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Panel I: Alternative Dispute Resolution Strategies in Medical Malpractice

Max Douglas Brown

Richard H. Donohue

Patricia C. Bobb

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**PANEL 1:
ALTERNATIVE DISPUTE RESOLUTION STRATEGIES
IN MEDICAL MALPRACTICE***

*Max Douglas Brown, Panelist***

*Richard H. Donohue, Panelist****

*Patricia C. Bobb, Panelist*****

*Michele Goodwin, Moderator******

MS. GOODWIN: Thank you. I'll be brief in the introductions, but I would want to echo what has been said about our extremely esteemed

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** Max Douglas Brown is Vice President and General Counsel to Rush-Presbyterian-St. Luke's Medical Center in Chicago, Illinois. In that capacity, Mr. Brown oversees a staff of health care, corporate and labor attorneys, who respond to a variety of legal challenges confronting one of this nation's leading academic medical centers.

*** Richard H. Donohue specializes in defending catastrophic injury claims of professional negligence against hospitals, physicians, attorneys and other professionals. Mr. Donohue also represents physicians and attorneys in disciplinary matters before various state regulatory agencies. Over the last ten years, he frequently has been requested to serve as a sole or co-mediator in alternative dispute resolution proceedings involving professional negligence, insurance coverage and commercial claims.

**** Patricia C. Bobb is the principal of the law firm Patricia C. Bobb & Associates and Of Counsel to the law firm of Propes & Kaveny. Ms. Bobb was the Felony Trial Supervisor of the Cook County State's Attorneys Office. She was also the former President of the Chicago Bar Association, former member of the Board of Governors of the Illinois State Bar Association, Regent of the American College of Trial Lawyers, a member of the Board of Managers of the Illinois Trial Lawyers Association. She was appointed Chair of the Illinois Supreme Court Rules Committee, appointed Commissioner of Attorney Registration and Disciplinary Commission, and Chair of the National Institute of Trial Advocacy.

***** Michele Goodwin is faculty co-chair of the Health Law Institute and founder of the Center for the Study of Race & Bioethics at DePaul University College of Law. She also served as an assistant dean at the University of Wisconsin Law School, where she earned her LL.M. degree and was named a William H. Hastie Fellow. She has lectured and researched internationally on healthcare access for the poor, mental health law, law and education, and human rights issues affecting women and people of color.

and accomplished panel. We are absolutely honored to have Max and Patti and Richard here with us on this panel, and I'll introduce them. But I also want to share with you how proud we are at the College of Law of the students who have endeavored to take this on. Those of you who are involved with the Health Law Journal have done an extremely wonderful job in putting on this symposium, and we're extremely proud of you, and we're happy to have all of you here to join with us today.

On our first panel, "Alternative Dispute Resolution Strategies in Medical Malpractice," we have three panelists. I'll introduce our panelists, and they will each speak. We'll save questions until the panel concludes.

First speaking will be Max Brown. Max is Vice President and general counsel to Rush-Presbyterian-St. Luke's Medical Center here in Chicago. In that capacity, Mr. Brown oversees a staff of health care corporate and labor attorneys who respond to a variety of legal challenges confronting one of this nation's leading academic medical institutions. Mr. Brown was formerly associated with the Chicago law firm of Arnstein & Lehr and served as legal counsel to Michael Reese Hospital & Medical Center before taking up his present position. Max Brown also sits on our advisory board for the Health Law Institute, so we try to get as much as we can out of Max.

Richard Donohue is a graduate of Northwestern University Law School. He specializes in defending catastrophic injury claims of professional negligence against hospitals, physicians, attorneys and other professionals. Mr. Donohue also represents physicians and attorneys in disciplinary matters before various State regulatory agencies. In addition to his professional liability defense practice, Mr. Donohue has handled numerous product liability cases and commercial disputes.

Patricia Bobb is the principal of the law firm Patricia C. Bobb & Associates and Of Counsel to the law firm of Propes & Kaveny. She graduated from Notre Dame Law School, our Catholic competitors. She was also the former president of the Chicago Bar Association and a dynamic woman involved in a number of organizations and associations throughout the city of Chicago. She also served as an adjunct professor at Northwestern Law School and has taught and spoken and written on various bar association advocacy programs for the National Institute of Trial Advocacy of the ABA. I'm happy to have each of you here. We will begin by having Mr. Max Brown speak.

MR. BROWN: Thanks, Michele. Michele failed to note that I graduated from DePaul Law School. As a matter of fact, I went to night law school. I came here to Chicago during the Vietnam War to actually serve as a conscientious objector having registered as a CO in my home state of Iowa. As that did not work out, I decided having gone through that process, I needed to go to law school. And while delivering groceries on Lake Shore Drive, I started night law school here. I fortunately was able to get a position with Arnstein Gluck Weitzenfeld & Minow. To digress in terms of my own situation, the last thing I wanted to be was a corporate lawyer, coming from my background. And I had a discussion recently with one of my mentors, Ted Shapero from Piper Rudnick, and Ted did different litigation. And we had received some work from Metropolitan Life to do mortgage foreclosures. So Ted brought the mortgage foreclosure cases to me, and I said, "Ted, I just don't think I can do this. I don't want to be a corporate lawyer, and I certainly don't want to do mortgage foreclosure."

And so Ted said, "Well, look over each case that is presented and make a determination. If you can't do this, then that's fine. Let me know."

So I looked over each case that came in, and I went back to Ted and said, "You know, they're just a bunch of deadbeats. They're not paying their bills. I can do this." And we established a system for mortgage foreclosures. That is my starting point as far as a corporate attorney.

I have been at Rush-Presbyterian for the last 20 years, and I have to tell you that it's the most exciting way to practice law in a health care setting. Every day we have no idea what is going to happen. In 1995, we decided that we needed to establish a system for settling medical malpractice cases. The current system had not been working. We were not able to settle cases, and when it went to court, oftentimes the cases were settled right before trial. So what we established in 1995 was a mediation of cases, one of the only hospital-based mediation programs in the United States. Rush-Presbyterian at the time and still receives about 36 lawsuits a year. We have a backlog of between 175 and 200 pending medical malpractice actions. I think it's important to note that most hospitals are self-insured. We were self-insured for many years at \$2.5 million. Two years ago we went up to \$4 million, and this last year, we jumped dramatically to \$15 million each and every occurrence.

Now, I don't mean to hijack this symposium, but I will, and I'm going to hijack it with this challenge to Dick and to Patti: this system cannot continue. This system of compensating injured patients cannot continue. Do we injure patients in hospitals? Yes, we do. Hospitals are not particularly safe places for sick people to be.

Let's clear the myth about medical malpractice. It does occur. Sadly enough, it occurs every day, and you only need to look at today's paper or put on the television and hear about the situation at Duke.¹ That happens.

However, those medical malpractice cases in my estimation, (and again, I look to Patti and Dick to comment upon this), only comprise probably 5% of the lawsuits that are brought against us. Seventy-five percent of the cases that are brought against us are poor result cases. We didn't like what happened any more than anyone else. There was probably no clear negligence, but a patient has been injured and deserves compensation. And generally those are the cases in which in some way, with the abilities of plaintiff's attorneys like Patti who do a wonderful job, find out if this could have been prevented, and before a jury will make their case that it could have. And they have been very successful in doing that.

