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Mediation: Claim Resolution without a Courtroom

Your stomach flips when you receive a Notice of Intent to Pursue Litigation (NOI) or other notice of a medical malpractice claim. Almost immediately an atmosphere of distrust, acrimony and unwillingness to negotiate develops between you, the doctor/defendant, and the patient/claimant, and your respective attorneys. While those feelings are understandable, they rarely foster compromise or resolution. In many cases, the Claims experts at First Professionals Insurance Company (First Professionals) have found the process of mediation to be beneficial in reaching resolution that is satisfactory to all parties.

According to Jerry Newman, full-time mediator practicing in Tampa, a key factor in the mediation process is control. Mediation is a non-adversarial, problem solving process in which the involved parties have control of the proceeding and the result.

“It is the only event in the life of a lawsuit where that is the case,” said Newman.

If the case goes to court, the result is controlled by the jury and is completely unpredictable. Mediation can eliminate the uncertainty of the outcome and eliminate expense, and will help eliminate the existence of controversy.

How It Works

In most Florida cases judges order mediation. Sometimes the parties will go to mediation before it is court-ordered to make it easier to accommodate all parties' schedules. Usually, the parties mutually agree to select the mediator, often a retired judge or attorney, although in some cases the mediator is court-appointed.

Most mediations are scheduled for a half-day or a single full day. The environment is informal and non-adversarial, and both the doctor and the patient should expect a relaxed demeanor from their attorneys. Courtroom tactics used by trial attorneys are not appropriate in mediation. Mediation usually takes place near the end of the discovery stage of litigation.

The mediator begins with an explanation of the process, and then each lawyer has a chance to summarize the case. Before each lawyer's summary, the mediator asks all parties to listen to all sides, not just their own, because they need to understand the entire case. That understanding can help all parties grasp the full risk involved with letting the case go to trial. As is human nature, sometimes it can be difficult to listen to the other side(s); nonetheless it is an important part of the mediation process.

The joint session concludes and the parties break up into separate rooms. Mediation is often held in a lawyer's office because there are conference rooms and multiple smaller rooms or offices available. The mediator, as a neutral and impartial third party, goes between the rooms to talk with each party to encourage and facilitate resolution, but does not tell the parties how to resolve the case. The mediation process is intended to help the disputing parties reach a mutually acceptable agreement but the mediator does not prescribe the resolution.

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When the parties are able to reach settlement as a result of the mediation process, there is no admission of any liability on the part of any of the involved parties, and all terms are confidential.

Mediation that results in settlement ends the case, as well as the related emotional anxiety and the expense of an ongoing legal battle. Reports are made to the Office of Insurance Regulation and to any respective licensing boards, and while those records are available to the public, nothing is released to the media because the settlement terms are considered confidential.

Why Mediate?

In essence mediation is a monitored settlement negotiation to assist all parties in reaching a resolution on the terms they want. It is the first step in the process toward a change of attitude because in most instances, the parties hear something new that helps them better identify their risk. Mediation eliminates the unknown aspect of the courtroom where the risk is difficult, if not impossible, to measure and predict.



Senior Vice President of Claims at First Professionals, Beth Rominger, says that mediation is often particularly helpful in cases where co-defendants have engaged in finger-pointing, which she points out “can turn a defensible case indefensible” and is not conducive to a good outcome. Because the mediation process strives to engage all parties in active listening, everyone has the opportunity to begin to understand the respective positions of each party involved and work toward a mutually acceptable outcome.

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Mediation versus Arbitration

First Professionals Insurance Company (First Professionals) offers an arbitration program to its policyholders. Like mediation, the objectives of arbitration are to reduce legal costs and facilitate speedier resolution of claims. But just how is it different from mediation?

First Professionals developed a binding arbitration program (Program) for its Florida policyholders to provide an alternative to the courtroom. Binding arbitration means that physicians and patients agree to present any claims that may arise from rendering or failing to render medical care and treatment before an arbitration panel – outside the court system. The arbitration panel is required to follow Florida law and its decision is binding upon the parties except in very limited circumstances. Binding arbitration affords potential benefits to both physicians and patients including:

- Lower legal costs for both parties;
- Lower indemnity payments through the use of an arbitration panel that, relative to a jury pool, will likely make a more well-reasoned and educated decision based upon the medical facts of the case; and
- A more prompt resolution of claims.

