

USE OF ADR FOR PERSONAL INJURY/MALPRACTICE CLAIMS

I. Statistics – Settlement Versus Trial

- Study conducted in September 2008 demonstrated the financial risks associated with foregoing settlement and taking one's chances at trial
- Study analyzed 2,000 cases over a 3-year period and compared the settlement offers and demands previously made by the parties with the verdicts they ultimately received at trial
- Found a high rate of decision error – *i.e.*, receiving an amount at trial worse than that offered by the other side during the course of the case
- While the rate of decision error was higher for plaintiffs than defendants, the mean cost of that error was significantly higher for the defendants

II. Mediation/Arbitration/Settlement Conferences

- Explanation of the general processes and differences among them
- Different styles for mediation – *e.g.*, facilitative, evaluative

III. Benefits of Mediation

- Significant savings in time and money
- Useful in managing clients' expectations – "reality check"
- Eliminates risks associated with trying cases in front of a jury
- Confidential process – can be important especially with sensitive medical issues or defendants who don't want to broadcast how much they paid
- Allows parties to be heard and to express/resolve emotions
- Allows for creativity when fashioning resolutions
- Parties more likely to abide by agreements if they had a hand in crafting it
- No real downside to mediation – most cases settle, but even those that don't, some benefits are realized (better understanding of each side's interests/motivations, better appreciation of your own case, narrowing of the issues, laying the groundwork for future settlement, etc.)

IV. Benefits of Arbitration

- Closure
- Savings in time and money - expedited (or no) discovery; streamlined adjudicatory process

V. Timing

- When to suggest/pursue mediation
- Pre-suit, start of discovery, after some important depositions taken, etc.
- Cost-savings diminish the later ADR is used

VI. Tips for Advocates

- Prepare clients for the process
- Anticipate the motivations/interests of the other side, but be sure to listen during the mediation and adapt accordingly
- Be careful of treating mediation like you're in the courtroom arguing in front of a jury
- How/when to educate mediator about strengths/weaknesses of your case
- Offer to the mediator your views on the impediments thus far to settlement

VII. Myths About Mediation

- Sign of weakness
- Have to reveal all my evidence
- Will open the floodgates to more litigation
- This case will never settle
- Strips away the proverbial "day in court"