But this system that we have of compensating patients will result in one or more major hospitals going down. We are not-for-profit organizations. We operate on a very thin margin. Some of us lose money year after year. When we are responsible for \$15 million each and every occurrence, when the value of cases in Cook County has doubled and tripled, this is not a system that can survive.

Let me read to you from the Chicago Lawyer, their million dollar survey for 2000 and 2002. In 2000 there were 154 tort law cases that settled for more than a million dollars. Seventy-three medical malpractice cases settled for more than a million dollars. The largest

¹ On February 7, 2003, a 17-year old Mexican immigrant, Jesica Santillan, found herself in a battle for her life when doctors at Duke University Medical Center transplanted a set of organs into the girl that were a mismatch for her blood type. The organs supplied by the New England Organ Bank were removed from an individual with Type A blood and were intended for one or two other Duke University patients with compatible blood types. However, one of the patients was not medically ready for a transplant and the size of the heart was too big for the other patient. Jesica, who had Type O blood, ultimately received the organs. While in a coma-like state from the first operation, Jesica received a second set of donated heart and lungs on February 20. Although this set was described as "an incredibly good match" Jesica's brain began to bleed and swell after the second operation, causing severe and irreversible brain damage. This tragic story came to an end on February 22 when Jesica was declared brain dead and removed from life support systems.

settlement at that time was \$10 million, and the largest verdict was \$55 million.

In 2002, there were 178 tort law cases that settled for more than a million dollars. Thirty-four cases settled for more than \$5 million. There were 74 medical malpractice cases that settled for a million dollars, and 19 cases settled for more than \$5 million. The total for all settlements was \$636 million in Cook County. The total for medical malpractice settlements was \$334 million. You cannot take \$334 million out of a jurisdiction like Cook County year after year and have that system survive. It won't happen. It can't happen. So my challenge to Patti and Dick and to you all, quite frankly, is, is there a better system for compensating injured patients?

Now, what we did is we established a mediation program. Mediation is where you have a neutral that helps the parties come to resolution. As you know, arbitration is different where you have a neutral that will make a decision as far as the facts are concerned. We have a unique system of mediation because we decided what we would do was train the very best plaintiff's attorneys and defense attorneys in the city of Chicago to serve as mediators, and then we would allow the plaintiff to select two mediators, one from the plaintiff's bar and one from the defense bar.

Both Patti and Dick have served very ably as mediators. Some of the other co-mediators that we have in the city of Chicago are Geoff Gifford, Jerry Groark, Jim Demos, Jeff Goldberg, Maury Garvey, to name just a few. We have approximately 25 mediators. The co-mediators are able to resolve an issue very quickly, as we were together with Dick Donohue and Geoff Gifford just the other day. These are the very best plaintiff's attorneys and defense attorneys in the city of Chicago.

They're able to cut to the chase very quickly. They've handled these sorts of cases before, and they're able to ask the right questions. Usually we're able to resolve a mediation within a three to four hour time period. We happen to hold the mediations at the Union League Club. It's a neutral location. It's not an office. We have these nondescript rooms that we mediate in. One time they put us in the War Room, which wasn't the best room to be in with all the shields and armaments and so forth. We requested not to be put in there again.

What we do is we sit down with the family and/or the injured patient, and we try to resolve what the value of the case is. These are

cases that are usually unpredictable, and I'll go into a little bit of reason as to why we mediate certain cases.

But there is one particularly memorable mediation that we had, and Susan O'Leary, who is an associate general counsel and director of risk management at Rush-Presbyterian, will remember this. We had a mediation concerning a child who suffered from Down's Syndrome, and we gave the child ten times the digoxin that the child should have received. We killed the child. The problem was that the dosage came from the father. Now, that is no excuse for what occurred, but the father gave the nurse the wrong dosage. They checked it. The pharmacy didn't catch it. Other nurses didn't catch it. The doctor didn't catch it. There was no excuse for this child receiving ten times the digoxin. The child died.

So we're mediating this case (this was a relatively young child and the family was absolutely distraught), and we realized something. At the end of the mediation, we talked and we conferred. We said, you know, we've settled this case, but we need to do more for this family. We need to apologize to this family.

What we did was start our process of, with a successful mediation, going back and apologizing to the family. And at that time our defense counsel, Chad Castro from Anderson Bennett, apologized to the family. It was a healing. It was a healing moment as far as the family was concerned, and it took away a lot of the guilt, we believe, that the father felt in terms of giving the digoxin.

Some mediations later we were mediating, (as a matter of fact, Jeff Goldberg was the plaintiff's attorney), and we settled a bad-baby case for \$4.8 million. And the mother was very, very angry. And so I took the opportunity to apologize to her, and she ran out of the room. And I looked up to Jeff, and he ran out of the room, and he came back, and he said, "Do you know what you've done?" I said, "I think I've screwed up the mediation." And he said, "No. What you've done is taken away a lot of the anger that the mother felt with your apology."

So the apology has been part of our process. An important part of our process. It's important that we as health care providers accept the responsibility of our mistakes. Sometimes apologies, though, don't always work, or I don't feel.

On one occasion, one of the mediators said to me, "Well, let's go back in together and meet the family, and Max can do his apology thing." It's hard to gear up for an apology with that sort of introduction, but be that as it may.

Mediation is all about trust, and one of the problems that we've had in Cook County is the lack of trust between plaintiffs and defendants. One of the problems that we've had is a lack of trust between the plaintiff's bar and the defense bar, and I would say that mediation has done a lot to overcome that.

We are blessed with a tremendous plaintiff's bar in the city of Chicago, and, yes, I said plaintiff's bar. They are all very skilled and very honorable people. And we're also blessed with a hell of a good defense bar as well. We think that mediation has overcome a bit of that warrior attitude that a couple of years ago was so prevalent as far as defending medical malpractice cases.

Right now we are in the midst of a medical malpractice crisis, and I think one of the questions that we might be asking ourselves today is exactly how did we arrive at this point as far as Cook County is concerned? A few other states, Pennsylvania, Florida, Texas, most assuredly, have found themselves in the same situation. In Cook County we noticed that, and it occurred probably around the time of the O.J. Simpson trial strangely enough, that there was a sense of jury empowerment. It has nothing to do with race. It has to do with juries as political bodies.

Juries are political bodies. Alexis de Tocqueville in his book on America indicated and told us at the very beginning that juries are not judicial bodies. They are political bodies, and we ought to remember that. At any rate, what we have seen in Cook County is jury empowerment. It's not a bad thing. It's good.

We also saw a '90s economy which inflated the prices of everything. In Illinois we are blessed with two stupid political parties. The Democrats and Republicans in Illinois, if they don't get their act together, are going to have a health care system that is going to go down the tubes, and they don't have much time to resolve it. Every time the Republicans are in office, they establish tort reform. Well, we don't need that sort of tort reform because that's not fair. And every time the Democrats are in, we don't get tort reform. We don't get any sort of reform. I will suggest to you that both political parties have to wake up and do something for the health care system.

