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# For Emergency Payment Disputes, Mediation Is Cure

*Law 360, New York (September 15, 2008)* — A recent study by the Centers for Disease Control and Prevention found that emergency room visits at hospitals have increased 32 percent from 1996 to 2006.[1,2]

Although the federal government findings did not segregate the increased use by insurance status, the August 2008 Annals of Emergency Medicine reports that, while the proportion of uninsured visits was unchanged, the number of overall visits went up substantially and that visits by people in the highest income bracket increased the most.[3]

People with private health insurance are using emergency rooms in vast numbers. This development not only burdens the hospital's operations, but also generates disputes between the hospital, patients, and healthcare insurers.

State and federal laws compel hospitals (providers) to give emergency care to all patients whether or not they have the financial ability to pay, and, when such care is provided to a person with private insurance, the hospital will seek reimbursement from the insurer, and any remaining balance from the patient.[4]

The patient will contend such care was necessary under the emergent circumstances, covered by the health insurance policy, and the responsibility of the carrier.

Disputes can arise concerning the insurance status of the patient, whether the patient was actually faced with a medical emergency, and the value of the services rendered by the hospital.

If the insurer objects or declines to pay all the charges, the hospital bundles the claims into a lawsuit in the local court.

The principal issue usually involves the value of the services rendered by the hospital. Normally, the hospital claims its fully "billed charges," which are set internally by its "chargemaster." The insurer responds by contending the charges are inflated, and that it should only have to pay the "reasonable value" of the services rendered, i.e., quantum merit, and looks to what is reasonable and customary in the market.

Since these concepts are subject to interpretation, they give rise to expert input and controversy, and the ensuing expense, distraction and uncertainty of litigation. No matter what happens at trial, only the claims then before the court will be determined. For future claims the whole process will have to be undertaken again.

 

Since litigation to resolve these burgeoning emergency care claims is not very attractive, the parties should explore mediation as the way to resolve the current claims and to establish a protocol for the resolution of future claims.

*What Is Mediation?*

Mediation is a confidential, voluntary, non-binding process using a neutral third party to guide the parties toward a mutually beneficial resolution of their dispute.

Unlike an arbitrator or judge, who imposes a decision, the mediator helps the parties to decide for themselves whether to settle and on what terms.

The mediator acts as a catalyst for the process, helping parties reach agreement by identifying issues, exploring possible bases for agreement and the consequences of not settling, and encouraging each party to accommodate the interests of the other parties.

Generally, the mediation will begin with a joint session with all participants. Each side will be able to summarize its position during this session. The presentations for these kinds of matters are most effective if they include charts, audiovisual aids, and oral presentations by counsel, expert witnesses, or principals.

Bear in mind that the goal is not to prove a case but to clarify issues and positions. In this type of case, the initial presentation may last 15 to 30 minutes and should include input from the business executives and staff.

The joint session is followed by private, confidential caucuses between the mediator and each side. In caucus, private information, you would not want disclosed in direct negotiations, can be shared with the mediator.

The mediator will assist all parties in exploring the strengths and weaknesses of the case. The caucuses provide an excellent opportunity to assess realistic options for resolution without compromising any party's negotiating posture.

Caucusing will generally continue until a settlement option has been developed, which all sides believe is acceptable. At that point, the mediator will reassemble the parties and summarize the terms of the settlement or agreement.

The parties may then draft and execute a memorandum stating the key terms of the agreement. A formal agreement, consistent with the memorandum, and including all the required terms, can be drafted later, with the assistance of the mediator to resolve any disagreements that may arise.

However, since presumably the parties understand that they will have to work collaboratively going forward to manage future claims pursuant to the protocol they have negotiated, drafting the formal settlement agreement should be less problematic.

If a resolution is not reached in the initial session, the parties may authorize the mediator to conduct follow-up activities. This can consist of telephone caucusing, further investigation or information exchange among the parties, or an additional mediation session.

*Timing Of Mediation*

There is no hard and fast rule determining when a case is most appropriate for mediation. The optimal time for a mediated settlement occurs as soon as each party has sufficient information to evaluate the case.

That information can be obtained through informal or formal discovery, preferably before the mediation session in order to allow the parties to properly assess the impact of the information.

The only danger of mediating too early is that a second session may be required. However, the mediator can serve a very useful role in the first session by helping the parties define the issues and determine what information should be exchanged and when the exchange can be accomplished. The cost savings to the parties of that "discovery management" usually well exceeds the expense of a second session.

At the other end of the spectrum, a mediation held after the parties have completed discovery and are on the eve of trial can make for a rough and frustrating day of negotiation. Once the parties have spent so much time, energy, and money preparing for trial, they are not in the best frame of mind to discuss settlement.

Their flexibility has decreased because of litigation expenses and the animosity that normally develops during the discovery process.

*What Is "Sufficient Information"?*

Normally in these types of disputes, there is a history of submissions of computer runs generated by the hospital to the insurer, so the parties are usually well informed concerning the patients and the nature and extent of the services rendered.

Oftentimes, there is a knowledge gap concerning how the charges were priced (the hospital's point of view) and whether the charges were reasonable and customary (the insurer's point of view); information should be exchanged in this regard.

Although it is possible to settle the case with information supplied for the first time at a mediation session, the success of the mediation is often directly proportional to the amount of information disclosed prior to the session.

