

Drive Down Healthcare Costs By Creating A “Culture Of ADR”

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The twin imperatives of providing high-quality and low-cost healthcare have proven elusive to achieve in combination. The same technology, specialization and expertise that produce high-quality care also result in increased costs that burden patients, providers, insurers, employers, consumers and the economy as a whole.

Cost containment efforts that focus directly on patient care cannot avoid at some point threatening advancements that have been made in quality of care. Instead, healthcare organizations should continue to focus on driving administrative waste and inefficiency out of their systems.

To this end, corporate counsel at healthcare organizations need to consider the amount of administrative cost that is imposed by court litigation and litigation-related expenses across the different types of disputes that typically arise for the organization. Whether these disputes involve patients and providers, providers and payers, providers and employees or other staff, or providers and vendors, including written arbitration agreements in healthcare contracts will open up opportunities for cost containment that support rather than imperil high-quality patient care.

Arbitration And Healthcare Disputes

Arbitration involves the contractual election of an expert decision-maker to resolve disputes under designated rules and procedures, and to do so outside of a courtroom. Several of the features which distinguish arbitration from court are particularly beneficial in the healthcare context.

First, arbitration permits the parties to select a decision-maker with expertise in healthcare. This can save parties the time and expense required to educate a generalist decision-maker and to provide any necessary industry or scientific context. The National Arbitration Forum and other arbitration administrators make available rosters of arbitrators who are healthcare specialists. However, parties remain free to select any type of arbitrator that they choose.

Second, arbitration is less adversarial than court litigation. In the patient-provider context, filing a lawsuit is often seen as contentious and rash. Healthcare providers often feel that engaging in adversarial litigation is inconsistent with ethical commitments associated with the patient-provider relationship. In contrast, arbitration permits the parties to maintain a more constructive relationship that can support continued “work with” opportunities that encourage early settlement and resolution.

Third, arbitration proceedings and awards are not usually disclosed publicly unless the parties decide to disclose. This aspect of arbitration enables providers and patients to protect the confidentiality of individual healthcare information. Confidentiality may also be important for employment disputes and disputes that arise in ongoing business relationships.

The Legal Context

The Federal Arbitration Act (FAA) embodies a strong federal policy in favor of arbitration, and this policy extends full force to arbitration agreements in the



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healthcare context. However, the healthcare context gives rise to unique considerations that should be kept in mind.

First, parties may challenge an arbitration agreement under principles of state contract law, so in the healthcare context, patients sometimes challenge arbitration agreements under the rubric of procedural unconscionability. In particular, expedited admissions procedures conducted in the urgent or emergent care or nursing home setting can create situations where valid assent to the arbitration agreement can be called into question. Providers should take special care to effectively communicate about arbitration under these circumstances and some specific strategies are mentioned below in the “How to Get Started” section below.

Second, state regulation of health insurance and the McCarran-Ferguson Act can, under some circumstances, cause state laws governing the “business of insurance” to supersede the FAA. Attorneys should therefore be aware of state insurance laws regulating arbitration, especially in the context of payer-provider arbitration agreements. However, states are beginning to recognize the benefits of resolving billing disputes using arbitration, and some states require insurers to arbitrate payment claims at the election of patients and providers.

Existing Arbitration Agreements Or New Initiative?

Often, arbitration is already a fixture in one or more areas of a healthcare organization’s operations, even though it has not yet been widely utilized. Human resources may have a long history with employment arbitration agreements and in arbitrating employee disputes as a part of an employee dispute resolution program. Procurement and purchasing may routinely include arbitration terms in both significant and routine vendor agreements. Finally, healthcare organizations may already be contractually committed to arbitrate disputes with patients with an eye toward resolving liability matters quickly and efficiently in arbitration rather than in potentially protracted court litigation.

Implementing and promoting a culture of ADR can often begin with corporate counsel looking to exercise the right to arbitrate disputes that fall under existing arbitration agreements. The second step is to then look to include arbitration agreements in other types of contracts where any disputes that arise are being channeled to court litigation rather than arbitration.

How To Get Started – Contract Drafting And Program Design

Arbitration becomes a viable option

only with a pre-dispute agreement between the parties. Arbitration agreements must be properly constructed and presented in order to be enforceable in the healthcare context. The considerations below provide healthcare attorneys with a framework for discussion of these issues with business stakeholders and for implementing an arbitration program.

