November 2015

Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases

Rita Lowery Gitchell

Andrew Plattner

Follow this and additional works at: https://via.library.depaul.edu/jhcl

Recommended Citation
Available at: https://via.library.depaul.edu/jhcl/vol2/iss3/2

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
MEDIATION: A VIABLE ALTERNATIVE TO LITIGATION FOR MEDICAL MALPRACTICE CASES

Rita Lowery Gitchell*
Andrew Plattner**

INTRODUCTION

Mediation is defined as intervention; interposition; the act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute.¹ A neutral third party, the mediator, maintains an informal environment so the parties can discuss and resolve accusations and work through conflict and emotionally-charged issues with their attorneys and each other, which otherwise would be difficult to accomplish through litigation.² The reality of the practice of modern law is more and more cases are being settled before going to trial.³ The pursuit of settlement has increasingly become

---


³BLACK'S LAW DICTIONARY 1133 (4th ed. 1968). See also NANCY H. ROGERS AND RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW (1987) (explaining the "third person" could be an individual mediator, two or more attorneys and/or experts representing each disputant's interests, respectively, and could be provided by a private dispute resolution agency or by court order). See also CAL. CODE REGS. tit. 16, § 3602(2) (1994) (defining mediation as a process in which a neutral person(s) facilitates communication between the disputants to assist then in reaching a reconciliation, settlement or other understanding).


³See Sally Engle Merry, Disputing Without Culture, 100 HARV. L. REV. 2057 (1987) (book review) (noting the Civil Litigation Research Project of the University of Wisconsin found the majority of civil cases worth less than $10,000 were settled before electing to initiate trial proceedings). See also Edward M. McNally and Barbara Macdonald, The New Delaware Mediation Statute, 21 DEL. J. CORP. L. 87 (1996), quoting Kenneth R. Fienberg, Mediation: A Preferred Method of Dispute Resolution, 16 PELL. L. REV. S5, S6 (1959) ("[W]hether or not we confront a 'litigation crisis', we must face the fact that tens of thousands of administrative decisions and court cases are handled through highly adversarial sets of procedures that are all too
a tenet of good client service.\textsuperscript{4} Finding ways to avoid litigation is a reflection of our incipient anti-law ideology, where we are beginning to realize that society’s social order can be maintained efficiently by resolving conflicts through alternatives to trial.\textsuperscript{5}

The high cost and enormous time commitment litigation requires to resolve disputes in the United States has prompted businesses, employers, and individual parties to choose alternative forms of dispute resolution. As attorneys, employers and other professionals begin to realize that the nature of the dispute incorporates parties’ desires to reveal their self-interests and emotional concerns, they recognize the need for informal forums which allow these concerns to be addressed.\textsuperscript{6} Alternatives to litigation have become increasingly attractive because they incorporate techniques which reduce cost and time spent on lawsuits, and allow the disputants more autonomy in determining the outcome.\textsuperscript{7} By listening to and/or evaluating each party’s claims, the mediator can improve communication and help the parties clarify the issues so that more effective negotiations and settlement possibilities can be considered.\textsuperscript{8} The mediator extends the negotiation process by attempting to improve communication between parties in order to arrive at a mutually agreeable settlement.\textsuperscript{9}

Many times, issues have not been articulated in a manner the parties and parties’ attorneys can understand. Still, all elect to commence litigation procedures. This makes the pre-trial process inefficient, costly, and time consuming.\textsuperscript{10} Mediation, on the other hand, leaves the ultimate authority of fashioning a solution in the hands of the parties whose goals

---


\textsuperscript{5}See Merry, \textit{supra} note 3, at 2057.

\textsuperscript{6}See id. at 2061.

\textsuperscript{7}See id.

\textsuperscript{8}See Rogers, \textit{supra} note 1, quoting Stulberg, \textit{The Theory and Practice of Mediation: Two States’ Experiences}, 6 \textit{VT. L. Rev.} 85, 88-91 (1981). \textit{See also} Kimberlee K. Kovach and Lela P. Love, \textit{Evaluative Mediation is an Oxymoron}, 14 \textit{Alternatives} (Mar. 1996) (explaining that inherent in the process of mediation is the assumption that people have the resources and creative capacity to resolve their own disputes more effectively than would a judge or arbitrator).

\textsuperscript{9}Id.

\textsuperscript{10}Brad Burg, \textit{Isn’t There Something Better than Suing? There is! Mediation}, 69 \textit{Med. Econ.} 164 (1992) (reporting mediation can challenge attorneys to sharpen their legal arguments which will inform the clients and help them to decide whether to settle).
are to reach a specific outcome, while considering each party's values, norms and principles.\(^\text{11}\)

Mediation is a win-win situation, in which the parties decide for themselves (without a judge or jury) a mutually acceptable settlement, and, if no resolution is found, they may simply walk away from the mediation and pursue litigation.\(^\text{12}\) If the parties do decide to litigate, the process of mediation has already clarified many issues, and has created opportunities for the parties to realize arguments which they could present during litigation.\(^\text{13}\) The process of mediation usually does not result in a binding agreement, which holds much less of a chance for either side to lose simply by engaging in mediation.\(^\text{14}\) The parties are typically more satisfied with mediation than are parties with litigation.\(^\text{15}\) Of attorneys involved in both litigation and alternative dispute resolution (ADR), more prefer to mediate than to litigate.\(^\text{16}\) Of the cases that do go to mediation, approximately eighty-five percent settle as a result of mediation.\(^\text{17}\)

\(^{11}\)See Folberg, supra note 2 (explaining mediation is not bound by the rules of procedure and substantive law; by discussing their needs and interests, parties' hostilities are greatly reduced, and the control of the resolution outcome remains in their hands); Robert A. Baruch Bush, What Do We Need a Mediator For?: Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. DISP. RESOL. 1 (1996) (asserting the mediator can help parties understand the situation and each other's options better, which allow parties to gather information and analyze it much more completely and accurately; the increased clarity a mediator provides to parties allows them to move towards making a decision or choosing litigation).

\(^{12}\)Id.

\(^{13}\)Mediation Seminar, The Defense Research Institute, Inc. (April 17-18, 1997); Frona C. Daskal, Mediation for Health Care Providers: An Exciting Alternative for Dispute Resolution, 22 J. HEALTH & HOSP. L. 338 (1989) (concluding no penalty occurs for failure to reach an agreement; if the mediation is unsuccessful, the parties are free to pursue other remedies).

\(^{14}\)See McNally, supra note 3, at 87 (85% of mediations result in the settlement of disputes); LEONARD L. RISKIN AND JAMS E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987) (explaining an agreement reached through mediation is enforceable only if it satisfies the requirements of contract law).

\(^{15}\)See Baruch Bush, supra note 11, at 1, quoting, Janice A. Rechil and Royer F. Cook, Mediation In Interpersonal Disputes: Effectiveness and Limitations in Mediation Research: The Process and Effectiveness in Third-Party Intervention 31, 33-37 (explaining that disputing parties feel satisfied with the process and return to it again, and 80-89% of disputants were satisfied with the mediator and the mediation process); quoting also Jessica Pearson supra note 15, at 33-37 (“[M]ore than three-fourths of the . . . mediation clients expressed extreme satisfaction with the process . . . . In contrast, only 40% of . . . respondents (in one study) were satisfied with the court process, and only about 30% of the other sample”).

\(^{16}\)Mary Wisniewski Holden, As Courts Overflow, Mediation Flourishes, CHICAGO LAW. (March 1997) (The American Bar Association poll conducted in the Summer of 1996 found that 51% of attorneys favored mediation for resolving disputes, while 31% preferred litigation).

\(^{17}\)See McNally supra note 3, at 87.
mediation is conducted early in the dispute resolution process, eighty percent of the cases that would otherwise be litigated are settled; and parties are responsible only for the preparation and costs equivalent to paying for a single deposition.\footnote{18}{

This comment will discuss the use and process of mediation as compared with litigation and will delineate the advantages of mediating a dispute. Then the article will explore the different styles of mediation, including the application of mediation in the medical malpractice context, and will distinguish mediation from other forms of alternative dispute resolution. Mediating the brain-damaged baby case is also discussed, for the purpose of demonstrating that mediation can be beneficial for the health care provider who prefers the finality of settlement over potential for a runaway verdict, and who would also like to see any settlement money spent for the child's best interests.

THE MEDIATION PROCESS VERSUS LITIGATION

Mediation is comparable to litigation in many ways, and much of the preparation for mediation entails the same method adopted by trial attorneys.\footnote{19}{Attorneys and/or mediators must be aware of the details of each case; they must undertake depositions, interrogatories, and a pre-mediation submission discussing the evidence; they must present photographs, x-rays, tabulations, medical literature, and they must prepare and present opening and closing statements to begin the mediation process.\footnote{20}{Despite the pre-trial/pre-mediation similarities, the nature of each process contains substantial differences. Mediation enables the parties to deal with the issues they believe to be important, as opposed to giving the attorneys cart blanche to argue the legal merits or what they perceive as the most important issues; rather, mediation provides the parties a sense of being heard.\footnote{21}{Mediation can involve party-to-party...}

\footnote{19}{ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION (1994).
\footnote{20}{Theodore Shelley Ashbell, Medical Malpractice Mediation, CBA RECORD (1996) (letters to the editor).
\footnote{21}{See Baruch Bush, supra note 11, at 14; Craig A. McEwen and Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Me. L. REV. 237, 245-60 (1981) (stating, "linking high satisfaction levels to parties' perception of 'processual advantages' including: opportunities for free expression of emotions and feelings, closer attention to a range...}
communications versus lawyer to tribunal communication. Mediation involves party control, whereas adjudication involves all control vesting in a stranger. Mediation focuses on the future and future relationships, whereas adjudication focuses backwards by applying the rules of law only to past acts. Finally, through mediation, the law is determined, applied or disregarded by the parties, while in adjudication, the law is determined and applied by the judge and jury.

