



DISPUTE RESOLUTION SECTION

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"Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise."

*Edna Sussman, Chair, NYSBA Dispute Resolution Section
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THE BENEFITS OF MEDIATION AND ARBITRATION FOR DISPUTE RESOLUTION IN HEALTH LAW

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"Traditional litigation is a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle... Our system is too costly, too painful, too destructive, too inefficient for really civilized people."

Chief Justice Warren E. Burger of the U.S. Supreme Court

Litigation is a lengthy and expensive proposition. It is also a stressful process that destroys relationships. Lawyers seeking to best serve their clients must consider other forms of dispute resolution which can avoid much of the delay, expense and disruption of traditional litigation. Mediation and arbitration are responsive to the Healthcare client's needs ways that are simply not possible in a formal, court proceeding.

Healthcare providers, insurers and suppliers rely to a large extent on professional relationships to fulfill their Missions and advance their business models. When disputes arise, preservation of the underlying relationship is often critical to the parties. Arbitration has become very common in the resolution of commercial disputes and is routinely incorporated into such contracts as a method of choice for resolving disputes. Although more efficient than litigation, arbitration is a formal, evidentiary process that results in a final, binding award by the arbitrator. Mediation, on the other hand, is a less formal process and is particularly well suited for situations where it is desirable and/or necessary to preserve the underlying relationship of the parties. The goal of this paper is to help the Health Law practitioner improve the client's experience in resolving disputes, produce better outcomes for the client and preserve critical relationships and partnerships in the process.

I. Mediation

<i>“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time.”</i> <i>Abraham Lincoln</i>
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Mediation is the process in which parties engage a neutral third person to work with them to facilitate the resolution of their dispute. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose (or in many cases, lose/lose). While not every case can be settled, an effort to mediate is appropriate in virtually any subject matter and any area of the law. The advantages of mediation include the following:

1. ***Mediation Works.*** Statistics have shown that mediation is a highly effective mechanism for resolving disputes with a very high success rate. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90% of cases settle in, or as a result of, mediation. Most cases in mediation settle long before the traditional “courthouse steps” affording the opportunity to fashion a solution specifically tailored to the case and at a significant saving of cost and time for the parties.

2. ***Control by the Parties.*** Each dispute is unique, and parties to mediation have the opportunity to design their own unique approach and structure. They can select a mediator of their choice who has the experience, skill set and knowledge they require. With the help of the experienced mediator, parties can plan how the mediation should proceed and decide what approaches make sense during the mediation itself.

3. ***The Mediator Plays A Crucial Role.*** The mediator’s goal is to help the parties settle their differences in a manner that meets their particular needs. An experienced mediator can serve as a sounding board, help identify and frame the relevant interests and issues, help the parties test their case and quantify the risk/reward of pursuing the matter. When asked, the mediator can provide a helpful and objective analysis of the merits to each party’s position, foster or suggest creative solutions, and identify and resolve impediments to settlement. This may be accomplished by meeting with parties separately, as well as in a group, so that participants can speak with total candor during the process. The mediator can also provide the persistence that is often necessary to help parties reach a resolution.

4. ***Opportunity To Listen And To Be Heard.*** Parties to mediation have the opportunity to air their views and positions directly, in the presence of the other party. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a

neutral authority figure, the parties often feel that they have been heard, similar to having had “their day in court.”

5. ***Mediation Helps In Complicated Cases.*** When the facts and/or legal issues are particularly complicated, as is often the case in Health Law, it can be difficult to sort them out through direct negotiations, or during trial. In mediation, by contrast, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. Even if the case doesn't settle, the process might have eliminated certain issues and simplified the remaining litigation or arbitration on the merits.

6. ***Mediation Can Save Relationships.*** The litigation process is very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. By contrast, in mediation, disputes -- such as those between an employer and employee, hospital and physician, or partners in a business -- can be resolved in way that saves the relationship.

7. ***Expeditious Resolution.*** Mediation can take place at any time. Since mediation can be conducted at the earliest stages of a dispute, parties can avoid the potentially enormous distraction from and disruption of one's business and the turmoil in one's personal life that commonly results from protracted litigation.

