Mediation

RUSSELL G. THORNTON, JD

Almost every health care liability claim will be mediated before it is tried or otherwise resolved. Mediation is an integral part of the litigation process. Without fail, courts either order parties to mediate before trial or require that mediation be part of an agreed-on pretrial plan created by the parties (1). Mediation, when properly used, can be beneficial and quite effective, but its routine use in the pretrial process has eroded its potential benefit. The pro forma use of mediation has also allowed this dispute resolution tool to often be misused and a waste of time for all involved. If mediation is approached with the proper mindset and commitment, however, it can be of benefit.

Mediation provides the parties to a legal dispute a face-to-face opportunity to resolve their differences through use of an impartial third party (the mediator) in circumstances that require a focus on the claim with a minimum of outside interference. Mediation also minimizes the potential for the parties' counsel to control the outcome or interfere with the negotiation process. While the court cannot compel parties to resolve their differences, it can compel them to participate in mediation to see whether those differences can be resolved (2).

Prior to the advent of mediation, counsel and the liability insurance representatives responsible for a claim would work to negotiate claims among themselves. They would then shuttle the various offers and demands to their clients. Claim negotiation in this manner was certainly a reasonable way to conduct business and could be quite effective. Unfortunately, this process did not always result in a timely resolution of claims that could or should have been resolved, either because of attorney procrastination, a lack of a sense of urgency for counsel or the participants until just before the case was set to go to trial, or an inability of counsel to set aside their personal differences and put forth the effort needed to see if a matter could be resolved in the best interests of their clients short of trial. For these reasons, it was not unusual for matters to be resolved "on the courthouse steps," either the day of or the weekend before trial. Resolution of a case in this manner was often distasteful to everyone involved, since schedules were already rearranged to assure participation at trial and because much time, effort, and expense had been put forth in preparation for a trial that did not occur.

In the early 1990s, Texas courts began to more frequently utilize the authority granted to them by Texas statute to require the mediation of cases during the litigation process before trial. Specifically, the *Texas Civil Practice and Remedies Code* gave courts the authority to require parties to participate in various forms of

alternate dispute resolution (ADR) (3). Many methods of ADR are available, including arbitration, summary trials, and mediation (4). Courts were pleased with mediation because it not only provided a rather cost-effective method to dispose of cases but also provided the parties with the focus and sense of urgency needed to make them look seriously at possible resolution of a claim before approaching the courthouse steps. The early success of mediation resulted in its current routine use and in the development of an entirely new sector of the legal industry. This has caused problems because matters may be ordered to mediation before the parties are ready and because a number of mediators to whom courts refer cases are simply not effective or good at their job.

Mediation requires a mediator, an impartial third party with training and experience in mediation (5); other participants include the parties, the parties' counsel, and any other individuals necessary to negotiate a final settlement of the case. In health care liability claims, liability insurance representatives are included since usually only they have the authority to offer liability insurance funds in exchange for settlement of the case against the insured health care providers.

An important factor to keep in mind is that, because mediation is a form of settlement negotiation, the process is completely privileged and confidential (6–8). Any statements made by a party during mediation cannot be used against that party at any subsequent hearing or trial. Thus, even if the defendant were to admit that he or she was negligent or liable during mediation, that statement could not be used at some later time (9, 10). Additionally, communications with the mediator in connection with mediation are privileged. Unless the mediator has the party's consent, he or she cannot disclose that information to the other side. A party may provide information to the mediator that the mediator will want to disclose to the other side in an effort to obtain a compromise, but unless the disclosing party allows the mediator to pass on that information, he cannot do so (11). Finally, the mediator cannot be called or utilized as a witness about the mediation process (6–8). These provisions all exist to encourage parties to communicate freely with the mediator. Open communication enables the mediator to be as informed as possible about the dispute and allows the best chance at achieving compromise.

From Stinnett, Thiebaud & Remington, LLP, Dallas, Texas.

Corresponding author: Russell G. Thornton, JD, Stinnett, Thiebaud & Remington, LLP, 4800 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202 (e-mail: rthornton@strlaw.net).

For mediation to have the potential for success, all of the participants need to be committed to the process. This does not mean that the parties must be willing to settle the case before mediation begins or even be willing to make an offer of settlement. It does require that the parties commit to give reasonable consideration and analysis of their position and that of their opponent and use the process to determine the course of action they want to follow in disposing of their claim. If all of the participants are not committed to the process, everyone involved is better off advising the opposition of this situation and potentially going to the court with a request to not mediate. Generally, however, commitment to the process is in each party's best interest. Mediation provides some control over the case outcome. At trial, the parties have no real control over the outcome, which is primarily left up to the case jurors.

