STRATEGIES AND USES OF ADR FROM THE PLAINTIFF'S PERSPECTIVE

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INTRODUCTION:

As a lawyer who represents plaintiffs, my job is to get them money. All I have to do is have good facts, liability, a defendant with some money, and my job is done. Sounds simple enough when put that way. Perhaps a demand letter, a lawsuit, a settlement discussion or two, maybe even mediation or certainly a trial. Just get the money and the job is done.

This paper will focus on the strategy and uses of ADR as the way to get the job done – that is, as the way to "get them money." ADR as used in this paper will only apply to mediation as my experiences with other forms of mediation, in particular, binding arbitration have not been satisfactory. Arbitration seeks to replace the jury whereas mediation is a method by which parties can avoid having to go to a jury if they can find a mutually satisfying (or should I say aggravating) settlement point. I am committed to the jury system as the single best way to resolve disputes. In fact, the threat of a jury verdict – to both sides – is the number one motivating factor to a successful mediated settlement.

While all cases can be mediated successfully, medical malpractice cases best illustrate the multiple advantages available to the litigants in mediating a case.

Accordingly, this paper will frequently refer to the mediation of medical cases for examples of the strategies and uses of mediation from the plaintiff's perspective.

Medical malpractice cases are excellent examples of how mediation can successfully end a case. The reason that mediation works so well in medical negligence cases is not that simply that the cases are more complex, not because of experts, and not because of life care plans, and economists. The reason is emotional. "Studies show that anger, confusion regarding what happened, desire for revenge, and other subjective factors often motivate plaintiffs to file malpractice claims."[1]

In most personal injury cases, the parties don't have any kind of personal relationship. Two cars meet on the street, or a product user gets tangled up with a dangerous machine, or there is a quick slip and fall. Neither the tortfeasor nor the plaintiff has much emotional baggage tied up in the event. Maybe the driver of the car feels he is not at fault, but it's just a car wreck and he or she didn't devote his or her life to learning to drive. Besides, the car insurance will take care of it and no one will think poorly of the driver who caused the wreck - we've all been there. A product manufacturer may have some pride in its product, but ultimately the only real issue for most corporate defendants is one of money - they will take the course of action that best guarantees their shareholders' interests. Even a slip and fall is just a quick unexpected event that is usually deemed one of the risks of business. Thus, in mediating these cases the focus really is on money and the mediations usually move right along until both sides find the middle ground they seek.

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[1] Metsloff T, Peeples RA, Harris CT, *Empirical Perspectives On Mediation and Malpractice*, 60 Law & Contemp. Probs. 107, 108 (Winter 1997); Frank Sloan et. al., Suing for Malpractice (1993)

But medicine is different. In medicine, emotions run high on both sides. Doctors take being sued personally and patients view the doctor's errors as inexcusable failures of their implied promise of perfection.

Doctors too often perceive themselves as god-like healers who have devoted their lives to studying hard in high school, college, and medical school all for the purpose of one day being able to use their considerable skills to heal the sick. Many have been told since childhood that they are near perfect and they have become convinced that mistakes are made by mere mortals, not by the likes of them. As a result, they have a very hard time accepting the reality that through a mistake in judgment or skill they have actually caused harm instead of healed an injury. They view their relationships with their patients as ones where there should be ultimate and unfettered trust by the patients.

Patients view their doctors much the same way as doctors view themselves. Except perhaps they demand even more from the doctors than many doctors are willing or able to deliver. They want not only good medical advice and skill; they also want time, a good listener, and candor. When there is a mistake made by the doctor who has failed to deliver adequate time, or who has failed to listen to their problems, or who has been less than candid, patients are more than merely disappointed - they feel betrayed and they are angry. They want revenge. They want the doctor to suffer as they have.

But as a lawyer, all I can deliver through the usual course of events is money. And if I have a defendant doctor (or any other defendant for that matter) whose psyche won't allow him to recognize the realities of his error, and I have a client who wants money and revenge, then I am in a real quandary. This is why mediation can sometimes work so well in medical negligence cases – or any cases where emotions run higher than

the norm. Mediation in a medical negligence context, or other emotional case, should be looked at as an opportunity to reach solutions to problems that, in other contexts, usually can be adjusted with cash.