We've also seen in Cook County a resistance to settlement. Part of this has to do with a national data bank which does not accomplish what it's supposed to accomplish. We've also seen doctors who are in the midst of professional upheaval. We have seen an insurance

company, the Illinois State Medical Insurance Exchange, established as part of their approach, an intransigence, a resistance to settling cases.

There's also a myth of insurance coverage. On two occasions recently, as far as trials are concerned, we've asked jurors how much they assumed that hospitals are insured for, and their responses were incredible. In both instances they said, "Well, they've got billions." Not millions, billions of dollars in insurance coverage. This is not the case.

We just needed a few cases in Cook County to spark what has happened. That happened, I think, with the Rachel Barton case.² I'm sorry that Bob Clifford isn't here yet so I could provoke him as well as I provoked everyone else, but the \$30 million Rachel Barton case was certainly one of the sparks that caused the current situation. We have ongoing media coverage, and finally, we have hospitals. Hospitals are in the quandary.

Medical malpractice is a dirty little secret. It's not something that hospitals are terribly very proud of, and it's very hard to defend medical malpractice as far as that is concerned.

Well, I'm going to let someone else stand up. I hope there is sufficient information and that there are sufficient ideas that we might discuss for the remainder of the time. Thank you very much.

MS. GOODWIN: Next up will be Richard Donohue. Max has highlighted fascinating issues including politics, not only bringing in the Democrats and the Republicans, but juries as well. And actually, a number of people have written on your point on juries being political bodies. In fact, a recent book about the Rule of Law that's written by Neil Komesar³ deals exactly with that topic about when is it that we have too much court, too much law, and the power that juries have. It

² In March of 1999, Rachel Barton was awarded what was then the staggering amount of \$29.6 million in her lawsuit against Metra and the Chicago North Western Railroad/Union Pacific. Barton, a renowned violinist, severed her left leg in January of 1995, after being dragged close to 400 feet by a Metra train at her final destination of the Winnetka train station. The accident took place when her violin strap was caught in the closing train doors as she exited the train. Instead of leaving her half-million dollar violin behind, Barton chose to hold onto the strap until a train conductor spotted the situation. The jury initially awarded Barton over \$30 million for her injuries, but this amount was reduced by 4.5% after the jury decided she was 4.5% responsible for her injuries. Robert Clifford was Rachel Barton's attorney.

³ NEIL KOMESAR, *LAW'S LIMIT: RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2002).

will be interesting to pick up on some of those themes and to now see how Richard will respond to what Max has offered.

MR. DONOHUE: Thank you very much, Professor Goodwin. And thank you very much to the DePaul Journal of Health Care Law for inviting me. I appreciate it. Good morning ladies and gentlemen. I'm one of those people that get very nervous when I go into a law school building, but I'm happy to be here anyway.

These are very interesting times for all of us. I had suggested I thought it would be better if we sandwiched Patti between Max from the hospital and myself as a defense lawyer, but she always outmaneuvers me, and she wants to go last. I'm sure you all know she has the right of rebuttal so I'll get up here first.

I'll try to talk to you a little bit about this mediation concept, but I would say this: the most fascinating part of this to me is I only defend doctors and lawyers. It's kind of one of the strange parts of our legal culture in Chicago, and I think this is true in most major metropolitan areas. You're on one side or the other. And I can't tell you, I'm looking for the opportunity (and I hope it comes before I end my career), to try a plaintiff's case because I sure would like to argue damages instead of defend them. But that's what I'm stuck with, and it's a great challenge these days.

What I was about to say is that what I've learned out of this whole idea is that good lawyers really don't differ that much on their opinion about what should happen with these cases. I was dragged kicking and screaming into this mediation idea about seven years ago when Max and our retired judge, Jerry Lerner, put this program together. And if we hadn't just started our own firm at that time, and if I hadn't been pushed into it by my two young partners, I probably never would have gotten involved.

I don't know the rationale for it, but they decided to have the training for this the weekend before Christmas. And if you have four children and a lovely wife like I have, that is not a good time to be out of your home. But having said that and having gone through it, I wasn't really that enthused with the idea. And I think a lot of lawyers, particularly on the defense side, were of the belief that this could be a bad thing because this may cost us money. We won't have the opportunity to run the meter for three or four or five years.

And I will say, and I have said this before when I've spoken at these panels, that I'm sorry that Judge Lerner is not here. He's now a retired judge, so, of course, now he's in Florida. But I have admitted

that I have changed my mind 180 degrees on this whole idea. I think it's an excellent idea. I think it's worked very well. Unfortunately, (and Max made the point and I can say it because it's probably my biggest client), I think the biggest stumbling block to this program being more successful, is the reluctance of some of the major carriers to really commit themselves to this program.

What has happened in the last year and a half, and I don't think there's any question in my mind, is the post September 11th trauma of the jury system. And a lot of people like the professors here who are much smarter than I am, I'm sure, are going to publish on this, and we're going to learn about this.

I don't think I have a reputation among the plaintiff's bar as being a doomsayer on the defense side, but I will tell you what has happened lately is not a good thing for anybody, and it's not a good thing for me because I'm going to be out of business, too. I just don't think we can continue to see \$30-\$50 million verdicts.

What Max made reference to is that most of the major medical centers in Chicago have a very healthy self-insured retention, and the reason they do is they love to get dollar-one coverage. But they can't afford it, and so now over the last five years, approximately, the size of that retention has gone up.

So if you get a hospital, it doesn't have to be a major hospital, but a hospital that has within a particular policy year three or four or five bad hits, then they are going to go under. Although there certainly are other reasons, Michael Reese Hospital is now in bankruptcy, and Mercy Hospital has been teetering on bankruptcy. It's just going to happen, and it's not going to be a good thing for anybody.

That being said, the issue is how do we deal to get these cases resolved? Now, this mediation concept, I don't think it's been embraced by everybody, but at least the people that have participated have generally been satisfied and have come back.

There are several gentlemen sitting in the back row who are from very well-known plaintiff's personal injury firms. They've been around the city for a long time. They're very well regarded and very successful and have used this program quite effectively. And there have been a number of other plaintiff's firms, and I think that they've been generally satisfied with what has happened.

What you have to understand is this is not something where people come in and say, "Okay. What do you think our case is worth?" That is not the job of the mediators.

Frankly, Max made reference to one of the cases that I was involved with which settled for a lot of money several years ago, but it's not the mediator's job to decide what a case is worth or at what figure it should settle. That's for the parties to come to an agreement, hopefully.

And one of the advantages of this two-mediator system is when you have an experienced plaintiff's lawyer such as Patti, and a guy who can sort of fake his way through like me, you tend to have a pretty good idea of what's going on.

It's been interesting in this concept that a lot of lawyers, particularly on the defense side, have felt that this would be a good way to segue into slowing their practice down a little bit. But people seem to want as mediators lawyers that are in the arena getting eaten by the lions on a regular basis because they know what the practical problems are. They know what a particular judge is going to do on an objection.

