

UTILIZATION OF MEDIATION IN MEDICAL DISPUTE SETTLEMENT DURING COVID 19 PANDEMIC

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Abstract

Health services provided by doctors to patients during the COVID-19 pandemic can lead to medical disputes, such as the case of a patient who feels he has been infected with the virus even though the results of the PCR swab are negative, as well as the refusal of patients who are about to give birth because they have not had a PCR swab. Mediation can be used as an alternative to medical dispute resolution outside the court by involving the mediator in order to achieve a final result that is acceptable to the parties. This study uses a normative juridical approach and secondary data sources as the main data through primary, secondary, and tertiary legal materials and will be analyzed qualitatively. The obligation to carry out mediation in medical disputes is considered a faster and relatively inexpensive dispute resolution process and fulfills a sense of justice as regulated in Article 29 of Law No. 36 of 2009 concerning Health in accordance with Article 130 HIR and Article 154 Rbg that cases that do not take the Mediation procedure are a violation. To the provisions of HIR and Rbg. Similarly, PERMA No. 1/2016 concerning Mediation Procedures in Court as a substitute for PERMA No. 1/2008.

Keywords: Covid 19; Mediation; Utilization; Dispute Resolution

1. Introduction

Concerning the outbreak of the coronavirus with the type of virus SARS-Cov-2 or known as Covid 19. Whose appearance was first detected in Wuhan, China, and has now spread widely to all parts of the world, causing the public's need for health services to increase¹. People need health services that are fast, precise, and accurate to prevent and treat their illnesses. But in reality, many people complain about the health services provided during this pandemic, such as people only receiving question and answer checks about their health conditions without carrying out comprehensive examinations such as swab tests (throat mucus), body temperature checks, and so on, likewise, with the unavailability of a particular waiting room for patients suffering from COVID-19 symptoms, inadequate isolation rooms and even health workers who do not understand how to operate several medical devices.² These problems can certainly lead to conflicts and disputes because patients feel disadvantaged by seeing the final result. At the same time, doctors and medical personnel are guided by operational standards and procedures (SOP), processes, and service ethics. Therefore, medical disputes must be resolved immediately to narrow down the

¹ Diah Handayani, Dwi Rendra Hadi, Fathiyah Isbaniah, Erlina Burhan, "Penyakit Virus Corona 2019."

² Foundation, "Laporan Temuan (Sementara) Call Center Warga Sadar Corona."

problem and maintain the continuity of the relationship between doctors and patients during this COVID-19 pandemic.

There are two ways to resolve disputes: through court/litigation and out-of-court/non-litigation.³ Proceedings in court require a lot of time and money, are very formal and technical, and are not in favor of the public interest; besides that, naturally, there will be a winner and a loser.

Indonesian people have long known the terms deliberation and consensus to resolve a dispute by involving community leaders or customary heads to produce a problem resolution acceptable to all parties. The dispute resolution process, in its development, is known as mediation. Efforts to resolve disputes using mediation⁴ will usually achieve peace because the parties can put forward proposals according to their interests. Even if mediation is not successful or an agreement has not been reached, it can clarify the problem and narrow the dispute because the parties can convey what they feel and want.

Dispute resolution by mediation is expected to be the best choice to resolve medical disputes in positive law in Indonesia.⁵ Elucidation of Article 29 UU No 36 Tahun 2009 about Kesehatan states that mediation is carried out if a dispute arises between health workers and patients as recipients of health services. Settlement of disputes through mediation is carried out outside the court involving a mediator and agreed by the parties. The parties litigating in the court of the first instance must go through the peace process through the mediation process as stipulated in Article 130 of the Indonesian Regulation (HIR) and Staatsblad 1941 No. 44 and Article 154 of the Regulation of the Procedural Law for Regions Outside Java and Madura (RBg) Staatsblad 1927 No. 227.

Stipulation of Regulation of the Supreme Court of the Republic of Indonesia (Perma) No. 01 of 2008 concerning Mediation Procedures in Courts which was updated by Perma No. 1 of 2016 which in its preamble states that mediation is a peaceful dispute resolution process that is appropriate, effective and can open access more broadly to the parties to obtain a satisfactory and fair settlement.

