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LAW REVIEW

## Mandatory mediation paying off

By Marlon Davis,  
PBN Managing Editor

A pilot mediation program started in 2005 in Superior Court has led to settlements in almost half the 70-plus medical malpractice cases it has handled so far - a success rate so high that the program is going to be made permanent and expanded statewide.

Medical malpractice litigation has long been plagued by delays in Rhode Island, with cases taking, on average, more than six years from incident to resolution, according to a National Practitioner's Data Bank analysis often quoted by insurers.

The Rhode Island Medical Society, the Hospital Association of Rhode Island and others have been pushing for years for legal reforms they say would expedite cases, such as reducing the 12-percent interest rate on damages to which successful plaintiffs are entitled.

But consumer groups and plaintiffs' lawyers say such measures would hurt people with legitimate claims and not really solve the problem, and legislators have generally agreed.

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In September 2005, Superior Court Presiding Justice Joseph F. Rodgers Jr. tried a new approach. In two separate orders, he set parameters for discovery and expert disclosures and he required mediation for all medical malpractice cases before they could go to trial.

The latter was just an experiment, limited to Providence County (and Bristol County, which uses the Providence courts). Retired Judge Richard J. Israel would mediate two or three cases a week, on Fridays, volunteering his time.

Rodgers didn't know how big a dent Israel might make in the case backlog. "If we can get rid of one out of three," he told a reporter, "that's an accomplishment."

Israel did far better than that. From last September through May, he said in an interview, he completed mediation in 29 cases, and 13 - 45 percent - were settled, while in 16, there was an impasse, though one or two have been settled since then.

In his first session, from September 2005 through May of 2006, the settlement rate was even higher, Israel said, about 50 percent. "I'd say it's an unqualified success," he said.

Rodgers said that based on the results, "I'm confident that the program is worth continuing."

"I've heard from defense attorneys," he added, "who are obviously quite involved, [that] they also believe it's been rather successful." And because Israel has told him he wants to hold mediations in Kent, Newport and Washington counties, the program will likely be expanded to those courts when Israel returns from vacation in the fall.

Israel typically mediates two cases each Friday: one in the morning and one in the afternoon. With all, he takes the same basic approach - highlight the risk involved in not settling, and encourage both sides to compromise.

Michael G. Sarli, a partner at Gidley, Sarli & Marusak who represents defendants in malpractice cases, has participated in several mediations.

"I believe it provides a forum for the plaintiffs to articulate their perspective on a case," he said, "and sometimes when they hear the other side's perspective, it looks a little different than it may originally have. And of course you have the

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benefit of a retired Superior Court judge perhaps casting reality over the whole thing for both sides."

John P. Barylick, a principal at Wistow & Barylick, which represents plaintiffs, has only gone through one mediation session so far, but he was pleased with the result.

Barylick was representing the family of a person who died from a malignant melanoma that was diagnosed late, and though he had built a strong case, he said, "not one dollar had been offered before the mediation." By the end of the afternoon, there was a settlement.

Without that session, Barylick said, the first settlement talks might have been "on the steps of the courthouse, or after the jury was in the box, which is a wastefully late time to do it."

Patrick C. Barry of Decof & Decof, another well-known plaintiffs' attorney, said he has been in four mediations, and "it's a good program."

"The clients don't always want to go, because they're being ordered to, essentially," he said. "But if it gets them to a faster resolution, if it helps them resolve issues of liability and, if someone has done something wrong, holds them accountable, those are all beneficial."

Moreover, Barry said, the settled cases have alleviated the backlog, so cases that do go to trial are moving more quickly. To him, that's proof that the legal reforms sought by doctors, hospitals and insurers are not needed.

"It's an indication that the judicial system has been able to address [the problems]," he said. "It hasn't required any legislation or any other outside tinkering with the system."

Steve DeToy, director of government and public affairs for the Medical Society, wouldn't agree with that point - his group is still seeking those long-desired reforms. But he said the program is making a difference.

"We're very grateful to Judge Rodgers and Judge Israel for putting it in," he said.

Israel noted that these expedited resolutions also save everyone money. The plaintiffs' lawyers, who typically work for a share of the damages paid, have to spend "considerable amounts" on expert witnesses, among other things, and for the insurers, the fees for defense lawyers can be "quite substantial" even if they win at trial.

"The mediation also spares the parties some of the emotional expense, if you will, in going to trial," he said. The uncertainty of a trial can be difficult for both sides, he noted, and "it's true that the claimants sometimes do relive the anguish of an unfortunate medical experience" at the trial.

Still, not everyone has come out pleased. Barylick said he's spoken with some colleagues who've had negative experiences, "but they tended to be on smaller cases," which are harder to settle.

"I think when there's not a peril of an insured being hit for a judgment above their coverage," he said, "then insurers feel a lot more sanguine about saying, 'I'm not paying a dollar.'"

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