Healthcare Arbitration Agreements Face New Attacks: How Providers Can Respond And Draft Effective Agreements

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Introduction

Healthcare providers, particularly hospitals and long-term care facilities, increasingly rely on arbitration agreements to stipulate how certain disputes between patients and the provider will be addressed. These arbitration agreements are often presented with the admission agreement. Many healthcare providers believe arbitration offers certain advantages, such as saving the parties costs and fees as compared to a court trial, greater flexibility in scheduling, rapid resolution of disagreements, confidentiality protections not afforded to public trials, and greater certainty and limitations on damages awards.

Other healthcare providers believe that arbitration has not yielded these benefits and that a court trial may be equally favorable. Part of that belief may be the result of poorly-drafted arbitration agreements which give wide latitude and equitable discretion to the arbitrator. Whatever the philosophical perspective on the utility of arbitration, it remains that an arbitration agreement is only as good as its terms and enforceability. If the agreement is illegal, too narrow, overbroad, or poorly drafted, the healthcare provider may be unable to enforce the agreement or may lose some, if not all, of the advantages arbitration can bring.

In addition, a healthcare provider should take the time to ensure that the terms of its arbitration agreement are drafted to achieve its purpose. When drafting the arbitration agreement, the provider has the opportunity to set the rules of the arbitration. Updating an arbitration agreement to meet current legal standards and the provider's arbitration goals can save significant time and money down the road.

The use of arbitration agreements in the healthcare industry, and particularly for long-term care, is a controversial topic because it pits the patient's right to freely enter into contracts against the notion that patients may have diminished capacity to enter into contracts and an arbitration agreement presented upon admission is akin to an adhesion contract or otherwise unfair. Elder rights and patient advocacy groups argue that including an arbitration clause in the admission agreement itself improperly leads prospective patients to believe their admission to the facility is conditioned on agreeing to arbitration.

In response to these concerns, and leading what may soon become a trend, California became the first state to prohibit long-term care facilities from writing and using their own, customized, admission agreements. This article examines current developments impacting healthcare arbitration agreements and offers some detailed strategies providers should consider.

California Law Affecting Healthcare Provider Arbitration Agreements

For many years, California law has required medical malpractice arbitration agreements include certain terms and disclosure language. Last year, the California Department of Health Services ("DHS") (now re-named the California Department of Public Health) enacted additional regulations that directly affect arbitration agreements in long-term care facilities and prohibit including an arbitration clause in an admission agreement.[1] The regulation prohibits long-term care facilities from drafting their own admission agreements and instead requires them to use the Standard Admission Agreement created by DHS. The Standard Admission Agreement does not contain an arbitration provision, and any arbitration agreement must be offered as a separate document with prescribed font size.[2]

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1 22 C.C.R. §72516 (these regulations were promulgated following the adoption of SB 1061, codified as Health & Safety Code §1599.61). The regulation became effective on January 2, 2006, and applies to all patients admitted since January 1, 2000.

2 22 C.C.R. §72516(d); Health & Saf. Code §1599.81(b).

The Standard Admission Agreement was successfully challenged in *Parkside Special Care Center, Inc. v. Sandra Shewry*, a trial court decision, on the grounds that several of its provisions are invalid and inconsistent with existing law.[3] Following the court's decision, DHS suspended the mandatory use of the Standard Admission Agreement and is in the process of revising the document. However, it is important to note that the court upheld the validity of the regulation's requirements regarding arbitration agreements (*e.g.*, the arbitration agreement must be a separate document from the admission agreement and must use certain fonts). The court specifically held that the requirement of a separate arbitration agreement is consistent with existing law under Health and Safety Code section 1599.81, which prohibits conditioning admission on signing an arbitration agreement, requires the arbitration agreement to be on a separate document, requires separate waiver clauses for medical malpractice and other claims, and mandates particular disclosure language.