8. ***Reduced Cost.*** By resolving disputes earlier rather than later the parties can save tremendous sums in attorney's fees, court costs and related expenses.

9. ***Lessens The Emotional Burden.*** Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there typically is much less of an emotional burden on the individuals involved. Furthermore, proceeding through a court trial may involve publicly reliving a particularly unpleasant, embarrassing or unfavorable event which gave rise to the dispute. This is avoided in mediation.

10. ***Confidential Process & Result.*** Mediation is conducted in private -- only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the process. Moreover, the parties can agree to keep their entire dispute (including the existence of the dispute) and the nature of the settlement confidential.

11. ***Avoiding “Advocacy Bias” And The Uncertainty Of Litigation.*** Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions, noting that the predictive abilities of parties and their counsel are unclear at best. Attorney advocates may suffer from “advocacy bias” -- they come to believe in and overvalue the strength of their client's case.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of \$1.1 million -- when they did make the wrong decision.¹

A mediator without any stake in the outcome or advocacy bias can be an effective "agent of reality" in helping parties be realistic about the litigation or arbitration alternative.

12. ***There are no appointed "winners" or "losers."*** In mediation, the mediator has no authority to make or impose any determination on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties.

13. ***Parties Retain Their Options.*** Since resolution during mediation is completely voluntary, the option to proceed thereafter to litigation (or arbitration) is not lost in the event the mediation is not successful in resolving all matters.

14. ***More creative and long-lasting solutions.*** Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular interests rather than being limited by the remedies available in court or arbitration. Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be satisfying and adhered to by the parties.

II. Arbitration

Arbitration is the formal legal process in which parties engage a neutral or panel of three neutrals to conduct an evidentiary hearing and render a binding award in connection with their dispute. Arbitration is a matter of agreement between the parties, either pre-dispute in a contract, or post-dispute when a difference arises. The process can be tailored to meet the needs of the parties. With the ability to design the process, coupled with the best practices that have developed, arbitration offers the following distinct advantages:

1. ***Arbitration Provides A Binding Decision By A Qualified Neutral.*** The arbitrator is an authority figure who renders a decision that binds both parties. The parties can select arbitrators with expertise and experience in the relevant subject matter or that meet other criteria that they desire. Arbitration avoids a trial where the subject matter may not be within the knowledge or experience of the judge or jury.

2. ***Arbitration Is A Private Process.*** Like mediations, arbitrations are conducted in private. Only the arbitrators, the parties, counsel and witnesses attend the arbitration. Confidentiality of the arbitration proceedings, including sensitive testimony

¹ Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, (Springer Science + Business Media LLC New York publ.) (2010)

and documents, can be agreed to by the parties. In contrast, court proceedings are generally open to the public. The context of a private arbitration is generally less adversarial, and ongoing relationships suffer less damage.

3. ***More Control and Flexibility with Less Expense.*** Unless otherwise limited by contract, parties to arbitration can set parameters to suit their needs, such as the number of arbitrators hearing the case, the location of the arbitration and scope of discovery. Parties will also have input in scheduling the hearing at a time that is convenient. The arbitration process generally does not include time consuming and expensive discovery that is common in U.S. courts and motion practice is also much less common. Parties can also decide to arbitrate only key issues, further limiting expense.

4. ***Arbitration Provides Finality.*** In court proceedings, parties have the right to appeal the decision of a judge or the verdict of a jury. In contrast, the grounds for court review of an arbitration award are very limited. The award of an arbitrator is final and binding on the parties.

Healthcare Business Transactions – Consider Arbitration For A Fast & Final Result

Healthcare entities are parties to important and often long-standing contractual relationships that are key to fulfilling their Missions and successful operation. Aside from garden-variety commercial relationships, such as landlord-tenant, vendor supply and service contracts, and equipment purchase and leasing, examples of critical relationships are those between insurers and providers, insurers and members, hospitals and physicians, and multi-provider consortia and affiliations.