I hate to raise the word, and I don't know how specific you get here, but the curse of every good trial lawyer in Illinois is Rule 213,⁴ which relates to opinion disclosure, (and I didn't even think about it, but I can say this now because we have Patti, the chairperson of the Supreme Court Rules Committee here).

In every case in the last ten years there has been Rule 213 objections. The lawyers are hauled out of the courtroom to, "Where is this in the deposition?" The judge is upset. The jurors are furious. Patti and her committee now have a revised rule. It is working better. But the point I'm trying to make is you need lawyers that are there everyday figuring out what problems you're going to have if you have to try the case.

Some of the questions that have come up in mediations are: When do you mediate? What's the appropriate time? Well, we've mediated cases before suits have actually been filed. If you have good lawyers and they know what's involved, and you have sophisticated clients such as Mr. Brown who knows and has been involved in these cases, there's no reason the suit necessarily has to be filed.

There was a case that was mediated involving another major medical center in the city that, like Rush, is a very fine hospital. But

⁴ Rule 213 requires all opinions to have been expressed before the trial in either interrogatory answers or in deposition testimony. The burden of showing an opinion has been so disclosed is on the proponent of the evidence.

mistakes happen. This case was mediated almost immediately when it happened. It was the old classic “sponge left behind” case.

The woman, unfortunately, was going to die. She was terminally ill from cancer. The case was mediated, and it was settled. And tragically within a matter of weeks, nothing to do with the sponges, she died from her cancer. So the timing of this goes all over the board.

I mediated a case last April with Mike Kelly, who is going to be here shortly, that was on trial. We actually mediated the case before the trial started or about a week into the trial. And I’m happy to say that the case was settled, and it was a bad case. So the timing is all over the board.

What happens at the mediation? Well, normally people submit position papers ahead of time on each side, and they’re exchanged. Sometimes if enough discovery has gone on, you might get answers to discovery. Sometimes you might not. But I think, and I’m sure Patti will comment on this if she disagrees with me, we have a pretty good idea before we ever even meet the people if they know what their case is about based on what their submission is.

Believe it or not, some of the things you learn in law school actually are true, and one is if you can’t tell me in three pages what your case is all about, you don’t know your case. And we can tell, and the nice thing about doing this, particularly when you have two mediators involved with another lawyer who’s experienced this, you can say I think they missed this issue or that issue. But you can tell from these position papers.

Then you get into who goes to the mediation. Well, I think generally speaking, it is very helpful to have the plaintiff present. However, that is the decision of the plaintiff’s attorney. That’s what they’re getting paid for, so to speak. But it seems to be helpful.

And I have witnessed these apologies that Max made reference to. They are very effective, and they’re very heartfelt, and I’ll get into them in a minute. I’m the lawyer who said it’s time for Max to give his apology thing. He was trying to be too nice.

But having said that, it can be very effective, particularly when it’s well done, and it is well done by Max and by Chad Castro, one of the lawyers who regularly represents the hospital.

But there’s a lot of emotion in these mediations, and sometimes people need their “day in court.” They need to vent. And it’s very helpful to have someone like Patti who’s been dealing with clients who need to vent for a number of years who knows how important that is.

So a lot of good sometimes comes out of it, particularly when you have (this Down's case is a good reference), a bad-baby case or a profoundly injured child. It's a terrible burden on the family, and they need to talk to somebody about it. So it can be very helpful.

On the defense side, you clearly need the person there who can make the decision of what's going to happen. I don't generally think having a doctor there is a good idea because sometimes you get bad blood rekindling in front of the mediation, and that doesn't do anything.

However, I have been at several mediations where the doctors have been there. I don't remember if Patti was involved with this with me, but I did one in a case that was pending I think down in Bloomington or Peoria and the doctor showed up. It took a day and a half, and I'll tell you, the case would have never settled if the doctor hadn't been there. He felt badly. He wanted the case settled. So it varies about who's there and who's not.

I'll explain what happens in the mediation briefly, and then I'll end. Usually people come in and make, if you will, an opening statement. It depends. If it's only lawyers there, and if you've read the submission, you know. The point is we're not there to waste anybody's time.

The one thing about this that has surprised me is that, as Max said, these things can actually go fairly quickly, much quicker than you'd think, particularly if you have very good lawyers involved. The cases that we've had real problems with and generally have not settled are when you have inexperienced lawyers there because there is definitely an advocacy of mediation, which wasn't taught when I was in law school, and I'm not that old.

But the point I'm trying to make, there's a style to this, too. You know, there's the piss-off factor, if you will, that you've got to avoid. There are also times, and this is something that Patti can speak of much better than I, when lawyers need help with their clients. When you have another experienced lawyer there, they can talk to the client. And I'll tell you, I've done a lot of these with Patti and Geoff Gifford who are two of the most respected and best plaintiff's lawyers, two people that I fear personally. But I can tell you that because they've been there and they're very effective.

And on the defense side, I've heard all the arguments from my clients. I know what's not going to work. I know that the fact that Mr. Jones was an alcoholic and Mr. Jones smoked 48 packs of cigarettes a

day, and Mr. Jones had 87 affairs on the side is not going to be a good argument to make to the jury. But when he's survived by Mrs. Jones and seven little Joneses, if you want to take a \$5 million case and make it a \$25 million case, then you can throw out all this stuff.

When you start off doing this, you think, "Ah-ha, the smoking gun." And you find out the longer you do this that the smoking gun is a 40-kilowatt, kiloton, whatever it is, nuclear holocaust that you don't want to create.

So in closing, there is no magic to this. I do think that the climate here calls out for this to be accepted. I think this is something that the law schools need to address because I think the days of mortal combat are over. And just as a practical reality, this is an idea whose time has come. Thank you.

MS. GOODWIN: As we go further along, more ideas come out of this panel. Between Max's talk and Dick's talk, issues of honesty and integrity come up. When do you give the apology and how sincere can the apology come across when over time it's heard again and again? But is it necessary for the aggrieved party to hear it? And there's some tension in balancing there, especially if the attorneys are involved with these over and over again.

Timing: getting ahead of the court process. When you get in is an interesting issue as well.

Strategies: to what extent do attorneys move and negotiate this process and how much involvement do the actual people who are involved have?

Now, what about those questions of harm? We've heard about the money issues here, and there's a lot of money at stake, in the millions, tens of millions of dollars. But how do we address patient harm, and how do we address the issue of discouraging certain types of behaviors if that is possible?

Conversely, we have those tensions of healing. Do we actually heal through the court process? Does mediation allow us to get closer to the healing process which is not all financial? Some of the healing process is something that money cannot buy. And how much does Max's apology and maybe one from the doctor actually further that healing process?

These are some of the other questions I think that come to mind with this panel, and I'm happy to welcome Patti up to the microphone so that she might further give us some insight into these issues.

MS. BOBB: I feel like I should give a rebuttal argument to Mr. Brown's comments. He raised a number of issues which are very important and very complex, and many of which are outside the confines of our discussion today. I don't want to get too far off track.

I do want to try to touch on some of the issues he raised and comment on some of the myths about medical malpractice cases. Mr. Brown read you the statistics of the million-dollar-plus cases in Cook County, and there are a number of them. I will tell you, however, that most of those cases, if not all of them, are cases that involve catastrophic and permanent injuries or deaths.

