RESOLVED, That the American Bar Association urges lawyers and all interested parties to increase their utilization of the broad array of alternative dispute resolution (ADR) techniques, as an effective, efficient, and appropriate means to resolve potential health care disputes stemming from increased access to health care coverage for many Americans and the changing structure of health care delivery across the nation due to recent health care reforms, the expanded use of technology in all aspects of health care, and the ever-increasing regulation, both state and federal, of the health care industry.
I. INTRODUCTION

During the past few decades, the legal profession has embraced an increasingly wide array of dispute resolution processes to address their clients’ problems. With the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever increasing use of technology in providing health care, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing integration and interdependence as a means of accomplishing these goals. These complex relationships, vital to health care delivery but often with competing goals, may give rise to conflict.

Disputes and conflict arise in almost every facet of health care and span all settings – hospitals, physician’s offices, home health agencies, hospices, health insurance company’s claims departments, and providers’ corporate headquarters. Issues include family disputes in a hospital, denial of claims for reimbursement, disagreements when physician practices are bought and sold, and hospital merger and acquisition. In addressing each of these conflicts and disputes, ADR can play a useful role. While there are no collected statistics reporting the precise use of ADR in healthcare disputes, anecdotal evidence suggests that the health care industry and the legal profession with an interest in health care have lagged behind others in embracing the broad array of dispute resolution techniques to address conflicts and resolve disputes.

Health care spending represents a significant part of the nation’s economy. In 2013 the United States spent $2.9 trillion on health care or about $9,255 per person. Health care spending remains at 17.4 percent of the economy. Every American has a stake in our health care system – and how its conflicts and disputes are resolved.

• What is ADR?

The ADR processes used most commonly in health care disputes include mediation and binding arbitration. Mediation is a voluntary dispute resolution process; all parties consent to participate in good faith in an effort to reach a mutually agreeable resolution of their dispute. The mediator is a neutral and facilitates the negotiation process by asking questions and

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2 Morreim, H., Conflict Resolution in Health Care, AHLA Connections (January 2014).
exploring creative means to accomplish the objectives of both parties. Some mediators engage in an evaluative process, point out strengths and weaknesses of the respective litigants, and proactively afford each party the mediator’s opinion or assessment of the relevant issues focused on the likelihood of success if the parties process to litigation. Yet others emphasize a problem-solving approach based on the parties’ most important goals.

Arbitration, on the other hand, is a dispute resolution process in which a neutral party, i.e., the arbitrator, hears a dispute between one or more parties somewhat like a judge in a courtroom and, after considering all relevant evidence, renders an award or decision in favor of one of the parties. Arbitration decisions may be either binding or non-binding based on the terms of the arbitration agreement entered into by the parties. Binding arbitration decisions are generally enforceable by a court. Nothing in this Report should be construed as taking a position regarding mandatory pre-dispute arbitration of employment disputes.

ADR, however, is not limited to mediation and arbitration. ADR techniques extend to pre-dispute facilitated discussions where a neutral will facilitate early resolution of a dispute. Other forms of dispute resolution include early neutral evaluation, settlement conferences, private judging or fact finding.

Traditional ADR brings the parties together in person. In person ADR remains commonly used to mediate, arbitrate, or otherwise resolve many disputes. However, technology is increasingly used in ADR. Online dispute resolution, the application of information and communications technology, has come to dispute resolution. It takes advantage of our ability to use the Internet – accessed by a variety of devices, our computer, smartphone, to communicate and resolve disputes easily and quickly. ADR also includes other electronic means of communication, including video conferencing and text based, asynchronous conversations.

An array of ADR techniques is broad and can serve many useful roles. Conflict management can address conflicts in a variety of contexts where there is no litigation in mind whatsoever. Processes labeled as focused or guided discussions led by peers in the nation’s high schools address many conflicts experienced by adolescents and young adults. Individuals engaged in collaborative problem solving address a variety of conflicts arising in hospitals involving patients and their families. It is acknowledged that litigation will continue to be appropriate in a variety of contexts. Effective dispute resolution requires the agreement of the parties to enter into the process. Nothing in this report suggests that parties cannot file and

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6 See, American Jurisprudence, Second Edition §6 Mediation (database Updated February 2015). Also see, Mediation Rules, Office of the Circuit Executive, United States Court of the Appeals for the District of Columbia Circuit, Civil Rule 84.2 (a) Description.


