

# *I Won't See You in Court:* Arbitration Options for Hospitals

Presented by Martin L. Fineman & Gabrielle Goldstein  
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# Today's Speakers

## Gabrielle B. Goldstein

- Counsels health care providers, health care technology and biotechnology companies on a range of business and regulatory matters;
- Advises clients in this sector on contracting issues;
- Is an active member of AHLA and Women Health Care Executives.

J.D., Boston University School of Law

# Today's Speakers

Martin L. Fineman

- Over 25 years of experience as a litigator—has handled numerous cases before arbitrators, mediators, judges and juries;
- Has represented health care providers in American Arbitration Association (AAA), American Health Lawyers Association (AHLA) and JAMS proceedings;
- Is a commercial and securities arbitrator through the AAA;
- Has been a Judge Pro Tem and Judicial Arbitrator for the San Francisco County Superior Court from 1990-present.

J.D., University of California, Berkeley, Boalt Hall School of Law

M.B.A., University of California, Berkeley, Haas School of Business

# *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)

- This seminal case in the field of arbitration involved a hospital. The underlying dispute involved a contract to build a new wing of the hospital.
- The United States Supreme Court stressed the “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” In addition, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”

# Why Arbitration?

- Cost
- Avoiding juries
- More input into choice of “judge”
- Speed
- Privacy
- Not creating precedent
- Limiting available remedies
- Minimizing harm to relationships

# More About Costs

- Discovery
- Fewer procedural motions and activities
- Length of time to hearing

# Disadvantages of Arbitration

- High administrative fees
- Often, non-refundable arbitrator fees
- Less opportunity to quickly weed out unmeritorious claims
- Unintended consequences
- Rules of evidence not strictly applied
- Rules of law (e.g., statute of limitations) not necessarily applied
- Typically, no right to appeal

# Prevalence of Arbitration in Hospital Context

- Labor and Employment
- Malpractice
- Commercial Payor
- Vendor
- Hospital/Physician Contracts: Medical Director and Professional Services Agreements

# Prevalence of Use of Arbitration by Hospitals

- Conventional wisdom is that arbitration is widely used
- Statistics suggest otherwise

# Arbitration: Initial Considerations

- Not all situations or disputes are well suited to arbitration.
- Issues presenting important policy considerations not best suited for ADR.
- Also, disputes involving regulatory or statutory interpretation in unsettled areas of law
  - Fraud and abuse

# Drafting: Arbitration Clauses Overview

- Self-executing Clauses
- (Broad) definition of dispute
- Pre-dispute provisions (mediation)
- Locale for hearing
- Organization to administer—or ad hoc
- Method of selecting arbitrator(s)

# Drafting: Arbitration Clauses Overview Con't

- Specification of rules to govern
- Judgment to be rendered by a court
- Scope of discovery
- Right to appeal
- Limitations on relief available
- Attorneys' fees clause and costs of arbitration

# Drafting: Self-Executing Clause

- Well drafted arbitration clause vital.
- “In the event of a dispute over the terms of this contract or related to this contract, the parties agree to arbitrate.”
  - This is not self-executing because it does not provide sufficient clarity around arbitration process.
  - If opposing party refuses to arbitrate, other party must obtain court order to compel arbitration.

# Drafting: Self-Executing Clause

“Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity hereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. The proceeding shall be held in the City of San Francisco. Any arbitration fees shall be paid equally by the parties. This clause shall not preclude the parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.”

# Drafting: Choice of ADR Providers

- AHLA
- AAA
- JAMS
- CPR Institute for Dispute Resolution
- Non-administered (ad hoc)

# Selecting Arbitrators: Considerations

- One arbitrator vs. three
- All neutral vs. party-selected arbitrators
- Expertise in subject matter and understanding of dynamics among the parties to the dispute.

# Arbitration Clauses in Action

## Medical Director Agreement between Clinic and Physician.

### “Arbitration and Dispute Resolution.

- A. Non Medical Disagreements.** In the event that disagreements arise between the Parties concerning performance under this Agreement, or on other matters, Physician and the Clinic Administrator shall meet and confer to resolve the dispute.
- B. Medical Disagreement.** In the event of that any question or dispute arises concerning standards of professional practice or the medical aspects of the Professional Services, Physician and the Professional Director shall meet and confer to resolve the dispute.
- C. Arbitration.** Following exhaustion of all dispute resolution procedures provided for under the terms of this Agreement, the Parties shall submit such disputes to binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. The proceeding shall be held in the County of San Joaquin.”

# Arbitration Clauses in Action

## Professional Services Agreement between Clinic and Physician.

**“11. Arbitration.** Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in City of San Francisco, before one arbitrator. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. The arbitrator may, in the Award, allocate all or part of the costs of the arbitration, including the fees of the arbitrator and the reasonable attorneys’ fees of the prevailing party.”

# Arbitration Clauses in Action

## Software License and Support Agreement between CA Hospital and MA Vendor.

“ **Dispute Resolution**. In the event of any dispute arising out of the terms of this Agreement, the parties agree that the first recourse to resolution shall be by arbitration. Prior to initiating arbitration with respect to any dispute or claim arising under this Agreement the parties agree to make a good faith effort to settle such dispute or claim. If the matter is not resolved between the parties within thirty (30) days following one party seeking good faith resolution, either party may initiate arbitration with respect to the matter.

Subject to the foregoing, any controversy or claim arising out of or related to this Agreement including any dispute regarding the validity or scope of this Agreement shall be decided by one arbitrator pursuant to arbitration conducted in accordance with the Comprehensive Arbitration Rules and Procedures of JAMS (collectively, “Rules”).

Except as otherwise agreed in writing by the parties, any such arbitration shall be held and conducted in the County chosen by Defendant within ninety (90) days of the appointment of the arbitrator... the parties shall have the rights of discovery and all relevant evidentiary laws shall apply to testimony and documents submitted to the arbitrator as otherwise applicable in the relevant Court with jurisdiction in the venue selected by the Defendant.

Any arbitrator selected under this Section shall be a retired judge, and if unavailable, a person with business, financial or legal experience in the health care industry of at least five (5) years ...”

# Drafting: Creative Options

- “The arbitration shall be held in Los Angeles, California, pursuant to the Streamlined Arbitration Rules and Procedures of JAMS, except that the provisions governing the right to discovery as set forth in Cal. Code of Civil Procedure §1283.05 are incorporated into this Agreement.”
- “The parties shall select a single neutral arbitrator. If the parties cannot agree upon such arbitrator within twenty (20) days of the Answer Date, then each party shall choose an arbitrator and the two arbitrators together shall select a third arbitrator (the “**Arbitrators**”) and the matter shall be arbitrated by the panel of three Arbitrators. If the two Arbitrators are unable to agree upon a third Arbitrator within thirty (30) days after the Answer Date, then the either party may request the American Arbitration Association to select the third Arbitrator.”

# Drafting: Creative Options Con't

- “The prevailing party, as determined by the Arbitrator(s), shall be entitled to reasonable attorneys’ fees and costs. In cases submitted to arbitration, the parties agree to share equally in the administrative fee, if any, unless otherwise assessed against the non-prevailing party by the Arbitrator(s).”

# Questions?

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