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# Mediation As An Alternative Dispute Resolution Tool In Healthcare Malpractice

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***Abstract:*** **This review paper, Mediation As An Alternative Dispute Resolution (ADR) Tool in Healthcare Malpractice, begins with background information on medical malpractice in the United States of America. Given the expansive growth of medical malpractice suits, alternate dispute resolution has been embraced in many states to find swifter and less costly avenues to address medical malpractice suits stemming from health care organizations and private practices. Among the alternative dispute resolution models, mediation has been deemed beneficial in many regards to address potential medical malpractice cases. Various elements of mediation are presented, including, but not limited to, definitions, types, growth, uses, metrics, benefits, weaknesses, processes and outcomes. Bible-based alternative dispute resolution in human matters and medical malpractice is also included. Recommendations for health administrators related to alternate dispute resolutions and related policies are presented followed by a summary discussion.**

***Keywords:*** **alternative dispute resolution, healthcare administration, healthcare malpractice, mediation.**

## I. BACKGROUND OF MEDICAL MALPRACTICE

### Definition and description of medical malpractice

According to Bieber (2023) medical malpractice arises when a health provider, of any type, provides care that does not meet the proper standard of care.[1] Included in the group of health providers are doctors, nurses, surgeons, anesthesiologists, radiologists and more.[1] Giardino and Edwards (2021) defined medical malpractice as "an act or omission by a healthcare provider that deviates from the accepted standard of practice in the medical community and causes harm or injury to the patient."[2] Pakpahan et al. (2021) described the moral obligations and principles of the medical profession to include autonomy (respecting the rights of patients), beneficence (extending kindness to patients), nonmaleficence (not harming patients), and justice (eliminating discrimination).[3] Despite the importance and use of the moral principles, Susila (2021) stated that the growth of medical malpractice cases is a global phenomenon – although the medical malpractice system in the United States is well developed when compared to other countries.[4]

Susila (2021) further characterized the United States of America as a litigious society with medical malpractice suits being common occurrences.[4] Giardino and Edwards (2021) stated that the chance that an American doctor will be sued is greater than any doctor in other parts of the world.[2] Gutierrez (2020) simply described medical malpractice litigation as a way to determine whether there is the existence or absence of liability in a dispute between a patient and healthcare provider (doctor, hospital, nurse).[5]

Jackson et al. (2021) further reported that the medical malpractice has burdened the United States' healthcare system economically, through direct and indirect costs.[6] Due to a rise in malpractice payouts, Jackson et al. (2021) reported that there has also been an increase in defensive medicine leading to longer hospitals stays and unnecessary ordering of hospital procedures.[6] Accordingly, Glover et al. (2020) reported that perceptions of medical liability have influenced clinical

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decision-making (defensive medicine), trainee decisions related to specialty/subspecialty training, where to practice and which practice models to utilize.[7] Giardino and Edwards (2021) described the impact of medical malpractice concerns resulting in the practice of defensive medicine, depletion of limited resources, and limitation on the release of clinical quality management documents.[2]

## ELEMENTS OF MALPRACTICE / NEGLIGENCE CLAIM

According to Bieber (2023) elements needed to prove a malpractice claim include a doctor-patient relationship with duty to care; a provider's breach of the duty to care in accordance with what a reasonable physician with comparable skills and training would have done; patient harm due the provider's treatment failure; and the acquisition of patient damages (bills, income loss) due to the provider's negligence.[1] Giardino and Edwards (2021) presented the elements to prove negligence as a cause of malpractice as follows: "duty to treat; breach of duty to provider reasonable standard of care, causation, and evidence of damages - emotional or physical harm."[2] According to Pozgar (2023) negligence has three forms: malfeasance when an unlawful or improper act is carried out; misfeasance – when an act performed improperly results in injury to another and nonfeasance when a provider fails to act when there is a duty to act as a reasonably prudent person would do in a similar situation.[3]

