Arbitrating a Medical Malpractice Claim

Mary A. Bedikian

Michigan State University College of Law, bedik@law.msu.edu

Follow this and additional works at: http://digitalcommons.law.msu.edu/facpubs

Part of the Dispute Resolution and Arbitration Commons

Recommended Citation

Arbitrating a Medical Malpractice Claim

By Mary Aslanian-Bedikian

Introduction

In 1975, the Michigan Legislature enacted Public Acts 140 and 141 (MCLA 600.5001 et seq., MSA 27A-5001 et seq.), also known as the Hood-McNeely-Geake Malpractice Arbitration Act of 1975. The Michigan Medical Arbitration Statute, as it is commonly called, became effective January 1, 1976. Since the adoption of this arbitration mode for dealing with medical malpractice disputes, at least 26 other states have addressed the problems inherent in medical malpractice.

One provision in this law is designed to facilitate the use of arbitration to resolve disputes arising from health care furnished by a physician, hospital, or other "health care provider." The Act requires insured hospitals, HMO clinics, and sanatoria to offer arbitration to inpatients, outpatients and emergency patients (after treatment).

The agreement may not be revoked by the health care provider once the patient has assented to its terms. However, the patient may revoke within 60 days after discharge by notification in writing.

The statute provides that such arbitration will be administered by the American Arbitration Association (AAA) or "another entity organized to arbitrate disputes pursuant to this chapter." It also provides an optional arbitration mechanism for patients treated or examined in the office of a medical or other health care provider.

Arbitration is elective; the Act does not compel its use. Patients who believe they have a ripe claim for medical malpractice may seek arbitration or sue in court.

A patient's election to arbitrate must be confirmed by an Agreement to Arbitrate, executed before health care is provided, or in the case of emergency care, afterwards.

Such arbitration agreements cover the hospital, its employees, and those independent health care providers who have not agreed to arbitrate. (Kukowski v Piskin, infra). They do not cover treatment rendered by independent staff personnel who have not executed an Agreement to Arbitrate with the hospital, nor do they cover treatment rendered by health care providers outside the hospital.

The law requires that the patient be given a Patient Information Booklet at the time the arbitration option is offered. This booklet, which includes a Spanish translation, can be secured through the Michigan Hospital Association or the American Arbitration Association.

Determinations of medical negligence and concomitant liability are made by an impartial three-member panel. The panel is mutually selected by the parties, and is composed of an attorney, a physician or hospital administrator (if the only named respondent is a hospital) or a licensee in another health care profession, and a public member.

A 1980 amendment to the statute established new procedures which included substitution of a dentist for a physician in cases involving alleged dental malpractice.

Arbitration as an alternative for resolution of controversies and disputes has long been heralded as expedient, efficient and fair. More than 40 states have now embraced some version of the Uniform Arbitration Act, which provides that agreements to arbitrate future disputes are binding, irrevocable and enforceable.

With increasing reliance on arbitration as an alternative to litigation, participants need sufficient expertise to maximize its benefits. Experience suggests that the dynamics of arbitration, particularly those applicable in the medical malpractice sector, are little understood.

This article does not discuss the advantages or criticisms of arbitration; rather it is intended to demonstrate how the process works and to explain its principle features.

Case Initiation

A case is initiated by filing a Demand for Arbitration. Unlike formal case pleading requirements which must be met before court jurisdiction can properly attach, a Demand for Arbitration need only identify in general terms the nature of the alleged malpractice and the remedy sought. An example:

NATURE OF DISPUTE: Medical malpractice occurred in that Dr.
John Smith used sutures in knee surgery which were supposed to dissolve but did not, causing chronic infection and permanent damage to Plaintiff's left knee, and pain suffering past, present, and future.

CLAIM OR RELIEF SOUGHT: (amount, if any) Money damages to compensate claimant for pain and suffering and permanent injury to left knee.

The names of all respondents must be set forth on the Demand. If agents of the respondent hospital(s) are unknown, fictitious names will satisfy the threshold statutory requirements.

Each respondent must be served with a copy of the Demand. This serves as a notice requirement similar to the general court rule requirement for litigated cases.

