

# Mediation as Toll to Settle Medical Disputes; Indonesian Case

Gunawan Widjaja<sup>1</sup>

<sup>1</sup>Faculty of Law, Universitas Tarumanagara, Jakarta, Indonesia

Corresponding author. Email: [widjaja\\_gunawan@yahoo.com](mailto:widjaja_gunawan@yahoo.com)

## ABSTRACT

Health care, including medical services is very complex in practice. It involves many kinds of aspects, such as ethic, discipline and legal issues, but it only has one objective. It aims for human health. It focuses on patient safety. Patient is the only concerned in health care. It is said that any intervention made in health care must be patient-oriented. However it cannot be denied that many disputes were arisen over the result of medical services. This research explores the possibility of using mediation as a tool for settling medical disputes in Indonesia. This research is a normative legal research. It conducts literatures review on the prevailing laws and regulations on health care and medical services in Indonesia. This research used secondary data which consist of applicable laws and regulations. Data were analysed using qualitative approach with the purpose to identify and understand the kinds of medical disputes, and the probable methods and ways of settlement that can be used. Data and analysis proved that mediation was the best method and way to settle medical disputes in Indonesia. Not because it was stipulated in the laws and regulations, but it is indeed suitable to Indonesian local culture. Researcher strongly encourages the using of mediation to settle medical disputes in Indonesia.

**Keywords:** mediation, medical disputes, alternative disputes resolution

## I. INTRODUCTION

World Health Organization (WHO), in its 2016 publication, has introduced the term of “integrated care” in view of healthcare policy. In the publication, WHO mentioned three principal definitions in relation to the “integrated care”. The first referred to the process-based, the second was taken from user-led views, and the third was the health-system based. By referring to integrated care, all healthcare stakeholders, including policy makers, regulators, evaluators, providers, givers, managers, users and community, are required to be proactive and cooperate in team, not only to cure but also to prevent people from suffering from illness [1].

Before, in 2009, American Medical Group Association (AMGA) has discussed health reform principles. One of them is the principle that healthcare delivery system must be transformed into an organized system of care and not a non-system fragmented healthcare delivery. AMGA supported the development of patient-centered care Model. The Model includes health promotion and prevention, from proactive monitoring of health status, early detection to curation and rehabilitation such as intervention, coordination and collaboration among healthcare givers and providers, supported by advanced technologies. All these efforts will reduce duplications, improve saving lives and money [2]. To support the Model, WHO in 2009 has issued WHO Patient Safety Curriculum Guide for Medical Schools [3].

Even though many efforts have been taken during medication processes to minimize the risks of errors or failure that may cause harm or even death to the patients, it cannot be denied

that there were still many factors that cannot be avoided [4] [5] [6]. Patients and/or his/her families who cannot accept the injured or death conditions of the patients will seek justice in forms of remedies. Legal lawsuits were taken by lawyers representing the injured patients and/or distress families. On the other side, the healthcare givers and providers will argue that there were many adverse-events that has not or cannot be identified or determined in advance. All of these matters will deplete much energy, waste of time and money without really getting satisfactory decisions.

This research tries to discuss the possibility to use mediation as an alternative tools to settle healthcare or medical disputes in Indonesia.

## II. METHOD AND MATERIALS

This research is a normative legal research. Data used in this research are secondary data. Data were obtained through literature review using “google search” machine using the main key words “medical disputes”, “mediation” and “medical mediation” in English and “*mediasi*” “*penyelesaian sengketa alternatif*” and “*undang-undang bidang kesehatan*” in Indonesian language. Data consisted of primary legal sources and secondary legal sources.

Data were analyzed using qualitative method with descriptive analytical approach. The descriptive approach was conducted in order to seek general knowledge on the application of medical mediation as tools for settling medical disputes in other countries. Meanwhile analysis discussed as whether, prevailing Indonesian healthcare and medical services laws and

legislations, and culture, do support the implementation of using mediation to settle medical disputes in Indonesia.

### III. RESULTS AND DISCUSSIONS

#### A. Healthcare Disputes Mediation in Several Countries

Healthcare is indeed very complex issues. In healthcare industry, there will never be an equal information. Healthcare givers and providers will have more information than the patients [7]. Therefore, to equalize the information, so that the patients can make decision before an intervention is made, an informed consent is required [8] [9]. Communication between the healthcare givers with the patients will become the bridge to bring about all the required information from the healthcare givers to the patients [10] [11].

Besides the asymmetric information, there were many other aspects in human life that neither healthcare givers nor healthcare scholars know. It was known as medical adverse event or adverse drugs reactions with respect to the utilization of certain medicine. Both refer to the unknown events or reactions that can be suffered by patients after the patients were given certain kinds of interventions or medications [12] [13] [14] [15].

Any kind of injury, loss or dead incurred or happened during the delivery of healthcare services can definitely rises issues to medical disputes. Many researches proved that conducting lawsuits in court of law would not be good for everybody. The huge amount of economic costs of litigation [16] and the social cost of litigation [17] were the most common example. In medical litigation, the social costs could be in the forms of loss of trusts, confident and respect to medical profession, as well as the exposure of confidential (secret) information contained in patients' medical records to public.

In 2011 Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs of European Parliament issued a result of a research entitled Quantifying the cost of not using Mediation – a data analysis. The report concluded that even in a very low rate of mediation, mediation can save time and reduce cost of litigation that must be borne by the disputing parties. Furthermore, the report suggested that there will be a simple regulation to make mediation mandatory [18].