10 The eBay/PayPal electronic dispute resolution system is a good example of ADR used on an almost exclusively electronic basis.

pursue litigation whenever appropriate. Disputes must be selected as appropriate candidates for dispute resolution by an acceptable ADR technique.

Finally, ADR is commonly accepted by nearly all courts across the nation at all levels and has become “mainstream” practice – a means of offering litigants “different options and opportunities for resolving their disputes” in lieu of litigation. 12

II. HEALTH CARE DISPUTES AMENABLE TO ADR

Many different types of private and public health care disputes are amenable to resolution through ADR. Court sponsored programs, private professional organizations offering mediation and arbitration services, and programs offered by health care providers offer a multitude of ADR services. In the health care arena the major areas of disputes may be cataloged as follows:

- Payor/Provider claims/network disputes

Disputes between providers and health insurance companies are becoming more and more common. In the healthcare industry, payors and providers often have claims for both underpayment and overpayment arising from ongoing contracts or other healthcare services that are litigated where lawyers may wish to consider dispute resolution, where appropriate. 13 Issues include coverage, coding, billing, claims payment, contract interpretation, risk sharing, and/or administrative issues, including exclusion of providers from limited provider networks. Disputes extend to management services companies, e.g., laboratory billing disputes, and third party vendors offering ancillary services such as durable medical equipment and physical or occupational therapy.

Individual health claims are generally addressed through internal health insurance company appeal procedures and many states offer a right of appeal to a state insurance agency appeals process. Many large claims for denial of benefits on grounds of lack of medical necessity, cosmetic or experimental/investigative procedures, or denial of coverage of “new technology” treatment may be litigated in the courts where dispute resolution may provide a useful role.

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• **Medicare Reimbursement disputes**

Hospital Medicare Part A Inpatient Prospective Payment System (IPPS) disputes or appeals from annual cost reports span a wide range of issues with enormous financial consequences for providers, principally acute care hospitals. Commonly appealed issues include the disproportionate share payment (DSH), reimbursement for bad debts, wage index, graduate medical resident and allied health education expenses, and capital costs. Cases have high dollar value.\(^{15}\)

Presently, over 9,000 Medicare IPPS administrative provider appeals are pending before the Provider Reimbursement Review Board. Disputes between providers and Medicare Administrative Contractors (MACs) representing HHS are infrequently mediated. ADR can be expanded in this area.

• **ERISA Litigation**

Participants or beneficiaries in an employee benefit plan subject to the Employee Retirement Income Security Act (ERISA) may sue to “recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” This cause of action provides typical contract remedies such as recovery of accrued benefits, declaratory judgments to clarify plan benefits, and injunctions against future denials of benefits. Class action lawsuits may be brought against the plan denying coverage/benefits, the plan administrator, the employer/sponsor, third-party insurers and administrators and plan fiduciaries.

The Employee Benefits Security Administration (EBSA), U.S. Department of Labor, has substantial enforcement responsibility for ensuring the integrity of private employee benefit plans. In FY 2014, the EBSA initiated 2,541 cases resulting in monetary fines or other corrective action. Where voluntary remedies are insufficient, the Department of Labor initiates litigation. In FY 2014, 107 cases were brought in federal courts.\(^{16}\) All these disputes might be more quickly and less expensively resolved through ADR.

• **National and international contract disputes involving drugs patented by pharmaceutical companies and associated issues**

Issues include breach of contract, patent/trademark infringement, licensing, and IT; disputes common to commercial claims including joint venture, partnership, distribution, and

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manufacturing. Notwithstanding their complexity, and perhaps due to their difficulty, many would benefit from ADR.

- **Physician practice/Provider business disputes**

  Employment contracts, purchase agreements, partnership agreements, repayment of loans, non-compete, non-solicitation, and anti-theft clauses, fiduciary duty obligations, managed services organization (MSO) contracts, space sharing agreements, corporate and LLC formation, employment law, worker’s compensation issues, and shareholder issues are among the disputes that arise in physician practices. These physician disputes may escalate into unpleasant exchanges of charge and counter-charge, none of which is in the interest of any party. These disputes may be resolved by ADR in the interest of all outside a public forum.

