

# **SETTLEMENT STRATEGIES IN COMPLEX MEDICAL MALPRACTICE CASES**

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## **SETTLEMENT STRATEGIES IN COMPLEX MEDICAL MALPRACTICE CASES**

Working to settle a medical malpractice case is a constant and evolving effort. It begins the moment of the first analysis when the client first calls and sometimes continues right up until the moment trial begins or sometimes later on. This paper will examine some strategies for effectively settling medical malpractice cases in today's challenging medical malpractice environment. We will look at mediation techniques and strategies for educating your opponents about the risks that they face going forward. It will examine traps that can catch the unwary in the course of making offers and drafting settlement documents and it will discuss methods to maximize your client's potential recoveries.

### **I. HANDLING MEDIATION**

The road to mediation begins well before the check is cut for the mediator and the client is given directions to the office. Settlement strategies for a medical malpractice case must begin the moment the case is presented to the lawyer. In today's challenging environment with greater restrictions on the plaintiff and tougher courts' analysis of plaintiffs' cases, a lawyer must be careful about selecting the right case. With the many challenges if an attorney seeking to move a medical malpractice case fails to catch all of the requirements, it will be almost impossible to settle the case. Case analysis begins once the client calls by reviewing the medical issues involved in the case.

First, what is the standard of care breach that is alleged? If it is a difficult issue to understand or one that requires multiple doctors to explain, this must be taken into account early. Second, how straightforward is the link between the standard of care breach and the cause of the plaintiff's problem? Again, if this issue is not clear or requires numerous doctors to explain, this will have a significant impact on the strategies you will want to employ in negotiating the case. Finally, how strong are the damages in the case and do they include things other than non-economic damages? Without a strong case beyond non-economic loss, it will be very difficult for any lawyer to exceed the limitations placed on liability by Chapter 74 of the Texas Civil Practice & Remedies Code.

Posturing the case for a successful mediation begins in the initial preparation. Once the call is in, it is important for the attorney to evaluate these elements and get the case to a well-credentialed and qualified doctor or other healthcare provider. While this may be more expensive, having the expert's support at the inception of the case will save a lot of time, heartache, and disappointment towards the end. Make sure your expert has the credentials to give opinion testimony regarding the issues involved in this case. A simple rule of thumb is to make sure that the expert doctor is involved in the same field as the healthcare provider or doctor in the case. Be careful about using expert locator services who frequently will give you whatever doctor they have a relationship with, rather than someone who is really qualified to render opinions. In today's environment of expert witness challenges and the

growing impact of *Daubert*, having an unqualified expert or one susceptible to attack is the quickest way to ensure that a mediation or any settlement strategy will be ineffective. The problem arises by having to anticipate all the potential variables that might arise during the course of the case. The plaintiffs' burden is to try to window out every potential alternative cause or other factor in proving their case. This sometimes makes it very difficult to find an expert.

Once the expert is located, it is very helpful to have the expert review the medial records or other evidence that supports the case and render a report early on. While the rules allow an expert report to be filed after the Petition is filed, it is my practice to try to have the expert's report ready to go before I file the case. This gives me time to review and make sure that it is legally sufficient and covers all the bases raised in the Petition. It also avoids the headache of trying to run down an expert with a deadline fast approaching. Providing the expert report with the Petition is one of the first steps towards successfully settling a case. It is uncommon, but sometimes defendants are willing to discuss settlement of the case at this early stage after receiving the expert's report. Because of this, it is important to make sure your expert's credentials are well established, that the report covers all the required elements, and that it reflects that he or she has done the appropriate amount of work to be able to render the opinions.

I find it does not happen too frequently, but insurance companies are sometimes willing to discuss settlement shortly after receiving the expert report if it is impressive enough or if the issues involved are straightforward enough. However, this is a rare situation in my experience. Of course, I may be just doing something wrong, but anecdotally, I am not aware of many people who are successful at getting cases settled immediately after the expert report is filed. The economic realities of today may put some pressure on defense attorneys to respond and investigate the case before settlement negotiations begin in earnest.