A copy of the Agreement to Arbitrate executed by the patient and the hospital must accompany the Demand. If the Agreement is not readily available and its lack will substantially delay the initiation of the proceedings, the patient can complete an Affidavit asserting that an Agreement to Arbitrate has in fact been executed. The Affidavit is deemed an appropriate substitute for the Agreement to Arbitrate and thus permits the American Arbitration Association to properly invoke its jurisdiction.

Prior to oral hearings the Agreement to Arbitrate must be made available to the administrative staff of the AAA. This Agreement plus other relevant documents and materials will be presented to the Board of Arbitrators at the pre-hearing conference.

Disputes between parties who did not sign an Agreement to Arbitrate may be resolved in arbitration if all parties execute and file a document called a Submission Agreement. This Agreement must identify the issues and the relief sought. It serves as the arbitrators' authority to render a final and binding determination.

The final manner in which a case may be initiated in arbitration is pursuant to court order. Courts have authority to direct cases to arbitration in the interests of speed and justice. Normally this authority is exercised when a party claims that the dispute is not arbitrable but is unable to demonstrate application of any of the bases set forth in Michigan General Court Rule 116 relative to accelerated judgments. At least five percent of the arbitration cases presently pending or previously processed are the result of a court mandate requiring the parties to exhaust their legal remedies vis-a-vis arbitration.

Appointment of the Arbitration Panel

Appointment of the panel is one of the most important aspects of the arbitration process. As previously indicated, the arbitration panel must consist of an attorney, (designated as the chair), a public member, and a hospital administrator or "other health provider."

Within 20 days from the date AAA receives the answer(s) to the Demand for Arbitration and requests for joinder, the AAA simultaneously mails to each party an identical list of five arbitrator candidates in each of the three categories, showing brief biographical notations concerning each candidate.

The parties are free to peremptorily strike all unacceptable names. They then rate the rest in numerical order of preference.

To provide procedural safeguards, the Legislation provides a voir dire process which permits a party to submit reasonable questions to an arbitrator candidate within ten days of receiving the candidate's name. Questions must be propounded through the Association, and the candidate must respond within five days of receiving the question(s).

The Association is required to furnish copies of the answers to the party submitting the questions, plus the questions and answers to the other parties.

After the parties return the lists the AAA invites the arbitrators to serve, in accordance with the designated order of mutual preference. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to serve, or if for any other reason an appointment cannot be made from the submitted lists, a second list of persons in the particular category will be submitted.

If the second list fails to yield agreement the AAA will make the appointment from among other members of the panel without submitting additional lists.

The Association's arbitrator appointment is subject to challenge by any party for cause. In addition to the usual grounds, a challenge may be predicated on facts which affect or appear to affect a panelist's objectivity. Requests to strike an arbitrator for cause are decided by the Regional Director.

Once appointed, arbitrators are required to subscribe to an oath of impartiality. An arbitrator is required to disclose to the AAA under oath any circumstances which might affect his/her impartiality, including any bias, financial or personal interest in the result of the arbitration, and any past and present relationships with any of the parties or their counsel. The AAA communicates this disclosure to all parties.

The arbitrator will be dismissed unless all parties waive any presumption of bias by reason of the disclosure. If all parties so waive the presumption of

Mary Aslanian-Bedikian is the Michigan Regional Director of the American Arbitration Association. She is a member of the State Bar of Michigan, Labor Law Section — State Bar of Michigan Committee on Arbitration and Alternate Methods of Dispute Resolution, American Bar Association, Industrial Relations Research Association, Society of Professionals in Dispute Resolution, National Association of Women Lawyers and Women Lawyers Association of Michigan — Oakland County Branch. She is a former instructor at the Detroit College of Law, where she was graduated from in 1980. Ms. Bedikian has lectured and written extensively on the use of alternate third-party dispute resolution systems.
bias, the AAA will thereafter determine, in its sole discretion, whether the arbitrator should nevertheless be disqualified. AAA then informs the parties of its decision.

AAA is governed in this decision primarily by the holding in Commonwealth Coatings Corp v Continental Casualty Co, 393 US 145, 149 (1968), where the Supreme Court said:

"The rule of disclosure and canon of ethics rests on the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias." (emphasis supplied.)

The decision of the AAA is deemed conclusive.

Pre-Hearing and Discovery Concerns

The attorney on the panel is designated by law to act as the chair, with jurisdiction over all pre-hearing procedures. Pre-hearing procedures may be invoked during the discovery phase. The statute requires that discovery must commence no later than 20 days after all parties have received a copy of the Demand, and must be completed within six months from that date.