Comparisons of mediation and trial processes are useful for the future mediator, attorney and disputing parties. For instance, attorneys must decide which cases are appropriate to mediate. This decision includes the same analysis an attorney undertakes when evaluating a case for trial and/or settlement potential: including the likelihood of a favorable or adverse verdict, the amount of discovery needed to fairly estimate a verdict, the amount of time needed to obtain discovery, and the cost of pre-trial and trial or pre-mediation and mediation. Unlike litigation,
however, the parties involved in mediation may decide, by contract, when the actual mediation should occur, and whether parties may pull out at any time, whereas litigants in a trial are bound to wait until the courts are available to hear attorneys argue on the parties' behalf. This flexibility allows the parties to choose early mediation dates to discuss specific, objective issues at a time the parties are typically more flexible and oriented towards a resolution, and promotes containing costs which may create positive lawyer-lawyer dynamics, as opposed to allowing the litigation process to breed distrust or create close-mindedness as time progresses.

Parties typically find value in the opportunity to participate in settling their disputes in meaningful ways. Unlike trial, they enjoy a greater degree of participation in the issue-identifying and decision-making processes, as well as being able to express themselves to each other, and their attorneys, and the mediator(s) in an informal setting. Because of these distinct features of mediation, parties find value in the process itself, even if the outcome is less favorable than what they would have obtained in court. Further, some of the uncertainties proceeding litigation are absent from the mediation process. For example, the parties are allowed to choose their own mediator(s).

Selecting the Mediator

Like the pre-trial procedure of selecting a jury, the selection of an appropriate mediator requires reflection on whether the type of person is right for the type of issue presented. Like choosing a jury, attorneys will inject their concepts of what they believe to be a good mediator for the agreement).

28 See Kirtley, supra note 21, at 6.
29 See Galton, supra note 19, at 6 (suggesting that any complex hospital liability cases have been mediated even before an answer to the lawsuit has been filed, and 90% of these cases were resolved).
30 Id.
31 See Baruch Bush, supra note 11, at 17 (suggesting that consensual processes offer a greater degree of process control, which seem to the disputants to be subjectively fair, regardless of whether the process leads to favorable outcomes).
32 Id.
33 Id.
34 See McNally, supra note 3, at 88 (explaining that litigation is inherently uncertain: regardless of how much time and money is spent, the outcome cannot be utilized for planning in any rational manner).
35 See Gitchell, supra note 26.
ensuing process, which, if the attorneys are evenly matched, will be the impartial mediator their clients deserve. Attorneys want to consider whether the mediator has been trained in a certain fashion to enable her to facilitate or evaluate the case better than a mediator trained in a different way or by a different program. In other words, the psychodynamics of a particular case will dictate who is chosen to mediate it.

Different states may require individuals to complete certain training courses and attain certain practical skills before those individuals are allowed to mediate. For example, in Illinois, some Judicial Circuits, along with some private organizations, train and certify mediators.

37 See Galton, supra note 19, at 8. See, e.g., Gitchell, supra note 26 (considering the reputation of the attorneys handling similar cases, the client's input on reviewing the credentials of the available mediators, and reviewing the mediator's background for potential conflicts with the particular attorneys, clients or subject matter).
38 Diana Santa Maria and Marc C. Gregg, Seven Steps to Effective Mediation, TRIAL, June 1997. In the authors' view four basic personality types are prevalent among mediators: 1) directors: want immediate results, may accomplish settlement quickly, but shortchange one party, 2) influencers: "people persons," generally settle disputes in an agreeable fashion, 3) steady type mediators: focus on getting the job done via the status quo, where settlement generally accounts for all the facts, and 4) compliant type mediators: concentrate on key details and follow standard operating procedures. Id.
39 See Galton, supra note 19, at 8 (noting that the Texas Alternative Dispute Resolution Procedures Act § 154.052(a) requires 40 hours of training); see, e.g., McNally, supra note 3, at 96 (explaining that the Delaware ADR Act (DE. CODE. ANN. tit. 6, §7709 (1995)) provides a clear methodology for selecting ADR Specialists: the party who initiates the proceedings shall select a panel of three ADR Specialists in Delaware to be considered by the parties, and in order to qualify as an ADR Specialist, a person must complete an approved training course of at least 25 hours in civil dispute resolution or be an attorney with a minimum of five years experience); see also Feerick infra note 43, at 97 (indicating the Florida Supreme Court has taken an active role in mediation by adopting procedural rules for mediation and arbitration in Rules 10.010-10.290 (May 8, 1992)); see also Barbara Filner and Michael Jenkins, Symposium: Certification of Mediators in California, 30 U.S.F. L. REV. 647, 655 (1996) (indicating that states use a variety of contrasting approaches for regulating the mediation field: Colorado and Idaho allow individuals qualified to mediate as determined by the Director of the State Office of Dispute Resolution; in Alaska and North Dakota, a mediator can be any person the court finds suitable; in Wyoming, the mediator can be one who is experienced in the subject matter of the dispute; in Florida, only those who are members of a nationally-recognized mediation association may mediate; and California, through its Dispute Resolution Programs Act of 1986 requires 25 hours of training for persons conducting mediations).
40 Brian Cummings, Mediator to Hone Skills, CHI. DAILY L. BULL., Aug. 3, 1995, at 3; see, e.g., Applications Wanted, CHI. DAILY L. BULL., Aug. 28, 1996, at 3 (indicating that the 19th Judicial Circuit accepted applications from mediators to handle civil cases when the amount in controversy exceeded the cap for mandatory arbitration; mediators were given 16 hours of training); see also Honorable Judge Ann B. Jorgensen, The Mediation Process in Civil Cases, DCBA Brief (June 1996) (announcing the Eighteenth Circuit Court-Approved mediation program
federal courts also have their own guidelines. Beginning in 1990 with the Civil Justice Reform Act (now expired), the federal courts required ninety-four of the federal district courts to utilize one of six forms of ADR.\(^4\) In the last five years, mediation has eclipsed arbitration as the primary ADR process in the federal courts.\(^4\) The Society of Professionals in Dispute Resolution (SPIDR) determined that a variety of professional organizations should establish qualifications, which should be based on performance rather than paper credentials.\(^4\) Other organizations continue to attempt to solve the problem of credentialing mediators.\(^4\) No matter what parties base their decisions on, parties participating in mediation should know the mediator’s credentials and be aware of different mediation styles.

The professional backgrounds of the mediators are as diverse as the issues presented to them.\(^4\) Not all mediators are attorneys, and not all states that certify mediators require that their educational and professional backgrounds involve lawyering.\(^4\) For example, Washington does not require parties involved in health care disputes to choose from the list of attorneys the superior court maintains for mediation purposes, if the parties agreed, in writing, to use another mediator.\(^4\) Also, Michigan’s

---

\(^4\)See Plapinger, supra note 4 (explaining other forms of ADR in the federal district courts are arbitration, summary jury trials, early neutral evaluation (ENE), settlement week, and case valuation).

\(^4\)Id. (quoting a study published by the ABA in ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS, mediation is used in 41 of the 94 federal district courts, while arbitration is used in only 22).


\(^4\)See Tom McDonald, Finding a Win-Win Solution: The Credentiling Conflict Between Attorney and Non-Attorney Mediators Threatens to Undermine the ADR Movement. Here’s One Way Out, TEX. LAW., Mar. 4, 1996, at 15 (suggesting a multi-tiered system of credentials and qualifications designed to separately address attorney and non-attorney neutrals or the area of practice a neutral plans to pursue, and when full disclosure of qualifications and credentials are made, consumers could make informed selections according to their particular needs).

\(^4\)See id.


\(^4\)WASH. C.R. 53.4(e) (1997) (the statute does not suggest that when parties choose an alternative to the court’s list of attorney-mediators, they must choose another attorney; it simply states they may choose another mediator).
form of mediating health care disputes involves a mediation panel, where the parties designate the health care professionals who will serve on the panel. Yet, because certification of mediators is a relatively new concept, some critics are concerned that attorneys will be better able to represent parties in this type of legal proceeding.

Each state that certifies mediators deals with this concern in its own way. Florida certifies attorneys, mental health professionals, and accountants as mediators. Kentucky’s mediation statute is based on the principle that, as long as all mediators go through the same certification process, nothing indicates that judges or lawyers will serve their clients better in mediation than other professionals. Because mediation exists to allow people to represent their self-interests in their disputes, parties should choose the mediator with whom the client feels most comfortable, and whose style comports to the most effective resolution of the instant matter.

MEDIATION STYLE: UNDERSTANDING DIFFERENT TYPES OF MEDIATION

A mediator’s style will dictate the process of the mediation as well as make one mediator, trained in a certain fashion, more attractive to disputants than a mediator trained in another fashion. Some commentators believe the mediator must remain impartial and neutral, and must always remember that his job is to facilitate a resolution. The most common styles of mediation are evaluative mediation, facilitative

---

46 See Kirtley, supra note 21.
52 See Dwight Golann, Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators (1996).
53 See Galton, supra note 19, at 1-2. This author states that it is a “sad” situation where that buzz words for particular styles of mediation have developed because “[m]ediation, by its very nature, requires a multiplicity of different kinds of cases... one mediation style may be absolutely perfect for one particular case and absolutely wrong for another type of case. Truly excellent mediators will receive training in all mediation styles in order to be able to use a number of different styles and approaches in the same mediation.” Id.
mediation and co-mediation. A fine line separates each style from one another, such that one may perceive a mediator as facilitating a case when she is truly evaluating it, and vice versa. No matter what style the mediator follows, part of her job is to explain to both sides what they would encounter in court if no agreement can be reached through mediation. The parties may have to relinquish control over how the dispute is resolved, and must abide by what the judge decides.

