NATIONAL ARBITRATION FORUM

Mediating and Arbitrating Healthcare Disputes

Includes Practical Tips and Model ADR Language

January 2005

Abstract:

Healthcare providers, health plans, insurers, and patients are turning to mediation and arbitration in response to the high costs of lawsuits. Mediation and arbitration are rational alternatives to expensive lawsuits. This white paper describes the legal landscape of healthcare mediation and arbitration, and provides practical tips and sample contract language to help ensure that parties realize the full benefits of mediation and arbitration.

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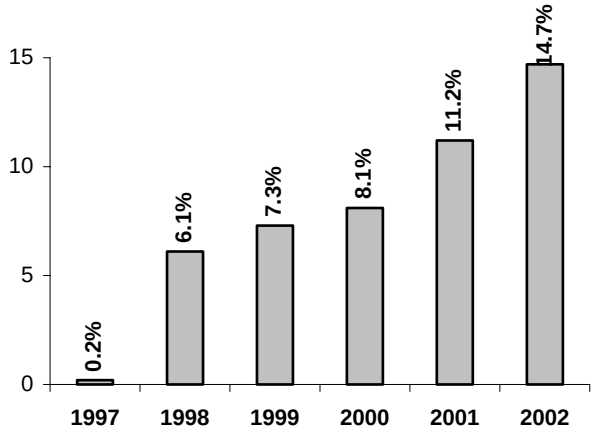
Introduction

Practitioners and commentators continue to describe and debate the healthcare crisis in America. And no element of this crisis seems to generate more vigorous debate than the way legal disputes involving healthcare are resolved. This is not surprising, because the number of healthcare lawsuits has grown steadily each year, and litigation costs have skyrocketed.

The ripple effects are felt throughout the system and throughout the entire economy. Premium and legal costs are passed on to consumers, furthering patient dissatisfaction with the healthcare system. (See Fig. 1)

Figure 1
Health Costs Rising Sharply



Source: NCCI; William M. Mercer, Insurance Information Institute

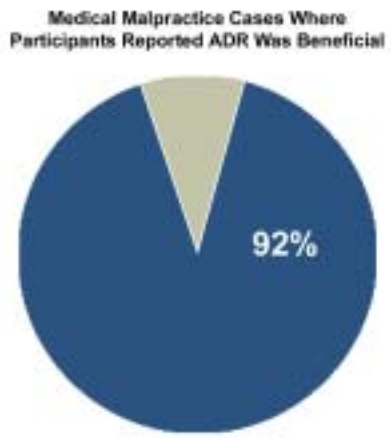
Providers, insurers, and patients need an avenue to protect their legal rights. But the legal solution need not be limited to expensive, slow-moving lawsuits. There is a better way.

Alternatives To Lawsuits

Healthcare providers and insurers are increasingly turning to alternative dispute resolution ("ADR") processes—primarily mediation and arbitration—as a way to address rising legal costs. By including a pre-dispute mediation and arbitration clause in healthcare admission

agreements and contracts, providers and patients agree to route future disputes into efficient, fair, effective forums—mediation and arbitration—rather than the lawsuit system. (See Fig. 2)

Figure 2



Source: U.S. General Accounting Office

Mediation consists of negotiations facilitated by a third-party neutral (the mediator) who has no authority to render a decision. The mediator's role is limited to helping parties arrive at a mutually agreeable resolution to the dispute.

Arbitration is a streamlined hearing presided over by a third-party neutral (the arbitrator) resulting in an enforceable, final decision rendered by the arbitrator. The arbitrator's role is similar to that of a judge.

Mediation followed by arbitration allows parties to attempt to resolve their dispute through mediation, and if any issues remain unresolved after mediation, these issues are resolved through arbitration.

Mediation

Patients, providers, and health plans may agree to mediate future disputes by signing an agreement as part of the admissions or contract process, or they may agree to mediate after a dispute has arisen. Parties may also be referred to mediation by a judge or court personnel as a pre-requisite to or part of the litigation process.

Parties may select a mediator of their choice, including selecting from a roster of neutrals provided by the National Arbitration Forum ("FORUM"). By doing so, parties are assured that they have selected a mediator that has been carefully screened, is a highly qualified legal professional with expertise in healthcare, and one that is subject to strict ethical and due process protocols.