Based on a report made in year 2013, in the United States of America, cost of litigation was estimated around 2.4% of total national healthcare expenditure. From those amounts only around 30% to 45% of the money involved in the claim went back to the claimant. In view that most of the medical disputes came from lack of communication as a result of asymmetric information, mediation was found to be the best solution for the disputant to resolve their problems [19].

Amirthakingham in 2017 argued that the use of mediation to settle medical disputes rose the issue of patient autonomy, which at the end will contribute to the improvement of patient safety [20]. Mediation will enhance communication between patient and the healthcare givers and/ or providers that will increase transparency in solving the disputes between them. Lin (et.al.) in their research in Singapore tertiary-care hospital, also concluded that clinicians would prefer mediation as the mostly-like dispute resolution, where they can achieve better result as compared to litigation [21]. Lee and Lai mentioned in their research that most of medical disputes litigation were most

likely related to miscommunication. They quoted that in the National Health Service Litigation Authority (NHS LA) of UK has been asking their representative lawyers to consider and offer mediation since 2000 [22]. In Hongkong itself, Judiciary's Practice Direction requires parties in disputes to participate in meaningful pre-trial mediations to settle their disputes outside the courtroom.

Monk, Sinclair and Nelson noted that mediation is the best way to recreate understanding and trust between the patient and healthcare givers on many adverse event or adverse drug reaction [23]. DeAngelo stressed that in many circumstances, where disputes were related to right-to-die, do not resuscitate, living wills, mediation was the best options chosen by the patients and/ or their next to kin [24]. Regis and Poitras highlighted that during mediation, there will always a room for apologies, which may be one among several claims imposed by patients to the healthcare givers and/ or providers [25].

#### B. Used of Mediation to Settle Medical Disputes in Indonesia

Based on the findings as described above, it cannot be argued that mediation may provide better solution to settle medical disputes. During mediation, communication can be made, in order for the disputing parties to seek best settlement. Confidentiality, trustworthiness and respect can be maintained. Research also showed that currently Indonesia had issued 5 laws in the fields of healthcare and medics. They are Law No.29 Year 2004 regarding Medical Practice (State Gazette 2004 No.116, Sup. No.4431) (Medical Practice Law), Law No.36 Year 2009 regarding Health (State Gazette 2009 No.144, Sup. No.5063) (Health Law), Law No.44 Year 2009 regarding Hospital (State Gazette 2009 No.153, Sup. No.5072) (Hospital Law), Law No.36 Year 2014 regarding Healthcare Givers (State Gazette 2014 No.298, Sup. No.5607) (Healthcare Givers Law) and Law No.38 Year 2014 regarding Nursing (State Gazette 2014 No.307, Sup. No.5612) (Nursing Law).

From the five laws, there are actually three main basic laws, i.e. the Health Law that regulates health policy in Indonesia; Hospital Law that regulates the provision of healthcare in hospital setting; and Healthcare Givers Law that regulates the role and functions of healthcare givers including physician and dentist (regulated in Medical Practice Law), nurse (regulated in Nursing Law), pharmacists (regulated in Government Regulation No.51 Year 2009 regarding Pharmaceutical Works), and others (regulated by Ministry of Health Regulations).

From those three laws, only two in particular mentioned about using mediation to settle medical disputes. Article 60 point f of Hospital Law relates to the settlement of disputes through mediation by Provincial Hospital Supervisory Body (*Badan Pengawas Rumah Sakit Provinsi*). In Article 29 of Health Law, all medical disputes in relation to the negligence of healthcare givers shall be first settled using mediation. Meanwhile Article 78 of Healthcare Givers Law provides almost the same provision as stipulated in Article 29 of Health Law. Healthcare Givers Law broaden the types of out of court settlements, not only by mediation, but including all kinds of alternative disputes resolution mechanism. This provision refers to the applicability of Law No.30 Year 1999 regarding Arbitration and Alternative Disputes Resolution (State Gazette 1999 No.138, Sup. No.3872) (the Arbitration and ADR Law); or in the event that a medical suit has been submitted to court of law, Supreme Court Regulation No.1 Year 2016 regarding Mediation Procedure in Court of Law shall apply.

The above discussion proved that mediation can or shall be used to settle medical disputes. With respect to the process stipulated in Arbitration and ADR Law, National Medical Disputes Settlement Centre (*Pusat Penyelesaian Sengketa Medis Nasional*) (PPSMN) was established in early 2019. PPSMN is an independent body established in accordance with the prevailing laws and legislations in Indonesia to settle medical disputes as instructed by the Health Law and Healthcare Givers Law, by, among others, using mediation as a tool to achieve mutual benefit settlement for the patients as well as the healthcare givers. PPSMN also provides assistance to settle medical disputes that related to or involved hospital settings [26].

Besides the legality of mediation as a tool to settle medical disputes, mediation can actually be found in Indonesian way to settle disputes through amicable settlement (*musyawarah untuk mufakat*). This means that mediation is not something new for Indonesian people. To enhance mediation, all we need is to foster the spirit and culture of *musyawarah untuk mufakat* through good mediators.

#### IV. CONCLUSION

Mediation is suitable to be used as the best method, way and tool to settle medical disputes in Indonesia. Besides it was instructed by the laws, legislations and other regulations, mediation found its ground in Indonesian local culture. Researcher strongly encourages to use mediation as a mean to settle medical disputes in Indonesia.

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