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A cure-all for med-mal woes?

by Noah Schaffer

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In recent years, medical-malpractice cases have been more likely to go to trial than almost any other kind of lawsuit. In fact, a 2006 Boston Bar Association report on the so-called "vanishing jury trial" noted that while most suits were being settled, court dockets were still busy thanks to med-mal lawyers.

However, plaintiffs' and defense-side medical-malpractice attorneys say lately they have been seeing a steady increase in the number of cases going to binding arbitration instead of trial. The result, they say, is slightly fewer victories for doctors, but also fewer runaway jury verdicts.

Amy E. Goganian, a Wellesley med-mal defense lawyer, is among those who have noticed an increase in arbitrated cases. She says arbitration has a lot to offer parties bogged down in lengthy medical-malpractice disputes, which usually involve the extensive use of expert witnesses by both sides. Many of those experts, she points out, particularly those on the plaintiff's side, come in from other parts of the country to testify.

"I think the impetus for the trend was a logistical one," she says. "We would get these trial dates from the court, and everybody would clear their schedule well in advance, coordinating with multiple expert witnesses. And then the case wouldn't go to trial. Then it'd happen again and again, making for a cumbersome, expensive and frustrating process."

Arbitrators, on the other hand, schedule a date and "barring something very dramatic and unforeseen, you go when they say you'll go," Goganian says.

Boston-based neutral and retired Judge Peter J. King says there "are definitely more" med-mal cases going to arbitration. He recalls informal conversations he's had with attorneys whose presentations "would have been very attractive" if they landed in front of a jury.

"So, I asked why they'd gone to arbitration, and the answer has been always the same: cost," says King. "They pay their expert, and quite often the date is not kept. So, they still have to pay their expert for the day and again the next time and again the next time."

King also points out that an arbitrator might stay late to let a witness conclude his testimony, while a judge will generally end the day promptly at 4 p.m. — potentially costing the party that hired the expert thousands of dollars for the expert's time the following day.

The 10th time

Boston plaintiffs' attorney Patrick T. Jones wonders why arbitration isn't used more often in complex tort cases. He points to the considerable time and money savings, as well as the elimination of jury selection headaches and other hard-to-predict elements of selling a case to a jury.

Jones notes that three of the five largest arbitration awards reported by Lawyers Weekly in 2006 were medical-negligence personal injury cases. (Two were reported by Jones' firm, Cooley, Manion, Jones.)

That's proof, he says, that arbitration is a "legitimate option" for med-mal cases.

It is little surprise that plaintiffs' attorneys would want an alternative to the malpractice jury trial system, where, as Jones puts it, they lose "nine out of 10 times. The burden [for plaintiffs] is very high. Jurors are conditioned that doctors can't do anything wrong, and that awards in these cases will find their way into their bills in the form of new or additional health care premiums."

The medical profession, Jones adds, "has done a great job in trying to draw a connection between large jury verdicts and large premiums."

But in that 10th time when the plaintiff prevails, says Jones, the jury could decide on an enormous award.

"If they take a $25 million hit on a case, the other nine out of 10 don't matter," Jones says of malpractice insurers and defendants. "But in that same case, an arbitrator might have found for $3 million to $4 million ... so there are reasons for both sides to look at arbitration as a speedy, cost-effective way of delivering justice."

If a lawyer marshals all his evidence and summarizes it effectively, "you've got a right to believe that you'll get a fair number from an arbitrator — who might be a lot fairer and more predictable than a jury," Jones says.

Goganian agrees, noting that arbitrators, who are often experienced attorneys or retired judges, aren't as likely to be swayed by emotional arguments as are jurors plucked at random from society.

"If you have a case with potentially very large damages, you might be less likely to get a runaway verdict at arbitration," she says.

On the flip side, Goganian points to the commonly professed opinion among both sides of the medical-malpractice bar that jurors give great deference "to physicians and their judgment process. If your case is a gray area, as so many of these cases are, a juror might say we'll give our deference to a physician's judgment [while] an arbitrator might not do that," she says.

But if there is a higher percentage of plaintiffs who recover in arbitration awards, why would a defense attorney give up the right to a jury trial?

The answer, according to King, is that arbitrators don't award "off-the-wall" sums. "A jury has to put dollars and cents on impairment and suffering, [which] are hard to put numbers on," says King. Arbitrators, on the other hand, are often former judges who can draw from their years on the bench, refer to published verdicts and settlements and seek input from colleagues.