In the framework of reforming the bureaucracy of the Supreme Court of the Republic of Indonesia, mediation is one of the supporting elements to increase public access to justice and implement the principles of simple, fast, and low-cost judicial administration. The advantages of

³ Mulyadi, "Alternatif Penyelesaian Sengketa Kelalaian Medik Yang Berkeadilan Di Indonesia."

⁴ Septiyo, Setiyono, and Samara, "Optimalisasi Penerapan Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Tindak Pidana."

⁵ Santoso, Isharyanto, and Sulistiyono, "Majelis Kehormatan Disiplin Kedokteran Indonesia (Mkdki) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien."

using mediation are: a) Flexible, voluntary, fast, cheap, as needed, neutral, confidential based on good relations; b) Improve communication between the disputing parties; c) Help release anger towards the other party; d) Increase awareness of the strengths and weaknesses of each party's position; e) Find out about hidden issues related to disputes that were previously unnoticed; and, f) Get creative ideas to resolve conflicts. While the disadvantages of proceeding on the litigation path when compared to mediation are: a) A protracted process to get a final and binding decision; b) Cause tension or hostility between the parties; c) Limited and general abilities and knowledge; d) It is open and cannot be kept secret; e) The interests of other parties are not accommodated; f) Weak administrative system and judicial bureaucracy; and, g) The judge's decision was deemed unfair because it only won one party.

Based on the above, dispute resolution by mediation has its advantages. Article 4 paragraph 1 of PerMa No. 01 of 2016 stipulates that all civil disputes submitted to the court of the first instance must first be resolved through reconciliation with the help of a mediator. Based on this background, the use of mediation in resolving medical disputes can be an option for the parties to end medical conflicts during the current COVID-19 pandemic.

2. Method

Research is an essential effort and not just observing an object that is easy to hold.⁶ The type of research used in this paper is normative juridical or doctrinal research because it examines the systematics of laws and regulations and examines the synchronization of laws and regulations. This study uses secondary data in the form of library research or documentary studies through primary legal materials as the principal legal material that can covers laws and regulations and all official documents containing legal provisions. Secondary legal materials are legal materials that provide explanations for primary legal materials such as books, articles, journals, relevant research results, and tertiary legal materials to find instructions and answers for primary and secondary legal materials, such as legal dictionaries and other language dictionaries. The last step is to collect the data that has been compiled so that it becomes a legal paper that can answer the questions that have been developed previously to help readers draw the correct conclusions.

⁶ Appludnopsanji and Purwanti, "Double Track Criminal System of Indonesia: Criminal Sanction and Chemical Castration Treatment Policy on Pedhophilia?"

3. Results and Discussion

3.1. Factors Causing Medical Dispute

A dispute in English vocabulary is referred to as "dispute." This dispute arises due to a conflict. Two or more parties are faced with different interests but cannot develop into an argument if the party who feels aggrieved only harbors feelings of dissatisfaction in their hearts. Conflict develops or becomes a dispute if the party who feels aggrieved has expressed displeasure directly to the party deemed detrimental or to another party. This means that the argument is a continuation of an unresolved conflict.

Disputes are disputes, conflicts, or disputes between the parties related to things considered valuable, either in the form of money or objects. The legal relationship between doctors and patients in health services is often colored by negligence in fulfilling patient rights, leading to conflicts and disputes. Explicitly according to Nader and Tood, there is a distinction between a. Pre-conflict, which is a situation that arises because a person is dissatisfied with being mistreated. b. Conflict, which is a condition in which the parties are aware or know that they have disagreements. c. Disputes, namely conflicts that are opened in public by involving third parties.⁷

Regarding medical disputes between doctors and patients, it begins with dissatisfaction from one party because the promised achievements are not fulfilled. There is a default from the other party, in this case, the doctor. Defaults made by doctors include: a) The doctor did not do what was agreed upon; b) The doctor is late or not on time for what was agreed; c) Doctors are not perfect at doing what has been agreed; and, d) Doctors do what, according to the agreement, should not be done.

Other things that can be the cause of medical disputes are hospital management policy factors, such as:⁸

- a. Lack of a conducive place and time for dialog or two-way communication between doctors/dentists/health workers and patients. This unfavorable spatial and temporal arrangement is very vulnerable to triggering miscommunication. Doctors/dentists / other health workers and patients are not free and have no privacy when expressing problems experienced, both symptoms, causes, treatment plans, risk factors, etc. At the same time, sufficient information (inadequate information) is needed in health services.

