doctor and/or nurse who is expected to contribute to a settlement. Also, a deposition of the defendant doctor may be necessary to get the doctor to consent to settlement, which is an essential pre-requisite to any mediation.

The deposition of experts is usually not required before proceeding to a mediation. If the facts are sufficient to show liability, the defense will often assume that you will have experts to testify on the plaintiff's theory of liability. Also, any defendant will know what their liability expert has to say before agreeing to a mediation. However, you should be prepared to at least identify your liability experts prior to a mediation and even offer their deposition so that all liability issues will be clear at the mediation. If the defense agrees that they want to take your experts' depositions before mediation, then you should obtain a stipulation for an early designation of experts before offering plaintiffs experts for deposition.

In any case where the plaintiff has significant damages and/or any type of permanent disability, an IME is required before the defense will ever be in position to accurately evaluate the plaintiff's damages. The defense may be reluctant to notice an IME if the mediation is far enough before the trial date because of their

fear that they may not be able to conduct a second IME before trial without a court order. Since any court would grant such a motion, is it better to inform the defense in advance of a mediation that if the case does not settle, the plaintiff would agree to a second IME. That agreement would eliminate that potential barrier to a mediation being scheduled before a trial date has been set.

### 3. When and how to schedule a mediation

Although the defense attorney will often request a complete evaluation of a case, including liability and damages, before agreeing to proceed to a deposition, it is only necessary for the defense to understand the liability potential of the case before agreeing to schedule a mediation. After a mediation date is set, which is usually at least 60-90 days out, the damages aspect of the case can be developed, including scheduling an IME and/or obtaining economic data on lost wages and future medical expenses. In any case that involves significant economic damages, a mediation should be scheduled far enough out to allow for both sides to obtain expert evaluations on damages, including a life care plan and economic reports. Also, you should provide your economic reports to the defense at least 30 days before the mediation so that the insurance carrier will have sufficient time to obtain authority for settlement. If a trial date has been assigned, which then sets a CCP Sec. 2034 designation of experts, it is sometimes helpful to schedule a mediation just after the date for the designation of experts so that both sides will know the identity of the experts, but before taking the depositions. This can save the cost of going through expert depositions.

### 4. Selection of a mediator

The best mediator is usually a former plaintiff attorney who has experience with medical malpractice cases, since they often have a better understanding about the value of a case, both in terms of damages and liability. While there are many retired judges who are excellent mediators for many types of cases and who may have a good understanding about the mediation process, their trial experience with medical malpractice cases usually involves cases with little or no merit. Since a mediation involves more than just facilitating the positions of the opposing parties, having a mediator who can critique the position of each party by providing an independent evaluation about the strengths and weaknesses of each side will be beneficial to both sides. Over the years, most defense attorneys and insurance claims representatives have recognized the need to have an experienced attorney as mediator rather than just someone with good mediation skills. As a result, these individuals are usually booked well in advance, which is why it takes 60-90 days or

more to get a date for mediation. However, this allows enough time to properly prepare for a meaningful mediation, rather than going to the first available person.

## 5. Mediation brief

A well-prepared mediation brief is most helpful for an experienced mediator to be able to evaluate the case and assist in mediation. It should contain a narrative of the essential facts of the case and a separate analysis of the liability and causation issues, including references to specific expert opinions. The damages section should include all reports necessary to document the damages, including any relevant medical reports on the plaintiff, a life care plan, and economic report.

This will allow the mediator to understand your position and the relation of the actual damages to plaintiff's demand. In many mediations, the defense will only submit a confidential brief to the mediator, either because one defendant does not want the plaintiff to know its position relative to another defendant, or because a defendant does not want the plaintiff to know about some problem that the defense has in the case. On occasion, the defense will submit a confidential brief because they do not want to admit too much to the plaintiff and would rather just settle the case. Therefore, the only constant for a successful mediation is a well-written and thorough brief by the plaintiff.

## 6. Mediation process

The defense will always want to respond to a specific dollar demand by the plaintiff before making an offer at mediation. Therefore, you should be prepared to make a specific demand either at the start of the mediation, or in the brief sent before the mediation.

The amount of the demand will be based on the trial value of the case and on the available insurance coverage of the defendant. Most physicians in California have a \$1 million limit of liability insurance, but if a physician is employed by a medical group, the group may have additional liability insurance coverage for the case. It is not necessary to know the full amount of the available insurance coverage before starting the process to get to mediation, but it is essential to know the full extent of available insurance coverage by the time the mediation starts. Sometimes, it will take the mediation process to fully uncover the available insurance coverage directly from the insurance claims representative who attends the mediation. Although an insurance company will never settle a case for more than the available insurance coverage, they will sometimes hide the availability of excess coverage,

and it will be up to the mediator to uncover whether such excess or additional insurance is available.

Since many medical malpractice cases will involve multiple defendants, it is important that all liable defendants attend the mediation, since the mediation is the only time when the defendants will have an opportunity - or a reason - to assess their relative liability. Often, such relative liability must be determined between the defendants before any substantive discussions can occur on the amount of an offer.

## 7. When to settle and for how much

In most medical malpractice cases, a mediation is the best opportunity to settle a case for several reasons. First, it is often the only time and place when multiple defendants can actually discuss their relative liability. Second, it provides an opportunity to obtain an independent evaluation of the value of the case from the mediator, which can have an effect on both the plaintiff and the defense. Third, it is the opportunity for you to fully discuss all aspects of the case with your client who should be provided a copy of the brief to fully understand both the facts of the case and the liability issues. While many cases can and should be settled at a single mediation session, sometimes each side needs to re-evaluate their position, especially when there are multiple defendants and more authority is needed to settle. If the case does not settle at the first mediation, it is imperative for the plaintiff's attorney to identify all of the issues that must be resolved before returning to a second session. An experienced mediator can be very helpful in focusing on such issues.

Because of the MICRA limitation on non-economic damages, the value of any medical malpractice case can be reasonably determined in advance of the mediation, and assuming adequate liability insurance coverage, a mediation offers the opportunity to mathematically determine the value of a case for settlement. While you may feel that a jury will award a substantial amount at trial, based on the economic damages that can be placed before them, and any medical malpractice defendant is concerned that a jury may do exactly that, it is the unpredictability of any jury trial that makes mediation appropriate for medical malpractice cases. While cases with good facts and clear causation should settle for an amount closer to the plaintiff's determination of damages, even cases with defensible causation or conflicting evidence on the standard of care can be settled if both sides recognize that the plaintiff's damages multiplied by the percentage probability of success will result in some value. This removes the risk to the defense of a larger verdict, while

guaranteeing the plaintiff some recovery that can be viewed as reasonable under the specific facts and circumstances of the case.

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