According to the statute, discovery must be conducted as if the matter were in court. This is fairly unusual, as a general rule there is no discovery in arbitration proceedings.

Because of the significant distinction between arbitration proceedings in general and medical arbitration proceedings, it is of paramount importance for participants involved in the latter to understand that discovery, as defined and limited by the Michigan General Court Rules and the Federal Rules of Civil Procedure, is available to any party.

An extension of time for completion of discovery is granted only upon a showing of good cause. Prompt and reasonable requests for extensions are frowned upon and are further discouraged by the language of the law. Extensions cannot prejudice the non-moving party.

Discovery concerns have taken many forms. The issues range from a request for additional time for discovery to inability to obtain medical records or the names of opposing counsel’s expert witnesses.

Pursuant to Step 4 of the Rules, and further sanctioned by statute, parties are entitled to disclosure of the name of any expert witness to be called, and they have the right to question the witness. Discovery of expert witnesses can be obtained by the interrogatory procedure set forth in rule 26(B)(4)(a) of the Federal Rules of Civil Procedure.

A party may disclose without request, or shall disclose upon request, the name of each expert that party expects to call at the hearings, the subject matter on which the expert will testify, the substance of facts and opinions to which the expert will testify, and a summary of the grounds for each opinion.

If a party exercises the discovery procedure described here, the request must be made before the date on which an expert is noted for deposition. Other discovery is commenced under prevailing Michigan civil practice rules.

Any further discovery of the expert by any other party, by deposition or otherwise, obligates that party to pay the expert for time and expenses in a reasonable amount as determined by the arbitrators.

On application of a party the arbitration panel or the attorney chair has authority to order the deposition of a witness to be taken for use as evidence and not for discovery. If the witness cannot be compelled to attend the hearing, or if exceptional circumstances prevail, then the deposition must be allowed, in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at the hearing.

This procedure is currently provided for in Michigan General Court Rule 506, which permits the introduction of de bene esse depositions.

Pre-Hearing Conference to Establish Ground Rules

The pre-hearing conference is often misconstrued as a meeting between the parties and the arbitrators for the purpose of stipulating to uncontested facts and eliminating duplicative material.

The pre-hearing conference in arbitration is conducted between the arbitrators and a full-time AAA employee, called the tribunal administrator, who serves as an intermediary between the parties and the arbitrator.

The tribunal administrator responds to the arbitrators’ procedural questions and conducts a briefing prior to the arbitration hearing. This briefing session covers the rules, and highlights the salient points of the Michigan Medical Arbitration Statute.

The administrator strives to ensure that the rules and the statutory requirements are adhered to. To fully protect the rights of the disputants, no direct communication occurs between the parties and the arbitrators during the pendency of the case.

If the issues the parties have raised before the hearing are “outcome-determinative,” a different type of conference will be arranged between the attorneys of record, and the attorney chair and his/her sidebar panelists.

An example: In a recent case the respondents raised the defense that the statute of limitations had expired. Since this could preclude the plaintiff from either arbitrating or litigating the claim, a procedural hearing was convened for the purpose of determining the validity of the respondent’s defense.

Exchange of Relevant Information

To expedite arbitration proceedings it is imperative that the parties exchange whatever relevant information they possess. When difficulties arise and the arbitrators are compelled to intercede, the arbitrators typically advise the parties that they will be required to cooperate with each other in permitting, conducting, and completing the exchange of information concerning each others’ witnesses and documents.

The arbitrators have the right to subpoena documents. As an inducement to cooperate, the arbitrators generally make it clear to the parties that questions as to whether something falls within the rubric of “permissibility” will be resolved in favor of production rather than concealment. This rule is fairly common and applies to most arbitration proceedings held in Michigan.

Very few problems of this type have actually surfaced since the introduction of the medical arbitration system in Michigan.

To further expedite the hearing it is advisable for the parties to prepare written biographical summaries concerning each witness who will be required to submit testimony. These summaries should contain the normal introductory questions and responses...
pertinent to the identity of the witness, educational qualifications, work history and other non-contestable details. Written summaries are particularly helpful where a large number of witnesses are to be called.

