

Mediating medical-malpractice cases

Top ten practical tips for resolving medical-negligence cases at mediation

By Bruce G. Fagel

Successful mediation of a complex medical negligence case requires a thorough understanding about both the facts of the case and the mediation process. The following 10 suggestions will help improve the probability of a successful resolution of a case at mediation.

1. If liability is a significant issue in the case, offer plaintiff's liability experts for deposition prior to the mediation.

Since the circumstances that lead to mediation are so varied, the fact that any defendant in a medical negligence case agrees to come to mediation is not enough to lead to a settlement offer. Nothing will end a mediation session more quickly than a defendant who does not recognize any liability risk at trial.

Since there are often several months between an agreement, or Court order, to mediate a case and the date of the mediation, providing plaintiff's main liability experts for deposition by the defense will help focus the liability issues and provide a basis for the defense counsel to seek some level of authority from the insurance carrier. It will also provide a basis for obtaining consent to settle from the physician, if such consent becomes an issue prior to mediation.

At the time a mediation session is scheduled, you should specifically inquire if the defendants will be prepared to engage in a good faith effort to settle the case without expert depositions. If the defendants are aware of their liability, plaintiff's experts' depositions are usually not needed prior to mediation. But if the defense attorney needs more information to obtain consent or authority to settle, then you should schedule the appropriate plaintiff expert depositions prior to the mediation.

2. If there are economic damages in the case, provide documentation prior to the mediation.

In any case with significant future loss of earnings and/or future medical care expenses, the defendants' insurance carrier will usually require sufficient documentation well in advance of the mediation so that they can obtain adequate authority for any offer to settle. If the plaintiff is alive, an "IME" must be conducted at least 45 to 60 days before the mediation, so that the defendant can use this report to evaluate their damages exposure.

Most IME exams usually do not include a defense life-care planner, or if they do, the defense may not prepare an LCP report prior to the mediation. Therefore, a plaintiff's life care plan will usually be the only damages report that the defense will have for their own evaluation prior to the mediation. In a wrongful death case, the defense will require an economist's report for any claim for loss of earnings and/or the economic value of home services. These reports, including any life care plan should be marked "for mediation purposes only," in case the mediation is not successful and you need to change the report for trial and still use the same damages expert.

3. Prepare a detailed mediation brief and send it to the defendants, and the mediator, at least one week prior to the mediation.

This brief should start with a description of the essential facts and liability issues in the case that is one page or less. By focusing the case into a mini-brief, you can demonstrate the simplicity of the case which will make it easier for a jury to understand at trial. Ultimately, any medical malpractice defendant and their insurance carrier are most concerned that a jury will actually understand the facts of the case if it goes to trial. The brief needs to be sent to the defense in sufficient time for them to file their own brief prior to the mediation, and many defense attorneys will wait until they receive plaintiff's brief and then use their brief to refute the facts or liability issues of the case. This will help focus the issues at the mediation and allow time for you to prepare the mediator with appropriate counter-arguments.

Oftentimes, the defense will quickly retreat from the positions stated in their brief or agree that those are no longer issues in the case. Although many defense attorneys submit confidential briefs for mediation, unless they are willing to get past liability and discuss damages with an offer, you should ask the mediator to request that the defendant submitting a confidential brief remove the confidentiality so that the issues can be addressed and countered; otherwise, the mediation will never progress to any meaningful offer.

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4. Decide on your mediation strategy before the mediation and share this strategy with the mediator at the start of the mediation.

In cases involving multiple defendants, the dynamics between the various defendants can be as, or even more, important than the facts and expert opinions in the case. Not infrequently, the mediation becomes the first opportunity for the different defense counsel and their claims representatives to actually meet and talk about the case. While the mediator probably knows the defense attorneys personally and from prior cases, he or she will still know less about the specific dynamics of the case than you will from your participating in discovery with defense counsel. Giving the mediator a heads-up review of the players and some suggestions about how to get the discussions moving in the direction of a meaningful offer will help the mediator get the trust and confidence of the defense attorneys, which is critical to the mediation process.

Decide which defendants are the major liable defendants and which are minor players and give this analysis to the mediator. This will allow the mediator to concentrate on the major player and leave the minor players to "close a gap" if necessary. While the mediator will usually want each defendant in a separate room, there may be reason to have some of the defendants share a room "to talk to each other." This may be especially important in those cases where the defense attorneys have not agreed upon either the value of the case or the relative liability of their clients. It is not unusual for a defense attorney to agree to mediation and even agree that the case should be settled, only to arrive at the mediation and claim that some other defendant should pay the money.

5. Make a reasonable demand, either as a CCP Section 998 demand or a demand based on the reasonable value of the case.

While the definition of reasonable is highly case specific, the demand should take into account multiple factors, not just the damages that can be "placed on the blackboard" by the plaintiff's economist. Factors including the venue, how the plaintiffs will play out in court versus the defendants, the specific medical complexities of the case, and other factors that may affect the jury verdict. It is much easier for a defense insurance carrier to ignore an unreasonable demand rather than a demand that is reasonable. Since non-economic damages are limited to $250,000, the spread between plaintiff's economic damages and the defense calculations usually depend more on the liability issues in the case, rather than the cost for medical care or interest and inflation rates. However, in major injury cases, the largest component of damages depends on the hours of care needed and the level of such care. An eight-hour CNA is less than 20 percent of the cost of a 24-hour LVN. In such cases, the mediation should focus on the reasonable level of care before discussing specific monetary offers.