#### **A. Preparing for Mediation**

Once the case is prepared and filed, all steps should lead towards trying to resolve it either through trial or mediation. To prepare for mediation you need to evaluate what the other side likely knows about your case, what sticking points there are in the facts or in the medicine that provide gray areas for argument, and what other motives might be involved in trying to resolve the case. Pretty early on you should identify what the dispute will be over - the medicine or causation in the case.

Prior to mediation it is important to do the depositions or discover the records or other evidence that will support your version of events. It is my belief that if you know a particular witness is going to be supportive of your case, it is probably worth getting that person deposed or getting their testimony by affidavit or some other manner to preserve it and present it to the other side. I have heard some debate amongst other attorneys about "sandbagging" with the key witness. But I believe that showing that card to the other side or

educating the defense about the weaknesses in their case prior to trial is the strongest way to ensure that an early settlement can be achieved.

To help prepare for mediation and for trial, I think it is worthwhile to videotape the depositions of your key witnesses. It is becoming my practice to videotape almost all my depositions, even sometimes the depositions of the defense experts, because you never know when the crucial bit of testimony might pop out and having that moment on tape is sometimes very valuable.

As a checklist for preparing for mediation, I believe you need the following:

1. Make sure you have the evidence that supports your case proved up either by deposition, by secured expert, by affidavit, or by records;
2. Make sure you have an idea of what the defendant's insurance policies and other potential assets are;
3. Make sure you have an idea of exactly what prior medical liens or other potential third-party interests are involved in the case;
4. Make sure you have an idea of what your client's expectations for the settlement are and have a frank discussion with them about the risks of going forward;
5. Try to evaluate what the defendant's motivations towards settlement might be. For example, is the doctor involved one that has been the target of several lawsuits and may have a problem giving consent to any settlement no matter how bad the facts; and
6. Who is going to mediate the case? Selecting a mediator can sometimes be as important as taking depositions and obtaining records.

## **B. Preparing the Case**

Most cases cannot be, in my experience, successfully mediated until defendants have had an opportunity to evaluate the strength and weaknesses of your experts. Therefore, I think most cases stand the best chance of a successful mediation after your experts have been deposed. It is incumbent before mediation to try to get your plaintiff's experts set for deposition to give the defendants an opportunity to make that decision and to prevent them from using the fact that the plaintiff's experts have not been deposed as an excuse for delaying any kind of resolution of the case.

When I prepare for mediation, I try to collect information I have that supports the

case and make a presentation of it to the defense counsel. I do not always follow the same pattern but on a case-by-case basis decide what it is that I need to educate the other side on.

### **C. Settlement Brochures**

For many cases I prepare a written settlement brochure. My background before becoming an attorney was as a newspaper reporter and as a result, I tend to think visually and in type. Many years ago I started doing layouts similar to what you would see in a magazine presenting graphic representations of important parts of the case and a written description of what the case was about. Often I use these as sort of a preview of my opening statements and be sure to address in it issues that I know the other side might be wondering about.

I think it is best in the settlement brochures to confront both the positive parts of your case and the negative parts of your case head on. Spending too much time on just the positives, when the defendants know that you have a weak point and failing to address it, will just give them an opportunity to pick apart or ignore your settlement brochure. The following is a description of a sample settlement brochure that I did in a case that dealt with the suicide of a young man while he was being cared for in a psychiatric hospital.

The first step in preparing the settlement brochure is to determine what kind of visual elements you might have to work with. A good place to begin is to get photographs and videotapes of your client. If the case is a death case, I find that videotapes have a strong impact both in front of the jury and at mediation. If you can find a videotape that involves the decedent interacting with his family or other potential parties to the case, this is very helpful.