Mediation's Advantages

Mediation is less expensive than litigation. Studies have repeatedly shown that mediation, including mediation in the context of medical malpractice disputes, is far less costly than litigation. One study reported that the cost of mediation can be as low as one-fourth the cost of traditional litigation.[1]

Mediation is less time-consuming than litigation. In an era when it may take as long as five years to get a court date, and several more years to final resolution if a case is appealed, mediation provides a more expeditious way of resolving healthcare disputes.[2]

Mediation may lead to quality improvement. One of the reasons many physicians are considering mediation programs is that litigation often works against promoting quality improvement or error reduction.[3] Claimants in medical malpractice actions may seek compensation but also may seek to prevent future harm. A mediated settlement can address all of the parties' interests, including quality improvement initiatives, in ways that would not be possible in litigation.

Mediation provides the ideal setting for "I'm Sorry" programs, in which a healthcare professional may offer an apology. Within the medical community, many believe that an apology serves to prevent future litigation.[4] Mediation presents the best opportunity for parties to offer an apology. Statutes and rules governing mediation proceedings, along with the mediation agreement itself, typically state that any information discussed during mediation proceedings is "confidential and privileged in nature."[5] Without the confidentiality provided by mediation, parties can be hesitant to offer apologies due to fear that an apology or admission of error will precipitate a lawsuit.[6] Confidentiality in mediation proceedings also ensures that parties cannot introduce information discussed in mediation proceedings during subsequent proceedings.[7]

Mediation allows parties to better predict gains and losses. Parties are able to put their positions, demands, and defenses to a "reality" test in mediation through discussions with opposing parties and the mediator.

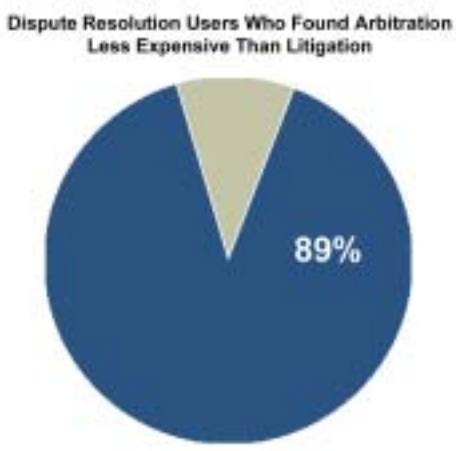
Arbitration

When a legal decision is needed, arbitration is the ideal forum in which to decide healthcare disputes. Through a pre-dispute arbitration agreement in the admissions documents and contracts, providers and patients can agree to shift future legal disputes out of the expensive lawsuit arena and into arbitration—a fair, inexpensive and efficient forum that can provide parties with the remedies available under the relevant substantive law.

Advantages of Arbitration

The U.S. Supreme Court, in the 1995 *Allied-Bruce Terminix* case, noted arbitration's benefits compared to litigation, including less expense, simpler procedural and evidence rules, less hostility between parties, less disruption of ongoing and future dealings among the parties, and more flexible scheduling of times and places for hearings and discovery.[8]

Figure 3



Source: Brener, *Costs And Value Of Arbitration*, World Arbitration & Mediation Report (Apr. 2003).

Arbitration is Less Expensive Than Litigation

Courts and commentators who have compared overall litigation costs to overall arbitration costs have repeatedly reached the conclusion that overall legal fees in arbitration are generally much lower than litigation. Analyzing a group of medical malpractice arbitrations at Duke University Law School's Private Adjudication Center, participants reported that arbitration fees were reasonable.[9] The General Accounting Office (GAO) conducted a study which was presented to Congress that showed that "medical malpractice cases reported high savings rates" when resolved through ADR, including arbitration.[10] In a study published in 2003, 89% of those surveyed found arbitration less expensive than litigation. (See Fig. 3)

Arbitration is Less Time-Consuming Than Litigation

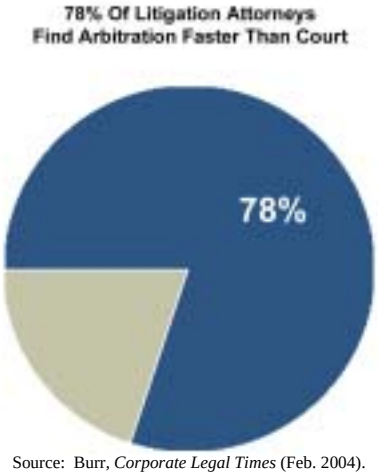
Part of the cost savings in arbitration is no doubt related to the fact that arbitration is much faster than litigation. The GAO study reported that arbitration hearings typically required two to four days, compared with several weeks for court hearings in traditional litigation.[11] That same study showed that total time elapsed from the claim to final judgment was 19 months for medical malpractice arbitration compared to 33 months for litigation.[12] The Duke study reported that the most complex, time-consuming arbitration lasted three days; the estimated time for trial for that same case in court was a minimum of three weeks. (See Fig. 4)