For example, last week Dick and I mediated a case where a profoundly injured baby was the plaintiff. The baby's parents were poor and on public aid as a result of the baby's condition. They had to resort to public aid to take care of this child for life. And it's not just poor parents who are affected by the cost of caring for a profoundly injured child for life. Part of the reason that these cases end up being settled or tried for so much money is the catastrophic and huge cost of taking care of these people who are profoundly injured.

One of the issues for hospitals to grapple with is the cost of medical care which has continued to rise more and more. You know, it's very easy to make the plaintiffs and trial lawyers the scapegoats. These are very complex issues. The biggest problem now is that the insurance companies that had been used to making a lot of money for many, many years, all of a sudden, because of the downturn in the economy, they're not making as much money on their investments. And how do they deal with that? They deal with that by raising their premiums and blaming the tort system and trial lawyers and juries.

What Max talked about in terms of the cost of insurance is absolutely correct, and I suggest to you that plaintiff's lawyers and juries aren't to blame for that. But we make convenient scapegoats. If you look at states across the country that have instituted tort reform and put in caps on verdicts, their premiums have continued to go up.

So it's not going to solve the problem to take away the right to a jury trial, which is one of our most fundamental rights. And, of course, I disagree very strongly that juries are irresponsible and make unreasonable decisions. I have the most profound faith in juries. I've tried cases for 30 years, and I believe in the sanctity of the jury system. Are there aberrations? Sure, there are, on occasion, but you cannot denigrate the entire system because of a claim that juries are always runaway juries and can't be trusted to make rational decisions.

I'd like to touch on the apology issue that Max mentioned, because I think it deserves a comment from a different perspective. Over the years I've handled many, many malpractice cases involving a number of hospitals and doctors. One of the things that's always been interesting to me is why it is that hospitals aren't more proactive when mistakes happen in the hospital. Why they don't approach the patient and say, "You know what, we goofed. We recognize that we made a mistake, and we want to do what we can to make it right." That's when the apology should come, not four or five years later when the plaintiffs have gone to a lawyer. I think hospitals have a responsibility to be accountable for those mistakes and be accountable for them at a realistic time. That approach would reduce the number of cases that are actually filed, because most people don't really want to go through the process of filing a case and the ordeal that follows.

Medical malpractice cases, in my view, are the most difficult types of cases for plaintiffs. Everybody thinks, even a lot of defense lawyers, "Gee, I can hardly wait until I get a plaintiff's case." Plaintiff's cases are very, very tough. Not only are they hard to prove, but they are enormously costly, more than I suggest any other kind of personal injury case. So when clients come to me with a potential malpractice case, I spend lots of time discussing with them the difficulties inherent in these cases, because they need to understand that early on before they commit to going through with the process.

The problem is that in most medical malpractice cases, there is rarely a "clear negligence case," as Max called them. Unless, of course, you take off a woman's breast by mistake because you read the wrong lab report, that's clear negligence. You chop off someone's wrong leg because you weren't paying attention to what the X-rays said, that's clear negligence. But that rarely happens. The more difficult cases are the ones we see everyday where mistakes have been made, but they are much more complicated and difficult to prove. Additionally, there are always many defenses to those medical mistakes, and that's why many of these cases don't get settled early on.

When I interview a potential client in a medical malpractice case and determine there is no case, I spend time with the client explaining why the case is not meritorious. When I turn down a case, I say, "You know, you can go out on LaSalle Street and find a lawyer that will file this lawsuit for you. You can do that. There are lots of lawyers, and you have a right to do that. I'm just telling you that if you do that and in four or five years at the end of this long, arduous journey you get

nothing, you've gone through all this hell, and you'll understand what I've told you about why this isn't a valid case." I do try to help them understand why they should not pursue the claim at all.

I believe that the plaintiff's lawyers who have experience in this field have an obligation to a potential client to make them understand what is involved in one of these cases. It's not easy for a plaintiff to be involved in a medical malpractice case and they need to have a realistic view of what they are getting into. And when potential clients come to you and they are angry, I think that anger usually has to do with what happens in a hospital setting or with a doctor.

Most people, I suggest to you, do not want to file lawsuits. Despite the publicity, most people will come to see me and say, "I've never done this before. I'm not sure I really want to do it, but I think something happened. I tried to find out from the doctor why this happened, and they wouldn't talk to me."

Another thing that happens in hospitals is that sometimes nurses who have the most contact with patients make comments to patients about something that happened. They give the patient the idea that someone made a mistake in the patient's treatment. Of course, five years later when you depose the nurse who made the comment, they have "forgotten" the conversation, but that's how these things happen sometimes.

I have had cases where people come to me, and it's clear to me that a mistake was made, but the damages aren't severe enough to justify going forward with the case. In this type of case, I have tried over the years to resolve the case without filing a lawsuit. I sometimes call hospitals and say, "Here's a case where a mistake was made. It should be settled at this stage before these people get to a lawyer." I've even told patients to try to settle them on their own in some cases where a mistake was made, but the damages weren't severe enough to justify filing a lawsuit. Unfortunately, very few hospitals will try to settle these cases at an early stage. It rarely works, and I don't really understand why.

That's not to say that every one of these cases is a valid case, but what I'm saying is that one way to deal with this problem is to have a better risk management process within the confines of a hospital. Because most patients, if you are honest with them and you say, "We made a mistake," they will respond to that.

One of the questions I always ask a potential client in a medical malpractice case is, "What do you think you can accomplish by this

case?" It's very interesting. Most of them will say something like, "Well, I don't want the doctor to be able to practice and hurt anyone else."

And I of course say, "Well, that's not going to happen and the doctor will not lose his practice or license as a result of this case. Or they will say, "I want him to admit that he made a mistake."

And I respond and let them know that they generally never admit to making a mistake. Generally, there is only one thing that realistically can be accomplished by a lawsuit, and that is to provide compensation to the client or the family member who was injured as a result of the malpractice. In fact, the truth is, that out of 50 potential medical negligence clients I encounter, I might accept one case. The reason is because even when you have a case that falls within the category of a mistake having been made, I always have to consider all the hurdles you have to get over in these cases. The first hurdle is proving that somebody violated the standard of care. In many of these cases, you can show that. It's the second hurdle that's the hardest one, and that is proving that that mistake, the negligence, actually caused the injury.

It's not enough to justify going forward if the potential client "almost died" but managed to make a full recovery. In that situation, because there is no permanent damage as a result of the malpractice, there is no viable case. This is true because in that situation, the money that would have to be spent in pursuing the case is going to be far more than you could ever recover by way of damages.

These are some of the reasons that plaintiff's attorneys who do this work regularly, probably reject most of the cases they consider. We understand this reality because we work on a contingent fee basis, and our clients can't afford to pay the cost of investigating and pursuing a case. We as lawyers have to advance those costs, and we know how expensive they are. So we have to be very, very cautious about the cases that we take.

It's all about responsibility and accountability. I think the apology is effective and generally sincere when it comes from the hospital or doctor at the time the case is being settled. I think it would be more effective if it were made at a much earlier stage.

