Healing T

Alternative Dispute Resolution (ADR) comes to the health care industry as a needed and growing means to reduce the inevitable frictions in a large and complex system. This article will discuss why and how this is occurring, and the ways in which attorneys can use ADR as a more satisfactory route to justice for their clients.

As an industry that provides and finances health care for almost 200 million people, and that employs more personnel and assets in the process than any other country, the American health care industry is not only one of the largest segments of our economy, but is one of the most sensitive and socially important parts of it as well. It encompasses the rendering of care by physicians and other health professionals, hospitals, nursing homes, home care agencies, and outpatient treatment facilities, and the provision of services by a wide array of other facilities to meet the needs of patients.

Financing health care adds another layer of interaction, involving insurance companies, health maintenance organizations, self-insured employers, and government programs such as Medicare and Medicaid. Needless to say, the tensions that often arise between a patient's entitlement to care, on the one hand, and the cost, selection, and quality of it on the other, as well as the array of contract, labor, and employment issues that develop among the participants, generate a large volume of conflicts.

Alternative dispute resolution is a generic term that describes a variety of processes used to resolve these disputes as an alternative to litigation. Arbitration and mediation are two of the most common ADR processes used. Under the Michigan and federal arbitration acts,[1] arbitration provides a court-enforceable award after a hearing conducted by the arbitrator, and is not subject to appeal except in narrow and unusual circumstances. An arbitrator who is selected because of his or her expertise in the industry or the kind of dispute at hand is often in a position to understand and appreciate the issues and background of the case, and to fashion an award that reflects these insights. Mediation is a party-driven process in which a neutral third party assists the disputants in addressing the issues and fashioning their own means to resolve them. The mediator has no power to impose a settlement.

Arbitration and mediation have certain common attributes: a completely neutral dispute resolver who is bound to confidentiality and cannot be called as a witness; a private process that cannot be pried into by the press or public; and freedom from the delays of court dockets. Discovery is not a part of the mediation process. In arbitration, discovery is controlled by the arbitrator and can be held to the minimum necessary for the parties to prepare their cases. These facts and the relatively short time to obtain a mediation session or an arbitration hearing help to hold down the attorney fees for all parties. Other costs for mediation and arbitration include the fees of the dispute resolver and of the

hyself

ADR in the Health Care Industry

By Donna J. Craig and John A. Cook

Fast Facts:

Alternative Dispute Resolution is a generic term that describes a variety of processes used to resolve disputes as an alternative to litigation.

Arbitration and mediation are two of the most common ADR processes used to resolve patient health care providers and insurance disputes.

The principal organizations that provide alternative dispute resolution services are the American Health Lawyers Association and the American Arbitration Association.

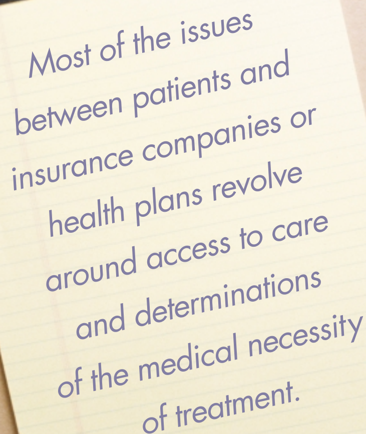
ADR service administering the case. While a judge's services are at the public's expense, the costs of discovery, motion practice, and other costs incurred in litigation often exceed those incurred in ADR, especially in mediation.

ADR is particularly appropriate in certain types of disputes, as the following examples illustrate.

- A patient is denied care because of strict interpretations of policy exclusions (including experimental, cosmetic, and medically unnecessary treatment) in the face of innovative diagnostic techniques, potentially life-saving but new and expensive drugs, and promising new therapies that are still outside the standards of traditional medicine.
- A physician is denied participation on the panel of a health maintenance organization because of a past treatment error or inaccurate medical records that resulted in a malpractice settlement or a sanction by the Board of Medicine.
- A hospital grants an exclusive contract to a group of diagnostic radiologists and refuses to allow other qualified radiologists to use its diagnostic facilities, resulting in the inability to use their medical staff privileges at the hospital.
- An organization consisting of hospital and physician groups contests an interpretation of its contract with the largest health plan in the area, involving technical issues that were not addressed during contract negotiations and that could jeopardize their financial solvency.

Ability of ADR to Deal With Non-Economic Issues

The emotional stakes in health care disputes are sometimes as high as the financial ones. Anger and frustration caused by denial or inadequacy of care and serious threats to business and professional careers are elements that are often difficult to address in a legal system geared more to the law and economics of a case. The court system offers slow docket, openness to public view, layers of appeal, and lack of a means for the grievant to speak out personally and have his or her



sense of wrong clearly and directly addressed. Because parties value speed, confidentiality, and finality in the resolution of their disputes, as well as a forum suitable for sorting out many technical and complex details, many parties turn to ADR to resolve their legal, financial, and emotional disputes.

