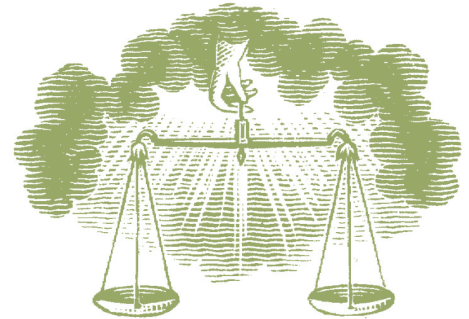


Keep It Out *of the* Courtroom



Arbitration as a method of settling malpractice claims is picking up steam in some states. The increased efficiency—as well as the confidentiality of the proceedings—make this trend attractive to both physicians and insurance companies.

BY JOAN SZABO

TWO YEARS AGO, OBSTETRICIAN CATHERINE WHEELER OF SALT Lake City, Utah, started asking her patients to sign agreements which stipulated that malpractice disputes will go to arbitration for settlement. In these agreements, an arbitrator or panel of arbitrators not connected to a specific case hears arguments from both sides and arrives at a decision that both parties must accept.

Wheeler has not actually been through the arbitration process, but she says these agreements are good for both physicians and patients. Arbitration provides parties involved in a dispute with an economic, efficient, confidential, and neutral forum to resolve their dispute, she

says. In addition, parties in the arbitration process can bypass crowded court dockets and schedule a hearing at their convenience.

“Arbitration also cuts down on frivolous lawsuits and allows patients who are truly injured to receive the majority of the award, which is rightly theirs,” she adds.

The process of arbitration also saves time spent during the hearing and pre-hearing motions, says Gordon Ownby, general counsel for the Cooperative of American Physicians, Inc.-Mutual Protection Trust (CAP-MPT), a California-based medical professional liability protection provider run by physicians. In addition, medical malpractice trials can last from one to four weeks, whereas arbitration will rarely last more than three to five days, Ownby says.

Wheeler is not alone in asking patients to sign arbitration agreements. Although statistics on the use of arbitration are not available, health-care experts believe more physicians, especially obstetricians and neurosurgeons, are beginning to use arbitration as a way to settle malpractice claims. Statistics from the American College of Obstetrics and Gynecology indicate ap-

proximately 76 percent of ACOG fellows have been sued at least once. What's more, obstetricians, on average, experience 2.6 liability claims during their careers.

"These concerns over lawsuits as well as escalating insurance premiums have led some excellent physicians to stop practicing medicine," says Wheeler. For example, one in seven ACOG fellows no longer practices obstetrics, she says. In addition, the number of medical students choosing to enter ob/gyn residency has declined. In 2004, only 65 percent of residency slots were filled by U.S. medical school seniors, compared with 86 percent a decade earlier.

Skyrocketing malpractice premiums, particularly for ob/gyns and surgeons, are believed to be one of the reasons why some physicians and insurers are turning to arbitration. Medical malpractice insurance premiums continue to rise, especially in states that have taken no steps to make their legal systems function better.

Impact on insurance rates

Arbitration is not new and has been recognized as a method of settling disputes for years in many industries. Those who have experience with pre-injury voluntary arbitration agreements say the process is beginning to have an impact on malpractice insurance rates.

Utah is one state where arbitration agreements are being used to a significant degree by physicians over the past two years. "The year 2006 will be the first one in a long time that the Utah Medical Insurance Association, a not-for-profit self-insurance company, will not be raising insurance premiums," says Mark Fotheringham, the vice president of communications and membership for the Utah Medical Association.

"After experiencing premium hikes of 30, 25 and 15 percent in previous years, arbitration has prompted a reduction in the cost of defending against claims, which we are told is the major reason for the premium stability this year," he says.

The greater the risk of malpractice lawsuits, the greater is the interest in using arbitration in a medical practice. "Neurology, ob/gyn, and surgical specialties are the ones most likely to use arbitration," Fotheringham says. Even so, the benefits of arbitration are substantial enough that many low-risk practitioners in the state are using the agreements as well.