For the time being, long-term care providers may use their own admission agreements, but they will need to draft separate arbitration agreements. It remains that admission to a long-term care facility (as defined by Health & Safety Code section 1599.84) may not be conditioned on signing an arbitration agreement.[4] In light of changing regulations and heightened scrutiny regarding the patient admission process, every healthcare provider should review its existing arbitration agreement to verify that the agreement complies with current legal requirements. Failure to comply with the new requirements can expose a provider to citation penalties, monetary fines and civil enforcement actions.

Disclosure Language

California law requires specific disclosure language for arbitration agreements used by healthcare providers or for certain causes of action (*e.g.*, medical malpractice).[5] If the arbitration agreement does not contain the required provisions or otherwise comply with the statutory requirements, it may be unenforceable.[6] For example, long-term care arbitration agreements must contain specific advisory language at the top of the agreement, in bold-face font and no smaller than 12 point type.[7] *See* Figure No. 1.

(fig. 1)

Patients shall not be required to sign this arbitration agreement as a condition of admission to this facility, and cannot waive the ability to sue for violation of the Patient Bill of Rights.

As a risk management tool, healthcare providers should consider including in their arbitration agreement additional ratifying language to that effect, such as

> Patient acknowledges and understands that he or she has the option of not signing this Arbitration Agreement. The execution of the Arbitration Agreement is not a pre-condition to treatment or care, admission to the Facility, or continued stay at the Facility.

California law also mandates that agreements containing provisions arbitrating medical malpractice claims include specific waiver language and a notice printed above the signature line in at least 10 point, bold font and red ink.[8] *See* Figure No. 2. Medical malpractice arbitration agreements must also state that the agreement may be revoked by written notice delivered to the healthcare facility and received within thirty days of signature.[9]

(fig. 2)

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

An awareness of all the applicable statutes and regulations will enable counsel to eliminate potential problems before any arise. For example, Code of Civil Procedure section 1295(b) only requires 10 point font, but in light of the 12 point font requirement under 22 C.C.R. 72516 and Health & Safety Code section 123222.1, hospitals, skilled nursing facilities, intermediate care facilities and residential care facilities for the elderly should print the entire arbitration agreement in at least 12 point font. Obtaining a court-certified Spanish translation is also recommended.

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3 Cal. Sup. Court, San Diego County, Case No. GIC 860574, 2006. For example, the Standard Admission Agreement is inconsistent with the Health Insurance Portability and Accountability Act.

4 Health & Saf. Code §1599.81(a).

5 Code Civ. Pro. §1295; Health & Saf. Code §23222.1; 22 C.C.R. §72516.

6 *Rosenfield v. Sup. Ct.*, 143 Cal.App.3d 198 (1983).

7 22 C.C.R. §72516.

8 Code Civ. Pro. §1295(b).

9 Code Civ. Pro. §1295(c).

Waiver of Claims

Many healthcare providers continue to use arbitration agreements with a single, broad catch-all provision waiving a court trial for all claims. However, such provisions do not satisfy the legal requirements of healthcare arbitration agreements, nor do they offer the provider an opportunity to creatively and strategically sculpt the terms of any potential disputes.

Lawsuits against healthcare providers often allege causes of action for negligence, elder abuse, emotional distress, fraud and medical malpractice. California requirements for healthcare arbitration agreements prevent a healthcare provider from lumping all these causes of action into one waiver provision.[10] Accordingly, an arbitration agreement should have two provisions governing waiver of claims. *See* Figure No. 3.

The language in Article 1 of Figure 3 is required verbatim by California law.[11] Article 2 of Figure 3 is a modified catch-all waiver provision and, unlike medical malpractice, no particular language is required. Note, however, that Article 2 has been drafted with a long-term care facility in mind because the provision intentionally excludes from arbitration any transfer, discharge or eviction proceeding. Often, the most effective mechanism available to a long-term care facility to address a disruptive or dangerous patient is to remove the patient from the facility through a court process (such as eviction). By exempting those proceedings from arbitration, the provider retains a powerful tool to initiate an expedited court process in those situations.

(fig. 3)

Article 1: It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or court process except as California law provides for judicial review of arbitration proceedings. Both parties to this 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.