## REASONS FOR MALPRACTICE CLAIMS

Reasons for malpractice claims run the gamut in healthcare organizations and practices. Bieber (2023) reported medical mistakes as contributors to medical malpractice claims.[1] Among the mistakes were misdiagnosis, delayed diagnosis, failure to obtain informed consent, incorrect treatment, treatment mistakes, surgical malpractice, birth injuries, wrongful death, emergency room negligence, anesthesia errors, and amputation injuries.[1] Jackson et al. (2021) reported common plaintiff allegations related to spine litigation as complication of procedures, lack of informed consent, and failure to diagnose and treat patients in a timely manner.[6] Gutierrez (2020) also reflected on the role of anesthesia in the increase in medical malpractice claims.[5] According to Gutierrez (2020), "the introduction of anesthesia in 1846 expanded the surgical field and the number of surgical procedures."[5] The rise in surgical procedures led to the rise in medical, dental and pharmaceutical claims.[5]

According to Jackson et al. (2021) in the United States health care system, spine surgery is one the most litigious areas.[6] Glover et al. (2020) also reported specialty specific malpractice claims from 2001 to 2015 that included the highest number of claims for obstetrics and gynecology, internal medicine, surgery, family medicine and emergency medicine respectively.[7] In Poland, Benedikt et al. (2020) also reported that conflicts involving medical professionals and patients can arise from consent procedures, health promotion and prevention of diseases, diagnosis, therapy, rehabilitation, drawing up healthcare documents, passing medical information and issuing medical opinions.[9]

Asian authors also reported causes of patient and family dissatisfaction (medical disputes) as a provider not doing what the medical agreement said must be done; being late or untimely in the fulfillment of the medical agreement; not perfectly performing the obligatory terms of a medical agreement; and a provider doing what the consensus (reasonable comparable provider) said should not be done.[3]

## IMPACT OF MEDICAL MALPRACTICE

The impact of medical malpractice is far-reaching – although health reform seeks to deter the filing of frivolous claims.[4] According to Susila (2021), "a 2013 study estimated that 210,000-400,000 people die annually in the United States of America due to medical errors."[4] Yihan and Zhu (2020) reported that the number of annual deaths from preventable medical mistakes in hospitals is more than the number of Americans who died in the Korean and Vietnam wars.[10] "With as many as 100,000 deaths a year, medical malpractice kills almost as many people as AIDS, breast cancer, and motor vehicle accidents combined."[10]

Variations in the annual number of deaths due to medical errors and medical malpractice highlight the difficulty in accurately determining the true impact of medical malpractice in the United States of America. Even so, the reported deaths do not include the number of patients that may have been injured or suffered losses due to medical malpractice – the deviation from accepted standards of care.

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### COSTS OF MEDICAL MALPRACTICE CLAIMS / TYPES OF COMPENSATION

Glover et al. (2020) reported that the median amount of malpractice claims among resident physicians from 2001 to 2015 in the United States was $199,024 – an amount that was similar for non-resident physicians ($190,200).[7] The mean amount paid for the resident physicians during the time period was $430,139 (Glover et al., 2020). Jenkins et al. (2021) highlighted research showing that the traditional medical malpractice litigation process costs more than $55.6 billion annually (in 2008 dollars).[11] The author also reported that based on the states ranked in a 2019 U.S. Chamber Institute for Legal Reform Lawsuit Climate Survey, Florida was ranked among the worst states for overall treatment of tort and contract litigation, damages, judges' impartiality, jury fairness, and proportional discovery.[12] Other states with reports of high costs and adverse state liability systems included West Virginia, Mississippi, California, Louisiana, Illinois, New York, New Jersey and Missouri.[13]

Jenkins et al. (2021) reported that national indemnity payments for malpractice claims for 2015 – 2019 were highest in Florida – with an average of $496,000 per claim – with a defense fee averaging $119,000 – also the highest in the nation.[11][14] According to the Journal of the American Medical Association, $300,000 is the mean payment for victims of medical malpractice – varying based on damages and injuries sustained by patients.[1] There have also been reports of seven and eight figure settlements based on the severity of injuries and damages.[1] Susila (2021) reported that malpractice fees are growing 7.5% annually – with more than 50% of awards going to legal fees.[4] Yuhan and Zhu (2020) stated that "awards are meant to make the injury victim whole. Thus, compensatory damages may include payments for monetary losses, medical care, lost earnings, pain and suffering, emotional distress, loss of companionship, loss of enjoyment of life, and more." [10]

