When Mediation Meets Medicine

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In this article, experienced mediators, Steve Lancken and Elizabeth Rosa, debunk the myths and discuss the realities of mediations involving medical professionals.

It is not just doctors who hate being involved in conflict and dispute. Only a few perverse individuals thrive on the adrenaline of a claim being made by or against them, and the ongoing conflict.

In our careers as mediators, and before that as lawyers, we have seen the full range of personal conflict and legal disputes – from partnership disputes, familial separations, employment claims, allegations of professional negligence, and even allegations of criminal misbehaviour. Almost everyone who faces such problems feels a knot in the stomach and a fear of the unknown.

People dislike conflict because autonomy is lost, creating an uncomfortable loss of control. The choice at first blush is between giving in or fighting. Even in Australian courts where the forum for determination is clean and impartial, the truth is that disputants lose control. Even good and diligent lawyers describe the “litigation lotto” of the uncertainty of judges deciding who is right or wrong.

The courts are the best option offered by the “state” to decide disputes. Courts offer a fair process, but for at least one half of their “clients” (the losers), the outcome is not seen as fair.

So what can mediation and mediators offer when conflicts occur in the medical environment? How can MDA National support you to sort out conflict in a way that addresses your professional and personal goals without resorting to the “litigation lotto”?

Here are some thoughts about mediation that will help MDA National Members get the most out of mediation.

Mediation as a decision-making tool

Sometimes mediation is marketed as solving all problems. It does not. What it does offer is the chance to make good and informed decisions about whether you are better off continuing with the dispute, i.e. continue to litigate, or to take some alternative course.

Mediation is NOT about giving in. What mediation offers, however, is the benefit of certainty. A negotiation can result in a decision that is certain and final. During the process of the negotiation there are decisions and trade-offs to be made, and they can be made in an environment where information can be exchanged openly, without the fear of it being used against you.

Agreeing to mediation is not a sign of weakness. In addition, in many cases, court orders are imposed which make mediation compulsory.

The information exchanged in mediation assists in making decisions. Parties or their representatives share information to enable good decision making – and the mediator, who is trained in communication skills, assists with this process.

Settlement at mediation is voluntary

No one is obliged to make an offer or even to stay at a mediation session after information is exchanged. Dr Helen Havryk, Claims Manager at MDA National, has told us there are many instances where MDA National will attend mediation on behalf of a Member and make no offer of monetary compensation. This is likely to occur when a case has no prospect of success. On the other hand, if MDA National foresees a risk, they might seek to settle on a commercial basis that reflects the seriousness of that risk. In some cases, mediation is welcomed as an opportunity to attempt settlement of a matter where this is clearly the correct decision.

Mediation has no downside

The worst thing that can happen at mediation is that there is no resolution and everyone has to continue on with the litigation. There is a small cost of the mediator's fees and the time spent by claims people on behalf of a Member.

According to Dr Havryk, "It is very rare that we would require a Member to attend mediation. Of course if our Member wants to attend, we will discuss with them their role, preparation and what they want to achieve."

Members are not required to attend mediation unless there is a good reason. You might want to attend for one of the following reasons:

- to understand more about the dispute
- to engage and speak directly with the other party, be they a patient, employee, business partner or colleague – good mediators manage such communications in a way that helps you achieve what you seek from these conversations
- to understand the decision-making process and its impact on you, and this includes the financial, professional and reputational impact
- to discuss the issues with your claims staff and lawyers.

We think that if the mediation is about any ongoing relationships such as employment or partnership, you should attend and participate in creating options for the future.

Mediation can be about personal issues as well as "the case"

In mediation, the private concerns of parties such as reputation, future goals and aspirations can be addressed. Also, the question of what is going to happen in the future as a result of learning from the past can be dealt with. These issues do not exercise the minds of judges.

Mediation is private

The deliberations of courts and tribunals are public. Not so in mediation, where the usual practice is for the outcome to remain confidential. In almost all cases, if the matter is not resolved at mediation, the court will not learn what was said or what "offers" were made.

Mediation is about the future, not the past

Mediation is not all about fault or responsibility. While lawyers at a mediation might discuss the events that led to the dispute so they can understand the risks going forward, the outcomes in mediation are forward focused – about what is best for tomorrow, not who is to blame for the past.

For that reason mediation is not the forum for personal or professional criticism, especially that of the medical professional. In that respect, mediation is not at all like a trial where attribution of fault is often the main issue.

“In a medical negligence case, our Members will know in advance what view MDA National and its lawyers take about liability issues, and there is opportunity for discussion,” says Dr Havryk.

A good approach to mediation

Mediation is best approached with an understanding of what it is and what it is not. Being successful in negotiating at mediation warrants a great deal of preparation, not about who is right or wrong, as the lawyers will do this for the trial, but about issues such as:

- how and what to communicate
- whether it is appropriate to offer an expression of regret or condolences or understanding for another’s suffering
- what might be an appropriate trade-off for the avoidance of risk, if any
- what is important to you and your family, your insurer and others affected by the result.

Professional mediators assist with the conversations needed to find outcomes that make sense to all parties.

Some myths about mediation

Myth	Reality
The mediator will tell the other side (or you) that you are wrong.	This is NOT what a mediator does.
You must settle.	Settling should NEVER be a requirement of attending.
What you say will be used against you.	Almost all mediations occur in situations where there is a legal privilege protecting communications from being used against the participants.
Cross examination or questioning takes place.	This occurs in court, NOT in a mediation.
Agreeing to mediate is a sign of weakness.	Trying to find an outcome that is better for all concerned should never be seen as a sign of weakness. “I want to talk” does not mean “I want to give in”.

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