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Initials of Patient or
Patient's Legal Representative

Article 2: The Parties intend, understand and agree that any dispute, whether arising from tort, contract, negligence or otherwise, including any claims for loss of consortium, wrongful death, emotional distress, punitive damages, and/or any actions brought on behalf of Patient by third parties, shall be submitted to binding arbitration and not a lawsuit or resort to court process (except as California law provides for judicial review of arbitration proceedings). Any action or proceeding by the Parties for transfer, discharge or eviction is expressly excluded from this Arbitration Agreement.

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Initials of Patient or
Patient's Legal Representative

The two-article format in Figure 3 also is useful because the separate signature lines provide great adaptability. If the patient does not want to arbitrate potential medical malpractice claims, he or she can still sign the rest of the agreement.

Long-term care facilities should be aware that California law restricts a patient's ability to waive a jury trial for certain claims. For example, a resident of a skilled nursing facility or an intermediate care facility may not waive the right to bring a court action for a violation of the Patients' Bill of Rights.[12] An arbitration agreement that provides otherwise is void as contrary to California public policy. Arbitration agreements must be appropriately tailored and inform the patient of this right.[13] Consider the following language:

The right provided for in Health and Safety Code section 1430, to bring an action against a facility for the violation of the regulatory Patients' Bill of Rights, may not be waived and is not waived by this Arbitration Agreement.

Even when the agreement meets all legal requirements, courts may hesitate to enforce arbitration agreements when the plaintiff also has pled claims not covered by the agreement. On May 2, 2007, the Court of Appeal upheld a trial court's refusal to enforce an arbitration agreement between a nursing facility and a patient.[14] In *Fitzhugh v. Granada Healthcare and Rehabilitation, LLC*, plaintiffs filed suit for elder abuse, wrongful death, and violations of the Patients' Bill of Rights. The trial court denied defendant's motion to compel arbitration, finding that because claims alleging violations of the Patients' Bill of Rights and wrongful death could be brought in different

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10 Code Civ. Pro. §1295; Health & Saf. Code §1599.81(c).

11 Code Civ. Pro. §1295(a). An agreement that complies with Section 1295 is, by statute, not an adhesion contract or otherwise improper. Code Civ. Pro. §1295(e).

12 Health & Saf. Code §1430(b). The Patients' Bill of Rights is contained in 22 C.C.R. §72527.

13 Health & Saf. Code §1599.81(d).

14 *Fitzhugh v. Granada Healthcare and Rehabilitation, LLC* (First Dist., Div. Three), 2007 Case No. A115123.

forums (*i.e.*, one in court, the other in arbitration), the potential for conflicting rulings on common issues of law or fact warranted refusal to compel arbitration.[15]

Patient Representative

The signature lines in Figure 3 contemplate a situation where the patient may not be competent to sign and instead, the patient's legal representative may sign on his or her behalf. Often, a close relative who accompanies the patient on admission will offer to sign as the "responsible party." Be careful. The provider must verify that the person who signs the agreement truly has the legal authority to sign on the patient's behalf.[16] As a risk management rule, whenever someone else signs on behalf of a patient, the provider should attach to the agreement proof of the signing representative's relationship to the patient and his or her legal authority to sign on the patient's behalf. Of course, the provider or its representative must also sign the arbitration agreement.

Setting the Rules of the Game: Drafting the Procedural and Substantive Law for Use During Arbitration

Among the strategic opportunities available to a healthcare provider when drafting an arbitration agreement, the most valuable is the opportunity to dictate the procedural and substantive law that will apply to arbitrated disputes. Many healthcare providers believe arbitration will reduce uncertainty and limit exposure by eliminating the jury factor from lawsuits. Waiver of a jury trial, however, does not guarantee a smaller judgment. If the arbitration agreement does not properly define the applicable law, the arbitrator may be less restricted than even a jury when rendering an award.

