

# Health Care Matters



## The Uses of Arbitration / Judicial Reference in Complex Health Care Litigation

By Hon. Ann Kough (Ret.)

Everyone knows that using a mediator with health care experience is valuable in complex health care matters. But there are many other ways ADR can assist both counsel and parties in complex health care litigation.

More and more service contracts between health care providers and insurers and/or payors call for binding arbitration. The advantages arbitration gives the parties are time savings, the ability to choose a decision-maker with health care experience, the ability to contain discovery to that which is necessary for resolution of the dispute and the ability to streamline the resolution process (such as by addressing issues in phases, or “buckets.” For example, Phase I could resolve “medical necessity” claims; Phase II, the “other payor” claims, etc.). Similar advantages apply to other health care disputes, such as the sale of health care practices or facilities, medical partnership disputes and billing

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## The Advantages of Early Mediation of Physician Disputes

By Thomas I. Elkind, Esq.

Many physicians practice as sole practitioners, as partners in a group or in other affiliations. When physicians buy, sell, join or leave these practices, or bring others into them, disputes can arise regarding the valuation of the practice, future relationships of the parties, and ownership, among other things. If these disputes cannot be resolved amicably by the physicians, the next step is usually for all parties to “lawyer up,” which often results in a “business divorce.” Most lawyers agree that ugly marital divorces are among the biggest wastes of time and money of any legal dispute. Business divorces are no different. Lawyers acting in the best interests of their clients will do anything they can to avoid getting their clients bogged down in litigating these disputes.

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## Uses of Arbitration

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...ADR can be useful in the economic resolution of health care disputes.

issues. Choosing an arbitrator with health care experience means counsel does not need educate the decision-maker as to Medicare reimbursement, dual use of a license during the sale of a facility or other issues unique to health care. In matters where there is no arbitration clause, the parties should consider agreeing to arbitration post-dispute to utilize its unique advantages.

Even if the parties don't arbitrate the entire matter because they don't want to waive their appeal rights or they do want full-blown discovery, ADR can be useful in the economic resolution of health care disputes. Many states provide that parties in litigation may stipulate to having all or part of any claims referred to a neutral. The California Constitution, Article VI, section 21, provides for the appointment of a temporary judge to serve in a judicial role. Such an appointment empowers the neutral to manage and try the entire matter, while preserving the parties' appellate rights. California Code of Civil Procedure section 638 similarly provides for the appointment of a referee to hear and decide the entire matter. The decision of the referee must be entered by the trial court as a judgment by the Superior Court. Under both

of these procedures, the parties retain their appellate rights while having the advantage of choosing a decision-maker with health care experience who can effectively and efficiently manage the dispute through trial, guarantee a trial date and devote full days to the trial.

Judicial references can also be useful for discrete issues within the litigation. Section 638 additionally provides for reference of less than all the claims in dispute. The parties can agree that only certain issues will be heard by the referee and can decide whether the referee's decision will be binding or will consist of findings and recommendations to the trial court. In one recent matter concerning the sale of a skilled-nursing facility, the claims included breach of contract and fraud. The parties agreed to separate what they called "the accounting issues," which dealt with which entity had agreed to bill Medicare and private insurance for services performed prior to the sale and what reimbursement would have been had the claims been billed in a timely manner. By using a referee with health care experience, the parties didn't need to educate the trier of fact as to, among

other things, the use of the seller's license by the buyer until a new license can be obtained, the common practice of the buyer agreeing to bill for services performed by the seller but not billed prior to the sale, how Medicare billing works or HIPAA issues connected to a former owner's access to patient records. As in arbitration, by using a referee, the parties were able to devote full days to trying these issues without interference from other matters scheduled for the same day or continuances necessitated by the trial court's calendar.

Using arbitration or judicial reference can also be less intimidating to the client, as hearings are usually held in the ADR provider's conference room rather than in a courtroom. The parties can take breaks to strategize or just have a cup of coffee and some down time. Trial time can be constructed around the witnesses' availability rather than the court's.

When drafting service agreements, purchase agreements or other health care contracts, counsel should consider an arbitration or judicial reference clause. And when disputes arise, as they inevitably do, counsel should discuss with their clients whether a post-dispute agreement to refer the dispute to ADR is in their clients' best interests. In most cases, it will be. ●



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## Advantages of Early Mediation

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There are several ways to avoid litigation. Arbitration can be a faster and less costly alternative than court litigation. Arbitration awards can be overturned by the courts only in very limited and unusual circumstances.

**Another advantage of mediation is that the dispute can be resolved quickly....**

However, arbitration is solely a creature of contract. A party that has not contractually agreed to arbitrate a dispute cannot be forced to participate in an arbitration. Also, if a dispute involves more than two parties, only if all parties involved consent to it can other parties be joined in one arbitration. This can lead to a situation where all involved parties cannot be brought into one proceeding to resolve the dispute. A party can be forced to arbitrate against one or more parties at the same time as it is engaged in court litigation against other par-

ties involved in the same dispute. Such a situation not only can be very expensive, but there is also the possibility of inconsistent results being reached in the multiple proceedings.

Whether or not the parties to a dispute have contractually agreed to arbitration, mediation is another method to resolve a dispute. Unlike arbitration, mediation is a non-binding process that parties can use before,

during or even after the litigation of a dispute. The parties must agree on the mediator, whose function is to assist the parties in negotiating a resolution. If the process is not successful, anything done in connection with the mediation remains confidential, and the parties can then proceed with, or continue, their litigation.

