

**A HEALTHY ALTERNATIVE TO TRIAL:
MEDICAL MALPRACTICE ARBITRATION AGREEMENTS**

By Shannon Raye

We have all heard the old adage that a plaintiff wants his or her day in court. But is it really worth it to take a case to trial? The recent trend is for most cases to be resolved through arbitration or mediation. Very few cases go to trial, and even fewer are decided by a jury. In fact, Oregon law imposes a mandatory arbitration requirement for all lawsuits filed if the damages claimed total less than \$25,000 or \$50,000 (depending on each county's local rules).

It is also common to have arbitration clauses in contracts, which require arbitration of any dispute between the parties that may arise from the contractual relationship. So, why are so many people choosing arbitration over trial?

The arbitration process itself is similar to a trial. In an arbitration hearing, the parties can call witnesses, submit evidence and argue their cases in the same manner as at trial. The difference is that an arbitrator, or a panel of arbitrators, decides the outcome of the case instead of a judge or jury. There are advantages to arbitration, and the specific advantages depend on the circumstances of each case. In general, many parties prefer arbitration because it provides a quicker resolution than trial. Also, the proceedings and the arbitrator's decision can be kept confidential and out of the public eye.

Arbitration is becoming more common in the medical malpractice area as well. Many states have statutes allowing medical practitioners to request that their patients sign arbitration agreements. These statutes specify strict guidelines that the medical practitioner must follow in order for such an agreement to be legally binding. However, both the legislature and judiciary of many states have expressed concern over arbitration agreements between physicians and patients. They feel that in the physician-patient relationship, there is a greater risk that the patient has been coerced or required to sign the agreement in order to obtain necessary medical care.

Oregon has no such statute setting forth requirements for arbitration agreements between physicians and patients. Instead, Oregon law generally allows parties to agree to arbitrate their disputes using an arbitration agreement. In fact, Oregon law requires that all parties in any action against a health practitioner or health care facility participate in either mediation or arbitration within 270 days after the action is filed, unless the parties agree otherwise.

Even though Oregon law requires that the parties attempt to resolve their dispute by arbitration or mediation, there are still advantages to having an arbitration agreement. For example, the agreement can specify what rules should apply to the arbitration process, and what arbitration service the parties must use. Also, an arbitration agreement can be tailored to meet specific needs. For instance, the agreement can require that the proceedings remain confidential. Another benefit is that the parties can agree in advance to hire an arbitrator or panel with specialized knowledge in a particular area, such as medical procedures.

The specific language used in the agreement, and the process used to obtain the patient's signature, is particularly important in a medical malpractice arbitration agreement. Courts have invalidated arbitration agreements because the agreement was too one-sided in favor of the medical provider, the patient was required to sign the agreement as a condition to receiving medical care, or the patient was not aware of the implications of the agreement. Courts have these concerns because they do not want anyone to give up their right to a jury trial without being fully informed.

An arbitration agreement provides significant advantages to both parties over a jury trial. Quicker resolution of the case can mean less cost and stress to both parties involved. This is especially important in a medical malpractice case, which is often stressful and emotionally challenging for all parties involved.

If you would like information or assistance in using arbitration agreements in practice, or if you have questions regarding this article, please contact either Shannon Raye or Hunter Emerick.

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