- **Accountable Care Organization (ACO) disputes**

  There are presently over 600 ACOs serving 14% of the nation’s population and the number is growing as a result of the new Medicare Shared Savings Program. Issues include quality of care, shared cost programs, conflicts among providers in the ACO and their relationships with commercial payors, termination/withdrawal or restriction of participating physicians due to poor performance and other reasons, reimbursement and financial incentives, use of quality metrics/clinical practice guidelines, evidence based medicine standards, calculation of patient utilization and cost, and access to data. Myriad issues associated with ACOs present additional opportunities for ADR.

- **Disputes over the dissolution/sale/merger or acquisition of a hospital, medical practice or other health care entity**

  Contract and other disputes regarding physician practices arise in a variety of contexts including the retirement of physicians and the sale or closing of practices; contract disputes when physician practices are sold and consolidated with hospitals, shareholder agreement buy

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20 See, Ronai, St., *The Patient Protection and Affordable Care Act’s Accountable Care Act’s Organization Program: New Healthcare Disputes and the Increased Need for ADR Services*, Dispute Resolution Journal, August/October 2011, available at https://www.google.com/url?url=https://www.adr.org/cs/idcplg%3FIdcService%3DDGET_FILE%26dDocName%3DDADRSTG_011022%26RevisionSelectionMethod%3DLatestReleased&(rect=j&frm=1&q=&src=s&sa=U&ei=F1IDVYX3E-O1sASZ8IFo&ved=0CCsQFjAFoBQ&usg=AFQjCNEDAgzePyPq599OmpGfe8KjDo-VPQ.

out provisions and other features of such agreements, 22 sale or dissolution of practices consistent with Stark safe harbor provisions; covenants not to compete; disputes over fair market value; conversion of hospitals from not for profit to for profits status, including real estate restrictions; Medicare loss on sale claims for reimbursement with high dollar stakes. The need for litigants to resolve these business disputes quickly may strongly recommend the use of ADR.

- **Medical staff, credentialing and peer review disputes**

  Medical staff disputes arise as physicians interact with hospitals and other health care providers. “Sour relations” escalating to litigation can arise from provider appointments and credentialing, termination or threatened termination of privileges, changes in by-laws, the expanding use of technology, including electronic medical records, performance of medical staff responsibilities; 23 addressing the needs of disruptive or impaired health care professionals; conducting peer review and quality assurance; taking corrective personnel actions; providing fair hearings for medical and allied health professional staffs; peer review communications and records confidentiality; National Practitioner Data Bank querying and reporting; peer review immunities; the effect of hospital business upon medical staff membership and privilege, and such mundane matters as the hospital’s physician call schedule or adding staff to a department absent consultation with current staff members. These disputes are susceptible to resolution by a range of ADR techniques. 24

- **Medical malpractice**

  Numerous commentators frequently note that ADR can be helpful in resolving medical malpractice disputes. 25 Where appropriate and properly used, ADR can resolve malpractice claims in a more efficient, cost effective manner than litigation and permit the use of techniques to be utilized that are not available in litigation. A physician’s apology can, among other factors, facilitate resolution of these cases that have long been the subject of controversy among physicians, lawyers, and patients. 26

- **Qui tam and False Claims Act (FCA) cases – Federal and state**

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Whistleblowers are filing *qui tam* lawsuits\(^{27}\) and federal\(^ {28}\) and state\(^ {29}\) agencies are engaging in widespread investigations and other activities to address the commonly recognized problem of fraud in health care. Overpayment is an increasingly important issue as the Affordable Care Act and the Fraud Enforcement and Recovery Act (FERA) imposed False Claims Act liability for overpayments, including any overpayment held for more than 60 days and expanded government authority to address kickbacks; claims of Medicare fraud including over-billing, mis-billing, and billing for services not provided; FCA quality of care amendments, anti-kickback provisions, and other regulatory violations may make FCA cases fertile ground for dispute resolution.

- **Employment disputes in provider settings**

  Employment related disputes actionable under federal and/or state law may be amenable to a variety of ADR techniques.

