

Attorneys for NHC fire case speak to Rule 31 class at ICM



Early disclosure of all documents and legal arguments, confidentiality agreements, an experienced mediator and cooperation among lawyers were some of the major factors resulting in 30 of the 32 lawsuits filed in the 2003 National HealthCare Corporation (NHC) fire to be settled within a year of the tragedy, a remarkably speedy conclusion in legal terms.

So said two of the lead lawyers involved in the case – Lee Barfield, of Bass Berry & Sims, and David Smith, of the Law Offices of David Randolph Smith & Edmund J. Schmidt III, at a mediation training session Thursday at Lipscomb University.

“If we had not gone to mediation and had all these things come together, we would still be in court today,” Barfield told an auditorium full of professionals enrolled in Lipscomb University’s first [Rule 31 mediation training](#) course.

In March, Lipscomb’s [Institute for Conflict Management \(ICM\)](#) was approved as the only educational institution in Middle Tennessee to offer Rule 31 mediation training, a course required of anyone desiring to conduct court-annexed mediation. The ICM’s first class of Rule 31 mediators began instruction earlier this summer, and Barfield and Smith were on hand Thursday to provide an insider’s view of the high-profile NHC case.

In September 2003, a fire broke out in an NHC facility on Patterson Street killing 17 and injuring 20, Barfield told the class. The facility did not have sprinklers and, at that time, was not required to by state law.

NHC’s desire to put the tragedy behind them by resolving the lawsuits quickly and the families’ desires not to relive the experience at a trial were both strong motivators in pushing the case toward mediation, said Barfield, who represented NHC, and Smith, who represented several plaintiffs. NHC didn’t want to put its employees through a lengthy litigation experience and most of the families were not interested in waiting years for a settlement, said the lawyers.

Barfield and Smith both outlined numerous steps in the preparation for the case that they believed led to very successful mediation process and a fair settlement for the families of the victims:

- **Information was shared openly and earlier than in most litigation.**

Early on the various plaintiffs’ lawyers for all 32 suits came together to cooperate as one, sharing all information and establishing a common expense account, Smith said. In addition, the plaintiffs and defense agreed to keep all documents confidential from the press and public and to expedite the 80 or so depositions as quickly as possible.

During the mediation process, all legal arguments and evidence was presented, with lawyers holding nothing back in case of a potential trial, the lawyers said. By having all the information available earlier in the process, the mediator, lawyers and the clients themselves were able to evaluate the case better and imagine more clearly how a legal argument might play in court.

“It’s educational,” Barfield said of the mediation process. “You learn about your case and the other side’s case, and you learn if perhaps your assessment of the case is not quite right.”

- **Declaring settlements confidential helped resolution come more swiftly.**

In order to prevent competition and bitterness among clients receiving various size settlements, the lawyers all agreed to argue each case independently and to keep each settlement amount confidential. Clients also agreed to the confidentiality policy, instead relying on the mediator and the lawyers’ judgment to know if their offer was fair in relation to all the others.

- **Retaining an experienced mediator that both lawyers and clients could trust was key.**



Attorneys Barfield (left) & Smith

Finding Lew Conner, an experienced mediator with local knowledge of how juries often rule and personal experience with a lawsuit involving his own father, was a big plus, Barfield said. Clients could relate to him on a personal level and the lawyers trusted his legal expertise.

“I am looking for someone who will express their opinion (about the case) at the right time, after they have earned credibility,” Barfield said of a good mediator. Sometimes good mediators have to “knock heads” and firmly tell clients and lawyers where they stand in the case and what they will be facing if they walk away from mediation, he noted.

- **Videotaping depositions was important to “tell the story” in mediation.**

Both the plaintiff’s and defense lawyers felt they needed to tell a human story, so both used videotaped depositions to communicate the impact and emotional turmoil of the fire and its aftermath to the mediator and the other parties involved in the case, the lawyers said. These tapes gave the parties on both sides a glimpse of what a courtroom trial would look like to a jury.

“Client education is so important,” Barfield noted. “One of the big problems today is that clients are not educated as to the real chances of their case in court.”

In the end, 30 of the 32 lawsuits filed were settled by mediation within a year of the fire. Two cases drug on for two more years, but were eventually settled by mediation as well, Barfield said.

About 90 percent of all lawsuits are settled in mediation, not in the courtroom, the lawyers said, which is why Rule 31 mediators are so important to the legal system. While the NHC suits could have built a lucrative career for any of the lawyers, mediation provided a faster, certainly fair and cathartic alternative for the victims families and the NHC employees, they said.

The Lipscomb’s Institute for Conflict Management is a unique program in Middle Tennessee. Since its creation in summer 2006, the institute has held several public conferences with guest speakers such as former hostage negotiator Terry Waite, author Bruce Feiler and Judge Ken Starr. In the future, the institute’s plans include working with the Metro Nashville Police, training bi-lingual mediators and hosting the annual conference of the Tennessee Association of Professional Mediators.