⁷ Sulistiono, *Eksistensi & Penyelesaian Sengketa HaKI (Hak Kekayaan Intelektual)*.

⁸ McTaggart et al., "Initial Hospital Management of Patients with Emergent Large Vessel Occlusion (ELVO): Report of the Standards and Guidelines Committee of the Society of NeuroInterventional Surgery."

- b. For any information that has been given to the patient, the hospital management must provide an informed consent form as proof of agreement that the patient has been given the data and a refusal sheet as evidence that the patient refuses or cannot accept the information that has been shown to him.
- c. No risk management continuously monitors and processes risks that will arise or have arisen. The trouble is not appropriately anticipated from the start, and then it becomes wider and wider so that medical dispute cases cannot be avoided.
- d. Management has not qualified the responsibility for health.

The juridical impact of medical disputes can occur in both criminal, civil, and administrative law. For example, in criminal law, there is fraud on patients because doctors give false information, violate decency, and deliberately ignore patients. Medical disputes from the aspect of civil law occur when parties feel aggrieved against health services, giving rise to civil lawsuits in the form of default or acts against the law.⁹ Based on administrative law, medical disputes occur when doctors practice without being equipped with a registration certificate (STR) issued by the Indonesian Health Council (article 29 paragraph 1 of Law No. 29 of 2004 concerning Medical Practice) or a Practice License (SIP) issued by the Head of the local Health Service. (Article 36 of Law No. 29 of 2004).

3.2 Medical Dispute Resolution Using Mediation

Although it can be done through court or litigation, medical dispute resolution will make the parties' positions opposite and hostile. Besides that court decision that is win-lose solutions tend to stretch the parties' relationship and can pose other risks, such as counterclaims for defamation and so on. The litigation process is also less profitable because there is a burden of proof, the length of the proceedings, court hearings are open to the public. At the same time, confidentiality is a priority.

Medical disputes are different from civil disputes in general because medical conflicts impact doctors as individuals, professional organizations, and institutions that protect them (hospitals). Suppose the medical dispute resolution process is carried out through a litigation process that is open to the public. In that case, it can undoubtedly provide an opportunity for

⁹ Prabandari, Busro, and Priyono, "Tinjauan Yuridis Wanprestasi Dalam Penyelesaian Sengketa Medik (Studi Kasus Putusan Mahkamah Agung Nomor 2863K/PDT/2011.)"

character assassination that is detrimental to the reputation of doctors/hospitals as health service providers, so it is necessary to look for alternative health dispute resolution outside the court.

Mediation is a non-litigation approach in dispute resolution recognized by positive Indonesian law, carried out through a familial process, prioritizing the principles of humanity and justice to maintain good relations to end existing disputes. Mediation deserves to be chosen because of its mutually beneficial nature (mutual winning). In addition, because the process is closed to maintain the confidentiality of the disputing parties, the deliberation process for joint decision-making can place an equal bargaining position between the patient and the doctor or hospital in dispute. The mutual agreement obtained in the mediation process will be stated in a peace memorandum or peace deed, which is final and binding.

The term mediation is etymologically derived from the Latin *mediare*, which means "to be in the middle." Being in the middle shows a role for a third party who is in charge of mediating and resolving disputes between the parties called the mediator. As the party in the middle, the mediator must be in a neutral and impartial position and must be able to maintain the interests of the disputing parties fairly and equally, thereby creating a trust (trust) for the disputing parties.¹⁰ However, the achievement of peace remains the responsibility and is in the hands of the parties themselves.¹¹

Takdir Rahmadi said that mediation is a process of resolving disputes between two or more parties through negotiation or consensus with the help of a neutral party who does not have the authority to decide. The mediator's authority in the mediation process only helps the parties resolve existing problems. In a dispute, if one party is more substantial and tends to show his power, the mediator plays an essential role in providing concrete directions to equalize it to reach an agreement.

The relationship in health services (doctors and hospitals) with patients is a relationship based on trust. Patients believe in the ability of doctors who will try their best to cure their illness. However, there is something that patients forget that health services are carried out based on medical science, which is not an exact science like mathematics where the results can be predicted at the beginning of the calculation. The built amount of trust often results in disappointment when hopes for recovery are not realized after receiving medical services. It is even possible for the disease to develop into severe or side effects from treatment or medical actions taken. For example,

¹⁰ Eddi Junaedi, "op.cit".

