



THE MANAGED MEDIATION OF A PAYOR-PROVIDER HEALTH CARE DISPUTE

By Viggo Boserup, Esq.

In the health care industry, payors and providers often have claims for both underpayment and overpayment arising from ongoing contracts or other health care services rendered.

When claims arise between a payor and a provider, they are often aggregated and combined for purposes of litigation, sometimes totaling thousands of claims in a single action. When the parties are unable to resolve the claims informally, they often become subjects of either a civil action or an arbitration. In either case, the parties try to settle those claims and often do so in mediation.

A Different Kind of Mediation

Typically, more than 95 percent of mediations are initiated by one or two parties who agreed on a mediator, scheduled the mediation, filed a brief and showed up at the mediation session. The mediation session is often the first time the parties discuss the issues with the mediator or each other. The success of mediations involving large numbers of claims and related issues, however, is often in direct proportion to the degree of pre-mediation communication, document exchanges and analyses of these unique types of claims. It is the goal of the Managed Mediation to facilitate pre-mediation activities and greatly increase the likelihood of resolution.

Unique Qualities of Payor-Provider Disputes

What makes payor-provider disputes unique is that most often there are multiple issues, or buckets, involving decision-makers from different departments within the same organization (i.e., the claims people versus the contracts people versus the case administrators). Each bucket may contain hundreds or thousands of separate claims that arise under the same contractual relationship. Because the claims are individually

small, the provider most often waits until it has gathered a sufficient number of claims to make filing the action or mediating the case pre-litigation worthwhile.¹

These types of claims fall into several familiar categories, such as lack of authorization, medical necessity and usual and customary rates. Typically, they will span fixed dates of service. During the pendency of the action, there may accrue additional claims for additional dates of service or claims that were not part of the original claims but arose under the same contractual or non-contractual relationship as the original claim(s). At the same time, the existing contract may be expiring, may have expired or may be in the process of being renegotiated during the pending action. So by the time of the mediation, there are original claims, accrued claims, future claims certain to arise from the relationship and often contract issues that need to be addressed.

The Managed Mediation

Advance Collaboration

In the Managed Mediation, the parties confer with the mediator well before the mediation session to agree on what events or milestones should occur prior to the mediation. Having identified the necessary milestones and key players, the parties then agree on a schedule for their implementation. It is the goal of the Managed Mediation to address all issues in an orderly and effective process designed to save time, money and human resources.

Preliminary Mediation Management Conference

When the parties submit a matter to mediation, they will be given a date for a Preliminary Mediation Management Conference (PMMC). The agenda for the conference typically will include a description of the claims by bucket/category, amounts of the claims, identity of

1.800.352.JAMS | www.jamsadr.com

*This article was originally published by LAW.COM
and is reprinted with their permission.*



the parties required to attend the mediation, dates for exchanges of specific types of information, contract issues, identity of individuals regarding contract issues, dates for subsequent status conference(s) and the date(s) for the mediation. The PMMC can result in a Scheduling Agreement signed by the parties, which then describes the path to mediation.

Cost Factors

Along with the greater likelihood of resolution comes a commensurate decrease in the costs associated with the prosecution or defense of claims. Because each party has a voice in factors such as timing of milestones, designation of individuals and exchange of documents, the party has an opportunity to do so in a way most convenient and efficient for that party. Likewise, the cost of the mediator may be less. The mediator can be hired as in the case of an arbitrator, with the payment of a retainer prior to the PMMC.² Given the greater likelihood of resolution at the first mediation session or even earlier as to some or all issues, total mediator charges may ultimately be less than they would be by entering a mediation without prior mediator involvement.

Conclusion

Parties to a traditional mediation rarely take the time to speak with the neutral in advance of the mediation session. In payor-provider disputes, this is a major missed opportunity because their mediations are precisely the type requiring collaborative preparation. They almost always have multiple issues presided over by more than a single individual on each side. Through the collaborative planning at the PMMC, many such problems can be avoided: The parties will have a better understanding of what is needed to prepare for and schedule the mediation, they will have a sense of the most effective method of dealing with issues at the mediation and there will be no “empty chairs.” By eliminating avoidable obstacles through thorough and effective planning with the mediator, the parties will have greatly increased the likelihood of success at the mediation session. ■

¹ In one case involving separate provider hospitals, all of whose cases were consolidated into a single civil action, Medicaid claims filed against the administering agency averaged more than 1,000 patients per hospital. Total amount of all claims was less than \$10 million, making individual actions highly impractical. Two initial mediations set the stage for two settlements, clarification of issues and subsequent sessions. After two years and additional sessions, all claims were resolved.

² Rates vary depending on the mediator and the location, similar to the variation in billing rates for practicing attorneys. Some charge by the hour, with rates anywhere from \$150 to more than \$900 per hour. Others charge by the day, but generally only for full-day hearings. In the Southern California market, the cost of a PMMC and follow-up work would typically be between \$450 and \$800 per hour, again, depending upon the mediator.

***Viggo Boserup, Esq., CEDS**, is a JAMS neutral based in Southern California. In addition to more than 20 years as a fulltime mediator and arbitrator, Viggo serves as special master and referee in a number of cases involving electronic discovery. He is certified as an Electronic Discovery Specialist by the Association of Certified Electronic Discovery Specialists (ACEDS). He can be reached at vboserup@jamsadr.com or for more information, please visit www.jamsadr.com/boserup.*