Figure 4

Source: U.S. General Accounting Office

Recently, *Corporate Legal Times* reported that 78% of attorneys surveyed reported that arbitration is faster than litigation.[13] (See Fig. 5)

Figure 5



Source: Burr, *Corporate Legal Times* (Feb. 2004).

Arbitration Awards Conforming to Substantive Law

Arbitration does not limit a party's right to seek redress but simply shifts the resolution of the dispute from the court system to an arbitral forum. Depending upon the procedural rules of the ADR forum utilized, arbitrators may or may not have a choice regarding applying the relevant substantive law. If a final decision and award conforming to substantive law is important to the parties, they will need to ensure that the ADR forum they choose requires application of the substantive law. Arbitrators deciding cases under the FORUM *Code of Procedure* for example must also apply relevant legal precedent when deciding cases.[14] National Arbitration Forum arbitrators are also empowered under the FORUM *Code of Procedure* to award all remedies allowed by the applicable substantive law.

Arbitration is Fair

Numerous commentators and researchers have concluded that individuals fare at least as well in arbitration as they do in court, if not better. For instance, in a study by the U.S. General Accounting Office, plaintiffs in medical malpractice disputes prevailed more often in arbitration than in litigation.[15] Researchers Michael Delikat and Morris Kleiner reported that

consumer claimants in the Southern District of New York prevailed 46 percent of the time in the arbitration versus 34 percent in court. [16]

Individuals also receive monetary results in arbitration similar to those in court. Consumer advocacy attorney Lewis Maltby found that in some cases, consumers receive a greater percentage of the relief they ask for in arbitration than in lawsuits. Maltby along with Delikat and Kleiner also found that arbitration provides slightly higher median monetary awards for successful claimants than do lawsuits.[17] (See Figure 6.)

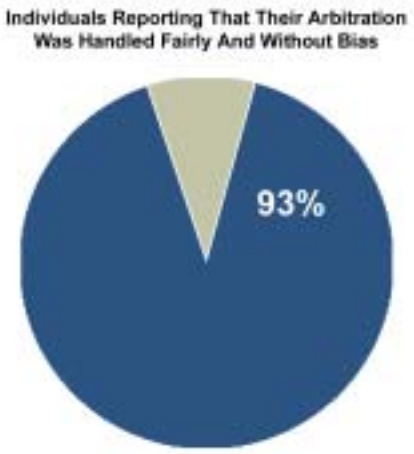
Figure 6

Source: Delikat and Kleiner, ABA Conflict Mgmt. (Winter,2003)

A study analyzing Kaiser Permanente's healthcare arbitration program, which is perhaps the largest of its kind in the U.S, showed that participants and their attorneys reported a high degree of confidence in both the program and the arbitrators.[18]

Similarly, individuals find arbitration to be a fair alternative to litigation. 93% of a group of individual consumers surveyed who participated in arbitration believed their cases were handled fairly and without bias. (See Fig. 7)

Figure 7



Source: Perino, *Report to the Securities And Exchange Commission (Nov. 2002).*

Arbitration Law in the Context of Healthcare

The Federal Arbitration Act and State Arbitration Law

The most common and most effective way for healthcare providers, health plans, and patients to make sure that disputes are arbitrated rather than litigated is by agreeing to arbitrate all future disputes at the outset of their relationship, before disputes arise. This can be accomplished by including an agreement to arbitrate in the admission documents when patients first seek treatment, or plan enrollment documents, or business relationship documents.[19] (See Appendices for sample language.)