¹¹ Head, *Pengantar Umum Hukum Ekonomi*.

the patient becomes disabled or leads to death. This certainly impacts the disharmony of the doctor-patient relationship because the patient or his family considers that medical negligence has occurred. In fact, patients also tend to question the results of health services by ignoring the process, while the health law emphasizes that in providing health services, health workers are only responsible for the efforts made (*Inspanning Verbintennis*) and do not guarantee the final results (*Resultalte Verbintennis*).

To solve medical disputes it is necessary to find the cause first because it cannot be denied that the current medical profession is like a microscope because it is the center of attention and is widely criticized by the public and the mass media. This is relevant to Suryono's opinion, which states "advancements in technology and biotechnology in the medical field provide optimistic hope for improving Indonesia's quality of health services. With diagnostic technology, it can be detected as early as possible with maximum precision.¹² With technology, treatment results achieved can be optimal with minimal risk or negative impact. It concerns, sometimes for promotional purposes, that is not uncommon for health service providers (doctors or hospitals) to inform the advantages of technology used excessively without any information about the losses or impacts that may arise from its use. This disproportionate provision of knowledge often causes dissatisfaction or disappointment among patients and families, which leads to health disputes.

Dispute resolution through mediation is carried out by the disputing parties themselves accompanied by a mediator. The mediator fully submits the dispute resolution process to the parties regarding the form and amount of compensation or specific actions to ensure that losses do not recur. However, mediation is not a panacea to overcome the distortions of the litigation paradigm and is not always appropriate to apply to all disputes or is not always necessary to resolve all issues in a particular argument.¹³

Mediation used in dispute resolution will function correctly if:¹⁴ a) the parties have comparable bargaining power; b) the parties pay attention to the future relationship; c) Many issues allow trade-offs to occur; d) there is urgency or time limit to complete; e) the parties do not have long-lasting and deep enmity; f) if the parties have supporters or followers they do not have much hope but can be controlled; g) setting a precedent or defending a right is no more important than

¹² Suryono, *Penyelesaian Sengketa Dugaan Malpraktek Tenaga Kesehatan, Pertemuan IBI Yogyakarta*.

¹³ Eddi Junaedi, "Opcit."

¹⁴ Santoso, Isharyanto, and Sulistiyono, "Majelis Kehormatan Disiplin Kedokteran Indonesia (Mkdki) Untuk Dapat Menjamin Keadilan Dalam Hubungan Dokter Dan Pasien."

solving an urgent problem; and, h) if the parties are in litigation, the interests of other actors such as lawyers and guarantors will not be treated better than mediation.

The basic principles of dispute resolution using mediation are as follows:¹⁵ a) The existence of the Voluntary Principle of the Parties (Voluntary Principle), means that the parties voluntarily seek solutions to problems in the common interest without being forced and without threats or pressure; b) The principle of self-determination (Self-Determination Principle) means that the parties are free to determine their wishes and their own will. The mediator only acts as an intermediary to not force the parties to produce or agree to a peace agreement; c) The Confidentiality Principle means that mediation is confidential so that only the parties and the mediator know the process and the information; d) The principle of Good Faith (Good Faith Principle), namely, the parties must have the will to immediately resolve the problem and not take advantage for themselves but for the benefit of all parties (win-win solution); e) The Principle of Determining the Rules of the Game (Ground Rules Principle), meaning that the parties make an agreement and comply with the rules of the game so that the mediation process can run constructively to obtain the desired result with the help of a mediator; f) Principles/Procedures of Separate Meetings (Private Meetings Principle/Procedure), namely that the parties and the mediator may hold separate meetings with one of the parties if a deadlock arises in the negotiations due to emotional factors.