## II. ALTERNATIVE DISPUTE RESOLUTION MECHANISMS FOR MEDICAL MALPRACTICE CLAIMS

### THE ROLE OF GOVERNMENT AND LAW IN MEDICAL MALPRACTICE CLAIMS

"The government uses laws and regulations to codify actions it believes to be appropriate in specific circumstances for the protection of the population."[2] Likewise, the government has National Quality Standards to improve the overall quality of healthcare, by reducing costs, reducing harm caused in the delivery of care and by promoting the wide use of best practices for healthy living.[2] Also in 1986, the National Practitioner Data Bank (NPDB) was created as a component of the Healthcare Quality Improvement Act.[2] The NPDB "was intended to restrict the ability of incompetent physicians to move from state to state unscrutinized."[2]

According to Pozgar (2023), "the number of adverse actions reported for nurses to the NPDB was 12,298 in 2003, which nearly doubled to 22,742 in 2012."[8] Giardino and Edwards (2021) stated that "hospitals, state medical boards, and other healthcare entities who engage in formal peer review activities are required to report disciplinary actions they have taken to the NPDB."[2] The reporting requirements include professional review actions of physicians, acceptance of surrender of clinical privileges or restriction of privileges of a physician, professional board actions that result in licensure status changes, exclusion of Medicare-Medicaid programs and sanctions and malpractice payments and settlements made on behalf of physicians.[15]

Huey (2021) reported that individual states have their own laws concerning mediation.[16] Gutierrez (2020) reported that "procedures followed in medical malpractice cases are dependent on the individual state laws and rules of evidence and civil procedure."[5] The author cited the case of Florida statutes that require a three-week settlement conference before trial - while as many as seventeen other states require medical malpractice cases to be presented to a screening panel before the trial stage.[5] Among the seventeen states named were Alaska, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, Utah, Virginia, the Virgin Islands and Wyoming.[5] "In response to the malpractice crisis, a majority of American states have adopted tort reform measures aiming to reduce the overall costs of medical liability. The extent and specifics of tort reform varies from state to state." [4]

Also, some states have made reforms that make it difficult to file cases and others have made efforts to place caps on damage awards, shorten statutes of limitations, implemented pre-trial review panels, limited liability of individuals through joint and several liability reforms, modified collateral source rules and periodic payment for insurers.[4]

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## MODELS OF ALTERNATIVE DISPUTE RESOLUTION FOR MEDICAL MALPRACTICE

Susila (2021) reported that American courts have encouraged parties to settle medical malpractice suits using alternative dispute resolution – acknowledging that some states such as Colorado and Wisconsin already have successful programs.[4] Susila (2021) stated that alternative dispute methods such as arbitration, mediation and the communication and resolution programme (CRP) allow for a non-combative, swifter, more economical means for medical malpractice settlements.[4] Arbitration is the referral of a dispute for determination by a third party (the arbitrator) whose decision is based on the facts and evidence submitted by the parties.[4]

"Mediation is the process whereby a third party, the mediator, attempts to bring about a settlement between the parties of a complaint." [8] However, most scholars report that the mediator role (neutral) and terms of the agreement are different from those in arbitration. The Communication and Resolution Programme encourages communication and facilitates restitution for injured parties.[4]

## MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION TOOL

Giardino and Edwards (2021) specifically describe mediation as a "form of conflict resolution that brings two parties together to discuss their issues with the assistance of a mediator (an impartial third party) but does not involve a binding decision."[2] According to Giardino and Edwards (2021) the mediator is an honest broker who does not have the power to require a settlement.[2] Gutierrez (2020) reported that many states have established pre-trial screening panels as a form of alternative dispute resolution through arbitration proceedings as well as pre-trial mediation.[5] Such mediation panels are supported by health professionals as they can be used to quickly determine whether medical malpractice cases have grounds to be settled or moved to the trial stage.[5]

Besides medical malpractice, mediation can also help to resolve disputes "related to consumer protection, land hazards, environmental destruction, and labor."[17] Stulberg (2020) also reported that mediation can be used to address educational disputes with parents and school districts, and disputes with homeowners and financial institutions regarding mortgage debt reduction schemes to avoid foreclosures, immigration policies, and police practices.[18] Benedikt et al. (2020) reported that mediation can be applied in "family conflicts, divorce conflicts, residential conflicts, environmental conflicts, workplace conflicts, transportation conflicts, conflicts in international politics, conflicts in municipal politics, school conflicts, ethnic conflicts and judiciary conflicts."[9]

When considering the use of a particular mediator, parties sometimes examine physical proximity, compensation rate, substantive expertise, and mediator competency.[18] Some institutions also require minimum requirements for a person seeking to be a mediator – such as the completion of a mediator skill building program with a requisite number of training hours.[18]

