FRAMEWORK OF DISCUSSION

Legal Strategies – case law and arguments to combat plaintiffs’ strategies to defeat arbitration agreements.

Operational Strategies – forms, policies, procedures and practices to combat plaintiffs’ strategies to defeat arbitration agreements.
WHY ARBITRATE?
Minimize total exposure
Emotional lawsuit – arbitrator (or panel of arbitrators) not likely to react to an emotionally charged presentation
Slight increase in the odds of an award that will be reasonably related to the facts and damages.
Plaintiffs in medically-related disputes prevailed more often in arbitration than in litigation.
Beware of Waiver!
Why Arbitrate? (Cont.)

- Benefits all parties
- Decreased costs
- Simpler procedural and evidence rules
- More flexible scheduling of times/places for hearings
- Hearing vs. trial length
PREPARING FOR ARBITRATION

- Learn about the arbitrator – talk to colleagues
- Do you want a panel vs. one neutral?
ARIZONA LAW
A.R.S. §§ 12–1501–1518
Validity of Arbitration Agreement.
Applies to medical facilities, health care providers, etc.
Presumption of validity for written agreement.
Arbitration agreement must comport with “reasonable expectation” of the parties.
Agreement must also not be “unduly oppressive” or “unconscionable.”
Can not be a “take it or leave it” agreement
Two Types of Unconscionability

- Substantive Unconscionability
- Procedural Unconscionability
Legal Arguments in Opposition to Arbitration Enforcement
Signatures
Binding non-signatories
(Agent Heirs, Next of Kin, Administrator of an Estate, Spouses, etc.)
General Power of Attorney v. Health Care POA/Proxy
SUBSTANTIVE UNCONSCIONABILITY

- Linkage to Caps on Damages
- Discovery Limitations
- Prohibited Attorney Review
- Condition of Admission
PROCEDURAL UNCONSCIONABILITY

- Arbitration Agreement one of a stack of admission documents
- Arbitration documents not explained
- Cognitively-impaired resident
- Language Barrier
- “Stressful” time for family/patient
- “Take It or Leave It”
Considerations Prior to Drafting Agreement

- Involve the insurance provider
- Providing for mediation?
- Costs
- Speed to Hearing
- Appeals
- Who will conduct the arbitration?
DRAFTING THE AGREEMENT
OPTIONAL
VOLUNTARY
SEVERABILITY CLAUSE!!
INDEPENDENT IMPARTIAL ARBITRATOR (or panel, or entity)
REVOCATION CLAUSE
DRAFTING THE AGREEMENT (Cont.)

Broad scope of covered claims:

– All claims re: patient’s/resident’s care against facility, employees, agents, officers, subsidiaries, directors, parent entity, affiliate, medical director
DRAFTING THE AGREEMENT (Cont.)

- Production of documents
- Expert witness discovery
- Arbitrator has subpoena power
- Arbitrator can hear motions
DRAFTING THE AGREEMENT (Cont.)

- Discovery Procedure
  - Per Arizona Rules of Civil Procedure, subject to this agreement
    - Think carefully before including written/deposition discovery timelines
- Provide a copy of the ADR Rules (JAMS, etc.)
DRAFTING THE AGREEMENT (Cont.)

- **Jurisdiction** – Arizona Revised Statutes, or, Federal Arbitration Act.

- **Binding Effect of Agreement** –
  - binds all persons whose claims are derived through, or on behalf of, the patient/resident
  - parent, spouse, child, guardian, heirs, legal representative
DRAFTING THE AGREEMENT (Cont.)

- Costs to be borne by each party
- fees awarded, per Arizona statute/prevailing party rules (Offers of Judgment; Breach of Contract, etc.)
SIGNATURE PAGE “MUSTS”
Right to seek legal counsel
Not a precondition of admission
No undue influence
Nothing prevents resident from reporting violations of law, or administrative code, to appropriate agency
Binding arbitration
Waiving right to appeal arbitrator decision to court of law
Operational Strategies (Cont.)
Staff Training Videos
Explain admission documents
 Ability to answer questions
(Know what arbitration means!)
(Know the difference between mediation and arbitration!)
Let family/patient take agreement home
Don’t rush the admission process
Videotape the admission/signing?
OPERATIONAL STRATEGIES (Cont.)

Family Education Videos/Brochure
Fast and low-cost approach to dispute resolution
Mediation to arbitration track (ADR)
Arbitration decisions are final and binding
Timeline of events
Appeals not allowed
No damage limitations
CHOOSE FACILITY REPRESENTATIVE WISELY

- Trained
- Bilingual
- Answer Questions (or defer and call back)
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