A Case Study of Non-Binding Mediation in Practice:
Rush-Presbyterian-St. Luke’s Medical Centre, Chicago, Medical Malpractice Mediation Programme: Continued...

The Structural Framework of the Rush-Presbyterian-St. Luke’s Medical Centre Programme of Non-Binding Mediation

On completion of the initial stages of the programme, as outlined last month, the next stage is the actual mediation itself, or the party meeting stage. This usually begins at 9.30 am in the morning, with a brief outline of the mediator’s own background in medical malpractice litigation, as well as any previous legal experience in general; all of which assures the parties to the mediation that the process is being handled competently by a mediator with appropriate experience.

The mediator will then introduce the respective sides to one another, which is then followed in turn by the opening presentations by counsel for each side in the case. This normally begins with the plaintiff’s attorney presenting the basis for his or her client’s claim against the defendant. This is then followed by a reply from the medical centre’s counsel. This is aimed at reactivating the process of dialogue between the parties to the dispute, as well as affording the mediator a chance to pose questions clarifying issues that have emerged. The mediator undertakes to do this in a manner that will seek to be both instructive and informative, by pointing out potential strengths and weaknesses of both sides to the dispute. This initial process will last up to an hour and a half.

Although this is a relatively slow part of the overall mediation process, it is designed to introduce a sense of mutual respect within a neutral atmosphere. It also seeks to encourage both parties to continue to participate in the process and assist them in reaching a satisfactory settlement. In the meantime, the mediator seeks to establish an overall feeling of open mindedness and flexibility. This is done by outlining the issues, and ascertaining which ones are easy to settle and those which will be more difficult to reconcile, rather like the issue clarification stage, as outlined in a previous article on the theory of mediation, in this series.

The next stage of the Rush mediation programme is what is referred to as “breakout sessions”, which incorporates the theoretical concept of “brainstorming sessions” as well as the process of option building. This is a crucial part of the mediation programme. Here the mediator gathers information, shares the relevant pieces of evidence in the case, and in the process seeks to encourage movement by both sides as a result of options being developed, and proposals being considered as part of the overall settlement to the case. This part of the mediation procedure can take several forms. Firstly, the conduit tactic, in which the mediator reports the settlement proposals from each side to the other. Secondly, the surrogate tactic, where the mediator additionally supplies justification to the proposals. Thirdly, there is the reshaping tactic, a more proactive approach, where the mediator alters or embellishes the proposals with his or her ideas about resolving the dispute. Finally, there is the clarification tactic, in which the mediator elicits responses or reiterates or highlights an issue raised or a statement raised. It is up to the individual mediator to decide upon which tactic to adopt, although the conduit approach is the most utilised.

The last step in the mediation process is the settlement stage, which occurs once both parties are back in the main negotiating room, which may or may not result in an agreement being reached. In the event that a solution is not forthcoming, this stage is an opportunity to bring the parties together, face to face, and maintain communication between the sides to the dispute. At this point, the policy of Rush Medical Centre’s counsel is to apologise to the aggrieved party. This not only assists in maintaining contact between the respective parties, but also helps to preserve the cordial nature of the meeting and establish a lasting basis for future dialogue and an ultimate settlement of the dispute. It is through the preservation of communication between the parties that the opportunity to repair the damage to the doctor-patient relationship, which emerges as the most beneficial characteristic of non-binding mediation. According to US mediation expert Elizabeth Sherowski:

“Mediation is most successful in cases involving long-term relationships which will extend into the future, because one of the primary goals of mediation is to restructure the relationship of the disputants.”

How successful has this programme actually been? Since the programme’s introduction in late 1995, thirty three cases have been mediated, with a total of $15 million having been paid out by Rush Medical Centre. The largest settlement has been for $4.7 million, while the lowest was $21,700. As a process it has assisted Rush in settling cases for amounts which are compatible with the hospital’s insurance reserves, and according to Max Brown, General Counsel at Rush, the mediation process is highly successful in assisting the parties to maintain control of the settlement process. The costs of mediation are estimated to be half of those for a case settled at pre-trial, even without going to court, while the number of cases in which Rush has been named as a defendant has been reduced.

More importantly, in relation to the doctor-patient relationship, the programme of non-binding mediation - with the confidential nature of the proceedings, and the less confrontational more conciliatory approach adopted in the process - has assisted in the settlement of cases. It has also helped both parties come to terms with what has happened, enabling physicians to preserve their professional self-esteem, and patients to feel that their grievance has been heard and addressed. Overall, faith in the doctor-patient relationship is restored through this form of conflict resolution.

Yet are there alternatives to non-binding mediation in relation to medical negligence cases? The other major form of ADR used in the US is binding arbitration, which we will discuss in the next edition.

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