According to Carbone (2019), a qualified mediator usually has formal training and an accumulation of substantial experience.[19] Carbone (2019) also asserted that subject matter training does not substitute for training in mediation.[19] Dearmin (2022) reported that private mediators may include retired judges, former plaintiff or defense attorneys.[20] The number of excellent mediators with such expertise are limited in number and often require extended time periods (up to six months) to retain.[20] Even so, Dearmin (2022) reported that parties working with a talented mediator may reach a mutual agreement 70-80% of the time.[20]

Jenkins et al. (2021) reported that mediators for the University of Florida, Florida Patient Safety and Mediation Program (FLPSMP) were required to complete a mediation certification program that included "standards of mediator education (graduate degree), training, mentorship and good moral character."[11] Mediators of the FLPSMP "had between 10 and 30 years of Florida Supreme Court-certified mediation experience, with a group average of over 12 years. Collectively the mediators participated in over 8,900 civil mediations, of which, about 250 were FLPSMP cases." [11] Pakpahan et al. (2021) summarized the role of the mediator "to help parties seek various possibilities for dispute resolution by not making decisions or imposing views or judgements on problems during the mediation process." [3]

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## TYPES OF MEDIATION (COURT/ PRIVATE)

There are various types of mediation that can be used to settle medical malpractice disputes. Dearmin (2022) stated that there are times when parties are required to meet with a court-ordered mediator.[20] Such court mediators often lack experience with medical malpractice, thus yielding a less than optimal outcome – 5 – 10% success rate.[20] Carbone (2019) advised that when court-ordered mediation occurs, counsel should aim to use the mediation time to exchange information, streamline discovery and as a way to lay the foundation for negotiation and settlement.[19]

Dearmin (2022) reported that in medical malpractice lawsuits, it is common for parties – including the plaintiffs and any defendants to meet a private mediator.[20] Mediations with private mediators have a much higher rate of success for negotiation and settlement.

## GROWTH/MODELS OF MEDIATION

Susila (2021) highlighted the growth of mediation in the United States as a result of the explosive increase in medical malpractice cases during the 1960s and 1970s. [4] During this period, court and legislatively approved mediation programs grew to include both civil and criminal cases.[4]

According to the author, some states such as Connecticut and Wisconsin have mandated that medical malpractice cases undergo mediation.[4] Additionally, several medical universities have instituted formal medical malpractice mediation programs and panels – such as Drexel University's College of Medicine and the University of Florida Health System.[4][11]

Accordingly, mediation models began to grow and develop, including facilitative, evaluative, settlement and transformative or therapeutic.[4] In the facilitative model, the mediator helps parties to reach a solution by analyzing the issues, exploring favorable options and offering advice and opinions about the outcome.[4] Carbone (2019) stated that facilitators promote communication and help parties reach a mutual resolution without expressing opinions on case merits.[19] "Evaluative mediation is a hybrid form of mediation and arbitration. The mediator performs a quasi-arbitral function." [4] Carbone (2019) indicated that evaluators will provide expressions on case worth and merits.[19] Settlement mediation occurs in courts or other institutions that limit processes and outcomes.[4] Transformative mediation aims to alter the disputants' appraisals of each other using therapeutic techniques.[4]

## MEDIATION PROCESSES FOR MEDICAL MALPRACTICE DISPUTES

The mediation process can vary based on setting, overseeing body and type. However, Dearmin (2022) stated that once plaintiffs and defendants have agreed to mediation, each party will provide a mediation brief to the mediator.[20] Thereafter, participants will work and negotiate until an impasse, a situation when progress is no longer possible, occurs. The mediator may create a mediator's proposal for the group to consider. If the case is not resolved, the matter may proceed to trial – although information from the mediation process remains confidential and cannot be used by any party in a subsequent trial.[20]

Carbone (2019) encouraged preparation, patience, openness, compromise, and bargaining in the mediation process.[19] Also, the process should include a well-qualified mediator, pre-mediation conferences, position papers, moderated exchange and direct dialogue, participants with full settlement authority, and realistic / negotiable offers.[19]

