Focus | *Employee Benefits & Executive Compensation and Health Law*

Cost Efficient Healthcare Arbitration

BY CECILIA MORGAN AND GEOFF DRUCKER

Arbitrations have become more prevalent in the healthcare industry. The most common complaint about arbitration is that it is too much like litigation; it is too expensive, slow and consumed by procedural battles tangential to healthcare business interests. Since healthcare is such a highly regulated field, healthcare disputes lend themselves to arbitration; healthcare laws and technical language are often best deciphered by a healthcare-savvy arbitrator. . The alternative to arbitration is trial by judge and/or jury with its accompanying risks.

Consider the following baker's dozen "dos and don'ts" prior to a final arbitration hearing:

1. Independent administration is best. The administrative body—such as JAMS, American Health Lawyers Association (AHLA) or the American Arbitration Association (AAA):

- identifies the arbitrator by a fair process with disclosures,
- has trained staff to answer questions and provide administrative support, and
- provides rules, the hearing location and office access for the parties and attorneys.

Ad hoc arbitration administration is often stalled by disputes over ex parte communications and payment.

2. Consult with the independent administrative body to determine the rules which best meet the parties' needs. A time-tested and published set of rules clarifies the discovery protocols, hearing location selection and form of award, which minimize costs, while providing a full, fair hearing.

3. The parties can bypass the lengthy arbitrator selection process by agreeing on the arbitrator in a simple phone call between lead counsel. Counsel can select an arbitrator based on her unique healthcare regulations expertise and availability at a proper price point.

4. One arbitrator is much less expensive than a panel. A single arbitrator avoids the substantial cost of calendaring multiple arbitrators, along with parties and witnesses. When the parties cannot agree to one arbitrator, designate one panel member as the discovery arbitrator.

5. Prepare for the preliminary scheduling conference. Most professional arbitrators provide a template of the matters to be considered in the initial hearing. Contact opposing counsel to agree to the procedures and deadlines that best suit the parties' needs. Include your client in the preparation for the hearing.

6. Attend the preliminary scheduling conference telephonically at a time when all—including the client—can actively participate. Set realistic time deadlines that will be honored. Agree on published discovery protocols to limit paper discovery and number of depositions. Consider including the parties' IT professional in the conference; they may prepare exhibits—such as spreadsheets of complicated medical billing information—that may be used by all parties at the hearing. Number the exhibits consecutively starting with the exchange of documents through the deposition process. Discuss pre-marking exhibits, preparation of joint exhibit lists and the process for resolution of the admissibility of exhibits. Timely circulate the scheduling order to all interested parties and witnesses for calendaring.

7. Use e-discovery and file only the discovery which the arbitrator must review, paring down discovery to avoid duplicated submissions of the same information.

8. Waive summary disposition except on discrete issues and schedule time for the proper filing of the motion, responses and decisions.

9. Think about those witnesses who can testify via video or Skype as opposed to those that may testify by affidavit or deposition. Schedule any doctors' depositions early in the process—and when they are not on call—to avoid rescheduling due to medical emergencies.

10. Schedule a conference between lead counsel to enter into stipulations.

Agree on a discovery dispute resolution process, e.g., certificate of conference process, to limit hearings with the arbitrator.

11. Pay arbitrator's invoices promptly to ensure timely hearings and decisions.

13. Schedule a mediation with a healthcare mediator. Since over fifty percent of convened arbitrations never reach final hearing and award, a properly timed mediation results in settlement in more than fifty percent of cases.

There are many similar suggestions for the hearing itself. The hearing is significantly expedited by stipulations on all documents, Skype or video depositions and limiting expert testimony to affidavits and to cross examination. **HN**

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