California law favors the enforcement of Arbitration Agreements. Arbitration is a more time and cost efficient manner to resolve disputes. So why are so few arbitration agreements in the long term care setting actually enforced?

The scenario is all too familiar to most who handle admissions in the long term care industry: A patient is admitted, the admissions paperwork is signed, and the patient and/or family understands and agrees to arbitrate any disputes which may arise from the admission. The arbitration agreement is signed. Later, litigation arises, and despite the existence of a signed agreement to arbitrate, a lawsuit is nevertheless filed in the superior court. Efforts to enforce the agreement in court are unsuccessful. What went wrong?

The right to compel arbitration depends on the existence of a valid agreement to arbitrate between the parties. Most arbitration agreements fall victim to unenforceability due to several common mistakes which can be avoided.

In order for an arbitration agreement to be upheld in court the agreement must:
1) be substantively valid, and
2) be executed by a proper signature.

In recent years, several decisions involving arbitration in the long term care setting have dictated the result of disputes concerning arbitration agreements.

**Agreement Not Enforced** - A comatose patient was admitted to a skilled nursing facility. The patient’s daughter signed the arbitration agreement one week after admission, but did not hold a Durable Power of Attorney. The Court refused to enforce the agreement to arbitrate reasoning that authorization to make health decisions on her mother’s behalf was not the same as the daughter’s independent authority to bind her to arbitration.

**Golinger v. AMS Properties** (2004) 123 Cal. App. 4th 374. - Arbitration Agreement Not Enforced - A patient’s daughter signed her mother’s admission form to a residential care facility. Both the admission agreement and the arbitration agreement contained signature lines for “resident,” “responsible party” and “agent.” The Court held that when the daughter left “agent” space blank and signed only as the “responsible party” she was accepting only the financial responsibility for her mother’s bills.

**Garrison v. Superior Court** (2005) 132 Cal. App. 4th 253. - Arbitration Agreement Enforced - The patient’s daughter was the designated agent for her mother’s healthcare decisions pursuant to a healthcare power of attorney form. The Court held that the daughter was authorized to bind her mother in this case because the agreement to arbitrate was related to healthcare.

**Hogan v. Country Villa** (2007) Cal App LEXIS 289, wherein a patient’s daughter was authorized by a healthcare power of attorney to make medical decisions for her mother. The agreement to arbitrate in Hogan was upheld by the Court of Appeal because the court reasoned that the appointment of the daughter as the mother’s agent for healthcare decisions empowered the daughter to execute the agreement on her mother’s behalf, as part of the long term care facilities’ admission package.

**Flores v. Evergreen at San Diego, LLC** (2007) Cal App LEXIS 348. - Arbitration Agreement Not Enforced - On March 13, 2004, the California Court of Appeal for the Fourth Appellate District decided the matter of Flores v. Evergreen at San Diego, LLC, wherein a patient’s daughter was authorized by a healthcare power of attorney to make medical decisions for her mother.

The power to make medical decisions was held to be distinct from the authorization to bind another to arbitration.

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In this case, the patient’s husband signed various documents upon his wife’s admission to a skilled nursing facility. Some documents were signed by the husband as the wife’s “agent” while others were signed as his wife’s “legal representative”. The husband did not have a power of attorney, conservatorship or guardianship which authorized him to act on his wife’s behalf. The Court reasoned that the husband had no authority, express or implied, which authorized him to act on behalf.

How do you turn the lessons learned from these recent decisions into arbitration agreements which your long term care facility can enforce?

Consider the following steps:

1. **Start With A Substantively Valid Contract:**
   
   In order for your standard arbitration agreement to be enforceable, the contract must be valid. A valid agreement to arbitrate contains the following required 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 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 a violation of the Patient’s Bill of Rights.
   - Arbitration agreements as to disputes arising from professional negligence of a healthcare provider shall contain the language of Code Civ. Proc. §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 GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.”

   In addition, the following suggestions are also recommended:
   - Use a large font throughout the document.
   - Repeat the fact that by signing the agreement, the right to a jury trial is waived, again and again.
   - Increase the scope of the agreement. Rather than using language like: “arising out of this agreement” try broad language like “relating in any way to the patients stay.”
   - Indicate that the agreement to arbitrate is intended to apply to all admissions, and will apply retroactively.
   - Consider including a stipulation as to the applicability of the Federal Arbitration Act.

