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An Arbitration Primer for Providers

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The right and obligation to arbitrate a dispute derive solely from a mutual agreement between two or more parties to a contract. Like other terms in a managed care contract, arbitration terms are completely negotiable. Providers should determine whether arbitration is an appropriate dispute-resolution tool for them and, if so, negotiate arbitration provisions that are favorable to them.

Contract negotiators for a healthcare provider may spend months negotiating the language of the managed care components of

their agreements, yet uncritically accept a payer's arbitration provision in the contract. Such a provision deserves a provider's attention. An arbitration provision under which a payer expects to arbitrate hundreds of disputes a year

case of one side over the other in that particular dispute.

Arbitration versus Trial

When negotiating arbitration terms, keep in mind the differences in process and purpose between arbitration and trial in the courts. The question of whether it is better to resolve disputes through arbitration than through the courts is worth some initial thought. At \$300 to \$600 an hour per arbitrator, the cost of a

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panel of three arbitrators for a two-week arbitration hearing is much higher than the cost of a judge whose services are free and a jury whose daily fees usually are less than \$300 for the group. Filing a complaint in court usually costs under \$200. In contrast, the nonrefundable administrative fee that the plaintiff must pay to begin an arbitration in which more than \$1 million is in dispute easily can exceed \$10,000. Although typically much less time is devoted to discovery before an arbitration than before a trial, in many cases this absence of discovery results in the arbitration hearing

with its contracted members and providers will not be best suited for a hospital that may need to use arbitration only once every three years or so to resolve a multimillion-dollar rate dispute.

Addressing key arbitration issues in the contract before a dispute arises will give the provider greater leverage to enforce its contract. Arbitration provisions are much easier to negotiate before a dispute arises when both parties expect not to use them. Once a dispute arises, the negotiation will be over what is most advantageous to advance the

ISSUES AND ACTIONS

Arbitration provisions in managed care contracts can be structured to suit the needs and priorities of healthcare providers.

- **Dispute resolution through the courts rather than through arbitration sometimes may benefit the provider.**
- **Providers can specify arbitration rules that are appropriate for the type of dispute they expect.**
- **Providers should resist language that prevents arbitrators from awarding punitive damages.**

having to occur, because cases are much more likely to settle when the parties fully understand each others' documents and witness testimony.

Although many civil courts continue to be crowded, other courts now offer a reasonable probability of a trial within about a year of the complaint being filed. With delays in selecting an arbitrator and the limited availability of the most popular arbitrators, completing an arbitration easily could take much longer.

Arbitration Provisions

Access to the court system is automatic if an arbitration or other dispute-resolution clause is not included in a contract. Without an arbitration provision, the issues that follow in this article become irrelevant to the contract negotiation because they are covered by the rules of civil procedure. Some payers are willing to drop arbitration clauses. So consider whether arbitration is the best method to resolve the type of disputes you anticipate under the contract. If arbitration will be part of the managed care contract, careful consideration of the following arbitration provisions will help you negotiate an advantageous agreement.

What rules will govern. The first problem to avoid is failing to specify the rules that will govern your arbitration. Your state may have a general arbitration statute that provides some limited guidance, but it probably does not give enough detail. Several sets of rules for arbitrations are available from national arbitration organizations, such as the American Arbitration Association, JAMS, and the American Health Lawyers Association. You will want to review the information provided by these organizations for two basic issues. First, review the content of the rules. Although they are very similar, some rules may have advantages over others for the type and size of dispute that may arise. Second, consider the quality

and size of the arbitration panel available in the locale where you expect to resolve any disputes.^a The evaluation of the panels is best made by counsel who have experience in dealing with arbitrators from the respective organizations.

Arbitration rules generally will address such issues as the initiation of the case and the conduct of the hearing. The parties may always agree to additional or different specific rights in their arbitration provision. Do not hesitate to request additional provisions that are important to your business goals.

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When the arbitration must be commenced. State law sets statutes that limit the time within which a claim may be brought in court. For example, a limit of four years for filing a claim alleging breach of a written contract is common. Several payers include language in their standard contracts that requires arbitration to be demanded within a much shorter time than allowed by the statute of limitations; a common requirement is that arbitration be demanded within six months of when the claim arose, or the claim will be waived. Such a requirement is an advantage to the payer, because a hospital's delay in filing a claim may cause the hospital to forfeit its right to pursue a remedy. There is no good reason for a provider to accept a contract term that mandates a shorter period in which to demand arbitration than that provided by law to file a complaint in court. By failing to specify any time period, providers

have the benefit of the generally longer time limits set by law.

What type of arbitration panel will be used. Do you want a single arbitrator or a panel of three? If a panel of three, should all three be neutral, or should each party select its own "party" arbitrator who will together select a third neutral arbitrator? As a general rule, you usually can strike the best balance between economic concerns and confidence in a fair result by retaining a single arbitrator for smaller cases and a panel of three neutral arbitrators for larger cases,

which usually are defined as being in excess of a certain amount, eg, \$1 million or more. In most cases, retaining two party arbitrators is an unnecessary and ineffective additional expense.

Non-neutral arbitrators carry less weight in the deliberations of the panel because of their obvious bias; at the same time they add little or nothing to the advocacy role of the parties' attorneys.

What issues must be arbitrated. An arbitration provision that covers "all disputes arising out of or relating to the contract" usually will be interpreted to include claims for breach of contract as well as tort and statutory claims. Resolving all claims in one forum is efficient, but retaining a jury instead of a professional arbitrator to decide a large claim for fraud that has the potential for punitive damages may be preferable. Sometimes a contract will contain an arbitration provision prohibiting the arbitrator from awarding punitive damages. You should resist such language. Although arbitrators generally will award punitive damages less frequently and in lower amounts than a jury, you should retain this disincentive to fraudulent behavior.

Where the arbitration will occur. Do you like the idea of your

a. These three organizations provide rules and information on panel composition free of charge either on their web sites (www.adr.org, www.jamsadr.com, and www.healthlawyers.org) or by request.

employees travelling 100 miles or more to stay in an expensive hotel to give 45 minutes of testimony at an arbitration hearing? If not, you will want to specify that any arbitration must take place in the town or county where the hospital is located or some other convenient location. Agreement on this point is easier to reach during contract negotiation than after arbitration is demanded.

What discovery will be permitted. Discovery is the ability to obtain information from the opposing party in advance of the hearing so that a defense to the opposing party's case can be prepared. In a case decided in court, you may ask for your opponent's documents in relevant categories, for the written identification of witnesses and other facts, and for oral depositions of witnesses. All of this can occur months in advance of trial.

In many arbitrations, the only discovery that occurs is an exchange

of exhibits and witness lists a few weeks before the arbitration hearing. Next most common is the additional exchange of limited categories of documents before the hearing. The identification of uncalled witnesses and oral depositions is rare. This limited exchange of information works well enough in contract disputes about simple issues or where relatively little is at stake. It is, however, potentially disastrous in large managed care disputes because your opponent can limit exposure of damaging documents and unflattering witnesses.

To even the playing field, the arbitration provision should specifically grant both parties the right to discovery. A simple way to do so is to agree to use procedures available in state or Federal court rules covering discovery. Another option is to allow each party the unlimited right to request documents and a more limited right to ask written questions

or take oral depositions, usually by limiting the number of depositions (eg, five or fewer) that each party can take without the permission of the arbitrator.

Negotiating an appropriate arbitration provision is an important part of a managed care contract enforcement strategy and will be vital to the successful resolution of any contract disputes encountered by a provider. As with any tool of deterrence, it may be of even greater value in preventing some disputes from ever developing. ■

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