MEDIATION

As a plaintiff's lawyer, I use mediation to accomplish my one clear goal - to get money for my clients. At one time not too very long ago, believe it or not, mediation was the preferred method of resolving disputes and more matters were settled with the aid of a mediator than through the courts. When communities were small, it was essential that matters of dispute be resolved in an amicable manner. Community survival depended on it. However, with the industrial revolution and the tremendous growth of cities, the need for cohesive communities lost its importance and litigation took over as the way to resolve disputes. Mediation is now making a comeback because of economic issues - the need to reduce the cost of dispute resolution and the need to guarantee a result and reduce risks for all concerned.

The definition of mediation is not particularly complex: Mediation is when two or more entities come together to solve a dispute with the assistance of a trained third party mediator. It is not a substitute for a trial. Instead, I view it as a desired step along the way that might allow me to achieve my job of getting money for my client faster and with more certainty. In my view, a plaintiff can only achieve success (being the recovery of a proper amount of money) in a mediation if the prospect of a trial is perceived as a genuine possibility by the other participants in the mediation. Everyone must perceive this as a risk and everyone must understand that the plaintiff, if forced to trial, will be fully prepared to give it a good shot at winning.

Mediation can assist me in achieving the goal of getting money for my client by providing a forum in which the emotional needs of the various parties can also be addressed. Once these needs are out of the way, the money problem can then be addressed in a fashion that is more orderly and likely to result in success. Mediation is also perhaps the most efficient way to resolve multiparty cases as it provides an opportunity for all of the parties to come together, weigh their respective liability exposure and perhaps buy their peace.

> Mediation can be particularly helpful in multiple party malpractice cases.
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> In the experience of Eric Galton (the author of Texas Lawyer Press' Mediation Manual) and a number of other high profile mediators with several hundred cases each to their credit, there are two important observations involving medical malpractice cases.
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> a. One of the most difficult portions is the mediating that goes on between the different defendants. Often the best method of handling this is to first have the defendants agree to a reasonable settlement range and then to have each put up an initial contribution (without looking into a formula) to test whether the plaintiff can be moved towards that range.
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> Only after the plaintiff has moved into a reasonable range that the defendants can agree to, should the percentage contributions, the necessary amounts to
> "close the gap" (between the initial offer amounts and the amount that is "reasonable") be discussed. Often the reasonable range figure provides incentive, as does the possibility for partial settlements between the plaintiff and some defendants. [2]

TIMING OF MEDIATION

If there is going to be a mediation, it should take place as early as possible. "As early as possible" is determined on a case-by-case basis. Obviously, you want to have sufficient information about the merits of the case to make mediation worthwhile.

[2] http://adrr.com/adr1/essayd.htm

However, given the groundwork that goes into preparing a medical malpractice case or any other complex and expensive case - including securing experts prior to filing, generally a good bit of information is available very early on, and the plaintiff at least can be ready for mediation at the get go.

In single defendant cases in which liability is relatively clear, and damages obvious, there is no reason to delay mediation and it makes sense to move in that direction right away - perhaps even before suit is filed. (We have asked for pre-suit mediation in a number of cases but have been told the insurers feel uncomfortable in this semi-adversary setting without the aid of lawyers. Yet, these same claim adjusters have no problem at all encouraging victims to settle directly with them without the aid of a similarly skilled advocate.) In other cases, it may make sense to wait until the parties have some feel for the respective liability of each player. But even in the more complex cases, it makes sense to get the mediation ball rolling as soon as possible, and perhaps set a date and use that date as a deadline by which certain discovery will be completed.

> b. Cases seem to resolve more consistently if mediation occurs very early. Unlike many defendants, most medical malpractice defendants are experts who can understand the risks and the theories. They may very likely have access to almost all the facts long before the plaintiff's discovery seeks them.
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> Further claimants' negative feelings towards health care providers will harden over time. Physicians' "denial matrices" also seem to harden more as time passes. What was a great tragedy for which a defendant feels sorry eventually becomes a past matter that the defendant does not wish to remember or to accept blame in. Settlement works best when both parties are still able to communicate and listen. [3]

[3] http://members.aol.com/ethesis/mw1/adr1/essayd.htm

Sometimes it seems as if counsel for the defendant doctor intentionally delays mediation in order to bill more to the file before it is possibly closed at the mediation. This is perhaps understandable, but not acceptable or ethical. However, it is pretty obvious when this is happening. Depositions of collateral medical providers, records custodians, and family members are not essential to being prepared for mediation. They may be essential to billing a file - but they should not delay mediation. In our office, we have a practice - particularly in multi-party medical negligence cases, of establishing a court ordered schedule early on for the completion of discovery and setting a trial. Often included in the scheduling order is a time frame for mediating the case.