Whether an expert’s qualifications are sufficient to classify him/her as an “expert” may be a contestable issue. In such a case the advantage of the written summary will obviously be diluted. Written summaries should nevertheless be used where appropriate.

**Self-Authentication of Documents**

The Michigan Medical Arbitration Statute mandates that the arbitration proceeding be conducted in accordance with certain Federal Rules of Civil Procedure, the Michigan Rules of Evidence and, in instances where parallel provisions of evidentiary rules do not exist, the Federal Rules of Evidence. Federal Rules of Evidence 901 (A) and B (1)-(9) are identical to the Michigan Rules of Evidence with respect to the requirement of authentication or identification of documents as a condition precedent to admissibility.

The General Provisions establish that the authentication or identification requirement is satisfied “by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

Section (B) of Rule 901 provides a number of examples where the requirements of the rules come into play. Sections relevant to arbitration proceedings include the following:

1. **Testimony of Witness with Knowledge.** Testimony that a matter is what it is claimed to be.
2. **Non-expert Opinion on Handwriting.** Non-expert opinion as to the genuineness of the handwriting, based upon familiarity not acquired for purpose of the litigation.
3. **Distinctive Characteristics and the Like.** Appearance, content, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.
4. **Public Records or Reports.** Evidence that a writing authorized by law to be recorded or filed, and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Legal Research & Analysis Corporation takes great pride, and care, in the preparation of memoranda. When an attorney contacts us for assistance, we, after a no-charge discussion of the issues, submit an estimated budget of the project. Once the budget is approved, we assign an attorney with matching experience to the project and begin thorough research of all relevant cases and statutory law. Often we use computer techniques to access one of the world’s largest legal libraries cutting research time to a fraction of traditional methods.

In all complex cases LR&A attorneys hold a pre-research planning conference. When the basic data is amassed, the primary researcher assigned to the project writes a first draft memorandum which is reviewed by the LR&A staff. This enables us to apply our collective experience to legal problems, insuring that every aspect of the case has been considered and explored.

As attorneys, we fully realize that internal memoranda require absolute objectivity and thoroughness. LR&A, as a specialized legal research organization, has earned a reputation for solid, high quality memoranda work. If you need a complete analysis of a legal problem, call us for a no-charge discussion of your requirements.

For a package of information about all of Legal Research & Analysis Corporation’s services, write or call. There is never any charge for pre-research consultation.

Spend your time more profitably. Use LR&A as your research source.
A significant saving in time and cost can be made if the arbitration panel admits documents which are self-identifying. This is consistent with the presumption that documents which purport to be what they are offered into evidence as are in fact such documents, and will be received without further authentication.

Any party to the proceeding who has a valid objection to the introduction of the evidence, or who questions the authentication of the documents or materials entered into evidence, can interpose an objection.

Use of Depositions and Affidavits

Section 5049 (1) of Michigan Compiled Laws Annotated states that "a party is entitled to disclosure of the names of any expert witnesses who will be called at the arbitration and may depose the witness." Though expert witness testimony is not required under the arbitration statute, expert testimony can be admitted under the same circumstances as in a civil trial, and thus be subject to cross-examination. In the interest of time it is suggested that expert witness testimony be presented in writing. Relevant excerpts from the deposition can then be introduced into the oral hearing subject to the opponents' right to introduce other parts of the deposition as unsuppressive to the nature of a question during examination.

Should the need arise, cross-examination could be conducted in person. The author recognizes that the manner in which testimony is offered is often as crucial to the parties as the substance. This does not mean that important testimony should be limited to and reserved for written submissions; the suggestion is, rather, that if back-up expert witnesses or secondary witnesses are relied upon, their testimony can usually be submitted through affidavits or depositions, preserving the opponent's right to cross-examination if necessary.

Authoritative Treatises and Texts

Pursuant to Section 5049 (5) of the Michigan Medical Arbitration Statute, authoritative published works on the general and specific subjects in issue may be admitted and argued from, after notice to all parties.

In medical malpractice cases a substantial amount of the testimony adduced at the oral hearing is furnished by experts. Whereas Michigan Rule of Evidence 703 may require facts or data relied upon by experts in forming opinions or inferences to be admitted in evidence, the parallel citation in the Federal Rules of Evidence imposes no such prerequisite. Facts or data utilized by experts need not be admissible in evidence.

