

WILL YOU BE ABLE TO ENFORCE ARBITRATION AGREEMENTS IN THE FUTURE?

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Arbitration Agreements require disputes between a resident and a long term care facility to be resolved through binding arbitration. The agreement designates an alternative dispute resolution forum that is independent of the courts. Arbitration is often a more time and cost effective means of resolving disputes than a jury trial.

The Federal Arbitration Act (FAA) provides that written agreements to arbitrate are enforceable. However, a bill entitled "Fairness in Nursing Home Arbitration Act of 2009" has been introduced which proposes substantial changes to the FAA. This proposed law would practically result in a ban on any form of civil arbitration in the long term care setting. It is designed to effectively invalidate pre-dispute arbitration agreements.

Its predecessor, the "Fairness in Nursing Home Arbitration Act of 2008", was considered by the federal legislature but ultimately never became law. The Senate Judiciary Committee conducted hearings and heard witness testimony about the bill. Witnesses who offered testimony in favor of the bill included a plaintiffs attorney whose testimony described the most extreme instances of abuse and neglect. Witnesses who opposed the bill included a professor of law who specializes in arbitration law. His testimony highlighted the importance of pre-dispute agreements to arbitrate which produce social benefits resulting from arbitration's lower process costs. The Department of Justice also strongly opposed the bill when it explicitly stated that the proposed law "would needlessly invalidate arbitration agreements between long-term care facilities and residents of such facilities".

Currently, the "Fairness in Nursing Home Arbitration Act of 2009" is in the first step in the legislative process. It has been referred to the committee on the Judiciary. The majority of bills never make it out of the committee and consequently do not become law. This bill should meet the same fate as its 2008 predecessor so that the American people are not denied fundamental legal rights. Until a bill like this is actually passed, there are important steps which you should take to increase successful enforcement of arbitration agreements.

California Courts traditionally favor enforcing arbitration agreements as a means of easing court congestion. However, when an elder is inserted into the equation, a Court's predisposition to enforce arbitration agreements may be moderated by the perceived need to provide protection to that segment of the society. In order to increase your ability to successfully pass judicial scrutiny placed on the long-term care arbitration agreement.

VALID ARBITRATION AGREEMENT

In order for your arbitration agreement to be enforceable, it must be a valid contract. A valid agreement to arbitrate contains the following requisite elements:

- The arbitration agreement must be on a separate form from the admission agreement and contain space for the signature of any applicant who agrees to arbitrate his or her own disputes.
- Arbitration clauses as to medical malpractice claims must be separate from those applicable to other arbitration clauses.
- The arbitration agreement must contain a notice that the patient may not waive his/ her rights to sue for violation of the Patient's Bill of Rights.
- Arbitration agreements as to disputes arising from professional negligence of healthcare provider shall contain the language of Civil Code Procedure § 1295(a) as the first article of the contract: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration".
- Arbitration agreements as to disputes arising from professional negligence of a healthcare provider shall contain immediately before the signature line, in at least 10-point, bold red type, the following: "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."

SIGNED BY THE PROPER PARTY

A valid arbitration agreement is not enforceable unless it is signed by the proper party. Residents and their families members often challenge the authority of the person who signed the agreement to bind the plaintiff to arbitration. The outcomes of these challenges vary based on specific facts surrounding the signature. The following are the three situations the facility may face when obtaining a signature on an arbitration agreement:

- **Competent Patient Who is Physically Able to Sign:** As long as the patient is competent and able, they are the proper signatory. A spouse or adult child can not sign on behalf of a competent resident unless they have been appointed as the resident's durable power of attorney.
- **Competent Patient Unable to Sign:** When a competent patient is admitted but is unable to sign due to physical limitations, an authorized individual may sign for the patient. Obtaining the signature in this manner will most likely be upheld in the court if there is a verbal confirmation of the authorization of the individual who is to sign, in front of a witness, who would be available to testify should a dispute arise. The admission coordinator should have a direct conversation with the patient to ascertain that the patient understands that his/her authorized representative will be signing the agreement on his/her behalf. This conversation should be documented in the agreement by the person authorized to sign and the signature should be obtained below it. It is important the additional language be in the handwriting of the authorized individual.
- **Incompetent Patient:** This scenario is the most common and problematic. When an incompetent patient is admitted, the agreement must be signed by an individual who has been empowered to enter into such an agreement on behalf of the patient. A copy of the

document authorizing signature on the patient's behalf should be copied and attached to the arbitration agreement. For the highest rate of success in enforcing the arbitration agreement under this scenario, there must be a Durable Power of Attorney. This legal document allows someone else to act on the patient's behalf. Under a power of attorney agreement, the patient may grant the authority to their attorney in fact to act on their behalf with regard to any lawful subject or purpose. The Durable Power of Attorney should be signed and dated prior to the date on which the arbitration agreement was signed. This will tend to prove the patient's intent to be bound by his/her attorney in fact at the time the arbitration agreement is signed.

- **Adequately Explained when Presented:** Even when a valid arbitration agreement is signed by the proper party, it still may not be enforceable if the person signing claims he or she was not aware they were waiving their right to a jury trial. Courts have refused to enforce an agreement when the signing party claims he or she was not aware of what they were signing for a number of reasons: 1) the party was not given an opportunity to read the agreement before signing, 2) the party cannot read or understand English, 3) the arbitration process was not described in a manner that the party understood he or she was waiving the right to a jury. It is important the admission coordinator or other persons tasked with obtaining signatures knows how to explain the agreement to the patients and their authorized representatives. An opportunity should be provided for questions and answers prior to obtaining a signature.

Successful enforcement of your arbitration agreements begins with your admissions personnel. Make sure your admissions coordinator is provided with the proper training and tools necessary to implement the steps outlined above.

Stephen Hunter joined Wroten & Associates in 2008. Mr. Hunter's practice focuses on defending elder abuse, wrongful death and medical malpractice actions. He is experienced in the various phases of litigation, including deposition and law and motion. He has successfully prepared, argued and won dispositive motions on behalf of healthcare providers, including demurrers leading to dismissal of the case. Mr. Hunter has prevailed in enforcing arbitration agreements between healthcare providers and their patients. Mr. Hunter has been admitted to practice before all of the courts of the State of California and the U.S. District Court for the Central District of California since 2007.

Mr. Hunter graduated from California State University, Hayward and obtained his Juris Doctor from Thomas Jefferson School of Law in San Diego, California. He was honored in law school for his pro bono work at Thomas Jefferson's Veterans Legal Assistance Clinic. He also received the Distinguished Volunteer Award for his work through the San Diego Volunteer program as well as the State Bar's Wiley W. Manuel Pro Bono Award for Legal Service. In addition to his California State Bar membership, Mr. Hunter is a member of The Defense Research Institute and The Orange County Bar Association.