**Evaluative Mediation**

When the mediator is assisting the negotiation process by focusing on the case's value in litigation, and offering her or his views about what would happen if the case was adjudicated, the mediator is focusing on the merits of the case. The mediator is using an evaluative style to make realistic assessments about the merits. Evaluative mediation is effective but also controversial, and is embedded with an inherent "win-lose" ideology which can result in putting the "neutral" at odds with the "loser." The evaluative mediator is presumed to be able to analyze the strengths and weaknesses, as well as the risks and costs of cases after exploring the relevant facts and legal issues with the parties and their counsel. The evaluative mediator assumes the participants want and need the mediator to provide direction as to settlement based on law, industry practice or technology. The evaluative mediator should be able to form credible

---

54 Id. (these terms, however, may overlap and may be named differently among mediators; see, e.g. Evaluative Mediation: Why, When and How to Manage the Merits, ABA Annual Meeting Section of Dispute Resolution (August 3, 1996); see also CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (1986); see also Folberg, supra note 2, at 140-41.  
55 See LISNEK, A LAWYER'S GUIDE TO EFFECTIVE NEGOTIATION AND MEDIATION (1992); see, e.g., Sally Engle Silbey and Susan Merry, Mediator Settlement Strategies, 8 LAW AND POL'Y 7, 19 (1986) (finding that mediation occurs on a continuum from passive (facilitative) to active (evaluative) and that much overlap in styles occurs), see also D. KOLB, THE MEDIATORS, 40-41 (1993) (stating, "[M]ost mediators use a variety of techniques as needed during the mediation session, and which are in accord with their personal style").  
56 Reshma Memon Yaqub, Bridging the Gap: Mediation Services Help Both Sides In A Dispute Hammer Out an Agreement, CHI. TRIB., Jan. 20, 1997, at C1.  
57 Id.  
58 See Golann, supra note 52, at 22.  
59 MARJORY CORMAN AARON, MEDIATING LEGAL DISPUTES, Ch. 10 (1996).  
60 Id.  
61 See Riskin and Westbrook, supra note 14.
judgments on the issues and arrive at a value of the litigated case, thus influencing what the parties will view as a reasonable settlement range.\textsuperscript{62}

Commentators have suggested that evaluative mediation be used when the mediator can confirm that both parties base their assessments of the damages on essentially the same discovered evidence and case or statutory law, when the experts have examined the same scientific or technical issues, and when deep emotional concerns have been exposed.\textsuperscript{63}

If issues still need to surface, and if the parties are ill at ease with the process, attempting to evaluate the case can paralyze the process of mediation and may also be destructive to the goal of settlement.\textsuperscript{64} The evaluative mediator’s job is to probe, to make assessments, to make predictions about what will happen in court and the impact of non-settlement of the parties’ interests, to develop proposals, and to urge the parties or push them to accept a proposal or settlement option.\textsuperscript{65} Because evaluative mediation is a process of valuing claims and issues, and results in one side taking something of value, generally money, from the other side, this style of mediation is controversial.\textsuperscript{66}

Some commentators have even called evaluative mediation an “oxymoron,” explaining that the process of mediation should be undertaken with neutrality in mind and in practice; when the mediator evaluates each side’s claims and concerns and finds that one side’s claims would win at court and settles for that side, all neutrality is lost.\textsuperscript{67} When a mediator’s assessments favors one side over the other, commonality between parties is transformed into an adversarial process.\textsuperscript{68} Essentially, if evaluations are included in the mediation process, a number of important values are threatened, such as uniformity in rule development, framing and attaining a clear goal, and maintaining mediation’s unique

\textsuperscript{62}Id.
\textsuperscript{63}Id.
\textsuperscript{64}Id.
\textsuperscript{65}See Feerick, supra note 43, at 102.
\textsuperscript{66}See A LAWYER’S GUIDE TO EFFECTIVE NEGOTIATION AND MEDIATION (West 1992).
\textsuperscript{67}See Kovach, supra note 8; see, e.g., Aaron, supra note 59, at 12. “[O]nce the mediator presents his or her evaluation no matter how careful the phrasing—one party may see itself as the ‘loser’ and the other party as the ‘winner’ based upon the degree to which the evaluation validates or contradicts their respective views of the case and settlement positions.” Id.
\textsuperscript{68}See Aaron, supra note 59, at 12.
role of trusting the parties to settle by simply helping them get to a settlement.\(^6\)

However, some commentators believe that evaluative mediation may be used effectively in certain circumstances. Of those who support the use of the evaluative approach, they generally agree that it is best utilized later in the mediation process if the parties need more time to express their issues, or when the parties have indicated, up front, that they want the mediator to evaluate each side’s position, or when the mediator believes that the parties are unlikely to reach an agreement without considerable participation by the mediator.\(^7\) Also, when there is a high emotional level and a long history of conflict, the mediator must sometimes employ an evaluative approach to maintain control of the process.\(^7\) By studying relevant documents, such as pleadings, depositions, reports, and mediation briefs, and by allowing the parties or their representatives to help the mediator construct her own understanding of the circumstances, the mediator may be able not only to appraise the parties of their strengths and weaknesses, but also to construct an agreement/settlement that is truly fair.\(^7\)

For example, evaluative mediation may be beneficial for a brain injury case.\(^7\) As in all pre-trial procedure, experts are needed to formulate medical opinions, and documents for pleadings, discovery, depositions, as well as mediation briefs and independent medical examinations of the injured plaintiff will be needed in order to assess the extent of the injuries.\(^7\) Instead of undergoing a full trial, an evaluative approach to mediation may serve to clarify the complex issues surrounding a brain

---

\(^6\) *Id.* Even the Model Rules for Professional Conduct for Mediators is at odds with evaluative mediation, the Rules hold self-determination to be so central to the mediation process that providing professional advice would undermine a tenet of mediation. *Id.*

\(^7\) *See Lisnek, supra* note 55 (the mediator can become an advocate for each party’s position as it is presented in the mediation); *see also* Kolb, *supra* note 55. An illustration of an evaluative approach is Henry Kissinger’s mediation of the Middle East negotiations of the 1970’s, where he exclusively controlled the communications among all parties, persuaded them to make concessions, proposed possible settlements, and maintained the talks. *Id.*

\(^7\) *See Filner and Jenkins, supra* note 39, at 655.

\(^7\) *See Riskin and Westbrook, supra* note 14 (suggesting the mediator may also want to include knowledgeable representatives of corporations or other organizations to attend and participate in the mediation in order to gain the fullest understanding of the circumstances as possible).


\(^7\) *Id.*
injury case. Because assessing the extent of the brain-damaged plaintiff's injuries and projecting the need for future medical and psychological care requires a fair amount of conjecture, a mediator, or co-mediators, at least one of whom is knowledgeable in the area of brain trauma, may be better able to focus on the plaintiff's injury and the plaintiff's need to be compensated and the likelihood of success of legal issues at trial. An evaluative mediator can suggest a price settlement which adequately serves each side's interests. If a party refuses the abide by the mediator's settlement terms, litigation may always be pursued. Still, other commentators believe that the facilitative style is the purest, or most neutral, form of mediation.75

Facilitative Mediation

When the parties feel as if they lack a sense of empowerment, when there are perceived barriers to resolution in the negotiation process, and when the information obtained seems entirely one-sided, the mediator may employ a facilitative approach.76 Referred to as "empowerment mediation," "pure form mediation," or "community model mediation," the facilitative approach incorporates creativity, intuition, and problem solving skills to empower the parties to discuss and resolve the issues in a way that is acceptable to both sides.77 The facilitative mediator generally believes that the parties can create an fair settlement, without having the mediator discuss the actual substance of the claims.78 Yet, like the evaluative mediator, the facilitative mediator inevitably deals with the merits of the case, albeit through assisting the process itself, in order to fully discuss the principle of settlement.79 Thus, the facilitative mediator's "mission" is to enhance and clarify communications between the parties in order to help them decide a proper settlement.80

Unlike the evaluative mediator, the facilitative mediator does not use his own assessments, predictions or proposals, and does not refer to

75 See Kovach and Love, supra note 8.
76 See Aaron, supra note 59, at 4.
77 See Galton, supra note 19. See also Joseph C. Bird, Mediating Employment Disputes: A Timely Idea, MICH. LAW. WkLY, Oct. 21, 1996, at 4 (labeling facilitative mediation as "true mediation," which only requires the mediator to intervene in the parties' discussions in order to reach a settlement, not to evaluate their claims).
78 See Kolb, supra note 55.
79 See Golann, supra note 52, at 22.
80 See Riskin and Westbrook, supra note 14.
supporting documents (pleadings, depositions, reports) in order to prompt the client to accept the mediator’s version of the merits of the case. The facilitative mediator exists to encourage presentations and discussions of the parties’ legal issues, to cause parties to bring about their own proposals for resolution, and to allow the mediator to continually relate and respond to the dynamics of the situation. Thus, while evaluative and facilitative mediation can result in settlement, the role of the mediator and the process of the mediation in reaching settlement are quite different.

Co-Mediation
Another approach to mediation is co-mediation. Co-mediation is a variation on traditional mediation, in which each disputant is represented by counsel, and both sides act in tandem to resolve the dispute. Co-mediation is also described as one mediator concentrating on the factual content of the dispute, while the other helps the parties deal with communication barriers and the emotional content of the dispute. One mediator may be talking with the parties, while the other may be observing nonverbal clues or communication patterns that may be helpful in facilitating a settlement. Co-mediation evolved from the reality that most of the conflicts confronted by mediators are multidimensional issues. Because mediators/lawyers often lack interdisciplinary training or experience, a team of mediators may be used to fully address the emotional, legal and technical aspects of the disputants’ case. Allowing mediators to focus on the aspects of the dispute with which they are most familiar may enhance the process of mediation.

