

Frequently Asked Questions: Contractual Arbitration in California

We encourage our member physicians to learn about our optional contractual arbitration program. This article answers frequently asked questions about this alternative method for resolving disputes and its impact on a physician's practice.

Q: What is contractual arbitration?

A: Traditionally, medical malpractice suits have been resolved through litigation, a public process that is time consuming, expensive, and stressful for both sides. The high financial and emotional costs of litigation have given rise to an increase in the popularity of arbitration, an alternative method for resolving disputes that allows the parties to define the process and to put their dispute before knowledgeable, neutral arbitrators.

Q: How does arbitration work?

A: Each party, represented by qualified counsel, presents its case and offers evidence and expert witnesses to experienced arbitrators who arbitrate the dispute.

The key to an effective arbitration program is utilizing an agreement that clearly sets forth the rules, procedures, and provisions of the process. Parties can choose to resolve their dispute informally, with little pre-hearing procedure, or they can agree to resolve their dispute formally, with extensive procedural protocols. If the parties have entered into a proper arbitration agreement, the dispute will be resolved with finality and with very limited opportunity for review by the courts.

Q: What are the advantages and disadvantages of arbitration?

A: The benefits of arbitration include the following:

- Jury trials may take years to be heard and weeks to complete, while arbitration generally takes place within a year and usually lasts less than a week.
- Jury trials and decisions are open and available to the public, while arbitration is often heard in a private conference room, with the results not generally made public.
- Medical malpractice claims often present complex standard of care and causation issues that require a lay jury to understand and to form an opinion based on competing expert testimony. Arbitration is a more objective process that permits discussion between attorneys and the arbitrators.
- Appeal is possible in a jury trial, but arbitration presents a very limited opportunity for review by the courts.

- Amounts of jury awards are variable, dependent upon venue, and often appear to result from an emotionally inflamed response rather than from impartial analysis. In arbitration, it is unusual for arbitrators to return a verdict that appears to be the product of passion or prejudice.
- Depending on the state, punitive damages may or may not be considered by a jury. These damage awards are absent in arbitration.

Although arbitration has many advantages, it is not without disadvantages. Physicians should thoroughly review all aspects of arbitration before deciding whether to implement the program in their practice. Here are some of the disadvantages:

- Discovery of facts does not occur unless each party specifically agrees. Information that may help one party defend or prove a fact may not be produced before or at the time of the arbitration.
- For smaller claims, i.e., those less than \$5,000, the cost of arbitration may exceed the claim.
- Compromise awards are more common with arbitration than in court decisions.
- Parties do not have an opportunity for their “day in court.” All decisions are made by arbitrators.
- When deciding the case, rather than following prevailing law, the arbitrators may render a decision based on equity or a sense of fairness and justice.
- If a party is unhappy with the arbitration outcome, successful challenges—an appeal to a court—are rare.
- Health plans may severely limit the use of arbitration, resulting in more expense. For example, restrictions on where arbitration will be conducted and the use of specific arbitrators may be required by health plans.

Additional resources about the advantages and disadvantages of arbitration include your patient safety/risk manager at The Doctors Company, the *California Physician's Legal Handbook* (available at www.cmanet.org), and the California Medical Association's On-Call service at www.cmaoncall.com.

PATIENT SAFETY/RISK MANAGEMENT FAQs (continued)

Q: How do the processes compare?

A: The elements of each method include the following:

In a Trial

- The patient obtains a plaintiff's attorney.
- The plaintiff's attorney files a lawsuit.
- Discovery begins and experts are hired.
- Settlement may be considered.
- A trial date is set.
- A jury is selected.
- A verdict is reached.
- An appeal may be initiated.
- Trials may last weeks or months.
- The process may take years to be resolved.
- The plaintiff/patient incurs attorney's fees to be paid from the award if there is a plaintiff's verdict.
- The plaintiff/patient may wait a long time to receive the monetary award.
- The public has access to the trial verdict.
- The judgment is reported to the National Practitioner Data Bank (NPDB).

In Arbitration

- Three experienced arbitrators (usually three attorneys or judges) arbitrate the dispute.
- There is a limited right to appeal.
- The verdict is binding.
- Arbitration can be more cost effective.
- Arbitration can last one or two days.
- Information is heard by professionals, not by lay jury members.
- If there is a plaintiff's verdict, the monetary award is paid immediately.
- The results are not generally made public.
- The judgment is reported to the NPDB.

Q: If I implement arbitration in my office, what happens if I have a claim?

A: In the event that a claim is brought against you or a reportable event occurs, make sure that you report to your claims representative at The Doctors Company that there is an arbitration agreement in place with the patient.

Our experienced, professional claims experts are dedicated to your protection and will be with you through every step of the process.

Q: Do all physicians in a practice need to use the arbitration agreement?

A: Yes. There may be a conflict if one physician or allied health provider does not use the agreement, as in an on-call coverage situation. Because of this type of potential complication, we advise that practices take an all or none approach to implementing our arbitration program.

Q: May I require a patient to sign an arbitration agreement to receive care?

A: No. Pressuring a patient to sign the arbitration agreement may result in an adversarial interaction before care begins. California case law holds that if a patient can show that he or she was pressured into signing an arbitration agreement, the agreement may be ruled invalid.

Q: Can a patient rescind the arbitration agreement?

A: Yes. The patient can rescind the agreement in writing within 30 calendar days of signing it.

Q: Are the arbitration forms available in languages other than English?

A: Yes. We also provide arbitration forms in Spanish.

Q: What are some of the key elements to successfully implementing an arbitration program in my practice?

A: Providing your staff with adequate training is essential in implementing an arbitration program. Be sure to explain to your staff both the advantages and the disadvantages of arbitration and to give them an opportunity to ask questions regarding the change in office practice. Make sure that all new physicians and staff receive orientation and education about the arbitration process.

Our guidelines can help you successfully implement this process in your practice. For more information, read our article "Implementing Contractual Arbitration in Your Office" or contact our Patient Safety Department at (800) 421-2368, extension 1243.

PATIENT SAFETY/RISK MANAGEMENT FAQs (continued)**Q: Where can I get more information or order additional agreements?**

A: The Doctors Company is available to support you and your staff in implementing the arbitration program in your practice. Please call the Patient Safety Department at (800) 421-2368, extension 1243.

To order additional physician-patient contractual arbitration agreements, visit www.thedoctors.com/arbitration or send your request to arbitration@thedoctors.com.

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Founded by doctors for doctors in 1976 to advance, protect, and reward the practice of good medicine, The Doctors Company is the nation's largest insurer of physician and surgeon medical liability. For more information on our innovative patient safety products and services, please call (800) 421-2368, extension 1243, or visit us at www.thedoctors.com/patientsafety.

The guidelines suggested here are not rules, do not constitute legal advice, and do not ensure a successful outcome. The ultimate decision regarding the appropriateness of any treatment must be made by each health care provider in light of all circumstances prevailing in the individual situation and in accordance with the laws of the jurisdiction in which the care is rendered.

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