Alternative Dispute Resolution in Medical Malpractice Cases

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We cannot call alternative dispute resolution (ADR) the "new kid on the block" anymore. When I began practicing law in the early 1970s, mediation was a term rarely heard, and usually in the family law context. Arbitration at that time was confined primarily to commercial disputes and court-annexed arbitration with the right to a de novo jury trial for the unhappy litigant. In my 18 years of trial practice before assuming the bench in 1991, I never represented a client in a mediation or a private arbitration.

However, at least by the turn of the 21st century, alternative dispute methods of mediation and arbitration became popular tools of the litigator's trade. Today, to the delight of those of us practicing alternative dispute resolution as our profession, mediation and private arbitration are used commonly in virtually every type of civil case. Moreover, a fairly recent trend has been to use mediation and arbitration more frequently in medical negligence cases. In fact, some hospital organizations such as the University of Pittsburgh Medical Center and Drexel University College of Medicine have incorporated mediation into their risk management and patient safety programs. Arbitration usually presided over by a single arbitrator is becoming more regularly used in cases involving health care providers.

Arguments favoring the use of ADR in the medical negligence context have been based primarily on these goals briefly outlined below.

• Use of a more qualified decision-maker.

Many ADR advocates have questioned the legitimacy of lay juries deciding complex medical-legal disputes and have looked to ADR to provide more qualified decision-makers. As a comedian once said, "When you go into court, you are putting your faith into the hands of 12 people who weren't smart enough to get out of jury duty." While I take issue with that statement after presiding over numerous medical negligence cases in my 15 years on the bench, there is legitimate concern from both the plaintiff and defense bar that a jury may not be able to deal with the complexity of the issues which they are called upon to factually decide.

• Reduction in litigation costs.

The cost to take a medical negligence case to trial is often significantly higher than to take other civil cases to the same conclusion. Under the Medical Care Availability and Reduction of Error (MCARE) Act, before filing suit, a plaintiff needs to have an evaluation of the case performed by a relevant professional in order to secure a certificate of merit. Both sides thereafter need to employ medical experts to render written expert reports and then to testify at trial concerning the alleged breach of the standard of care, whether the action of the health care provider caused harm, and the nature and extent of the harm suffered. While I am not aware of any studies that have tracked the average cost of a medical negligence case in Pennsylvania, anecdotally, the range of costs is usually estimated between $20,000 (for the "small" case) and well into to six figures (for the "larger" case). ADR is often seen as a means to reduce those expenses.

• Reducing the trauma of malpractice litigation.

Traditional malpractice litigation often takes an emotional toll on the parties. Plaintiffs may suffer social stigma if they sue their doctors or a local hospital, especially in smaller communities. Physicians often perceive the lawsuit as an allegation of almost criminal conduct and often speak in terms of innocence or guilt rather than civil liability. ADR methods mitigate these problems to some extent by being more private and less lengthy, allowing both parties to go on with their lives earlier and often with less publicity.

Mediation

Mediation is negotiation facilitated by a neutral third-party mediator and its most important characteristic is that it is non-binding. When parties decide to attempt mediation, they may break off the negotiations at any time and the content of the

mediation is, by law, confidential. In Pennsylvania, that confidentiality is secured through the Pennsylvania Mediation Statute, 42 Pa. C.S.A. Section 5949. The Pennsylvania Supreme Court had implicitly endorsed mediation in medical professional liability actions by its adoption of certain rules of civil procedure. Under Rule 1042.21, a health care provider may file a motion with the court requesting court-ordered mediation and, at pretrial conference under Rule 1042.51, the trial court is required to inquire if the parties are willing to participate in mediation.

Good cause does exist for the Supreme Court's encouragement of mediation efforts in these cases. The parties can select a mediator who has the knowledge and experience to understand the medical and legal issues of a medical negligence case. A mediator with such knowledge can identify with and converse with the clients and their lawyers about the issues involved, thereby increasing the credibility of the process. An experienced mediator can challenge positions taken at the mediation by either side and perhaps produce a re-evaluation of the parties' previously taken positions. A mediation also allows the plaintiff the opportunity to be heard in a professional setting by a third person who, because of his background has the credibility to evaluate the case. The defendant health care provider also has the opportunity to explain, in a confidential setting, that "outcomes do not always mean that there was professional negligence." Mediation provides a forum at which both sides can express their concerns and may lead to an acknowledgment of the problem, sometimes in the form of an apology, which may transcend the mere perceived desire for financial gain. Some studies have shown that, in medical negligence cases, money was only the third most important reason for suing, after seeking an apology and information about why the adverse event occurred. Because mediated settlements by definition must be agreed upon by both parties, they are associated with greater durability and satisfaction.

Arbitration

If a case cannot be settled through mediation, the parties should consider whether arbitration, rather than jury trial, would be the best alternative in prosecuting the case to its conclusion. Arbitrators can be selected for their medical background or experience in medical negligence cases. Such an arbitrator will likely understand the issues, both legal and medical, better than a lay jury would. A second benefit is the flexibility of scheduling; arbitrations can be scheduled around the needs of the parties and their experts rather than the scheduling being controlled by the needs of the trial court in handling its docket effectively. Arbitration often allows for an otherwise two-week trial to be handled in a day or two. Often in arbitrations, expert reports, rather than live expert testimony, are used to prosecute or defend the action.

Some Dos and Don'ts

• Some Considerations at the Mediation:

Leave any attitude/posturing outside the mediation room. The key to mediation is a sense of compromise and working together. There is time enough for fighting if the case needs to go to trial. However, counsel should firmly (but respectfully) outline the areas of factual or legal disagreement between the parties. Remind everyone that these disagreements will not be decided at the mediation but at trial if the case does not settle.

Consider allowing the clients to vent (at least in the caucus with the mediator). The catharsis of allowing clients to express themselves to a third-party impartial mediator often does wonders for the mediation process. Especially in death cases, relatives often feel badly about decisions they made in referring the patient/relative to a particular health care facility or provider. It is often helpful, to clients as well as to the mediation process, to allow them to express all the emotions that they have about the situation, including any guilt they may harbor.

• Some Considerations at the Arbitration:
Exhibits. With medical negligence cases, there are likely to be more documents and records for the consideration of the arbitrator than in other types of cases. First, consider what exhibits the arbitrator really needs (admission notes, discharge summaries, relevant specific test results, expert reports, etc.) rather than providing him with the entire chart that will play no role in the arbitrator's evaluation. Secondly, nothing is more frustrating for an arbitrator to have to page through numerous exhibits to find those exhibits to which counsel is referring at the hearing, so tab the important exhibits.

Attempt to persuade the experienced arbitrator with medical and legal arguments; do not focus your appeal to emotion or sympathy; that is why you picked him in the first place. •

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