It is important that the claimant recognize that the professionals involved in the process (the attorneys, the liability insurance representatives, and the mediator) have superior knowledge and experience in valuing claims. Frequently, the most difficult part of mediation is getting the claimant to understand that not all disputes are valued in the millions of dollars. Claims are rarely resolved, through trial or settlement, in amounts that are even remotely close to those reported in the sensationalized lawsuit stories in the media. Those results generally involve extenuating circumstances, are not normal, and are frequently overturned during the appeal that follows. Therefore, the claimant must recognize that any "pie-in-the-sky" preconceptions that he or she might have about the potential value of a case are often misconceptions that must be overcome at mediation. If these misconceptions cannot be overcome and the claimant is unwilling to listen to the "reason" offered by the professionals involved in the process, mediation will not resolve the case and the case will have to be tried to determine its value. Educating the claimant to these facts beforehand is extremely beneficial to the process. More often than not, this education has not been provided by counsel before mediation begins. Oftentimes, however, it appears that claimants' counsel rely on the mediation process and the mediator to bring these facts home to the claimant. The rationale is apparently that counsel does not want to be perceived as working against the client's desires. Thus, a disproportionate amount of time can be spent during mediation educating the claimant about the real potential value of the claim.

One of the health care provider's roles in the process is in deciding whether to allow the liability insurance carrier to make offers of settlement. Most professional liability insurance policies have what are known as "consent" clauses. This means that the insurance carrier cannot make any monetary offer of settlement without the health care provider's consent to do so. Whether failure to give this consent is simply an attempt to avoid mediation altogether should be considered on a case-by-case basis. Generally, a stated desire by the defendant to avoid settlement is not a sufficient basis for a court to allow the parties to proceed to trial without mediation. Not infrequently, when focused on the claim at mediation, the defendant will allow an effort at settlement. Further, many attorneys prefer that their clients who state a reluctance to consent go ahead with mediation, just to ensure that they are completely educated about the

exposure they face and are truly committed to trying the case after careful thought and consideration. Attorneys all have stories about clients who express no interest in settling a claim, and will not even consider settling a claim, until the Friday before trial when for the first time they carefully consider the claim and its repercussions. Suddenly, when counsel is trying to prepare for trial, those efforts are fragmented by frenetic attempts at settlement. This causes anxiety and frustration to all involved and can frequently result in settlement on worse terms than might otherwise have been obtained if a concerted effort to resolve the case had been made earlier.

Mediation is often a tedious, day-long process. The mechanics of mediation are quite simple and straightforward. Mediation generally begins with all of the parties, their counsel, and the insurance representatives in one room. During this "joint session," the mediator gives an introductory presentation, primarily to educate the parties about the process. Each of the parties' attorneys then gives a brief presentation, or position statement. Generally, statements by the parties themselves are of no benefit at this time. Following the joint session, the parties are then placed in separate rooms and the negotiation process begins. This part of the mediation process, referred to as "caucusing," is drawn out and tedious. The mediator spends time in each room trying to understand that party's arguments about the case and its value, while enlightening the room about the other side's position and the strength of its arguments. This is also when the parties discuss the case with the mediator. It is during this part of the mediation that the mediator often must educate the claimant that he or she does not have a multimillion dollar claim. This back-and-forth process continues until the case resolves or until the parties and the mediator determine that there is no desire to settle, that the gap between what one side is willing to offer and the other is willing to accept cannot be closed, or that further work or reflection is needed before the sides can truly decide whether that gap can be closed. The process of buying a new car is somewhat similar. Like the car buyer, the claimant generally starts from an unreasonable position and makes a totally outrageous demand. This results in an equally unreasonable and outrageous response. As with the new car process, some unreasonable back-and-forth posturing often is necessary before the parties get to where they are seriously trying to negotiate, to a middle ground where the case might be resolved.

To get the most out of mediation, the health care provider must be ready and willing to hear and consider the claimant's position and arguments and to defend his or her actions to the mediator. If the provider wishes to settle a claim, the goal is to resolve the matter for as little as possible. A settlement on the most beneficial terms, and sometimes any settlement at all, requires winning the mediator over to the provider's side. The mediator is impartial and will try to remain impartial, but the mediator is human. Thus, the mediator will be more likely to direct efforts at getting the matter resolved along the lines proposed by the party who appears to have the better, more well reasoned position. The defendant health care provider is an indispensable and key asset in efforts to win the mediator over. A credible and effective defendant can be the mediator's best weapon when discussing the case in caucus with the claimant. A provider who is knowledgeable and committed to his or her

position is probably the most important factor in the defense's efforts to win the mediator over during this process.

The attorneys involved must be committed to the process by properly preparing for mediation. This requires counsel to educate the client and insurance representative about the case during its development, not just right before mediation. This is accomplished by providing the client with timely summaries of the case investigation, depositions taken, and expert reviews. Further, counsel must be knowledgeable about the facts of the case and be prepared to offer the opposition a coherent statement of the defense position. The claimant and his or her attorney must believe that defense counsel has an argument that can be credibly made and persuade a jury. Counsel must make every effort to place seeds of doubt in the minds of his opponents, and most importantly in the mind of the claimant. Mediation provides a unique opportunity for the defense because it allows defense counsel to speak directly with the claimant without having the message filtered by opposing counsel. Further, a strong presentation gives the mediator additional material to work with during the mediation process. Finally, in an effort to win the mediator over, counsel should provide the mediator with an understandable written position statement prior to the mediation itself. This position statement is an important part of mediation because it represents the start of the defendant's effort to persuade the mediator to reason along the lines of his or her position, defense theme, and valuation of the case.

