

# *Mediation Resource Guide for Healthcare Providers*

*Nature of Mediation*



*Mediation in Healthcare Complaints and its Potential  
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*Frequently Asked Questions by Healthcare Providers  
About Mediation*



Resources for better healthcare

## *Nature of Mediation*

Mediation is a form of conflict resolution that brings two parties together in a process conducted by an impartial third party (the mediator). Medicare introduced this process as an alternative to medical record review for beneficiary complaints.

Mediation is a process that often results in increased satisfaction to the participants. It is not a binding arbitration. Participation is voluntary. By its very nature, mediation is a process in which the parties willingly decide to participate. One or more of the parties may need to be persuaded, but it is the eventual consent of the parties that gives the mediator the authority to work with them; there is no other basis for that authority.

Confidentiality is a key component of mediation. In order for mediation to be successful, both parties must feel as free and open as possible in their attempts to work through their conflict. No record is kept of the proceedings and any notes taken during the mediation session are destroyed. Nothing said during the mediation can be used against either party in a court of law. All parties, including the mediator, need to agree that all statements made during the process will be kept confidential unless the parties agree otherwise. If and when the parties reach an agreement, however, that agreement and its particulars are usually released to the QIO in order to monitor any terms.

### **How Does Mediation Differ From Arbitration?**

Arbitration and mediation are differing forms of conflict resolution, as is a trial in civil court. Arbitration is an adversarial process in which the arbitrator does fact-finding by hearing each of the parties and by examining any witnesses and/or documents that the parties may present. During a designated period of time, usually 15 to 30 days, the arbitrator weighs the evidence and decides the case in a written award. The award is usually binding and enforceable by a court. Sometimes parties prefer a non-binding or advisory award.

Mediation is a consensual and collaborative process in which the parties have agreed to participate in good faith and to authorize a third party, the mediator, to facilitate efforts to reach a resolution of their conflict. In contrast to arbitration, the parties themselves decide the outcome and create a mutually-agreed-upon resolution. The primary focus of the mediation is on the relationship between the parties and the development of each person's insights into self as well as to the other person's perceptions. Once both parties have reached an understanding and decided how to settle the conflict, the mediator writes up an agreement based on what has been said. He or she then reviews the agreement with both parties, who then, along with the mediator, sign the agreement. If the two parties involved in a beneficiary complaint do not agree and come to a resolution, the patient can then choose to let the case go into the traditional medical record review process.

# Mediation in Healthcare Complaints – Its Potential Effects and Advantages

## **Collaborative Problem Solving**

Experience has shown in many instances that mediation can forestall highly adversarial means of dealing with a complaint or a conflict such as litigation, appeals to public officials, or attempts at media publicity. A high percentage of beneficiaries become convinced that collaborative problem solving, by way of mediation, is a desirable alternative to adversarial confrontation.

## **Time and Resources**

The time and resources spent on mediation are relatively minimal and are certainly worth investing for the potential rewards of generating good will, understanding, and the constructive resolution of a complaint. A mediation session typically takes two to four hours, significantly less time than traditional medical record review. Every effort is made to schedule a mediation session at a neutral location, convenient for both parties. As an alternative, a mediation can take place via telephone.

## **Participant Satisfaction**

A major reason for the growing use of mediation as a way of dealing with conflicts is the satisfaction that many individuals experience when they find that they have the opportunity to communicate directly with the responding party. Under such circumstances, it is not unusual for a complaining party to be satisfied by a reasonable explanation of why the events occurred the way they did. Furthermore, an apology (if appropriate), as well as assurances that other beneficiaries will not experience the same situation, can also add to the success of a mediation. Repeated experience demonstrates that even a fragmentary meditative intervention can achieve understanding and resolution of problems before they escalate into adversarial confrontations.

## **Relation to Internal Grievance Process**

The fact that you may be using mediation, and/or arbitration in your internal grievance process is, of course, not the same thing as an external intervention. There will always be cases that will not respond to an internal process because of a perception of bias resulting in some sort of adversarial negotiation. To allay any anxieties about external intervention, it may help you to know that mediation is the most effective means of working through problems cooperatively with your patients.

## **Selection of Cases for Mediation and Examples**

The types of cases that will go to mediation are those where significant quality of care problems are not present. After a complaint is received from a beneficiary, an initial peer physician review will be done to make this determination.