The other issue that is critical in any significant damage case is the probable life expectancy. Even though plaintiff's experts may be prepared to testify to a significantly longer life expectancy than the defense experts, the defendants can by law have any judgment reduced to periodic payments, hence the annuity cost is the true measure of the defendant's liability exposure. The cost of the least expensive annuity from an A or A+ rated annuity company is usually more than what the defense economist would calculate based on the defense expert's opinion on life expectancy. Even though the defense can claim to have expert testimony on life expectancy that would justify a very low offer, when the factor that is based on life expectancy is changed to the annuity age-rating equivalent, the value of the case based on the defense life-care plan can become more realistic.

6. Acknowledge the weaknesses of your case to the mediator.

In any medical malpractice case, there are both strengths and weaknesses. If the mediation focuses on the weaknesses of plaintiff's case, there will never be a reasonable offer. If you acknowledge the weaknesses of your case to the mediator early in the mediation and offer reasonable refutations and counter-arguments, it will be easier to then focus the mediation on the strengths of the case.

It is also important that your client understand the potential weaknesses of the case, so that any offer by the defense can be placed into the proper context of what may be considered as reasonable. While few plaintiffs want to proceed to trial and would prefer a settlement prior to trial, they need to understand that a trial may be necessary if the case does not settle, and they need to be willing to continue the case if the defense does not provide a reasonable settlement offer.

7. Use the mediator to assist, but do not expect him/her to argue your case to the defense.

There is a difference between providing a mediator with the facts and/or counter-arguments for the defense claims and asking or expecting the mediator to make your case to the defense. While the mediator may have an opinion about the value of the case based on his review of the plaintiff and defense mediation briefs, you should not ask the mediator to place his value on the case. When a mediator gives his opinion about what amount should settle the case, it is rarely helpful to either side early in the mediation. The only time a mediator should give a value on the case is if the two sides make sufficient progress but are still separated by a significant but negotiable amount. In these circumstances, a mediator's proposal for an amount between the two sides may be required as a final step, and often requires the defense to obtain more money than the authority they brought to the mediation. However, in such circumstances, a mediator's proposal allows the defense to focus on an amount that they know will settle the case without further negotiation.

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8. Be prepared to present and discuss your case directly to the defense attorneys and claims representatives.

While most mediators prefer to not have the parties or counsel meet with each other or to have any open session discussions, if the mediation appears to be at an impasse for any reason, it may be helpful for the defense to see and hear your direct presentation of the case and honest assessment of how the case will play out in front of a jury. When such occurs, the defense attorneys and insurance claims representatives, or hospital risk managers will rarely directly respond or engage in any open discussion, but such a presentation may provide an additional opportunity for the mediator to give his interpretation of your case after you have made such a direction presentation to the defense.

9. Explain the mediation process to your client and keep them involved throughout the process.

Few plaintiffs have any idea how mediation works. They often think that they will have to talk to the mediator or sit in the same room with the defendants.

Before any offer is communicated by the mediator, you need to explain both the mediation process and the fact that the first offer by the defense may be far from the real value of the case or the eventual settlement value. Many plaintiffs think that mediation is simply a method for the defense to admit their guilt and pay damages to the plaintiff, and they are often offended by the opening offer. Some mediators prefer to discuss any offers or issues affecting liability directly with the plaintiff's attorney and then leave the attorney to talk to the plaintiff. Other mediators will discuss both offers and other issues directly with the plaintiff and attorney. Which method works best for each case should be more dependent on the receptiveness of the plaintiff to separate discussions between the mediator and the attorney.

10. Be prepared to continue negotiations if the case does not settle at the first mediation.

Successful mediation of a complex medical malpractice case should be viewed as a process rather than as a one-time event. While many cases can be settled in one session, there are a variety of reasons why they cannot. But even when a case does not settle, the mediation should be used to narrow the issues and determine what can be done to make a second session worthwhile. Where time prior to trial permits a second mediation session, it should be scheduled, if possible, before leaving the mediation. But there should also be a specific plan that is agreed upon by both sides about the issues or discovery that must be resolved before returning to mediation.


Fagel

Bruce G. Fagel, M.D., graduated from the Univ. of Ill. (1972), and was licensed to practice medicine: Illinois, 1973; California 1975. He received his JD at Whittier College (1982). Dr. Fagel is a regularly invited speaker before organizations of attorneys, physicians, and hospitals internationally, and has been interviewed by CBS, ABC, NBC and various media affiliates. Featured in "The Best Lawyers in America, 2007." He has been an eight-time nominee by Consumer Attorneys Association for Trial Lawyer of the Year and recently featured in the National Law Journal as "The 10 Best Trial Attorneys in the Nation". Dr. Fagel has authored various articles on medical malpractice issues and served as a consultant on medical malpractice law to the California Judicial Counsel Committee, which wrote the new CACI jury instructions (California Approved Civil Instructions).

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