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Mediation of Health Care Disputes: *An Opportunity to Heal Or a Prescription for Disaster?*

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The fact that the field of health care is often referred to as the remaining holdout when it comes to mediation is a result not only of the lack of integration within health care systems, but also to the lack of consensus as to whether mediation is an improvement over the status quo and, if it is, who should serve as mediators.

Those who resist mediation fear that opening the doors of a complicated, multifaceted and rapidly changing industry to a cadre of mediators with a "one size fits all" mentality and little experience in the field of health care would result in a toxic mess.

Which is the best approach, how may it be put to use, and what are the relevant questions?

IS MEDIATION AN IMPROVEMENT?

In health care disputes, whether or not mediation is an improvement on the status quo may depend upon the mediator's ability to integrate a working knowledge of medicine with the appropriate process. This must be more difficult than it sounds, as many matters are mediated twice, hardly an improvement over the status quo.

The reason for this redundancy seems to be that the first mediator often treats the health care dispute as a typical zero-sum situation, seeing his or her role as a facilitator in dividing a monetary pie. Having heard of such mediators, health care decisionmakers often prefer a mediator with more comprehensive subject matter expertise than mediation skill.

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The best solution seems to be a highly experienced mediator who has a facile knowledge of medicine and is attuned to the myriad issues presented by patients, physicians, staff, institutions, health care systems and insurers.

Where does one find such a mediator? The fact is that, despite the debate on whether health care disputes are amenable to mediation, the mediation profession has already garnered much experience in the field. Rather than continuing to ask whether health care matters should be mediated and if so, who should do the work, perhaps the answer to these questions lays in appreciation of the work that is being done in the field, as well as recognition of those who are doing it.

CAN DISRUPTIVE PHYSICIANS BE MEDIATED?

Few disruptive physicians exist, yet an entire industry has been created in order to identify, punish, train and regulate this small subset of physicians whose actions and emotions tend to impede effective and efficient health care delivery. Is there disruptive behavior? Absolutely. But rather than being a product of pathology, such behavior is more likely a result of physicians who have not been equipped to deliver services while maintaining effective relationships in an environment of increasing pressures and limited resources.

Rather than punish such doctors by exiling them to a week-long training camp with others bearing the disruptor label, a two-step process has proved successful. First, mediate the immediate situation to restore productivity to the workplace. Second, meet with the individual medical provider to help them understand that their goal of rendering quality medical care and building self-satisfaction will only be realized if they behave in a manner that meets the aforementioned goals. In other words, remind them of what it was that brought them to medicine in the first place, and show them the easiest way to attain it. Easiest and least disruptive are synonymous. The right mediator can do this in one or two days.

MEDICAL MALPRACTICE MEDIATION

Despite attempts to improve the quality of health care in the United States, bad outcomes occur on a regular basis. Some may be a result of incorrect decisions or bad judgment that ultimately prove incorrect, but that are not negligent. Others may be caused by judgment so impaired so as to constitute professional negligence. The causes of many outcomes may never be understood.

In all three cases, however, there are patients with the exact same needs. Patients want to understand what happened, want to comprehend how it happened, wish to learn whether steps could be taken to minimize the likelihood of it happening again, and would like to receive appropriate compensation for their injury.

Many litigators, and some mediators, perceive medical negligence mediation as simply a question of who pays whom, and how much. The practices of experienced mediators who fall prey to this paradigm eventually devolve into a simple meeting whereby the neutral attempts to convince the parties that the mediator's end result is the one that the parties should be led to. It becomes a process of pressure, persuasion and perseverance, but not of true progress. Simple monetary negotiations miss important opportunities to address the plaintiff's familial, emotional, informational and structural financial needs. The oft-forgotten defendants have such needs as well — just talk to the spouse of a physician who has been sued.

HEALTH CARE FRAUD

Most health care institutions and their counsel do not realize that allegations of health care fraud brought by state and federal agencies may be mediated. Of course it requires the agreement of all parties, but Medicare and Medicaid programs, and the agencies that enforce their myriad regulations, are increasingly amenable to resolving fraud cases through mediation.

One week of mediation may eliminate the need for three years of discovery and another month or two of trials. In a recent nursing home fraud case, it was not until the third day of mediation that the government realized that the overutilization they were alleging involved beds that were not even being billed to their program.

More information gets exchanged sooner in mediation than in litigation or the discovery process. If there are mitigating factors or legitimate defenses to allegations of fraud, there is no better forum to make that clear to the government than in mediation.

HEALTH CARE INSTITUTIONS

One Philadelphia hospital recently invited its department heads to take an entire day to learn how to employ mediation-type tools to manage the inevitable conflicts that health care delivery produces. The program was so successful that programs are under way to explore the possibility of training each hospital department individually.

Astute health care institutions have learned that when it comes to conflict, prevention and management is easier (and more pleasant) than cure. One day of mediation skill training can improve quality while saving time, money and perhaps even lives.

NATIONAL VACCINE INJURY COMPENSATION PROGRAM

Living on a New Zealand farm at the age of 4, Liam Caldwell probably felt that life could not get any better. He was correct, as it did not. His parents had decided that moving to the United States would provide their son opportunities not offered in their homeland. When it came time for Liam to enter the public school system, he received the measles, mumps and rubella (MMR) vaccines required for admission to the school system. Such vaccinations were not required in New Zealand.

Soon thereafter, Liam became quite ill, eventually becoming paraplegic. Not only were the family's dreams of opportunity shattered, they now were saddled with what would prove to be millions of dollars of medical and injury-related expenses. They filed for compensation from the National Vaccine Injury Compensation Program.

Fulfilling its responsibility, the U.S. Department of Justice, through its special master, raised questions regarding the alleged relationship between the vaccine, its alleged impact and the responsibility of the United States, if any.

This matter probably could have been litigated, and perhaps the family would have recovered the millions that eventually would change hands as a result of mediation. What litigation would not have remedied, though, was the incredible guilt experienced by parents who felt that, but for their decision to move to the United States, their youngest son would be perfectly well.

Should health care disputes be mediated? Considering the opportunities described above, the answer would appear to be yes. In fact, there are qualified neutrals already on the job. Given the intricacies of health care mediation, finding one may be worth the search. •