

Alternative Dispute Resolution and Medical Malpractice

Insurance Practice

Samuel J. Arena, Jr.	(215) 564-8093
Craig R. Blackman	(215) 564-8041
David M. Burkholder	(215) 564-8717
Andrew J. DeFalco	(215) 564-8119
Thomas W. Dymek	(215) 564-8053
Jane Landes Foster	(215) 564-8056
Jeffrey D. Grossman	(215) 564-8061
Kimberly A. Hendrix	(215) 564-8137
Patrick R. Kingsley	(215) 564-8029
Jana M. Landon	(215) 564-8049
Andrew S. Levine	(215) 564-8073
Jeffrey A. Lutsky	(215) 564-8087
William E. Mahoney	(215) 564-8059
Francis X. Manning	(856) 321-2403
Nancy Livers Margolis	(215) 564-8118
Maureen H. McCullough	(215) 564-8067
Joseph J. McHale	(610) 640-8007
Adina F. Morse	(215) 564-8047
Richard S. Mroz	(856) 321-2404
Stephen B. Nolan	(856) 321-2405
Lee A. Rosengard	(215) 564-8032
John A. Saler*	(215) 564-8709
Gina M. Stowe	(610) 640-7960
Andrew K. Stutzman	(215) 564-8008

*Senior Consultant

Office Locations

Philadelphia, PA
 Malvern, PA
 Cherry Hill, NJ
 Wilmington, DE
 Washington, D.C.

www.stradley.com

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By: Adina F. Morse

The purpose of this article is to present a brief overview of three innovative programs that have recently been implemented by a professional liability insurer and two major healthcare institutions in an effort to help alleviate the current malpractice crisis.

The existence of a medical malpractice crisis in this country is beyond doubt. Average jury awards have skyrocketed by an estimated 176 percent to \$1 million for a typical case. National malpractice premiums have more than doubled over the past ten years and have tripled in the last two years for certain specialties, such as general surgery and obstetrics and gynecology. And in 2001, it is estimated that malpractice insurers paid out \$1.34 in claims and costs for every \$1.00 received in revenue (including investment income).

The Current System - Litigation

Additionally, our current system is not meeting the needs of the parties to malpractice disputes. Approximately 80 percent of the malpractice claims that are brought do not involve provider negligence. Conversely, only about 3 percent of those actually injured by a provider's negligence file suit.

These figures suggest that it is not the meritorious claims that are being litigated. Possible reasons for why such a small percentage of plaintiffs who have been injured by a provider's negligence actually file suit are that: most of the injuries are only moderately incapacitating;

malpractice attorneys typically work on contingency fee arrangements and may only be willing to take on claims with sympathetic victims with large damage claims; some people are simply not litigious in nature; or, many do not wish to damage the long-standing relationship with their doctor.

Furthermore, litigating medical malpractice claims is costly. Estimates place the cost of an average defense of a medical malpractice case at \$86,000 per claim in cases where the defendant prevails at trial and nearly \$17,000 where the claim is ultimately dropped or dismissed. Discovery alone in a malpractice case can be so costly that plaintiffs may feel compelled to take a chance at trial in an effort to recoup legal costs.

For many malpractice plaintiffs, who are simply seeking an explanation of what happened, an apology, an acknowledgement of accountability, money to pay for their unreimbursed expenses, and/or assurances that the provider will take steps to avoid a recurrence of the event, a trial is an expensive, lengthy, unpleasant and ineffective process.

Mediation

Dissatisfaction with the litigation process and the unpredictability of results inherent in it are causing a growing number of parties to medical liability cases to explore alternatives, and mediation in particular. In sharp

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contrast to a trial, disputes can be resolved through mediation in a fraction of the time and at a fraction of the cost. Mediation is voluntary, flexible, confidential, informal and non-binding.

A neutral third party facilitates the negotiation, yet the parties never relinquish the power and responsibility for resolving the dispute. They maintain substantial control over the conduct of the process and complete control over the outcome. Optimally, mediation seeks to redefine the dispute as a problem to be solved in order to enable the parties to arrive at a solution that addresses their often-complex interests. Because mediation is a facilitated negotiation, the parties are free to engage in creative problem solving, preserve their relationships and work together to fashion remedies that are not available in litigation or any adjudicatory process.

Mediators, unlike judges, do not impose solutions to the dispute on the parties. Instead, mediators work with the parties to identify their individual interests and needs, and to achieve a result in which both parties “win.” Mediators can be either evaluative or facilitative, or a flexible mix of the two styles.

In evaluative mediation, the mediator may offer her opinions about the strengths and weaknesses of the case, challenge the parties’ positions and expectations, and introduce settlement proposals. By contrast, a facilitative mediator refrains from offering his assessment of the case or suggesting solutions, and instead guides the parties to create their own proposals for settlement.

Arbitration

Mediation is often mentioned in the same breath as arbitration under the rubric of alternative dispute resolution, but arbitration actually has much more in common with litigation than with mediation. Arbitration is the resolution of a dispute subject to the decision of neutral third party.