The Federal Rules of Evidence thus permit a more relaxed evidentiary proceeding.

After the adducement of opinions or inferences by the experts, the respondent in the medical case may introduce learned treatises for the purpose of impeachment. Pursuant to Rule 803 (18) of the Federal Rules of Evidence, learned treatises can be used both for cross-examination and direct examination.

Courts typically allow expert testimony when the issues presented by the case are such that the opinions, inferences or conclusions of an expert will assist the jury in its deliberations. Arbitrators will likewise allow expert testimony if it can be determined that such opinions, inferences and conclusions will render assistance to the arbitration panel in determining ultimate issues of fact.

However, if the plaintiff is attempting to carve out a res ipsa loquitur case, negligence is to be established by inference from the circumstances of the case. Expert testimony is not required. Thus there will be no use of authoritative treatises and texts.

Fewer than five percent of cases processed in the arbitration forum have relied upon res ipsa loquitur theories of negligence.

Briefing Session Pertinent to Pre-Hearing Administrative Practices, Procedures and Statutory Requirements

The tribunal administrator conducts a briefing session with the panel of arbitrators immediately before the opening of the oral hearing. The principal purpose is to familiarize the panel with the issues framed for arbitral determination, and to review the documents filed in the case.

The Evidentiary Hearing

The evidentiary hearing aspect of the proceeding is considered the most important. Arbitration hearings are private, attended by the arbitrators, parties, legal representatives and key witnesses. Unlike court proceedings, the admission of visitors not intimately connected with or affected by the proceedings is contingent upon the mutual consent of the parties or a directive of a majority of the arbitrators.

In the majority of cases the hearing will be held in the general locale where the occurrence complained of occurred, unless all parties agree otherwise. The AAA provides hearing room facilities at no cost to the participants. The arbitrators fix the time and place for each hearing. (Rule #9 of the Michigan Medical Arbitration Rules).

Once the oral hearing commences, proper hearing room decorum is required. Unsolicited comments should not be proffered by advocates. Objections to the nature of a question during the witness examination phase should be directed to the arbitration panel, not to the attorney conducting the examination.

Recesses are generally granted as a matter of course. If a party believes that a witness's testimony will be lengthy, then clearly a recess will be in order. Marathon sessions are not useful; they are strongly discouraged.

The initial document reviewed by the arbitration panel is the Stipulation of Facts. If the case does not involve a threshold procedural challenge to the execution of the Agreement to Arbitrate, the stipulation should be accompanied by a copy of the Agreement. Additionally, the issue or issues to be decided by the panel are subject to stipulation.

The narrowing down of issues reduces the amount of time required in the oral hearing phase.

If the Stipulation is in writing, it should be introduced into the arbitration record as such and treated as a joint exhibit. If the Stipulation is oral, then each party need only signify that the contents of the Stipulation are accurate and require no further explication.

The customary order of proceeding in the evidentiary hearing is as follows:

1. Opening statement by the initiating party (claimant), followed by
401(k) created a new dimension in benefit plans. It also created some new problems in record keeping.

Comerica Bank, with a commitment to leadership in 401(k) plans, has recently invested in a system designed to meet the complicated record keeping requirements of these plans, as well as other defined contribution plans. It's new. The newest, most efficient system yet devised. And it can save you time, trouble and calculator tape.

All you do is provide us with tape input or hard copy. We do the rest. Track employer and/or employee contributions. Calculate and allocate earnings. Prepare sponsor's reports. Perform qualification testing. All the activities connected with 401(k) plans. We can provide a variety of investment vehicles to meet the needs of your plan. Let us help you design your program. You'll get the comprehensive investment management and participant reporting required.

Call Terry Keating, First Vice President, Comerica Bank-Detroit. (313) 222-3898. Or write for our brochure, 211 West Fort Street, Detroit, Michigan 48226.

That's why you need us.

Comerica Bank
2. Presentation of evidence, witnesses and arguments by the claimant.

3. Cross-examination by the respondent.

4. Presentation of evidence, witnesses and arguments by the respondent.

5. Cross-examination by the claimant.

6. Summation by both parties, usually following the same order as the opening statement.

The arbitrators may vary this order on their own initiative or at a party's request. Variance of the procedure normally will affect the burden of proof.