Let me talk to you for a minute about mediation. The reason that this medical malpractice mediation really works, in my view, is because the mediators, on both the plaintiff and defense side, are all experienced trial lawyers in medical malpractice cases. If it did not have that crucial component, it would not work. All of the lawyers who

act as mediators understand the realities of the system and the value of cases, and for that reason, we're able to work toward an amicable agreement.

Dick and I have done a number of these together, and interestingly enough, in about every case that we've done together, before we get together with the parties, when we read the submissions, he and I talk usually about what we think the case might be worth. In fact, our feeling about the value of a particular case is generally in the same area, because we've had the experience.

And the other reason that it works is that those of us who do this work generally know and have a great deal of respect for our opponents. We tend to see the same lawyers on the other side of litigation, like Mr. Kelly and Mr. Donohue for the defense, who are the elite of the personal injury bar. So there's a great deal of respect and appreciation of the ability the experienced attorneys in the area in realistically determining the value of this type of case.

The mediation system works as an alternative means of settling cases. You know what it's an alternative to? Judges mediating cases. It doesn't really happen very often that judges have the time or the ability to settle cases. There are a few judges in the Law Division who are good at it, but the bottom line is they have to spend a great deal of time mediating cases, and sometimes they can't or won't spend the time necessary to effectively settle these complicated cases. So the co-mediation format provides a forum for getting together, analyzing a case, and trying to bring it to a resolution. More often than not, it does accomplish this goal.

In almost every one of the cases that I've mediated we have settled the case, if not at the mediation, sometime shortly thereafter. I find it very challenging to do these mediations because there's so many different people that you're dealing with, but the particular format with two mediators from opposite sides does work very well.

When we started out, it was a program initiated by Rush, and slowly but surely other institutions are coming on board. Other doctors are coming on board. The biggest problem is the Illinois State Medical Association. They do not want to get involved in this process. They, too, have seen a reduction, not a very big one, in their profits over the last few years, so they generally take a hard line. Hospitals actually have been the most proactive in the mediation of their cases, and I think this makes sense since in many cases they have the most to lose.

And so I am, as Dick and most of us who have been involved over the six or seven years who have been involved in this co-mediation process, are real advocates of this as an effective alternative to trial of medical malpractice. I hope the program will continue to be successful. Thank you.

MS. GOODWIN: Before opening up the floor for questions, I'd like to pose a question to our panelists. Each of the panelists have spoken about how mediation works, and that it's rather rare that you see people coming together from very different sides of an issue saying, "It works."

The question must be asked, then, why does it work? How does it end up working for the plaintiff who might have had the wrong leg cut off or who might have had the sponge or the scissors left in after a surgery? How does it work for the hospital or the doctor? What makes these processes work? Is it the money that's saved? Is it that mediation provides an opportunity for a type of communication that's not possible in the court setting? Is it because of time, that sometimes you can jump ahead of the ball game if you know that something bad happened? That perhaps, why wait until the suit was filed? Why not get the process going?

So why does mediation work? I'll open it up to our panelists.

MR. BROWN: The cases that you mentioned, cutting off the wrong leg, are not the sorts of case you're going to take to mediation. Those are virtually indefensible cases. It's a question of how much damage as far as those cases are concerned.

The cases you take to mediation are the cases that are unpredictable. You don't know what the result is. Medical malpractice cases are not clear cases, and I appreciate Patti bringing up the fact. There are reasons why incidents occur, and there are defenses. You don't know how a jury is going to react as far as that is concerned. So the principal reason you take a case to mediation is because of the unpredictability of the result.

MS. GOODWIN: It also saves you from the jury because you may worry that a jury might be sensitive to the issues.

MR. BROWN: Absolutely.

MS. GOODWIN: Of course, you have people on the jury who put themselves sometimes in the position of the person who's been harmed. Patti, why do you think that mediations work for your clients?

MS. BOBB: Well, I think the bottom line on mediation is it's probably an economic decision on both the defense and the plaintiff's side as there is always unpredictability from both parties' sides. You never know for sure what a jury is going to do, and you feel strongly about your case.

These are very tough cases. They're very expensive cases to pursue. Just the investigation and discovery phase of a trial is enormous. A medical malpractice case is enormously expensive, and you can add to that, probably double that, with the cost of a trial if it's tried the right way.

So I think fundamentally it's an economic decision. I think all of the other things just come out of the process as an opportunity to really discuss issues. And, frankly, my sense is that the plaintiff's and defense lawyers who come to these mediations really want input from people who haven't been intimately involved in the case over the years.

Lawyers get caught up in their cases, and sometimes it gets harder and harder to step back and look at a case realistically, and this provides an opportunity to do that with neutral parties who don't have anything invested in either side of the case. That is why I think it works because sometimes we bring up things and point out things to both sides that may not have actually occurred to them. If they think they have a really strong defense, for example, and Dick as a defense lawyer says that's not a great defense and it's not going to work, that makes a huge difference.

So it's an opportunity to really get a new evaluation of a case from people who don't have anything invested in it, and I think that's part of the reason why the actual process works. And if we didn't have experienced mediators who have tried cases and who know about this unique kind of a case, it would not work either, but that gives credibility to our evaluation of the facts of the cases.

MS. GOODWIN: Dick?

MR. DONOHUE: Well, I think that Max and Patti have hit the right points. I'll just make a couple brief points on this.

The only thing that is predictable about a jury trial is its unpredictability, and particularly in a case that comes to mediation that people are not certain as to what the result is going to be, but both sides are taking a chance. In these days of very sophisticated trial lawyers, jury consultants, examining the venire pool, et cetera, you do everything that you can, but you still don't know. So certainty is one factor. The costs have already been talked about.

The third thing is closure. On the defense side, we don't always have to deal with the family or someone who is tragically injured. And when you get someone in a mediation and you see the tremendous emotional angst that's involved in this, it's interesting; these mediations, they sometimes take on a life of their own, and you can see in the mediation that it is true.

I don't want to say we're like used car salesmen, but there's a closure there. You like to close the deal. And some of that inevitably happens because it's so emotional when there's this discussion, but it's over. It's a certainty and it's over. So I think that's a factor also.

MS. GOODWIN: Let's discuss the dynamics of the mediation before we open up the floor for questions.

Max, when you were talking about how you set this up, the model I assume that you use is with two mediators that come in, and then there are the attorneys that represent the various parties. Would you explain a little bit how it works?

MR. BROWN: Sure. Actually, most mediations across the country just have one mediator, and I think that this is a unique program. And it was really Judge Jerry Lerner who considered this because we wanted to establish a basis of trust.

So we have two mediators selected by the plaintiffs. They are trained by Rush, but they are selected by the plaintiff. And they can select both the plaintiff's attorney and the defense attorney, and we've never had a problem with that.

The only problem that I have had was one particular mediation in which the plaintiff's attorney, for whatever reason, selected two defense attorneys, and they gave me such a rough time as two defense attorneys. I think every defense attorney secretly wants to be a judge. At any rate, that was not a good experience. So we get together, and we share submissions, we get together, and we have basically opening statements, ten to fifteen minutes by each side. And then we have

breakout sessions, so that Dick and Geoff Gifford, for example, might go into the plaintiff's room. We try not to seek a demand because that can be a volatile situation, and so it's a matter of shuttled diplomacy.

