Dynamic Chiropractic

PERSONAL INJURY / LEGAL

Doctor-Patient Arbitration Forms Benefit Chiropractors and Their Patients

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One of the wisest decisions a chiropractic doctor can make is to use doctor-patient arbitration forms. Over the past 20 years, arbitration has become a common sense, economical, and expeditious alternative to the court system for both doctor and patient. In arbitration, procedures are simplified to reduce attorney's fees and procedural delays, and the parties avoid the great backlog of cases waiting on the courts' civil calendars. Arbitration is perfectly legal in California and many other states across the country. Yet, some questions remain and must be addressed if the chiropractic profession is to make use of this valuable tool. How does arbitration work? How will it benefit the doctor? What if the patient does not want to sign?

How Arbitration Works

An arbitration agreement is signed by the chiropractic doctor and the patient generally prior to treatment. The agreement binds both to take any malpractice claim to a neutral arbitrator, rather than a jury or judge.

In the event of a claim, the patient does not waive the right to recover for negligently inflicted injury. The doctor and patient agree on an arbitrator, sometimes by having each side pick one arbitrator whose only function is to choose a third neutral arbitrator to hear the case. Frequently, arbitrators are lawyers or retired judges. Each side may retain attorneys who then present the case to the neutral arbitrator who decides the case and whose final decision is binding on the parties. At the arbitration hearing, the arbitrator will hear the evidence, decide whether there was negligence and, if so, will determine what the damage award will be.

Benefits For Doctors

Arbitration benefits the doctor in a number of important ways. First: While there is a scarcity of statistical data, using an arbitrator appears to yield lower damage awards by avoiding "runaway juries" as sometimes occur in jury trials. In chiropractic, large compensatory jury awards in the millions are appearing more and more frequently in court cases involving cardiovascular accidents across the country. More importantly, arbitration reduces the fear of runaway juries that the patients' attorneys' can use against doctors to force high settlements. With arbitration, the parties can get down to the facts of the case.

Second: Arbitration saves the chiropractor time, worry and money. Arbitrated cases generally are decided within one year, because of simplified discovery and procedural rules. By contrast, jury trials drag on between three and five years. Simplified arbitration procedures result in substantial savings in attorneys' fees. Attorneys' fees in a full-blown jury trial range from $50,000 to $150,000, but only from $15,000 to $45,000 in an arbitration hearing.

Third: Arbitration helps the chiropractor keep his or her record clean because it screens out "professional plaintiffs." Professional plaintiffs are people who make a habit or a living by bringing "nuisance suits." A nuisance suit is one that is groundless, but which the doctor or his malpractice

insurance company is forced, by economic necessity, to settle, because a court battle would be too costly. A professional plaintiff won't be able to hold the "jury trial" ax over the head of a chiropractor who requires patients to sign arbitration agreements. The professional plaintiff won't sign an arbitration agreement, but will seek out another practitioner to prey upon -- one who doesn't use arbitration.

Less than one-half of one percent of prospective patients will refuse to sign arbitration forms. A fair number of these people are exactly the sort of patient you do not want to treat. These patients' attitude is that if they are in any way dissatisfied they will call their lawyers first, you second. Any doctor who has suffered through a nuisance suit will probably tell you "I wish that I had never treated that patient!" Avoiding nuisance claims is especially important given the passage of the new federal law that requires reporting all malpractice claims paid, regardless of the amount, even those under $3,000, to the new Federal Claims Data Bank.

Fourth: Use of arbitration may create an unexpected financial gain in malpractice premium savings for the doctor who has malpractice coverage with a company whose program requires mandatory arbitration. An insurance company using arbitration as a cost containment device to reduce claims, amounts of awards, and attorneys' fees is likely to offer continued lower premiums. Insurance companies that do not use arbitration are forced to defend claims in expensive jury trials and are likely to suffer increasing claim costs; as a result, they may be more likely to raise premiums or be forced out of business.

Malpractice insurance programs that require its insured doctors to have patients sign arbitration agreements, report lower incidence of claims, probably because the forms screen out the professional plaintiffs. There are two prominent examples of the success of the programs with mandatory arbitration. First, United Physicians, a self-insured group which offers malpractice insurance for medical doctors, has for the past four years used a combination of mandatory risk-retention seminars for its insureds, and doctor-patient arbitration forms and has reduced claims so successfully it has actually lowered its premium rates. Second, the National Chiropractic Council (NCC), an insurance buying group under the Federal Liability Risk Retention Act of 1986, recently reported that over the past 4 years, only 1 out of every 107 insureds has a claim against him, in stark contrast to a claim's history of 1 claim out of every 23 insureds for National Chiropractic Mutual Insurance Company (NCMIC), which does not require doctor-patient arbitration of claims.

Escalating claims increase premium rates. NCC, which uses mandatory arbitration, has not raised rates in the past four years and its rates are about one-third that of NCMIC for limits of liability of $1,000,000/$1,000,000. Since 1985, NCMIC has raised rates by about 57% for those limits and 144% for its lower limits of $50,000/$150,000. As yet, NCMIC has not adopted mandatory arbitration as a cost containment device.

It is an important point that individual doctors -- doctors insured by NCMIC or any company that does not require arbitration and even uninsured doctors -- may on their own choose to use arbitration forms in their practices as an added safeguard to protect the doctors' professional treating records. Voluntary use of arbitration forms will permit the doctor to screen out professional plaintiffs and may help prevent settlements of nuisance suits by the insurance company, since arbitration removes the threat of the expense of jury trials.

Benefits For Patients

A major objection to arbitration is worry over patients' resistance to the idea. Fortunately, there are a number of ways to convince patients that arbitration truly benefits both doctor and patient.

