# HOW TO SAVE TIME AND COST IN HEALTHCARE ARBITRATION: CAN IT REALLY BE LESS EXPENSIVE THAN LITIGATION?[±]

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Many people have questioned the premise that arbitration is preferable to and cheaper than litigation. Is this concern legitimate? Is this different in healthcare than in other types of arbitration cases? What does experience reveal?

As stated by an experienced arbitrator: "Arbitration can cost just as much or as little as the parties wish it to cost." (Sir Roland Burrows, KC*, cited in CIArb Costs of International Arbitration Survey, 2011,* Chartered institute of Arbitrators.) So, what factors raise the cost of arbitration? What can be done to control this rising tide? Can costs be controlled when one party wishes to raise the amount of money and/or time spent by the other as a litigation (arbitration) strategy?

## I. FACTORS THAT LEAD TO RISING COST IN ARBITRATION

There are at least six (6) factors that lead to the rising cost of arbitration in healthcare and other types of complex cases:

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## 1. Number of Arbitrators

Contractual arbitration clauses specify that either one sole arbitrator or a panel of three arbitrators will hear the case. Many attorneys are concerned with the finality of a sole arbitrator, and worry about trying their party's case before a single neutral, who may have a legal approach, thought processes or predilections they cannot anticipate. By contrast, a panel of three offers different points of view and legal temperament. Thus, many counsel feel the client may be better off with three "bites at the apple" rather than with one. Few lawyers realize, however, the difference in cost between the use of a sole arbitrator and the use of a panel of three. Data collected by the American Arbitration Association ("AAA"), based on large complex cases decided in 2012 (involving over $1million), show that when a panel of three arbitrators was used, the cost of the case was five times as high as the cost where a sole arbitrator decided the matter. Increasingly, healthcare cases are classified as large complex cases as they can involve allegations of millions of dollars in damages and complex legal and regulatory issues.

Ironically, many doctor's employment and physician's shareholder agreements contain arbitration clauses requiring three arbitrators. This is probably because the parties want to "hedge their bets" and make sure they get at least one arbitrator, who is sympathetic to their side of the case. These are often the smaller arbitration cases, however, and the three-arbitrator panel drives the cost of the proceeding out of proportion to the size of the dispute.

## 2. Selection of an Arbitrator Not Familiar With the Subject Matter of the Case

Healthcare is one of the most highly regulated industries in the United States today. Its financing mechanisms alone boggle the mind. HRSA, ACO, PPACA, MSSP, HIT, FFS, CHIP, PBM and ZPIC are common acronyms used in the healthcare field. Is it necessary to spend time explaining these acronyms to the arbitrator before the case begins or as it progresses? Even if explanations are set forth in briefs, does the arbitrator understand the concepts well enough to interpret them in disputes where their application is central to the issue at hand? If not, more time will be spent by the arbitrator and by the parties in explanation and absorption of concepts that are second-nature to a neutral experienced in the industry. This takes counsel's time, and costs the clients' money.

### 3. Length of the Proceeding

The number of arbitrators deciding the case also increases the length of time the proceeding will last. Data from the AAA reveal that cases of more than $1million in damages, where awards were issued in 2012, lasted twenty-five percent (six months) longer when decided by a panel of three arbitrators than when the cases were decided by a sole arbitrator. The reasons for this include the increased difficulty in scheduling hearings and meetings between the arbitrators. Also, an increased length of time is required for three people to make decisions on all matters, and to draft orders, opinions and awards. Longer duration of the case leads to higher costs for everyone involved. While large reimbursement and healthcare business disputes may take months, some physician employment and shareholder disputes should be arbitrable in one to a few days. These times are extended where more arbitrators must make decisions.

### 4. Discovery and Motion Practice

Major discovery disputes about documents and depositions belong in litigation, not in arbitration. Often in cases involving claims reimbursement, quality measures resulting in peer review determinations and contract disputes over managed care or risk-sharing agreements, the focus of the case is the data. Data and records may be in electronic and/or paper form. In large hospital systems or insurance carriers, data may be stored at multiple sites. Thus, the details of access to and production of large volumes of data and/or records may take time to work out between the parties. In arbitration, as in litigation, the production of documents is often one of the most contentious aspects of the case, as well as the most difficult for the arbitrator to manage.

Experienced litigation counsel have learned that repetition works. Parties are said to select arbitration, however, to avoid lengthy and acrimonious exchanges over documents and depositions of witnesses and experts. Multiple discovery disputes and motions, supported by the same contracts and documents, can increase the cost of the arbitration exponentially.

### 5. Use of Litigation Counsel and "Over-Lawyering"

As noted by Jeffrey W. Carr, Vice President & General Counsel of FMC Technologies, Inc., "Arbitration is often unsatisfactory because

litigators have been given the keys to run the arbitration and they run it exactly like a piece of litigation. It's the corporate counsel's fault by simply turning over the keys to a matter."