The decision is binding, and there is a limited, narrow right to appeal. Binding arbitration is usually quicker, less formal, less costly and more private than litigation, but like litigation, the parties present cases, evidence and witnesses and argue their positions to the arbitrator. Arbitration has been proposed as a method to resolve malpractice claims, but to date, has not met with much success.

Thomas B. Metzloff, in *The Unrealized Potential of Malpractice Arbitration*, cites judicial hostility, legal

uncertainty, a comfort level with the current system, the lack of empirical data that arbitration actually works in the malpractice setting and the perception that arbitration does not “substantially address the fundamental flaws of the litigation process” as the reasons arbitration has not met with much success as a method to resolve malpractice claims.

Unfortunately or fortunately, this method of alternative dispute resolution in the healthcare arena has, for the most part, been relegated to insurance claim disputes.

Several mediation-based approaches to case resolutions being tried around the country hold significant promise as effective alternatives to traditional, expensive and time consuming litigation and claims management processes.

The COPIC Program

In Denver, Colorado, a professional liability insurer, COPIC, has implemented an innovative, early intervention pilot program to resolve health care situations in which there is an unexpected or adverse outcome. The hallmark of this program is the timing: the intervention begins within the first 48-72 hours after the adverse or unexpected medical event.

The resolution process is initiated by the physician after a discussion with the risk manager to determine if the case is an appropriate one for the program. The physician then approaches the patient and the patient then decides if she is interested in participating.

The program is designed to preserve the physician-patient relationship and to compensate the patient for unreimbursed expenses related to the injury.

In the two and half years since this program was implemented, 425 cases have been subject to this program and a total of \$447,000 to 100 patients, or an average of \$4500 per patient, has been paid out. In only two of the 425 cases have subsequent lawsuits been filed, and to date, no additional payments have been made on these claims.

Naval Center Program

In Bethesda, Maryland, the National Naval Medical Center employs a full-time civilian “ombuds,” or neutral, who is also an experienced clinician, to resolve healthcare disputes. Depending upon the nature of the dispute, the ombuds may respond to a patient’s specific request or act as a mediator between the patient and the physician. The

goal of the Naval Center's program is to begin information sharing between the parties before they become entrenched in their positions.

In 20 months of operation, approximately 170 cases have been processed and 169 have been resolved to the satisfaction of both parties. Additionally, none of the resolutions have involved the initiation of formal legal claims or monetary payments. The resolutions have instead focused on ensuring that the unanticipated outcome or medical error does not reoccur. Since its inception, the Naval Center's program has been attracting increasing attention in the medical and legal communities.

The Rush Model

In Chicago, Illinois, Rush Presbyterian-St. Luke's Medical Center has developed a unique program to resolve cases after a legal claim has been made. Last year, this program earned the prestigious Annual Award for Excellence in Conflict Resolution of the CPR Institute for Dispute Resolution.

Since 1995, Rush has used trained mediators from among members of the plaintiffs' and defense malpractice bars to co-mediate medical liability disputes. Co-mediation is a process in which the attorney representing the party with a claim against the hospital reviews a list of qualified mediators and selects one from the plaintiffs' bar and one from the defense bar. The plaintiff may choose co-mediation or, alternatively, may choose to have her dispute mediated by a single judge from a panel of retired judges. Most cases are co-mediated and Rush attributes the success of the program largely to the expertise and balance provided by the co-mediation design. The mediations usually take only a few hours to reach a resolution, instead of the more than 3-5 years it can take to reach a conclusion through the Chicago trial calendar.

Between 1995 and 2000, 65 cases have been mediated through the program. Sixty of the cases mediated have

been resolved with settlements ranging from \$21,700 to \$5,800,000. Rush reports that both they and the plaintiffs experience a high level of satisfaction with the program, which has helped Rush more accurately control its expenses and more accurately predict the costs of its medical liability claims management program.

State Efforts

The concept of alternative dispute resolution and malpractice is capturing the attention of state governments, courts and medical societies. For example: In Pennsylvania, Governor Rendell's Task Force on Tort Reform is considering implementation of the Rush Model as one way of resolving medical malpractice cases. The Governor's Plan for Medical Malpractice Liability Reform is available at www.ohor.state.pa.us/pdf/govsplan.pdf.

In Massachusetts, the Center for Health Care Negotiation, Inc. has collaborated with the Massachusetts Board of Registration in Medicine to develop the Voluntary Mediation Program for disputes between patients and providers. This is the first program designed to mediate medical malpractice disputes under the auspices of a state agency.

More information can be found at <http://www.state.ma.us/mrc/agency/mediation.htm>

The application of alternative dispute resolution techniques to medical malpractice claims is an idea whose time has come. In the months ahead, expect to see a growing national awareness and interest in the approaches that have yielded such success in many parts of the country.

The author would like to thank Jane Ruddell, President of Health Care Resolutions, located in Conshohocken, Pennsylvania, for her significant contributions in providing information on the programs identified in this article. ■

Adina F. Morse is an associate in the litigation department of Stradley Ronon Stevens & Young. She is also a member of the firm's alternative dispute resolution group and can be reached at 215-564-8047 or amorse@stradley.com.



Stradley Ronon Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103



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