Huey (2021) highlighted the family law mediation process in Texas where, the day before mediation, parties and their lawyers receive forms from the mediator or mediation service that must be read, completed, signed and returned – including the rules of mediation.[16] Once mediators are paid, if not court-appointed volunteer mediators, the basic evidence will be presented with time for exchange, using rules of confidentiality and good faith negotiation.[16] The role of the mediator will be to remain neutral and help the parties reach an agreement on the dispute – regulating emotions. If an agreement is reached, the parties will sign the agreement (Mediated Settlement Agreement) before leaving the mediation session.[16] To become a final order, the agreement will need to be drafted, reviewed, and signed by the parties and the judge on the case.[16]

Balzer and Schneider (2021) reported that "even if a mediator provides a settlement offer, the parties can decide to reject it and enforce a hearing."[21] Balzer and Schneider (2021) also added that term sheets can be used to confirm intermediate results of mediation and allow for negotiation about other aspects of the mediation process.[21] Though not always legally

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binding, term sheets can be signed separately, after which time, the mediator prepares the final settlement agreement.[21] Mediators are also trusted and provide confidence to parties in the procedure.[21]

## BENEFITS / LIMITATIONS OF MEDIATION RELATED TO MEDICAL MALPRACTICE DISPUTES

Although mediation does not always end in a mutually agreed upon settlement, numerous authors and scholars have reported the benefits of mediation. According to Huey (2021), mediation is an effective and efficient way to resolve cases without the time and expense of trial preparation and proceedings.[16] Likewise, Balzer and Schneider (2021) reported that mediation can lower legal expenditures in dispute resolution – even with failed settlements.[21] Creo (2020) highlighted how mediation sessions can be conducted online via Zoom for efficiency and cost-effectiveness.[22] Such Zoom sessions were also favored among insurance representatives – limiting their need to travel to participate in mediation sessions.[22] Even in Poland, Benedikt et al. (2020) presented "mediation as an attractive low-cost alternative to court proceedings as the parties remain in full control of the process."[9]

Dearmin (2022) indicated that mediation can bring a lawsuit to a close sooner, involving less time, energy and less distress than going to trial.[20] Dearmin (2022) stated that the process can take hours and may require an additional day for negotiation and settlement.[20] Time required for mediation can be varied – but much less than the time needed to prepare and go to trial. Carbone (2019) reported mediation cases that have been settled in a half day to a full day – sometimes requiring more than one session.[19] Jenkins et al. (2021) reported swift resolution of cases with less than nine months as the average settlement time for medical malpractice claims in the Florida Patient and Safety and Pre-Suit Mediation Program during a thirteen-year period.[11]

Balzer and Schneider (2021) described the mediation process as allowing for flexibility by the mediator.[21] Carbone (2019) also cited the neutral role of the mediator in resolving disputes.[19] Balzer and Schneider (2021) also highlighted the importance and benefit of a neutral committed third party to disseminate information among the disputing parties.[21]

Confidentiality was also a great benefit of the mediation process as noted by several authors.[19][20] Painter et al. (2023) reported that mediators can improve communication, allow for common ground and assure the confidentiality of information be exchanged – which cannot be subject to discovery in medical malpractice claims or legal proceedings.[23]

Susila (2021) reported that the American healthcare system has also used mediation to facilitate communication between patients and doctors after an adverse event, to ease tensions among members of caregiving teams, to help with end-of-life decisions by families and health professions and to help to settle medical malpractice claims.[4] Banjarnahor and Helvis (2023) described mediation as a way to solve a disagreement by bringing in a neutral third party.[17] Benefits of mediation were presented as a means of preserving the image of the hospital and as a way of maintaining trust in health professionals.[24] Benedikt et al. (2020) highlighted "mediation as profitable for conflicted parties who are striving to maintain their long-term relationship, as well as those for whom confidentiality is a priority."[9]

In a 13-year review of the University of Florida Health System/ Florida Patient Safety and Pre-Suit Mediation Program, the settlement / overall resolution rate was reported as 74.4%.[11] Dearmin (2022) also reported a mutually acceptable agreement 70 – 80% of the time when an experienced private mediator is utilized.[20] Benedikt et al. (2020) described mediation as "a highly valuable method of resolving conflicts in an inexpensive, timely and mutually respectful way."[9]

However, Dearmin (2022) reported that a con of mediation was that some defendants wanted their day in court based on the belief that they had met the standard of care.[20] Also, some health systems and providers believed that settling cases that could be won in court fueled the tendency for frivolous lawsuits.[20] Benedikt et al. (2020) cited the lack of balance of strength among conflicted parties in relation to economic or intellectual resources as a weakness.[9] Another allegation was that mediation is a tool for the privatization of the justice system.[9]