2. **Explain The Agreement Before Seeking a Signature:**
   
   Once your standard contract is substantively valid, your facility admissions coordinator must be provided with the proper training and tools necessary to adequately explain the agreement so that patients and their authorized representatives will make an informed and voluntary decision to enter into the agreement.
   
   - The admissions coordinator must be able to effectively explain arbitration. Consider the use of
3. Execute The Agreement With The Correct Signature:

Now that your valid agreement to arbitrate has been explained, all questions have been answered, and the patient or the authorized representative is ready to sign, the agreement must be executed by a correct signature. Three situations are common in the signature phase in the long term care setting:

a. Competent Patient Who Is Physically Able To Sign - With a competent patient who is physically capable of signing the agreement, there is little issue with regard to the proper signatory. As long as the patient is competent and able, they are the proper signatory.

b. 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 required signature in this manner will most likely be upheld in court, should the agreement be challenged. In order for a signature obtained in this manner to be enforceable, there must be verball confirmation of the authorization of the individual who is to sign, in front of a witness. The person authorized to sign must then write the authorization into the agreement, and sign below it. The additional language and the signature must be in authorized person’s handwriting.

c. Incompetent Patient - The most common and problematic scenario is when an incompetent patient is admitted. Under these circumstances, 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. With an incompetent patient, two legal arrangements generally confer the proper authority upon a patient’s representative to bind the patient to arbitration. Look for one of the following two types of agreements when a third party is acting on behalf of an incompetent patient:

• Durable Power of Attorney - A power of attorney is a legal document which allows someone else to act on the patient’s behalf. Under a power of attorney agreement, the patient may grant a third party the authority to act on their behalf in fact to act of their behalf with regard to any lawful subject or purpose.

• Conservatorship/Guardianship - A Conservator or guardian may be appointed by a court for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter. The conservatorship may be established for the person or estate or both. Some conservatorships give the conservator the right to make medical decisions for the conservatee, and authorize the conservator to enter into transactions on the conservatee’s behalf. Finally, a health care agent agreement may or may not hold up in court if the agreement is challenged.

• Health Care Agent - The patient may designate a third party as their agent for their health care decisions. Under an agreement of this type, a “health care decision” is defined as a decision made by a patient or the patient’s agent regarding the patient’s health care, including:

• Selection and discharge of healthcare providers and institutions;

• Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication; and

• Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

Whatever the circumstances which confront the admissions staff of your long term care facility, keeping in mind the specific guidelines outlined above will increase the number of valid and enforceable agreements to arbitrate which are obtained at your center.

Sarah P. Gates, an associate at Wroten & Associates, main area of practice is in Elder Abuse & Long Term Care Litigation. Ms. Gates graduated from California State University San Bernardino with a degree in Business Administration, and obtained her JD from Southwestern University School of Law. Ms. Gates was admitted to the State Bar of California and to practice in the United States District Court Central District of California in 2003.
In a recent national seminar regarding consumer protection class actions, Elder Abuse was specifically identified as one of the burgeoning areas for class action litigation. Courts have increasingly disfavored class certification for cases involving personal injuries and wrongful death making “traditional” elder abuse cases, which usually involve such claims, all but impossible to certify. Nonetheless, plaintiffs’ counsel looking for ever greater personal rewards are filing consumer protection class action claims against groups of skilled nursing homes and residential care facilities for the elderly under both California’s Unfair Competition Law and Consumer Legal Remedies Act.

In our next newsletter, we’ll address the basic allegations of such consumer protection claims and provide an overview of the damages sought on behalf of the class members. We’ll address the challenges both sides face as plaintiffs seek class certification. Finally, we’ll discuss interesting procedural decisions which must be made such as whether to remove a class action complaint filed in state court to federal court and whether to compel arbitration. Wroten & Associates, Inc. is proud to provide class action defense representation.

For further information regarding this article, please contact Ms. Wroten at 949.788.1790 or e-mail her at: kwroten@wrotenlaw.com