### ***Some examples of cases for which mediation is suitable:***

- ♦ The beneficiary says they were given the wrong medicine, and the medical record shows the medicine was correct, but the instructions given were not clear or completely understood.
- ♦ The beneficiary's representative states his or her parent was discharged before he or she was able to walk. The medical record shows that the patient could walk with assistance, physical therapy in the home was ordered, but the family did not understand what arrangements had to be made to start the care at home.
- ♦ The beneficiary states that the care received from an orthopedist for neck pain did not help her. The medical record shows that the physician discussed a variety of available options for care. However, the beneficiary did not make a choice and did not return for a follow-up visit. Malpractice Claims Data shows that there are two major ways that practitioners and providers can reduce the risks of malpractice claims:

1. Through prevention, by finding out and addressing why a patient complains and takes legal action
2. By addressing complaints, when they do occur, in the least confrontational and the most personal human way, investing the time it takes in talking with the patient about the complaint.

More frequently than not, a complaint arises from a patient's perception of error or negligence rather than certifiable acts or omissions. The key factors in complaints are a breakdown in communication resulting in patient dissatisfaction. The highest frequency of malpractice claims comes from patients who feel rushed, ignored, receive inadequate explanations or advice, and perfunctory attention during routine visits. Malpractice attorneys say that 80 percent of malpractice cases come out of communication issues.

There is also some evidence that good communication can enhance the quality of care. When complaints do occur, one of the least confrontational ways to address them is through mediation.

**References:** Localio, A.R., et al, "Relation Between Malpractice Claims and Adverse Events Due to Negligence": Results of the Harvard Medical Practice Study III, *New England Journal of Medicine*, 1991; 325/4, 245-51.

Lown, Bernard, MD, *The Lost Art of Healing*, ct. 1996, 1999. Penchansky, DBA & Macnee, Carol, PhD, RN, "Institution of Medical Malpractice Suits" in *Medical Care*, 32/8, 1994, 813-831.

## *Frequently Asked Questions by Providers About Mediation in the Medicare Beneficiary Complaint Response Program*

### **1. Who makes sure that the terms of a mediation for a beneficiary complaint are complied with?**

To the extent that a party's compliances or non-compliances are predictable during the hearing, a mediator's role includes the effort to prevent, so far as possible, misunderstandings that might result in non-compliance. The mediator's function does not extend beyond the hearing. After the mediation session, the QIO is responsible for monitoring terms of the mediated agreement to assure compliance.

### **2. I am perfectly satisfied with medical record review. Why should I try something like mediation that I've had no experience with?**

From a business point of view, mediation is an effective way to avoid litigation, saving you significant amounts of time and money in the long run. Even if many of such lawsuits might ultimately be dismissed, they take up your time and attention, and cause stress to the patient-physician relationship. From a professional standpoint, mediation allows you and the complainant to determine the resolution, rather than a third party. Previous experience with mediation shows that both the physician and the patient are very satisfied with the outcome of mediation. By letting your patients know that you are open to mediation, you are sending them the message that you want to hear their concerns, improve the quality of care you provide, and ultimately have their best interests in mind. By communicating this message and displaying this attitude, you are bound to see increased patient satisfaction and potentially more patient referrals as well.

### **3. I am confident in my clinical expertise and abilities and the quality of care I provide to my patient. What good will a mediation do?**

A mediation is conducted in a neutral environment where each party has the opportunity to explain their side of the story. People are generally more inclined to listen to one another when there is the presence of a third person, or mediator. Besides, there may be other factors in your relationship that are leading your patient to doubt your word. It may be a matter of trust at this point. It may also be that the patient simply wants to feel that their complaint is really being heard. The fact that you are taking the time and trouble to meet with them may convince him/her to trust what you say.

### **4. But isn't it risky to go into a mediation and get entangled in a situation where a complaining patient can use what I say to hang me up in court later on?**

The mediation process is consensual and confidential. Whatever is said in a mediation cannot be used against either party as evidence in court. Even if you agree to mediate, you cannot be compelled to come to an agreement if it doesn't seem satisfactory to you. If the complainant is inclined toward going to court, communicating with you in a mediation might change his or her mind. If the patient is inclined toward mediation, you need to ask yourself whether your declining to participate in mediation would increase or decrease the patient's likelihood to sue.