- **Long Term care – Skilled Nursing Facilities (SNFs), Long Term Care Hospitals (LTCHs), and Hospice Care**

  Billing and quality of care issues continue to be the subject of federal and state audits, investigations and enforcement actions. They represent special opportunities for mediation beginning at the investigation stage and, if necessary, culminating at the litigation phase and during enforcement proceedings. SNFs and LTCHs are subjected to numerous allegations of abuse and inadequate treatment of patients including preventable injuries and hospitalizations. In addition, billing issues arise from the facilities’ interactions with the Medicare, State Medicaid programs, and private payors. The HHS OIG latest work plan found that SNFs billed one-quarter of all 2009 claims in error, resulting in $1.5 billion in inappropriate Medicare payments. There are licensing and certification disputes arising over standards of care and participation in federal and state programs. Finally, dispute resolution can be considered in addressing conflicts arising from end of life and other treatment decisions. These conflicts and disputes between providers, patients, and the Federal and State governments represent opportunities principally for mediation.

- **Home Health Care Agencies (HHAs)**

  HHAs provide health care services to beneficiaries pursuant to both Medicare and Medicaid. Likewise, adult day health care programs provide health, therapeutic, and social services and activities to program participants. Beneficiaries enrolled must meet eligibility requirements, and services must be furnished in accordance with a plan of care that meets regulatory requirements. Medicaid allows payments for adult day health care through various authorities, including home and community-based services (HCBS) waivers. These programs present coverage, billing, and regulatory issues\(^ {30}\) that are tailor made for ADR.

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\(^{27}\) There are many *qui tam* lawsuits in the health care area. See, e.g., Mintz Levin *Qui Tam Update*, May 2014, available athttps://www.healthlawyers.org/Events/Programs/2014/Documents/MintzLevin.pdf.


• HIPAA/Privacy and Security – compliance

The health care industry now leads all business sectors in breaches of protected health information subjecting patients to undue risks of identity theft and other harm. 31 Breaches are occurring all across the health insurance industry from major health insurance companies to the nation’s most renowned hospitals. Each breach results in the filing of significant litigation and plaintiffs are beginning to erode the prevailing standards that no relief can be afforded to patients unless each shows some demonstrable harm resulting from the breach. As a result, defendants have real incentives to resort to ADR to mitigate damages and protect against reputational harm by resolving claims quickly.

• Recovery Audit Contractors (RACs), Program Safeguard Contractors (PSCs) and Zone Program Integrity Contractors (ZPICs) – investigation and enforcement activities

Recovery Audit Contractors (RACs), Program Safeguard Contractors (PSCs) and Zone Program Integrity Contractors (ZPICs) carry out benefit integrity activities for Medicare Parts A and B, and a Medicare Drug Integrity Contractor (MEDIC) carries out benefit integrity activities for Medicare Parts C and D. ZPICs and PSCs are required to detect and deter fraud and abuse in Medicare Part A and/or Part B in their jurisdictions. They conduct investigations; refer cases to law enforcement; and take administrative actions, such as referring overpayments to claims processors for collection and return to the Medicare program. 32 Unpaid alleged overpayments are referred to the IRS for collection. These investigation and/or enforcement activities provide additional opportunities for the use of ADR.

III. ADVANTAGES OF ADR

ADR has many advantages. Like any legal proceeding, the mediator or arbitrator must lead or facilitate the process in a manner that provides the parties with the advantages of the process. While any process can be abused, if implemented appropriately, ADR holds out these potential benefits. 33 The advantages are summarized as follows.

• **Cost efficient, less expensive than protracted, adversarial litigation**

There is little disagreement that litigation can be an expensive, time consuming way of resolving disputes. While litigation is necessary when statutes are unclear, a novel theory is advanced to support a legal claim, or a precedent is needed to clarify an important legal principle, it need not be an automatic response to every dispute or conflict. These considerations apply to the entire range of health care disputes. Many health care disputes implicate the complexity inherent in state and federal regulations that control nearly all aspects of the nation’s health care delivery system. Others involve medical and scientific data and information. Such litigated disputes often give rise to the “battle of the experts” where the competing sides seek to convince the judge, jury or both by expensive, compensated by-the-hour experts. Discovery further increases the cost and protracted nature of litigated health care disputes. High dollar cases are often litigated by the nation’s leading law firms where hourly rates often exceed $800 per hour.

