

PRF NEWS

Arbitration and Arbitration Agreements —How They Work Together

BY JUNE RILEY, MBA

Using binding arbitration to resolve medical malpractice claims has been a cornerstone of PRF’s philosophy since the company was formed in 1976. Arbitration provides the healthcare professional with a more efficient and less intrusive method of resolving disputes while not unfairly limiting the patient’s right to seek compensation for injury. There are several differences between binding arbitration and a jury trial.

- ▶ The major difference is that in binding arbitration the claim is decided by a three-person panel consisting of a party arbitrator chosen by the plaintiff, a party arbitrator chosen by the defendant, and one mutually agreed upon neutral arbitrator. The arbitrators are experienced attorneys or judges knowledgeable in matters concerning medical malpractice. In a jury trial, the “triers of fact” are a panel of 12 jurors with limited, if any, knowledge of law or medicine.
- ▶ The discovery phase of litigation is virtually the same for arbitration and jury trial, allowing the defendant access to all the tools (subpoenas, depositions, experts, access to medical and other relevant records) needed to build a solid defense.
- ▶ Arbitration scheduling is more flexible and may result in a swifter resolution of the claim, although in most instances cases are settled or dismissed before the arbitration hearing.
- ▶ Arbitrations are confidential, and therefore provide a non-public and less formal forum for the resolution of a claim.

WHERE TO GET PRF’S ARBITRATION AGREEMENT FORMS

PRF provides arbitration agreement forms free of charge to its Insureds. You or your office staff can order the PRF arbitration forms by calling **Lasting Impressions** at (925) 686-1509. Simply let them know that you are a PRF Insured, provide them with the necessary shipping information, and the forms will be delivered directly to you at no cost.

DISCUSSING ARBITRATION WITH YOUR PATIENTS

Some PRF Insureds who are new to using arbitration forms are concerned about how their patients will react when presented with the arbitration agreement. Our experience has been that patients are increasingly familiar with these types of agreements and rarely hesitate to sign them. For patients who desire further reassurance, PRF has provided an insert in this newsletter entitled “**Patient Explanation Sheet: Important Facts about Arbitration.**” Please retain a copy of this explanation sheet to give to any patients that have concerns about the arbitration process.

On those rare occasions when a patient is still reluctant to sign the agreement, please keep the following in mind: *(continued on page 3)*

Inside PRF News

Arbitration and Arbitration Agreements—How They Work Together

Resolving medical malpractice claims through binding arbitration is key to PRF. Insureds must understand the importance of using the arbitration form provided by PRF.

1

Cases Illustrate Code Green Success

Two cases show how Code Green has been effective in averting formal litigation and reducing the cost of claims.

2

Annual Meeting Focuses on Promissory Notes and Patient Safety

PRF’s Annual General Membership Meeting in April featured discussions of a proposed Promissory Note Offering and the importance of addressing adverse outcomes with respect and compassion.

4

Cases Illustrate Code Green Success

BY STEPHEN J. SCHEIFELE, MS, MD

Code Green is PRF's policy of disclosure, apology and restitution which is implemented after an adverse medical event. Reflecting our philosophy of addressing the patient as a whole, Code Green maintains the role of the physician as the patient's advocate by recognizing the patient's perspective and empathetically identifying and acknowledging their concerns and losses. By preventing the sense of abandonment and resulting anger that many patients feel after an adverse medical outcome, Code Green has been proven effective in averting formal litigation and reducing the cost of claims.

pre-operative diagnosis of adenocarcinoma-in-situ. During the course of the procedure, the peritoneal cavity was inadvertently entered. The complication was immediately recognized and an unscheduled laparoscopy was performed to exclude a bowel or other internal injury. The patient required an overnight stay in the hospital and had a longer but uneventful recovery at home.

Although there is usually no medical liability involved when a patient experiences a recognized complication of a procedure, the patient did have unreimbursed expenses as a result of the prolonged hospitalization and extended recovery time.

With PRF approval, the physician compensated the patient for her expenses and maintained the physician role as a patient advocate. PRF in turn reimbursed the physician.

Case 2. A patient experiences an adverse outcome where there is clearly some physician liability involved.

A woman was admitted at term for an elective induction of labor following an uncomplicated prenatal course. A breech presentation was detected and the patient underwent an "uneventful" cesarean section with the delivery of a healthy infant. While the obstetrician turned to pass the baby to the

retained lap sponge and she was referred to a general surgeon who was not a member of her health plan. The sponge was removed by laparoscopy and the pelvic abscess treated with parenteral antibiotics, but as a result the patient required an additional five days of hospitalization.

