

Malpractice – The Phenomenon and the Relevant Advantages of Mediation in Criminal Cases

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ABSTRACT: Malpractice is a relatively newly recognized phenomenon, whose negative effects regard both the client (patient) and the professional. Nowadays, there is a widely held intention of the client incurring damages from a malpractice case in order to obtain damage-repairs that are higher than deserved, but also to cause a “bad-advertising” for the professional in default, especially in criminal cases. Mediation seems to be an instrument to provide the best solution for both parties involved: the client obtains a better repair than a Court-of-Law can decide upon, while the professional benefits from a more confidential analysis on his default; additionally, the Courts-of-Law are relieved from analyzing malpractice cases. The mediation procedure for medical malpractice cases can be regarded as an extrajudicial alternative, a “WIN-WIN” solution, by its nature, for the parties in conflict who have a possibility of reaching a mutually beneficial agreement. Whereas, according to Article 16 of the New Criminal Procedure Code par. 1 The criminal action cannot be put into motion and when it has been put into motion it can no longer be exercised if: g) the preliminary complaint was withdrawn in the case of offenses for which its withdrawal removes the criminal liability, the reconciliation occurred or a mediation agreement was concluded under the law. Therefore, a positive result of the mediation activity in criminal matters would lead to the suspension of criminal proceedings in the criminal investigation phase or the termination of the trial at the trial stage. In addition to this advantage, other benefits of the mediation procedure in criminal matters will be discussed in the present article.

KEYWORDS: criminal cases, injury, malpractice, mediation, phenomenon, win-win situation

Introduction

According to art. 60 (d) of Law no 192/2006 on mediation and the organization of the mediator profession, it results that the malpractice cases which are unfolding in the courts of law are subject to mediation. According to the regulation in force, the one who causes another to suffer through an unlawful action committed with guilt is obliged to fix it, and he is responsible for the slightest fault.

The object of the mediation is the conflict between the parties. To mediate means to intervene between hostile parties and to lead them to solving a conflict. The mediator is obliged to value and analyze carefully the object of the conflict, before accepting the case, deciding if that conflict is likely to be solved via mediation (Buzatu 2013, 10).

The procedure of mediation is meant to find amiable solutions for the litigations to be mediated. Once a reciprocal convenient solution was found, the parties will conclude an agreement. It can contain an acquiescence to the claims of the other party, a disagreement or, it can turn into a transaction (Constantinescu and Buzatu 2014, 394).

In its essence, mediation seeks to optimize the interdependence relationships between two or more parties that have become incompatible, regardless of their nature: social, inter-human, institutional (Mitroi 2010, 25). The mediation procedure for medical malpractice cases can be regarded as an extrajudicial alternative, a “WIN-WIN” solution, by its nature, for the parties in conflict who have a possibility of reaching a mutually beneficial agreement.

Mediation for medical malpractice cases

In the cases of medical malpractice, mediation represents for:

- **The victim** – following an agreement concluded between the two parties involved, the victim may receive the sum of money representing the compensation for: the entire injury caused by the physician or other medical staff to the patient; the cost for the medical care, for the temporary or permanent loss of work capacity, for the procreation capacity, the loss of bodily integrity and the suffering the injured party has to bear (Șanța 2013, 8).

- **The offender** - for him, a reconciliation agreement between the parties represents the chance to gain his / her right to freedom; stopping the criminal proceedings in the criminal investigation phase or the end of the trial in the trial phase and closing the case, with the advantage that the deed will not be mentioned in the criminal record.

In the other criminal cases, which are not susceptible to a preliminary complaint, an attenuating circumstance, which the court will take into account in individualizing the punishment, is the settlement of the civil aspect of the criminal trial through a mediation agreement with the victim; thus, the court may considerably lower the punishment, appreciating the offender's efforts to repair the damage and straighten it.