## POTENTIAL MEDIATION OUTCOMES FROM MEDICAL MALPRACTICE DISPUTE SETTLEMENTS

While the benefits of mediation have been established, all mediation cases do not end in settlements. Jenkins et al. (2021) reported that when the Florida Patient Safety and Pre-Suit Mediation Program was not successful parties involved had "the right of access to the courts to pursue traditional litigation."[11] Huey (2021) also reported that the rights of parties to secure the support of a judge to determine how the terms of a Mediated Settlement Agreement should be expressed in a final order

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in Texas.[16] Huey (2021) reported that a mediator can declare an impasse when no agreement can be reached – and an explanatory final short report can be filed with the court in Texas.[16] After the impasse, the case can be revisited in a few weeks for a post mediation settlement, mediated or non-mediated.[16]

Dearmin (2022) reported that if an impasse is reached, the mediator may make a proposal for the parties to consider.[20] When cases are settled there tends to be a lower payout than when cases are decided by a jury.[6]

Cases that fail in initial mediation can be revisited, arbitrated or proceed to court. Also, Jackson et al. (2021) reported that of the surgical cases that go to court, a favorable outcome is more likely (54-74.1%) for the surgeon or defense.[6] Carbone (2019) reported that the most common reason for a failed mediation is the non-attendance of persons with real settlement authority.[19] Staszak (2022) reported that legal disputes have not disappeared but have been diverted to other avenues of resolution.[25]

Dearmin (2022) also reported that of the vast amount of medical malpractice suits in the United States of America, only 7-10% go to trial; most are dropped or settled.[20] However, "if alternative dispute resolution fails to engender settlement, the disputants can use the information obtained during the alternative dispute resolution to determine what evidence to provide in an adversarial hearing."[21]

**BIBLICAL DISPUTE RESOLUTION IN HUMANITY AND MEDICAL MALPRACTICE**

Loue (2020) presented the number of disabilities in the United States annually as a result of medical errors.[26] The author also reported that physicians and health providers were often encouraged to avoid taking responsibility or apologizing for their errors – in an effort to minimize evidence in possible litigation.[26] Such views were deemed adversarial to Abrahamic faiths of Judaism, Christianity and Islam – which encourage truth-disclosure and apologies.[26] Loue (2020) provided scriptural references for truth-telling, apology and forgiveness using a bioethical comparative approach.[26] Such research provides foundational faith-based (including biblical) antecedents to alternative dispute resolution.

Colombo (2022) reviewed perspectives of intra-faith dispute resolution within Christianity.[27] Following a definition of alternative dispute resolution (ADR) and its various modalities (arbitration, mediation and mini-trials), Colombo (2022) provided scriptural basis for Christian ADR using the New Testament.[27] Two of the scripture references were:

"Matthew 5:9 – Blessed are the peacemakers: for they shall be called the children of God and Matthew 5:25 – Be at agreement with the adversary betimes, whilst thou art in the way with him: lest perhaps the adversary deliver thee to the officer, and thou be cast into prison."[27]

Most of the verses presented expanded upon Christ's fundamental message of mercy and forgiveness. In a secular environment, this would look like present day mediators aiming to help parties settle disputes – using guiding principles of justice, fairness, inclusiveness and equitable treatment. Parties involved would also be amenable to negotiation using patience and mercy. The mediation process has been heralded for its ability to expedite disputes in a much quicker manner than matters handled in a court setting.

Litigation was referred to as an offense / sin that revealed covetousness, ambition and revenge. The author also referred to litigants as involved in idolatrous practices.[27] However, in today's society, the author stated that the church had been stripped of its authority to exercise jurisdiction over Christian disputes – although the legal system is a product of the church.[27] However, the legal system (civil courts) and Christianity were deemed as not necessarily incompatible. Ideally, according to the author, Christian disputes should be resolved charitably and in good faith.[27]

An American theologian, Albert Barnes, reported that where a Christian is injured in his person, character or property, he has a right to seek redress through the courts – as a duty to his country, family and himself.[27] This should not be done for revenge or love of litigation but with the love of justice, and with a forgiving temper that the opponent may be benefited, and his rights secured.[27] Such research provides a historical dimension to the ADR process – with mediation based on several scriptures. In addition to the historical framework, the information presented supports biblical world view of mediation.