Utah first passed the medical arbitration law in 2003 and amended it in 2004 to say physicians are free to use arbitration agreements, but that they may not deny care based solely on the failure of a patient to sign the agreement. Cases must be settled within one year, which helps shorten the amount of time it takes



Catherine Wheeler, MD, of Salt Lake City has been asking her patients to sign arbitration agreements for malpractice disputes. "Initially, some of my patients are put off by the agreement, but once I explain what is involved in arbitration, most readily accept it," she says.

to get a judgment. In addition, Utah law prohibits the use of arbitration agreements in emergency rooms and by anesthesiologists as lawmakers thought it unfair to the patient to be presented the agreement just before acutely needed services would be rendered. As a contractual situation, both sides must have an equal opportunity to accept or reject the agreement without undue pressure.

Under Utah law, patients in the state may revoke an arbitration agreement within 10 days after signing it. The agreement remains in force and automatically renews annually unless either party issues a written revocation, which will terminate the agreement on the next anniversary date. "This may seem like a long time if you decide to terminate shortly after the anniversary date has passed, but a patient always has the option of seeking care elsewhere if they don't want to be treated under the provisions of the agreement. In addition, if both parties mutually agree to terminate the agreement immediately, they can do so," says Fotheringham.

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Existing federal arbitration legislation theoretically should allow any physician to use arbitration in any state, but some states specifically limit or restrict the use of such agreements by physicians. While the federal law should supersede a state law that bans the use of arbitration agreements, the state law would likely have to be challenged in federal court for the federal law to come into play, says Fotheringham.

Despite some state restrictions on the use of arbitration in the health-care field, a number of health insurance plans in a handful of western states are encouraging physicians to use these agreements. A recent Rand Institute for Civil Justice report on the topic found most physicians who asked patients to agree to binding arbitration reported they did so based on the recommendation of their insurer, and one-third said they did so because it was the policy of their physician group.

Arbitration should not be confused with mediation, which involves a process in which a facilitator attempts to help parties solve a dispute by way of settlement. Unlike an arbitrator, a mediator may only make suggestions and has no authority to enforce a decision on the parties.

The California experience

In California, CAP-MPT requires arbitration agreements of all new ob/gyns and neurosurgeons who are insured by the company. Currently, more than one-half of CAP-MPT's 9,000 members use arbitration agreements in their practice settings to reduce their risk, says Ownby.

Surgeon and CAP-MPT member William Choctow, who practices in Covina, California, has been using arbitration agreements for about three years. Although he has never been through the arbitration process, he believes asking patients to sign agreements is beneficial to both physicians

and patients.

New patients receive the arbitration agreement along with other registration forms, he says. The office manager explains the process to patients and if there are additional questions, he is more than happy to answer them. Most of his patients sign the agreement, he says.

An important benefit is that the transaction costs of arbitration are significantly lower than those associated with a jury trial, says Ownby. "Throughout our 20 years of experience with arbitration, we have consistently saved about one third on our defense costs," he says. These savings help lower the cost of membership and operating costs for the company, and eventually trickle down to savings for patients as well, he says.

The Doctors Company, a physician-owned medical malpractice liability insurer based in Napa, California with physician clients in all 50 states, makes arbitration materials available to its member physicians, but it does not specifically request that physicians use them.

Kaiser Permanente, one of the state's largest health insurers, has used arbitration to resolve all legal claims since 1971. Physicians with Kaiser are not staff physicians but are part of the Kaiser group in Northern and Southern California. Under the Kaiser plan, arbitrators are free to award any amount of damages as there is no cap on the size of an arbitration award and patient members are eligible to receive punitive damages. Kaiser makes it a practice to inform all its members that it requires the use of arbitration to resolve disputes.

According to Kaiser, most claims are resolved within 11 months. Even so, the company reports the vast majority of cases are informally resolved before arbitration—some are settled in mediation, others are settled without the intervention of a

third party, and still others are decided by way of "summary judgment," a procedure whereby a neutral arbitrator reads and considers affidavits and declarations and makes a decision without any evidentiary hearings. Still other cases are dismissed.

