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Arbitrating medical-malpractice cases

MED-MAL LITIGATORS SAY THEY ARE MORE LIKELY TO WIN PLAINTIFF AWARDS AT ARBITRATION THAN AT TRIAL

As trial lawyers, we typically avoid arbitration as a means of resolving disputes based on the reasoning that jurors are more likely to relate to our clients and more likely to find in their favor and award them more damages than an arbitrator. Although this is generally true for most of the personal-injury cases we handle, statistics show that claimants/plaintiffs in medical malpractice cases are more likely to prevail in arbitration than they are in civil jury trials.

In fact, one of the major malpractice insurance providers, CAP/MPT, in explaining to its members why it was abandoning its mandatory arbitration policy, stated that "while the result of any particular case will always depend on the medical facts, juries have awarded defense verdicts at a higher percentage rate than have arbitrators." This is consistent with the experience of approximately 30 of CAALA's most experienced medical-malpractice litigators, based on an informal survey, who reported their experience of winning in arbitration was substantially higher than at trial.

This article will address the statutory bases for arbitration in medical-malpractice cases, how such a proceeding is initiated and litigated, suggestions for presentation at the arbitration hearing, which malpractice cases may be better in arbitration than court, and a discussion of the special rules in arbitration of disputes against Kaiser.

Statutory basis for arbitration

Medical-malpractice arbitrations are governed by the same statutes as any other consumer arbitration, Code of Civil Procedure section 1280, et seq, with a few exceptions and some additional requirements.

One notable exception is set forth in Code of Civil Procedure section 1281.2, subdivision (c), which allows a court to rescind an arbitration agreement if the plaintiff/claimant is involved in a dispute that involves multiple defendants, some of whom are covered by a mandatory arbitration agreement and some of whom are not. In recognition of the fact that litigating the same issue in two forums is inefficient and could lead to conflicting results, the statute allows the court to combine the issues in a single action, usually in court.

This situation is not uncommon in medical malpractice cases where there may be several physicians and a hospital who are named defendants and some of those defendants have an arbitration agreement with the patient and some do not. Although this is the precise situation contemplated by Code of Civil Procedure section 1281.2 subdivision (c), the statute states, ". . . this subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295."

So, although it may be more judicially efficient to combine all the defendants in a single forum, this subdivision is relied upon by defendants in malpractice actions to keep that from happening. With that provision, if a defendant with an arbitration contract wants to, they can force the case against them into arbitration and split the case away from the other defendants. This is usually a bad scenario for the plaintiff because you would potentially find yourself having to litigate the case in two separate forums which will multiply the expense and leave you with the potential for conflicting results.

Code of Civil Procedure section 1295 sets forth specific requirements for arbitration contracts in medical malpractice cases. Failure to follow these requirements can give plaintiffs an avenue to rescind the agreement and file the action in court, if that is the desirable route.

Section 1295 requires that any contract which requires arbitration for disputes over medical services must make it very clear – in two places – that arbitration is the sole remedy and that the patient is giving up his/her right to a jury:

> (a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider *shall have such provision as the first article of the contract* and shall be expressed in the following language:
>
> 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 resort to 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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(b) *Immediately before the signature line* provided for the individual contracting for the medical services must appear the following in at least *10-point bold red type*:

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.

(Code Civ. Proc., § 1295.)

Since most Californians have health insurance through their employer, the requirement of a knowing waiver of the right to a trial by jury is extended to health care service plans by Health and Safety Code section 1363.1, which requires that in any contract providing health insurance through a health care service plan the disclosure in the enrollment documents "shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of section 1295 of the Code of Civil Procedure." (Health & Saf. Code, § 1363.1)

This provision has been successfully used in motions to rescind arbitration contracts with Kaiser because the required language was not included in the enrollment package, including at least one case where the enrollment was accomplished online and the language was not displayed in the required format on the website. (*Brown v Kaiser,* No. E069356, 2019 WL 2539179 (June 20, 2019) (unpublished opinion).