Mediation can streamline this potentially expensive, protracted process by identifying the parties’ goals either before the filing of any lawsuit or at any step in the process, including after the trial. Years of litigation, discovery, motions and argument, trials, and appeals can be replaced by voluntary discussions among the parties facilitated by a neutral. Viewed from any vantage, mediation can shorten the process whenever initiated -- and can result in low cost resolution of disputes when initiated before a complaint is even filed. Arbitration can likewise streamline the process by focusing the parties, limiting discovery, including depositions, and avoiding strict application of the rules of evidence, and other formalities imposed by a court. If properly administered, arbitration will seldom take as long, consume as many resources, or result in the “quagmire” of court litigation. Both mediation and arbitration can accommodate the parties’ time and scheduling requirements, and other needs. 34 ADR does not suffer the consequences of a crowded docket.

• **Ability to choose the neutral with expertise in health care**

The selection of a neutral with expertise in the health care can facilitate the resolution of the dispute by focusing the parties on the core of the dispute. Selecting an individual with knowledge of the relevant health care regulatory scheme, state or federal, that governs nearly all aspects of the medical delivery system, facilitates the prompt and timely resolution of health care disputes. A knowledgeable neutral in the regulatory, scientific, and/or technical aspects of the dispute can use this knowledge to facilitate the resolution of the dispute. There is no need to educate the judge or jury. Neutrals are also effective in the resolution of differences arising among physicians in a group practice when one member fails to meet the expectations of another physician. Neutrals with experience in reimbursement, e.g., diagnostic codes, length of stay, and other reimbursement rules and regulations, can readily resolve complex reimbursement disputes governed by rules few understand and appreciate.

• **Ability to create novel solutions afforded by the flexibility of the process**

34 *Id.*
In mediation, the parties make all decisions. The parties’ ability to control the process permits them to agree to remedies that may not be available through litigation but serve to meet their needs. In a medical malpractice case, among other factors, a physician’s apology to the grieving parents of a deceased child can be a powerful tool of settlement. Counsel’s willingness to contribute to an agreed upon charity may help to resolve of an attorney’s fees dispute in a health care dispute. In complicated health care disputes, the neutral experienced in the organizational and managerial aspects of hospitals and physician practices may assist the resolution of a contract dispute by facilitating the renegotiation of the contract as well as damages. The flexible nature of the process also facilitates scheduling, including timing of meetings/hearings and venue. Many of these same considerations apply to arbitration.

• Maintain long term relationships while resolving a dispute

ADR offers parties to a dispute a means of minimizing emotional, high stakes risks commonly associated with adversarial litigation. Mediation is entirely voluntary, lacks the formalities associated with court proceedings, is held in private, and can lead to confidential agreements resolving disputes absent widespread media attention. In arbitration, the parties can agree to the components of the process to a large degree, maintain their ability to promote privacy and confidentiality, and avoid most of the pit-falls of high risk public in-court litigation. All these factors may serve to maximize the parties’ ability to maintain professional and business relationships essential to their long term success. On the other hand, mediation may help mend frayed personal relationships that erupt as families address issues associated with the hospitalization or loss of a loved one.

• No or limited discovery

Generally, mediation does not contemplate discovery. Mediation can commence before any discovery has been taken, be adjourned to permit any necessary fact finding, or take place after all discovery has been completed. Absent discovery, mediation can permit the parties to discuss the facts and present their respective positions. The discussion may assist the resolution of the matter by permitting the parties to candidly express their respective views – a useful process since nothing said or done in mediation can be later used in court.

35 Todres, J., Toward Healing and Restoration for All: Reframing Medical Malpractice Reform, 39 Conn. L. Rev. 667, 686 (2006) (“[a] study published in Lancet, the leading British medical journal, found that as many as 37% of medical malpractice plaintiffs reported that they would not have filed lawsuits if their doctors had sincerely apologized instead of stonewalling.”).


38 Some commentators have observed that formal discovery may be required to assist mediation or arbitration during the course of the dispute resolution, especially where highly complex scientific or forensic issues are in dispute and that discovery may establish facts essential to the successful resolution of the dispute.
In arbitration, it is not unusual for parties to limit the scope and timing of discovery. Arbitration rules also serve to limit discovery. For example, Rule 22 of the AAA Healthcare Payor Provider Arbitration Rules limits discovery to one deposition absent the parties’ agreement or the arbitrator’s approval. 39 Like the Federal Rule of Civil Procedure, these rules require disclosures to shorten and facilitate the resolution of the case. 40 JAMS has issued a list of factors for arbitrators to use when evaluating discovery requests such as the nature of the dispute, whether the parties agree to the scope of discovery, the relevance and reasonableness of the requested discovery, the presence of genuine privilege and confidentiality concerns, and the relative need of the parties. 41 The College of Commercial Arbitrators has issued a protocol urging arbitrators to actively manage and shape the arbitration process and “avoid unnecessary discovery.” 42 Discovery disputes can be resolved informally by the arbitrator and, in many cases, there is no need for motions to compel discovery.