Generally, the Federal Arbitration Act ("FAA") governs agreements to arbitrate.[20] The FAA provides that an agreement to submit a "controversy" to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[21] The United States Supreme Court has held that the FAA applies to all arbitrations that "involve" interstate commerce, and that a broad interpretation of the Act's language "is consistent with the Act's basic

purpose, to put arbitration provisions on 'the same footing' as a contract's other terms."[22] Underlying this policy is Congress' view that arbitration constitutes a more efficient dispute resolution process than litigation.[23]

Courts have determined that activities in the health care industry constitute interstate commerce, and therefore, virtually all arbitration agreements in the industry are subject to FAA guidelines.[24] In reaching the conclusion that interstate commerce includes the health care field, the courts found that shipping medical supplies, performance of certain laboratory tests and recruitment of physicians often take place across state lines.[25]

Some states have enacted laws to govern arbitration in the health care field, including statutes that set out specific requirements for healthcare arbitration agreements.[26] The FAA, however, pre-empts state laws that are inconsistent with its guidelines.[27]

Federal pre-emption limits the ability of a state to place requirements on arbitration agreements. In *Doctor's Associates. v. Casarotto*, the Supreme Court ruled that the FAA preempted a Montana statute that placed "type-face" size requirements on an otherwise valid arbitration clause.[28] The Montana statute declared an arbitration clause unenforceable unless the clause was printed in a certain format.[29] Subsequently, other courts have interpreted the FAA as preempting state law restrictions regarding either format or the nature of the arbitration agreement.[30]

In short, federal law requires the enforcement of contracts to arbitrate future disputes. The FAA preempts state laws that restrict those contracts. Congress has created and the Supreme Court has consistently affirmed a policy requiring enforcement of predispute arbitration agreements, including agreements to resolve all statutory and common law claims by arbitration.

Legal Precedent for Arbitrating Health Care Claims

Courts have repeatedly reaffirmed the role of arbitration in all areas of business and consumer transactions, including healthcare and long-term care. In *Madden v. Kaiser Foundation Hospitals*, for example, the court compelled arbitration of a medical malpractice claim brought by a state employee against a health plan, honoring the agreement to arbitrate entered into by the State of California and the health plan.[31] In so holding, the court stated, "[A]rbitration has become an accepted and favored method of

resolving disputes…praised by the courts as an expeditious and economical method of relieving overburdened civil calendars."[32]

In *Buraczynski v. Eyring*, the Tennessee Supreme Court held that arbitration can be as beneficial in the healthcare industry as in any other industry.[33] The court also found that "arbitration agreements between physicians and patients are not per se void as against public policy."[34]

In *Briarcliff Nursing Home, Inc. v. Turcotte*, the Alabama Supreme Court reversed a lower court decision and compelled arbitration in a consolidated appeal of two wrongful death actions brought by the estates of former nursing home residents.[35] After examining the facts, the Court held that the arbitration agreements involved in the case were neither unconscionable nor unfairly entered into by residents lacking choice.[36] This holding was despite the fact that the arbitration clause at issue was part of the nursing home admission form.[37]

Similarly, in *Gainesville Health Care Ctr., Inc. v. Weston*, the Florida Appellate Court reversed a lower court decision and compelled arbitration, holding that the plaintiff failed to establish that the arbitration agreement at issue was unconscionable.[38] The court noted, "[a]rbitration agreements are a favored means of dispute resolution, and doubts concerning their scope should generally be resolved in favor of arbitration."[39]

Elements of a Successful Healthcare Consumer ADR Program

Create and Nurture a Culture of ADR

Senior leadership should make a pronounced, long-term commitment to resolving claims through internal grievance procedures, mediation, and arbitration. Some healthcare organizations have dedicated staff whose sole responsibility is to oversee and manage ADR programs.

Educate and Train Staff

Educating and training admissions staff, physicians, risk managers, and claims personnel will not only go a long way to promote a culture of ADR. It will also ensure that accurate, consistent information is disseminated to staff, some of whom will ultimately interface and communicate with patients.

Track Results

Create a system to track outcomes and "lessons learned." This will ensure continued progress toward the goals identified in establishing the ADR program.

Drafting and Presenting the ADR Agreement

A healthcare ADR program, particularly one that includes an agreement to arbitrate offered to patients during the admissions process, is nothing if the ADR agreement itself will not be enforced by a court. Drafting an agreement that accomplishes your goals and one that will also stand up to judicial scrutiny is paramount.

While the FAA preempts contradictory state statutory schemes that limit or restrict arbitration, state contract principles apply to whether agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law.[40] Arbitration agreements between "businesses" and "consumers" are most frequently challenged on the grounds that they are unconscionable.[41] Courts have overwhelmingly rejected these challenges[42], and have routinely enforced these arbitration agreements. They are much more inclined to do so, however, when the arbitration agreement in question includes substantive and procedural safeguards that guard against perceived or actual unfairness to the "consumer" party.

