

**MEDIATION AND ARBITRATION OF MEDICAL
MALPRACTICE DISPUTES: TIME FOR A POSITIVE CHANGE**

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I. THE PRESENT SYSTEM OF RESOLVING MEDICAL MALPRACTICE DISPUTES

1. Does the current system work?

Medical malpractice claims are generally resolved through tort litigation based on each state's tort system. A 2004 survey in Connecticut showed that 63% of the population surveyed favored having medical malpractice disputes resolved by a third-party rather than a jury. The legal system's approach to resolving medical malpractice disputes often prevents efforts to improve patient safety and reduce medical error. Many providers order tests and procedures to avoid being second-guessed and sued. The legal process is adversarial, costly, time consuming and slow. A 1991 Harvard study concluded that only one in eight patients who had experienced negligent care filed a lawsuit.

2. Cost

- a. Can arbitration and/or mediation help control the cost of medical malpractice liability?
- b. Insurance premiums: Can arbitration and/or mediation of medical malpractice claims help control the costs of insurance premiums, which in some cases have driven certain specialties from practicing medicine in certain areas?

3. Timeliness of resolving disputes

4. Fairness of results

Arbitration and/or mediation can: (1) fairly compensate injured victims; (2) determine what claims are frivolous or without merit; and (3) further the societal goal of reducing future risks.

5. Plaintiff's perspective

6. Defendant's perspective

II. UNIQUE PROBLEMS IN MEDICAL MALPRACTICE CASES

1. Expert driven nature of disputes – standard of care

2. Damages
 - a. Tort reform and caps on damages
 - b. Pain and suffering
 - c. Economic damages
3. Physicians and consent to settle
4. National Practitioner Data Bank

III. MEDIATION OF MEDICAL MALPRACTICE DISPUTES: THE PREFERRED ALTERNATIVE?

1. Mandatory mediation
 - a. By contract
 - b. Court ordered
2. Voluntary mediation
3. Advantages of mediation
 - a. Control over the process
 - b. Cost
 - c. Time
4. Disadvantages of mediation

IV. ARBITRATION OF MEDICAL MALPRACTICE DISPUTES

1. Binding versus Nonbinding Arbitration
2. Prelitigation Arbitration Process: Approximately one-half of the states have mandated a prelitigation process that is nonbinding and generally includes some type of neutral evaluation.

3. Mandatory Arbitration

a. Legal Problems with arbitration clauses

- i. The United States Arbitration Act provides in part that:
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
- ii. Generally, litigants have a constitutional right to a jury trial. By signing a mandatory arbitration agreement, a litigant gives up his or her right to a jury trial.
- iii. The validity and enforceability of a mandatory arbitration agreement is determined by state contract law. Many state courts have struck down mandatory arbitration clauses.

4. Voluntary Arbitration

5. Advantages of Binding Arbitration

- a. Less Costly
 - i. Impact on malpractice rates
 - ii. Three-panel arbitration may not be less costly
- b. Less Time Consuming
- c. Quicker resolution
- d. Limited appeal rights / finality of decision

6. Disadvantages of Binding Arbitration

- a. Limited appeal rights
- b. Uncertain results
 - i. Jury versus Arbitrator(s)
- c. May prevent meaningful discovery

V. WHO SHOULD THE MEDIATOR(S) AND ARBITRATOR(S) BE?

1. Number

- a. One mediator or co-mediators
- b. One arbitrator or panel of three arbitrators

2. Qualifications of mediators or arbitrators

- a. Attorneys
 - b. Physicians
 - c. Other healthcare professionals
 - d. Other experienced mediators and arbitrators
3. Choice of Mediators and Arbitrators
- a. American Health Lawyers Association
 - b. National Arbitration Forum
 - c. Association for Conflict Resolution
 - d. American Arbitration Association: will not accept cases involving individual patients without a post-dispute agreement to arbitrate.
 - e. Court list of Arbitrators and mediators
 - f. Arbitrator(s) and Mediator(s) picked by the parties
 - g. Experienced medical malpractice attorneys: Are they biased?
 - h. Arbitration versus mediation: Does healthcare experience matter?

James A. Christopherson practices in the area of healthcare law, construction and real estate law, litigation and alternative dispute resolution. Mr. Christopherson regularly advises and represents healthcare clients and providers on a wide range of healthcare issues, including compliance, Stark, HIPAA, collections, litigation, medical malpractice, joint ventures, and corporate issues. He received his B.A., *magna cum laude*, from Michigan State University, and his J.D. degree, *cum laude*, from Wayne State University. He is a member of the State Bar of Michigan and is admitted to practice before the United States Supreme Court (where he has personally argued), the United States District Courts for the Eastern and Western Districts of Michigan, and the United States Court of Appeals for the Sixth Circuit. He is the recipient of the American Jurisprudence Award for Taxation. He is a member and former president of the Grand Traverse/Leelanau/Antrim Bar Association. He is a member of the American Health Lawyers Association, and the Health Care Law Sections of the State Bar of Michigan and the American Bar Association. Mr. Christopherson is an arbitrator and mediator for many organizations including many courts, the American Arbitration Association, the National Arbitration Forum, the American Health Lawyers Association and the International Institute for Conflict Prevention & Resolution. He is Member of the Chartered Institute of Arbitrators. Mr. Christopherson can be reached at Christopherson@ddc-law.com or at 231-929-0500.

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