Litigating your arbitration case

If you have determined that you will pursue your malpractice case in arbitration, the process starts with a Demand or Petition for Arbitration, which is served on the defendant(s). To ensure that you have protected the statute of limitations as to all defendants (and potential defendants), or if you want to reserve your right to rescind the arbitration agreement, it is always advisable to file a complaint with the court as well as a Demand to Arbitrate. Having a civil action on file also provides a forum in the event there is a problem with selecting a neutral arbitrator, filing a petition to enter judgment based on the arbitration award or for other issues that may arise where the court's intervention is needed.

Selecting the neutral

The selection of the neutral arbitrator is the next important step. Depending on the terms of the arbitration contract, you will either have a single neutral arbitrator or each party will have a party arbitrator and they will select the neutral arbitrator resulting in a panel of three arbitrators.

The most efficient way to select the neutral arbitrator is to stipulate to a person with the defense attorney. The CAALA listserve is a good way to find names of good neutrals who would also be agreeable to the defense. If you are unable to agree on a neutral arbitrator, you can file a petition with the court to appoint a neutral arbitrator under Code of Civil Procedure section 1281.6 (unless the case is against Kaiser, see below).

When you file the petition, you file a list compiled jointly with the defense attorney and the judge nominates five potential arbitrators from that list. You can then agree with the defense as to one of the five nominees (or someone else). Of note, you only have five days to make the selection. If no one is selected, the court will appoint one of the five nominees as your neutral.

If the arbitration agreement requires three arbitrators, each party nominates one party arbitrator and then the two party arbitrators select the neutral. Most of the time, however, you will agree with the defense attorney and your party arbitrators on the neutral. However, as above, if there is no agreement, you can petition the court to appoint the neutral under Code of Civil Procedure section 1281.6.

Once the neutral is selected, there will be a phone conference with the neutral and a number of topics will be discussed: 1) The date for the arbitration and how many days need to be scheduled; 2) how discovery will be conducted and what procedure will be followed for discovery disputes and dispositive motions; 3) when experts will be designated and how expert discovery will be conducted; 4) any other procedural issues related to the conduct of the arbitration.

When selecting a date for the arbitration and determining the number of days that need to be set aside, it is best to err on the high side when you are having the initial conversation with the neutral arbitrator. The reason for this is that if you have selected a good neutral, the chances are that their extra days will fill up and if you do not have them reserved ahead of time, you will not have enough time to complete your arbitration. As you get closer to the actual arbitration date, you can reassess the number of days you are going to need and cancel any unneeded days. With this in mind, be sure to find out what the arbitrator's cancellation policy is and how many days ahead of time you need to cancel to avoid having to pay for the neutral's fees.

Discovery and preparation of the case

The right to discovery in arbitration is guaranteed to be the same as in cases filed in the Superior Court:

> To the extent provided in § 1283.1 depositions may be taken and discovery obtained in arbitration proceedings as follows: ¶ (a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the

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> arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with §1985) of Title 3 of Part 4, and in Title 4 (commencing with §2016.010) of Part 4, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action. . .

(Code Civ. Proc., §1283.05)

Most of the time, the parties agree to "go by Code" when it comes to deadline dates for discovery cutoff, expert designation date, dispositive motions, etc. The exception is for discovery disputes. In our experience, most neutral arbitrators encourage the parties to quickly and informally bring any disputes to the attention of the neutral so that a telephone hearing can be held to discuss the dispute and to resolve it quickly. If the dispute is one that requires briefing and a formal Separate Statement, a briefing schedule will be determined which is likely going to be much shorter than the Code provides. Briefing is typically by letter brief if both parties stipulate accordingly. This method is quite efficient and leads to a much quicker resolution of the dispute.

Many times, the parties will stipulate to an expert designation date and expert discovery deadlines that are earlier than the one provided by the Code of Civil Procedure. It is good practice to confirm any agreed-upon dates/deadlines with your arbitrator in the event of a disagreement as the case works its way to the actual arbitration.