At the evidentiary hearing arbitrators generally require adherence to the ground rules articulated by the tribunal administrator at the pre-hearing. Repetitive or cumulative direct evidence is not tolerated; neither are repetitive or argumentative cross-examination.

In the event of excessive replication or argumentation, the arbitrators may request that the parties carry forth the argument in a post-hearing brief.

Arbitrators have been encouraged to ask questions whenever the evidence is not clear-cut. Although occasionally the interjection of too many questions can affect the free flow of the proceedings, it is better for the arbitrators to ask questions about unclear issues and evidentiary matters than to leave them unclear. Attorneys representing the parties should respond with brevity to the questions posed, not deliver a soliloquy.

It should be noted that the majority of oral hearings in a medical malpractice tribunal are concluded within two full days.

One of the key factors in preventing excessive hearing time in medical malpractice arbitration is the inclusion of an expert on the panel. The expert's participation results in a decrease in the amount of time required to educate the panel on the nuances of medicine, and the standard of care embraced within the profession and the hospital.

The most critical issue raised in oral hearings in recent years has been what is commonly referred to as "arbitrability." Simply stated, the respondent or the claimant may raise the issue of jurisdiction directly with the panel.

Although ordinarily this objection would be interposed by the respondent, many claimants, on their attorneys' advice, are filing demands in arbitration primarily to protect their rights while they contest the authority of the panel to hear and decide the dispute.

Objections to jurisdiction can be procedural or substantive. Procedural objections arise when a party believes that the time limits for filing the Demand for Arbitration have not been complied with, or certain prerequisites have not been sufficiently exhausted to justify invoking the jurisdiction of the arbitration panel.

Procedural arbitrability in a medical malpractice case is typically raised by the respondent in the form of a GCR § 116 objection, i.e., statute of limitations, fraud, release, etc.

Substantive arbitrability directly affects the merits of the dispute. This objection is rarely raised in medical malpractice cases, since medical malpractice claims are appropriate for resolution by arbitration through the statute.

The question of arbitrability should be raised before the panel at the beginning of the proceeding. Bifurcated proceedings will generally follow. The panel will review the documentation and decide on the validity of the procedural objection.

The panel can then enter what is called an interlocutory award. If the panel sustains the objection its authority is terminated. If the objection is not deemed meritorious, the panel will direct that the parties proceed with the merits of the case. The parties may subsequently proceed based on the order of presentation outlined above.

After the admission of necessary documentary evidence, the parties may proceed to oral argument. Each representative's responsibility in this phase is to briefly summarize the evidence and then demonstrate how the evidence leads to the conclusion the panel is asked to embrace.

As in litigation, oral closing arguments in arbitration must be clear and concise. If this part of the argumentation is going to be extensive, it is preferable to submit a summary statement and orally highlight the significant points of the case.

Post-Hearing Schedule

At the conclusion of the oral hearing, the parties have the right to request that closure not occur until after the filing of post-hearing briefs. If the parties agree among themselves to a genuine need to file such briefs, the arbitration panel will generally acquiesce. The issues in medical malpractice cases are typically complex enough, and the proofs are sufficiently cumbersome, to warrant a summary of the type fulfilled by a brief.

The parties should not use this opportunity to engage in hyperbole and invective. The filing of the brief signifies a need to satisfy the arbitrators' curiosity as to the genuine facts in dispute and the law as applied to the facts. This need can be met by short and persuasive statements. Since arbitrators do not get paid for "hearing study time," lengthy briefs are not encouraged.

If a party later requires an extension for filing a brief, it is that party's responsibility to contact the opponent to secure the necessary consent, and then to notify the tribunal administrator of the situation. The administrator will then try to secure consent from the members of the panel.

It is better for the attorney who needs the extension to articulate the basis for it; otherwise the panel may construe the proposed delay as "foot-drugging" and assign less weight to that party's post-hearing brief.

Occasionally, either before or after the filing of post-hearing briefs, a party to a medical malpractice case may request re-opening of the oral hearing, for one of two possible reasons: Discovery of new and material evidence or discovery of a factual mistake.

In the former instance, the issue of whether or not re-opening is justified must be placed before the panel. Pursuant to § 24 of the Michigan Medical Arbitration Rules, only the panel can determine the appropriateness of the request. An opportunity to solicit the comments and reactions of the opponent will be provided.