At the same time, it is possible to prevent damage not only to the image but also to the reputation that the doctor has in society and the professional and/or academic-scientific environment (Mitroi 2010, 21). He can learn a valuable lesson, getting to know straight from the patient, by listening to his story and learning about the latter's experiences with the consequences of his/her medical error/fault. The positive outcome of mediation can be a lesson for the physician, teaching him how to improve his inter-relationship with other patients, avoiding similar mistakes, and continuously improving his medical knowledge and from a practical point of view, by being able to make those constructive changes that become apparent after the mediation experience. Relieving the courts of the large number of pending cases, which hinder the effective implementation of justice - by resolving the conflicts through mediation, in a shorter time.

- **For both the victim and the offender:** avoiding a long period of time in which a trial may be extended in the courts of law.

Due to the fact that the role of establishing the guilt or innocence of a doctor falls to other competent bodies, mediation only seeks to support the dialogue between the injured party (or the patient) and the offender (the doctor) respectively, with a view to reaching a consensus on the amount and method of payment of the amount to be received by the victim (Șanța 2013, 43).

However, not all negotiations have a positive outcome for various reasons: the interaction may be deficient - from the patient side versus the doctor who had cause him a disability or suffering for life (Șanța 2013, 26) either because there are barriers in communication, or because there was an inappropriate management of emotions that had distorted the climate necessary for negotiation; or, the complexity of the negotiated issues may prevent the parties from understanding all the implications.

The mediator must always be preoccupied with the interest of the parties and show empathy towards their positions, by actively listening to obtain the information necessary to achieve the desired result and acting as a mentor in the mediation sessions. The mediator will provide the parties with all the necessary explanations regarding the mediation process, which in turn will express their own vision of the conflict, identifying mainly the legal facts and implications. In a second step, the mediator assists the parties in recognising their specific interests, in identifying and establishing options for reaching a reconciliation agreement. The mediator listens to the parties' position, primarily separate, in order to obtain additional information they do not want to share with the other party, then involving both, encouraging an open and direct dialogue to understand and analyze issues that concern them, as well as their priorities. At a final stage, it is intended that the parties reach an agreement providing for the conditions of compensation, in respect of which the mediator draws them in writing, taking the form of a transaction agreement.

An extremely important thing that emerges from art. 68 par. 1 of the Law no 192/2006, is that in the course of criminal proceedings, the mediator must give the parties the right to legal assistance, mentioning in the final minutes whether they were assisted by the lawyer or whether they have expressly renounced the assistance.

In general terms, the mediation procedure comprises the following steps:

- inviting the parties to mediation;
- informing the parties on the merits of the mediation procedure in settling the dispute and on the rights of the parties to the proceedings;

- attending the mediation session with all parties involved and drafting the mediation agreement following the agreement concluded between the parties.

During the prior information meeting on the mediation procedure, the parties will be informed of the following issues:

- Mediation as a method of solving conflicts.
- The principles of mediation (impartiality, neutrality, confidentiality, voluntary character).
- The rights and obligations of the parties involved.
- The rights and obligations of the mediator.
- The role of the mediator in the procedure.
- Advantages of mediation.

The advantages of mediation in medical malpractice cases

The main asset of mediation is that it allows the participation of a third party, unrelated to the conflict and impartial, which seeks to put the negotiator's positions on an equal footing, helping them identify the common interests they should retain, who will work to create a favorable environment for good communication and, if necessary, suggest options for settling the dispute. It can be easily stated that mediation is a form of assisted negotiation. Its result will be a negotiated agreement of the same value as the parties could have obtained on their own, being facilitated by the mediator's activity.

One of the advantages of mediation in malpractice is the low cost to the traditional way of settling disputes. Generally, the court fixes for the guilty parties an amount of money, totally inconsistent with the outcome of mediation, where the amount of covering for damages is much lower because all reconciliation techniques are applied by negotiation. Moreover, another adverse effect of following the traditional way of judging is that, because of its contradictory nature, the parties turn against each other and, in the case of a dispute between a doctor and a patient, this is a particularly unfortunate consequence (Tudor 2010, 54). This is due to the fact that the parties had at some point a trustworthy patient-doctor relationship, such relationship being affected during a trial in court.

