The Unlikely Power Move:
Seek Arbitration in Your Med Mal Case

By Benjamin Ikuta

The judge in downtown Los Angeles was perplexed. She informed the parties that in her 15 years on the bench, it was the first time she had seen a plaintiff move to compel arbitration with a defendant opposing the motion.

The underlying case had been pending for over two years at that point, with multiple motions and depositions already completed. It involved an otherwise healthy 28-year-old woman hoping to start a family when she sought care from an OBGYN for treatment of a fibroid. Over just six weeks, the OBGYN performed three invasive procedures—including two D&Cs and a uterine artery embolization—that ultimately destroyed her uterus. The embolization cut off blood flow to the uterus, and the following surgery led to severe complications, including infection, abdominal pain, and sepsis. The patient was hospitalized, almost died, required yet more emergency surgery, and all her reproductive organs were removed. It was a horrifying case.

Benjamin Ikuta is a partner at Ikuta Hemesath LLP with offices in both Northern and Southern California. Ben concentrates his practice entirely on medical malpractice. He has tried multiple medical malpractice cases to verdict and, given the challenges of trying med mal cases, is proud of his .500 record in trial. ben@ih-llp.com

The OBGYN had significant medical board issues prior to this case. The prior issues, just like this one, involved gross overtreatment of three women. All three had invasive procedures after just one office visit without even considering conservative options. Just like in our case, each of these women were rendered infertile. He served an actual suspension for the prior cases before his license was reinstated a few years prior his treatment in this case.

By the time of the hearing on the motion to compel arbitration, the defense had not offered a penny to settle the case. Because any settlement over $30,000 must be reported to the medical board, the defendant OBGYN refused to settle the case. For the same reporting reason, physician consent is required before an insurance company is permitted to resolve any medical malpractice case. While both the gynecologist and his attorney knew that he acted inappropriately, he was not able to afford another strike against his license. They were able to secure a hired-gun expert to say that the care and treatment was appropriate as a judgment call. Since the case was almost entirely limited by the then-MICRA cap of $250,000, there was also no possibility of personal exposure to the physician given his standard $1 million policy.

Over the defendant's objection that the plaintiff waived the right to arbitrate for waiting too long, the court granted the motion to compel arbitration with the plaintiff responsible for half of all arbitration fees and costs per the agreement. Before the arbitrator was even selected, the physician and his insurance carrier agreed to pay $300,000 to settle the case, which were the maximum damages possible.

The Plaintiff Has a Higher Chance of Success in Arbitration

When it comes to a jury trial, a "good medical malpractice" case is an oxymoron. Any medical malpractice case can be lost at trial. Once, we even lost a case involving a retained sponge! Statistics show that in California, over 85% of medical malpractice cases that go to trial are defense verdicts.

> Arbitrators are well-aware that doctors are not perfect and commit malpractice.

Jurors respect doctors and nurses and want to believe that if they go to a doctor they will be helped, not harmed. This results in a tendency to "forgive" doctors, nurses, and hospitals, who generally do not intend to cause an injury, even though "intent" is obviously not a factor in negligence cases. Doctors and nurses also tend to be stronger witnesses than defendants in other types of cases. Not only does any adverse judgment get reported to the medical board, a plaintiff verdict also gets reported against the physician to the National Practitioner Data Bank (NPDB). The NPDB is a federal databank where all malpractice settlements and judgments are reported. As hospitals, credentialing

bodies, and medical groups have access to the NPDB, a settlement or adverse verdict could impact that physician's future credentialing, privileging, and employment prospects.

Thus, given the reporting requirements to the board as well as the NPDB, healthcare defendants also are far more personally invested in the defense of their own case, leading to being extremely prepared for testimony at trial.

In addition, while jurors are almost always aware that drivers carry insurance, jurors often do not know of the existence of medical malpractice insurance. This leads to jurors being overly concerned about how a plaintiff-side verdict could impact the defendant doctor or their practice.

There is also a strong "reverse reptile" issue in medical malpractice cases. Jurors often choose to assume that the injury could not be helped and occurred even in the absence of negligence, so that they can convince themselves that it is not something that would happen to them or their family.

Put simply, jurors feel qualified to judge a bad driver or a bad employer. However, jurors do not feel qualified to judge the performance of a surgery or medical procedure that they have never even heard of, much less performed. When combined with the favorable view jurors have of healthcare providers, defense verdicts are the norm in medical malpractice cases. By contrast, arbitrators are well-aware that doctors are not perfect and commit malpractice.

In the Kaiser arbitration system, the process of ranking and striking arbitrators is through an intermediatory called the Office of the Independent Administrator (OIA). The OIA is a gross misnomer as it is fully-funded by Kaiser. It is an inherently unfair system, as the arbitrators are strongly encouraged to find in Kaiser's favor or risk losing the lucrative business by being stricken in future cases. Yet, in the past seven years, out of 235 cases that have made it through a full arbitration, 156 were in Kaiser's favor. Even in the biased Kaiser arbitration system, the 66% defense rate is still far lower than in civil court.

