Health Care and Mediation

by David M. Wells, J.D.

"I was never ruined but twice - once when I lost a lawsuit and once when I won one." Voltaire.

Conflict! Disputes! Litigation! These are three of the most dreaded aspects in the every-day life of those trained and inspired to provide medical services to the public. The prevention and care of medical problems is difficult enough without adding contract and employee disputes, disagreements with partners and business associates, credentialing and privileging issues, "turf" wars, and the growing variety of negligence lawsuits. These day-to-day non-medical problems are extremely costly in terms of lost time and the disruption of necessary activities. They also drain one's energy and can ruin a reputation.

While the business aspects of providing medical services to the public will never go away--even with socialized medicine--there is an alternative method for resolving disputes that is gaining popularity throughout the United States. It's called facilitative mediation, and proponents believe it is a more effective way of addressing dispute resolution because it is less costly, less adversarial and requires less of a time commitment than traditional litigation.

What is it?

Mediation is commonly described as a consensual, confidential process in which a neutral third party *without any power to impose a resolution* works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.

It is consensual in that the parties voluntarily enter into the process and only on the terms and conditions acceptable to the parties themselves. They remain in the process only so long as they desire, and they bind themselves to an agreement only if they believe it is in their best interest to do so.

The mediator is a facilitator who helps the parties communicate with each other and reach common ground. Mediators have no power to force parties to do anything, cannot bind parties to mediation agreements, do not make decisions on the merits of the case, do not act as an advocate for either party or a particular position and cannot impose any sanctions. A mediator encourages disputants to find a mutually agreeable settlement by helping them identify, express, and prioritize the factual and emotional issues; reduce misunderstandings; and identify points of agreement. The mediator helps the parties fashion their own tailor-made agreement.

Mediation is confidential in that the parties are not allowed to later use anything said during the process as evidence in court. Likewise, the mediator is not allowed to disclose anything said during the mediation process without permission from the parties. It is a private--not a public--process.

How does it work?

Facilitative mediation is a multi-step process. First, the mediator discusses with the parties or their attorneys by phone, in advance of the meeting, the general nature of the process, the nature of the dispute, and some procedural ground rules.

At the mediation, the mediator gives a short statement explaining the nature of the process, the roles of the participants, and the mutually agreeable procedural rules.

Next, each party is given the opportunity to make an opening statement summarizing the issues and the party's positions. If one side is represented by an attorney, both the attorney and the party speak.

The mediator then summarizes the issues and--with the help of the parties--prioritizes the issues. Through discussions and questions, the mediator helps the parties find areas of agreement and possible avenues for settlement. Sometimes, it is necessary for the mediator to meet separately with the parties in order to discuss matters confidentially with one side and to help the parties make movement in coming to an agreement. Many facilitative mediators, though, will attempt to keep the parties together as much as possible.

Finally, the mediator assists the parties in drafting their agreement. Most of the time, compromise is possible and preferable to litigation. Most litigants eventually conclude that a negotiated resolution better serves their interests when compared to the costs and risk of traditional litigation. If there is no acceptable compromise and the litigants' positions are irreconcilable, it will be necessary for a third party--a jury, a judge, or an arbitrator—to decide the dispute.

How is it different from litigation?

Litigation is inflexible. If the matter proceeds to trial, it is usually a zero sum activity with one party winning and the other losing. One party is declared "right" and the other "wrong." It is a public process and requires the parties to take public positions and disclose private information. It is unpredictable, sometimes irrational, and usually uncontrollable. It is very time consuming, emotionally draining, and expensive.

Mediation is a private meeting of the parties whereby they have the opportunity to confidentially express their legal, factual, emotional and moral viewpoints to the other party or parties. They have control over the process, which often is concluded in a matter of hours. If an agreement is reached, it is mutual. Communication, aided by the efforts of an effective facilitative mediator, can overcome what were previously thought to be insurmountable differences.

When is mediation most useful?

Mediation is particularly useful when:

- Confidentiality is important.
- There will be an ongoing relationship between the parties that is worth preserving.

- The parties want minimized costs.
- The parties need to express emotions.
- There are communication difficulties between the parties which impede settlement.
- Out-of-control parties need reality-testing from outside.
- There is a desire for creative solutions not obtainable in Court.
- A risk-free forum for risk-adverse parties is needed.
- There would be an uncertain outcome in Court.

Mediation is not particularly useful when:

- There is a legal principal at stake or a need for legal precedent.
- There is no willingness to compromise anything.
- There is need for vindication.
- There is a lack of good faith, or unmeritorious claim has been made.

What are the advantages of mediation?

- Mediation is the least intrusive form of third-party involvement in a dispute. The parties retain control over vital decisions affecting their lives and the outcome of the process.
- The outcomes are tailored to the needs and interests of the parties and reflect their own preferences and priorities. This creates the possibility of win-win results.
- The parties create their own settlement resulting in greater satisfaction with the outcome.
- The process addresses all relevant and negotiable issues raised by the parties and is not limited to legal causes of action.
- The process helps parties to more fully understand both sides of the dispute.
- The process improves the capacity of the parties to resolve future disputes because they gain a better understanding of each other. Their ability to work with work with each other in the future is enhanced.

- The confidential nature of the process allows the parties to keep their matters private.
- The process is often faster and more economical than litigation.
- The process may improve or at least should not further damage the relationship between the parties.

What are the disadvantages?

- Mediation does not create written precedence.
- The process does not create, refine or enforce societal norms for behavior.
- The process may give advantage to a more skilled or powerful party.
- It may difficult to get another party to mediate since it is voluntary.
- The process does not guarantee an end to the dispute. A settlement agreement may not be reached.

Where do I get it?

Many states have adopted dispute-resolution services. Frequently, mediators can be contacted through referral services established by the local courts or from local dispute resolution centers. There are also national services offering mediation including the American Arbitration Association, the National Center for Dispute Resolution, and the American Health Lawyers Association.

Summary

Using a professional mediator to assist you in resolving disputes is an excellent way to address many disagreements that occur in the every-day business of delivery of health care services. It can be used to avoid litigation or to resolve disputes after litigation has started. It is especially useful in situations where parties will need to continue to interact with each other or operate in close proximity to each other. Some examples include: contract and partnership disputes, labor issues, credentialing issues, medical staff issues, managed care disputes, disputes with patients or their families and negligence lawsuits.

David M. Wells is an attorney practicing in Muskegon, Michigan. He is the son of an Osteopathic physician, and he worked for five years as a hospital- employed inhalation therapist. He has logged many years of hospital board activity and has extensive experience with healthcare law, including the drafting and implementing of a joint operating agreement between an osteopathic hospital and a Catholic hospital system. Wells was trained in mediation through a program approved by the Michigan Supreme Court. He is a commercial arbitrator for the American Arbitration Association and the American Health Lawyers Association. He is also a labor arbitrator for the American Arbitration Association, the Michigan Employment Relations Commission, and the American Health Lawyers Association.