It is just as important that the liability insurance representative be committed to the process. This means that the adjuster must have reviewed and considered the information provided by defense counsel and have obtained adequate financial authority to resolve the claim on a reasonable basis. Nothing is more frustrating and wasteful than to mediate a case in which one of the adjusters is not committed to the process because of incomplete knowledge or understanding of the file or inadequate authority.

Finally, the mediator needs to be committed to the process. This requires the mediator to be knowledgeable about the process and the case and to be willing to challenge how both sides view their dispute and the settlement value they place on the dispute. For the process to be beneficial, the mediator has to play "devil's advocate" to both sides. Again, winning the mediator over with a reasonable, fact-based statement of position is important here. If the mediator is provided with reasonable, coherent, and well-based arguments in support of a party's position, he or she will spend much more time and effort at playing devil's advocate in the other room. Proper selection of a mediator is key to ensuring mediator commitment. Because there are so many mediations and it is no longer a unique process, sometimes the mediator goes on "autopilot" and simply goes through the motions. This usually occurs no more than once with a particular mediator. If it happens, counsel will generally avoid that mediator in the future.

Unfortunately, some courts, without thought, order that mediation occur by a set time after the case has been on file. Routinely requiring mediation within a certain period can make mediation counterproductive and lead to its abuse. If the mediation occurs too early in the process, the parties may not have had the opportunity to fully investigate and evaluate the claim from both sides. Mediation in that circumstance is a total waste: counsel cannot reasonably advise a client and insurance representa-

tive about the potential exposure that exists on the case, and the liability insurance carrier cannot make a reasonable determination about the potential risk and value of the case. Further, parties sometimes use early mediation as just another discovery tool. They use the process to get insight on an opponent's strategy or just to see how high or low the opposition values the claim, with no real intent to try to resolve the case at that time. Thus, the mediation becomes a waste of time and resources.

Clearly, it is important for counsel to do their best to make sure that all involved have a commitment to the process before mediation. Although defense counsel has no control over the opponent's true commitment and purpose going into mediation, his or her own commitment, the mediator's commitment, and the commitment of the adjuster can be controlled pretty well. Counsel's own commitment is established by taking the steps already discussed. Controlling the commitment of the mediator rests in large part in selection of the mediator. While courts often assign mediators as part of the routine referral of matters to mediation, the parties are almost always allowed to substitute another mediator they can agree on. Since there are many qualified, good mediators with health care liability claims experience, this is often not a problem. A well-constructed position statement is also a good step because it gets the mediator thinking about the case before the day of mediation. Counsel can get the adjuster committed by keeping him or her up to date on the development of the case long before mediation. This does not, however, always guarantee adjuster commitment to the process. Sometimes, despite the best efforts of counsel, the adjuster comes to mediation unprepared, unwilling to resolve the case, or with a very different opinion from that of counsel about the potential value of the case.

The last variable is you, the health care provider. If you do not wish to settle the case, stand by what you think is correct. Embrace mediation as a tool to strengthen and confirm your resolve to proceed to trial to defend your actions. Use the process as an opportunity to listen and carefully consider your opponent's position and arguments and to satisfy yourself that you are comfortable with your plan of action. If settlement is a consideration, know your case and be prepared to articulate your position concisely and coherently to the mediator in the one-on-one sessions. This will give you your best opportunity to obtain an acceptable resolution of the claim. While these steps will not make the process any more desirable or enjoyable, they will allow you to reap the most benefit possible.

1. *Texas Civil Practice and Remedies Code*, §154.051 (Vernon's 1997).
2. *Nueces County v. De Pena*, 953 S.W.2d 835, 836 (Tex. App.—Corpus Christi 1997, orig. proceeding) (citing *Decker v. Lindsay*, 824 S.W.2d 247, 250 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).
3. *Texas Civil Practice and Remedies Code*, §154.021 (Vernon's 1997).
4. *Texas Civil Practice and Remedies Code*, §154.023 (Vernon's Supp. 2002).
5. *Texas Civil Practice and Remedies Code*, §154.052 (Vernon's 1997).
6. *Texas Civil Practice and Remedies Code*, §154.053(C) (Vernon's Supp. 2002).
7. *Texas Civil Practice and Remedies Code*, §154.073 (Vernon's Supp. 2002).
8. *Texas Rules of Evidence*, Rule 408 (West 2002).
9. *Texas Parks and Wildlife Department v. Davis*, 988 S.W.2d 370, 375 (Tex. App.—Austin 1999, no writ).
10. *Williams v. State*, 770 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1989, no writ).
11. *Texas Civil Practice and Remedies Code*, §154.053(b) (Vernon's Supp. 2002).