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Mediation may provide resolution in Medical Malpractice cases

by Louis B. Kushner, Esq.

It's no secret that professional liability coverage is a huge issue for Pennsylvania health care providers – so much so that Governor Rendell put together a plan for medical malpractice liability reforms. One of the methods that he advocates is the use of voluntary mediation, using the Chicago Rush Hospital mediation model. Mediation cannot be mandated in Pennsylvania for cases in excess of \$50,000, but can be pursued if all parties agree to try it.

Mediation is one type of Alternate Dispute Resolution (ADR). It is generally a voluntary process where parties with a dispute use a neutral third-party person (the mediator) to reach a mutually satisfactory solution. Unlike an arbitrator, a mediator has no authority or power to force a settlement.

Mediation involves face-to-face negotiations between all counsel and insurance carriers. Claimants are present. Physicians and/or hospitals participate if they have not consented. If they have consented, or have no right to consent, the other parties can decide to include them but their presence is not mandatory.

How does mediation work?

Mediation is entirely dependent on the give and take of the participants and it is the role of the mediator to facilitate that give and take. Many mediators begin by meeting with all parties prior to the mediation session to obtain information. All parties then meet for a joint mediation session. The mediator will make remarks. The plaintiff's attorney is given a chance to make an opening statement, and then the plaintiff may speak. After a

round of questions, the defense's attorney will make an opening statement and the defendant has a chance to speak.

After the joint session, the parties will separate and the mediator will meet with each, discussing the risks of the case, possible outcomes, quality of evidence and potential costs should the case go to litigation. Possible settlements are presented and may include unique components not found in a trial case, such as an apology, or a donation to a charity. A mediator will not reveal what is discussed in these separate sessions unless granted permission to do so and will never favor one side. If an agreement can be reached, the matter will be settled.

Expect a mediation to last all day. While some cases may stretch into two days or have the parties go home to mull over the progress of the day, the majority try to reach an agreement by the end of the business day. While medical malpractice mediation in Pennsylvania has a very high success rate (JUSTUS MMG had an 89% success rate in Fall 2005; Drexel Med an 85% success rate),¹ should a case fail to settle and goes to trial, all of the mediation communication is confidential and protected from disclosure.

Why should I consider Medical Malpractice Mediation?

The benefits of mediation include: a reduction of cases that go to trial; an avoidance of high jury awards for plaintiffs; a chance to negotiate confidentiality of the resolution; and savings on protracted legal costs. (Mediation does not require discovery, which is time-consuming for attorneys

and can drive up legal costs.) It may also reduce the amount of time spent resolving the issue. As an added benefit, mediation often negates anger and bad feelings between the parties, making all of the involved more amenable to working together to resolve the issue. The outcome is more focused on a solution that is acceptable to all, rather than a winner and a loser, which is the usually outcome of a trial.

¹ Creo, Robert A. Esquire, Jacqueline O. Shogan, Esquire and Chaton T. Turner, Esquire. "Malpractice case alternative dispute resolution." *Physician's New Digest*. November 2005.

Forming a Medical Practice

by Bernadette L. Puzzuole, Esq.

Whether a new graduate of medical school, or an experienced practitioner thinking of forming a new medical group, deciding how you structure your medical practice involves many issues. Many practitioners consider only professional corporations, but, in fact, there are several alternatives that may be more attractive, depending upon the type of business you are in.

When deciding the form of business ownership to use, there are two main factors to consider: **liability exposure** and **tax ramifications**.

Liability is the risk that your practice will have to pay someone for malpractice by an employee. With professional business entities, regardless of the form of entity, **no form of business entity will shield you from your own malpractice or the malpractice of anyone providing services under your supervision**. It is possible, however, to avoid liability for the services provided by other physicians in the practice, or the malpractice of employees of those other physicians, through the choice of the right business entity. Corporations, professional corporations, limited liability partnerships and limited liability companies for restricted professional purposes can each provide some level of shielding, so long as care is taken in forming the entity, and in maintaining it through the years. A lack of diligence in maintaining the statutory requirements for the entity chosen can destroy any shield created.

A business entity (corporation, partnership, limited liability company) may be appropriate for both the sole practitioner, and the multi-physician practice for reasons other than liability. And, even if you elect to practice as a sole practitioner, you can obtain a partial shield through malpractice insurance coverage obtained in an appropriate amount, so long as you comply with the policy requirements, including notice of claims made or potential claims.

In situations where you could be personally liable for a malpractice judgment you may still be able to shield them from the judgment, or at least limit the reach of the judgment, if you have taken care in how you title your personal assets. Assets titled in both your and your spouse's name jointly can be shielded from attachment. Assets held in the name of a business entity

in which you have an ownership interest can also be shielded, although your ownership interest in the entity may be subject to attachment. If, however, in forming the entity, you adopted a carefully crafted agreement that restricts the ability of an owner to transfer his or her ownership interest, the attachment can be limited to only a share of profits, or to a cash amount with the entity required to buy-out the judgment holder for a specified amount.

Aside from liability, the other factor driving the choice of entity in which you should practice is the way the income and expenses of the practice will be treated for state and federal taxes. There are benefits and detriments to practicing as a sole practitioner, as a shareholder in a professional corporation, or partner in a limited liability company or member of a limited liability company for restricted professional services. Especially important are ways of deferring income, and dealing with self-employment tax and pension contributions. These need to be considered carefully, and discussed fully with your tax advisor so that you can carefully weigh the tax effect and liability effect of your decision regarding how you will practice medicine.

Case Summary Corner

The U.S. District Court for Pennsylvania has upheld what is believed to be the largest insurance bad faith verdict in Pennsylvania.

In the initial malpractice case, Stephen Jurinko sued Dr. Paul Marcincin, a dermatologist; Andrew Edelman, a pathologist; and Smith Kline Beecham Clinical Labs for failing to diagnose a cancerous lesion on his nose. (Smith Kline Beecham eventually settled for \$525,000.)

Marcincin's primary medical insurer, Medical Protective Company, insured him for \$200,000 but never offered more than \$50,000. It also assigned the same attorney to Mr. Edelman, knowing it would create a conflict of interest for the attorney. Although settlement in the amounts of \$1.5 million and \$2 million were suggested by different judges during litigation stages, Medical Protective did not settle. A jury verdict found Mr. Edelman not liable and Dr. Marcincin liable for \$2.5 million. As this amount exceeded his med mal insurance, Dr. Marcincin gave his rights to Mr. Jurinko to sue Medical Protective in lieu of paying the excess from his personal assets.

Mr. Jurinko filed a bad faith claim against Medical Protective (*Jurinko v. Medical Protective Co.*) seeking compensatory damages, interest, costs, attorney fees and punitive damages. The jury found in favor of Mr. Jurinko, and awarded him \$1.6 million in compensatory damages and \$6.25 million in punitive damages. Medical Protective sought a new trial. On March 29, 2006, U.S. District Judge Cynthia M. Rufe upheld the verdict, citing that there was sufficient evidence of bad faith in the failure to settle as well as in appointing an attorney with a conflict of interest.