The primary differences between mediation and arbitration are that the patient(s) agrees to arbitration prior to receiving care and treatment, and the arbitrators’ decision is binding. The mediation process is used only after a claim has been made and Notice of Intent to Pursue Litigation has been given.

In mediation, nothing is determined unless the parties reach an agreement, which is reduced to writing and signed by the parties and their attorneys. In arbitration, the decision of the arbitration panel is binding on the parties, whether they agree with the result or not.

For additional information concerning participation in the Program, please contact Stephany Carter in the Marketing Department at (800) 741-3742 ext. 3064 or at carter@fpic.com. For legal issues concerning the Program please contact Rob Wortelboer, First Professionals’ General Counsel and Vice President at (800) 741-3742 ext. 3281 or at wortelboer@fpic.com.

Florida Medical Association Waiver

When Amendment 3 passed in 2003, it imposed caps on attorney fees in medical malpractice cases. The Amendment was strongly supported by the Florida Medical Association (FMA) and First Professionals. As we have stated previously, we believe the tort reform legislation and the cap on attorney fees have provided some relief from the medical liability crisis.

The Florida Supreme Court has approved a procedural rule that allows trial lawyers to get around the amendment. The court ruled that attorneys can collect fees higher than the limits if their clients agree to it. Toward that end, the Academy of Florida Trial Lawyers has developed a waiver for attorneys to use with clients.

In response, the FMA developed a waiver for physicians to use with their patients. Patients who sign this waiver agree to accept a cap of \$250,000 for noneconomic damages. First Professionals strongly supports the FMA in its implementation of this waiver, although we will not mandate that it be used.



“The waiver is a monumental step forward for Florida physicians and their patients because it will continue to help stabilize Florida’s medical professional liability insurance market,” said President Robert E. White Jr., First Professionals Insurance Company. “In the long run, doctors who use this waiver will give Florida patients broader access to the quality health care they deserve.”

The FMA and its legal counsel have developed and copyrighted this waiver form. It is available only to members of the FMA and/or county medical societies. Physicians can contact the FMA directly to request the form, or to obtain membership information.

Visit www.fmaonline.org for details, or contact First Professionals’ Director of Society Relations, Angie Nykamp, at (800) 741-3742 ext. 3071 or angie.nykamp@fpic.com.

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The concepts of mediation are:

- Communication
- Negotiation
- Facilitation
- Problem solving, which emphasizes a self-determination of the needs and interests of the parties
- Fairness
- Confidentiality
- Full disclosure

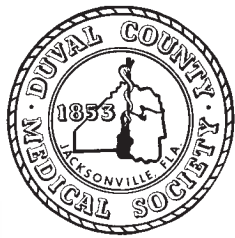
For mediation to be successful, Newman believes it is vital that each party “show up with an open mind and be willing to listen and rethink the case so they can honestly evaluate their risks.” He recognizes that sometimes for doctors that may be difficult because they are trained to be confident and to be right. When they are faced with lawsuit

and the opportunity for mediation they may need to suspend the method of thinking learned in their training.

For more information about mediation, please contact the First Professionals’ Claims Department at (800) 741-3742, ext. 3293.

First Professionals Expands its Societal Relations

First Professionals' is pleased to announce that we have finalized an Exclusive Endorsement and Sponsorship Program with medical associations in the following Florida counties:



St. Johns County
Clay County



Marion County



Putnam County

These endorsements mean that the organizations' members in good standing are eligible for a 5 percent discount on professional liability insurance coverage from First Professionals.

First Professionals is now endorsed by 21 county medical societies, 15 specialty societies, and three statewide associations in Florida. Our commitment to organized medicine and to our policyholders remains steadfast. We welcome our newest groups and look forward to our work with them.

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