Inevitably, disputes arise in these contractual relationships, often regarding matters such as reimbursement, the setting or modification of fee and rate schedules, levels of required performance and the circumstances of renewals and termination. Such disputes are well suited for arbitration because of the unique characteristics of the relationships and the fact that parties wish to continue doing business with each other notwithstanding the particular dispute. Because of this, the parties are often psychologically suited for early resolution instead of bitter and damaging combat.

Timing is especially important in these situations. The sooner the dispute is resolved, the sooner the relationship can continue on an even keel. Arbitration has the distinct advantages over litigation of a much faster track and finality of the decision. Confidentiality is another advantage, as the parties often are eager to resolve their disputes outside the glare of the public view. And in this era of financial stress on healthcare institutions and providers, the cost-savings of arbitration can be of enormous benefit.

Arbitration is a matter of agreement between the parties. Even if your underlying contract is silent on arbitration, parties are always free to agree to arbitrate. An agreement to arbitrate is usually a very simple document to draft.

Privileges, Credentialing and Other Sensitive Areas – Consider The Need To Save Time, Money & Reputations

Of particular sensitivity to healthcare institutions, providers and insurers are the granting, renewal and/or suspension and termination of privileges. These are fundamental to the provision of quality healthcare and the protection of the public. At the same time, these can be vital to the reputation, professional careers and viability of providers.

Disputes in this area cry out for the avoidance of expensive, lengthy and public proceedings. For example, with patient accessibility to healthcare as well as the careers of providers often hanging in the balance, an expeditious resolution of these issues can be of overarching importance. Although utilizing the Public Health Council (“PHC”) may be a required intermediate step in addressing hospital privileging decisions, the use of mediation or arbitration rather than litigation before or after the PHC decision can provide a much speedier outcome. Decisions regarding privileges also can be of a sensitive nature and involve high degrees of emotion, and the private setting of a mediation provides important confidentiality and may “lower the temperature” among counsel and the parties in a manner that enhances the presentation of the issues. Moreover, the use of skilled mediators or arbitrators drawn from specialty panels with knowledge of the credentialing process and pertinent issues not only will enhance the efficiency of the dispute resolution process, but also the level of confidence that the matter will be disposed of in a proper and practical fashion.

Hospitals and other healthcare institutions that are interested in including mediation or arbitration in their process for resolving credential disputes should also amend their medical staff bylaws, rules and regulations, and/or hospital bylaws (as appropriate) to specifically permit these mechanisms for dispute resolution.

Mediating Medical Malpractice Lawsuits² - A Trend Benefitting Plaintiff, Defendant & Insurer

Typically when something goes wrong in the treatment or care of a patient, the response of the physician and other health care providers is guarded – the result of a longstanding belief that to say as little as possible to the patient and family members is the best protection against litigation.

² This section is based on a prior article: C.S. Hyman & C.B. Liebman, “Mediating Medical Malpractice Lawsuits: The Need for Plaintiff and Physician Participation,” *Dispute Resolution Magazine* vol.16, no.3 (Spring 2010): 6-9.

In fact, research suggests just the opposite: litigation is more likely if patients and their families do not get answers to their questions as to what happened and why.³ The ideal time to give patients and their families information about what has happened is soon after the event has occurred. Those conversations are referred to as “disclosure conversations”. Disclosure policies in health care facilities vary as to who should be present and who conducts the conversations. In hospitals typically a physician, accompanied by a risk manager or other hospital representative, conducts these conversations. Recent research suggests that effective disclosure conversations may reduce the number of medical malpractice claims filed.⁴

In an effort to increase understanding of mediation and its benefits, two studies to evaluate the use of interest-based mediation to resolve medical malpractice lawsuits were conducted by C.S. Hyman and C.B. Leibman.⁵ Both studies were conducted under the auspices of Columbia Law School and required the approval of Columbia University’s Institutional Review Board. The first involved mediating medical malpractice lawsuits pending against the New York City Health and Hospitals Corporation (the “HHC study”) and the second, larger study involved medical malpractice lawsuits pending against 11 New York City hospitals (the “MeSH study”).