Among the benefits of mediation in medical malpractice conflicts are: the patients' response to the urgent questions and concerns that have led them to bring their doctor to court for their liability (Şanta 2013, 88) allows physicians to clarify what has happened and to express regret in this respect, thereby creating an opportunity to re-establish social relations; and possibly improving patient care in the future by facilitating communication and understanding that could lead to the prevention of future scenarios of the type that initiated the initial processes.

The advantages of mediation and utility are regulated under Law no 192/2006 on mediation and the organization of the mediator profession. In the cases of malpractice reaching the criminal sphere, the mediation can only be done with the consent of the offender, respectively of the defendant, and with the consent of the victim, respectively of the injured person. If both parties agree on the commencement of the mediation procedures, they will resort to the signing of the mediation contract. From the provisions of art 67, par. 2 of Law no 192/2006 Section 2 Special provisions on mediation in criminal cases "Neither the injured party nor the perpetrator can be compelled to accept the mediation procedure" As an out-of-court procedure, mediation can be accessed at any stage of the criminal process. With regard to the follow-up actions to the injured party's prior complaint, the parties to a criminal conflict have the opportunity to conclude a settlement through a mediation agreement without the need to notify the criminal bodies, thus preventing the opening of a criminal trial.

It would be preferable that the authorized mediators contacted to mediate cases of malpractice should have legal and medical knowledge, as well as be familiarized with the terminology used by insurance companies for an easy analysis of the cause of malpractice to a speedy settlement of the case through the mediation procedure, as regulated by Law no 192/2006. In this way, they would have acquired techniques and procedures distinct from the rest of the mediators.

At any stage of mediation, the parties can exercise the principle of autonomy by deciding whether or not to proceed with the mediation procedure, choosing a particular solution proposed during the mediation session. However, the mediator is strictly forbidden to impose a certain solution. When the parties have reached an agreement to meet their interests, the mediator will note this in writing by drafting a mediation agreement and a report of closing the mediation procedure. In order to obtain the enforceable power that is needed, the mediation agreement, being an private signature document, must be submitted by the parties:

- to the court if a case is pending in this regard for the latter to issue a court order, or the notary public

From the content of art. 60 par. (1) of Law no 192/2006 it is shown that during any stage of the mediation activity, the parties to the conflict have the right to denounce the mediation contract, thus obliging the mediator to record this through a minutes report within 48 hours from the date of the notification, and to bring this to the attention of the prosecuting authorities.

Conclusions

Medical malpractice processes are extremely costly, unfair and unsatisfactory for each party involved. Ideally, mediation should take place before civil or criminal proceedings are initiated, or even before seeking legal aid so as to maximize a decrease in the total costs associated with medical malpractice disputes.

It would be ideal, to say the least, for the public health directorate to hire authorized mediators to deal with malpractice cases that would have the knowledge of jurists and medical practitioners for an easy analysis of the cause of malpractice that would lead to a speedy resolution of the case by the mediation procedure, as it is re-enforced under Law no 192/2006.

The mediation procedure for medical malpractice cases can be regarded as an extrajudicial alternative, a "WIN-WIN" solution, by its nature, for the parties in conflict who have a possibility of reaching a mutually beneficial agreement. Whereas, according to *Article 16 of the New Criminal Procedure Code par. 1* *The criminal action cannot be put into motion and when it has been put into motion it can no longer be exercised if: g) the preliminary complaint was withdrawn in the case of offenses for which its withdrawal removes the criminal liability, the reconciliation occurred or a mediation agreement was concluded under the law.* Therefore, a positive result of the mediation activity in criminal matters would lead to the suspension of criminal proceedings in the criminal investigation phase or the termination of the trial at the trial stage.

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