To be successful at mediation, the information required is generally much less than what is required for an arbitration or trial. With the assistance of the mediator, participants often can judge the direction a particular issue is taking based on current information and forego the expense of further discovery.

*Getting Everyone To The Negotiating Table*

The goal in these types of matters is to settle the current claims and to establish a relationship and protocol to manage future claims without having to resort to litigation. Accordingly, it is critical to have the right people at the negotiating table. The best way to get them there is to use the mediator.

The mediator can visit with each side to determine who are the critical players who should be present and find out what information should be exchanged and make sure that it actually is. Through continued pre-mediation contacts, the mediator can increase the chances for success. Bear in mind that these communications are treated as confidential.

*Getting Ready For The Mediation Session*

Preparation of a negotiation plan prior to the mediation is critical; it should surface the important variables for a meaningful negotiation.

Three key elements to identify are: 1) issues to be resolved; 2) the participants who must be present at the session; 3) data that must be prepared and/or distributed among the parties or delivered to the mediator prior to the session.

Neglecting any of these elements will usually significantly delay any meaningful settlement discussions and can often cause confusion throughout the process.

After identifying the elements discussed above, analysis of the parties' position(s) on the issues should be undertaken. Trade-offs and bargaining positions should be determined in advance. As a final step in preparation, a range of acceptable outcomes and "Best Alternatives to a Negotiated Settlement" (BATNA) should be considered.

In other words, at what point will one's position be better served by going to trial as opposed to settling the dispute at the mediation?

*Preparing A Mediation Statement*

Each side should exchange a mediation statement far enough in advance of the actual session to allow each side to assimilate the points raised and assure the attendance of the appropriate decision-maker. If both sides indicate a willingness to explore a contractual relationship going forward then business people, who have authority, need to be present and participate.

A mediation statement is an opportunity to persuade the opposition. Use the mediation statement to convince the other side that settlement — on terms acceptable to you — is in its best interest.

The stronger and better supported your position, the more ammunition the mediator will have to persuade your opponent that the risk of going to trial outweighs the potential benefits.

Don't simply open your files. Make careful decisions about the trade-offs involved in giving up undisclosed information. Save information for disclosure during the mediation process (or not at all) to the extent that you deem appropriate. Exercise good judgment throughout.

 

*Attending The Mediation Session*

During the joint session, the opening statement not only identifies the issues to be negotiated, but also sets the tone for the entire mediation. The issues should be stated clearly in non-provocative language.

This will encourage the other parties to listen to the stated position and to actually "hear" the needs and interests expressed. Words with a negative connotation (e.g., "ridiculous," "totally unfounded," etc.) create roadblocks to any meaningful communication between the parties.

Do not make any settlement offers or proposals in your opening statement. Use this opportunity to clearly set forth the issues to be resolved and to create an atmosphere of trust and good faith for the negotiation to follow.

*Using The Mediator*

After the joint session, the mediator will meet privately with each side. Now is the time to convey your level of conviction about the case to the mediator. Argument is fine. Share with the mediator your strongest points and, as you begin to trust the mediator, be willing to acknowledge your risks and weaknesses.

If you are forthright, you will gain the trust of the mediator, which can be used to your advantage. If you treat the mediator as your collaborator, rather than adversary, you will get the most from the mediator. Remember, the mediator is not there to make a decision, but to help you convey your points to the other side and vice versa, so that all concerned will be in the best position to decide whether to settle and on what terms.

As you explore settlement options, flexibility is they key. You should make offers to generate movement by the other side. Never renege on a previous offer unless you are prepared to lose both tremendous time and the interest of the other side to negotiate with you in good faith. Do not draw lines in the sand.

It is critical that you listen to the mediator because the mediator is the only person who knows the attitudes of everyone involved and is in the best position to pursue settlement opportunities on your behalf.

Also, the mediator is in the best position to manage direct contact between decision makers, which likely will be necessary to achieve a going-forward business solution.

A skillful mediator can help you achieve an acceptable result. To get the most from the mediator, make him or her your friend; you can do that by appearing reasonable and realistic when the other side is not, and by being willing to explore approaches suggested by the mediator.

Remember, those suggestions are not created in a vacuum because the mediator knows what's going on in the other room and is motivated to use that knowledge to effectuate a settlement.

*Mediation Works*

Mediation can achieve results where direct negotiations may fail and litigation will not provide closure. Ninety percent of the time, mediation will result in a settlement. Effective use of the process will enable hospitals and insurers to focus on providing emergency care rather than fighting over who should pay for it.

*— By John Bates Jr., JAMS*

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[1] Author acknowledges the significant contributions of healthcare specialists attorneys George Colman, of Stephenson, Acquisto & Colman in Burbank CA, and Ken Richardson, of Marion's Inn in Oakland CA.

[2] The full report can be found at the National Center for Health Statistics, a division of the Centers for Disease Control and Prevention. (Website: cdc.gov/nchs)

[3] Annals of Emergency Medicine, Volume 52, Issue 2, Pages 108-115. (August 2008) (Website: www.annemergmed.com)

[4] In such circumstances, known as "balanced billing," some states (Colo., Conn., N.J., R.I. and W.V.) have eliminated the practice and other states are proposing to do so, e.g., SB 697 in California.

 