Consultant Pharmacists Forum

Alternative Ways to Resolve Contract Disputes: Implications for Pharmacists, Facilities, and Patients

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Alternative dispute resolution (ADR) has been developed as an alternative to going to court to resolve disputes. Arbitration and mediation are the two most common forms, with arbitration involving a neutral third party who decides the controversy, the award being either binding or nonbinding on the parties based on prior agreement. Mediation also involves a neutral third party, but the decision comes from the parties themselves reaching an agreement, with the mediator focused more on the process of securing a meeting of the minds. With the growing prevalence of ADR, pharmacists may encounter provisions in contracts—in either professional or personal life—so it is important that they understand the implications of such provisos. Pharmacists who serve patients in long-term care facilities also should be aware of the increasing use of provisions in patients' contracts with the institution and know how courts view those agreements.

ADR is being encountered with increasing frequency, and by being familiar with the two most common approaches, pharmacists can keep abreast of developments and work to avoid pitfalls while adopting these approaches to resolve disputes in appropriate circumstances.

Abbreviations: ADR = Alternative dispute resolution, AHLA = American Health Lawyers Association.

Key words: Alternative dispute resolution, Arbitration, Litigation, Mediation, Pharmacy law.

Increasingly, pharmacists are encountering provisions in contracts, both professional and personal, that include clauses authorizing use of alternative dispute resolution (ADR) should disagreements arise. These may be seen in participating-provider contracts with health insurance or managed care organizations, contracts from insurance underwriters that cover pharmacists and family members as enrolled beneficiaries, or contracts such as those to lease equipment or use the services of mobile phone service providers or Internet service providers. In recent years, this alternative to using courts and legal processes to resolve disputes also has been adopted in the long-term care industry, with ADR provisions being used with increasing frequency in contracts between the facility and patients.

The Anglo-American legal system, rooted in the Magna Carta of 1215 and signed by King John at Runnymede, has developed over almost eight centuries and has resulted in a highly refined system for resolving disputes. Yet, it has its flaws and drawbacks: it is time consuming, expensive, the parties must give up control of the outcome to a jury or judge, and it is an open process where all information, good and bad, positive and negative, becomes available to the public. ADR has evolved to address some of these objectionable characteristics of the litigation system.

ADR refers to any means of settling disputes outside of the courtroom. ADR processes have been

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described as "alternatives to having a court (state or federal, judge or jury) decide the dispute in a trial."[1] It has a long history of being used for disagreements related to construction, labor, and securities regulation, and recently it has been gaining popularity to resolve many other types of disputes including business, consumer, employment, environmental, family, housing, insurance coverage, neighborhood, or personal-injury controversies.

In the health care field, use of ADR was given a major stimulation by the 1998 report of the Joint National Commission on Healthcare Alternate Dispute Resolution.[2] This commission was a collaborative effort of the American Arbitration Association, American Bar Association, and American Medical Association, so its recommendations carried great weight.

The report has three parts:

1. A description of fairness standards for ADR in health care

2. A useful explanation of the different types of ADR processes

3. A listing of the disputes for which ADR would be effective, such as decisions of medical necessity; rulings on provider access; decisions on coverage of facilities, procedures, or equipment; determinations on coverage, reduction, or termination of services or payment; and issues of coordinating treatment by various disciplines

These explanations are especially relevant in any situation where the stakes are high or where strong emotions or distrust are present and time is of the essence.[3] The commission unanimously made five recommendations:

1. ADR can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients and private health plans and managed care organizations.

2. ADR can and should be used to resolve disputes over health care coverage and access arising out of the relationship between health care providers and private health plans and managed care organizations.

3. In disputes involving patients, binding forms of ADR should be used only where the parties agree to do so after a dispute arises.

4. It is essential that due process protections be afforded to all participants in the ADR process.

5. In review of managed health care decisions, ADR complements the concept of internal review of determinations made by private managed care organizations.[2]

Pharmacists who deal directly with patients and their family members unfortunately know first-hand that health care-plan benefit managers often disappoint the expectations of providers and their patients. Hence, conflict is inevitable and constant. In fact, the demand in the health care field is so well established that the American Health Lawyers Association offers an ADR service to facilitate finding mediators trained in that specialty (see www.ahla.org/adr/).

Arbitration

Arbitration is "the submission of a dispute to one or more impartial persons for a final and binding decision. Through contractual provisions, the parties may control the range of issues to be resolved, the scope of relief to be awarded, and many procedural aspects of the process."[4] The key is the use of a neutral third party who makes the decision for the parties in conflict. Usually arbitration will occur with one arbitrator, but sometimes a panel of three or five may be used, with each side selecting one arbitrator and those two individuals in turn selecting the others to comprise the panel. The arbitrator has control of the process and control of the outcomes and control of the process to the extent that the parties have given him or her that authority. Arbitration differs from mediation because the arbitrator has authority to make the final decision about the dispute whereas with mediation that is reserved for the parties.