The best starting point for an ADR agreement, especially one that includes an arbitration provision, is to review the model clauses provided by reputable ADR administrators such as the FORUM. Writing for the American Bar Association's *Dispute Resolution Magazine*, legal and ADR experts Lawrence Mills and Thomas Brewer suggest the following:

> To begin at the beginning, attorneys drafting ADR provisions should not overlook the considerable virtues of using a standard "all disputes" clause of the sort recommended by the major institutional ADR provider institutions such as the National Arbitration Forum... Using such a clause has many advantages: The clauses are brief. Courts and arbitrators have construed them in thousands of cases and respect and understand them. Such clauses

> incorporate by reference all of the provisions covered by the provider institution's rules, thus making it unnecessary to draft lengthy provisions addressing discovery, the method for selecting the tribunal, preliminary relief, and numerous other matters. These are important advantages.[43]

Seasoned healthcare attorneys are increasingly using model clauses from those provided by ADR administrators, knowing that they won't be left out in the cold with a poorly written or an unenforceable arbitration clause.[44]

Whether using a model clause from an ADR administrator or not, contract drafters and healthcare organizations should take into account the following guidance from the courts and from experienced health lawyers when drafting and presenting the agreement:

Make Sure the Agreement is Mutual and that it Covers All Disputes

Make sure the agreement binds both the patient and provider, and that it states that all disputes, including disputes regarding the enforceability and interpretation of the agreement, will be decided by the arbitrator. In other words, when a resident agrees with a facility to arbitrate, the agreement includes all potential patient claims, including liability claims, and all potential provider claims, including collections claims. The *Buraczynski* court noted this as a factor working in favor of clause enforceability.[45]

Provide All Legal Remedies

Legal remedies that are available in court should also be available through arbitration. This is especially true where contracting parties do not possess equal bargaining power.

Make ADR Cost-Effecitve for Patients

The cost of arbitration should not stand in the way of people bringing a claim. By referencing the FORUM's rules in the agreements, drafters may automatically incorporate the fee schedules that typically reflect reasonable fee allocation among the parties.[46]

Make the Agreement Plain and Understandable

The agreement should make it clear to the patient that he or she is foreclosing the option of a judge or jury trial and instead agreeing to an alternative forum. Consider using a stand alone agreement or bold font.

Educate Patients

Educating patients as to what they are getting in return—a fair, cost-effective method to resolve any future disputes—may serve to balance any uneasiness they may feel in signing such an agreement. Consider offering a "patient's guide" to ADR of the sort provided by healthcare ADR administrators such as the FORUM. Encourage patients to ask questions.

Consider Providing an Opt-Out Provision

Allow patients to "opt out" of the arbitration provisions within a certain period from signing, such as 10 days. An "opt out" provision can require a written notice from the patient.

Invoke the Federal Arbitration Act

State arbitration laws vary from one state to another. By invoking the FAA, healthcare organizations can use the same agreement in several states, and parties are assured that the agreement will be enforced according to its terms.

Select a Reputable Independent Entity to Administer the Process

To ensure that the process is run efficiently and in an unbiased fashion, designate in the agreement that mediation and arbitration will proceed under the rules of a reputable ADR administrator, one that administers the full range of healthcare ADR proceedings. The FORUM offers the full range of healthcare dispute resolution services, including arbitrations resulting from pre-dispute agreements involving patients if the agreement meets the standards set forth in the FORUM's Arbitration Bill of Rights.

In underscoring the importance of an independent administrator, experienced healthcare attorneys have noted that from both a fairness and process management point of view, parties are best served by incorporating by reference the rules of an administrator in the agreement. The process

may get too unwieldy if parties are left to sort out arbitrator selection procedures, deadlines, hearing dates, and other administrative matters on their own.

Appendix A:
Healthcare Patient/Enrollee Arbitration Clause

By signing this agreement, the (patient/enrollee) agrees with the (provider/plan) that any dispute between you and us and any dispute relating to medical services rendered for any condition, including any services rendered prior to the date this agreement was signed, and any dispute arising out of the diagnosis, treatment, or care of the (patient/enrollee), including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) shall be resolved by binding arbitration by the National Arbitration Forum, under the *Code of Procedure* then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum, at www.adrforum.com, or at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the (physician/other) including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term “patient” herein shall mean both the mother and the mother’s expected child or children.