Technology exists today to take still photo captures from videotape, and what I like to do, is incorporate those video pictures into the body of the settlement brochure. The other thing I like to do is take small snapshot pictures of the various witnesses taken directly from their videotape depositions to use as illustrations, when I reference them in the settlement brochure or when I do excerpts from their depositions. I find that the extra effort to put in the photographs and create other visual elements really helps sell the brochure.

Other examples include taking the logo of the defendant's facility or business, taking excerpts from the critical documents in the case for creating graphics, such as timelines or charts to illustrate the plaintiff's perspective on those elements of evidence in the case. I find that doing this work in the settlement brochure helps me think about what kind of trial boards or demonstrative needs that I will have when I try the case. For the costs associated with doing the settlement brochure in advance of trial, many times I can save myself a lot of heartache by determining what boards or what graphical elements do or do not work at the mediation and save myself from making the mistake of using what is ineffective in front of the jury.

It is also important in the settlement brochure to outline any potential new law or legal issues that might affect your case. For example, if there have been recent opinions from the Texas Supreme Court limiting the patient's right to bring the case that might be thrown up against you at the time of trial, it is best to have some sort of argument in your settlement brochure to counter those types of things. There is no canned formula for settlement brochures, although I think good ones tend to include a description of all your factual elements or legal issues and a section that shows to the opposing side the kind of people that are going to be involved, so that they can see whether or not a jury will likely be sympathetic towards them.

In addition to settlement brochures, I frequently do videotaped or DVD presentations that are like many news stories on the case. With today's technology of DVD and PowerPoint, it is becoming very cost effective to create multimedia presentations about your case.

One recent case illustrates how this is done. First, I collected videotaped statements from various witnesses that had not been deposed and took excerpts that helped describe the case from experts that had been deposed. In this particular case an individual was severely injured in a doctor's office and was rendered paralyzed as a result. In preparing the video, I had a videographer follow the client while he was in his nursing home and get video of various parts of his home and other locations that were relevant to the facts in the case. Then I went onto the internet and found computer animations about the procedure involved in the case and medical illustrations about the various parts of the anatomy that were involved in the case and incorporated that into my presentation.

While preparing a video or DVD type presentation, it is important to start off with a written script that you draft. Just like the written settlement brochure, the power of the DVD gives you an opportunity to practice your opening statements and prepare your arguments. The further power of the DVD is that you can incorporate actual live testimony, moving pictures, and emotional interviews that convey the full weight of the power of your case.

I think it is best to have a professional voice talent do the narration for the presentation. It is not as expensive as you might imagine and it adds that extra edge of professionalism that really makes it impressive.

Today's DVD technology allows you to put a lot of information on one disk. This can include an entire list of deposition excerpts or other video statements. It has been my practice to include the overall video presentation, along with these other fuller statements or other visual elements contained in their entirety on a DVD as well. Then the other side can navigate around just like they would with their DVD at home and watch what they want to or review whatever it is they want to. I find that making these edits and putting things onto the DVD also helps me prepare for trial in determining what testimony is the most impressive or

what witness looks the best. So it is money well spent.

With the settlement brochure and the DVDs, my practice is to always try to send these to the opposing side and the mediator well in advance of the actual mediation date. Sending it out just the day before very rarely gives them an opportunity to digest the full impact of it and take it into consideration when evaluating what their offers will be. As a rule of thumb, try to send it a week before the scheduled mediation date at the latest.

#### **D. Preparing the Attorney**

In preparing for mediation it is also very important to review the defendant's insurance policies. First, you should obtain these through Requests for Disclosures. If the defendant does not produce them, it is very important to go back and take a look at them to find out what kind of exclusions might exist, what kind of limitations might exist and factor that into your analysis.