Two Empirical Studies Mediating Medical Malpractice Lawsuits

- **Study #1 – NYC municipal hospitals 2004 29 cases referred
19 mediated, 13 settled, mean amt. of time in mediation 2.34 hrs.**
 - **Study #2 – NYC private, non-profit hospitals 2006-2007 67 cases referred
31 mediated, 21 settled, mean amt. of time in mediation 3.7 hrs.**
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In both studies after a case was assigned, co-mediators held a conference call with the plaintiff and defense attorneys and discussed the importance of the plaintiff’s participation in the mediation, because inadequate communication appears to be driving much of the litigation.

In the HHC study the same lawyer from the New York City Law Department represented the City in all 19 cases and became knowledgeable about mediation advocacy. In the MeSH study, the defense lawyers were primarily outside litigation counsel for the hospitals and in some instances appeared to be more resistant to mediation. However, there are also other factors that explained the lower number of cases mediated, such as successful settlement negotiations that were already underway and cases being withdrawn from the study for a variety of reasons.

³ G.B. Hickson et al., “Factors that Prompted Families to file Medical Malpractice Claims Following Perinatal Injuries,” JAMA vol. 267, no. 10 (1992):1359-1363.

⁴ A. Kachalia et al., “Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program,” Annals of Internal Medicine vol.153, no.4 (2010):213-221.

⁵ Articles reporting these studies are: C.S. Hyman & C.B. Schechter, “Mediating Medical Malpractice Lawsuits Against Hospitals: New York City’s Pilot Project,” Health Affairs vol. 25, no. 5 (2006) and C.S. Hyman, C.B. Liebman, C.B. Schechter, & W.M. Sage, “Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?” Journal of Health Politics, Policy and Law vol. 35, no. 5 forthcoming Dec. 2010.

The mean amount of time spent in mediation in both studies, approximately 2 ½ and 3 ½ hours respectively, appears to confirm the efficiency of the process as compared to litigation. In both studies there were cases that were mediated and settled with no or minimal discovery completed. This seems to indicate an additional area of potential savings, both financial and emotional.

There was a high level of plaintiff participation in both studies, but no physician participation in either. As discussed below, this may have limited the value of apologies offered and desire to benefit patient safety, as articulated by the plaintiff.

Plaintiff Participation in Mediations

Study #1	Study #2
16 of 19 cases	25 of 31 cases
84%	80%

Attorney and plaintiff satisfaction with the process was also measured and the rates were quite high.

Plaintiff Satisfaction		
	Study #1	Study #2
Mean:	2.2	1.98
Attorney Satisfaction		
Mean:	1.95	1.9
Scale: 1 (very satisfied) to 5 (very dissatisfied)		

This level of satisfaction might be surprising. An interest-based mediation style was used for both studies despite knowing that medical malpractice lawyers were less likely to be at ease with this style, preferring the evaluative, settlement-conference style in which the mediator presides over a position-based negotiation focused on compensation. A few attorneys were critical of the mediators' reluctance to value the cases.

An apology is a response that patients and their families expect after a medical error or adverse event and one that many physicians wish to give but feel constrained because of fear of an admission of legal liability.⁶ Mediation with its confidentiality provides a process in which apologies can be given without fear of retribution and the mediator, experienced in communication skills, can coach both parties to ensure a productive dialogue.

⁶ T.H.Gallagher et al., "Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors" JAMA vol.289, no.8 (2003): 1001 – 1007.

Apologies in Mediations

Study #1	Study #2
11 in 19 cases mediated	9 in 31 cases mediated

In the first study the experience gained by the defense attorney, who mediated all 19 cases, may have led to an increased comfort and expertise in offering apologies in contrast to the second study in which many of the defense attorneys appeared less comfortable with apologizing. Litigators unfamiliar with apologizing to plaintiffs may inadvertently offer apologies that sound hollow and are not heard as genuine.

