HEALTH LAW

In Consideration of Binding Arbitration Agreements

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Who can forget the following erudite exchange that forever and irrevocably links medicine and the law?

Otter: Point of parliamentary procedure!
Hoover: Don't screw around, they're serious this time!
Otter: Take it easy, I'm pre-law.
Boon: I thought you were pre-med.
Otter: What's the difference?
Otter: Ladies and gentlemen, I'll be brief. The issue here is not whether we broke a few rules, or took a few liberties with our female party guests—we did.

In contrast to the dispute resolution procedure regarding the Delta house's double-secret probation status, pre-dispute binding arbitration agreements are legal contracts in which both patients and physicians waive access to a jury trial and irrevocably commit to an arbitration process before either party has been harmed or any dispute has arisen.

As opposed to a trial by jury, one arbitrator or a panel of arbitrators decides the disputed matter. These agreements are irrevocable because the arbitration agreement precedes the actual conflict.

Arbitration has been defined as "an affirmative risk management [tool] that anticipates sources of conflict and puts in place systems to control costs and exposure to liability."[1] This process is very different from mediated settlements and other forms or alternative dispute resolution.

Despite the fact that only approximately 9% of physicians in the United States currently use pre-dispute arbitration agreements, their use is expected to increase dramatically, particularly given the litigious climate in which we practice.

And despite their increasing popularity, these agreements are not necessarily guaranteed to prevent substantial medical malpractice judgments.

For example, juries find in favor of the physician in approximately 70% to 80% of the suits. However, in the 20% to 30% of cases that physicians lose, the average plaintiff's award continues to increase.

Data from the Kaiser system is particularly illuminating. In 2005, Kaiser plaintiffs who arbitrated claims won 42.5% of the time, far greater than the 20% to 30% of the time juries award damages to plaintiffs in traditional civil litigation.

However, according to some estimates, arbitrator awards tend to average 40% to 50% less than the awards given by a panel of jurors.

One commonly accepted explanation is that juries are typically biased in favor of physicians but tend to be irrationally punitive once they are convinced of the physician's negligence.

There are a number of strategies used by plaintiff's lawyers to attack pre-dispute binding arbitration agreements. Despite the veracity of these attacks, pre-dispute binding arbitration agreements will most likely be upheld if the legal status quo is maintained.

Repeated, consistent losses by litigants employing a wide range of theories challenging binding arbitration agreements will certainly have an impact on those who must decide whether to accept or challenge the document.

If you decide to use a pre-dispute binding arbitration agreement, ask your counsel to consider the following when drafting the arbitration agreement:

- Present a clear, non-legalese, and unambiguous arbitration agreement.

  The agreement should define the mechanics of the arbitration process, selection of arbitrators, the waiver of the parties' right to a jury trial, and the areas or subjects to which arbitration will apply.
- Offer the agreement upon patient presentation to your clinic.

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The agreement must take place before the dispute arises. Nearly all banks, real estate companies, and healthcare providers ask their potential customers or patients to sign an arbitration agreement before the purchase, healthcare, or loan is provided.

- Generally speaking, few litigants will sign an arbitration agreement after they are "injured"— since their lawyers will invariably tell them they will get a larger recovery from a jury than from an arbitrator.
- Do not use overtly one-sided contracts (for example, an agreement presented as "take it or leave it). Moreover, do not attempt to limit the amount of damages.
- In the past, some non-healthcare companies placed limits on the total amount or kind of damages that could be awarded against them during arbitration.

  Arbitration is not a contractual method to limit damages; it is simply a lower-cost and more expedient substitute for court proceedings.
- Clearly define which jurisdiction and which venue will be utilized for the hearing.

  In general, the law of the state where your practice is located should apply. Also, specify a convenient venue or location for the arbitration hearing, such as a law office in a city where your center is located. This helps reinforce the notion that the procedure will be fair.
- Generally, most states do not mandate the number of arbitrators needed for a valid process.

  Although technically you need only one neutral arbitrator for an arbitration proceeding, many successful arbitration programs use three arbitrators: one selected by each party, and a third (neutral) arbitrator, who is selected by the other two arbitrators. Although the presence of three-party arbitration will add to the expense, their additional expertise and viewpoints may make the difference between winning and losing.

One question remains: If a prospective patient refuses to sign the agreement, should the urgent care clinic treat him?

If the patient has an emergency condition, the answer is obvious: treat the patient regardless of whether or not he signs the agreement.

However, if the patient answers "no" when asked if he has an emergency, then the clinician can decide whether to enter into a relationship with that patient.

If a new patient with no emergent issues refuses to sign the agreement, you can legally refuse to see him—unless of course you are a hospital-based urgent care clinic on a hospital campus.

In that particular case, the Emergency Medical Treatment and Active Labor Act applies and the hospital-owned, on-campus urgent care has to determine if the patient has an emergency medical condition.

If the patient is an existing patient and is continuing in a course of treatment, the center should continue with the patient's ongoing care even if the patient refuses to sign the document.

"One caveat: A court may interpret a 'take it or leave it' policy as so one-sided that your agreement is judged to be non-binding."

Conversely, if the patient is an existing patient with a new complaint, the center does have the right to refuse care.

For example, if the center has been treating the patient for a sprained knee and then the patient returns with complaints of a URI, the center could refuse to treat since follow-up is only mandated during a patient's "spell of illness."

One caveat is that a court may interpret this "take it or leave it" policy as so one-sided that your agreement is judged to be non-binding in a future proceeding.

In the end, the safest course of action is to treat all patients regardless of whether or not they sign the agreement (although, at this juncture, some providers *are* refusing to accept new patients who refuse to sign the agreement, provided they are not having an emergency).

Arbitration agreements are not a panacea to reduce potential liability. They are, however, a way to lower the cost and expedite the process which has risks and benefits for both parties.

Ask your malpractice carrier if they will reduce your deductible or lower your premium if your center begins asking patients to sign a pre-dispute binding arbitration agreement during the check-in process. ■

Reference

1. Sands JE. Alternative Dispute Resolution and Risk Management: Controlling Conflict and its Costs. 338 Litig. 7, 23 (1987)

TAKE-HOME POINTS

- Pre-dispute binding arbitration agreements are growing in popularity, but are not guaranteed to prevent substantial malpractice judgments.
- Such agreements are *binding*—i.e., irrevocable—and are likely to be upheld if the legal status quo is maintained.
- Juries tend to be biased in favor of physicians but irrationally punitive when convinced the provider has been negligent.
- The safest course of action is to treat all patients, whether they have signed an agreement or not.