For example, in a case involving the mental health of one of the parties, a lawyer/therapist team would be able to divide the process of mediation. The therapist may focus on the process of the mediation, and

---

81 Id.
82 Id.
83 See Folberg and Taylor, supra note 2.
85 See Folberg and Taylor, supra note 2.
86 Id.
87 Id. This author suggests, “[M]ediation presents a unique opportunity for the combining of services from different disciplines and the merging of expertise by the use of a team or co-mediation approach. Integration of professional services through the context of mediation allows professionals to avoid overstepping the limits of their knowledge and training, while providing a unique opportunity for disputants to receive comprehensive help with their conflict.” Id.
look for communication barriers or emotional impediments, when the lawyer could concentrate on the factual elements of the case, and assess the merits of the arguments to envision the dispute's settlement. Co-mediation may also be successful when the mediators are in the same discipline; they may compliment each other's efforts by assuming different mediation postures or create their own ingenious methods for reaching settlement. Simply by viewing the interaction of the mediators, the parties may be prompted to follow the mediators' lead, and debate their issues more calmly and rationally. Also, co-mediation can quell some perceived inequities in the mediation process, in that the mediators balance each other's take on the ongoing process. Further, the mediators may continually evaluate themselves and each other, which serves to narrow the focus for the mediators, and enlighten and appraise all involved of both important and inconsequential issues.

According to some authorities, the dual efforts of mediators, at times, may harm the mediation process. Aside from increasing the cost of mediation and scheduling problems, a new team of mediators may be hesitant to disagree with each other, or may feel awkward about performing what they normally do in private in front of many people. New mediators also may be confused about the ordering of issues to be discussed, which impedes the process of mediation and makes settlement options more obscure. However, others have found success in co-mediation.

---

83 Id.
89 Id. at 141-42 (explaining that the mediation process is hard work, and may require help from another mediator in order to maintain the momentum of the process and to keep control of discussions and issue resolutions).
90 See Folberg and Taylor, supra note 2, at 140.
91 Id at 142.
92 Id.
93 Id.
94 Id.
95 See Gitchell, supra note 26.
Aside from choosing the proper case and mediator, preparing for mediation is much like preparing for trial: confidence, commitment, and professionalism must be shown at each step of the process. Before mediation commences, a mediation agreement may be considered and should be signed by all parties who wish to participate in the mediation process. Beginning mediation with an agreement to keep communications confidential, and to plan ahead the steps to be taken when impasse occurs, allows the parties to demonstrate their autonomy in the mediation process. Some provisions in this agreement may include the “role of the mediator” (indicating the type of style or mode of operation the mediator should use for this particular dispute), “good faith and the right to withdraw,” “individual caucus” (when the mediator meets with each party separately), “confidentiality,” and “immunity” for the mediators from future proceedings.

While the agreement should lay most of the concerns on the table before mediation begins, it does not offer a guarantee that it will be followed. One author notes that the enforceability of such agreements is questionable, “[b]ecause the law views courts as entitled to every person’s evidence, public policy forbids contracting to exclude evidence . . . ,” and may allow third parties access to “confidential” communications and the courts access to testimony in its pursuit of justice. Nevertheless, an agreement incorporating the parties’ wishes before mediation begins eases the parties into the negotiation process.

96 See Santa Maria and Gregg, supra note 38.
97 See Gitchell, supra note 26.
98 Id.; see, e.g., Kirtley, supra note 21, at 6.
99 See Gitchell, supra note 26 (indicating specific provisions used in a particular mediation, and also including provisions such as “attendance and settlement authority” where the parties each had an agent who had the authority to agree to the offered settlement, “compensation” for the mediator, and “pre-conference submissions,” including the statement of facts, theories of liability, reports of experts and consultants, reports of witnesses, status of the case and trial date, and last demand or offer).
100 See Kirtley, supra note 21, at 6.
101 Id. at 11 (giving an example, “in a chain reaction automobile accident involving multiple parties, those choosing to mediate face the potential of having their mediation discussions discovered and admitted at trial by non-mediating drivers.”).
Pre-Conference Submissions
The next step in the process is preparing the pre-conference submissions. Similar to preparing for trial, the lawyer should prepare the submissions for the mediator as if she was presenting a brief to an appellate judge or opening statement to a jury; she should be persuasive towards her client’s case while educating the mediator as to its facts, as well as enabling the mediator to have a clear picture of her client’s position. Pre-conference submissions should also be planned and discussed with the client to prepare him for the process he will be undertaking.

As in a trial situation, simply explaining to the client what he may expect allows him to better contain his emotions and explain to the attorney what he wants and does not want revealed through the process. Unlike trial, when mediation reaches an impasse, the client must be prepared to discontinue the entire process and instigate his claim in court or another mediation. Through mediation, the attorney attempts to get the client what the client wants, whereas in trial, the bottom line may not be as significant as escaping or proving liability. Therefore the attorney must know her client’s bottom line in order to be fully committed to the mediation process. Simply asking the client about his concerns and goals allows the client to become an integral part of the process, which is quite unlike a trial situation.

THE MEDIATION SESSION

The Opening Statement
After the mediator is introduced, counsel makes opening statements. In a trial, the opening statement is the attorney’s chance to tell the jury what the case is all about, and a chance for the attorney to make a significant

102See Gitchell, supra note 26.
103Id. (explaining that in one particular mediation, the Pre-conference submissions also included technical evidentiary and documentary reports as exhibits, and suggesting that the lawyers should use their own judgments in deciding how much information to include and what to reveal to the mediator at this point).
104Id.
105See Santa Maria and Gregg, supra note 38.
106Id.
107Id.
108Galton, supra note 19, at 28.
first impression on the jury which he hopes will last.  First impressions are important in mediation, but unlike litigation, opening statements in mediation permit direct contact between the parties, because each party has the opportunity to set out for the other party (not the party’s attorney) opposing counsel’s perception of the case. Also unlike litigation, opening statements in mediation may indicate to the opposition each party’s willingness to reach a mutually acceptable agreement by the end of the process, whereas at trial, opening statements would not acknowledge another side’s concerns, but would argue only for a win. Opening statements allow the parties to expose the merits of their cases, to vent emotions and frustrations, and to gather information so that impasses may be better negotiated when they are reached. While representing a hospital against a claim of medical malpractice in a mediation, an attorney may consider stepping into the opponent’s shoes, wondering what the “injured” party needs to resolve the case, and personally acknowledging the opponent’s position and needs.

Caucusing

The caucus is used to explore issues, alternatives and consequences of courses of action, as well as allowing the parties to say what they want and need to say in order to ready themselves to negotiate. The mediator has discretion to either allow the parties to collectively air their views and frustrations, or to separate the parties and shuttle back and forth between them, listening to each party’s arguments in private. Depending on the issues and the level of emotion, the mediator may choose not to allow

---

109 See Mauet, supra note 36, at 43.
110 Id. (suggesting some tactics in opening statements: “do not address your remarks to opposing counsel ... do address your remarks to the opposing party ... do not engage in personal attacks on the other party ... do acknowledge you understand how the other side feels ... do emphasize your good faith participation in the mediation process and hope for resolution ... do not address sensitive issues ...”).
111 See Gitchell, supra note 26.
112 See Golann, supra note 52.
113 Id. (demonstrating the mediator should maintain advocacy to-wards her client’s position in order to persuade the opponents, use copies of x-rays, records, charts and other documents to illustrate the points the mediator needs to make).
114 See Gitchell, supra note 26.
115 Riskin and Westbrook, supra note 14.
parties to "vent" in an open forum. Eric Galton suggests using open caucuses in certain situations:

- when a collective session would be useful in exchanging otherwise discoverable evidence for purposes of evaluation;
- when the parties have a long-standing business relationship;
- when an open forum is needed to discuss the procedural posture of the case;
- when the negotiation posture—who made the last offer and in what amount—must be discussed; and
- when a party has a real interest in "public shaming" the other party as a pre-condition to resolution.

However, realizing that attorneys retain the arguments they want to preserve for trial if the mediation does not end in resolution, the individual caucus is preferable.

The Separate/Individual Caucus

The individual caucus is the essence of mediation; it is through the process of caucusing with parties that the mediator can elevate the main issues to the level of negotiation, while disposing those issues having little bearing on settlement. The individual caucus is confidential, except for what a party authorizes the mediator to disclose to the other. This allows the attorneys to choose which issues to discuss and which to preserve for trial. The parties and their counsel are placed in separate quarters, and the mediator shuttles back and forth between the rooms discussing issues, collecting data and documents, and assessing the strengths and weaknesses

\[\text{\textsuperscript{116}}\text{See Galton, supra note 19, at 31 (explaining venting is just as beneficial to the parties when they vent separately, because no damage is done to the other party when the mediator delivers the message in a calmer manner which puts parties in the mood to negotiate); Ruskir and Westbrook, supra note 14, at 221 (suggesting the nature of confidentiality is such that separate caucuses is more protective, since there are different laws regulating what testimony during the mediation may and may not be used in subsequent litigation).}\]
\[\text{\textsuperscript{117}}\text{Id. at 31-32.}\]
\[\text{\textsuperscript{118}}\text{See Gitchell, supra note 26.}\]
\[\text{\textsuperscript{119}}\text{See Galton, supra note 19, at 33.}\]
\[\text{\textsuperscript{120}}\text{Id.}\]
\[\text{\textsuperscript{121}}\text{See Gitchell, supra note 26 (in this attorney's experience with a professional negligence case, she chose to discuss evidentiary documents or case law in support of factual and/or legal positions or statements made during opening statement).}\]
of each party’s case. The individual caucus generally has three phases: the initial strength/weakness caucus, the preliminary negotiation caucus, and the closing/resolution caucus.

