Malpractice Crisis: Could Patient Alternative Dispute Agreements Help?

As hospitals and doctors search for solutions to the medical malpractice crisis, some providers are exploring the use of patient consents to arbitration or mediation ("ADR Consents") as part of the admission process. Health care leaders believe that encouraging such alternative dispute resolution may reduce litigation, lower damages awards, and ultimately reduce malpractice premiums.

Even in states such as Maryland, which now requires the mediation of claims in malpractice lawsuits, providers still could benefit from seeking a patient's agreement to mediate a dispute before a lawsuit is filed. Mediation before a claim has matured into a full-blown litigation would save time and expense, and could moderate hostility between parties.

Courts have yet to determine whether they will enforce patient agreements to mediate, arbitrate or otherwise defer a patient's right to sue. Enforceability of these agreements will depend in part on whether a court considers the agreement unfair to the patient or in some way biased in favor of the provider. The more an agreement compromises the patient's rights, the less likely it seems that a court will enforce it. For this reason, court rulings in the health care setting generally have rejected complete waivers of liability - e.g., covenants not to sue - as against public policy.

The effectiveness and enforceability of an agreement that affects the rights of a patient will depend largely on the balance, fairness and care of the provisions of the agreement - in short, how it is worded. The actual use of these agreements by providers also will create facts for courts to consider. For example, under what circumstances was the patient asked to sign the agreement? Was the patient asked to sign the agreement in the emergency room (problematic) or before elective surgery (more acceptable)? How may the provider ensure that the patient is aware and understands the relevant provisions of the ADR Consent? Courts may react tersely to "big" hospitals and "wealthy" doctors who "take advantage" of patients "under duress" at the time of signing the agreement. Despite current uncertainty about enforceability as ADR Consents evolve in practice, there appears to be little downside to using patient agreements that include ADR Consents as part of the admission process. A well-crafted arbitration or mediation provision, that a provider implements after thorough training of its employees who will administer the document, at least creates an opportunity for the patient and hospital. They will have the choice to handle and resolve a dispute in ways that may be faster, less expensive and risky, and perhaps less frightening than the courts.

If you are interested in learning more about patient mediation/arbitration agreements, please contact Lisa Keenan at (410) 244-7710, eckeenan@venable.com.