

Legal Q/A

Bruce E. Wood, Esquire

Q: *In an earlier column, you discussed arbitration clauses in employment contracts. What about arbitration of malpractice claims? Could I require my patients to resort to arbitration for any malpractice claim against me? I'm worried about the possibility of a multi-million dollar verdict by a runaway jury.*

A: Yes, but the requirement of arbitration, which takes away the patient's right to the court system and more importantly the constitutional right to a jury trial, must be set forth in a valid written agreement signed by the patient.

Agreements to arbitrate claims are governed by the Federal Arbitration Act, a law enacted to encourage the use of arbitration as a forum for dispute resolution. The Act affords the parties great flexibility in designing their own rules of procedure for resolving claims, including the permissible kinds of damages or other relief that can be awarded to a party.

For example, the arbitration agreement can include provisions for (1) location of the arbitration tribunal, (2) the number of arbitrators who will decide the case (don't get carried away with too many arbitrators – the parties must pay for them, unlike

to resort to arbitration for any malpractice claims? The agreement to arbitrate must be knowingly and voluntarily entered into. You cannot sneak it into the standard patient consent form hidden among the fine print. The arbitration provisions should be conspicuous and written in plain English, and preferably initialed by the patient so that there is evidence that agreement to arbitrate was a conscious decision on the part of the patient. It should be explained to the patient that under the arbitration agreement the patient is giving up certain legal rights, including the right to go to court or to seek damages for pain and suffering in the event of a malpractice claim.

Due to the novelty of these issues,

physicians should consult with their malpractice insurance carrier before attempting to implement the use of an arbitration agreement form with patients to make sure that agreement will not conflict with or violate the terms of the malpractice policy.

Arbitration agreements between physicians and patients are not, and may never be, commonplace, but as jury awards and the cost of malpractice insurance continue to escalate they may start to receive greater consideration.

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judges who work for free), (3) what qualifications must be possessed by the arbitrators (consider whether licensed physicians or retired physicians should decide malpractice cases), and (4) the kinds of relief that may be granted to the prevailing party.

A major focus of the current debate over tort reform involves whether injured parties should have the right to recover non-economic damages, i.e., pain and suffering (note: State Senator John DeFrancisco recently sponsored a bill that would allow other family members for the first time to recover non-economic damages in wrongful death cases). It is not uncommon for a jury to award damages for pain and suffering that far exceed the actual damages for unreimbursed medical bills, lost wages and other direct economic damages.

An arbitration agreement could specifically prohibit any award of non-economic damages by the arbitration tribunal. It could also exclude punitive damages. And the agreement can provide for an award of attorneys' fees to the successive party in the arbitration, something nearly impossible to obtain in a court case involving medical malpractice.

How do you legally require a patient