While the primary surgeon has traditionally been held responsible for retained objects, the operating nursing staff, and therefore the hospital, shares in the responsibility by maintaining a sponge count, which in this case was deemed correct. Although the courts have been shifting the responsibility for sponge counts away from the physician to the hospital, in this case the primary surgeon, a PRF insured, clearly bore some responsibility.

In this case, the application of Code Green enabled the physician to stand by the patient and acknowledge the outcome with empathy but without laying blame. The physician paid the second surgeon's fees and provided for extended child support while the patient recovered.

Acknowledging that retained objects should be preventable and are not acceptable also meant a monetary settlement with the patient. PRF was able to coordinate the settlement with a contribution from the hospital, which shared in the responsibility.

The actual process by which Code Green is administered will be discussed in a separate Code Green Policy booklet to be mailed shortly. ■

Dr. Scheifele is a board member and chair of the Risk Management & Education Committee of PRF.

By preventing the sense of abandonment and resulting anger that many patients feel after an adverse medical outcome, Code Green has been proven effective in averting formal litigation and reducing the cost of claims.

While there are many situations in which Code Green has been successfully applied, the following two cases from the PRF files are illustrative.

Case 1. A patient experiences a recognized complication of a procedure.

A woman underwent a cold-cone biopsy of the cervix for a

waiting pediatrician, the assistant surgeon, un-noticed, placed a surgical sponge into the abdomen. An incorrect sponge count then sealed the patient's fate. On post-op day 4, the usual day of discharge, the patient had a persistent ileus requiring further hospitalization and a GI consultation. The patient was finally able to be discharged on post-op day 8.

- ▶ Cost of additional procedures, testing and pharmaceuticals
- ▶ Home health equipment or supplies
- ▶ Second opinions
- ▶ Child-care costs
- ▶ Lost wages

The day after discharge the patient was seen with complaints of fever and abdominal pain when eating. The patient was afebrile, had a normal white count and unremarkable abdominal exam. She was sent home on a liquid diet. On post-op day 10 the patient presented to her primary care physician with persistent abdominal pain. An abdominal x-ray showed the re-

waiting pediatrician, the assistant surgeon, un-noticed, placed a surgical sponge into the abdomen. An incorrect sponge count then sealed the patient's fate. On post-op day 4, the usual day of discharge, the patient had a persistent ileus requiring further hospitalization and a GI consultation. The patient was finally able to be discharged on post-op day 8.



Arbitration and Arbitration Agreements: How They Work Together

(continued from page 1)

- Explain to the patient that s/he is not giving up the legal right to seek financial recovery.
- Remind the patient that once the agreement is signed, s/he has 30 days from the date of signing to rescind the agreement by providing written notice to the healthcare provider. The rescission policy allows the patient time to reconsider and even seek legal counsel, if s/he so chooses.
- You should make no effort to coerce a patient to sign an arbitration agreement. That would render it unenforceable. However, failure to make your best effort to obtain a signed arbitration agreement from all patients is grounds for terminating your insurance or for non-renewal. If a patient refuses to sign the agreement, you must decide whether or not to provide healthcare to that patient. If the medical situation is not urgent, you may wish to refer the reluctant patient to another physician who does not use arbitration agreements.
- The patient's welfare is always the first priority. An emergency situation is not the time to ask the patient to sign an arbitration agreement. Treat the emergency problem first. When the patient is next seen for an office visit is the appropriate time to discuss the arbitration agreement. If the emergency medical care you provided results in a claim being asserted by the patient, PRF will still provide you coverage.