Range of Parties and Conflicts, and the Selection of Appropriate Forms of ADR

Physicians and Hospitals

Recently, hospitals have attempted to improve on the integration of health care in their facilities by acquiring physician practices, forming joint ventures with physician organizations, and entering into contracts to manage physician practices. Such transactions have often upset established physician-hospital practice and referral patterns and have led to disappointing financial results for the hospitals, leading to dissatisfaction on both sides. As hospitals look to mergers, divestitures of physician practices, and termination or renegotiation of contracts to get out from under these burdens, valued relationships with the physicians are often strained. Litigation or other drastic measures to sort out and resolve the problems can be traumatic and, in some ways, self-defeating.

Mediation at an early stage by a person with experience in this health care setting has the best chance to help the parties to restore or maintain trust, while addressing such issues openly and creatively. While counsel for both sides must be very vigilant in advising their clients on how to navigate the treacherous waters of tax, anti-kickback, and physician self-referral laws, other practical constraints can be overcome through facilitative mediation. In such mediation, the special skills, training, and experience of the mediator are used to encourage the parties to fashion their own remedies.

If mediation fails or is not tried, arbitration still offers the best alternative to a public confrontation in court. Arbitration results in a final and binding award, which the arbitrator can mold in a way that poses as little danger of disrupting future relationships as possible. Clauses requiring arbitration of disputes may be used in agreements as the sole method of conflict resolution, or the parties may simply agree to arbitration in absence of such prior agreement. Either way, the parties can resolve their disputes and still have a chance to maintain mutually beneficial long-term relationship.

Patients and Health Plans

Most of the issues between patients and insurance companies or health plans revolve around access to care and determinations of the medical necessity of treatment. While these are often complex and emotionally charged disputes, there are opportunities to resolve these matters without litigation.

Take the case of a ten-year-old with an inoperable brain tumor. His parents refused to subject him to repeated bouts of toxic chemotherapy and instead sought a new non-toxic tumor fighting treatment in another state. Three years after the treatment, he was thriving and the tumor had shrunk. Although the treatment proved effective, the family's health plan refused to pay for it. The parents prevailed in a suit against the health plan. However, when the plan appealed, they agreed to enter into negotiations for a settlement. The case settled, but arguably the same or a better result could have been achieved at an earlier stage, with less emotional upheaval for the family and less media attention for the health plan.

If the parties had agreed to facilitative mediation at the start, a skilled mediator with knowledge of the health care issues involved might have been able to facilitate a direct dialog by the parties, with the participation of their respective counsel, and help them recognize the realities of their respective situations. Or, the parties could have agreed to have the case arbitrated by a neutral arbitrator who could be trusted by both parties to hear and understand their points of view and the health care issues involved.

Providers and Patients

Sometimes, patient care issues and treatment decisions can spark contentious disagreements between health care providers, patients, and family members. Take the case of an elderly patient who once led an independent life prior to hospitalization but now requires supervision or placement in a nursing facility. Even if the patient can come to terms with the loss of autonomy and the financial realities, the family often struggles with guilt or the adjustment in their role as caregiver, whether the placement is in a nursing home or with an adult relative. Oftentimes, while the patient and family struggle with these issues, there is a delay in transferring the patient to an appropriate post-discharge setting. The longer the patient stays in the hospital after acute care is no longer needed, the costlier it becomes for the hospital.

In an effort to address these issues, some hospitals and long-term care facilities are combining problem solving and mediation techniques. A neutral third party intervenes to bring the patient and family members (with the permission of the patient, and subject to state and federal confidentiality laws) together with the health care professionals, to define the needs of the patient and address the concerns that may block a resolution. This approach is being used effectively to address other patient care issues, such as medical-ethical issues, end of life decisions, and individual conflicts between caregivers and patients or family members.

Conflict in the Workplace

In any workplace, conflicts periodically arise between coworkers, usually over issues of perceived fairness or unequal treatment, claims of discrimination, harassment, or even fear of violence. In addition to these workplace issues, the health care setting has its own unique sets of issues that trigger conflicts. Because of the variety of health care professionals providing care to patients, in settings, such as hospitals, clinics, and long-term care facilities, underlying issues of autonomy, self-preservation, authority, independence, and interdependence can cause insecurity and confrontations.