"We have a sense of how much a case is worth," he says. "Even among arbitrators we have a broad range in terms of awards, but you won't get these extreme figures that are either unreasonably minimal or off-the-wall" excessive.

Goganian adds that she'd also be more likely to arbitrate a highly technical case that involves complex medical issues since an arbitrator "might be more in tune with the nuances."

And when it comes to expert witnesses, Goganian says an arbitrator might be less inclined to credit what "professional experts" have to say.

But Elizabeth N. Mulvey, a Boston attorney who received a $1.5 million med-mal arbitration award last year, says she continues to be a firm believer in jury trials for the "vast majority" of cases.

Nevertheless, she says arbitration is a viable option. "It's the equivalent of a jury-waived trial, but you get the benefit of being able to control the scheduling and the

timing of the case. But, it comes at a price," she says of the arbitrator's fee.

Anything is negotiable

Goganian says that, except for the lack of emotional play to the jury, little about the questioning of medical-malpractice witnesses changes when a case goes to arbitration instead of trial.

"You still want to impress the arbitrator with the strength of your experts' credentials and hit all the points you want to hit with standard of care and causation," she says.

When deciding whether or not a case should go to arbitration, insurance policy limits, "as always, play a role," she adds. "That's discoverable, so everyone knows how much coverage there is."

Other issues, such as prejudgment interest, can end up being negotiated.

"If you're a plaintiff who is trying to entice a defendant to go to arbitration, you could say you're willing to wave 50 percent of the prejudgment interest," says Goganian. "That's an inducement for a defense attorney, especially if it is an older case that has been lingering. In arbitration, you can negotiate anything."

Mulvey says that because many insurers — who are paying their legal team an hourly fee — view arbitration as more economically feasible than going to trial, they will offer a "winner-pays-all" deal when it comes to the arbitrator's fee.

"If the defense wins, then they pay the full cost," she says. "And if the plaintiff wins, there is money that can cover the cost. That shows the extent to which defendants think there is an economic advantage to using arbitration."

According to Jones, whether a result is confidential or not is also frequently negotiated beforehand. "Sometimes defendants are reluctant to decide to make it confidential, because it seems like it is signaling to the arbitrator that they expect money to be awarded," explains Jones.

But a big benefit of arbitration, Jones says, is that both the plaintiff and defendant can settle their dispute out of the public eye.

"That probably is as much a benefit for doctors and their families as it is for the plaintiffs, if not more so," says Jones. "It allows them to go to a private office over a few days and have their claim heard and resolved in a context that is more private, as well as requiring them to spend less time away from their office."

One potential downside of arbitration, he says, is that the losing party can feel an arbitrator's decision was a "personal one," as opposed to an "amorphous and anonymous" jury vote.

And, as Goganian points out, the state's trial courts are in the midst of a "fair and firm" trial-date initiative aimed at keeping trials on schedule. If the program continues to make progress, it could eliminate one of the main reasons a medical-malpractice case would be arbitrated instead of tried.

"Maybe in two to three years, if the Trial Court can pull that off, the trend of cases going to arbitration will be reversed," she says.

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On medical front, not everyone a believer in arbitration

Not all players in the medical-liability field are enthusiastic about arbitration.

Take Alan C. Woodward, for example. Woodward is chief of emergency services at Emerson Hospital in Concord and a former president of the Massachusetts Medical Society.

Woodward figures that arbitration "has to be better than trials, which can take five years" — a system that he calls "profoundly broken" and which needs to be replaced. Woodward would prefer a health court system with a single expert and a judge trained in medical issues.

Simply replacing a jury with an arbitrator still requires each side paying for experts who will say whatever their party wants them to say instead of offering unbiased, independent opinions, he argues.

Another skeptic is Richard C. Boothman, chief risk officer for the University of Michigan Health System. That hospital has received national attention for its policy of disclosing adverse medical results to patients. It also provides early settlements when the provider determines that a patient suffered from a medical error and aggressively defends claims it finds to be without merit. Compounded with other patient safety practices, the program has resulted in a dramatic cost savings in both legal fees and claims.

Arbitration still involves two sides, "each making unreasonable demands" and working toward the middle, says Boothman.

"The reason arbitration has not been very attractive to us is that too often it still results in splitting the baby," he says, noting that instead of a panel or single neutral "telling me how to settle a case, I need a decider if the other side thinks we're ungrounded. The arbitration venue does not offer that. I'd almost prefer to trust a jury than [an arbitrator], who sees his job as settling the case rather than deciding the case."

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