MEDIATION AS THE OYSTER OF MEANINGFUL OPPORTUNITY FOR MEDICAL SCHEMES IN SETTLING COMPLAINTS AND DISPUTES WITH THEIR MEMBERS

(Adapted from the Centre for Effective Dispute Resolution Mediator Handbook, London, United Kingdom)

PRESENTATION TO MEDICAL SCHEMES AT THE COUNCIL FOR MEDICAL SCHEMES MEDIATION WORKSHOP ON 20 MAY 2016

Vision without action is merely a dream.
Action without vision just passes the time.
Vision with action can change the world.

From The Power of Vision
By Joel Barker

What you plant now, you will harvest later

O G Mandino

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CMS.MediationPresentation.May2016A

A. Introduction

1. You all know that eating fatty junk foods might increase the risk of having a stroke. But how many of you here today have considered introducing mediation into the process of settling disputes with your members. Today I would like to spend some time showing you that mediation is, without mixing my idioms, the oyster of meaningful opportunity for medical schemes in settling complaints and disputes with their members.

B. Purpose of presentation

2. The purpose of this presentation is to:

2.1. sketch the current legislative dispute resolution landscape governing medical schemes and show what the legislation means for medical schemes who receive complaints from and have disputes with their members;

2.2. show that almost all medical schemes are not complying with their legal obligation in terms of section 29 (1) (j) of the Medical Schemes Act 131 of 1998 (the Act) to provide for the settlement of any complaint or dispute in the rules governing a medical scheme;

2.3. show that mediation is the most common form of a range of dispute resolution techniques that are broadly referred to as "alternative dispute resolution". Although this term is internationally accepted in the world of commerce and law the popularity and widespread use of these techniques, particularly mediation, render the term "alternative" to no longer be appropriate for what are now mainstream processes;

2.4. show that mediation is an important dispute resolution technique, which in the particular context of the health care industry offers both an exciting and unique opportunity to medical schemes to resolve complaints from and disputes with their members;

2.5. show what mediation is not; and

2.6. show that despite the overwhelming benefits of mediation, it is not always an appropriate technique to use to resolve complaints and disputes.

C. Current legislative dispute resolution landscape

The Constitution and health: socio-economic justice

Human dignity

3. Section 10 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that everyone has inherent dignity and the right to have their dignity respected and protected. This is an important right in the context of health care, particularly how we as a society treat the sick, frail and elderly.

Life

4. Section 11 provides that everyone has the right to life.

Health care

5. Section 27 (1) (a) provides that everyone has the right to have access to adequate health care services, including reproductive health care.

6. Section 27 (2) requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

7. Section 27 (3) provides that no one may be refused emergency medical treatment.

Access to courts

8. Section 34 gives to everyone the right to have any dispute decided in a fair public hearing before a court or independent tribunal or forum.

Medical Schemes Act 131 of 1998

9. The Medical Schemes Act 131 of 1998 ("the Act") is one of the legislative measures that the state has taken to achieve the progressive realisation of the right to access to adequate health care services.

10. The preamble to the Act states that the purposes of the Act are to, amongst other things, provide for the registration and control of certain activities of medical schemes and to protect the interests of members of medical schemes.

11. To this end, section 24 (1) of the Act empowers the Registrar of the Council for Medical Schemes (the Council) to register a medical scheme and to impose such terms and conditions as the Registrar may deem necessary.

12. Section 29 of the Act deals with the rules of medical schemes. Section 29 (1) (j), provides that the Registrar shall not register a medical scheme and no medical scheme shall carry on any business, unless a scheme provides in its rules for, amongst other things, the settlement of any complaint or dispute. So section 29 (1) (j) provides the tool in terms of the Act for schemes to establish complaint and dispute settlement procedures. It is disappointing that very few medical schemes have established complaint and dispute settlement procedures in their rules.

13. Chapter 10 of the Act deals with complaints and appeals. More specifically, section 47 provides for a written complaint concerning any matter provided for in the Act to be submitted to the Registrar. Section 48 gives to any person who is aggrieved by any decision concerning the settlement of a complaint or dispute the right to appeal against such decision to the Council. Section 49 empowers a person who is aggrieved by any decision of the Registrar to appeal against such decision to the Council. Section 50 of the Act establishes an Appeal Board which determines appeals against a decision of the Registrar and/ or the Council. The Council has established both an Appeals Committee and an Appeal Board to give effect to the resolution of complaints in terms of Chapter 10 of the Act.