If the oral hearing is re-opened for this limited purpose, it should be properly utilized. Failure to present "new" evidence may prejudice a party's claim or defense. Re-openings are treated seriously by arbitration panels; a frivolous request will not be permitted.

The second reason, discovery of factual error, does not require elaborate
Once the opinion and award are rendered, the American Arbitration Association is responsible for their distribution. The arbitrators have no further concern with the case, nor do they become involved in any court proceedings which may follow concerning the arbitration.

The Code of Professional Responsibility, under which all arbitrators work, indicates that arbitrators have a continuing obligation to keep confidential any information acquired about the parties during the arbitration.

From time to time, one of the parties will request clarification of the award. Since an arbitration panel is functus officio after it renders an award, the arbitrators' authority has expired by its own terms. This authority cannot be reinstated unless all parties to the proceeding agree, or unless otherwise mandated by court order.

In most cases the parties resolve their own differences once they learn that the panel cannot reconsider its award, even in a very limited way.

Conclusion

The comments in this article are primarily designed to enhance the readers’ knowledge of the arbitration process. Many of the attorneys with whom the American Arbitration Association deals will have some grasp of arbitral jurisprudence, but medical malpractice arbitration is not like any other type of arbitration proceeding.

Medical malpractice arbitration is conducted pursuant to a complex state law which expressly incorporates the Michigan General Court Rules and the Federal Rules of Civil Procedure. Most arbitration proceedings are informal and relaxed; medical arbitration proceedings are more rigid and structured. This rigidity is purposeful; it preserves the elements of due process and fair play, and enables the parties to use a more expeditious process for the resolution of claims.

The benefits of arbitration are enhanced in large measure by the participants’ understanding and appreciation of the unique differences between arbitration and litigation.

As to be expected with any new program, the medical malpractice arbitration enabling legislation is presently being challenged along two lines: Contractual and constitutional. In Kukowski v Piskin, ___ Mich ___, NW2nd ___, (1982) (#56532 re’d 12/8/82), the Michigan Supreme Court held that the arbitration agreements are unambiguous and extend to independent staff doctors who provide surgical or medical care in the hospitals.

Issues of deprivation of due process, bias of the physician panelist and contract of adhesion have been raised in Morris v Metriyakool, 107 Mich App 110; 309 NW2nd 910 (1981) and Jackson v Detroit Memorial, 110 Mich App 202; 312 NW2nd 212 (1981). Oral arguments were heard in March, 1983.

Until the Court hands down a definitive opinion on the arbitration statute, the American Arbitration Association will process all medical malpractice claims in accordance with the requirements of Public Acts 140 and 141 and the Michigan Medical Arbitration Rules, as amended and in effect May 1, 1983.

Anyone interested in further information about the program, can call the AAA Medical Arbitration Division through a toll-free number: 1-800-482-0660, or at 313-964-2525 (not toll-free).

Footnotes

2. M.C.L.A. § 600.5041(1); M.S.A. § 27A-5041(1) (1975)
3. M.C.L.A. § 600.5041(3); M.S.A. § 27A-5041(3) (1975)
4. M.C.L.A. § 600.5040(2)(a); M.S.A. § 27A-5040(2)(a) (1975)
5. M.C.L.A. § 600.5041(1); M.S.A. § 27A-5041(1) (1975)
6. M.C.L.A. § 600.5042(1); M.S.A. § 27A-5042(1) (1975)
7. M.C.L.A. § 600.5041(6); M.S.A. § 27A-5041(6) (1975)
8. M.C.L.A. § 600.5044(2); M.S.A. § 27A-5044(2) (1975)
9. M.C.L.A. § 600.5044(3); M.S.A. § 27A-5044(3) (1975)
11. General Counsels' Reports 1981-82 AAA
12. These grounds include: (1) the court lacks jurisdiction of the person or property; (2) the court lacks jurisdiction of the subject matter; (3) the party asserting the claim lacks legal capacity to sue; (4) another action is pending between the same parties involving the same claim; and, (5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute of frauds, infancy, or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.
13. M.C.L.A. § 600.5044(2) (1975); M.S.A. § 27A.5044(2) (1975)
14. M.C.L.A. § 600.5048(1) (1975); M.S.A. § 27A.5048(1) (1975)