As can be seen, the discovery process in an arbitration can be a much more informal – although still binding – process that can work very efficiently with both sides working together.

Conducting the arbitration

The best way to prepare for the actual arbitration is to treat it as a trial and prepare accordingly. One of the big differences when it comes to presenting the case to an arbitrator is that much of what one would do presenting the case to a jury can be streamlined in an arbitration as long as your opponent will agree to it.

For example, consider using video depositions, live video conference testimony of witnesses, and even stipulating to presenting certain witnesses' testimony by their depositions or expert witnesses' opinions by written reports. This is particularly effective with experts like forensic economists or life care planners. Most likely your arbitrator will be familiar with concepts like present cash value and work life expectancy. Your arbitrator may also be comfortable with certain aspects of human anatomy, or even certain medical conditions that will not require the usual expert testimony you would present to a jury to familiarize them with those concepts or conditions. An experienced arbitrator will undoubtedly be comfortable taking the pertinent facts from a witness's deposition, with your guidance and highlighting, of course.

You will want to be sure, however, of your arbitrator's level of experience and familiarity with the medical issues in your case. Having sat as a party arbitrator on many cases, the author has seen many attorneys present their case as if we on the panel had much more knowledge and familiarity than was assumed. It is always best to "under-assume" what the arbitrators will understand. For this reason, it is important to include medical diagrams in your presentation and timelines to present the pertinent facts of a case.

It is best practice to prepare a detailed and thorough arbitration brief and submit it to your arbitrator or arbitration panel several days in advance of your arbitration. Many arbitrators will provide requirements or guidelines on the submission of a brief and this is your opportunity, like an opening statement in a trial, to give your trier of fact an idea of what your evidence is going to show. Indeed, many defense attorneys give their brief short shrift and as the claimant attorney, one can gain an advantage by providing as much information and argument as possible.

You should also provide a complete evidence binder with exhibits well organized and labeled. The easier you make it for your arbitrator(s), the more smoothly your presentation will go, and the more likely you will be to prevail. With agreement from opposing counsel, any timelines you prepare for the arbitration can also be copied into your exhibit book. This level of organization will be greatly appreciated by your arbitrator.

The rules of evidence are technically still applicable in an arbitration, however, many arbitrators will apply a very relaxed set of evidentiary rules. Be prepared to object to evidence that is objectionable, however, also be prepared for those objections to be overruled with the arbitrator taking the position that any objection will go to the weight of the evidence, rather than the admissibility of it. Due to this relaxed nature, arbitrations are wonderful settings for young trial lawyers to cut their teeth, and maybe even make a few mistakes without it having a material impact on the award.

Along those same lines, the question always comes up as to whether a party should file a motion in limine if there is evidence that is particularly objectionable. These authors believe that it is worth bringing the objectionable material to the attention of the arbitrator if you have very strong grounds to keep it out. However, do keep in mind that even if the arbitrator grants your motion, he or she will have seen the evidence you wanted to keep out and it is a guessing game as to whether it will impact the arbitrator's award. In most instances, it is recommended to not file the motion in limine and put the evidence in the best light you can.

Malpractice cases better suited for arbitration

Generally speaking, the malpractice cases best suited for arbitration are those where the medicine at issue is complex. When you have complicated medical issues that involve testimony from experts in the fields of pathology, rheumatology, infectious diseases, endocrinology, or hematology/oncology, to name a few, it

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can be difficult to get your expert's opinion and the basis for their opinion broken down in such a fashion that a layperson juror can understand it, and more importantly, why it is important to your case. This is because opinions from these specialties often involve multiple treatises, studies, statistics, averages, and so on. If you have chosen the right neutral for your case (see *infra*) your arbitrator will have had some experience either on the bench or litigating medical malpractice cases and will not be phased by heady expert testimony and its overall application to your case. Matching a case well suited for arbitration with the right arbitrator is a critical task.

