



Legal Corner

Avoiding the Trauma of Courtroom Drama

By Gay G. Cox, JD



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Some physicians are contemptuous of attorneys and of the adversarial legal system. Their attitude has been shaped by their experiences with lawsuits. Whether in trial preparation and discovery, or in the courtroom itself waiting for things to happen, many physicians have experienced the frustration of having no control over the process or over the results. They have seen their time and money wasted. As much

as they may fear and hate it, in our litigious society, it is common for differences to land in this arena.

Physicians are faced with needing resolution of disputes regarding not only medical errors, but also many business-related issues, such as dissolution of a partnership, interference with business relationships, breaches of contract, covenants not to compete, employment and workplace matters, disputes with insurance providers and vendors, and so on. The reality is that most of the anxiety a physician is likely to experience in the legal realm will be conflict with other professionals and with family members, not claims made by patients.

Whatever the source of the dispute, it should come as good news that there are alternatives that do not involve the courthouse. The intent of this article is to define the alternatives that allow the physician to retain the greatest control over his or her destiny. When a physician seeks legal advice about a dispute, the most important initial decision that is made is how to proceed—what process will be the best means of solving the problem.

Ideally, hospital or practice group contracts will provide for a method of alternative dispute resolution (ADR). The most common ADR processes are arbitration and mediation. An arbitrator is essentially a private judge who makes decisions or recommendations. Arbitration can be a speedier and more private method of avoiding the courthouse, but it still involves someone else besides the physician deciding the outcome.

A method which many prefer over arbitration is mediation, especially if mediation is utilized at an early stage of the

dispute. A mediator serves as a third party neutral facilitator to assist the parties in their negotiations. The process is confidential and is based on the value of self-determination. The mediator may make suggestions, but has no power to make any decisions for the parties. The parties may or may not choose to have legal representation during the mediation sessions.

A fourth option is emerging: Collaborative Law. Collaborative Law, also known as Collaborative Practice, is a voluntary, confidential process in which the parties each engage the services of a collaborative lawyer who is a settlement expert. The parties agree and contract with one another that they will negotiate in good faith with the goal of reaching an out-of-court settlement. All the efforts of their respective collaborative lawyers are concentrated on settlement-focused discussions. Each has a commitment to a full and candid informal exchange of all information necessary to make an informed decision. If outside expertise is needed, the participants jointly retain neutral trusted advisors, not hired guns to engage in a battle of experts. If the lawyers are unsuccessful in helping the parties find a mutually acceptable solution to the problem, the contract requires that their services be terminated, and the option of proceeding to the courthouse remains available, but with new lawyers whose expertise is litigation.

The Collaborative Commitment of the lawyers never to litigate the case, is reassuring when one realizes that in litigation, more than 90% of the cases filed are settled before trial, and thus most trial preparation is never used to directly benefit the client. Whenever trial in court remains a possibility, physicians may suspect that their legal fees are being unnecessarily spent to prepare for trial, more to protect the lawyer from malpractice claims and to generate fees, than to serve the physician-client's interests. Web sites that offer a full explanation of the Collaborative Law process are www.collaborativelaw.us, www.massclc.org, www.collaborativepractice.com, and www.collablawtexas.org.

The Collaborative Practice process first took hold in divorce cases because it serves the parties' goal of maintaining relationships, particularly the co-parenting relationship. Similarly, many civil law clients have relationships they wish to preserve—professional colleagues, former business partners, employer-employee, hospital-physician, physician-patient, etc. Even if they are not disposed to preserve a relationship, they may recognize that how they handle conflict may affect their reputation and either promote or diminish their referral

base. The choice may also be driven by the desire to be the master of one's schedule and resources and not have the court system assume that role. These factors have led health care professionals and their legal counsel to recognize the usefulness of the process in physician-related dispute resolution.

The key is that lawyers who have specialized skills in conflict resolution are developing practices focused on transforming

the way conflict is resolved. This is a major legal paradigm shift. The physician community has been identified as one of the next groups most likely to embrace these creative alternatives as the means of saving themselves from the trauma of courtroom drama.

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