**Joint Session**

On some occasions, joint sessions or caucuses may be preferable. Instead of separating into quarters, the mediator may bring the parties together to ask what they want, to establish objective criteria that each party understands and agrees to, to test realities: fish for weak points and search for each party’s over-confidence, and to summarize and paraphrase for purposes of clarification. When the parties are not separated, the mediator can realize points on which the parties disagree, and can develop each party’s perception of the other parties’ interests. Due to the variety of ways the issues can be perceived, a joint session may be preferable to a private caucus or vice versa.

**Private Client Meetings Between the Attorney and Client**

The attorney may want to discuss certain aspects of the case/mediation with her client outside the presence of the mediator. This decision may rest on the client’s desire to forego exploring issues he feels he does not want to discuss, or the attorney’s desire to preserve issues for trial. A private meeting between the client and attorney or the attorney and the mediator allows each person to vent any emotions without disrupting the communicative process between the parties. In a medical malpractice

---

122 See Galton, supra note 19, at 33; see Gitchell, supra note 26 (explaining that the mediators would give the clients and the attorney a specific task, such as to explain how they planned to prove a specific point or issue or asking them to determine what damages would be worth if the jury were to believe the other party’s position).

123 See Galton, supra note 19, at 33. The mediator’s goal is to determine how one party’s arguments will impact the other party’s decision to settle. *Id.* This is typically accomplished through bonding with parties in order to obtain their trust and confidence, allowing the parties to vent-to immediately speak their minds without having destructive consequences on the overall mediation, identifying the decision-makers from each party, be it the party member himself or the attorney, and identifying of the negotiation style the mediator will use to reach settlement. *Id.*

124 *Id.*

125 See Arnold, supra note 22, at 386-87.

126 *Id.*

127 See Gitchell, supra note 26.

128 *Id.*

129 *Id.*
case, for example, a mediator may learn that the plaintiff's primary motivation for filing the action was a feeling that the physician did not care about the patient and never expressed regret for a negative outcome. Upon the lawyer's instruction, the mediator discusses that point with the physician, and learns that the physician wanted to express regret, but feared that it would be misconstrued as an admission of liability. When the parties reconvene, the physician may then communicate his regret to the plaintiff.

Closure

If mediation brought the dispute to a resolution, a memorandum of the agreement should be made, in writing, and signed by all parties and their counsel. "The memorandum of agreement will simply set out that the claimant will release any and all claims and dismiss the suit with prejudice in exchange for a specified sum of money." There is disagreement as to whether this writing should be done by the mediator or counsel, and whether it should be binding upon the parties at the close of mediation. A good idea is for the mediator to review the basis for the settlement and discuss that basis with the parties before any written agreement is signed. A mediator would want to review the agreement in terms of who does what, when, where, how, how much, and then ask if there is anything more the parties require of the mediator before putting the agreement into action.

If a settlement can be reached, the parties may be on equal planes, both feeling equally happy or equally unhappy in the resolution of their

---

130 See Galton, supra note 19, at 52.
131 Id.
132 Id.
133 Id.
134 Id. at 53.
135 See Galton, supra note 19, at 53 (the mediator should draft the agreement/memorandum, because the implication of bias arises when one counsel undertakes drafting such an agreement); see Arnold, supra note 22, at 421 (mediators should not draft such agreements because it may appear the agreement was the mediator's and not the parties', therefore making the mediator a disputing party to the terms of the agreement).
136 Id. (while a memorandum of agreement should be clear and specific, it should not be the final release document); see Arnold, supra note 22, at 421 (the written agreement should be binding and enforceable).
137 See Arnold, supra note 22, at 421.
138 Id.
dispute. If settlement is not reached, each side is still “left with a clearer picture of what the issues will be at trial, how firm the other party is in his/her position, and an educated prediction of the costs and consequences that lie ahead should the case not resolve prior to trial.”

Mediation costs less than trial, allows the attorneys to advocate for their clients, and yet winning “at all costs” is not an attitude the lawyers need in order to “win,” because the “win” is defined by the client.

**SPECIAL CONSIDERATIONS FOR MEDIATING THE MEDICAL MALPRACTICE CASE**

The medical malpractice/negligence case lends itself to resolution through mediation for several reasons. The claimant’s interests, monetary and non-monetary, may be adequately addressed, and the health care provider’s interests, monetary and non-monetary, can also be protected. It has been estimated that there are over 150,000 deaths and 30,000 serious injuries per year caused by physician and hospital negligence in the United States. A hospital or other health care provider cannot escape the high cost of litigation, either directly, by defending malpractice actions using a percentage of revenues or indirectly, by discouraging new patients from electing to receive care when bitter and protracted litigation imputes a decreased standard of care upon the health care provider. Mediation, from the point of view of health care providers, can alleviate the cost of

---

139 See Gitchell, supra note 26.
140 Id.
141 Id.
142 See Galton, supra note 19, at 117.
143 Id. See also Catherine S. Meschievitz, Efficacious or Precarious? Comments on the Processing and Resolution of Medical Malpractice Claims in the United States, 3 ANNALS HEALTH L. 123, 131 (1994) (suggesting the benefits to mediating the medical malpractice case are: to introduce into the system a more qualified decision maker for the complicated issues involved in determining liability, reduce the cost of resolving the dispute, either by shortening the period of time or lowering the costs associated with the process, decrease the mental anguish of going to court and being in conflict with one’s doctor or patient, improve the quality of expert witnesses, provide new forums for small-value cases, and or reduce or eliminate the prevalence of weak or false claims).
144 Sheila M. Johnson, Medical Malpractice Litigator Proposes Mediation, 52 DISP. RESOL. J. 42 (1997), quoting PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 12 (Harvard University Press, 1991). The Harvard Medical Practice Study II found only 1.53% of the patients injured by medical negligence filed claims against their tortfeasors. Id.
litigation, can protect the reputation of the health care giver, and can keep
the matter private. From the patients’ perspectives, their interests can be
served through mediation because juries generally do not favor the
medical malpractice patient, and the process of litigation could curtail
medical negligence.\textsuperscript{146}

Mediating the medical malpractice case offers claimants and health
care providers the advantage of settling monetary and personal issues
arising from medical negligence which litigation may not allow.\textsuperscript{147}
Claimants explain that the need to file a medical malpractice action often
arises not just because injury or death occurred, but because the health care
providers didn’t seem to care, the providers simply failed to express regret
about the occurrence, the providers failed to explain what actually did
occur (or, if an explanation was offered, it was too confusing), a dislike for
the physical appearance of the physician, or after the event occurred,
_attempts were made to execute releases or settle the matter in ways the
patient-claimant perceived as untruthful or coercive.\textsuperscript{148} When the
motivations for filing a claim are identified, the parties may speak openly
during a mediation in order to relieve the non-monetary stresses, which
would not necessarily be relieved during pre-trial preparations
(depositions) or even at trial.\textsuperscript{149} Also, the health provider’s interests can
be better addressed through mediation.\textsuperscript{150} The physician’s reputation may
be better protected through mediation even if he admits he may have made
a mistake in treatment by apologizing to the claimant.\textsuperscript{151} Because
mediation can be confidential, a physician may feel more at ease admitting
that he is human and did make a mistake despite his best efforts, or may
admit that something did go wrong during a procedure even though the
physician did not act negligently.\textsuperscript{152}

\textsuperscript{146}See Johnson, supra note 144, at 43-44, citing Neil Vidmar, The Unfair Criticism of
Medical Malpractice Juries, 76 JUDICATURE 118 (1992) (even when patients have a verdict in
their favor, they cannot rejoice for very long, due to the probable appeal by the health care
provider, and they must reduce their award to pay attorney’s fees).
\textsuperscript{147}See Galton, supra note 19, at 119.
\textsuperscript{148}Id.
\textsuperscript{149}Id. see also Johnson, supra note 144, at 42.
\textsuperscript{150}Id. at 122.
\textsuperscript{151}Id.
\textsuperscript{152}See Galton, supra note 19, at 122; see also Johnson, supra note 144, at 48.
When mediating the medical malpractice case, certain principles should be honored in order to preserve the integrity of the process. The first, and fundamental principle of mediation is self-determination, signifying that parties must have the ability to voluntarily reach their own agreement, or to end their participation in the mediation and litigate the case. Mediation allows for personalized and creative solutions, whereas judicial decision invites one ruling on the specific issues in front of the court. Another principle is impartiality, which gives the mediator her credibility and allows the mediator to guide the parties through the process with a sense of trust. The principle of fairness is particularly important when mediating the medical malpractice case, because the patient-claimant is inherently “weaker” than the physician at the time the treatment occurred and at the beginning of the mediation. This imbalance of power can be evened out by assuring that each party is represented by attorneys who have their clients’ best interests in mind, and by advising all parties that settlement should be reached by mutual agreement. Last, the principle of confidentiality is critical in assuring the parties that they may speak freely without worrying that everything they say will be used against them in subsequent litigation.

Perhaps the most important benefit to mediating the medical malpractice dispute is that the non-adversarial process allows the doctor-patient relationship to remain intact, because that bond was often formed from a friendship or long-lasting medical relationship.

---

153See Johnson, supra note 144, at 49 (explaining the American Bar Association, The American Arbitration Association and the Society of Professionals in Dispute Resolution have developed “The Model Standards of Conduct for Mediators” which promulgated certain principles).

154Id.
155Id.
156Id.
157Id. at 50.
158Id.
159See Johnson, supra note 144, at 51. “[T]he confidentiality agreed upon during mediation is contractual, but if the mediator is subpoenaed the contract is unenforceable. It is generally against public policy to contract to withhold evidence, but evidence can be withheld by asserting a privileged relationship.” Id.
160Id. at 48. “[M]aintaining the physician-patient relationship is becoming important to hospitals as they are increasingly incorporating individual physicians into the institution as employees. The same is true for HMOs that administer ERISA health plans. As employers lock large groups of employees into a particular provider system, the HMO will want to maintain customer satisfaction or risk losing many clients at once.” Id.
interests of both the patient group and the physician group is to maintain amiable relations, because with an increase in managed care, patients will be required to utilize certain health plans with certain physicians, and physicians will be required to treat a certain set of patients for the length of the insurance contract. Throughout the mediation process, the interests of the claimant, the interests of the health care provider, and the preservation of the doctor-patient bond should be maintained by each side’s attorney and the neutral mediator.