This provision for arbitration may be revoked by written notice delivered to (the physician/other) within ___ days of signature.

The patient understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the (physician or hospital/other), cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

The clause above is a sample clause and is not intended as legal advice. Laws and procedures change frequently and are subject to differing interpretations. This information is not intended as a substitute for obtaining legal advice from competent, independent, legal counsel in the relevant jurisdiction.

Appendix B:
Healthcare Patient/Enrollee Mediation Arbitration Clause

MEDIATION. The Parties agree that any claim or dispute relating to this Agreement, or any other matters, disputes, or claims between us, shall be subject to non-binding mediation if agreed to by you and us within 30 days of you or us making a request to the other by letter. Any such mediation will be held in the federal judicial district in which you reside, and shall be conducted according to the mediation rules of the National Arbitration Forum.

ARBITRATION. The (patient/enrollee) agrees with the (provider/plan) that whether or not mediation is requested by any party, any claim, dispute or controversy, including any that remain unresolved 120 days after an agreement for mediation, relating to medical services rendered for any condition, including any services rendered prior to the date this agreement was signed, and any dispute arising out of the diagnosis, treatment, or care of the (patient/enrollee), including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) shall be resolved by binding arbitration by the National Arbitration Forum, under the *Code of Procedure* then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum, at www.adrforum.com, or at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the (physician/other) including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term “patient” herein shall mean both the mother and the mother’s expected child or children.

This provision for arbitration may be revoked by written notice delivered to (the physician/other) within ___ days of signature.
The patient understands that the result of this arbitration agreement is that

claims, including malpractice claims he/she may have against the (physician or hospital/other), cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

This is a sample clause and is not intended as legal advice. Laws and procedures change frequently and are subject to differing interpretations. This information is not intended as a substitute for competent, independent legal counsel in the relevant jurisdiction.

Appendix C:
Healthcare Business Relationship Arbitration Agreement

The Parties agree that any claim or dispute between them or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the *Code of Procedure* then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum, www.adrforum.com, or by mail at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

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About the National Arbitration Forum

The National Arbitration Forum (FORUM) is one of the world's leading providers of alternative dispute resolution services, including arbitration and mediation. Committed to the integrity of America's legal process, the FORUM has maintained a distinguished panel of over 1,500 attorneys and retired judges who follow and apply the substantive law when rendering legal decisions for the past 20 years. FORUM mediators and arbitrators are located across the U.S. and in 35 countries around the world. By administering dispute resolution solutions that save time and money, the FORUM provides an efficient and effective service for all legal parties. Publisher of the *ADR Law & Policy Update*, the FORUM is headquartered in Minneapolis, Minnesota with offices in New Jersey and Southern California.

For more information visit the FORUM's website at www.adrforum.com or contact the FORUM at 877-655-7755.

[1] Some estimates state the cost of mediation is as low as one-fourth of the cost of litigating a claim. Stephen P. Anway, *Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*, 18 OHIO ST. J. ON DISP. RESOL. 439, 449-50 (2003); *Report of the Interagency ADR Working Group to the President of the United States*, *available at* http://www.usdoj.gov/adr/ (last visited Nov. 18, 2004). *See also* Scott Forehand, *Helping the Medicine Go Down: How a Spoonful of Mediation Can Alleviate The Problems of Medical Malpractice Litigation*, 14 OHIO ST. J. DISP. RESOL. 907, 919 (1999) (discussing approaches to resolving the medical malpractice crisis, and how mediation offers benefits over litigation, one being cost).

[2] *See* Forehand, *supra* note 7, at 919, 924 (noting in studies examining the effectiveness of mediation in the context of medical malpractice disputes, data shows mediation takes a fraction of the time and cost as compared to litigation in resolving disputes).

[3] *See* Dauer & Marcus, *supra* note 2, at 186 (discussing the effect of litigation on medical quality improvement efforts).

[4] *See* Andis Robeznieks, *The Power of an Apology: Patients Appreciate Open Communication*, amednews.com (July 28, 2003) *at* http://www.ama-assn.org/amednews/2003/07/28/prsa0728.htm (noting experts assert that apologizing for medical errors is "ethically correct" and "financially prudent"); Pamela J. Vaccaro, *Putting Politeness into Practice*, FAMILY PRACTICE MGMT., Am. Academy of Family Physicians (Apr. 2002), *available at* http://www.aafp.org/fpm/20020400/70putt.html (citations omitted) (stating an apology may prevent a lawsuit).