Make Sure the Agreement is Mutual and Covers All Disputes

The agreement should bind both parties, and it should provide that all disputes, including disputes regarding the enforceability and interpretation of the arbitration agreement, will be decided in arbitration. For example, when a patient and healthcare organization agree to arbitrate, the agreement should encompass all potential patient claims, including liability claims, as well as all potential organization claims, including billing claims. Full mutuality often plays an important role in determining arbitration agreement validity.

Access to All Legal Remedies

The agreement and the arbitration rules should provide that all legal remedies that are available in court are also available in arbitration. This is especially important where contracting parties do not possess equal bargaining power. The goal is to provide all parties with the same relief in arbitration that they would have available in court.

Flexible Procedures

Billing disputes are largely document-based and quite often can be decided without requiring an in-person hearing attended by the parties. Document-based hearings are particularly beneficial for patients – who can assert or defend claims without having to miss work – and for claims where the relief requested is relatively small.

Convenient Locations

Where in-person hearings are selected by the parties, it is important that they be conducted at a location that is convenient for all parties. The administering organization should have a sufficient number of arbitrators and hearing locations available in the locations where the disputes are expected to arise.

Make Arbitration Cost-Effective

Arbitration’s speed and efficiency advantages insure that the overall costs of arbitration will be much less than court litigation. However, it is possible that under certain circumstances, patients may encounter arbitration fees that may exceed court filing fees. Healthcare organizations should consider agreeing to cover patient filing fee costs that exceed the amount imposed by court filing fees. Paying or reimbursing these fees is an important aspect of providing patient-friendly access to the arbitration system while also further securing the enforceability of the arbitration agreement.

Make the Agreement Plain and Understandable

The agreement should make it clear to the patient that he or she is foreclosing the option of a judge or jury trial and instead agreeing to an alternative forum. Consider using a stand alone agreement, distinctive font, or requiring a separate signature or initials.

Educate Patients

Educating patients as to what they are obtaining by agreeing to arbitrate – a fair, cost-effective method to resolve any future disputes – serves to balance any uneasiness patients may feel in signing such an agreement. Consider offering a “Patient’s Guide

to ADR” in brochure form that explains arbitration and its benefits and answers common questions. Reputable arbitration administrators should be able to help provide this information.

Consider Providing an Opt-Out Provision

Allow the party with less bargaining power to “opt out” of the arbitration agreement within a certain period from signing, such as 10 days. An “opt out” provision can require written notice from the party opting out. The availability of an opt-out mechanism eliminates the direct relationship between agreeing to arbitrate and receiving care and can further buttress court enforcement of the arbitration agreement.

Invoke the Federal Arbitration Act

State arbitration laws can vary from state to state. By invoking the FAA, healthcare organizations can use the same agreement in several states, and parties are assured that the agreement will be enforced according to its terms. Invoking the FAA also triggers Congress’ strong policy preference in favor of enforcing arbitration agreements according to their terms.

Select a Reputable, Full-Service Arbitration Administrator

To ensure that the process is run efficiently and in an unbiased fashion, designate in the agreement that arbitration will proceed under the rules of a reputable ADR administrator, one that administers the full range of healthcare ADR proceedings and whose rules have been repeatedly tested and approved by courts. The elected arbitration rules are incorporated into the arbitration agreement and contain procedures that efficiently guide arbitrator selection, deadlines, disclosure and discovery of evidence, hearings, and the issuing of the arbitration award. In the healthcare context in particular, it is important to become familiar with the rules of the various arbitration administrators. Not all ADR providers, for instance, administer arbitrations resulting from pre-dispute agreements involving patients and providers.

Making the Program Work

The mere existence of an arbitration agreement that governs a particular dispute does not guarantee that the dispute will be decided in arbitration. Legal staff and relevant healthcare staff need to be aware of the right to proceed via arbitration and be prepared to assert the organization’s right to an arbitral resolution of the dispute. Procedures should take advantage of “work with” opportunities as the arbitration process unfolds in order to maximize the potential for mutually agreeable settlement before the arbitration hearing or award.

Tying It All Together

Arbitration has the potential to drive significant cost savings. Also, arbitration possesses several characteristics that are especially conducive to the efficient and amicable resolution of healthcare disputes, and to harness these capabilities, parties should select expert arbitrators, stay focused on “work with” opportunities, and shield sensitive patient and business information from public disclosure where appropriate.

Creating a culture of ADR by increasing the use of arbitration can be as easy as exercising the right to arbitrate created by existing, but neglected, arbitration agreements. Drafting new arbitration agreements is not complex as long as certain aspects of the healthcare context are considered and accommodated. The results obtained will be reduced litigation expenses, at no cost to the organization’s core mission of providing high-quality care.

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