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**RECOMMENDATIONS FOR HEALTH ADMINISTRATORS IN HEALTH FACILITIES REGARDING ALTERNATIVE DISPUTE RESOLUTION**

Healthcare administrators will greatly benefit from the guidance and lessons learned in the literature on mediation in malpractice and medical disputes. Giardino and Edwards (2021) recommended a seven-pillar approach to adverse events (using a model from the University of Illinois: Chicago) – "Reporting, Investigation, Early communication with patient, Apology with remediation, Process and performance improvement, Data tracking and analysis, and Education around the entire process."[2] The University of Michigan Health System also supported honesty and transparency with "open disclosure and offer."[2]

Jackson et al. (2021) suggested that there be more effective communication on informed consent to include the elements of the case, its risks, alternative to surgery along with a physical signed document.[6] Jackson et al. (2021) also advocated for developing protocols to minimize wrong-level surgery or retained foreign bodies. Also, surgeons should be encouraged to strive to provide timely diagnoses and treatment requiring urgent or emergent care.[6]

Painter et al. (2023) stated that attention should be focused on medical record documentation, disclosure of adverse events, second victim (physician) programs, grievance management techniques, alternate dispute resolution concepts, regulatory inquiries including state and licensure investigations, product failures, and electronic media strategies.[23]

Painter et al. (2023) also stated that prudent health organizations value healthcare risk management and use it to limit legal exposure and professional risk – especially for those specializing in obstetrics and gynecology.[23] Pakapahan et al. (2021) suggested that hospital management (healthcare administrators) address the need for two-way communication between doctors, dentists, health workers and patients.[3]

Also, the hospital management (healthcare administrators) "must provide an informed consent sheet as proof of consent that the patient has been given the information and a refusal sheet as evidence that the patient refuses or cannot accept the information given.." [3] Jenkins et. al (2021) highlighted the addition of mediation guidelines to patient consent forms.[11] A requirement that healthcare administration could consider and incorporate in their healthcare facilities. Additionally, Lee et al., 2020 emphasized the importance of administrative policies including adequate explanations to accompany written consent to decrease medical malpractice lawsuits and the need for dispute resolution.[28]

COPIC Insurance Company, a Colorado-based medical liability carrier introduced an early intervention program that may also be useful to health administrators.[29] The program highlighted the importance of the 3Rs in resolving medico-legal disputes – "recognize, respond and resolve with emphasis on disclosure, transparency, apology and patient benefits."[29]

## III. SUMMARY DISCUSSION

Malpractice and medical disputes occur in most healthcare settings – with common occurrences in orthopedic surgery, obstetrics and emergency units. Findings from the current review highlight the evolution, growth and role of mediation as a means to effectively manage malpractice claims and other medical disputes through out of court settlements. Medical malpractice cases may especially benefit from mediation - using court trained and private mediators. The relationship between mediation and timely and cost-effective resolutions was widely presented. Other benefits such as a neutral third party, confidentiality, enhanced patient-provider communication, mediator and process flexibility, protecting the reputation of the health facility and maintaining provider and patient trust were also included.

In addition to healthcare, various types of mediation were also utilized in many other fields – including facilitative and evaluative. Though mediation processes and procedures varied from state to state, timely and cost-effective resolutions remained a central theme – even in medical universities. Even so, some limitations of mediation in malpractice and medical disputes were identified as the potential asymmetry between parties in relation to income and knowledge, experience of some mediators, the need of some parties to have their day in court and use of mediation as a privatization tool of the courts.

Historical antecedents revealed that mediation has a faith (biblical) basis as supported by many scriptures and passages. Additionally, mediation literature provided guidelines for healthcare administrators relative to informed consent, medical record documentation, dispute resolution protocols, ways to protect the integrity of a healthcare institution, ways to limit litigation, grievance management, and ways to maintain trust in the provider - patient relationship.

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It is likely that mediation will continue to grow as an alternative dispute resolution tool in medical malpractice suits. The benefits reported greatly outweighed the limitations and weaknesses. Limitations of amount and timeliness of settlements present win-win scenarios for providers and patients. Efforts to minimize the volume of medical malpractice lawsuits going to trial has been greatly enhanced by mediation programs nationwide.

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