• Privacy and confidentiality

A formal ADR process is generally viewed as confidential and, as a result, advances the parties’ privacy interests. Rules of state, 43 federal court, 44 and mediation programs operated by private organizations and entrepreneurs promise or require the parties’ agreement that the proceedings be private and confidential, including the requirement that nothing used in mediation may be used outside the process or in court. 45 Arbitration may differ to the degree that the arbitration proceeding may lead to judicial action, including an action challenging an award or its enforcement. 46 As such, some information in arbitration may ultimately become public in a court related proceeding; however, information exchanged in mediation will be protected either by the agreement of the parties or the rules of the mediation.

• Enforceability or binding nature of agreements

The parameters and enforceability of an agreement made pursuant to ADR is subject to agreement of the parties 47 except arbitration may be entered into with a pre-arbitration

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39 AAA Healthcare Payor Provider Arbitration Rules, Rule 22 (2014) available at https://www.adr.org/cs/ideplg%3FdcService%3DGET_FILE%26DocName%3DADRSTG_004106%26RevisionSelectionMethod%3DLatestReleased&rct=j&frm=1&q=&esrc=s&sa=U&ei=cewJVf6nLYzhsATHmlHgDQ&ved=0CBQQFjAA&usg=AFQjCNEOimMQBmL0QvDXmq7WvTwl652BXA.
40 Id., Rule 23.
43 See, Washington Courts, Mandatory Mediation, Rule SPR 94.08.3m (Confidentiality); Rules of the Supreme Court of the State of New Hampshire, Rule 12-A. Mediation, § 11 (2015).
44 See, Office of the Circuit Executive, United States Court of Appeals for the District of Columbia Circuit, Civil Rule 84.9 (a) Confidentiality.
45 See, e.g., JAMS International Mediation Rules (Privacy) (Mediation sessions are private.”).
46 See, e.g., JAMS Arbitration Rules, Rule 26 (Confidentiality)(Confidentiality shall be maintained “except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement …”).
contractual obligation that the award is binding. \(^{48}\) Arbitration can, of course, be non-binding in other circumstances. \(^{49}\) In ADR, the nature of the “judgment” is flexible and can be designed to meet the needs of the parties. \(^{50}\)

## IV. ABA POLICY

In recent years, the ABA House of Delegates has adopted a number of policies regarding the use of ADR to resolve health care conflicts and disputes and others of general application to the area. ABA policies include the following:

### Resolution 101, Adopted by the ABA House of Delegates in August 1998

This resolution adopted the “black letter” of the Model Rules for Mediation and Client-Lawyer Disputes which recommends that jurisdictions establish a mediation program by providing a model for such programs.

* * *

### Resolution 103, Adopted by the House of Delegates in August 1998

This Resolution adopted a new ADR-related policy calling for giving patients enhanced rights vis-a-vis managed health plans. The Resolution supports the right of all consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and institutions that serve such plans and providers.

* * *

### Resolution 114, Adopted by the House of Delegates in February 1999

This Resolution reiterated and expanded Resolution 103 and called for federal, state, and territorial legislation establishing ADR as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

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### Resolutions 106, Adopted by the House of Delegates in February 1999

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\(^{49}\) See, e.g., American Arbitration Association, Non-Binding Arbitration Services and Rules, available at https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration/nonbindingarbitration;jsessionid=2f8VhfST74vzhTGr6nvpRcKZLQ8ny5xjWSp2rTJq!-817772710?_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop=1607098693232181%26_afrWindowMode=0%26_afrLoop%3Dnull%26_afrWindowId=null%26_afrLoop%3D1607098693232181%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dywugrc6jk_4.

Resolution 106 supported the enactment of federal legislation to allow patients to bring state court actions against managed health care plans. In that Resolution, the ABA supported and encouraged the use of ADR mechanisms prior to the filing of such causes of action.

* * *

Resolution 111, Adopted by the House of Delegates in February 2009

Resolution 111 opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients.