The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator. At the conclusion of the hearing the arbitrator issues an ""award," " a term of art referring to the decision of the arbitrator. Some awards simply announce the decision (a "bare-bones" award), whereas others give reasons (a "reasoned award").[1] The parties may have input into which type is used. These awards are made in writing and are enforceable in court under state and federal statutes. If enforcement actions prove to be necessary to bring the award to fruition, these claims are brought in court by the parties to the

arbitration to enforce the contract.[4]

The arbitration process can be either binding or nonbinding. Binding arbitration means that the parties have agreed, in advance, to be bound by the arbitrator's decision, regardless of the outcome. When arbitration is binding, the decision is final, can be enforced by a court, and can only be appealed on very narrow grounds. When arbitration is nonbinding, the arbitrator's award is advisory and will be final only if accepted by the parties.[1]

Arbitration is confidential to the extent that the parties structure it as such. They can request that the arbitrator publish only a conclusion in the report, and not put any details of the discussion in writing.

Mandatory arbitration clauses are increasingly encountered in business contracts for services, such as cell-phone lease agreements, to limit the options for a disgruntled consumer to mandatory arbitration. The Supreme Court has ruled that such provisions are enforceable.[5] A consumer movement based in California has a Web site devoted to outlining the perils for consumers who agree to contracts bearing binding mandatory arbitration provisions.[6]

Mediation

Mediation is a private process where a neutral third person called a mediator helps the parties discuss the issues and assists them to resolve the dispute themselves. This is in contrast to arbitration where the arbitrator decides. The parties have the opportunity to describe the issues; discuss their interests, understandings, and feelings; provide each other with ideas, and explore options or alternatives for the resolution of the dispute.[1] The mediator does not have the power to make a decision for the parties, but can help the parties find a resolution that is mutually acceptable. In mediation the only people who can resolve the dispute are the parties themselves. The mediator is there to control the process while the parties control the outcome.

Mediation sessions can proceed in a number of ways. Most mediations start with the parties together in a joint session. The mediator will describe how the process works, will explain the mediator's role, and will help establish ground rules and an agenda for the session. Generally, parties then make opening statements. Some mediators conduct the entire process in a joint session. However, other mediators will move to separate sessions, with the parties in different rooms and the mediator shuttling back and forth between the parties.[1] In this fashion the mediator helps the parties exchange information, perspectives, and offers. A good mediator also helps the parties "examine their interests, reframe the issues, and plays the devil's advocate. A mediator may or may not also help the parties in evaluating their positions on the matters at issue."[7] The mediator may play the important role of clarifying any vague aspects of a tentative agreement. These meetings in which a mediator talks with the parties individually to discuss the issues are called caucuses.[4]

Mediators, as well as arbitrators, typically use a formal ADR agreement and will ask the parties to sign it before the processes begin. It is typical for parties to mediation to split the expense, and they may be asked to pay the mediator's fees along with any costs related to securing the meeting site, if any, at the beginning of each session, recognizing that the mediator has no control of the outcome of the process and the parties' satisfaction with it.

Mediation is a confidential process, the details of which are not subject to legal discovery processes later in court proceedings. Nonetheless, an agreement arrived at in mediation is public information if filed in court, but the agreement typically does not include the details of the discussion or give-and-take that led to the agreement. Mediators have an ethical responsibility to maintain confidentiality. In mediation, as in arbitration, all parties are expected to keep any of the discussions confidential.

Although a judge may order a case to undergo mediation, for example with matters being handled in small claims court, the process remains voluntary in that parties are not required to come to agreement. In some court systems it is now commonplace for judges to divert certain types of cases, e.g., cases involving family law matters, to mediation to secure an out-of-court agreement and thereby eliminate the need to consume valuable court-related resources.

Even though mediation is voluntary and might be ended by either party at any time with or without cause, statistics show that nearly 85% of mediations

produce successful party-built solutions.[3] This is testament to both the effectiveness of mediation and mediators as well as to the commitment to the process by the parties.

Advantages and Disadvantages of ADR

The list of advantages for ADR, especially mediation, is much longer than the list of disadvantages (Tables 1, 2), most of which are tied to the lack of enforceability. Power to enforce an agreement exists only with a court, and going to court in proceedings to enforce a contractual obligation resulting from arbitration or mediation would be a separate undertaking.

One goal of the dispute-resolution process is to get the matter resolved quickly. A court judgment gives finality if one wants to go that route, but is more complex, almost always takes longer, is more expensive, and is certainly less private. Arbitration gives finality if that approach is preferred. Mediation also gives finality with a degree of control for the parties not seen with the other two approaches.