The first possible patient concern is that signing an arbitration agreement is a waiver of the patient's right to pursue a claim. On the contrary, arbitration does not remove the chiropractor's duty to render reasonable care or the patients right to recover for negligently inflicted injury. In arbitration, the patient may demand the same damages as in a trial, including punitive damages, and may be represented by a lawyer of his choice. One of the biggest concerns of a patient who brings a claim is, "When will I get my money?" Using an arbitrator, rather than a jury, to decide the case will result in a speedy resolution. The patient will get a quick and fair decision, probably within one year, instead of facing three to five years of discovery and procedural delays until the trial and, if the patient wins, possibly three more years of appeals by the other side. Arbitration's streamlined procedures make quicker awards likely and reduce delays that may force a financially strapped patient to settle. In addition, arbitration tends to be simpler and less adversarial than court or jury trials and, therefore, is less traumatic for all concerned.

A possible second patient concern is that arbitration is unusual -- an idea which could conceivably make the patient question the doctor's competence and confidence. Happily, arbitration is perfectly common and legal. For example: In 1975, the California Supreme Court held that arbitration is a "proper and usual" means of resolving medical malpractice disputes which "do no more than specify a forum for the settlement of disputes." Madden v. Kaiser Foundation Hospitals, 17 Cal.3d 699 (1975). The California Supreme Court stated the benefits of arbitration, as follows:

The speed and economy of arbitration, in contrast to the expense and delay of a jury trial, could prove helpful to all parties; the simplified procedures and relaxed rules of evidence in arbitration may aid an injured plaintiff in presenting his case. Plaintiffs with less serious injuries, who cannot afford the high litigation expenses of court or jury trial, disproportionate to the amount of their claim, will benefit especially from the simplicity and economy of arbitration; that procedure could facilitate the adjudication of minor malpractice claims which cannot economically be resolved in a judicial forum.

Id. at 711-12.

The Court also pointed out numerous examples of how common arbitration was even back then in 1975. Id. at 707. Of course, since 1975, use of mandatory arbitration has become more widespread and is often required by individual doctors, by health maintenance organizations, hospitals and major health plans, such as Kaiser Foundation Health Plan. In fact, since 1975, Kaiser has refused to accept members unless they agree to mandatory arbitration as part of their contract.

A third possible patient concern is that an arbitration award may be too low. In America, especially in California, people have come to view the courts as a lottery, a chance to win millions of dollars with jury trials being the "Big Spin." The problem with this idea is that fear of exorbitant jury awards has driven up the costs of malpractice coverage and, therefore, health care costs, and has even driven some doctors, such as obstetricians, from practice entirely. Overall average punitive damage awards in all types of California civil jury trials have skyrocketed 266%, to $4.4 million since 1987. (PIA Weekly Bulletin, Jan. 1990). In most civil cases, people view such possible punitive awards as the jackpot in the jury trial lottery.

What the health care patient should realize though is that punitive damages are rarely, if ever, awarded in malpractice cases. Under California law, and the laws of many states, punitive damages can be awarded in both civil trial and arbitration, but only in cases of fraud, malice (intent to cause harm), or oppression, in order to punish criminal or outrageous conduct. In the vast majority of malpractice cases, the patient is claiming simple negligence by the doctor, and may therefore, claim only compensatory damages, i.e., damages to compensate an injured patient for medical expenses, lost wages, and pain and suffering. Moreover, a recent California initiative caps pain and

suffering awards at $250,000. Thus, in the area of medical malpractice, the payoff of the Big Spin jury trial mentality is too small to justify the cost of increased health care fees, exorbitant attorneys' fees and years of court delays.

How to Use the Forms

Finally, there are several practical aspects about the forms themselves and about office procedures to consider. As the California Supreme Court pointed out in the Madden case, "Arbitrations are now usually covered by statutory law, as they are in California. Such statutes evidence a strong public policy in favor of arbitrations-----" Id. at 706 (quoting earlier case). The statute enacted by the California legislature protects patients rights and regulates the form and content of arbitration agreements requiring (1) specific language, (2) specific type size and color (certain warnings must be in red). See Cal. Code Civ. Proc 1295.

It is important for the doctor to use a form that meets legal requirements. For example, a black and white photocopy of a form will be unenforceable in California, since it will lack the red ink required, as would a do-it-yourself form without the exact required wording. At this time, there are several sources of forms complying with California law, including H.J. Ross Company and the National Chiropractic Council, based in Tustin, California, which will sell the forms regardless of whether you are insured through its program. Chiropractors practicing in states other than California should consult an attorney as to the laws in those states regarding the legality and formal requirements of arbitration forms.

In an emergency, of course, the doctor ethically may be compelled to treat absent a signed form. In most states, though, a doctor is perfectly within his rights to insist that a non-emergency patient sign an arbitration form prior to and as a condition or treatment. In such a case, it is up to the patient to decide whether to sign or to seek treatment elsewhere.

On a patient's first visit, prior to treatment, the doctor's office assistant should give the patient the arbitration form with all the other forms to be read and filled out, such as medical history and insurance forms. Three-page NCR (no carbon required) forms should be used, each page with the required red print warning. The original should go in the patient's file, a copy should be handed to the patient, and a copy should be filed alphabetically by patient name in an office file, exclusively for arbitration forms.

What if an occasional patient has a question about the arbitration form? The office assistant should understand and be able to explain the many benefits of arbitration to the patient. A patient is likely to be satisfied with this simple fact that the doctor's malpractice insurer requires arbitration (where that is the case), especially since affordable malpractice premiums for the doctor translates into lower treatment costs for the patient. Increasingly, chiropractors and their patients look at arbitration in the same way they view malpractice insurance -- as a common, practical tool that protects and benefits both doctor and the patient if an injury should occur.

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