PRF NEWS

Covering Practice and Risk Management Issues for Physicians

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ARBITRATION

The PRF Experience

In the 30 years that PRF has been insuring physicians, 23 cases have gone through the entire arbitration process. Of these, 17 were found in favor of the physician without any liability. In spite of these favorable outcomes, the average cost of defense for these 23 cases was $147,700 per arbitration. The average settlement for the 6 cases found in favor of the plaintiff was $212,300. The high cost of defense is the reason why suit avoidance through risk management and the application of Code Green is crucial for keeping premiums low.

In one example from the PRF files, it was alleged that a plaintiff suffered complications from surgery that resulted in a prolonged hospital course and multiple procedures. Additionally it was alleged that there was a lack of informed consent and that the patient was exposed to a substance to which there was a known allergy. The plaintiff represented himself without an attorney. Damages of $795,000 were requested, including $250,000 for pain and suffering. PRF argued successfully to have the claims of lack of consent and exposure to an allergen dismissed for insufficient evidence. The hearing over negligent treatment lasted 3 days, with experts heard from both sides. The majority of the arbitrators (2 out of 3) found in favor of the defendant without awarding any damages. The cost of defense was $131,320. ■

Arbitration: Why?

Thirty-one years ago there was a malpractice insurance crisis in California that resulted in MICRA legislation. In response, PRF was founded to be a physician owned and operated company with policies and procedures designed to support the physician's perspective. While PRF physicians always strive for the best possible medical outcome of any treatment or procedure, untoward events or complications do occur. It has always been the preference of PRF to have claims heard and resolved by arbitration, as opposed to a jury trial. Experience has shown that the arbitration process is both fair to the plaintiff while providing the physician with several benefits:

- Compared to a jury trial, arbitration offers a less public forum for the hearing and resolution of a claim.
- Arbitration can facilitate resolution of disputes before an action is initiated by encouraging a physician-patient dialog and the application of Code Green.
- The decision makers (arbitrators) are capable of deciding cases based on a more sophisticated understanding of the medical and legal aspects of the claim than lay juries with little or no knowledge of what constitutes standard of care or causation.
- A claim that is tried in arbitration is likely to take less of the physician's time away from his or her practice than a jury trial.

Initially, it was assumed that arbitration would be less costly than a jury trial. Recent trends suggest that arbitration may be more costly. PRF is currently investigating how to control the escalating costs of defense. ■

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PRF NEWS

Volume 10, Number 1

Covering Practice and Risk Management Issues for Physicians

ARBITRATION

How to Prevail

BY STEPHEN J. SCHEIFELE, M.D.

A good defense begins with the first patient encounter and continues with every interaction thereafter. Patients frequently sue not for the adverse outcome, but for a failure in the doctor-patient relationship. It's the patient's impression that the doctor wasn't listening, wasn't interested, didn't care or was simply too rushed that leads to the anger that can result in legal action. The best arbitration is one that is avoided altogether.

Spending the time to be an empathetic listener and adopting the policy of disclosure and apology will avoid a disgruntled patient and the potential suit that follows. Communication with the patient and family members after an adverse outcome should be honest and factual with easily understood terminology. It is appropriate to express compassion and feeling without communicating a sense of guilt or wrongdoing. Arbitrators will be empathetic with a doctor they perceive as compassionate and concerned for his or her patients.

A defensible position is one that is well documented. We are all taught in medical school to take a complete history, develop differential diagnosis and establish a management plan. With proper documentation any appropriate action is defensible even if in retrospect a different plan would have been preferable. Without documentation, a defense can be perceived as self-serving. The documentation needs to be legible - not only so that it is readable, but also as a positive example of the physician's work product. Documentation of informed consent should cover what a reasonable patient would want to know to make a decision. Discussions with the patient or family should also be documented. Contemporaneous notes are best and avoid the impression of trying to recreate the events to protect oneself. In any event, the medical record or office chart should never be altered, and late entries should be identified as such.