[5] *See* Bridges v. Metromedia Steakhouse Co., L.P., 807 N.E.2d 162, 165 (Ind. Ct. App. 2004) (discussing Indiana rules for ADR proceedings, specifically rules pertinent to mediation proceedings).

[6] Martha Kerr, *Medical Error Disclosure: Easier Said than Done*, Caring for the Ages, AM. MED. DIRECTOR'S ASS'N (May 2003).

[7] *See* CAL. EVID. CODE § 1119 (providing admissions made during mediation cannot be subject to discovery in future proceedings); N.Y. JUD. LAW ANN. § 849-b (providing communications during mediation are not subject to disclosure in later judicial proceedings).

[8] 513 U.S. 265 (1995).

[9] Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203 (Spring 1996).

[10] *Medical Malpractice*, *supra* note 49.

[11] *Medical Malpractice*, *supra* note49.

[12] *Id.*

[13] Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, CORP. LEGAL TIMES (Feb. 2004).

[14] National Arbitration Forum, *Code of Procedure*, available at http://www.adrforum.com.

[15] *Medical Malpractice, Alternatives to Litigation*, Report to Congress, U.S. General Accounting Office (Jan. 2002), *available at* http://archive.gao.gov/d31t10/145592.pdf.

[16] Michael Delikat and Morris M. Kleier, Comparing Litigation and Arbitration of Employment Distpues: Do Plaintiffs Better Vindicate Their Rights in Litigation?, A.B.A. Conflict Mgmt., Vol. 6 Issue 3 (Winter, 2003).

[17] Lewis L. Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 No. 1 DISP. RESOL. MAG. 23 (Fall 1999).

[18] *See* Annual Report of the Office of the Independent Administrator of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System, *available at* http://www.oia-kaiserarb.com/oia/Annual%20Reports.htm (providing information about the Kaiser arbitration program for the past five years).

[19] *Medical Justice Through Alternative Dispute Resolution*, The Forum Whitepaper (2004), *available at* http://www.adrforum.com/articles/whitepapers/Healthcare_07_2004.pdf.

[20] 9 U.S.C. §§ 1-16 (2004).

[21] 9 U.S.C. § 2 (2004).

[22] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-75 (1995).

[23] Hightower v. GMRI, Inc., 272 F.3d 239 (4th Cir. 2001); Southland Corp. v. Keating, 465 U.S.1, 16 (1984).

[24] Morrison v. Colo. Permanente Med. Group, 983 F. Supp. 937, 943-44 (D. Colo. 1997); Toledo v. Kaiser Permanente Med. Group, 987 F. Supp. 1174, 1180 (N.D. Cal. 1997).

[25] *Id.*

[26] *See e.g.* Cal. C.C.P. § 1295 (describing requirements in California for healthcare arbitration agreements).

[27] 9 U.S.C. § 2.

[28] Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996).

[29] *Id.*

[30] Hill v. Gateway 2000, 105 F.3d 1147, 1148-49 (7th Cir. 1997).

[31] 552 P.2d 1178 (Cal. 1976).

[32] *Madden*, 552 P.2d at 1182.
[33] 919 S.W.2d 314 (Tenn. 1996).
[34] *Buraczynski*, 919 S.W.2d at 319.
[35] 2004 WL 1418698 (Ala. 2004).
[36] *Briarcliff*, 2004 WL 1418698 at 4.
[37] *Id.* at 1.
[38] 857 So.2d 278 (Fla. Dist. Ct. App. 2003).
[39] *Gainesville*, 857 So.2d at 289.
[40] Galle, *supra* note 23, at 978 (2004).
[41] *Id.* at 983.
[42] *Id.*
[43] Lawrence R. Mills & Thomas J. Brewer, *ADR Drafting Tips: Courts May Refuse to Enforce "Incoherent Hybrids" and Overreaching Provisions*, DISP. RESOL. MAG. (Spring 2002).
[44] Interview with Loretta Lebar, Of Counsel, Stoll, Keenon & Park, in St. Paul, Minn. (Nov. 18, 2004).
[45] Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996).
[46] *See* National Arbitration Forum *Code of Procedure*, (July 2003) *available at* http://www.adrforum.com/code/070103.doc.