

Q. What is arbitration? Do I have a right to an attorney? Who are the arbitrators and how are they selected?

A. Arbitration is an alternative to jury trial for resolving legal disputes. Instead of presenting and arguing a case in front of a judge and 12 jurors, the parties in arbitration present their case before three professionals. Each side is represented by an attorney and most high-quality litigators are extremely experienced in both court and arbitration. After a dispute has arisen, one of the first steps is the selection of the arbitration panel. Each side of the dispute selects a “party arbitrator.” The party arbitrators are usually attorneys with experience in medical liability litigation. The two sides then select the third “neutral arbitrator,” who is usually a retired judge. These three arbitrators serve as the decision-making panel. The arbitration panel makes a determination based on the facts of the case as presented by the attorneys for both sides. Each side pays its party arbitrator and both sides split the cost of the neutral arbitrator.

Q. Are all CAP members required to use arbitration?

A. Unless you practice in certain high-risk specialties or your membership has an arbitration condition, your use of arbitration is voluntary. Members practicing in obstetrics or neurosurgery, physicians who have purchased \$2 million /\$4 million coverage, or doctors who have agreed to arbitration during the underwriting process must offer arbitration to their patients. Thus, arbitration is not required for the vast majority of CAP members.

Q. Why does CAP recommend the use of arbitration?

A. A medical liability claim is a very personal matter to physicians and patients. It is a traumatic occurrence that requires serious attention and compassion. The court system, by its very nature, is a public forum subject to scheduling uncertainties. Arbitration uses the same substantive laws as court, but it is done in a more orderly manner that avoids wasted legal fees and the emotional roller-coaster caused by cancelled court dates. Arbitration protects the rights of patients and physicians and provides a binding decision. Thus, the MPT Trustees, the CAP Directors, and the CAP Education Committee feel strongly that arbitration is a fair and economical way of resolving claims. The savings in legal costs from our members’ wide usage of arbitration are reflected in lower assessments for all.

Q. What are some of the other benefits of arbitration?

A. One of the main benefits of arbitration is the greater certainty in preparing for and scheduling the hearing. Instead of bouncing around on a court calendar, arbitrations can be firmly scheduled well in advance. Then, when the time comes to conduct the hearing, the proceedings are dramatically shorter in arbitration than before a judge and jury. At the hearing, the witnesses testify, in private, before arbitrators who generally are familiar with medical

terminology. The parties can thus present their case in a calm, rational manner to an informed audience instead of making a pitch through drama and emotion. All this means less disruption in the physician’s and patient’s life. The shorter time required to conduct an arbitration hearing also means that a doctor can attend the entire proceeding without sacrificing the needs of other patients.

Q. Should I decline to see prospective patients who refuse to sign the arbitration agreement?

A. CAP does not recommend turning away patients who reject arbitration. In fact, refusing to see such patients could violate your contracts with health care payors. Physicians who use arbitration in their practices tell us that very few of their patients reject the arbitration option.

Q. I don’t want my case settled; I want the opportunity to win. Why should I use arbitration?

A. Arbitration is sometimes mistaken for “mediation.” In mediation, the parties enter the process with the aim of finding a compromise damage award. In contrast, the two sides in arbitration prepare their case to win. Arbitrators can and do make awards strictly in favor of defendant physicians by awarding no money to claimants.


Q. Is it more likely that I will win in arbitration or a jury trial?

A. The likelihood of prevailing in a jury trial or in arbitration will always depend on the medical facts. Though not predictive of any particular case, our statistics show that in jury trials and arbitrations conducted, juries have awarded defense verdicts at a higher percentage rate than have arbitrators. Embedded in these results, however, is an indication that many of the cases taken to arbitration represented closer issues than those that went to juries.

Q. Who is more likely to award a higher amount, juries or arbitrators?

A. Our statistics show that on average, juries return higher damage awards than do arbitrators.

Q. Can a binding arbitration decision be appealed?

A. Parties in arbitration may appeal only in very limited situations, such as upon proof of fraud, neutral arbitrator bias, or collusion between arbitrators. Appeals with such allegations are rarely filed. This feature distinguishes binding contractual arbitration from jury trials, where adverse results often lead to appeals that put the physician in a state of uncertainty for years. 

For more than 20 years, CAP has encouraged binding arbitration as an effective tool in the litigation of claims against Members. The process continues to be one of the reasons that our members enjoy superior protection at costs lower than available elsewhere.

For more information about implementing arbitration in your practice, please call CAP Risk Management at 213-473-8788.