In addition to knowledge of the subject matter of the case, counsel representing clients in arbitration need to be familiar with the arbitration process itself, and how it differs from litigation. Ideally, arbitration is streamlined, less formal, more efficient and more collegial than litigation. Many healthcare parties choose arbitration because they will continue to work on deals, projects or joint ventures together after the arbitration is completed. Thus, they do not want to damage the relationship with the opponent by participating in the "scorched earth" tactics often valued by courtroom lawyers. Not only are these tactics counter-productive in terms of the parties' ongoing relationships, but they also raise the costs and expenses associated with the arbitration.

### 6. No Limits in the Arbitration Clause

A well-crafted arbitration clause in the agreement between the parties can set the tone and determine the process for the arbitration. As noted below, arbitration clauses can serve to control the subject matter, location, scope, length and damages awarded in the arbitration proceedings. The most general arbitration clauses contain no limitations on the use of the proceeding. As such, they do nothing to manage the proliferation of factors that lead to more costly arbitrations.

## II. PROCEDURES TO MANAGE TIME AND COST

The following techniques and/or procedures can be adopted to mitigate against the above factors and control time and cost in arbitration:

### 1. Selection of a Sole Arbitrator With Case Management Skills and Familiarity With the Healthcare Issues at Hand

Both the American Health Lawyers Association ("AHLA") and the AAA have lists of arbitrators experienced in various healthcare specialties. In particular, the AAA has established a National Healthcare Panel of Arbitrators. Members of these panels have completed questionnaires setting forth their experience, both in arbitration, and in particular types of healthcare matters. In addition,

references on each potential healthcare arbitrator are listed on the AHLA ADR panel website, and can be secured through the AAA and other sources. Through the proper research about each potential arbitrator prior to selection, parties may reach a level of comfort that enables them to go forward with a sole arbitrator, or to choose an appropriate panel that will result in cost savings in the case.

### 2. Careful Drafting of the Contractual Dispute Resolution Provision

Binding arbitration provisions can be drafted in all contracts to limit the scope of discovery, establish timetables and create other boundaries in the arbitration proceeding. For example, binding arbitration provisions in healthcare business agreements may contain the following types of limitations:

a) Parties will exchange and provide to the arbitrator a list of witnesses and pre-marked copies of all exhibits 14 days before the hearing;
b) No depositions will be permitted for discovery purposes;
c) The hearing will be held within 120 business days of selection of the arbitrators or within such other time as mutually agreed upon by the parties; or
d) The arbitrator may only award monetary relief, limited to compensatory damages.

Obviously, all of the above limitations would not be effective for employment disputes between hospitals and physicians, shareholder disputes between physicians and their practice groups, disputes involving credentialing or peer review matters or reimbursement disputes that require contract interpretation. In these types of cases, creative equitable solutions acceptable to all parties are often as important, if not more so, than the award of money damages.

### 3. Selection of Counsel for Arbitration and Healthcare Expertise

To represent a party in arbitration, counsel should be selected for his or her arbitration experience (either representing a party in arbitration or serving as an arbitrator). This is important so that the counsel understands the goals of arbitration-to simplify the case, and make it more expeditious and economical for the parties to pursue. Arbitration also should have an informality that is not present in the courtroom. Strict rules of evidence are not followed, and cooperation

among counsel is sought, so that the procedure runs smoothly, and is not hampered by the hostility often present in a courtroom. To the extent that counsel are able to work out issues among themselves, or with the aid of the arbitrator, the arbitration will proceed more smoothly and expeditiously.

Due to the complexity of the relationships between the parties in healthcare, the financing mechanisms and the plethora of state and federal laws and regulations, it is also essential that counsel know the healthcare field. This means that all counsel must have some familiarity with the specific subject matter of the case. For example, a lawyer knowledgeable about peer review or fraud and abuse would not necessarily know anything about the issues related to health information technology (HIT), and the laws and regulations surrounding the use of electronic medical records. If counsel has experience with medical malpractice cases, it could not be assumed that this attorney has experience with Medicare or other reimbursement mechanisms. If counsel must be educated as the case progresses, this raises costs and expenses to the parties.

### 4. Use of Early Disposition, Expedited or "Fast-Track" Rules or Time Periods

Use of "early disposition" procedures at the beginning of a case to winnow out claims and defenses and set parameters in the case is desirable, when the parties so agree. For example, in one matter, an arbitrator presented with twelve different cases by medical practices, all challenging the same reimbursement formula in an identical managed care contract, consolidated the twelve cases into one, after consideration of the request by the twelve different parties, as well as the opposition. Issues related to the types of damages available in the case are often disposed of early on, as are questions of jurisdiction and standing. As a preliminary matter, this author has decided the legal issue of whether an antitrust claim between rival doctors' groups could be heard in the arbitration proceeding.

"Fast-Track" or Expedited Rules or Review are also available through the arbitration process offered by both the AAA and the AHLA. These rules essentially speed up the time within which a case is presented, goes to hearing and in which an award is entered by the arbitrator. This will be less expensive, if the parties are willing to comply with the deadlines.