To address these concerns in a collegial atmosphere, some hospitals have implemented ombudsman and conflict-resolution programs. Steps have been taken to modify existing human resource grievance procedures

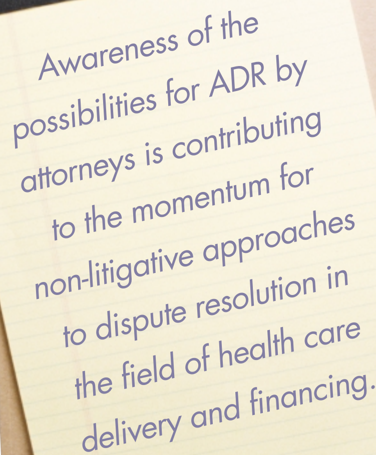
to address and resolve issues such as claims of harassment and unequal treatment, short of litigation. Conflict-resolution programs are designed to resolve the conflicts when they arise, before they can fester and get out of control. Any health professional, whether an employee or a licensed practitioner with practice privileges in the facility, may request the assistance of a trained conflict manager to intervene in the dispute.

These programs do not deal with direct patient care issues or allegations of negligence, but are reserved for turf, management, and personality conflicts. While conflict resolution programs are relatively new phenomena, they are creating momentum as health care professionals find better ways to resolve some of the day-to-day conflicts in the workplace. Importantly, such programs can also improve patient care and avoid unnecessary litigation and license sanctions, which degrade morale and are much more costly to resolve.

Role of the Attorney in Mediation

While most attorneys feel comfortable knowing their role in litigation and can easily apply litigation skills in arbitration, they do not always know what to expect in mediation and therefore may not be able to prepare themselves or their clients to participate effectively. The key to an attorney's success in mediation is shifting his role from advocate to counselor.

When attorneys serve as counselors, they can effectively work with the mediator to form a team to bring out and resolve both the surface and the underlying issues. An effective attorney in this role will allow the mediator a full scope of reality testing and probing for ultimate best interests. Once the dispute reaches the problem-solving stage in mediation, the attorney's role is to see that final agreements are complete, definite, feasible, and able to stand the test of time. When the parties have reached their agreement and have a sense of ownership of it, the attorney's skills help ensure that the agreements themselves will exclude future misunderstandings and misinterpretations.



Leading ADR Services

The principal organizations that provide alternative dispute resolution services are the American Health Lawyers Association (AHLA) and the American Arbitration Association (AAA). Both organizations find that use of their ADR services for health care matters has been climbing dramatically in recent years.

The AHLA is the nation's largest and oldest organization of health law attorneys. While the AHLA's ADR Service, formed in 1992, is much younger than the AAA, it features national and regional panels of trained dispute resolvers that are drawn entirely from attorneys who are specialized in health care law and business practices. The AHLA's Rules of Procedure for arbitration and mediation afford full administrative details and procedural due process for the parties, and specifically include both broad discretion for discovery and remedies that include both interim awards to preserve the status quo and final awards that can include the specific enforcement of contracts.

The AAA, with the assistance of arbitration and mediation panels made up of health care attorneys, health care executives, health care providers, and reimbursement experts, successfully resolves professional liability, personal injury, contractual, reimbursement, and provider-payer disputes. AAA has adopted the due process protocols established by the Commission on Health Care Alternative Dispute Resolution,[2] in which the American Bar Association and the American Medical Association were the other commission participants.

Awareness of the possibilities for ADR by a growing number of attorneys is contributing to the momentum for non-litigative approaches to dispute resolution in the field of health care delivery and financing. Clients are benefiting from this expanded knowledge and the skill of their attorneys. Conversely, attorneys who ignore the potential benefits of ADR for their clients, by not incorporating ADR clauses in contracts, or by failing to consider or take full advantage of ADR in the course of representing their clients, particularly in the health care industry, may not be affording the fullest and best service that their clients expect and need. ✦

Donna J. Craig, R.N., J.D, practices as an attorney, arbitrator, and mediator in Bloomfield Hills, concentrating in transactional, professional licensure, reimbursement, insurance, medical staff, patient care, and risk management matters. Ms. Craig serves as an arbitrator and mediator with the American Arbitration Association, American Health Lawyers Association, and Michigan Department of Community Health ADR panels, and is an approved mediator with the Oakland County Circuit Court, Oakland Mediation Center, and the Mosten Mediation Centers, a national ADR panel.

John A. Cook is a principal in the firm of Cook, Goetz, Rogers & Lukey, P.C., which concentrates on serving clients in the health care industry. He is a member of the American Health Lawyers Association and the American Arbitration Association, and serves on their respective rosters of neutral mediators and arbitrators. He is a qualified mediator in the Oakland County Circuit Court Mediation Rule Program.

Footnotes

1. Michigan Arbitration Act, MCL 600.5001, MSA 27A 5001, et seq.; Federal Arbitration Act 9 USC 1 et seq.
2. Commission on Health Care Alternative Dispute Resolution (American Arbitration Association, American Bar Association and American Medical Association), "Health Care Dispute Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes" (July 27, 1998).