By contrast, two wrongful death medical malpractice lawsuits in Pennsylvania were mediated as part of a demonstration project funded by the Pew Charitable Trusts (the “Pew Demonstration”).⁷ In both cases the chief of medicine participated along with other hospital representatives. In one case, the patient with end-stage pulmonary disease died after a resident inserted a subclavian central line and nicked the patient’s lung. At the mediation, the patient’s widow told the hospital representatives how she had been abandoned after being told of her husband’s death, left standing alone in the hall outside her husband’s room. She also explained that no one had explained to her what had happened. The chief of medicine and the director of patient safety were upset at how the widow had been treated. In addition, during the mediation the physician explained what the options were for placement of the central line and why the lung had been nicked. He apologized for the outcome and explained why the placement of the central line was not negligent, but that it might have been better to have inserted the line in the patient’s neck. As a result of this case, the department of medicine adopted a new decision tree for the placement of central lines to avoid this harm in the future. The settlement agreement included a monetary component and a commitment to conduct on-going staff training on how to respond to family members grieving as a result of the death of a loved one in the hospital.

The second case involved an elderly man on Coumadin, a blood thinner used to prevent and treat clots, who was admitted to the emergency room the morning after a fall. Contrary to hospital policy, the wife was not allowed to be with her husband for his final hours. The patient was initially misdiagnosed with an infection rather than internal bleeding. At the mediation, the chief of medicine listened to the widow and responded to her rage with an apology that acknowledged the hospital’s responsibility for the misdiagnosis. He explained what treatments had been administered. In the course of the mediation, the widow moved from rage to sadness and ultimately expressed gratitude for the physician’s apology. The hospital changed its procedures so that a patient on Coumadin who has fallen and enters the hospital through the emergency room is seen by a trauma surgeon.

⁷ C.B. Liebman & C.S. Hyman, “Medical Error Disclosure, Mediation Skills, and Malpractice Litigation: A Demonstration Project in Pennsylvania,” (2005) www.pewtrusts.org/our_work_report_detail.aspx?id=24398.

The HHC, MeSH and Pew Demonstration studies all show the tangible and intangible benefits of mediation. In addition, they provide a convincing starting point for healthcare providers, their attorneys and insurers to begin utilizing mediation to resolve medical malpractice and negligence claims.

Mediation In The Long Term Care Setting

The New York Public Health Law⁸ confers a private right on nursing home residents (or their legal representatives) to sue for the “deprivation of any right or benefit” created by contract, statute, rule or regulation.⁹ Compensatory and punitive damages are available as well as injunctive and declaratory relief. As an incentive to counteract the historically low values of claims brought by old, disabled claimants, class actions are authorized and attorney fees for prevailing plaintiff are also available.¹⁰

As a result of multi-million dollar actions using similar laws in Florida and other states, an explosion of litigation against New York nursing homes began around 2003. The prospect of cumulative damage calculations has been used successfully to establish a higher value for claims in the long term care setting. However, the avalanche of claims and detailed discovery needed to support deprivation of rights claims has also created huge burdens for both plaintiffs and defendants, slowing the development and resolutions of these claims.

Although the use of arbitration is disfavored in most situations involving claims of nursing home residents, and is specifically prohibited for use on nursing home admission agreements, mediation has proven to be an effective mechanism for resolving such claims. Mediation can assist the parties in becoming more realistic about their positions and can counteract the “advocacy bias” that often results from the zealous prosecution and defense of these claims. Lastly, but perhaps most importantly, mediation can reduce the emotional burden created by the protracted litigation and motion practice that is associated with these cases.

In addition to the benefits demonstrated by the HHC, MeSH and Pew Demonstration studies, mediation in the long term care setting can be effective in resolving disputes involving malpractice, negligence or deprivation of rights claim. In addition, disputes involving admission agreement issues (e.g. disputed charges; etc.) healthcare decision-making and appointment of surrogates among equally eligible

⁸ See NY PHL 2801 *d et seq.*

⁹ See NY PHL 2801d(2); and NY PHL 2801d(3)

¹⁰ See NY PHL 2801d(6)

relatives¹¹, and family disagreements over end-of-life care (i.e. treatment that is seen as too aggressive or not aggressive enough) are all well suited for mediation.

For More Information

For more information on mediation and arbitration, please visit the Dispute Resolution Section's homepage at www.nysba.org and click on the Sections/Committees tab.

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¹¹ See Chapter 8, Laws of 2010, N.Y. Public Health Law Article 29-CC ("The Family Health Care Decisions Act")