

Monday's mediation

The value of pre-lawsuit mediation in the right case; factors to consider

By Joshua West

Recently I had the privilege of participating with my clients and the defense in the early mediation of a tragic wrongful death case arising from a suicide which occurred at a crisis stabilization facility in the Northern California area. Although the result of the mediation is confidential, it highlights the importance of pre-filing mediation in the appropriate case.

Do I have a good case for early mediation?

When attempting to determine whether pre-lawsuit mediation is appropriate, there are many factors to consider including, but not limited to, the following:

- clarity of the facts and responsibility for the injuries/damages;
- age and circumstances of the plaintiff(s);
- the lack of significant disputed issues regarding liability or damages;
- ability to get all responsible parties to the table;
- willingness of the parties to negotiate on an expedited timetable;
- anticipated expenses associated with litigation and trial;
- the predictability of the probable result after a trial;
- the ability of the plaintiffs to have an impact on how things are done in the future.

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Clarity of facts

In our matter, the facts were relatively straightforward involving a severely depressed young man with a history of unsuccessful suicide attempts who had attempted suicide a week before, was hospitalized for several days to recover, and then eloped from the hospital after being declared by a psychiatrist under Welfare and Institutions Code section 5150 to be in imminent danger of harm to himself by a psychiatrist.

Having second thoughts about the job security of the employee under whose watch he eloped, the young man returned to the hospital the following day. After a second psychiatric evaluation he was again deemed by a second psychiatrist to be an imminent danger of harm to himself and was later transferred to an acute crisis stabilization unit.

After being evaluated and admitted to the unit, the young man was observed in a central observation room by staff until a disturbance occurred in one of the bathrooms of the unit involving a different patient. The security team and nurse responsible for observing the patients all responded to the disturbance involving the other patient. Our decedent then went into the second bathroom, secured a noose around his neck, using a scarf he had somehow gotten into the unit past the security team, secured a knot in the other end, placed it between the door and the frame, closed the door, and then hung himself to death.

The troubled young man was survived by his elderly parents with whom he lived in a separate downstairs unit. In this case, the non-economic damages were limited by MICRA to the statutory $250,000 cap and the economic loss was nominal due to the fact the decedent was disabled.

Plaintiffs' circumstances

The plaintiff parents are both elderly and neither one is in particularly good health, which was a concern going forward, but both are salt of the earth, good and decent people who make a wonderful appearance. A pre-mediation interview session with videotaped clips from the parents and other members of the family was made, edited and submitted to the mediator and the defense in advance of the mediation session. This was inexpensive and extremely helpful for the mediator to get to know our clients in advance of meeting them.

Few issues regarding liability and damages

Although the defense vigorously disputed responsibility for the incident, their own policies and procedures (which were obtained through an early Public Records Act request) and the records of the crisis stabilization facility itself strongly implicated the defendants based on its allowing the decedent into the facility with a potential ligature (the scarf); failing to monitor an acutely suicidal patient as he used a restroom capable of being locked by the patient and which contained an anchor point for a ligature; and in failing to substitute a staff member to observe the patients while all four persons on watch went into another part of the facility to deal with an unruly patient.

In addition, both psychiatrists who had evaluated the patient and declared him to be an imminent threat of harm to himself recommended a 1:1 sitter for the patient and this recommendation was questioned and then disregarded by the facility. Given the circumstances, liability was fairly straight-forward and the range of damages unfairly limited by the MICRA cap. We still had issues to deal with relative to the nature and extent of the loss given the strained relationship of the decedent and his parents in his later years, but given the impact of the videotaped interviews, we felt we had the better side of the argument.

Getting the defense to mediate

Getting all parties to the table included the filing of an early government claim and 90-day notice, serving a rather detailed early settlement demand for the MICRA limit plus economic loss, and inviting the defense to an early mediation.

Fortunately, the defense was amenable to the process and we wound up agreeing to the mediator the defense requested. Not always advisable, but we felt we had a pretty strong case to present and that the defense would be more likely to listen to a mediator it had selected as opposed to someone we had chosen.

Willingness to negotiate early on a discounted basis

One drawback of an early mediation is that the defense never wants to pay "full value" for the case and there is an implicit expectation that both sides will be willing to move to ground that they might not necessarily move to if they had to incur the time and expense of fully litigating the case. From the victim's standpoint, this means making a conscious decision to accept less than one might otherwise be entitled in order to eliminate the risk, time and expense of litigation; the death of a plaintiff; or the possibility of a compromise or defense verdict (which is an ever-present concern in medical negligence and public entity cases where jurors often have concerns about increased taxes to pay for the verdict).

Here, we took steps to quantify as best we could the likely expense we would have for costs advanced and experts, the amount of costs we might hope to recover in the event of a plaintiffs' verdict, as well as the likely result in the case of trial. We largely ignored

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the potential of recovering expert witness fees per CCP section 998 as experience with the same in public-entity defendant cases has been less than satisfactory. Once we had calculated the likely net verdict after trial with anticipated trial costs and compared that to what a settlement at the time of the early mediation with the actual costs incurred would be, we had a good basis to evaluate the defense offers at the mediation and be in a good position to make a sensible decision.

Likely result of a plaintiff's verdict

While it is never possible to predict what a jury might do in a given case, the venue we were in is not particularly generous when it comes to verdicts and there is a tendency for cases against health-care providers and government entities to require an even greater burden of proof than the law requires in order to get a jury to award significant damages in such cases. We also had a case where the decedent died at his own hand and had a strained relationship with his parents.

We had some concern that a jury might discount its verdict under these circumstances and we took steps to educate our clients before the mediation about this possibility, as well as the benefits of accepting a lesser gross amount now, as long as the net amount would be at least as much as they might hope to recover after a trial (assuming the jury awarded all they were entitled to recover).

Ability to impose concrete changes in the defendant's operations

One of the most satisfying parts of this mediation was the ability of the mediator to fashion things in such a manner that the clients' concerns about the lack of safety in the defendant's facility will be addressed and including those changes as part of any ultimate solution of the case.

The defense also demonstrated excellent judgment in terms of having a member of the facility and a superior from the Department of Public Health available to express a sincere and genuine apology to the parents and sister of the decedent and state in specific terms how this has impacted the staff at the facility and the changes, including those recommended by plaintiffs' experts, that are forthcoming to prevent a tragedy like this from ever happening again. Not only is this empowering to the family, it helps them appreciate the prospect that something good is going to come as a result of the death of their son and that, hopefully, no other family will have to experience what they have had to endure. We also thank and commend the Hon. Maria-Elena James, Judge, Ret., at ADR Services, Inc., for her excellent work in connection with this matter.


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