Prior to the mediation, I always prepare a complete breakdown of all my expenses to date in the case. I do this so that there is no surprise later on to the client of what my expenses were and also, like the liens, I want to know how much is coming out of any potential offer to educate the client. I think it is a good idea to have this breakdown available with you to discuss with your client before the mediation and to have it with you at the mediation when the numbers are flying during the course of it, so that the client keeps that amount in mind. I find this helps keep everyone happy as much as they can be during the process. It is also important when collecting your expenses to segregate out what is considered taxable court costs and what is not. I also like to make sure I know that number and have explained to the clients how taxable court costs may sometimes be paid in addition to a settlement and to use that number during the course of the negotiations.

#### **E. Preparing the Client**

You need to prepare your client for the mediation just like you need to prepare the opposing side. Many times the client is very anxious about the mediation and does not fully understand what actually is taking place. The client needs to be told exactly how the process works, who the mediator is, and the likely arguments they are going to hear at the time of mediation. If the client is blind-sided with the defendant's arguments because you have not educated them about it, it is likely going to create problems for you, or at a minimum, make the client upset. I find it is helpful to schedule a meeting a few days before the mediation to sit down with the client, discuss the case expenses, discuss the insurance policy amounts, and discuss how any third-party liens might be involved in the matter before heading into the mediation. Clients typically appreciate this meeting because it resolves any anxiety they may have about what they have to say or do at the mediation. It is better to have the client on your side when the inevitable fur starts to fly during the course of the negotiations.



Do not overlook the importance of potential third-party interests in your case. Many times, medical care liens can destroy the chances to settle a case. It is incumbent on you to get accurate lien information before discussing settlement with your client. It is also helpful to talk with potential lien holders before mediation to get a sense of whether they will reduce the liens. Unfortunately, lien holders are rarely cooperative in this regard. Agencies like Medicare are notorious for failing even to respond to inquiries and will not discuss reductions until after the settlement is reached. This puts the lawyer and client in a catch-22 situation – evaluate the settlement without knowing for certain what a lien holder might do later. The client must know about these issues before the mediation so that discussion of offers are realistic.

#### **F. Preparing the Defendant**

The defendant has to be prepared to settle if mediation holds any chance for success. First, the defendant must be educated about the dangers of a jury trial. It is essential to have a trial setting to accomplish this. I am constantly harping on my staff to get scheduling orders in place and trial dates secured as early as possible. If the defendant does not face a deadline or trial setting, it can erode their interest in giving top dollar at mediation. The defense also needs to see what your case is about. Expert reports, witness statements and client depositions are usually the minimum that is necessary to do this. Consider this when preparing a settlement brochure.

Second, many medical malpractice insurance policies give doctors the right to withhold consent to discuss settlement. As a result, consider whether the doctor has any motivation to avoid giving consent. Look for a history of other suits, actions by the Board of Medical Examiners or other factors that might make the doctor resist giving consent. If you have a doctor that has a problem with giving consent, take this into account when selecting a mediator. Make sure it is someone who has the experience to talk the doctor through the risks of not giving consent or you may be wasting your time at mediation.

Third, make sure you have all the defendants you need in the case. Specifically, look to see if there are claims that can be brought against a doctor's professional association or practice group. Many doctors were told that House Bill 4 and Proposition 12 would limit their exposure. As a result, it is not uncommon to find that they carry only \$250,000 per occurrence insurance coverage. The problem arises when you have insignificant economic losses that far exceed \$250,000. Including the practice in the suit – while it will not do away with the liability cap – can give you access to other sources of insurance when substantial economic losses are involved.

#### **G. Preparing the Mediator**

Selecting the right mediator for a particular case is very important and often is crucial

to getting it resolved. Many times courts will automatically appoint the mediator to your case. However, often the mediator that is appointed may have no experience with medical malpractice or the issues or the personality types that are involved in these cases. For that reason I think it is important to evaluate whether your mediator is going to be strong enough to deal with the personalities and the issues involved. This is not to say that anyone cannot mediate a medical malpractice case, but I find that someone familiar with medical malpractice or with a strong personality is better suited to mediate these types of cases. Typically doctors and other healthcare providers are intelligent and savvy businessmen who are not used to having people tell them what to do. Therefore, the mediator needs to be strong enough in his or her personality to stand up to that and to be able to work around that. Otherwise they may not be able to get the case resolved.