14. Recently the CMS has with the consent of both the scheme and its member concerned introduced mediation into its dispute resolution system. About 60%

of such disputes are being settled. This shows that mediation works as a dispute resolution technique in disputes between a scheme and its member.

Consumer Protection Act 68 of 2008

15. It is the duty of medical scheme trustees as the custodians of the medical scheme to place members at the heart of all a scheme's functions. After all, members are a scheme's customers and therefore consumers of the scheme's services.

16. The Consumer Protection Act 68 of 2000 (the CPA) came into effect on 1 April 2011. Its purpose in terms of section 3 (1) is to promote and advance the social and economic welfare of consumers in South Africa. The CPA applies to every transaction involving the provision of goods and services in the ordinary course of business unless exempted. Section 54 provides that a consumer is entitled to the right to fair value and quality service.

17. Section 85 establishes the National Consumer Commission (the Commission), which has a wide range of enforcement and dispute resolution powers. The Commission may resolve disputes through mediation, issue consent and compliance orders, apply to the National Consumer Tribunal for a fine to be imposed and refer certain offences to the National Prosecuting Authority.

18. Section 71 allows other regulatory authorities, such as the Council, to initiate complaints with the Commission. Section 72 permits the Commission to refer complaints to other regulatory authorities. Section 97 provides for the Commission to participate in the investigations and proceedings conducted by other regulatory authorities.

19. There are a host of rights, such as the right to receive information in plain and understandable language (section 22), the right to the disclosure of the price of goods or services (section 23) and the right not to be subject to unfair, unreasonable or unjust contract terms (section 48). The three month termination period and the waiting period in respect of prescribed minimum benefits are just some of the possible examples which could become the

subject of a dispute under the CPA. It follows that the CPA could adversely affect the medical schemes industry.

Legislation to be read together

20. The Constitution, the Act and the CPA must be read together. This means that medical schemes must act in a manner that enhances the rights of persons set out in these three pieces of legislation. This need not be at the expense of medical schemes. Rather, it will enhance the schemes themselves, grow their reputations, guard against the risk of member dissatisfaction and ultimately grow their businesses.

D. Comparisons between negotiation, litigation and mediation

21. It is useful to compare negotiation, litigation and mediation.

Negotiation

22. Negotiation is often the best, most economical and satisfactory way of resolving a dispute. Negotiation is an everyday activity for human beings, much of it is not recognised as negotiation at the time, and most of it is effective. For example, a scheme may reject a claim because the incorrect ICD codes have been used. The member may then request his or her medical service provider to correct the codes to the scheme's satisfaction and the scheme then settles the claim.

23. However, negotiations fail for a range of reasons, including distrust between the parties or advisors, poor negotiating skills, lack of realism, heightened emotion and other blocks to communication. For example, since medical schemes are bound by their rules, which are often not read or understood by the members, the member may have an unrealistic expectation of the scheme's duty to refund the member's claim. The mediator has an important role, detailed elsewhere in this presentation, in helping parties to overcome these and other barriers to effective negotiation.

Litigation

24. Litigation is the most recognised form of formal dispute resolution throughout the world. It is publicly financed and administered, carried out in a public forum, is involuntary and bound by detailed rules about process, evidence and argument. The decision is binding and is usually subject to appeal. The decision is based on law and precedent, the outcome is not necessarily easy to predict and may be perceived as unfair.

25. Although attempts continue to be made in South Africa and around the world to speed up the litigation process and reduce the costs, litigation continues to be an expensive and time-consuming way to resolve disputes. In many instances the value of a dispute is exceeded by the cost of resolution and the time taken to obtain a decision can often take years.

Mediation

26. Mediation has established itself as the core alternative dispute resolution process. Mediation has been generally defined as:

> *A flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution*.

27. The need for an alternative to litigation is broadly accepted in society. Mediation is used in South Africa mediation to resolve disputes in at least the following industries:

27.1. retirement funding disputes;
27.2. rental housing disputes;
27.3. consumer disputes;
27.4. employment disputes (it is generally recognised that the CCMA is the largest dispute resolution body of its kind in the world);
27.5. community scheme (sectional title, share block, retirement housing and housing cooperative scheme) disputes;

27.6. land restitution disputes; and

27.7. environmental disputes.

