



EFFECTIVELY DEPLOYING ALTERNATIVE DISPUTE RESOLUTION PROCESSES IN HEALTHCARE

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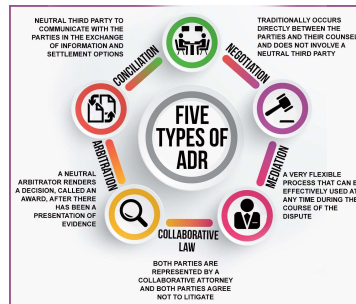
PRESENTERS



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TYPES OF ADR FOR HEALTHCARE DISPUTES

- **Mediation**
- **Arbitration**
- Misc: Direct Negotiation, Early Neutral Evaluation, Discovery Referees



MEDIATION IN HEALTHCARE DISPUTES

- Facilitated by a neutral
- Key benefits given likely ongoing business relationship
- Global mediation of multiple disputes



ARBITRATION IN HEALTHCARE DISPUTES

- 2 options when negotiations fail: court or arbitration
- Parties must agree to use arbitration
 - Contractual arbitration
 - Arbitration via stipulation
- Arbitration widely utilized in HC



BENEFITS OF ARBITRATION



Benefits of Arbitration

Subject Matter Expertise

- The AHLA's Dispute Resolution Service has an arbitrator panel exclusively comprised of healthcare arbitrators. Other arbitration providers have similar panels.
- Parties also can build in a process for selecting an expert healthcare arbitrator with specific attributes or skill sets by delineating certain qualifications.
- Too many requirements may limit the number of available, competent, and qualified arbitrators. Overspecialization may also deprive the parties of a valuable "outsider" perspective.



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Benefits of Arbitration

Efficiency, Speed & Cost Savings

- In arbitration, the discovery and hearing process is designed to move quicker than the judicial process.
- This is often accomplished through streamlined discovery procedures and elimination of dispositive motions practice.
- Parties can also set time limitations in their arbitration agreement:
 - The award shall be made within nine months of the filing of the notice of intention to arbitrate (demand), and the arbitrator(s) shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by agreement of the parties or by the arbitrator(s) if necessary.



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Benefits of Arbitration

Finality

- Even if the discovery and trial level process is no shorter than court litigation in a particular arbitration, arbitration awards are generally final, which results in a faster process.
 - Parties may not appeal an arbitration award absent (a) a court vacatur; or (b) a specific arbitration agreement provision specifying appeals.
 - Grounds for vacatur are very limited.
- Generally, judicial deference is accorded to arbitration awards in state and federal courts.

Benefits of Arbitration

Confidentiality

- The arbitrator is often required to maintain the confidentiality of proceedings.
- The parties can draft an arbitration agreement to specifically require confidential proceedings.
- Note: confidentiality is often lost post-arbitration if one of the parties seeks vacatur or applies to confirm the award for collection purposes.

Benefits of Arbitration

Parties Drive Process

- The parties, by agreement, can narrow or expand the scope of relief available for the arbitrators to award.
- There is wide latitude to allocate the fees and costs associated with the arbitration.
- The parties can get creative with the arbitration procedures. For example, they can employ Baseball Arbitration.

Misconceptions About Arbitration

Myth: No injunctive relief

- Fact: Arbitration can provide for both preliminary and final injunctions

Myth: No appeal

- Fact: Uniquely tailored appellate processes available

Myth: Arbitration is expensive

- Fact: Statistics routinely show arbitration is cheaper



The ADR CLAUSE

Multiple components

- Statement of purpose?
- Mediation and arbitration?
- Mandatory vs opt-out?
- Key choices for how arbitration is run

Online AI tools: AHLA & AAA
Clause-builders



Key Parts of an Arbitration Clause

- Venue
- Law & ADR Rules
- Scope of Clause
- Number of arbitrators



Key Parts of an Arbitration Clause

Venue

- Will the arbitration be at the claimant's offices in New York, or online via Zoom?
- Do not underestimate the time, cost, and toll on personnel associated with mediating or (especially) arbitrating a dispute in a jurisdiction away from home. That said, everything may end up subject to negotiation when writing a pre-dispute arbitration clause.
- Keep in mind that your choice of forum can also influence a future choice of law analysis.