By alerting PRF whenever an untoward event occurs, the physician is encouraged to record events and the thought processes behind them when the details are still fresh. This in turn allows PRF to review the information before any action might be taken and to start planning a defense. Active participation by physicians and their peers in the defense process is what distinguishes the PRF from other carriers and leads to more successful outcomes. The Patient Care and Management Committee, under the direction of Reuben A. Clay, Jr., M.D., provides valuable medical insight to assist the legal defense team and follows the entire process from the initial incident through a completed arbitration. ■

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

Inside PRF News

How Does the Process Work?

BY DAVID R. LUCCHESE, ESQ. AND JUNE RILEY, M.B.A.

In order for a claim to be heard and resolved via arbitration, a written contract (arbitration agreement) must exist between the health care provider and the patient.

PRF ARBITRATION AGREEMENTS—ONLINE

Read? Yes—Sign? NO!
Some PRF Insureds have asked about the possibility of putting the PRF Arbitration Agreement on their websites. It may be helpful for your patients to VIEW and READ the Arbitration Agreement online; however, when the time comes for your patients to sign an Arbitration Agreement, they MUST SIGN THE ORIGINAL, two-page, carbonized Agreement. These are provided free of charge to all PRF insureds. The "NOTICE" that appears just above the signature line must be printed in **red, full caps, bold**, and is only valid in specific fonts. Failure to use the forms provided may invalidate the arbitration agreement and could result in a jury trial instead of arbitration. ■

To be valid and therefore binding an arbitration agreement must comply with specific laws. For example, the notice to the patient that appears on the form immediately preceding the signature lines must be in red type, bold face, a specific font and a specific font size. **Because PRF arbitration forms are updated to comply with current law and provided to PRF Insureds without charge, it is very important to use the PRF's arbitration agreement.**

The arbitration agreement is binding not only on the patient, but also on relatives, unborn children and heirs. If an untoward event follows treatment by an on-call physician (such as the obstetrician on-call at the time of delivery), both the treating obstetrician and the on-call obstetrician are often named in a subsequent claim. As a PRF insured you may find yourself in either position, and it is comforting to know that the signed arbitration agreement will apply to you in both instances.

There are various methods by which a patient or the patient's family can assert a claim against a physician. The patient can:

- Send the physician a 90-day notice of intent to sue. This may come in the form of an official letter from the patient's attorney, or even a hand-written note from the patient.
- Make a verbal or written demand to the physician for compensation for expenses incurred as a result of an incident and/or compensation for alleged pain and suffering.
- File a demand to arbitrate with the civil court.
- File a complaint with the civil court and have the complaint and a summons served upon the defendant.

While there are no absolutes and the actions taken will depend on the facts of the matter in question, PRF will generally respond to the respective assertions of a claim as follows:

- **90-Day Notice:** Sometimes the 90-day notice of intent to sue represents an opportunity to work with the patient to find a resolution agreeable to both parties, and thus avoid litigation. Exactly how PRF and the insured should respond to a 90-day notice is considered on a case-by-case basis. 90-day notices do not always ultimately result in the filing of a claim. In PRF's experience approximately 45% of 90-day notices resulted in the filing of a claim, while the other 55% never moved past the point of a 90-day notice. Therefore, if the situation is such that negotiating with the patient or their attorney is not appropriate, PRF often takes the "wait and see" approach.
- **Patient Demand for Compensation:** Verbal or written demands can present another opportunity to reach an agreement and avoid litigation. If deemed appropriate, a settlement may be negotiated with the consent of the insured physician. However, if the demand is unreasonable in its amount, negotiations may not be successful, and it may be necessary to arbitrate the matter. Nevertheless, negotiation is often worth a try—we have seen demands for $1.5 million settle for $29,999. PRF always consults with the insured physician, and under no circumstances will a settlement be offered or paid without the written consent of the insured physician in question. If the case is considered defensible, PRF will support and honor the wishes of the insured physician.
- **Demand to Arbitrate:** A patient's demand to arbitrate initiates the litigation process. At this point, PRF will assign legal counsel to represent the defendant insured. This also is done on a case-by-case basis. The nature of the claim, the personality of the defendant insured and the personality of the attorney are all taken into consideration. At PRF we take care to find the best attorney not just for the case, but also for the insured in question. If a claim goes all the way through the arbitration process, the working relationship between the insured and the defense counsel is crucial to achieving the best possible outcome for the defendant insured.
- **Summons and Complaint:** If you are served with a summons and complaint, it is imperative that you notify PRF immediately, as the serving of the complaint triggers the countdown of a 30-day time period to answer the complaint. PRF will assign an attorney to represent you, and your attorney will need time to gather the facts of the case and to formulate an answer to the complaint. If a signed arbitration agreement exists, as is the case in most instances with PRF insureds, the attorney assigned to defend the PRF insured will advise the patient's attorney that this matter should be tried in the arbitration forum as opposed to civil court. If the plaintiff's attorney does not concede this point, the defendant's attorney will file a motion in the Superior Court to compel arbitration.