28. South African also has a range of ombud services in industries such as short-term insurance, motor industry, banking services, financial advisory and intermediary services as well as in local government (more specifically in the cities of Johannesburg and Cape Town), all of which use alternatives to litigation to resolve disputes. The Department of Justice's court annexed mediation pilot project is another important indicator of the role that mediation is playing in the resolution of disputes.

29. It can therefore be said that alternate dispute resolution has become a mainstream process and it is therefore not surprising that the term "alternate" in alternate dispute resolution is no longer seen to be appropriate. In short, mediation is inextricably moving to the heart of dispute resolution offerings both locally and internationally.

30. Following the advice of JF Kennedy, a former President of the United States, who once said:

> *Change is the law of life and those who look only to the past or present are certain to miss the future*

I now turn to consider mediation's unique offering to both medical schemes and their members.

E. Mediation's unique offering to both medical schemes and their members

31. We have seen that the Constitution provides for the right to life and the right to have access to adequate health care and that medical schemes are required by the CPA to place members at the heart of a scheme's functions.

32. Medical schemes stand accused of hiding behind their rules in order not to pay members' claims. While it is appropriate to judge each accusation on the particular facts and circumstances of each claim, it is important that medical

schemes are acutely aware of the unique environment which they operate. Members are faced with illness, which can be physically and mentally debilitating and in some instances fatal. It is therefore a highly emotionally charged environment in which families will go to extraordinary lengths to ensure that their loved ones receive the best possible medical treatment.

33. All of us here today know that medical schemes are not always bound in terms of their rules to fund a member's claim. However, there are many instances where medical schemes could in both their manner and reasoning have better communicated to the member their refusal to fund a member's claim. Sometimes simply stating the reasons for a refusal to fund a claim can be interpreted as a lack of empathy, which means that the communication may need to be framed differently. In other instances, members may need to be given more information to justify medical schemes refusal to fund the claim. So it is not just about funding rules.

34. It is into this emotionally charged space that a mediator, as a neutral person, is able to step into and facilitate a meaningful conversation between the medical scheme and a member aimed at resolving their dispute or difference.

F. More about mediation

Why mediation works

35. The focus of litigation is on the past, whereas mediation addresses the future. Mediation enables the parties to resume or sometimes to begin negotiations. The very presence of the mediator changes the dynamics of the negotiating process. The mediator should bring negotiating, problem-solving and communication skills and deploy them from a position of independence and neutrality to make progress possible where direct negotiations have stalled.

36. The mediator, as a neutral person, is potentially in a better position than any party or representative to:

36.1. win the trust of all parties;
36.2. facilitate communication;

36.3. focus the parties on the problem;
36.4. overcome emotional blockages;
36.5. help one party to understand the other party's case;
36.6. probe each party's case for interests, needs, strengths and weaknesses;
36.7. help parties assess their own case realistically;
36.8. suggest new avenues to explore;
36.9. overcome deadlock and help save face;
36.10. explore settlement proposals in depth;
36.11. assess realistically the chances of settlement; and
36.12. win approval for settlement proposals.

37. The mediator therefore adds a valuable dimension to a negotiation, having no personal stake in the dispute, by bringing neutrality to detailed negotiation discussions and adding a fresh and independent mind to the dispute.

38. Besides being quick and cost effective, one great advantage of mediation is that it looks forward, encouraging the parties to turn from the history and look to the future. Not all disputes are resolved by defining or creating a future relationship, but the prospect of a future without the dispute can itself be a powerful reason for settlement.

39. In contrast to litigation, arbitration or other adjudicative hearings, mediation provides an opportunity for parties to control the outcome of their dispute, even when direct negotiations have failed. Benefits of mediation include:

39.1. providing a platform for each party to say what it feels;
39.2. restoring communication;
39.3. offering a guaranteed 'day in court' before the Councils Appeals Committee or even Appeal Board;
39.4. giving the parties control of their own dispute; and
39.5. a final and certain outcome.

An overview of mediation: the mediation process

40. The following framework (which may be conducted in the presence of the parties, telephonically, by teleconference, through Skype or online and can be

adapted to suit the form being used) provides a safe foundation on which to build:

40.1. ***Initial joint meeting at which:***

40.1.1. the mediator clarifies the process and emphasises the ground rules;
40.1.2. trust can be developed between parties and the mediator;
40.1.3. the parties present opening statements to each other;
40.1.4. issues might be clarified; and
40.1.5. a joint exercise might be undertaken to establish what needs to be tackled in order to achieve a resolution.