This problem often arises in so-called short form arbitration agreements. These agreements merely incorporate by reference an existing set of arbitration rules, such as AAA or JAMS.[17] These agreements afford the arbitrator extremely broad equitable discretion with little to restrict the arbitrator to make rulings based on state law (or any law, for that matter).[18]

If the arbitrator is not confined to ruling according to state law, counsel's ability to assess possible outcomes of a lawsuit and offer a reasoned course of action is severely limited. In this respect, a poorly drafted arbitration agreement can actually ***increase*** uncertainty and exposure. Short form arbitration agreements should be avoided; the agreement should instead specifically identify the substantive, procedural and evidentiary law to be used during the arbitration.

When drafting the arbitration procedures, options are limited only by counsel's creativity and fundamental due process considerations. Who will pick the arbitrator? Will there be one arbitrator or a tribunal? Perhaps two party-affiliated arbitrators and a third, neutral arbitrator to preside? Does the provider want to permit full discovery conducted per state code or instead limit discovery and require the arbitrator's prior approval? Perhaps permit written discovery but require arbitrator approval for depositions? A provider also should consider including a summary judgment/summary adjudication procedure to allow it to effectively eliminate some causes of action early on in the arbitration.

A certain degree of flexibility regarding whether state evidentiary rules will strictly apply can be advantageous, and can be achieved with the following sample language:

The arbitration shall follow the rules of procedure and evidence of the state of California relating to trial of civil actions. The Parties, upon mutual written consent, may waive or modify evidentiary rule(s) or procedure(s).

Keep the language precise, clearly set forth the applicable law, and detail any customized exceptions.

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15 With very little explanation, the Court of Appeal summarily rejected defendant's claim that arbitration agreements would cease to be enforceable so long as a plaintiff includes a cause of action alleging violations of the Patients' Bill of Rights. Although the Court stated that courts should not tolerate artful pleading to circumvent a valid arbitration agreement, it seems to have taken the position that the compelling public policy prohibiting a patient from waiving the right to sue for violations of the Patients' Bill of Rights outweighs that risk. Accepting otherwise would minimize the public policy that under no circumstances may a patient waive his or her right to sue for a violation of the Patients' Bill of Rights.

16 For example, a person legally permitted to consent to medical treatment for a patient does not necessarily have the legal authority to bind the patient to an agreement to arbitrate. *Pagarigan v. Libby Care Center, Inc.*, 99 Cal.App.4th 298 (2002). However, an agent pursuant to a durable power of attorney may be able to bind a patient to arbitration, depending on the scope of authority granted in the document. *Garrison v. Sup. Ct.*, 132 Cal.App.4th 253 (2005). There are additional situations to contemplate, such as whether the mother of an unborn baby can bind that child to arbitration. Under California law, the mother can do so. *Pietrelli v. Peacock*, 13 Cal.App.4th 943 (1993).

17 Note that the governing law clause in the contract (*e.g.*, this agreement shall be governed by the laws of California) applies to the enforceability of the contract itself and does not dictate the procedural or substantive law to be used during the arbitration proceedings.

18 For example, neither AAA or JAMS rules require the arbitrator to adhere to California's substantive, procedural or evidentiary law.

If a healthcare facility is part of a larger corporate scheme, counsel should anticipate that a skilled plaintiff's attorney will name the corporate parent as a defendant. A basic practice to minimize a plaintiff's opportunity to pierce the corporate veil is to make arbitration agreements and admission agreements facility-originated; they should not be emblazoned with the corporate parent's name or logo. This does not, of course, eliminate the risk that the corporate parent will be named as a defendant. For that reason, facilities should evaluate whether claims against the corporate parent should be bound and joined to the arbitration. Similarly, the facility may want to file a counterclaim against the patient or his family. In order to avoid unnecessary law and motion practice, consider the following sample provision:

The Parties consent to the intervention and joinder in arbitration of any person or entity which would otherwise be a proper additional party in a court action, and upon such intervention and joinder, any existing court action against such additional person or entity shall be stayed pending arbitration.