### **5. Will the QIOs mediate cases involving potential medical malpractice?**

Any case could potentially involve medical malpractice if a beneficiary chooses to make such a claim. However, we will exclude cases involving gross and flagrant issues, concerns that indicate a pattern of substantial violations in the expected standard of care and cases already in litigation. As part of the Beneficiary Complaint Response Program, the initial physician peer review procedure will include determining if mediation is appropriate for a case and can be offered as an alternative to the medical records review.

### **6. You have said that a mediator does not judge the right or wrong of a case; then what does he/she do?**

The mediator helps the parties make decisions and come to an agreement by eliciting responses, helping with interpretation of what is being said and what is happening in the exchanges between them.

**7. I think that some of my patients may not be capable of dealing with a mediation. Some are just troublemakers and do not really have a case. Is this really worth my time?**

We have case management staff who spend a significant amount of time explaining the case review aspects involved as well as the ins and outs of the complaint process. A patient who is not ready to mediate in good faith is likely to pass up mediation as an option. As far as competence to participate in mediation is concerned, a complainant would be encouraged to get a relative or friend to help if he/she is not capable of participating. We also can provide a trained mediation advisor to assist either party in dealing with the mediation process.

**8. What does a mediation advisor do?**

Either party may bring a mediation advisor to the session if agreed to by the other party. The role of the mediation advisor is mainly to answer questions about the mediation process; they do not advise either party about what to do, or how to do it. The advisor can also attend the mediation for moral support.

**9. What about the mediator, how can he/she mediate if he/she doesn't have special medical knowledge or know much about managed care?**

Remember that the mediator is not going to decide how the matter should be settled. The mediator will have received training to orient them to the characteristics and the issues of the healthcare system. Besides, you, as a healthcare professional will be there to bring in medical data and explanations in terms that a layperson can understand. We also are using a co-mediation model in which retired healthcare professionals, including doctors, have volunteered and been trained to mediate. The professional mediator is experienced in eliciting additional explanation as necessary and would serve as an impartial spokesperson who would have the trust of both parties.

**10. Has mediation been used before with any success between doctors and patients or is this an experiment?**

Medicare is at the forefront of utilizing mediation in the healthcare system. While mediation has a long history of being used in various industries and situations, its use in healthcare has been somewhat limited, though successful. In a number of studies of its actual implementation, mediation has proved to have distinct advantages over the traditional medical record review process. Also, mediation has resulted in greater satisfaction, a sense of closure, avoidance of litigation, and improved relationships between physicians and patients.

**11. Are mediation hearings recorded or is there a contemporaneous record maintained?**

Mediation sessions are not recorded and the notes of the mediators and parties are destroyed at the end of the session. No record of any mediation details are kept on file.

**12. Could I bring my attorney to the hearing?**

You may bring an attorney to the hearing if all parties agree, but it is most important for the parties to talk with each other, rather than through lawyers. The attorney could be there with the understanding that their function is for private consultation when necessary, not for them to argue a case.

**13. Can a health plan representative attend the hearing even if the dispute is between a member and a physician?**

It depends on the nature of the beneficiary's complaint. For example, if the complaint is specifically against the physician, the physician could decide that, because some aspect of their employment affects what the beneficiary is complaining about, he/she would want a representative of the health plan to be there. Or they might not. If the health plan felt it had a stake in the situation, it could decide to become a party to participate in mediation and participate fully as a party. Or it might offer to participate in mediation with the complaining party separately about an issue or issues that affected the health plan.

**14. Can a physician send a representative to the hearing as opposed to attending in person?**

If the complaining party agrees, a physician could conceivably send a proxy with decision-making authority to be present in the mediation hearing. The beneficiary, in some instances, particularly when too disabled to participate in person, has the same option. It is always preferable, however, for the parties themselves to be able to communicate directly with each other in order to experience new understanding that both can learn from as they solve their problems collaboratively.

**15. What about insurance? Do I remain covered if I am in mediation?**

Where mediation has been used, the experience is that insurers sometimes recommend mediation. That is also true of attorneys who are representing physicians. However, it is recommended that you check with your insurance company to verify your situation.

**16. What is the impact to professional liability?**

We do not know what the impact will be at this time. However, the feedback from representatives of malpractice insurers has been positive. Malpractice insurance companies, as well as others in the healthcare industry, will be watching the rollout of mediation and evaluating the results of our program.