Once an action is started, the procedural events that happen between that time and when the matter is resolved, either in informal arbitration proceedings or in a formal jury trial, are relatively the same. These procedural events begin with the discovery phase. Both the plaintiff (patient) and defendant (physician) are allowed discovery in order to gather facts and build their respective cases. The discovery phase takes many forms. Such as:

- Specific, written questions
- Depositions of parties to the action
- Depositions of parties not named in the action, but who are related to the action or possess a certain knowledge as to the facts of the case
- Selection of expert witnesses to provide opinions to support/refute the assertions. In the case of the defendant, the attorney will seek expert opinion to support the assertions that 1) the physician acted within the standard of care and 2) the physician's actions, or omissions, did not cause the damages suffered by the plaintiff. Once the expert or experts are chosen and named, the opposing party may depose them. However, this is well into the discovery phase, and usually does not occur until very close to the arbitration or trial date.

Throughout the discovery process, PRF, with the advice of the Patient Care and Management Committee, will decide whether to continue to defend the case or attempt to negotiate a settlement. The first consideration for the resolution of this issue is the position of the PRF insured. As a company, PRF supports the insured physician and is always ready to provide a vigorous defense. The advantage of being a PRF member is the close attention and personalized approach taken for each claim. Every case, every insured and every patient represent a unique set of facts and circumstances. PRF's first loyalty is to the named physician—we are here to protect and to achieve the best possible outcome for our insured members. PRF has an experienced Board of Directors, highly qualified attorneys who are genuinely interested in providing PRF insureds with excellent legal advice, and an experienced, supportive staff.

The PRF arbitration contract provides that three arbitrators hear the case. The two "party" arbitrators are selected by the plaintiff and defendant, respectively. A third "neutral" arbitrator is agreed upon by both the plaintiff and defendant. Arbitrators are frequently retired judges. Testimony and expert opinions are heard much the same as in a jury trial. The length of time for completion of the arbitration varies with the complexity of the case, but is typically five days or less. However, PRF has had very complex cases that required a three-week arbitration.

After the case is presented, the arbitrators meet and discuss the case. Based upon California law, a majority vote decides the case. The neutral arbitrator is usually the deciding vote, as the party arbitrators in almost all instances support the viewpoint of their party (plaintiff or defendant). The arbitrators have up to 30 working days to reach their decision, although typically a decision is reached within a week or two. The neutral arbitrator writes the decision, which is called an Arbitration Award. The term Arbitration Award does not indicate which party prevailed. The actual terms of the decision, whether in favor of the plaintiff or the defendant, are stated in the Arbitration Award. The arbitrators' decision is binding, and except in extremely rare circumstances cannot be appealed. ■

David R. Lucchese, Esq., is a managing partner of Galloway, Lucchese, Everson & Picchi, a firm specializing in the defense of medical malpractice actions. June Riley is executive director of PRF.

ARBITRATION AGREEMENTS

Arbitration agreements are available to all PRF insureds **free of charge**. To order arbitration agreements call **Lasting Impressions Printing** at **(925) 686-1509**. Just give the staff at Lasting Impressions the name of the PRF Insured and order the quantities that you need in English, Spanish or Chinese. We suggest that you clip this item from the newsletter and post it in a prominent place for your office staff.

FOR ARBITRATION AGREEMENTS CALL LASTING IMPRESSIONS PRINTING (925) 686-1509 ■