THE IMPORTANCE OF USING THE ARBITRATION FORM PROVIDED BY PRF: THE LAW IS VERY PRECISE

The California Code of Civil Procedure not only spells out the exact language that must be included in the notice that appears above the signature line on the arbitration agreement, but it even mandates that the notice must be:

- 1) at least 10-point font
- 2) boldface type
- 3) red
- 4) in full caps

The arbitration agreement forms provided to you by PRF meet all the above requirements. Figure 1 (below) illustrates how the notice must appear. On occasion, it has come to PRF's attention that some Insureds have photocopied PRF's arbitration agreement form instead of ordering a fresh supply from Lasting Impressions. In the process of photocopying the form, the characteristic red font is lost. Courts will **not** enforce an agreement lacking **any** of the specified requirements. **It is imperative that PRF Insureds use the forms as provided and that no alteration take place.**

Please be aware that posting the arbitration agreements on your Websites can prove to be a risky practice. If a new patient prints the agreement directly off the Website, any alteration in the size

or color of the font would render the agreement invalid. Furthermore, in order for both the patient and the physician to have a copy of the agreement, the patient would have to sign the agreement twice since the printed copies will not be in duplicate. The only "safe" way to post the arbitration agreement on your Website is to clearly over-write on the form that it is "For Information Only" so that a form printed off the Website cannot be inadvertently used.

ELECTRONIC RECORDS AND THE AGREEMENT

PRF would like to assist Insureds who are converting to electronic medical record keeping that includes the arbitration agreement. However there are some administrative concerns involved in scanning the signed agreements:

- Where will the electronic scanned COLOR agreement be stored?
- Is the process compatible with the software being used for other electronic medical records?
- Is everyone (physicians, allied healthcare professionals and office staff) familiar with the process?
- In the event of litigation, how do you retrieve the signed COLOR agreement and reproduce it in COLOR to prove that it is a valid agreement?

Please do not attempt to initiate the process of scanning the signed agreements without contacting PRF. If you are interested in scanning the signed arbitration agreements, we would be pleased to arrange an on-site visit to assist you in ensuring that the agreements maintain their validity. If you have any further questions or concerns regarding arbitration or the arbitration agreements, please contact the PRF office at 415-921-0498.

HOW TO USE THE ARBITRATION INFORMATION FORM

There is an insert in this newsletter entitled, "**Patient/Physician Arbitration Agreements.**" This insert is intended for **physician and medical staff use only.** It answers many questions about the arbitration agreement, the process of arbitration and how the agreement should be handled administratively. We encourage you to retain a copy in your file and photocopy as needed. "Patient/Physician Arbitration Agreements" can be a useful reference tool for you and your office staff. ■

June Riley is executive director of PRF.

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

Figure 1.



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Annual Meeting Focuses on Promissory Notes and Patient Safety

A highlight of PRF's April 22 Annual General Membership Meeting was discussion of a proposed Promissory Note Offering by PRF's parent company, Sphargis, Inc. In 1998 the Company raised \$1.6 million in capital with promissory notes. The entire \$1.6 million was repaid in 2006 and proved an excellent investment for note holders.

PRF sent the Summary of Terms of the Promissory Note Offering with a cover letter from George F. Lee, MD to current and retired PRF-RRG Insureds and Sphargis shareholders on April 30, 2009.

Please contact June Riley at (415) 921-0498 if you would like the complete packet, or if you have any questions about the offering.

Because initial reaction was so positive, the Sphargis Board will close the offering on May 29, 2009, 30 days earlier than the anticipated closing date.

PATIENT SAFETY PRESENTATION

Also during the meeting, Dan Ford, patient safety advocate, gave a moving presentation about the injuries his wife suffered as a result of a medical error. Not surprisingly, his wife's injuries also seriously affected Dan and the couple's three young children.

As Dan told his story, it was apparent that he and his family suffered damages beyond those resulting from the medical error. When the Ford family tried to get answers from Mrs. Ford's health-

viders address adverse outcomes with respect and compassion—and how hurtful it can be when this is not the case.

Dan had several handouts regarding patient safety and the orga-

Dan's story demonstrated how meaningful it is to patients and their families when healthcare providers address adverse outcomes with respect and compassion—and how hurtful it can be when this is not the case.

care providers regarding her injuries, the responses—or lack thereof—showed no resemblance to disclosure, apology and restitution, which are the three principles of PRF's Code Green policy (see article on page 2).

Dan's story demonstrated how meaningful it is to patients and their families when healthcare pro-

nizations that advocate for that cause. Copies of those materials are available by calling the PRF office.

In addition to discussion of the Promissory Note Offering and the patient safety presentation, Annual Meeting attendees heard a brief financial review and business plan update and held an election of directors. ■



ADVERSE OUTCOMES/CODE GREEN

PRF Insureds with questions regarding adverse patient outcomes or Code Green should contact PRF Claims Administrator Sandy Souza by phone at (415) 921-0498, ext. 225, or by email at sandy@prfrrg.com.