Part of preparing the mediator includes educating the mediator about the issues involved in the case. I always try to send a copy of the settlement brochure that I have given to the defense attorneys and the insurance adjuster to the mediator as well, so that they have a clear idea of what is going on. You can save yourself the money by not sending them the full color draft or by not sending them every exhibit. I tend to find it is worth having a complete copy sent to the mediator so that he or she knows exactly what the other side is seeing. It is also a good idea to talk with the mediator beforehand either shortly before the mediation or before the mediation begins and identify to him or her what you believe to be the sticking points or the impediments to settlement. For example, if you think the doctor has not given consent, make sure you educate your mediator about those issues so that he or she does not waste your time making offers that will not be considered. It is also helpful, at least psychologically, to make these arguments to try to convince the mediator of your position. Then he or she can be more forceful in arguing your points with the opposing sides. Keep in mind the mediator is going to play both sides against each other, but it is still helpful to try to win them over as soon as possible. Many times I run into the same handful of mediators and have got to know them over time. I think this is helpful because if I have a relationship with the mediator, I know whether or not to believe them. It is a highly intangible element, but I think if you want to maximize your settlement, you need to know the mediator just as much as you need to know the facts of your case if possible.

## MEDIATION MATERIALS – Privileged or not?

Materials prepared for mediation may not be subject to the privilege.<sup>1</sup> For example, a court has held that a series of videotaped interviews presented during a mediation were discoverable.<sup>2</sup> In that case, an aircraft purchaser had filed a breach of contract action against an aircraft manufacturer. The plaintiff claimed the aircraft's cabin temperature controls did not meet specifications. At a mediation of the case, the manufacturer presented a series of videotaped statements from witnesses to buttress their arguments. After the mediation was unsuccessful, the Plaintiff moved to compel discovery of the unedited videotapes. The manufacturer unsuccessfully resisted claiming that they were protected under the attorney-client and mediation privilege. The Court of Appeals, however, ruled that the tapes contained unprivileged witness statements and ordered them produced.

The tapes contained potentially embarrassing sidebar discussions between the attorneys and the witnesses and reflected that the presentation was stopped and started to allow the witnesses to rehearse their testimony.

Similarly, courts have held communications made during an alternative dispute resolution session were not protected from discovery.<sup>3</sup> The confidentiality provision of statute precluding disclosure of all matters relating to mediation is restricted to those matters occurring during the settlement process.<sup>4</sup> Statutory provision mandating confidentiality of certain records and communications in mediation is not so broad as to bar all evidence regarding everything that occurs at mediation from being presented in the trial court, and rather than a blanket confidentiality rule for participants, the statute renders confidential only a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution (ADR) procedure.

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<sup>1</sup> Generally, mediation materials are considered confidential. See **TX CIV PRAC & REM § 154.073 § 154.073. Confidentiality of Certain Records And Communications**

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

<sup>2</sup>*In re Learjet Inc.*, 2001 WL 1439997 (Texarkana 2001).

<sup>3</sup> See *Avary ex rel. Estates of Bourgeois v. Bank of America, N.A.*, 2002 WL 442064 (Tex.App. – Dallas 2002, no writ) and see *In re Acceptance Ins. Co.*, 33 S.W.3d 443 (Tex. App. – Fort Worth 2000, no writ).

<sup>4</sup> *In re Daley*, 29 S.W.3d 915 (Tex.App. – Beaumont 2000, no writ)

## **SAMPLE SETTLEMENT BROCHURE**

What follows is a redacted settlement brochure from one of my recent cases. It gives an idea of the items I normally include in a presentation.