40.2. ***Private, confidential meetings between the mediator and each party separately to:***

40.2.1. examine the important issues and needs of each party;
40.2.2. encourage openness about weaknesses as well as strengths;
40.2.3. manage expectations;
40.2.4. work with the full team; and
40.2.5. discuss options for settlement.

Some of the above aspects might have been discussed in private meetings that precede the initial joint meeting.

40.3. ***Further joint meetings, as appropriate, at which parties might:***

40.3.1. discuss differences, particularly in understanding of fact, or expert opinion or likely legal outcome;
40.3.2. provide fuller explanations or information;
40.3.3. set an agenda and agree next steps;
40.3.4. generate ideas and options;
40.3.5. negotiate directly; and
40.3.6. set the settlement down in writing or agree further action.

The mediator's role

41. During the mediation process, the mediator fulfils several important roles that might include:

41.1. a manager of the process, providing firm but sensitive control, conveying confidence in the process, and giving a sense of purpose and progress;
41.2. a facilitator, helping the parties to overcome deadlock and to find a way of working co-operatively towards a mutually acceptable settlement;
41.3. an information gatherer, organising data, and identifying common ground, shared goals and zones of agreement;
41.4. a 'sponge' that absorbs the parties' feelings and frustrations, helping them to channel their energies into positive approaches;
41.5. an enabler, helping the parties re-evaluate their case by providing new perspectives;
41.6. a coach both before and during the mediation;
41.7. a reality tester, helping parties privately to take a realistic view of the dispute, rather than hide behind public posturing;
41.8. a problem solver, or rather a catalyst for problem solving, bringing a clear head and creative mind to help the parties construct an outcome that best meets their needs, when contrasted with the alternatives of non-agreement or an imposed decision by the Council, Appeals Committee, Appeal Board or High Court;
41.9. a negotiator, helping the parties to use effective strategies for making progress towards agreement; and
41.10. an overseer of the drafting of the settlement agreement, checking that all issues are covered and that the settlement is workable;

42. In order to fulfil these roles the mediator must gain the trust and confidence of the parties, and form a relationship that will encourage the parties to disclose information, safe in the knowledge that their trust will not be abused. Parties need to feel able to discuss potential weaknesses, as well as their strengths, so as to move away from positions and build a viable resolution and a sustainable agreement.

The essence of mediation and why it is successful

43. The essence of mediation and the reason for its success is that it introduces a powerful structure and dynamic into any negotiation or dispute discussion. The mediator acts as a catalyst, being an independent neutral person who is committed to helping the parties to settle, but who does not have a stake in the dispute or the outcome.

44. This changed dynamic:

44.1. gets the right people and the right information to the table;
44.2. identifies and focuses on the real issues and needs of the parties;
44.3. facilitates communication and separates the people from the problem;
44.4. helps overcome deadlock and emotional blockages;
44.5. restores the negotiation process;
44.6. helps parties reassess their case;
44.7. widens the options for resolution;
44.8. rebuilds or safeguards relationships; and
44.9. leaves ownership of the problem and the settlement with the parties.

The space that mediation creates

45. It is useful to consider the characteristics and qualities of the ‘space’ in which mediation takes place. The mediator has a role in creating that space for the parties.

46. Mediation is a place where the parties can take time out from the threat of adjudication by the Council and its adjudicative arms. It provides a fresh starting point, which allows the parties to agree, implicitly or explicitly, to behave differently for a while. It is a safe haven and can provide calm. It requires the skill and commitment of the mediator to give tone and substance to this space.

The mediator's style and approach

Facilitative or evaluative

47. Over the last decade there has been much debate about two main approaches to mediation: facilitative and evaluative. These terms have come to describe two styles, one perceived to be less interventionist than the other. In current practice, such a distinction is simplistic and ignores the breadth of the mediator's role and the range of techniques available to the mediator. Facilitative and evaluative styles are best regarded as describing the two ends of a spectrum of intervention styles, rather than as defining totally separate models.

The mediator is neutral

48. The mediator is neutral and must build and maintain the trust of the parties. This means that the mediator must avoid being judgmental, jumping in too quickly and giving advice.

The process is flexible

49. The mediation process is flexible and individual mediators develop their own style.

The parties decide the outcome

50. It is central to the philosophy of mediation that the mediator does not impose a decision on the parties. It is important that the mediator re-emphasises his or her role when setting the ground rules in the first (joint) session to avoid any misunderstandings about the role and function of the mediator. Moreover, the parties must look to their own advisors for legal or other advice. Mediators need to exercise special care about their role when dealing with unrepresented parties.

