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Alternative Dispute Resolution

Arbitrating a Medical Malpractice Case in Pa.

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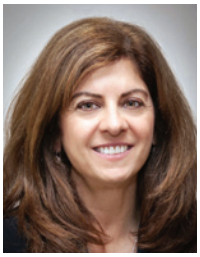
Special to the Legal

Increasingly, arbitrations have become a viable and sometimes preferred alternative for both defendants and plaintiffs in medical malpractice cases. An arbitration can, based on case particulars, offer the best strategy for final resolution of a medical malpractice case. Understanding the process in detail is essential to understanding its best use and application.

Arbitrations are a form of alternative dispute resolution outside the court system. In this form of ADR, the participating parties submit the case to an unbiased third party, who has been selected by agreement of the parties, to review the submitted evidence, hear testimony and make rulings on objections and motions. Ultimately, the intended goal of an arbitration is to have this neutral, acting as the judge and the finder of fact, determine whether the defendant is liable to the plaintiff, and if found liable, determine the amount of the award. If there are a number of defendants, the arbitrator will be called upon to apportion liability.

While there is not one defined case element that can be identified as the reason for placing a matter in arbitration, some factors that can make a case appropriate in a medical malpractice action are: the complexity of the medical facts; causation issues in a matter with good liability; liability issues in a matter with good causation; venue; length of the anticipated trial, potential appellate issues and anticipated expenses.



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In most and likely all arbitrations involving allegations of medical malpractice, the parties have negotiated the parameters of the process. High-low binding arbitrations have become the normal manner for this type of ADR process, and the parties negotiate the monetary payment to be made based on the arbitrator's findings. This technique (binding high-low arbitration) precludes the possibility of appeals (all parties would agree, however, that an arbitrator's award could only be set aside for grounds and procedures provided in 42 Pa. C.S. §7341-7342 for common law arbitrations) and delay damages, if those parameters are negotiated as part of the agreement.

Per the guidebook for the National Practitioner Data Bank, a high-low agreement is considered a contractual agreement between a plaintiff and a defendant's insurer. The agreement "defines the parameters of a payment the plaintiff may receive after a trial or arbitration proceeding." The guidebook explains that:

"A payment made at the low end of a high-low agreement that is in place prior to a verdict or an arbitration decision would not be reportable to the NPDB only if the fact finder rules in favor of the defendant and assigns no liability to the defendant practitioner. In this case, the payment is not being made for the benefit of the practitioner in settlement of a medical malpractice claim. Rather, it is being made pursuant to an independent contract between the defendant's insurer

and the plaintiff. The benefit to the insurer is the limitation on its liability, even if the plaintiff wins at trial and is awarded a higher amount. The benefit to the plaintiff is a guaranteed payment, even if there is no finding of liability against the practitioner."

"In order for the low-end payment to be exempted from the reporting requirements," the guidebook continues, "the fact finder must have made a determination regarding liability at the trial or arbitration proceeding."

Choosing the neutral can be a complicated process. The obvious ultimate goal is to present the evidence to an arbitrator who can put aside his or her party affiliation and decide the case based on the law and evidence. Current choices include experienced medical malpractice plaintiffs and defense attorneys whom the parties and their insurers have agreed to retain to hear the case. In cases involving MCARE coverage, the neutral also will be approved by MCARE. Conflict checks are performed by the neutral and disclosures of any potential conflicts should be provided so that all parties can make informed decisions about their possible choices. Other arbitrator choices are experienced retired judges and there are also formal arbitration corporations that specialize in providing numerous choices of arbitrators who have diverse experience and backgrounds. Cost may be a factor in choosing a neutral, as the arbitration costs are typically evenly split among the participating parties.

The arbitration agreement is a formal document that essentially establishes the agreed-to binding rules of the arbitration. It is important that all of the criteria governing the arbitration be clearly stated in the agreement. The proposed agreement is typically drafted and the parties have an opportunity to review the document and discuss any proposed revisions. The agreement should be signed by the attorneys and insurers. Examples of how payment will be made should be included in this formal agreement in order to prevent any possibility of later confusion. Some considerations for inclusion in the agreement are:

- Ensuring that the arbitrator is not aware of the existence of the terms of the high-low agreement.
- The high-low agreement will be binding and final with no possibility of appeal.
- Specific examples of how the high and low parameters will be applied depending on the arbitrator's findings and award.
- The fact that no delay damages, pre- or post-judgment interest or any costs will be paid to the plaintiff under any circumstances.
- An agreement that the plaintiff will be solely responsible to pay back any liens.
- The timing of advising the other parties of the experts or witnesses who will be called; alternatively, parties may agree to arbitrate without calling experts and rather rely on expert reports.
- What the parties have agreed to in terms of the arbitration submission and the evidence, arguments and expert opinions that the arbitrator is permitted to consider.
- The manner by which the arbitrator will receive evidence and applications of the Pennsylvania Rules of Evidence.
- The parameters of any release to be executed by the plaintiff once the award is provided.
- The fact that the case will ultimately be discontinued by the plaintiff.

As prescribed by the arbitration agreement, evidence is commonly presented through live witness testimony, videotaped depositions, transcribed depositions, live experts or expert reports of experts identified and exchanged during the course of the case, experts' curriculum vitae, discovery exchanged in the case and medical records, subject to the Pennsylvania Rules of Evidence. Arbitrators thoroughly review the material submitted by the parties before the arbitration. Some arbitrators will also ask questions to clarify points made during the witnesses' testimony or will ask for explanations of legal arguments made by counsel during closing arguments. Depending on the complexity of the case, an arbitrator can request additional submissions, including legal analysis of issues raised during the arbitration, providing the parties time to prepare additional briefs after the arbitration is concluded. The parties can agree to the form of the award letter, and some arbitrators will outline their findings on each issue they were asked to consider, and explain the basis for their decision.

The use of the binding high-low ADR process is becoming more and more attractive to plaintiffs and defendants in medical malpractice cases. There are numerous arbitrators to choose from and new arbitrators are emerging as more parties and insurance companies search for the perfect neutral to hear their case. Considering arbitration before costs are incurred to prepare for trial is always a good strategy. Unfortunately, there are still some attorneys who believe that they will get a better deal if they wait until the eve of trial to broach the subject. This is not a proven fact for ADR negotiations, and insurance carriers are sophisticated in the ongoing evaluation process during the lifetime of a case. Understanding the strengths and weaknesses of a case well before the trial date and keeping an open line of communication with opposing counsel can help avoid such last-minute negotiations and save each party the unnecessary expense of trial preparation, jury selection and even starting a trial. A high-low binding arbitration in medical malpractice cases is an increasingly utilized alternative to a jury trial, and an effective way to resolve a disputed claim, regardless of the number of parties involved.

Post & Schell associate Barri Alison Orlow contributed to this article. •