For example, the mediating parties’ attorneys and the mediator must be especially careful to consider each side’s interests during the opening statements. Eric Galton suggests some “do’s and don’ts” for the opening session:

- do speak in plain, clear language when medical terms are involved;
- do bring blow-ups of records or charts;
- do express regret when appropriate;
- do outline your view of the case;
- do express your view that the opposition is competent and that you appreciate their participation;
- don’t engage in personal attacks;
- never predict that you would assuredly win a trial;
- don’t raise a particularly sensitive issue in opening statements, rather, save them for caucuses; and
- never discuss money until the caucuses.

It may be important for the physician charged with negligence to attend the mediation session. Without the physician’s attendance at the mediation, the claimant’s feeling that the physician is indifferent or uncaring may tend to be confirmed. Also, the physician may need to attend the mediation session in order to truly hear and understand the nature of the claim against him, and to appreciate the nature of his

---

161 See Galton, supra note 19, at 123.
162 Id. at 124-25.
163 Id.
164 Id.
exposure to liability. Once these conditions are met, the roles each participant or his lawyer must play in the mediation should be determined.

The physician or lawyer should state what occurred and why it occurred in language the claimant can understand, and express his acknowledgment of how the claimant feels about the injury or loss. The physician should listen to the other side's presentation and should assist his counsel and the mediator in understanding both the strengths and weaknesses of the asserted claims. The physician should also, prior to the mediation session, consent to settlement.

In medical malpractice cases, the insurance representative is usually involved. The insurance representative must engage in active listening and interaction with the claimant in order to understand the claimant's position and effectively evaluate the claim. In order to fully and fairly negotiate, the representative must let the claimant know that he or she is a human being, not simply a representative from an uncaring company. This role is important whether the claim is made against one physician or employee of a hospital or if it is against multiple defendants.

When multi-defendant suits arise, the mediation becomes more difficult, not because the conflict between the claimant and defendants are more intricate, but because the defendants themselves will invariably dispute the guilt of each party and the levels of contribution to the settlement each is responsible for. When this situation arises, two mediations result: one between the claimant and defendants, and one between the defendants themselves. The mediator and respective counsel need to solve this problem. One possible solution is an agreement

---

165 See Galton, supra note 19, at 124-25.
166 Id. at 126.
167 Id.
168 Id.
169 Id. The insurance representative may be either an independent representative of the physician or the hospital, or may be the hospital's own insurance agent if self-insured.
170 See Galton, supra note 19, at 127.
171 Id. (imploring the representative to truly hear and understand the claimant through active listening-body language may indicate active listening-and repeating key points raised by the claimant).
172 Id.
173 Id.
174 Id. at 128. "[I]n many instances, the carrier for the physician wants the hospital to pick up a greater portion of the settlement pot. Conversely, the hospital often wants the physicians to exhaust their policy limits before making up the difference." Id.
among defendants to contribute settlement dollars on a pro-rata basis.\textsuperscript{175} But, if the defendants cannot agree initially on their levels of contribution/negligence, the pro rata option could be elusive. Eric Galton suggests that the mediator, in the initial caucus, may be able to obtain a consensus as to a fair settlement, and then determine each defendant's willingness to contribute.\textsuperscript{176} Then, once the plaintiff enters a perceived settlement range, the mediator only needs to negotiate the monetary gap between what percentages were contemplated by the doctors and what the plaintiff requests.\textsuperscript{177} Most importantly, the mediator must maintain continued communication between all parties such that the mediator's credibility does not diminish the case's settlement potential.

Attorneys who are recognized in the community as medical malpractice litigators may have higher levels of credibility than more general practitioners. A plaintiff specialist and defense specialist working together as co-mediators may have more credibility in the eyes of the parties and advocates than a lawyer who is accustomed to assuming disputants and their counsel are adversaries.\textsuperscript{178} The attorney/mediator must possess specialized skills which indicate to the parties that the mediator is credible, and the mediator must employ a style that suits the case. Indeed, the medical malpractice mediator should not only possess the highest skills in mediation, but must also have expertise in the subject matter of the instant suit in order to be credible to each party involved.\textsuperscript{179} For example, Chicago's Rush-Presbyterian-St. Luke's Medical Center (Rush) utilizes both plaintiff and defendant specialists, experienced in litigating medical malpractice cases.

**Rush-Presbyterian-St. Luke's Medical Center's (Rush) Co-Mediation Program**

The Rush co-mediation program has found success among both disputants and professionals.\textsuperscript{180} In 1995, Rush General Counsel Max Brown, concerned about the unpredictability of the resolution of medical malpractice cases at trial, instituted a mediation program to resolve the

\textsuperscript{175}Id.
\textsuperscript{176}See Galton, supra note 19, at 128.
\textsuperscript{177}Id.
\textsuperscript{178}Id.
\textsuperscript{179}See Johnson, supra note 144, at 53.
\textsuperscript{180}See Gitchell, supra note 26; see also Sanders, supra note 84, at 4-5.
claims against the hospital and its agents and employees in which an adverse verdict was possible. Retired Cook County Circuit Court Judge Jerome Lerner was appointed to work on the mediation program, and began by contacting other retired judges with experience in medical malpractice cases. Judge Lerner then called upon experienced trial attorneys to provide the names of attorneys who would be responsive to mediating medical malpractice cases. The judges and attorneys then underwent a training program for the role of mediator in the medical malpractice case. Before being allowed to mediate claims against Rush, the mediators were required to follow the co-mediation style.

Based on a co-mediation model used in Indiana, Judge Lerner sought to combine plaintiff and defense attorneys for the purpose of bringing about a consensual result. Despite some initial misgivings by plaintiff and defense medical malpractice attorneys, the co-mediation process was implemented in the fall of 1995. The first few cases mediated by

181 See Sanders, supra note 84, at 4. Max Douglas Brown, Rush's general counsel, called upon retired Cook County Circuit Court Judge, Jerome Lerner (an eleven-year scholar and practitioner of alternative dispute resolution processes,) to institute a mediation program that would alleviate some of the stress of relying on a jury to decide complex medical malpractice cases. Mr. Brown stated, "[I]n the last five years, we've taken better than 30 cases to trial. We have won 85% or had a hung jury. That's a good record. But, in a way, it's a meaningless figure because it's the 15% that kills you." See also Jerome Lerner, Mediation of Medical Malpractice Claims, 11 CBA RECORD, No.1 (Jan. 1997).

182 Id. (realizing that judicial experience brings a unique perspective and objective evaluation of what the disputants may confront at trial, Lerner developed a list of recommended retired judges who could act as mediators in medical malpractice disputes).

183 Id. Judge Lerner believed that the trial attorney's experience enabled them to be advised of the dynamics of a jury trial, the factors that influenced its outcome, the medical terminology and concepts. See, e.g., Sanders, supra note 84, at 4 (Lerner surveyed med-mal trial lawyers about whether they thought the program would be valuable to them; he asked lawyers for the names of opposing counsel whom they considered sufficiently fair, knowledgeable and experienced to become neutral at mediation); see also Gitchell, supra note 26 (Rush invited highly regarded medical malpractice attorneys from the Plaintiff and Defense Bars).

184 Id. A two-day training session, led by David Strawn, a former member of the Florida judiciary who trained in excess of 2,000 mediators (including judges) in several states, was attended by the prospective Rush mediators. Id.

185 Id. (explaining that the Indiana program was a successful model of one plaintiff and one defense attorney, Dan Roby and Lee Eilbacher, respectively, who found the co-mediation experience positive). See, e.g., Sanders, supra note 84, at 5 (noting the Indiana mediators led a two-day training session in which 25 of the 35 invited attorneys were present).

186 See Sanders, supra note 84 (explaining that some plaintiff's attorneys believe mediation is an encroachment on their client's right to a jury trial, and some defense attorneys believe that mediation will siphon off the large billable hours at the end of significant med-mal cases).
attorneys followed the co-mediation style, and allowed the attorneys to utilize the style with which they felt most comfortable. For example, one mediator utilized the facilitative and evaluative methods in three cases that went through the Rush program. The first co-mediation took place in January 1996, and produced a $200,000 settlement of a physician negligence case. The procedure surrounding the mediation was similar to the procedure used at trial. After receiving "pre-submission documents" containing factual summaries of the case, deposition transcripts, and literature on the medical procedure involved, the lawyers made opening statements at a mediation conference, and the opposing attorneys began moving towards a settlement. Early on, Rush engaged in eighteen mediations, with retired judges in nine cases and trial-lawyer co-mediators in the other eight, with only three failing to be concluded, and with settlements ranging from $36,000 to $1,750,000. Each person involved in the mediation found the experience genuinely satisfying. From the pre-mediation meetings where issues and strategies are discussed, to taking recesses during the mediation in order to evaluate their plans of action, the attorneys appreciated the efficiency and freedom of co-mediation. Attorneys also appreciated having a roster of eligible mediators to choose from, as well as the fact that what normally would have taken many weeks of pretrial preparation and at least three weeks of jury trial only took, on the average, three hours to resolve. The Rush co-

---

183 Id. See, e.g., Gitchell, supra note 26 (explaining that the evaluative method seemed to be the preferred method due to the highly technical and complex medical and legal issues involved).
159 Id. at 5 (noting Brian L. Crowe, former Cook County Circuit Court Judge and current partner at Rock, Fusco, Reynolds, Crowe and Garvey, believes that mediation should be conducted utilizing both styles/forms because the parties want an opinion on the value of the case).
191 Id. See, e.g., Gitchell, supra note 26 (explaining the mediation procedure as one of Rush’s mediators: formulating and signing a mediation agreement, preparing the Pre-conference submission, preparing the client for mediation, preparing and delivering the opening statement, holding individual caucuses, and holding private client meetings).
192 Id.
193 See Sanders, supra note 84, at 5.
194 Id.
195 Id. (quoting Geoffrey L. Gifford of Pavalon & Gifford, who explained, of cases worth approximately $500,000.00, "[t]hose are the cases that go begging for resolution because the costs of producing them is overwhelming... Our office does not want to handle a medical malpractice case unless it has a very substantial value because the costs of preparing and putting the case into suit and getting them ready for trial can be cost prohibitive.")
mediation program works because the attorneys, doctors, and parties want to resolve issues and reach settlements quickly and fairly, unlike lengthy and costly court battles. Other specific medical malpractice cases, such as a brain-damaged baby case, may be appropriate for some type of mediation.