I want to add that we started this as an experiment, and we started this as an open educational program. I would invite anyone who wants to attend one of our mediations to ask us. We'd be more than happy, and the mediators have been great. It allows you to travel with the mediators and see exactly what they do behind the scenes. So I invite you to do that.

MS. GOODWIN: And, Patti, the dynamics for your client, is it different than the courtroom? They probably start off by sitting around the table directly across from those with the hospital.

MS. BOBB: It's not quite as intimidating as a courtroom. Interestingly enough, the format can really vary a little bit, and it depends on who the mediators are and how you feel comfortable with doing it. But it is very important for me at least, and I'm sure Dick would echo this, that we get something about the case before we start. We tell the parties it doesn't have to be a long submission, basically outlining the facts. We get these cases at various stages, but many times we get the cases after expert discovery has been done and before the case is actually going to trial. The ones I've had lately, the trials are scheduled in the late spring or the summer. Ideally that's the best time to mediate a case because you know the strengths and weaknesses of your case and your witnesses, although, we've done them at various stages.

So because the mediators really understand these kind of cases, because they can quickly pick up on the facts and the strengths and weaknesses, we invite the parties to make any kind of an opening statement that they want. I think Dick and I, having done these a lot, don't really need to give a real opening statement because we don't really want to spend time in the mediation doing the advocacy thing, but it is important for the lawyers to be able to do that.

And the plaintiffs are always at that part of the session. Dick and I or one of us will explain to the plaintiff face to face what the process is, what we hope to accomplish, and we also talk to them about how we are going to be discussing the case in terms of money. And we want them to understand that that is because of the nature of the process, and we don't mean to denigrate what they've gone through or the jury. So

there really is more of an opportunity in these sessions to really talk to the plaintiffs directly.

I personally think that these do not work unless the lawyer, and primarily the plaintiff's lawyer, has really prepared the client for what the process is and what's going to happen, and that there is a relationship of trust between the plaintiff's lawyer and the client. I've had one mediation where it became clear to me that there was no communication or trust between the lawyer and the client and that they were counting on me to do their job in talking the client into settling the case. I felt very uncomfortable about that, and I would not do that, and I won't ever do that because that's not my role. If you don't have your client's trust at the point in time when you're getting ready to go into a trial, you're in big trouble as a plaintiff. I don't think you can represent anybody in that circumstance, personally.

We split the parties up room to room, and Dick and I discuss what the best way to approach the case is. It's not always a set way. It depends on where we think the problem is. If we think the demand is too high, we might talk to the plaintiffs first and discuss the case with them and maybe point out to them that, "Maybe you haven't thought about this. This defense is actually a fairly good one. It's worked in these other cases." And we go back and forth.

MS. GOODWIN: There's a hand from the back. Yes?

AUDIENCE SPEAKER 1: I'd like the panel to address the issue of the binding nature of mediation, and also, how many times going into mediation are you 27 miles apart, 10 miles apart, 30 feet apart?

MR. DONOHUE: Well, it's not binding if it's a mediation, at least the ones that I've participated in. So I think it's different from the classic arbitration, if you will, where I have done some that started off as a mediation, but they couldn't make a resolution. This has happened very rarely, not within the Rush system. But at the end of the day they said, "Okay. You've heard everything. We can't agree on this. We'd like you to decide." That in, my view, is the antithesis of mediation. The biggest challenge in this is finding out whether they are in the same universe or not, and we try to find out relatively quickly. So that's the answer on the binding.

On the money and where you're at, I never believe anything that lawyers write down and tell me anyway, so whatever they put down for

their demand or offer in these letters, I try to put people on the spot when we start because I like to know right away. When I'm at \$50,000, I say, "Are you at \$30 million? Because I've got 200 cases I'm trying to handle here, and I really don't have the time." And pretty quickly we find out how serious that demand is or not.

MS. BOBB: Almost all of the cases that we mediate come to us with both sides being in a mindset to settle the case, and I think obviously it's important before anybody decides to mediate these cases. By the way, we get paid by the hour for our work. The parties all split the cost of the mediation, and it actually is fairly cost effective. But people really are in the right mind-set. It's crucial that they are, and if they are as far apart as Dick explained, then it's going to be a waste of time.

We've had a number of cases where we begin the mediation and the plaintiff's way up here, and the defense is way down there, and one of the things we try to do early on is figure out if those are realistic numbers, and 99% of the time they're not. The plaintiff will come down, and the defendant will go up, and so our job is to try to establish some parameters within which we can do our work to try to get people to come to a middle ground.

But one of the things about a mediation is you sign an agreement. All the parties sign an agreement that nothing said within the mediation is going to be able to be used at a trial, no admissions, anything like that, so that you feel free to discuss the case.

And, they are not binding, but people who come to these come with the idea that they want to settle the case. At least the ones I've handled, I've not heard any of them blowing up for some reason. And when the plaintiff is there that makes a huge difference because you don't have that, "Well, I've got to talk to my client," part of the mediation. They're there. They're involved in the process, so they're not going to back away from it.

MS. GOODWIN: You had a question in back?

AUDIENCE SPEAKER 2: Max, as you know, we've been believers in your mediation service. We were one of the first ones in a case where we worked it out; the client wouldn't. It went to the Supreme Court and the bankruptcy courts and is there.

I want to make one comment and then ask you a question. Statistically 70% of the cases that are tried in Cook County in

malpractice cases result in defendant's verdicts, and that's something that you're aware of. Assuming that all of the ills that you talked about are there, talk to me about some possible help or cures for the system other than the mediation process.

MR. BROWN: Actually, the figure of 70% we don't think is correct anymore. That has slipped. That may have been true a couple of years ago, but that is not the case from what we understand the situation to be.

So how do we correct the ills? We need a system, and I guess it goes back to Michele's question, what is the purpose of the system now? Is it to be punitive? Because there's not all the money in the world that will rectify what has happened to a particular patient.

Are medical malpractice cases repetitious? No, and Susan and I have talked about this. There's probably no two medical malpractice cases in the last 23 years that I have been at Rush that is similar to another one or identical to another one. So all the work in terms of creating the appropriate policies are effective. Take the situation in Duke.⁵ I think they've already indicated they will have several doctors check as far as blood types is concerned. That incident will never occur again, but there will be other medical malpractice cases. I hesitate to say it, but medical malpractice cases are a cost of education. Most of these cases occur in academic medical centers. It is a cost of training. So, yes, there needs to be some system to compensate patients fairly.

And going back to the question about "how far apart." Susan and I reserve every single case at Rush, so when we go into a mediation, we have an idea of what our ceiling is. And again, I cannot overemphasize this: mediation is about trust and what you have to do to be able to convince the other side \$500,000 is a reasonable value as opposed to \$10 million.

And what you can't do is get upset with the other side. So they come in with \$10 million. Susan and I know what the value of this case is, and we know that Patti and Dick will probably come to somewhere near the same resolution. Maybe they'll say it's \$750,000. So I've got to go up a little bit more as far as my reserve, but I'm not going to get flustered because someone is at \$10 million, and then comes down to \$8 million. They'll eventually realize that I have a case as well.