What critics say

While there is support for arbitration among some physicians and insurers, the process does have its critics. Attorneys, for example, believe it is inappropriate for citizens to give up their constitutional rights to the country's court system. In addition, they argue that it is not wise to sign such an agreement prior to a dispute. They also say any flaws in arbitration agreements can lead to further litigation and expense, which physicians are trying to avoid.

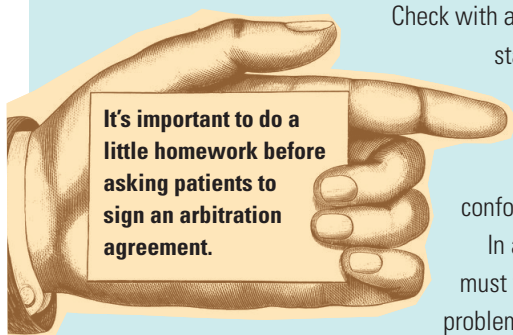
In some cases, patients have moved to deem arbitration agreements worthless and then pursued legal action in the courts. In other situations, patients may challenge the decision reached in arbitration, says Geoffrey Anders, an attorney with Health Care Law Associates and a practice management consultant with the Health Care Group, Inc., based in Plymouth Meeting, Pennsylvania. Arbitration may lead to litigating two cases, he says.

These difficulties may stem from how the arbitration agreement is written. It is important that agreements are correctly completed so legal challenges are avoided. The most typical errors found on the agreements include missing dates, failure to include the physicians group name as well as the employed physician's name on the agreement, and failure of a minor's legal representative to sign and date the agreement.

If a patient decides she wants to challenge the arbitration agreement, it is possible to bring a petition to compel the use of arbitration to settle the dispute, according

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Drawing Up an Agreement



Check with an attorney or get advice from the state medical association about arbitration agreements. The state medical association may have copies of agreements that conform to the state law on the topic. In addition, arbitration agreements must withstand legal challenges. Avoid problems in this area by paying close attention to your attorney.

The agreement should indicate the process that will determine where arbitration will take place if needed and how the panel will be selected. In Utah, the state maintains a list of

trained arbitrators (usually attorneys) for use by patients and physicians.

The California agreement clearly states that “both parties in the contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.”

The California agreement also says once signed, “The agreement governs all subsequent medical services rendered by provider to patient until or unless rescinded by written notice within 30 days of signature.” ■

to Ownby. “The rate of having those arbitration agreements overturned is extremely low,” he says. In addition, he says in his experience with CAP-MPT, plaintiffs’ attorneys who are experienced in litigating medical malpractice cases are much more likely to agree to arbitration without a court fight than those attorneys who don’t regularly practice in California.

Arbitration after an event

While arbitration has in the past few years started gaining greater acceptance in settling health-care liability disputes, some private arbitration associations don’t advocate pre-injury agreements. For example, the American Arbitration Association (AAA), one of the largest providers of alternative dispute resolution services in the country, will only provide arbitration services in patient malpractice claims if an agreement to arbitrate is entered into by the parties in writing after the alleged injury occurred. AAA maintains that pre-injury agreements are

fundamentally unfair.

The American Health Lawyers Association (AHLA) also has a similar policy in place. Nevertheless, it can provide arbitration services if the parties agree to this

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type of dispute resolution system after the injury occurred. The AHLA Web site offers a detailed description of these services. Go to www.healthlawyers.org (click on health law resources).

Agreeing to arbitration after an unexpected adverse outcome is not particularly beneficial to physicians because they end up having to pay a significant amount of money even if they win. According to Wheeler, “When parties agree to arbitra-

tion after an event occurs, the plaintiff’s attorney generally insists on a ‘high-low’ arrangement.” This means that if the physician wins, they will have to pay a low amount, which generally covers the attorney’s expenses. Wheeler’s colleagues who have gone through this have paid as much as \$250,000 to the other side when the physicians actually won the case. On the high end, the plaintiffs agree to cap the amount they might recover if they prevail, again resulting in a substantial loss to the physicians.

The lack of endorsement for pre-injury arbitration by AAA and AHLA doesn’t worry Utah physicians, says Fotheringham. “It’s a rather cutting-edge system we have here so we are not surprised that some might be resistant. We expect the process to spread to other parts of the country when people realize how much time and money it is saving for both sides in a liability dispute.”