There does seem to be a correlation between the success of a meditation and the proximity of trial. The closer the trial date the more likely the parties will take the mediation seriously. This is unfortunate, as cases should settle for what they are worth without having to put the parties to the expense of full trial preparation.

Often the first effort at mediation is not fully successful, but repeat efforts may get the job done. This is particularly true where the first effort is made early in the case and during the interim, parties are dropped and new evidence discovered.

GENERAL PREPARATION CHECKLIST

The preparation for a mediation is pretty much the same in all cases. The simple checklist I try to follow might include some or all of the following:

1. Know your case and the defendant's case.

I need to know the case; and I think it is important to understand the case from both the plaintiff and the defendant's perspectives. This requires awareness of which of

the important facts are disputed and which are not. It is also important to know which facts are really important. A list of both undisputed and critical facts should be prepared.

Using the lists of critical facts, I make a list to show how the facts supply the necessary elements to prove the cause of action. This combination of facts and law can be used as the basis for the introductory remarks made by counsel in the first portion of the mediation.

In addition to knowing the facts, and how they fit into the legal theory of recovery, there must also be a complete understanding of the damages. In preparing this list, all elements of the damages must be itemized along with supporting documentation and testimony. For example, if future medical care is necessary this might be documented in the life care plan and proved through the testimony of the life care planner and an economist. When discussing this element of damages at the mediation, this kind of detail adds credibility to the claim. Just as important as itemizing the damages, is knowing how critical emotional satisfaction is to the plaintiff. How valuable is an apology or an acknowledgement of responsibility? Will this be a stumbling block to the resolution of the case? Should I call defense counsel ahead of time to let him know to prepare his client about the value of this kind of concession? It continues to amaze me how some incompetent defense counsel ignore our warnings not to touch certain hot buttons during their remarks – its as if they are trying to insure that the mediation fails.

I also have to know the value of the case. Some people rely on jury verdicts for similar injuries. I think this has great limitations. First, I don't know who prepared and tried the cases. Were they prepared and tried with the same level of skill I bring to a case and my opposing counsel bring to the case? What was the venue? How well known was

the doctor or defendant? Second, most of the good cases settle and thus verdicts represent results in really spectacular cases and really bad cases. Additionally, many, if not most, medical malpractice cases and product liability cases that are settled are confidential; thus limiting the data available. Therefore, I place little value of verdicts reported in jury verdict reporters except to the extent these cases represent a minimum value for my case. Instead, I check with other good trial lawyers with relevant case experience. I also place some degree of trust in a quality mediator.

2. Know what happens if the case does not settle.

Before I go to a mediation, I need to know the date that trial is likely. I also need to know what additional expense will be incurred, whether my client can afford the delay (financially and emotionally), and most important whether my client can afford to lose if trial is necessary.

I like to put my likelihood of success on a bell curve with the most likely verdicts in the middle and the outer limits representing a defense verdict on one end and a grand slam home run on the other. My goal at mediation is to be on the high side of the crest of the bell curve.

I also want to analyze the possibility of splitting the defendants. Can I use the mediation to resolve a claim against some of the defendants in a way that will guarantee some minimum of recovery for my client and perhaps make the case more triable against the remaining defendants?

3. Educate the Client About the Process and Likely Tricks.

Obviously it is imperative that the process be explained to the plaintiff, including the introductory session, the opportunity to speak, and the long waits during while the

mediator spends time with the other side. But most important, I think the client needs to understand first and foremost that we can walk away from the mediation at any time. They must fully and completely understand that the mediation is voluntary and that by encouraging it I am not, in any way, trying to avoid trial. Instead, I emphasize that mediation is just an opportunity to get a guaranteed settlement and, if not, at least learn about the strengths and weaknesses in our case before trial.

