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Pharmacy Law Brief: Alternative Dispute Resolution

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Pharmacy Law Brief: Alternative Dispute Resolution

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Question: I was speaking with a local attorney recently at a social function who indicated that mediation is occurring with increasing frequency and in some fields reducing the number of cases going to court, especially cases involving allegations of professional malpractice. Is this a local trend or something of wider impact?

Response: Mediation is one form of what is known as alternative dispute resolution, with the word "alternative" indicating that this is an option which avoids the courtroom and most legal processes attendant to a court proceeding. The two principal approaches are arbitration and mediation.

Arbitration involves the two parties voluntarily agreeing to have a third party, known as the arbitrator, decide the matter. The arbitrator meets with both sides to hear their perspectives and then issues a decision which is binding. One will frequently hear of arbitration being used with salary disputes in the world of professional athletics. That imposition of a resolution differentiates arbitration from mediation. In mediation there is a third party known as the mediator, or sometimes called the "neutral," who talks with the parties and then proposes a solution to the dispute. The mediator has no authority to impose the proposed outcome on the parties; they must both agree to the solution of their free will. Often a contract will then be used to formalize the agreed upon outcome. One description of mediation I've heard is that it represents presenting a "choice among a limited number of unwanted options."

Sometimes mediation is seen in conjunction with a court proceeding. For example, if one were to go to Small Claims Court in Fayette County for resolution of a dispute involving less than \$2,500, the jurisdictional limit of such a court, the judge will direct the parties to meet with one of a cadre of mediators standing by in an adjacent room to attempt to resolve the matter without occupying the court's time.

Mandatory arbitration clauses are being included in a wide variety of contracts as the means of handling disputes, e.g., credit card agreements, insurer-participating provider agreements, etc. In some cases this provision is buried near the end of a lengthy document and the parties are not both aware of its existence until a dispute arises.

These approaches have gained in popularity in recent years for a number of reasons: (1) often less costly than going to court; (2) ability with mediation to continue to have

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a role in deciding the final outcome rather than having it imposed by a judge, jury or arbitrator; (3) dispute may well be resolved more quickly; (4) ADR is a private affair thereby avoiding the public exposure of a court proceeding; and on and on.

The Kentucky Court of Justice has adopted Mediation Rules. To be placed on the Kentucky Roster of Approved Mediators one must complete a 40 hour training program and 15 hours of hands-on experience. One can then apply to be placed on the Roster of Mediators that is maintained by the Kentucky Administrative Office of the Courts. Like many professional fields, there is a mandatory continuing mediation education expectation for mediators of four hours every two years. A common misconception is that one must be an attorney to be a mediator; that is not at all the case. Many mediators are social workers who mediate family disputes.

Referring back to the original question or comment, I was speaking with an attorney friend from Louisville who is active in the field of medical malpractice litigation who indicated that he knows several attorneys in the field who've not had a case go to trial in three years because mediation has become so popular as a way to resolve those disputes out of the public eye. In an area where one's professional reputation is so very important that argument is not hard to buy. Finally, it is noteworthy for pharmacists that alternative dispute resolution is sometimes referred to as "ADR", an abbreviation that in our field sometimes has a different meaning – adverse drug reaction! The two should not be confused.