American Bar Association
Health Law Section

Alternative Dispute Resolution in Health Care Disputes

Viggo Boserup, CEDS
JAMS

Mary Tesh Glarum
Doll Amir & Eley LLP
Topics for Today’s Discussion

- Mediation of Health Care Disputes
- Particular Health Care Disputes Ripe for Mediation
- Arbitration
Overall Benefits of Mediation in Health Care Disputes

- Maintaining positive business relationships
- Subject matter expertise by decision-maker
- Protecting PHI and confidential business information
- Lower cost
- Quick resolution
- Parties have control over resolution
Unique Challenges in Health Care Disputes

- Preparation is critical to successful mediation.
- Early exchange of information can help narrow the areas of dispute.
- Early involvement of the mediator can help focus the proceedings.
- Ensuring participation of key decision-makers is also critical.
- May involve multiple stakeholders on each side.
Health Care Disputes Ripe for Mediation

- Payor/Provider Reimbursement Disputes
- Claims against Payors Based on Authorization Denials
- Disputes over Termination of Physician Relationships
- Medical Staff Self-Governance Issues
Payor/Provider Reimbursement Disputes

- **Nature of the Dispute:**
  - Disputes over “reasonable and customary rates” for emergency services
  - Disputes over contract terms or rates

- **Preparation**
  - Select a mediator with experience in the area and schedule mediation 45 to 60 days out to allow for full preparation. Consider whether the mediation will realistically need two days.
  - Make sure both sides understand dollar amounts at issue
    - Exchange spreadsheets listing claims and claim-related documents (UB-40s, claim files, medical necessity claims, etc.)
    - Meet and confer regarding bucketing both sides and document basis for differences in bucketed amounts
  - Meet and confer to agree on issues to be discussed during mediation such as DOS, accruing claims arising after agreed-upon DOS, revisions in claim process to avoid future problems, terms and rates for a future contract.
  - Exchange mediation brief with opposing counsel and provide side letter to mediator with confidential information.
Payor/Provider Reimbursement Disputes

- Conducting the Mediation:
  - Consider joint session versus private caucus
  - Establish initial issues (i.e., what are the numbers to be resolved?)
  - Negotiations
  - Documenting the deal
  - Consequences of not reaching agreement

- Impact of Consolidation on Reimbursement Disputes
  - Variation in billing patterns by consolidated providers (hospital systems)
  - Variations in UCR methodology with consolidated payors
Claims against Payors Based on Authorization Denials

- **Nature of Dispute**
  - Patients challenging authorization decisions made by payors or their delegates (an increasingly popular claim, in part due to caps on damages in malpractice cases)

- **Particular Benefits of Mediating these Disputes**
  - Generally involve complex analysis of medical necessity, benefit issues, or both
  - Litigation is far more expensive due to the necessity of medical experts
  - Often involve a strong emotional component
  - Typically a strong disconnect regarding the underlying facts that can be clarified with a free exchange of information facilitated by mediator
  - Mediator with subject matter expertise can present issues in lay terms to patients
  - Payors have strong interest in early resolution of problematic cases to avoid negative publicity
Claims against Payors Based on Authorization Denials

**Preparation**
- Prepare detailed mediation briefs to help frame the issues
- Patient should provide clear articulation of services he or she believes were improperly denied
- Payor develops detailed understanding of basis for decision and provides benefit documents and utilization management policies

**Conducting the Mediation**

**Key Participants**
- Payor Representatives: member of management team responsible for authorization decisions, and in-house counsel or other employee tasked with risk management; carrier for payor
- Plaintiff representatives: spouse and/or family members who provide emotional support and may impact decision-making

**Maintain a patient-centric focus in order to:** (1) Give patient and family sense of control over what is happening; (2) enable patient to start metabolizing and accepting information; (3) help patient understand there is another side of the story, without requiring them to agree with it; and (4) allow payor representatives to understand patients point of view without fear of admitting liability
Disputes over Termination of Physician Relationships

- **Nature of Dispute**
  - Physician either opts to leave network or is terminated (such disputes frequently arise in the context of “poaching” by competing network)
  - Focus on where patients will be assigned, often involving continuity of care issues and consideration of financial impact of patient assignments

- **Preparation**
  - Any continuity of care issues should be bucketed
  - If physician terminated for cause, vet the underlying facts so the parties do not get bogged down in “he said, she said” allegations

- **Conducting the Mediation**
  - Often involves hurt feelings on both sides
  - Building trust in mediator can give each side an opportunity to tell their story and move on to practical matters impacted by change in relationship
Medical Staff Self-Governance Issues

- **Nature of Dispute**
  - Medical staff challenging institutional intrusion into decision-making and governance (of increasing significance in light of rapid consolidation and growth)

- **Particular Benefits of Mediation**
  - Parties will need to work together in the future, so an amicable resolution is ideal
  - Enables parties to work out rules going forward
  - Early mediation helps diffuse disputes before entrenchment
  - Each side gets to be heard
  - A skilled mediator can manage egos and expectations
  - Often involves technical issues of hospital and medical staff governance

- **Conducting the Mediation**
  - Mediation session is opportunity to start building basis of future positive relationships and a useful map for how future disputes will be handled
Benefits of Arbitration in Health Care Disputes

- Ability to select arbitrator familiar with legal and regulatory framework, as well as technical terminology
  - Single arbitrator vs. three arbitrator panel
- Quicker resolution
- Discovery management
  - Active management by an arbitrator can help streamline discovery and enable the parties to gather information that they truly need
- Confidentiality
- Less formal setting is more conducive to maintaining long-term positive relationships
- Flexibility in structuring hearing to hear threshold issues first
Arbitration Clauses

- Arbitration clauses can be drafted to specifically address types of disputes that may arise (i.e., specific procedures for the exchange of information in reimbursement disputes).

- While often an afterthought, it is a good idea to remind clients of the benefits of considering the contents of an arbitration clause:
  - If incorporating the FRCP, call out specific rules
  - Review online rules of providers
    - JAMS Comprehensive Rules 16.1, 16.2 and 17 regarding limits on discovery
    - JAMS Streamlined Rules imposing specific limits on document requests, e-discovery, depositions, experts, cut-off dates, etc.
  - Consider appellate review
    - JAMS Rule 34 provides an optional appeal procedure
Questions?