



Arbitration Agreements: Do I Need One?

By Tracy M. Falkowitz, Shareholder, Fowler White Boggs Banker

Every private practice physician's office should have an arbitration agreement for patient execution. Arbitration is a private forum where disputes are decided by an arbitrator or a panel of arbitrators. The arbitrator(s) selected may be attorneys with medical malpractice experience or even physicians. This is far superior to a jury of six licensed drivers determining the fate of a malpractice claim. While there are no guarantees with any forum, generally arbitrators rule without sympathy, yielding lower verdicts.

Arbitration is cheaper and quicker to resolution than traditional litigation. Additionally, arbitration proceedings are

less time consuming than a trial. Arbitration will include a mediation. And, significantly, an arbitration agreement discourages personal injury lawyers from taking smaller cases and lowers plaintiffs' expectations for recovery.

Discovery in an arbitration case is controlled by the arbitrator or arbitration panel. Hearings, which can delay litigation, are usually few in arbitration. Information and documentation produced remains private. This prevents use of this discovery in later claims.

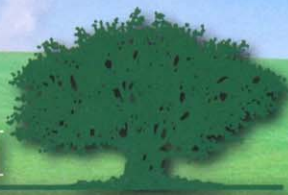
A patient may first bring a claim in court either because the patient does not recall signing the agreement or does not believe it is enforceable. Arbitration is highly favored,

so courts are looking to enforce arbitration agreements. All doubts during a determination of whether the parties should be compelled to go to arbitration must be resolved in favor of compelling arbitration. A judge is required to "indulge every reasonable presumption" in favor of arbitration.

Even though medical malpractice lawsuit filings have declined since the Medical Malpractice Act was enacted, the aggravation, expense, time and publicity which accompany litigation can devastate a medical practice. However, a well-drafted, reasonable arbitration agreement executed by the patient will be enforceable in the event a claim is filed.

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An arbitration agreement must meet four tests to be enforceable by the courts: 1) there must be a valid agreement; 2) the claim must be for an arbitrable issue; 3) the agreement must not be procedurally and substantively unconscionable; and 4) a waiver of the agreement by the physician must not have occurred. The arbitration agreement should be a freestanding, separate document and should be applicable to all entities practicing within a medical office.

To have a valid arbitration agreement, the patient must be given an opportunity to read the agreement, although it does not matter whether the patient has actually read the agreement prior to signing it.

For an arbitrable issue to exist, the agreement must be broad enough to include the allegations and the type of claim being brought. A well-drafted arbitration agreement will be applicable to all claims, including negligence, gross negligence,

contractual disputes, billing discrepancies and abuse.

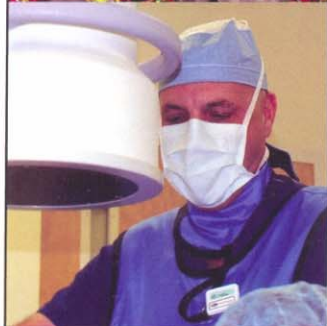
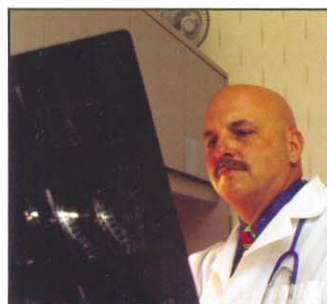
Procedural and substantive unconscionability must be shown by the patient to prevent enforcement of an arbitration agreement. Procedural unconscionability relates to the manner in which the contract was entered. Substantive unconscionability refers to the fairness of the terms of the agreement itself. Age, business experience and who drafted the agreement are all irrelevant. However, someone in the medical office must be able to answer any questions raised by the patient.

Once it has been determined that a valid arbitration agreement exists and covers the allegations raised against the physician, the physician must preserve the arbitration right by not waiving that right. Waiver is established when the physician engages in the litigation process. All court proceedings and discovery, if any, must be

solely in the furtherance of enforcing the arbitration agreement.

Arbitration agreements are so beneficial to physicians that some malpractice insurance carriers provide discounts for use of an arbitration agreement. While an arbitration agreement will not ensure that claims are not brought against the health care practitioner, it lowers plaintiffs' expectations because there will be no public forum and no jury of individuals sympathetic to their plight. Even if a claim is brought, with arbitration, defense of the claim will be cheaper, quicker to resolve, and will generally yield a lower damages award should negligence be found.

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