⁵ See *supra* note 1.

MS. GOODWIN: Do you want to ask your questions?

AUDIENCE SPEAKER 3: Yes. Each of you has addressed the issue of serving as an advocate and, alternatively, as a neutral. The first question is, then having had both of those perspectives, how do you educate or what are some of the factors that you would use to educate both attorneys and the insurers as to the advantages of going through a mediation? And as a second part to that, in addition to the law schools which you've mentioned should take some of the responsibility for educating attorneys, who else should be educating attorneys as to the process?

MR. DONOHUE: Boy, those are two excellent questions. I think the hope was that there would be some success of the system with greater involvement of the trial bar, and the word would get around, and there would be some discussions about this. And we have actually been asked to speak at several programs like this.

We've been on enough tangents in this meeting today, and I'm not going into the mandatory continuing legal education issue, (which I'm sure all these law students are loving), because that's a disgrace in my view and maybe we're going to fix that soon. And maybe if lawyers have to go, this is the kind of program that they would go to and learn something about mediation. I think to this point it's been pretty much word of mouth, and I don't think that's been terribly successful, to be candid.

MS. BOBB: Well, I think that the climate has resulted in lawyers really thinking maybe there is a better way than going to trial. And in Chicago, and I'm sure it's true everywhere, I remember in the early days when I was working on the Mandatory Arbitration System with Judge Lerner in the Circuit Court of Cook County, people started talking about the local legal culture, which I always thought was sort of an odd term, but now I understand what it is. And what that means is lawyers within this very small group of medical malpractice lawyers really have to be educated to the availability of the process, and I think it's happening naturally.

People ask me about it. We deal with more and more lawyers, and I think almost everyone who participates in the process as a plaintiff or a defendant is satisfied with the outcome. And so by word of mouth, more and more people are doing it.

I think the difficulty comes in when you deal with a lawyer as a plaintiff who maybe hasn't had a lot of experience in the field. But I try to talk it up as best I can because, frankly, I think it's a very good thing for everybody that these cases can be resolved at a point in time when you make the plaintiff whole or as best you can, and you cut off the costs of defense by the defendant. And so practically it's just happening.

There are some people who just won't do it, and they'll never do it. And, frankly, I am glad that in the five to seven years that we've been doing it, more and more people seem to understand that it's a good thing.

MR. DONOHUE: On the insurer issue, these people talk to each other. Rush started this, but for the most part, hospitals are onboard on this. Northwestern Memorial Hospital is very actively involved in mediations. Chicago Hospital Self-Insurance Risk Pool has been involved in it. And interestingly, most of the national insurers are forced through a number of other jurisdictions to participate. CNA, for example, the doctor's insurance company, has had no choice. The problem, if there is one, is the local insurance company, and it just hasn't been part of the legal culture.

MS. GOODWIN: Two last quick questions before we go to break.

AUDIENCE SPEAKER 4: I was wondering because of the technical nature of many medical cases how you maintain the period of mediation and not turn it into a mini trial or if it does turn into a mini trial.

MS. BOBB: Well, I think that's really a good question, but I think that's another way that having experienced lawyers as mediators makes a difference. Because, again, we often encounter lawyers who have been caught in the forest with all the trees around them for years and years, and they're off on a tangent or they're sure this one particular issue is going to be a key issue. And the way we avoid getting caught up in that kind of colloquy is just to say, "Okay. I understand you think that's important, but our goal here is to look at the big picture," and it's the responsibility of the mediators, the co-mediators to make sure that doesn't happen.

And really, they start to veer off occasionally, (or maybe even more than occasionally), but I think we've been pretty good at trying to get people back on track because there's a limited amount of time that you have for these mediations. Oftentimes you spend four to six hours. It's a long process, sometimes two days. And the more of these that we do as mediators, the more we are adept at keeping them as on track as they possibly can be. That's the goal.

MS. GOODWIN: We have one last question. Yes?

AUDIENCE SPEAKER 5: Thank you. I'm not an attorney, and my question truly is only personally focused based on the fact that I've had 40 years of experience in psychiatry, the last 20 in psychiatry and the law. And I'm looking at my own future options, and recently I was in California at a conference, and an attorney spoke about mediation and the significance very much in terms of what you've said today. But she said that she felt that a mediator did not have to be an attorney, and that other people with unique experiences could be mediators. And that doesn't mean to exclude lawyers, because that's the critical component, but in a different role in that if the mediator is not an attorney.

MS. BOBB: It depends on what kind of mediation you're doing. I know that, for example, in the divorce division of the Law Division of the Cook County Circuit Court, there are mediators who mediate those kinds of issues like child support. There is a setting for non-lawyer mediators. It would not work with medical malpractice cases because non-lawyers and particularly lawyers who haven't tried these kinds of cases would not be able to understand the reality of the practice, and I think that's a crucial component. But there is in the country, certainly with regard to business disputes, many, many areas where non-lawyers can be mediators, but I just don't think this is one of them.

AUDIENCE SPEAKER 5: Thank you. The lawyer at the conference in California was referring particularly to medical malpractice, and that's why I raised the question.

MR. BROWN: And let me just support what Patti has said. I think it's absolutely crucial that you have experienced trial attorneys who are quickly able to resolve the issue. It also goes back to the reliance of the parties in terms of the experience of the mediators as well.

MR. DONOHUE: I think that relates in part to that last question that was asked. It's an interesting idea, and I don't know whether it would work or not, but I have to embrace what Patti and Max have said for this reason: You cannot get off on a tangent on these things. The purpose of the mediation is not for the lawyers to show their stuff about how much they know. And one of the benefits of this system is that the people they're talking to may not know enough about the specific case, but know enough to know whether it's going to pass the red face test or not.

And, frankly, what we do has changed. Before, we would very patiently sit there at the beginning, and they would go on and on and we would be very polite. Those days are over. And now, frankly, (and Max is laughing but it's true), after about 30 seconds when people go off on something, I interrupt. It's usually easier to do for the lawyer whose side it is that is doing it. But, you know, we have the godfather of nucleated red blood cells Mr. Kelly,⁶ sitting in the back of the courtroom, and, frankly, I don't want to hear about it because I know what he's talking about. And I know that there are 48 articles on the other side of the literature that tell him he's full of his usual you know what. So respectfully, I just don't think it would work in this context.

MS. GOODWIN: Well, thank you very, very much. That concludes our first panel. We're going to have a break and reconvene at 10:45. Thank you very much.

⁶ Mike Kelly is a panelist for the subsequent panel, "Panel 2: Anatomy of a Malpractice Case from a Litigator's Perspective." He frequently has used Dr. Jeffrey Phelan, a maternal-fetal medicine specialist from Pasadena, California, as an expert. Dr. Phelan and a colleague, Dr. Gilbert Martin, a neonatologist from Los Angeles, have published several medical articles discussing the presence of a high nucleated red blood cell count as a marker arguing against perinatal asphyxia as causative of brain damage in bad baby cases.