

Keeping Doctors Out Of The Courthouse: Why Mediation Is Well-Suited For Physicians' Business Disputes

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February 2011

Having just completed the successful mediation of a dispute between a medical practice and a physician who elected to leave the practice to affiliate with a competitor, I have a renewed appreciation for mediation as a preferred alternative for the resolution of business disputes involving medical professionals.

For the uninitiated, mediation is a process in which two or more parties, often with the assistance of attorneys, meet with a mediator in an attempt to negotiate a resolution of their dispute. The mediator can be any person selected by agreement of the parties, who generally share in paying the mediator's fees and expenses. In mediation, unlike litigation or arbitration, no judge or arbitrator enters orders compelling a result; rather the mediator works with the parties and their counsel to structure an agreed upon business resolution. If the mediation does not result in a settlement, the parties remain free to resolve their dispute through litigation or arbitration.

The training, mindset and orientation of health care providers, while well-suited to their medical obligations, are fundamentally at odds with the way our judicial system approaches and resolves disputes. For the reasons outlined below, for physicians, mediation provides a compelling alternative to litigating or arbitrating disputes pertaining to the business aspects of their practice.

1. Mediation's Time Frame Is Consistent with the Orientation of Medical Providers. Physicians are scientists who, when presented with symptoms, review, analyze, diagnose, treat and move on. Medical cases are resolved in days, if not hours. In contrast, litigation and arbitration time lines are measured in months and years. Lawyers may appreciate the systemic beauty of discovery, depositions, motion practice, trials and appeals. Doctors do not. They desire prompt closure and finality. Mediation provides a vehicle where medical providers can resolve their dispute within a few weeks.

2. Mediation Is Far Less Intrusive on the Lives of Doctors. Whatever its merits as a vehicle for justice, the litigation process imposes time consuming obligations. Parties are required to search files to comply with production requests, to answer intrusive and cumbersome interrogatories, to prepare for and submit to depositions, and to sit through trials that many physicians believe are mind bogglingly slow and inefficient. Especially in the current environment where physicians need to work harder, often for less income, the time demands of litigation are even more burdensome. The relative simplicity of mediation substantially eliminates the opportunity costs that litigation imposes on those whose compensation is time dependent.

3. Control of the Process and Result Is Available to Physicians Through Mediation But Not Litigation or Arbitration. Physicians are highly skilled professionals who, because they are entrusted with enormous responsibility over the lives of their patients, are accustomed to controlling the key decisions that constantly must be made. When transplanted to the worlds of litigation and arbitration, physicians find they have little say in the outcome determinative processes that govern their dispute. They are told what documents they must produce, they are told when they must do certain things, they are told what they can and cannot say-and, at the end of the day, the outcome is dictated by a judge or an arbitrator who, no matter how well intentioned, may not reach the "correct" result. Mediation, by definition, is designed to achieve an agreed upon resolution, thereby placing physicians firmly in control of the process and the outcome.

4. Mediation Involves Substantially Less Expense Than Litigation or Arbitration. While few people enjoy paying legal fees, physicians, more than many, find problematic the concept of billable hour compensation arrangements. Doctors-who can't charge for routine phone calls or for the down time they may have waiting for a patient-often are frustrated at a legal world where attorneys are "on the clock" every time the phone rings, when waiting in court for a motion to be heard, or when an adversary's motion, no matter how spurious, requires that a time-consuming response be filed. As a focused, goal-oriented and efficient process, mediation enables attorneys to focus their efforts on direct value-producing activity, which aligns with the procedure-based compensation model to which physicians are accustomed.

Certainly, there are circumstances when litigation and arbitration are appropriate for the assertion and defense of business claims by medical providers. However, in many cases, mediation will prove to be the best alternative. When a dispute arises, medical providers and their attorneys should evaluate the suitability of mediation. Proactively, physicians also should consider including in their contractual agreements a provision that specifies disputes will be referred to mediation as a pre-condition to the commencement of litigation or arbitration.

Rob Harris, of Levett Rockwood P.C., represents business clients, including medical providers, in the prevention and resolution of disputes. He also regularly serves as a mediator and arbitrator, and is a recipient of the "The Honorable Robert C. Zampano Award for Excellence in Mediation," named after a Connecticut federal judge renowned for his dispute resolution skills. Rob is a member of the Connecticut and New York bars.

Levett Rockwood P.C., based in Westport, CT, represents a diverse group of business clients, including healthcare entities, throughout the state and nationally.

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