Training of the Facilitators, or "Neutrals"

While many, if not most, arbitrators and mediators have a legal background, this is not a requirement. Training is usually at the level of a certificate rather than an academic degree, i.e., the aspiring neutral third party will complete a short course of three to five days' duration. Instruction usually will include both didactic presentations and role-playing. Once the certificate program is completed, an experienced facilitator mentors the budding neutral, taking on an expanding role in the process over a number of cases. At the end the mentor "certifies" that the trainee is ready to serve without supervision.

When This Knowledge Might Be Useful to the Pharmacist

Certainly these insights regarding both forms of ADR may be useful to the pharmacist in both professional matters and personal matters because contractual agreements are ubiquitous in our society. This understanding of the options for resolving disputes may prove helpful when discussing matters with long-term care administrators anticipating a dispute with a payer or with a patient. Or it could be that the pharmacist becomes aware of a potential dispute between a patient or the patient's family with a provider, and ADR alternatives might be useful in those situations.

Case Examples from Long-Term Care

Courts in a variety of jurisdictions have had opportunities to address legal issues with arbitration in the context of services provided to patients in long-term care facilities. Issues associated with mediation do not get to the courts nearly as frequently because of the "result-must-be-acceptable-to-all-parties" aspect of that process. With mediation, the dissatisfied party can merely walk away without agreeing to the result; bear in mind that this is not the case with some arbitration situations because the arbitrator makes the final decision.

A review of several long-term care-related cases from recent years may provide insights on how these legal issues arise and how the courts decided them. While no cases involving pharmacy services could be located, there have been cases moved through the judicial system related to mandatory arbitration provisions in patient-admission contracts.

2007 Florida Case

A 2007 case in Florida addressed the legal acceptability of a mandatory arbitration clause in a contract executed on a patient's admission. A dispute arose between the representative of the estate of a former nursing facility resident and the institution. The nursing facility went to court to seek enforcement of a provision in the admission contract directing that all disputes be settled by arbitration rather than by going to court. The trial court issued an order compelling the arbitration, and the patient's representative appealed. The appellate court ruled that some provisions related to the arbitration mandate ran contrary to protections for nursing facility residents enacted by the state legislature. The core issue was incorporation in the admission contract of some provisions related to the "Rules of Procedure for Arbitration" adopted by the AHLA. The court's decision was that if AHLA provisions were in conflict with the state statute, the statute should prevail.

As part of its decision the court stated that a nursing facility should be expected to "proffer [offer] form

Table 1. Advantages of Alternative Dispute Resolution

- Voluntary
- Adaptable, flexible, and limited only by the creativity and expertise of the participants
- Less expensive than court
- Even-handed or fair
- Faster/less time required
- Sessions are scheduled at the convenience of the parties and mediator
- Parties have greater participation in reaching a solution
- Privacy during the proceeding/not open to the public
- Confidentiality of outcome/not a matter of public record
- Topical expertise of the arbitrator or mediator, such as familiarity with health care issues
- Parties have more control over the outcome/empowerment
- Parties have input into selection of the person who will influence the outcome
- Informality
- Adversarial and polarizing atmosphere of the courtroom is avoided
- Procedural or evidentiary rules are more flexible than in court
- More accessible than court
- No procedural delays as in court
- No limitations on available remedies as with the law
- Not precedent setting if that is a concern for follow-on matters
- Availability of an apology, admission of wrongdoing, or explanation
- Feedback that is so important for quality improvement is facilitated

Table 2. Disadvantages of Alternative Dispute Resolution

- No precedential value
- No "public blame"
- No discovery available, which could be quite necessary in a very complex case
- No award of attorney fees to the prevailing party, as in many lawsuits
- No availability of judicial review on appeal

contracts that fully comply with the statute, not to revise them when they are challenged to make them compliant. Otherwise nursing facilities have no incentive to proffer a fair agreement."

An additional facet of the case that attracted the attention of the judges was that the personal representative of the patient who executed the documents upon her mother's admission did not sign in her capacity as her personal representative; to the contrary, she only signed the provision in the document addressing where financial notices were to be sent, the daughter having control of the funds to pay the bills. This provided additional support for the court's decision that the arbitration provision in the admission contract should not be enforced.[8]

2008 Ohio Case

The opposite result was reached in an Ohio case a year later. Slightly different from the Florida matter, the patient signed an admission contract and a separate document entitled "Alternative Dispute Resolution Agreement between Resident and Facility." When the patient died it was alleged that the care received at the facility had been the cause of the death. The personal representative of the patient's estate sued the operator of the nursing facility who, in turn, asked the court to stop the legal proceeding so the matter could go to arbitration. The trial court agreed with the facility's position and dismissed the case. The personal representative filed an appeal, and the Ohio Court of Appeals agreed with the decision of the judge in the lower court.