THE DECISION TO MEDIATE OR LITIGATE -
The Brain Damaged Baby Case

Birth-related neurological injuries account for the majority of suits against obstetricians, close to one-third of all obstetric claims. One such case is the brain-damaged baby case. If the hospital/health care provider can determine that it/he is in the position to settle the case early on, mediation may be the most appropriate direction for all the parties involved to turn. If the extent and effect of brain damage is in dispute, independent medical examinations (IMEs), in which a team of rehabilitation specialists administers a battery of tests to evaluate the potential benefits of early intervention for the infant, are in order. Just as in litigation, the defendant can request and pay for the plaintiff to undergo examinations, allowing the specialists to begin estimating what special services and equipment the infant would need. An early IME could also serve to attract the plaintiff’s attention; if early intervention is in the child’s best interests, then mediating a settlement sooner would save each side valuable time and money.

Medical science recognizes that growth of an infant’s brain is greatest in the first three years of life. This growth is directly related to the development of an infant’s mental capacity, emotional and social growth, and overall well being. Not only can a child’s I.Q. be boosted from fifteen to thirty points from continued and consistent stimulation, but

---

196 Id. Mr. Brown and Judge Lerner hope this program is used by other hospital attorneys for medical malpractice cases. Id.
198 See Sanders, supra note 84.
200 Susan Ludington-Hoe, HOW TO HAVE A SMARTER BABY 43 (1987) (explaining the child’s brain has reached over 90% of its maximum size by the time the child is three years old, and the majority of brain growth occurs in the first year following birth).
201 Id. at 8-9.
memory, curiosity, attentiveness, and a child’s motor skills may also develop such that the infant is more functional as a result of stimulation. When the infant is born with a neurological disorder, the need for assistance in his or her development is even greater than that of an unimpaired infant. This requires a great deal of money, many hours of rehabilitation, and a sincere desire to help the infant’s development. If these interests are not realized early on, ideally from the time the plaintiff discovers the medical defect/negligence, the brain-damaged or mentally and physically challenged infant will be even more disadvantaged. Thus, early mediation may serve to promote funds to provide for improving the infant’s rehabilitation potential as well as the parent’s pecuniary and social interests.

Mediation also serves the health care provider’s interests when faced with two different scenarios in a brain-damaged baby case: when the health care provider believes there is an increased potential for an adverse verdict, and when the health care provider feels that she is not negligent, but that the time commitment involved or the possibility of reputational damage induces her to settle. For example, in the first scenario, the health care provider has not told the mother her child may be physically and/or mentally challenged, nor has the provider encouraged the mother to undergo any testing for impairment, when, in fact, preliminary investigation, and input of experts, reveals the likelihood of a mental or physical challenge to the unborn child could have been determined well before birth. The law requires disclosure of this fact, and the plaintiff may allege a case of wrongful birth. In this scenario, the hospital or provider may want to resolve the claim as early as possible to avoid large defense costs and the likelihood of an adverse verdict, and also the providers would rather have litigation money spent on rehabilitation for the child at a time when it is most helpful. The second scenario, on the other hand, requires more reflection upon the advantages to mediation.

For example, take the infant born with cerebral palsy. Over the last twenty years, medical research has determined only a small percentage of infants born with neurological damage have that condition as a result of delivery or intrapartum mismanagement. Yet, when an infant is born

202 Id.
203 See Poe, supra note 197, at 27.
204 See Sanders, supra note 84.
205 See Poe, supra note 197, at 21.
with neurological damage such as cerebral palsy, the majority of plaintiffs assert that the cause was intrapartum fetal distress caused by asphyxia, which was a result of intrapartum mismanagement.\textsuperscript{206} However, the evidence suggests that the vast majority of cerebral palsy cases are not caused by birth asphyxia.\textsuperscript{207} Even though the physician does not have control over the cause of cerebral palsy in most cases, the physician is blamed by the impaired infant’s family.\textsuperscript{208} The authors understand that the defense may not want every case mediated, however, when litigation would take valuable time away from the physician’s practice or would cause great damage to the physician’s or institution’s reputation or when the defense will be very costly, mediation can serve the provider’s interests well. Even if the physician has a vast amount of medical literature and expert testimony to support his actions as non-negligent, taking the cerebral palsy case through litigation may result in large economic damages as well as compensation for pain and suffering, despite the evidence weighing in favor of the treater.\textsuperscript{209} If the infant and family ever hope to adequately manage the disability, earlier compensation would benefit the child, would place the lid on defense costs, and would prevent adverse publicity.

The parties may consider a structured settlement in the form of a reversionary medical expenses trust.\textsuperscript{210} Due to the plaintiff’s long-term economic needs, such as medical treatment and related care (rehabilitation, psychological testing and counseling), expenses can best be met from a cost and financial security standpoint.\textsuperscript{211} When mediation results in an agreement between the family of the brain-damaged child and the health care provider/institution, a structured settlement, in which the defendant provides cash and/or periodic payments to be administered by a bank or corporate trustee, could insure the child has funds available to him for immediate rehabilitation and consistent rehabilitation over his recovery

\textsuperscript{206}Id.
\textsuperscript{207}Id. (citing studies reporting the proportion of cerebral palsy associated with intrapartum asphyxia is most likely in the range of 3% to 13%, and there is an absence of clear causal relationship; clinical findings of intrapartum or perinatal asphyxia may be a consequence of an already impaired infant, rather that the cause of impairment, and for most cerebral palsy cases, the cause remains unknown).
\textsuperscript{208}Id.
\textsuperscript{209}Id.
\textsuperscript{210}See Gross, supra note 199, at 30.
\textsuperscript{211}Id.
period or life span.²¹² When the trust terminates, typically upon death of the plaintiff-beneficiary, unused principal and accumulated income would revert to the settling defendant.²¹³ Not only would this fee structure provide needed support for the child and family, but early intervention could also offset future treatment costs by reducing the extent of impairment of function that would be more likely to occur without aggressive early intervention. For example, perhaps five years after suit is filed, and after payments have been made for the child's medical care, the child is not wheelchair bound but is able to walk with the aid of a walker.

Mediating the brain-damaged baby case could also help alleviate the problem of antagonism between multi-party defendants.²¹⁴ Mediation would allow for a single defendant, be it a physician, hospital, intern, or resident, to mediate a reasonable award to the plaintiff in order to meet some of the plaintiff's rehabilitation needs. The rehabilitation could, in theory, help alleviate some of the damage exposure for the whole case when years later the case reaches the jury with the other co-defendants. If physicians opine prompt and immediate rehabilitation will make a difference in the child's ability to walk or perform academics, then having an early mediation should be an attractive alternative to litigation for the plaintiff. In mediation, a defendant choosing to resolve the case early could earmark specific funds for rehabilitation, such as physical therapy fees for the first three years.

Other medical malpractice cases in which funds for immediate use can be attractive to plaintiffs include the failure to diagnose cancer or other disease and nerve injury repairs or other disorders that can be alleviated by rehabilitation or prompt surgery. Health care providers and lawyers should discuss mediation as an option to litigation. Mediation, however, does not encompass every alternative to litigation. Other forms of alternative dispute resolution are comparable to and distinguishable from mediation, and should be familiarized by both attorneys and health care providers.

²¹² Id.
²¹³ Id.
²¹⁴ See Galton, supra note 19, at 128.
MEDIATION AND OTHER FORMS OF ADR

Mediation has been used to resolve disputes for centuries.\textsuperscript{215} Like its historical evolution, mediation has taken the form of a process, systematically isolating disputed issues and resolving to find a consensus on each issue in order to settle them.\textsuperscript{216} From labor-management contract and child custody and divorce disputes to large corporate and medical malpractice disputes, the process of mediation has steadily worked its way into our legal system.\textsuperscript{217} This reflects not only the desire to settle cases before litigating them, but also the sentiment that the parties should also be involved in resolving their own disputes. This desire, however, is tempered by the array of procedures and style options from which a mediator must choose to effectively produce a settlement.\textsuperscript{218}

Although mediation is a distinct form of alternative dispute resolution, it is oftentimes confused with other forms of ADR.\textsuperscript{219} Aside from mediation, other methods of ADR include: arbitration, conciliation, negotiation, mini-trial, summary jury trial, and early neutral evaluation.\textsuperscript{220}

\section*{Arbitration}

Arbitration is defined as the reference of a dispute to an impartial third person chosen by the disputants who have agreed in advance to abide by the arbitrator’s award made after each party’s arguments have been

\textsuperscript{215}See Folberg and Taylor, \textit{supra} note 2. In ancient China, the Confucian view was that moral persuasion solved disputes more effectively than sovereign coercion. \textit{Id.} Religious communities and other subcultures have historically resolved disputes between community and congregation members by providing their own groups of trusted members to resolve disputes with the purpose being to retain their own ideals about how conflicts should be resolved. \textit{Id.} See, e.g., Riskin and Westbrook, \textit{supra} note 14 (further stating that the Orient views litigation as a shameful last resort, contrasting directly with Western perspectives).