3.3. Utilization of Mediation as a Medical Dispute Resolution During the Covid 19 Pandemic

Compared to other alternative methods, mediation offers integrative dispute resolution because it is cheap and fast. During the current COVID-19 pandemic, health services cannot be separated from conflicts and medical disputes between doctors, patients, and hospitals requiring resolution. For example, the case of a medical dispute that occurred on 3 November 2020, at the Telogorejo Hospital Semarang over the health services provided to patients on behalf of Samuel Raven where the patient came to the hospital with complaints of stomach acid but felt he was Covid-19 because he was placed in an isolation room despite the results of the swab. The PCR is negative.¹⁶ Likewise, the case of refusal by the hospital for a mother who is about to give birth but

¹⁵ SYUKUR, "Mediasi Yudisial Di Indonesia; Peluang Dan Tantangan Dalam Memajukan Sistem Peradilan."

¹⁶ "Pelapor Kasus Dugaan Malapraktik RS Telogorejo Semarang Klarifikasi Ke Polisi Halaman All - Kompas."

has not yet done a PCR swab test because she has no money.¹⁷ These cases must be resolved immediately so as not to interfere with the performance of doctors and hospitals in providing health services to other communities. Therefore, according to the author, the settlement of medical disputes that arose during the COVID-19 pandemic should be resolved through mediation because it considers time, cost, and benefits.

Article 24 paragraph 2 of Perma No. 1 of 2016 stipulates the time limit for the mediation process to be 30 working days from the mediation date. Therefore, in the mediation process, the parties (in-person) must attend the Mediation meeting directly with or without being accompanied by a legal representative, unless there is a valid reason such as health conditions that do not allow attending the Mediation meeting based on a doctor's certificate; under custody; have a place of residence, residence or position abroad; or carrying out state duties, professional demands or work that cannot be abandoned. Good faith in the mediation process is required as regulated in Article 7 of Perma No. 1 of 2016. This is where the essential spirit and indication of the effectiveness of the Mediation process in resolving cases, especially during the covid 19 pandemics. The existence of good faith in the mediation process makes the mediation process carried out by the disputing parties run effectively and efficiently, so it does not require high costs.

In the mediation process, one of the parties or the Parties and/can be declared not in good faith by the mediator if: a) absent 2 (two) times in a row at the Mediation meeting without valid reasons; b) attended the first Mediation meeting but never attended the next meeting; c) without useful information does not repeatedly appear. It interferes with the schedule of the Mediation meeting; d) present at the Mediation meeting, but does not respond to the Case Resume of the other party; and, e) the draft Peace Agreement that had been agreed upon was not signed. The legal consequence of a plaintiff who has bad intentions is to have to pay mediation fees.

The benefits of resolving medical disputes during the COVID-19 pandemic through mediation and saving time and costs can also maintain the confidentiality of the parties to the conflict, thus enabling the parties, in this case, doctors, hospitals, to still provide health services to the public in general.¹⁸ The critical thing to note about mediation in medical disputes is the mediator. A mediator in a medical dispute does not have to be a doctor or a lawyer. The right mediator to handle medical disputes must know medicine and law because the mediator has one

¹⁷ Makassar and Cipto, "Dinkes Makassar Panggil RS Yang Tolak Ibu Hamil Bersalin Karena Tak Punya Biaya Swab Test Halaman All - Kompas."

¹⁸ Katsarava et al., "Poor Medical Care for People with Migraine in Europe – Evidence from the Eurolight Study."

of the functions as an educator or educator.¹⁹ In carrying out this function, the mediator must be able to digest and understand the wishes, aspirations, work procedures, the constraints of the parties, and the problems that occur.

Absolutely must be controlled by a mediator. In the end, the mediator is required to master all stages and the mediation process well. The ability to bring together the intentions and desires and interests of the parties and find common ground and formulate it precisely with concise and simple sentences as well as the application of strict principles of applicable law (including regarding contract law) and put it in the form of an agreement is essential. Therefore, increasing human resources for mediators needs to be carried out consistently, continuously, and continuously. Learning from the successful implementation of Mediation in Japan and Singapore, it is also necessary to look for patterns and patterns of dispute resolution that align with the values held by the Indonesian people.

4. Conclusion

Medical disputes that arise between the parties, namely patients, doctors, and hospitals during the current COVID-19 pandemic, must be resolved quickly and precisely so as not to burden the course of health services to the community. One way that is considered to be able to resolve medical disputes rapidly, accurately, and fulfill a sense of community justice is through mediation as regulated in Article No 29 of Law, accompanied by a skilled and careful mediator who has the legal and medical knowledge to obtain a dispute resolution that results in an agreement and fulfills the sense of justice of the parties to the dispute.

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