In 2011, the AAA released its "Payor Provider Arbitration Rules", specifically for the arbitration of disputes between healthcare payors and providers. Under these rules (used only by choice of the parties), a provider includes all types of healthcare professionals and provider institutions. A payor includes an insurance company or any other party responsible for paying all or part of a claim relating to a health service. Payors include HMO's and administrators of self-funded or other health plans. The Payor Provider Rules call for a single arbitrator for all cases, regardless of size, unless the parties agree otherwise. Cases may proceed on one of three tracks: 1) desk or telephonic (no depositions); 2) regular (one deposition); or 3) complex (two depositions). All of these tracks are designed to limit discovery and provide for a more streamlined and cost-effective process.

Arbitrators also may discourage the filing of unproductive motions, or limit motions to those that appear to focus the arbitration process by winnowing out claims and defenses, and setting parameters in the case. For example, at least one arbitrator requires a moving party, prior to filing a dispositive motion, to file a short letter brief explaining why the arbitrator is likely to grant its motion. This can save time and money by eliminating those motions that are unlikely to be productive.

Particular types of healthcare cases also lend themselves to consolidation or summary adjudication of multiple claims, all of which have the same characteristics. For example, in a case with hundreds of claims for reimbursement, will each claim be adjudicated individually, or is there a way to expedite the process with random sampling of similar types of claims?

## 5. Limitation of Discovery

Limitation of discovery is essential to hold down the costs of arbitration. In the AAA Commercial Rules (R-22) and the new AHLA Rules of Procedure for Arbitration (Rule 5.5), the arbitrator has discretion to limit discovery to achieve an efficient and economical resolution of the dispute. Thus, interrogatories, production of documents and depositions are often abbreviated to what is essential to the case. In large document reimbursement or claims adjudication cases involving electronic data, the arbitrator may be asked to approve protocols for the review of computer files, as well as the process by which the document production will take place. Where individually identifiable health information is included in the documentation, HIPAA requirements must be complied with. Which

computer drives are to be accessed, where the data are to be produced, in what format, what personnel are allowed to review the data or records, and within what timeframe are all subjects that the arbitrator must be prepared to manage efficiently.

## 6. Control of the Case Schedule

The arbitrator's ability to set time limits for the different phases of the arbitration, and require the parties to stick to them, is one of the most important factors in controlling arbitration costs. This, of course, requires the cooperation of the parties and their counsel. As noted above, motion practice must be limited, and parties must do everything they can to comply with the schedule they agree to. Limiting the number and length of submissions to the arbitrator (including attached exhibits) can make a big difference in the case. Unnecessary repetition raises cost. At the outset, when scheduling for the case is initiated, the parties must determine how much time will be needed at the hearing for each side to present its case. Bifurcation of the liability and damages portions of the case may make sense at the hearing. Finally, the parties must make clear to the arbitrator whether they want a reasoned award, and, if so, what level of detail they would like to receive from the arbitrator. Obviously, a more detailed written analysis raises the cost of preparation of the award.

## 7. Requirement of Witness Testimony (if necessary) in Written or Video Form

Witnesses require time and money. While the individual who drafted a disputed healthcare contract provision may be essential to an in-person hearing on the meaning of the agreement, some types of cases barely require witnesses at all. For example, reimbursement cases where the arbitrator is asked to apply a contract formula to the payment for treatment rendered may be based primarily on payment and medical records documentation. Disputes over HIT licensing or contract completion may be based solely on documents and electronic data. Where witnesses are required, their testimony may be taken by deposition and recorded in video form for use at the hearing. Obviously, many issues will require testimony from witnesses at the hearing. To the extent this can be streamlined in advance, costs will be lowered.

### 8. Use of Technology to Reduce Costs

Where possible, the parties should provide for electronic service of submissions and orders directly between the parties and the arbitrator(s). Medical records and other data can be produced electronically, and not by paper copy, as long as appropriate HIPAA and security safeguards are in place. At the hearing, testimony from witnesses may be presented via video. Power point, other slides and electronic mechanisms may be used at the hearing to introduce data, charts, documents, contract terms and other types of demonstrative evidence. Essential documents in the case need only be presented once, and need not be duplicated each time during the arbitration proceeding that a presentation is made to the arbitrator.

In emotional cases, such as peer review and ACO matters, physician employment cases and other types of hospital/physician disputes, the presentation of evidence through electronic or video technology also may serve to diffuse the effect of in-person testimony. This, in turn, could require less time than the introduction of live witnesses, and thus reduce the cost of the proceedings.

## III. CONCLUSION

One of the advantages of the arbitration process is that it is controlled by the parties. The proceedings are confidential, and the parties can choose their own decision-maker(s). As noted above, however, too much control by the parties and their counsel can lead to the high costs they sought to avoid by selecting arbitration. By managing the factors that raise costs in arbitration, the parties can achieve a process for adjudication of their claims that is much more efficient than going into court. Among other things, this requires the choice of an experienced and knowledgeable healthcare arbitrator, who understands the complexity of current healthcare laws and regulations. The arbitrator also must be able to manage the parties and their counsel through the efficient and cost-effective process of enforcing deadlines and timetables, while fairly allowing the parties the latitude required to present their cases. In healthcare, where many of the institutional and smaller providers and payors rely on Medicare, Medicaid and other inconsistent sources of funding, judicious use of the arbitration process could result in a significant boost to the bottom line.