The appellate court divided the issues in two—procedural matters and substantive questions. Focusing first on the procedural issues associated with the patient's signing the admission agreement, the court noted that the facility had provided an affidavit that she was alert and appeared to understand the explanation of the arbitration provision. But the court noted that she was under stress at the time of admission, was sporadically confused, and had difficulty signing her name at the time of admission. Taking all factors into account, the court concluded that the facts pointed toward procedural "unconscionability," meaning that the agreement was one that no person "in his senses, not under delusion, would make, on the one hand,

Alternative Dispute Resolution: Do's and Don'ts

- **Do** review contracts for dispute resolution provisions before signing.
- **Do** identify the provision as arbitration or mediation, if found.
- **Do** determine whether the arbitration is binding, if authorized by the contract.
- **Do** ascertain how the facilitator or neutral will be identified or agreed on.
- **Don't** sign away basic legal rights to go to court to resolve disputes without doing so knowingly or thoughtfully.
- **Don't** assume when reading a contract that going to court will be the approach used to resolve disputes.
- **Don't** rely on the other party to the contract to select the facilitator or neutral without your concurrence.
- **Don't** forget to look for a provision addressing where the alternative dispute resolution will occur if the contract is with a nonlocal entity.

and which no fair and honest man would accept on the other."[9]

Turning to the next facet of the case, substantive matters, the court concluded that the agreement was not substantively unconscionable. This conclusion was based on the fact that the agreement contained a warning that the signee was yielding his or her legal right to a jury trial of disputes and allowed the resident 30 days to reject the agreement. In order for the court to throw out the arbitration agreement it must be both procedurally and substantively unconscionable, a situation that did not occur in this instance. The result was that the trial court decision halting the legal proceedings was upheld, and the matter was referred for arbitration.[10]

Other Recent Cases

The highest court in Massachusetts addressed the issue of mandatory arbitration in a 2007 decision. The issues were similar to those in both prior cases, i.e., what was the role of a state statute as in the Florida case and was there procedural or substantive unconscionability as in the Ohio case. Applying a state statute, the Massachusetts Arbitration Act, the court ruled that neither version of unconscionability existed and that the arbitration agreement should be upheld. The court case was dismissed with a directive to the parties to go to arbitration as agreed in the admission contract.[11]

More recently, early in 2009 the Tennessee Court of Appeals decided a case involving an arbitration clause in an admission agreement. The patient did not sign the agreement; her husband did. She developed some complications and eventually passed away. The estate filed a lawsuit against the facility, which defended the claim by arguing that the matter should not be heard in court because of the arbitration agreement. At the trial court level the judge ruled that there was insufficient evidence that the husband had authority to make the arbitration clause in the admission agreement binding for his spouse and, accordingly, denied the facility's motion to dismiss the case. On appeal, the higher court ruled that the case should be returned to the trial court level because the judge there had not made certain factual findings regarding the authority of the husband's signature to be binding on the wife.[12]

Implications

While these decisions are very fact-specific and the legal framework undergirding them may be specific to the jurisdiction in question (e.g., Florida has the

Nursing Facility Residents Act that was a factor in the case above), studying the decisions in cases that have been decided by the courts can provide a preview of how future disputes about applicability of an arbitration clause might be resolved.

It is noteworthy that in some of these cases just reviewed, the mandatory arbitration provision in the contract of admission was specifically called to the attention of the patient, and in one instance there was a separate document specifically addressing that issue. However, this may not always be the case for contracts to which the pharmacist or the pharmacy is a party. In fact, it could well be that some of the contracts that consultant pharmacists are operating under on a daily basis contain mandatory arbitration provisions that pharmacists, who have signed them, have yet to notice. For example, it could be that an insurance contract or policy has such a provision, but the insurance agent did not direct attention to this provision at the time the contract was executed because the provision so blatantly favored the underwriter issuing the policy. Such provisions could appear in any sort of contract, e.g., the insurance policy or in the lease covering space where the pharmacy operates. Such provisions also could be in participating-provider contracts with nursing facilities, health insurers, managed care organizations, or even in contracts with suppliers of medications and medical devices to the pharmacy.

Conclusion

ADR offers a choice to those facing the travail and tribulation of going to court to resolve disputes. Either arbitration or mediation may be more appealing than the option of going to courtroom, but binding arbitration has a number of drawbacks. Pharmacists should be alert for such provisions when entering into contractual obligations. Mediation is the approach that continues the greatest control for the parties and the fact that 85% of mediation sessions result in the parties coming to an agreement reflects a great level of satisfaction. Nonetheless, as AARP has recently emphasized, any time an individual gives up the legal right to turn to the courts for redress of grievances by using an alternative approach, such a decision should be made with full knowledge of the consequences of doing so.[13]

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