The mediator has an active and a proactive role

51. Facilitating a re-evaluation of all the issues that seem to block a workable settlement is an active and strenuous process, requires alertness and concentration from the mediator. A mediator must bring to the process advanced interpersonal and communication skills, as well as process management and problem solving skills, and a willingness to enable rather than dictate. The mediator has to be patient and robust.

52. A robust approach will undoubtedly be needed when:

52.1. handling multiple issues;
52.2. offering reality testing;
52.3. overcoming emotional deadlock;
52.4. reassessing the alternatives to reaching an agreement; and
52.5. re-examining options for co-operative solutions.

G. Mediation is not...

53. Mediation is subject to a number of misconceptions. It may be helpful to examine some of these misunderstandings.

54. **Mediation is not a bar to litigation or adjudication** because parties do not lose their right to have their dispute adjudicated by the Council's Appeals Committee.

55. **Mediation is not toothless** because it is the parties' freedom to take an opportunity to settle their dispute that creates the greatest momentum.

56. **Mediation is not mere compromise** because most settlements in mediation are not the result of splitting the difference down the middle. In fact, the mediator can assist the parties to develop creative options for settlement, based upon the interests and needs of the parties and agreed objective criteria, which are not available through litigation or adjudication.

57. **Mediation is not a waste of time and money if it fails** because mediation almost always tempers aspirations with realism and concentrates the parties' minds on the risks of not settling. Even when settlement is not reached, the parties often find that the process has been beneficial.

58. **Mediation is not a sign of weakness** because it is an intellectual and professional challenge in which the risks are low and the potential for a successful outcome is high.

59. **Mediation does not prevent parties having their day in court – in a way it guarantees it** because it provides the parties with an opportunity to present their case to each other and to highlight aspects of particular significance for them before a neutral third party. This is often a powerful precursor to settlement. Conversely, should the parties not reach a settlement at mediation then adjudication almost always follows.

60. **Mediation need not be risky or involve showing one's hand** because the extent of information divulged is within the parties' control.

H. Mediation is not always the appropriate technique

61. Some differences and disputes may not be suitable for mediation. They include the following instances:

61.1. a party wants to establish a binding precedent;
61.2. a party needs to deter future claims by establishing a no settlement reputation;
61.3. one or more parties refuses to participate in good faith in the process;
61.4. one or more persons essential to a resolution cannot be bought into the process;
61.5. a party seeks validation or vindication by a person in authority who declares that the party was blameless and the other party wholly to blame;
61.6. the parties are embroiled in a value-based conflict on which they see no room for compromise;
61.7. a party seeks retribution;

61.8. a weaker party needs the power of a court or other adjudicative body or of law to balance an imbalance of power or resources;
61.9. when only a court can offer a remedy to the dispute;
61.10. the dispute is subject to an appeal; or
61.11. the dispute is a compliance issue in which compliance must be enforced by a regulator or other enforcement agency.

See Paula Young (Associate Professor at the Appalachian School of Law, Virginia, USA) in an article entitled *The "What" of Mediation: When Is Mediation the Right Process Choice?*

I. Conclusion

62. Authors have identified a range of attributes of a dispute with the parties that will make mediation more successful. They include:

62.1. a positive state of mind;
62.2. good faith;
62.3. adequate settlement authority;
62.4. flexibility;
62.5. patience;
62.6. realistic expectations;
62.7. preparation;
62.8. a willingness to listen;
62.9. an effective negotiation strategy;
62.10. creativity; and
62.11. honesty.

63. Paula Young reminds us that:

> *As mediators, lawyers and their clients gain more experience of mediation, fewer and fewer types of disputes will seem less amenable to the process. Even if mediation only succeeds in improving the parties' communication, in identifying the underlying interest, in narrowing the issues and conflict, or in helping them more carefully*

evaluate their litigation option, it can move the dispute towards a quicker, more cost-effective resolution".

64. It has been a pleasure to be with you today. I hope that the ideas I have shared with you will have been of some help in promoting your work in which I - like you - believe so firmly. I strongly encourage those medical schemes that have not yet done so to provide in their rules a procedure that governs the settlement of any complaint or dispute. The procedure should include mediation. I wish all of you great success.

Trevor Bailey