\textsuperscript{216}See Moore, \textit{supra} note 54, at 19-20 (suggesting that the Bible refers to Jesus as a mediator between God and man, and that in the Jewish religion, the Rabbis in Europe were instrumental in mediating disputes amongst members of that religion).

\textsuperscript{217}See Rogers and Salem, \textit{supra} note 1 (explaining mediation has also been used in domestic disputes, proceedings against farmers, criminal complaints, environmental disputes, intergovernmental disputes, and educational disputes).

\textsuperscript{218}See Moore, \textit{supra} note 54.

\textsuperscript{219}John W. Cooley, \textit{Arbitration vs. Mediation-It's Time to Settle the Differences}, CHI. BAR REC., \textit{reprinted in Mediation Training Program Materials}, Circuit Court of Cook County and The Chicago Bar Association (for example, mediation, conciliation and arbitration were once used interchangeably).

\textsuperscript{220}See Plapinger and Stienstra, \textit{supra} note 4.
Arbitration may be compulsory, when one or both of the parties are required by statute to enter into arbitration as opposed to being allowed to litigate their dispute. Or, arbitration may be voluntary, existing to alleviate conflict regarding the meaning of terms in a contract and for the violation of the terms of an existing contract. Unlike mediation and other forms of ADR, arbitration involves a decision by the intervening third party. Parties must abide by the arbitrator's decision, which is generally unaccompanied by any explanation of why that result was reached, and is almost always without any possibility of appeal. Allowing the process of dispute resolution to end in a binding decision reflects an awareness by both parties that there is no reasonable likelihood of a negotiated settlement, and no reasonable assumption can be made that the parties will have an ongoing relationship after the decision is made.

Unlike arbitration, the result in mediation is not a decision made by the third party. Rather, mediation exists to allow the parties to come to their own resolution of the issues, and is based on the assumption that people have the creative capacity to resolve their own disputes. The process itself is also different, whereby the mediator encourages parties to examine and articulate their interests, and the mediator engages in creative problem solving techniques to alleviate any further misunderstandings. Arbitration is similar to litigation, in that it involves a formal hearing in

---

221 BLACK'S LAW DICTIONARY 70 (6th ed. 1999). The parties arrange for a third party to hear their disputes for the purpose of avoiding disputing in front of a judge or jury through the process of litigation. Id. See, e.g., Riskin and Westbrook, supra note 14 (the majority of states have enacted statutes modeled after the Uniform Arbitration Act, which governs the validity and enforceability of arbitration agreements).

222 Id. An example of compulsory arbitration is in the statutory requirement of labor disputes involving public employees. Id.

223 Id. Settling the terms in a contract through arbitration is referred to as “interest arbitration,” and arbitration to settle the violation of an existing term in a contract is referred to as “grievance arbitration.” Id.

224 See Cooley, supra note 219, at 204.

225 See McNally and MacDonald, supra note 3, at 6.

226 Id.

227 Id.

228 See Kovach and Love, supra note 8.

229 Id. See, e.g., Cooley, supra note 219, at 204-05 (the arbitrator employs mostly left brain or rational mental processes to come to a logical decision, while the mediator employs mostly right brain functions: conceptual, intuitive, artistic, in order to maintain the parties' dialogue towards a mutually acceptable decision).
front of a person or panel who then decides in favor of one side over the other; there is a winner and a loser.\textsuperscript{230}

Sometimes these two alternatives are combined into what is labeled as "Mediation/Arbitration" (Med/Arb).\textsuperscript{231} The parties in a Med/Arb arrangement agree to begin with mediation, but if mediation fails, the parties proceed with arbitration.\textsuperscript{232} The person who serves as the mediator may also serve as the arbitrator, if the parties so choose.\textsuperscript{233}

**Conciliation**

Another form of alternative dispute resolution is conciliation, defined as the adjustment and settlement of a dispute in a friendly manner, used in courts before trial with a view towards avoiding trial.\textsuperscript{234} Conciliation is generally regarded as the process that occurs before the parties commit themselves to mediation in an attempt to reduce tensions and clarify the issues.\textsuperscript{235}

**Negotiation**

Negotiation is the process of submission and consideration of offers until an offer is made and accepted.\textsuperscript{236} Negotiation is a process of adjustment and back and forth communications incorporating divergent values designed to reach an agreement.\textsuperscript{237} This form of alternative dispute resolution generally takes the form of discussing and clarifying disputes which have already occurred as well as future transactions or legislation.\textsuperscript{238} During negotiation, the parties' efforts are geared towards ascertaining each other's bottom line, while attempting to keep their own bottom line a secret.\textsuperscript{239} On the other hand, the parties' efforts in mediation are geared towards presenting their emotional stance on the issues and not concealing them.\textsuperscript{240}


\textsuperscript{231} Id.

\textsuperscript{232} Id.

\textsuperscript{233} Id.

\textsuperscript{234} BLACK'S LAW DICTIONARY 200 (6th ed. 1991).

\textsuperscript{235} See Rogers and Salem, supra note 1.

\textsuperscript{236} BLACK'S LAW DICTIONARY 720 (6th ed. 1991).

\textsuperscript{237} See Riskin and Westbrook, supra note 14.

\textsuperscript{238} Id.

\textsuperscript{239} Id.

\textsuperscript{240} Id.
Mini-Trial
A more formal process than mediation, the Mini-Trial offers parties a way to argue their case in front of a panel, consisting of executives from both sides who are empowered to settle the case as they see fit. The panel often consists of a third-party neutral who is an advisor, and is generally an expert in the field knowledgeable on the instant issues. This process is similar to mediation in that the decision is a non-binding advisory opinion made by an expert. However, mini-trials are not usually employed until after litigation has commenced, entailing much of the uncertainty, cost, and frustration associated with litigation.

Summary Jury Trial
Unlike any other forms of ADR, summary jury trial is the only method in which a case is presented to a jury. The summary jury trial is an adaptation of the mini-trial, and consists of lawyers giving brief presentations of their cases to a jury that has no authority, but whose members are drawn from the same population as real jurors, and whose goal it is to show both parties what a typical jury would decide. This process encourages settlement by offering a non-binding verdict on liability and damages, which presumably helps the parties better understand their cases. Like the mini-trial, summary jury trials are employed after the commencement of litigation, which may make them costly and frustrating.

Early Neutral Evaluation
Early neutral evaluation calls upon experts to render advisory, non-binding opinions about probable court outcomes or difficult factual or technical issues in order for the parties to engage in more realistic assessments of

---

242 Id.
243 See McNally and MacDonald, supra note 3, at 91.
245 See Riskin and Westbrook, supra note 14 (summary jury trials are usually court-ordered, not consensual). See also Klein, supra note 245, at 459.
246 Id.
247 See McNally and MacDonald, supra note 3, at 91.
their cases during negotiations. The evaluator meets with the parties and their attorneys in session to help them simplify the case by discarding issues not worth pursuing and/or agreeing on pre-trial procedures. Some experts, on the other hand, may render binding opinions. One example is the private trial: a privately-hired former judge applies a full range of evidentiary procedures to reach the equivalent of a judicial determination. Parties may also agree to be bound by the decisions of neutral experts or early neutral evaluators.

These forms of alternative dispute resolution differ from mediation and each other in manner and process. Even if a mediator follows a format, her approach to the mediation process will be different from another mediator's approach. Indeed, each alternative dispute resolution process threatens or promotes different values or interests, requiring reflection from parties' attorneys as to which process will serve their clients best for their particular circumstances. Mediation itself holds much diversity in its approach to problem solving. Depending on the type of case, the mediator's concept of her role, and the ability and desire of the mediator to frame the issues in a certain way, mediation will adapt and evolve with each dispute as it arises. Because each dispute and each

---

249 See Galton, supra note 19. A new area of mediation is Settlement Week, which is an organized program by a local or state bar providing pro bono mediations by volunteer lawyers. Id.

250 See Klein, supra note 245, at 459.

251 Id.


253 Id.

254 See Riskin, supra note 14. See, e.g., Golann, supra note 52 (while a mediator has complete freedom to improvise, some general processes are followed: 1) the opening session serves to introduce the parties and explain the overall process to them; 2) private caucuses, where the mediator speaks privately to each party and their attorney, allows them to gather sensitive information, obtain direct access to the principals of the case, and allow the parties to vent outside the presence of the other; and 3) moderated negotiations to promote constructive bargaining tactics, and tie down the settlement terms in writing).

255 See Golann, supra note 52.

256 Id.

257 Id. (explaining the mediator may take a passive or aggressive stance towards the mediation process, from urging participants to simply agree to talk, to setting an agenda of issues to discuss, to helping parties develop their own proposals, to persuading parties to accept a particular solution), quoting Folberg and Taylor, supra note 2, at 7-9.
party possess unique characteristics, the mediator(s) must also attempt to use the style of mediation most appropriate to each unique situation.\textsuperscript{253}

**CONCLUSION**

Mediation is a viable alternative to litigation. From pre-mediation submissions and agreements to the caucus and post-mediation settlement contract, the parties are able to continually express their interests and negotiate, through unantagonistic means, a settlement that otherwise would not be attainable through the trial process. For medical malpractice cases, mediation offers a way for attorneys to be actively involved not only in the gathering of information to submit and argue in front of a jury, but also through protecting the client's interests early and allowing the client to define a win for himself rather than the judge or jury to do so. Mediation is a win-win situation; the parties may express themselves throughout every stage of the process, and if the parties cannot agree on a settlement, the court system is always open to them.

\textsuperscript{253}Id. (mediation defies strict definition because the specifics of mediation depend upon what is being mediated, the parties, the mediator, and the setting).