I also think it is important to prepare the client for any role playing that might be necessary as part of the effort to guarantee a maximum settlement. Should they be obstinate? Should they be aggravated? Should they be quiet? Should they publicly reject all offers and let me be the only agreeable person? These issues must be discussed and understood by the plaintiff before the mediation begins.

In addition, if there are two lawyers in my firm attending the mediation, we each need to fully and completely understand our roles. Are we "good cop" and "bad cop"? Are we going to split up to focus on an individual issue or defendant?

It is also imperative that the plaintiff be prepared for some of the more aggravating aspects of mediation. Two that come readily to mind are the low-ball first offer and the use of the future value of a structured settlement as a misleading offer. Unless I explain the inevitability of a low-ball first offer the client will immediately be offended and less likely to persevere through the process. And, in the unlikely event the defense actually makes a legitimate first offer, the client is pleasantly surprised and the whole day starts off with a better likelihood of success. I think it is essential to keep emotions under control so I always prepare the client for this tactic.

While the low ball first offer is aggravating and borderline offensive, what is really disturbing is the use of structured settlements to mislead the often uneducated plaintiff. I prepare clients for this likelihood and instruct them how the tactic will be used and how to react to it. If we have determined that a case is worth, for example, five million dollars, I want the client to understand that five million dollars future value is not the same as five million dollars in present value. This sometimes takes more than an hour to fully explain to the client, but in large cases it is essential.

The client also needs to know about the strengths and weaknesses of his or her case. If some fact or element of the case is first explained by the mediator or defense lawyer this negatively affects my client's trust in me. If the clients do not trust me, then I will not have much influence in helping them make a good decision as to whether to settle or go to trial.

4. Insure that Plaintiff and Defendant's Files are Complete.

A scheduled mediation provides a perfect opportunity to insure that the file is complete. For the mediation to be successful, both sides must have the same information. Statistics show that 21% of all mediations fail because the parties are not fully prepared in that a crucial medical record, bill, report, or similar item is missing from one side's file or the other's.

PARTIES TO THE MEDIATION

The defendant doctor should almost always appear at the mediation or a malpractice case. Similarly, in any case where emotions run high, the defendant should be present to at least show he cares. As noted above, there are deep emotions involved in medical negligence and sometimes other kinds of cases. Many times the whole reason

the plaintiff sought a lawyer had more to do with the doctor's failure to give the plaintiff what was perceived as an adequate explanation of what occurred, or perhaps even an apology, than it does with the egregious nature of the negligence. When the doctor does not show up at the mediation this adds salt to the plaintiff's wounds; makes emotional closure impossible; and can, and usually does, result in the plaintiff insisting on a higher settlement. When the doctor is not present, the plaintiff is just made angrier.

MEDIATOR

The mediator in a medical negligence case should have some experience in medical cases - both as a lawyer and a mediator. He or she should also bring to the table knowledge of the carrier or hospital defendant's hot buttons. He or she should have an understanding of the qualities of experts, the value of similar cases, and the skills of the respective lawyers.

Similarly, if the case involves issues of law that the other side does not seem to understand the mediator's skill in that area is paramount to a successful result. In this regard, settling a car wreck case where there is a likelihood of a bad faith claim being made against the insurer demands a mediator with the ability to educate the insurer that its risks do extend beyond the limits of the small policy covering the defendant.

CONDUCT OF THE MEDIATION

First, and foremost, the parties should come to the mediation in the proper frame of mind. All must enter the day with the genuine hope that at the end of the day or days the case will be resolved. Of course if the defendant has a plan to walk away without paying anything, there is no sense in mediating. The plaintiff can go to trial and walk away empty handed. Accordingly, it must be presumed that some substantial sum of

money will be exchanged. If the defendant knows going in that an exchange of money will never happen, then it should refuse to mediate.

Preparation is also important. Statistics show us that defendants spend only about 10.1 hours preparing for a mediation[4]. Is this enough? Perhaps it is but maybe it is not. Too often, the defendant has not looked at critical evidence until the mediation. Too often the first time the defendant realizes that he does not understand the life care plan is at the mediation. The problem with this approach is that the case has already been evaluated by the insurer without considering all of the evidence. This results in too little authority to settle the case. Too little authority is the equivalent of a waste of time. More thorough preparation avoids this kind of problem.