Another type of case well suited for arbitration is one where you are confident a jury will not like your plaintiff/claimant. An example would be cases involving claims arising out of plastic surgery and/or other elective procedures. Most jurors will be turned off by the fact that your client is pursuing a lawsuit in connection with a procedure he or she was not medically required to undergo, whereas an arbitrator is less likely to hold that against them and evaluate the case based on the evidence and the expert testimony.

Kaiser arbitrations

Without a doubt, this section could be its own article. In fact, there are annual conferences dedicated to handling just Kaiser cases. For the purposes of this article, however, we are going to focus on the logistics of initiating a Kaiser arbitration.

As in any case, you will need to prepare and serve a Demand for Arbitration. Assuming the case arises out of a Kaiser facility located in Southern California, you will need to serve your Demand on Southern California Permanente Medical Group (SCPMG), Kaiser Foundation Hospitals (KFH) and Kaiser Foundation Health Plan (KFHP). Briefly, KFHP is the plan that provides insurance- like coverage to its member/patients. KFHP has a contract with SCPMG – a partnership of Kaiser physicians – to provide physician-related care to its members at its hospitals and other facilities (i.e., KFH) around Southern California. Due to the intricate nature of the relationships between all three entities, it is important to serve all three with your Demand. Keep in mind, however, that KFHP does not provide any patient care such that when you serve KFHP with written discovery you are likely to get a litany of objections and non-responses.

After serving your Demand for Arbitration, the first contact you'll receive in response to the Demand will likely come from the Office of the Independent Administrator ("OIA"). The OIA is a third-party company that manages all of Kaiser's arbitrations. Not only does the OIA draft and manage the rules governing how Kaiser arbitrations are to be handled, but the OIA also facilitates the selection of arbitrators and two key waivers that we recommend you sign at the outset of most cases.

The OIA allows claimants to waive party arbitrators. As discussed above, arbitrations can be conducted with a single neutral or a neutral plus two party arbitrators. In most cases, we recommend to our clients that they waive their right to a party arbitrator because hiring a party arbitrator can be expensive and it can also complicate scheduling when you have to consider the schedules of two additional attorneys.

The OIA also requires Kaiser to pay for the neutral arbitrator if the claimant waives any objection to this. An arbitrator's rate for a full day can range between $5,000 and $12,000 a day. If you are in arbitration for four days, which is an average length of time for a medical malpractice case, you can expect a bill for somewhere between $20,000 and $48,000 regardless of outcome. Kaiser, while forcing its members into arbitration agreements, offers to pay for the neutral arbitrator. While these authors do not believe Kaiser is doing this out of the kindness of its "heart," we would nonetheless recommend you waive your client's objection to Kaiser paying the arbitrator's bill. Even though the arbitrators know who is paying their bill, our experience has been that most neutrals do not take that into consideration when deciding the case. In addition, it saves your client an additional $20,000-$48,000 or more in costs you would not have otherwise needed to incur.

Once you've signed these two waivers and sent them back to the OIA, your next goal will be to select a neutral arbitrator. This can be accomplished in one of two ways: (1) through a rank-and-strike process facilitated by the OIA, or (2) making a mutually agreeable selection with defense counsel. These authors recommend the latter for a few reasons. The list of possible arbitrators the OIA sends out on any given case is largely random and not specific to the type of case you're handling. Moreover, you rarely end up getting assigned your top two picks. Further, the neutral arbitrator you and opposing counsel select does not need to be from the list the OIA sends out. It is for these reasons you are almost always better off selecting a mutually agreeable neutral.

Once you have selected your neutral and notified the OIA of your selection, the arbitration can proceed in its usual course as described above.

Conclusion

It is important to select the right malpractice case for arbitration and match it to the right arbitrator. Unlike other areas of our practices, arbitration can be a desirable route for litigating and resolving medical malpractice cases when these two choices are made correctly.

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