The Resolutions and related Reports are available at:

[Insert links]

V. CONCLUSION

This Resolution is intended to call attention to the use of a broad array of dispute resolution processes in the resolution of health care disputes and to encourage its use and further use by lawyers and other interested parties as a means of resolving the expanding number of health care disputes all across the industry in an effective, efficient, and low cost basis.

Respectfully submitted,

Howard Herman, Chair
Section of Dispute Resolution
GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Dispute Resolution

Co-sponsoring Entity:

Submitted By: Howard Herman, Chair, ABA Section of Dispute Resolution

Summary of Resolution

During the past few decades, the legal profession has embraced an increasingly wide array of dispute resolution processes to address their clients’ problems. With the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever-increasing use of technology in the provision of health care, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasingly interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. The Report acknowledges the appropriateness of litigation but emphasizes that ADR can be useful tool in resolving health care disputes.

Approval by Submitting Entities

The Section of Dispute Resolution approved this Resolution at a meeting of the Section Council on August X, 2015.

Has this or a similar resolution been submitted to the House or Board previously? No.

What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

Resolution 101, Adopted by the ABA House of Delegates in August 1998

This resolution adopted the “black letter” of the Model Rules for Mediation and Client-Lawyer Disputes which recommends that jurisdictions establish a mediation program by providing a model for such programs.

* * *

Resolution 103, Adopted by the House of Delegates in August 1998

This Resolution adopted a new ADR-related policy calling for giving patients enhanced rights vis-a-vis managed health plans. The Resolution supports the right of all consumers to a fair and efficient process for resolving differences with managed health
care plans, health care providers, and institutions that serve such plans and providers.

* * *

Resolution 114, Adopted by the House of Delegates in February 1999

This resolution reiterated and expanded Resolution 103 and called for federal, state, and territorial legislation establishing ADR as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

* * *

Resolutions 106, Adopted by the House of Delegates in February 1999

Resolution 106 supported the enactment of federal legislation to allow patients to bring state court actions against managed health care plans. In that resolution, the ABA supported and encouraged the use of ADR mechanism prior to the filing of such causes of action.

* * *

Resolution 111, Adopted by the House of Delegates in February 2009 (Boston, MA)

Resolution 111 opposed the use of mandatory, binding, pre-dispute arbitration agreements between nursing homes and patients.

What urgency exists which requires action at this meeting of the House?

This Resolution encourages the expanded use of the broad array of dispute resolution techniques to address the potential increase in disputes and conflicts arising from the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever-increasing use of technology in the provision of health care. In health care today, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing integration and interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. ADR can be among the useful tools to resolve all of these disputes.

Status of Legislation. (If applicable)

Not applicable.
Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Resolution will be distributed to the courts, practitioners, health care providers, and posted on the ABA website. In addition, further “educational opportunities” should be developed.

Cost to the Association. (Both direct and indirect costs). None.

Disclosure of Interest. (If applicable). Not Applicable.

Referrals.

The proposed Resolution and Report have been sent to …

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution encourages the expanded use of the broad array of dispute resolution techniques to address the potential increase of disputes and conflicts arising from the enactment of health care reform, increased federal regulation of diverse aspects of the nation’s medical care delivery system, and the ever-increasing use of technology in the provision of health care. In health care today, there are a multitude of health care disputes that span all aspects of the provision of health care. The structure of healthcare delivery across the nation is changing with increasing emphasis on successful outcomes and reducing costs. Providers are becoming increasingly integrated in a variety of arrangements of increasing interdependence as a means of accomplishing these goals. Such complex relationships to achieve competing goals may give rise to conflict when the maintenance of such relationships is vital to the delivery of care to patients. ADR can be among the useful tools to resolve all of these disputes.

2. Summary of the Issue that the Resolution Addressed

With health care reform and the changing structure of the delivery of health care, increased use of technology, and increasing federal and state regulation of healthcare, ADR can be a useful tool in addressing potential disputes and conflict arising from the present day, constant changes in healthcare.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The Resolution encourages the expanded use of the broad array of dispute resolution techniques as one means to promote the cost efficient, more timely resolution of a wide range of health care disputes across all health care settings.

4. Summary of Minority Views

This Resolution and Report have been revised in response to input received from several ABA entities. No minority views have come to our attention.