

TEXAS LAWYER

The Health Care World After COVID: How to Best Resolve Conflicts

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Health care litigation costs in the United States have skyrocketed as health care providers, insurers, and manufacturers have become subject to lawsuits for medical malpractice, negligence, product liability and other legal claims. Health care organizations may also face claims related to data breaches, regulatory compliance and other issues. Because of the costs associated with litigation, the use of alternative dispute resolution (ADR) was growing in popularity in health care cases even before the COVID-19 pandemic, which exacerbated the need for expedited resolutions and cost containment. As opposed to traditional litigation, ADR, in the form of mediation and arbitration, is more efficient and cost-effective in resolving all types of disputes.

"Lawyers have been increasingly using mediation and arbitration since the start of the pandemic, when many court systems slowed down (or even shut down) and accumulated significant backlogs." In addition, the pandemic exacerbated existing problems in the health care industry, such as the increasing cost of care and the shortage of health care workers. These problems and other pressures contributed to an increase in disputes in the field of health care. Virtual mediations and arbitrations continued throughout the pandemic and continue now in an effort to save parties money and allow them to participate without any travel expense or time away from work.

Along with these problems, health care is changing. First, the use of telehealth increased during the pandemic. Second, the consolidation and retraction of health care entities have continued as the industry attempts to contain rising drug costs and eliminate surprise billing for consumers. Contracts regulating care management,

employment and cost containment are creating friction in health care participant objectives. The effort to create more productive and more profitable entities has resulted in more disputes in need of mediation to manage the future of these changing relationships.

Many health care organizations and insurance companies have begun to offer mediation and arbitration services to patients and medical personnel as an option for resolving disputes. Mediation is quick, confidential and less costly, and it allows for a more collaborative and less adversarial approach to dispute resolution.

Many health care providers and institutions are including mandatory arbitration clauses in their contracts requiring that any disputes be resolved through arbitration rather than through the court system. Arbitration can be more cost-effective for all parties and can provide quicker resolution of disputes. The use of arbitration has also extended to health care disputes that are more complex due to the technical nature of the issues involved. Contracts between hospital systems and insurance companies often provide for the use of arbitration, which in turn allows for the use of specialized arbitrators with expertise in health care and medical issues.

Traditionally, health care systems have managed disputes internally with human resources or a process controlled by administrators of the health care system. The



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flaw with this approach is that at least one party will feel the system is stacked against them. Bringing in an independent, neutral mediator ensures that the process is fair and unbiased. A mediator who is not employed by the health care system, insurance company or provider will be well received by an employee or a patient, who is more likely to feel that they are getting treated fairly. First, because they are not connected to the outcome, an outside party brings a unique and fresh perspective to the problem. Second, it is easier for a third party to give the parties attention and focus their conflict warrants. Third, the parties will benefit because someone else will be responsible for managing the mediation. A mediator will tailor the mediation to the parties. The parties, whether employees, providers, health care systems or larger entities, need only work with the mediator to have the appropriate decision-makers present at the mediation and to provide information about the dispute in advance of the mediation.

A professional mediator will artfully personalize the mediation process and tailor it to the circumstances of each dispute. By creating a process that considers the specific needs, interests and concerns of the participants to a conflict, there is a better chance of resolving a dispute and creating long-lasting solutions while also adopting preventive measures to avoid future conflicts. It is the mediator's job to anticipate the needs and interests of the parties and to use their expertise to improve the process itself and make it meaningful for all. Remember, mediation is not a one-size-fits-all approach; it needs to be adjusted for the parties involved.

Mediators are adept at building trust and relationships with adverse parties. The first thing a mediator does is listen to and understand the perspective of each party. An administrative employee or a hospital officer is not equipped to take on this role because they have a stake in the outcome of the dispute. This bias toward the employer disqualifies them from having more power than another party in the process. By relinquishing control of the process, parties can communicate better and de-escalate an often distrustful and adversarial relationship. Further, all parties benefit from having the mediator work to facilitate creative and longstanding improvements to the status quo.

Nowhere are the constraints and conflicts bigger than in the delivery of medical care during ever-changing

regulations regarding COVID-19. Because frustrations and conflicts are everywhere in digesting this new information, clashes in the workforce are becoming more commonplace and more difficult to resolve. Everyone has a different theory of how to effectively incorporate conflicting regulations into the day-to-day workplace; parties are rarely heard. As a result, frustrations and conflicts fester and grow. There is no mechanism for diffusing this tension or for improving existing relationships between the staff; as a result, patients suffer. Due to these ongoing pressures, many workers have chosen to leave or retire in what has been called the "great resignation." The void left by these workers has increased the strain on existing personnel and can create internal conflicts. There are frequent clashes between highly paid temporary workers brought in to address staff shortages and existing staff. For example, a traveling nurse will often clash with a nurse who was trained at the hospital and has a vested interest in the community. Mediation offers a mechanism for resolving personality conflicts among health care workers and creating better working relationships.

Venting to a neutral party may be the only chance to improve systems and communications. Our priority during these ever-turbulent times should be aimed at maintaining and cultivating existing relationships. With the ongoing pressures of reducing health care costs and increasing the quality of care, this requires being able to evaluate existing relationships and needs and to pivot and make changes to improve these relationships, as well as to monitor training and procedures to better meet current circumstances.

With the problems facing the health care industry, using a third-party neutral to resolve conflicts is an effective way to work together and improve our health care system.

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