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Key Parts of an Arbitration Clause

Law & ADR Rules

- Choice of law clauses address the procedural and substantive law to be applied to the dispute.
- This can be rather simple. If all of the parties and relevant conduct are/were in one state, it may be enough to say that state's law will govern the dispute.
- If the agreement involves interstate commerce, it may be prudent to acknowledge that the arbitration is governed by the Federal Arbitration Act and by the substantive law of a particular state.
- Note: choice of law provisions are not always enforceable.
- The choice of ADR procedural rules is often made based on the reasons the parties elected ADR in the first place and the likely nature of their dispute. ADR service providers have their own sets of rules, or parties may elect to apply court rules.



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Key Parts of an Arbitration Clause

Scope of Clause

- The parties can determine the scope of the claims that will be subject to arbitration.
- A party drafting an arbitration clause consider the types of claims it might bring and be forced to defend in the future.
- Even matters that do not fall within the scope of the ADR agreement may be subject to ADR if they are “inextricably interwoven” with claims within the scope of the agreement.
- Recommendation: If you are going to parse claims, be specific.



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Key Parts of an Arbitration Clause

Number of Arbitrators

- A single arbitrator will hold down costs more likely to commit legal error than three.
- This can be problematic if the ADR clause at issue does not provide for an appeal, especially given the judicial hesitancy to vacate arbitration awards.



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Key Parts of an Arbitration Clause

- Scope of Discovery
- Fees & Costs
- Appellate Rights



Key Parts of an Arbitration Clause

Scope of Discovery

- While giving significant discretion to the arbitrator, many ADR service provider rules contemplate limited discovery, e.g. no/limited depositions, no requests for admission, no interrogatories.
- Parties to an ADR clause do not have to abide by the rules of a service provider – they can choose or create their own.
 - If the parties want more discovery than is generally contemplated in arbitration, they can agree that the Federal Rules of Civil Procedure or a given state's rules will apply.
 - They also can agree to a hybrid discovery process where, for example, the parties are permitted up to 15 document requests and 10 interrogatories, but there are no requests for admission.
- When deciding what rules and procedures to apply, consider the nature of the disputes likely to arise from the agreement.

Key Parts of an Arbitration Clause

Fees & Costs

- In litigation, these are often controlled by statute, but in arbitration the parties can agree to an allocation in advance.
- There are numerous options:
 - Prevailing party is entitled to fees and costs
 - The parties bear their own fees and costs
 - The arbitrator can make an award of fees and costs, or just costs
- The threat of an attorneys' fees award can deter a party with a weak case from initiating an arbitration, but the potential for an attorneys' fees award to a prevailing party can make a dispute harder to settle once it starts.



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Key Parts of an Arbitration Clause

Appellate Rights

- Absent agreement, there are generally no appeals of arbitration awards, but nothing prevents the parties from agreeing in advance to allow an appeal to a single, second arbitrator or to a three-arbitrator panel.
- Arbitration appeals provide the parties – or a party – with an opportunity to correct errors but undermine the traditional finality of the initial stage of arbitration.
- An appellate clause likely is inappropriate where the parties will end up in relatively small disputes of manageable value. But in more complex, high-dollar disputes, an appellate right in an ADR clause can be critical particularly of a single arbitrator.
- Appellate clause v. three-arbitrator panel



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Choosing the right arbitrator

- Qualifications
- Availability & Cost
- Interview or Questionnaire
- References?



COMMON HEALTHCARE ARBITRATIONS

Malpractice

Employment

Healthcare
Practice
Divorce

Payor-
Provider

Breach of
Contract

Life Sciences
& Pharma

Questions

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