How arbitration works

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Arbitration is a process where a neutral third person or a panel of three hears evidence and makes a final binding decision. With three-way arbitration, the patient and physician each select their own arbitrator from a list of pre-qualified professionals. Then those two arbitrators select a third independent arbitrator, who acts as the judge and jury. Arbitrators are usually retired judges or practicing attorneys. Under binding arbitration, both sides in a dispute must accept the decision.

Kaiser's process is overseen by an independent administrator, the Los Angeles-based law offices of Sharon Oxborough, a neutral, third party. Under the contract with the Arbitration Oversight Board, the office of the independent administrator maintains a listing of approximately 300 neutral arbitrators qualified to hear Kaiser cases. It independently administers arbitration cases brought by members of Kaiser health plans. Kaiser arbitrators must have practiced law at least 10 years and have substantial litigation experience.

Kaiser says a neutral arbitrator is typically appointed within 69 days and most claims are resolved within 11 months. Patients can select any neutral arbitrator, not just those on Kaiser's list. During the arbitration, the patient and Kaiser present witnesses, including medical experts.

Arbitration does involve costs for patients, unless arbitrators agree to represent the patient on a contingency basis so that a fee is charged only if the case is successful and money is recovered. Some attorneys will agree to this.

Arbitrators generally earn from \$100 to \$600 an hour. According to Kaiser's Office of the Independent Administrator, the average total fee charged by neutral arbitrators was \$3,290 in 2004. It is also important to point out that patients who decide to go to arbitration are responsible for the cost of calling their own expert witnesses.

With Kaiser, the cost is shared jointly by Kaiser and the patient. In a three-way arbitration, each side pays the entire cost of its arbitrator, plus one half of the neutral arbitrator's cost.

Getting patients ready for arbitration

Many physicians are concerned about asking patients to sign arbitration agreements. They worry that doing so will undermine patient confidence, but Ownby says in CAP-MPT's experience, most patients sign the agreements. If they decline, the physician still cares for the patient. Fotheringham estimates that in Utah, 99 percent of the patients who are offered an arbitration agreement are signing them.

When presenting the agreements, providers must take time to give patients proper information about the process. Obstetrician Wheeler agrees. "Initially, some of my patients are put off by the agreement, but once I explain what is involved in arbitration, most readily accept it," she says. She lets them know that if something goes wrong while she is caring for them and they decide to sue, it may take up to five years to reach the end of a lawsuit.

Physicians who would like to try arbitration should make sure that their insurance carriers as well as their state laws don't prohibit arbitration. Once that hurdle is cleared, they can start by getting a copy of an agreement from the state medical association or an attorney.

Most experts agree that the best time to present the agreement is during new patient registration, but it is also possible to ask existing patients to sign these agreements.

Arbitration experts advise physicians to explain why they are asking patients to sign the agreements. Presenting the process in a favorable light, emphasizing the quickness of a decision and the confidentiality of the process are important,

says attorney Anders.

In addition, be sure that the written agreement clearly states the terms of arbitration. Anders points out that when patients sign these agreements they are agreeing to give up the right to a trial by jury, so this must be an informed decision. It is important to provide explanatory materials. The agreement should be freestanding and not buried in another document or hidden among other paperwork.

It's possible to further explain the arbitration agreement by attaching a letter to patients in registration material, saying that the agreement indicates the physician and the patient are agreeing that any dispute arising out of the medical services received is to be resolved in binding arbitration rather than a suit in court.

In addition, it's a good idea to tell patients that by signing the agreement, the parties are changing the place where a claim will be presented, but that it is still possible to call witnesses and present evidence. Patients should also know that an arbitrator is able to award them as much money as they could receive in court.

While arbitration is not expected to solve the medical liability crisis in this country, it remains one way to help alleviate some of the problems associated with today's legal system. According to Wheeler: "The bottom line is our current tort system is causing a decrease in patient access to care, less safe care, and frivolous expense that would be better spent on providing care." ■

Joan Szabo lives in Great Falls, Virginia. She is the author of *Physicians' Legal Handbook*, and *Maximizing Practice Profits*. This is her first article for *Unique Opportunities*.