The scope of available damages also should be considered when drafting arbitration agreements. Although an arbitration agreement may not improperly deny the patient damages, it can address whether the American Rule (*i.e.*, each party bears its own fees and costs) or the English Rule (*i.e.*, fees and costs are borne by the losing party) applies in the arbitration. Because the healthcare provider often has greater financial resources than the plaintiff-patient, an agreement that prevents fee-shifting will have a greater impact on the patient. It also may encourage reasonable settlement at an early stage in the litigation. Consider the sample language in Figure No. 4.

(fig. 4)

> The arbitrator shall have the authority to award any remedy or relief that a court of the state of California could order or grant, but no other remedy or relief. The award must be limited to the relief available to a California state court and under California law for the cause(s) of action at issue in the arbitration. However, each party shall bear its own costs, expenses, legal fees, witness expenses, and 50% of the arbitrator's fees and such expenses may not be awarded against the opposing party. The provisions of California law applicable to healthcare providers shall also apply including, but not limited to, California Code of Civil Procedure sections 667.7 and 425.13, and Civil Code sections 3333.1 and 3333.2.

Interestingly, advocacy groups recently have lobbied to shift the costs of healthcare arbitration away from patients and entirely onto the healthcare provider. In April 2007, the Orange County Bar recommended amending Code of Civil Procedure section 1284.3, which permits fee shifting only if a party prevails in arbitration. The proposed changes would instead require that when a party moving to compel arbitration is a healthcare provider, that party must pay 100% of the fees and expenses of the neutral arbitrator, as well as the fees and expenses incurred in the process of selecting the arbitrator. The San Diego Bar Committee of Delegates voted to oppose the proposed change. At the State Bar conference in September 2007, there will be a statewide vote of bar associations on whether to adopt the proposal. If adopted, it will be introduced as proposed legislation for 2008.

Counsel also should consider additional tailoring that includes a confidentiality provision:

The arbitration is confidential and, except as may be necessary to enforce the award, neither the Parties nor the arbitrator may disclose the existence, content, documents, testimony or results of any arbitration hereunder without the prior written consent of both Parties.

When to Present the Agreement

Restrictions exist on when and how healthcare providers may present a patient with an arbitration agreement. For example, as discussed earlier, a long-term care provider may not present an arbitration agreement to a prospective resident as part of the Standard Admission Agreement.[19] Read narrowly, this would suggest that an arbitration agreement may not be physically attached to the admission agreement, but could be provided simultaneously with the admission agreement. Such an interpretation may be short-sighted because it could lead a resident to claim that he or she believed that signing the arbitration agreement was a precondition to admission or treatment.

One possible course of action is to draft the arbitration agreement as a separate document and never present the arbitration agreement at the same time as the admission agreement.[20] This approach could reduce both the likelihood of a patient claiming undue influence, and the risk of a penalty from the state survey agency for a regulatory violation.

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19 22 C.C.R. §72516(d).

20 The new California regulations are silent as to whether or not an arbitration agreement may be presented at the same time as the admission agreement.

Retroactive Applicability

If a healthcare provider chooses not to present an arbitration agreement concurrent with the admission agreement, a patient might not sign the arbitration agreement until after he or she has been at the facility for a period of time. If the provider wants to bind claims arising before the agreement was signed, the agreement will need to include a provision enabling retroactive application of the arbitration agreement to cover the patient's entire course of treatment. Consider the language in Figure No. 5.

(fig. 5)

> By initialing below, Patient intends and acknowledges this Arbitration Agreement to cover claims arising before the date it is signed. This Arbitration Agreement is effective as of the date of the provision of the first care or service of any kind.
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> _____
> Initials of Patient or
> Patient's Legal Representative

Conclusion

Healthcare providers should stay up-to-date on changes to state and federal requirements for arbitration agreements between providers and patients, and revise their arbitration agreements accordingly. An awareness of the hidden risks in arbitration, and looking beyond the basic short form agreement, will reveal practical strategies a provider can incorporate into its arbitration agreement. Experienced healthcare counsel can draft well-tailored arbitration agreements specific to their clients' particular needs.

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