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TOP HEALTHCARE LAWYERS 2023

Considering Arbitration Clauses in the Context of Health Care Contracts

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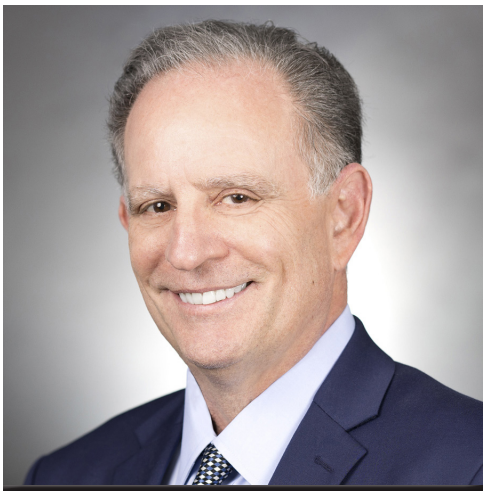

It is not uncommon to come across lawyers discussing whether to include an arbitration provision in a health care contract, whether it's regarding carriers, providers, technology, trade secrets, acquisitions or other transactions. While there may not be one answer that fits all situations, there are issues that should be considered.

JURY WAIVERS: First, and perhaps foremost for the parties to the contract, is whether they want to waive a jury. In *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal. 4th 944, the Supreme Court of California held that pre-dispute jury waivers are unenforceable. The rationale was that the California Constitution permits jury waiver only via methods explicitly permitted by statute, none of which is contractual in nature; i.e., the explicit waivers found in statutes all occurred after the filing of a lawsuit. Grafton Partners, however, did not bar arbitration provisions, which effectively act as a jury waiver, because "it has always been understood without question that parties could eschew jury trial either by … agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum." Id. at 957.

Parties to a contract need to consider whether they want potential disputes before a jury, and if not, they must include an arbitration provision (or some other alternative means of dispute resolution) to achieve that objective.

PRIVACY: There is substantial confusion on this point. Arbitration proceedings and filings are not confidential, in some senses*, but they are private. This means the filings database is not accessible to the public or the press and that there is no public record that a dispute has been initiated. While judges and arbitrators can both issue protective orders to further protect or shield this type of information from public view, the parties often do not reach agreement on what is confidential or proprietary, and a court may not agree that the public does not have the right to see certain information. In the context of health care litigation, this can be particularly significant because cases often deal with issues that may not be appropriate for public consumption, such as private health information or trade secrets.

EXPERTISE: Health care cases often require a specific area of expertise. Judges in most jurisdictions are assigned randomly to cases without regard for specific expertise. Arbitrators are assigned in multiple ways, which typically aid the parties in finding a neutral with the appropriate expertise and experience, such as the following:

- The most common process is known as strike and rank. While each organization has its own nuances, the concept is that the parties are provided with a list of potential qualified arbitrators, along with their respective curricula vitae, and the parties then strike a certain number of candidates and rank the remaining ones. The alternative dispute resolution (ADR) provider then typically assigns the arbitrator with the highest common ranking.
- The parties often stipulate to a specific arbitrator(s) before submitting a demand.
- The arbitration provision can call for a specific arbitrator(s).
- The arbitration provision can identify specific qualifications that the candidates must have before a list can be compiled.

Whatever process is used to select the arbitrator(s), the process (in all its various iterations) is designed to cull from those arbitrators who the provider deems have the requisite expertise, or the parties can provide the criteria or even select the arbitrator if there is agreement among them.

EFFICIENCY: Health care cases can be complex and time-consuming. Arbitration rules and procedures are designed for efficiency, including the flexibility afforded to the parties to participate in the scheduling orders, the limitations on written discovery and depositions, the limits on third-party discovery and the inherent efficiencies in dealing with a service provider. While the parties are naturally bearing the costs of the arbitrator and/or the provider, the efficiencies gained in dealing with complex health care issues often offset the fees incurred.

The parties can also control, either via contractual agreement or stipulation, the process by which evidence is presented at the final hearing. If properly orchestrated, this creates an additional efficiency in terms of presentation and can help the parties understand each other's arguments, decrease fees and foster settlement.

Format: An arbitration provision can dictate how many arbitrators are on the panel and how they are selected. For example, many arbitration provisions provide for the selection of three arbitrators if the amount in dispute exceeds a certain threshold. Other provisions call for each side to select one arbitrator and for those two to select a third. The alternatives are limited only by the creativity of the drafters. A panel of arbitrators can provide the litigants with more comfort since, as discussed below, appeals of arbitration awards are very limited.

Finality: Along those same lines, absent an agreement to the contrary, there are few avenues, if any, to appeal. While this may seem draconian at first glance, it not only saves the litigants time and money by taking years (and perhaps decades) off the timeline, but it also helps to drive settlement because the shorter timeline finality requires the parties to engage in substantive settlement negotiations sooner rather than later.

PROCESS: All health care cases are different. Because each case is different, it makes sense to put in place bespoke discovery, timing and hearing rules for different cases. While each ADR provider has its own set of rules, arbitration is generally designed to permit the parties, if they so stipulate, to help shape the process to meet the needs of the case, which decreases the cost and helps expedite resolution, either through hearing, dispositive motion or settlement.

While all transactions are different and require a unique approach, the issues raised above are a general guide to start analyzing if an arbitration provision is appropriate, and if so, what issues need to be addressed. Those issues include, among other things, jury waivers, choice of alternative dispute resolution provider, the requisite expertise of the arbitrator(s), the number of arbitrators and the process.

**JAMS Rule 26 provides: Rule 26. Confidentiality and Privacy*

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

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