In fact, even medical malpractice insurers are aware that civil trials are better for healthcare providers than arbitration. One of the largest medical malpractice insurers in California for doctors is Co-operative of American Physicians, Inc. ("CAP").[1] CAP used to encourage and support arbitration and even provide its physicians with sample arbitration agreements. In December of 2015, CAP sent a letter to all its insured as well as posted on its website a document titled: "CAP Discontinues Physician-Patient Arbitration Program." (https://www.capphysicians.com/articles/cap-discontinues-physician-patient-arbitration-program.)

> Even in the biased Kaiser arbitration system, the 66% defense rate is still far lower than in civil court.

CAP correctly explained 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." CAP goes on to explain: "With physician-patient

arbitration no longer presenting clear-cut advantages to the membership, CAP will no longer support arbitration as an alternative to the court system and will no longer supply arbitration agreement forms to CAP physicians and their medical practices. CAP recommends that members no longer offer arbitration agreements to new patients."

While not as public, other medical and dental malpractice carriers have followed suit and have encouraged physicians not to include arbitration agreements in their materials.

The Arbitrator Will Know of the Defendant's Prior Lawsuits, Discipline History, and Criminal Misconduct

Many of the providers that we sue have been sued previously, oftentimes for similar malpractice. In addition, providers will often have a history of board discipline. Some providers will even have a criminal history. In one case, the defendant nephrologist had been convicted of domestic violence, being found naked on his front lawn with a loaded gun screaming at his wife. He had been arrested only two weeks before the malpractice occurred. The case quickly settled after discovery revealed an arbitration agreement and we demanded arbitration.

In civil court, a trial judge will almost always exclude this evidence under Evidence Code sections 210, 364, and 1101(b). Of course, in arbitration, the same arbitrator deciding the facts of the case will be exposed to this evidence in in limine rulings. This will undoubtedly help the claimant even if the arbitrator finds such evidence inadmissible.

The same is true for experts. Many arbitrators, particularly those well-versed in medical malpractice, know which experts are trustworthy and which are hired guns. As in our OBGYN case, this was invaluable as the defense expert was well-known for saying *anything* as long as he was being paid. If there is helpful literature on the subject matter, it is also far more likely to be considered by an arbitrator than by a jury.

The Arbitrator May Even Award More Damages than a Jury

The MICRA cap on damages under Civil Code section 3333.2 is inadmissible at trial. In other words, the jury is not told of the statutory limit. (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 880.) It is often devastating at trial to have a jury award a very high noneconomic damage amount, but award far less in economic damages.

Of course, the arbitrator will know of the cap and that can actually help you. In a case several years ago under the old MICRA cap, we pursued a dental malpractice case where a celebrity dentist performed extremely shoddy work, overtreating and ruining 9 healthy teeth. She performed unnecessary caps and crowns and left grossly open margins, resulting in bad infections and a 5-week hospitalization. It was an egregious case where even subsequent providers were extremely critical of the dentist.

We were confident winning in front of an arbitrator or a jury. However, the arbitrator not only awarded the full $250,000 cap for the claimant, but also the full $250,000 amount for the claimant's husband for his loss of consortium action. Our client was also awarded the full amount of her future economic damages. It is very doubtful a jury would have awarded anywhere close to $250,000 for the loss of consortium action.

Particularly in cases that are impacted by the MICRA cap with little economic damages or that contain a loss of consortium or NIED claim with separate caps, arbitration is also favorable over a jury trial.

How to Find the Arbitration Agreement

Despite medical malpractice carriers and defense lawyers actively telling healthcare providers not to have arbitration agreements, arbitration agreements are still common. Many providers, through habit, use the same agreements used for many years. Others have received bad legal advice outside of their insurance carrier, and continue to use arbitration agreements.

We find that such agreements are particularly common with dentists, plastic surgeons, and bariatric surgeons. They also frequently appear in cases where the doctor and patient share a common ethnic background and communicate in a language other than English. That said, we've seen them used across many medical specialties—even in hospital settings.

We are also personally aware of some medical malpractice defense firms who will actually *remove* a signed arbitration agreement from the patient's chart. These defense firms also prefer to be in front of a jury rather than an arbitrator. When confronted, they claim that an arbitration agreement does not reflect care or treatment and thus is separate from the chart. They will contend that such an agreement belongs in an "administrative" file.

In discovery, it is important that you ask for any and all copies of any arbitration agreements. Special interrogatories should specifically ask if an arbitration agreement exists. If you do find one in a medical malpractice case, it's worth seriously considering whether arbitration might offer a strategic advantage. ■

---

[1] Technically, CAP is a physician-owned cooperative that provides medical professional liability protection through its Mutual Protection Trust (MPT), but for all intents and purposes it functions the same as an insurance company.