Physicians who face the prospect of a “business divorce” are well-advised to seek an early resolution. If the parties cannot negotiate a resolution, mediation is the best

and least expensive way to proceed. In mediation, all the parties can agree to participate in the process even if they have not agreed to arbitrate their dispute. The cost of the mediator, which is usually shared equally by the parties, is minimal when compared to the cost of engaging in an adjudicatory proceeding.

Another advantage of mediation is that the dispute can be resolved quickly so that the parties can get back to productive activities. Arbitrations that involve the valuation of a medical practice, for example, can be very complex, with many facts to examine, experts to get testimony from and documents to review and explain. Arbitration hearings of these proceedings can take several days over several months, and litigation can take even longer.

The advantages of speed, low cost and potential resolution make mediation an especially attractive tool prior to the commencement of litigation. ●



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## Mediation: The Most Effective Option for Medical Malpractice Cases

**By David M. Zacks, Esq.**

A botched surgery. A misdiagnosis. An unnecessary procedure. A neglected patient. Unfortunately, these realities befall our health care system all too often. No matter who's at fault, these tragic mishaps can cause tremendous pain and suffering to patients and their families, as well as inflict damage on the professional reputations of doctors and hospitals.

But these incidents often are made worse when those involved turn to the courts to allocate blame and seek damages. Frequently, they come to realize that litigation costs

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## Most Effective Option

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them more money, time and stress than they had expected. Even the “winners” learn that the ends did not justify the means.

Take, for instance, a surgery that goes awry. In the aftermath, the doctor often points the finger at the hospital, suggesting that it had not provided the right equipment or staffed the surgery with qualified nurses. The hospital, in turn, points the finger back at the doctor, suggesting that if she had any objection to the equipment or the nurses, she should have let the hospital know. Meanwhile, the patient points the finger at everyone: the doctor, the nurses, the hospital and

ing the finger at each other. But they realize they cannot avoid the negative publicity that comes with a public court filing, which casts a shadow over their careers and reputations no matter the true merits of the case, and this creates a major distraction. As the case winds its way before a jury, both sides put their fate, at least temporarily, in a jury's hands, with no outcome certainty. Because even after verdict is finally rendered, usually several years after initial filing of the case, the case is still not over. Inevitably, the losing side files an appeal, and it takes many more months for the case to be resolved.

must live with uncertainty and the stress that comes with that. By contrast, participants in mediation can be assured of an outcome as soon as a decision is rendered. For plaintiffs, this may mean receiving a check within a few weeks of the conclusion of a mediation.

**Confidentiality:** Medical malpractice cases can take a toll emotionally—on both plaintiffs and defendants—and litigating them in public does nothing to alleviate the stress. In some cases, the adversarial nature of litigation can further harden the feelings between the parties and create more distrust. Mediation, by contrast, takes place behind closed doors, where proceedings remain confidential and where reconciliation and candor are the goals. The confidentiality of mediation proceedings can also protect professional reputations and personal privacy.

**Mediator expertise:** Parties in mediation aren't burdened with the task of educating a jury about complex medical procedures, as they would be at trial. Instead, the parties can focus on the facts of their particular dispute. A mediator who is steeped in medical malpractice litigation will know where to focus the efforts of the negotiations.

**Flexibility and creativity:** Most of the time, medical malpractice litigation is all about monetary damages. This singular focus tends to make parties rigid in their approach to solutions to the dispute. Mediation, by contrast, can offer more flexibility and creativity. Sometimes an explanation for what happened, new safety protocols or an apology is as important to a patient as money. ●

*With a skilled neutral, medical malpractice disputes can be resolved quicker and cheaper than litigation.*

the equipment manufacturer. The patient, left to his own imagination, envisions scoring a multi-million-dollar jury verdict and hires a lawyer to file a lawsuit.

But eventually, reality sets in. As the court proceeding gets under way, the patient begins to appreciate the long, steep climb he faces before he'll ever see a dime. He comes to realize, for example, that in medical malpractice cases, the plaintiff must prove causation—that his or her injury was the approximate cause of the alleged malpractice. Generally, it is not enough to show that a medical practitioner was negligent. There must be a demonstrated connection between the negligence and the injury, a relatively high bar.

Meanwhile, the sky-high costs of litigating malpractice cases also become apparent to the patient. He realizes, for example, that he needs to hire an expert witness as well as produce his medical records going back many years.

The co-defendants also become jaded as the process inches along. They eventually decide to cooperate rather than keep point-

ing the finger at each other. But they realize they cannot avoid the negative publicity that comes with a public court filing, which casts a shadow over their careers and reputations no matter the true merits of the case, and this creates a major distraction. As the case winds its way before a jury, both sides put their fate, at least temporarily, in a jury's hands, with no outcome certainty. Because even after verdict is finally rendered, usually several years after initial filing of the case, the case is still not over. Inevitably, the losing side files an appeal, and it takes many more months for the case to be resolved.

It doesn't have to be this way. The process of resolving a medical malpractice complaint does not have to be complicated, antagonistic or expensive.

Medical malpractice cases, with all their intense emotions and complexity, are designed for mediation, which can give parties numerous advantages over litigation, such as the following:

**Speed and savings:** With a skilled neutral, medical malpractice disputes can be resolved quicker and cheaper than litigation. Generally, mediation is not burdened by the protocols of court rules, which cause delays and drive up costs in areas like discovery, depositions and evidence. By filing a case in court, plaintiffs surrender to the court's schedule and procedures. By using mediation, the parties are in control. This means they can set their limits on discovery and establish their own timetable.

**Outcome certainty:** In the event a medical malpractice lawsuit proceeds to a jury verdict, the case would still be a long way from completed. Inevitably, appeals are filed, which can take years to resolve. Both sides



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