PARTICIPATION DURING THE MEDIATION

I used to advise my clients not to speak during the initial joint meetings at the mediation. I didn't want them to say something to hurt the case. On more recent reflection and experience, I think the plaintiff should talk about the damages they have suffered. This does two things. One, it allows them to vent - an important process if the case is to settle. Two, it humanizes the plaintiff to the adjuster and mediator. Of course, not all plaintiffs are comfortable with this and I certainly would not force this on them. Nevertheless, "it is important that the parties are allowed to speak and 'clear the air' if justice in the eyes of the participants is desired."[5]

Regardless of whether the plaintiff speaks or not, the defendant doctor or other individual in an emotion heavy case absolutely should speak. This is important to the

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[4] Metsloff T, Peeples RA, Harris CT, *Empirical Perspectives On Mediation and Malpractice*, 60 Law & Contemp. Probs. 107, 126 (Winter 1997)

[5] http://www.mediationassoc.com/info.html

plaintiff who needs to hear remorse and perhaps an apology. It is not essential that the doctor or other defendant admit liability. It is only important that they let the plaintiff know that they are genuinely sorry about the outcome. Of course, if the defendant is a defensive, holier than thou, self-important jackass, then maybe he should keep his mouth shut and not aggravate the situation.

I think everyone on the defense side should speak if only to express sympathy and a good faith desire to settle and resolve the case. Plaintiffs are suspicious of all of the new people who show up at a mediation. They probably have not seen the adjuster before or the structured settlement salesperson, or the doctor's private counsel. To promote trust in the process, I think all of these players should say something during the initial meeting. "In resolving allegations of medical negligence, patients tend to favor mediation because it provides a forum in which they can express their concerns and may lead to an acknowledgment of the problems sometimes in the form of an apology."[6]

EXCHANGE OF OFFERS

While I realize that insurers want to minimize the amount they will pay on a claim, I think it is counterproductive to low-ball a case. Too often insurers start with a low first offer as a response to what they perceive as a ridiculously high demand. (With competent counsel the plaintiff's demand is rarely really unreasonably high - instead it represents full value for the case if it were tried.) Insurers should not take an emotional response to the demand as this simply adds fire to an already emotional situation. The plaintiff is already emotional enough. Instead, success in the whole process is more

[6] Grenig JE. *Alternative Dispute Resolution in Health Care*. In: Sanbar SS, Gibofsky A, Firestone, MH, Le Blang TR, eds. Legal Medicine. 3rd Ed. St. Louis, MO: CV Mosby & Co; 1995

likely if the insurer will make a solid first offer and then demand substantial movement from the plaintiff as a show of equivalent good faith.

Defendants should never, under any circumstances, insist that their offer of a structured settlement be communicated to the plaintiff in a manner that emphasizes the future value of the offer. Perhaps very inexperienced counsel will be impressed with offers presented in this way but most see it as a bad faith effort to fool the plaintiff. Additionally the insistence on the use of a particular structured settlement company gives rise to distrust.

A GOOD SETTLEMENT DELIVERS MORE THAN MONEY

As noted above, one of the real advantages of mediation is that it offers the opportunity to address the emotional needs of the parties. This cannot be overlooked as an important goal of mediation and an important tool in reaching a monetary settlement. As counsel for the plaintiff, my job is to get money. I cannot accomplish this goal if there are emotional needs of my client that are not addressed. Or, even if I can accomplish a resolution without some apology or acceptance of responsibility, it often costs the defendant more than it would have. The cost of a disappointed plaintiff is apparently more than the value of a physician's or other defendant's ego. Regardless of the difficulties of addressing these non-money issues if the parties are to be made happy, this is a task that cannot be avoided.

If there is to be a truly satisfying resolution for the plaintiff, it can only be achieved during mediation. While many of my clients profess that they will feel vindicated when a jury finds the defendant liable and publicly announces its verdict, this feeling is not consistent with reality. Proceeding to trial will not solve the emotional

needs and issues of the parties. This is borne out by a recent survey that shows that as many as 95% of parties in civil cases, winners and losers, were less than pleased with their day in court. Certainly, that statistic alone warrants giving mediation a try.