Can Contracts Preclude Frivolous Lawsuits?

Precedent Suggests Yes, When Carefully Crafted and Introduced

Frivolous malpractice claims are expensive and time-consuming. What remedies are available to physicians who fall prey to such lawsuits?

One remedy is to file a suit against the plaintiff and his or her attorney using the tort of malicious prosecution. However, a key element for prevailing is proving that the attorney filed the case with malice, which is difficult to do. In addition, courts generally grant plaintiffs and attorneys wide latitude in pursuing claims of malpractice. Hence, malicious prosecution is a remedy rarely used.

Contract law, which is separate from tort law, is another avenue of redress for physicians to investigate. This article will explore the ability of contract law to protect physicians from frivolous lawsuits.

Making Contracts Enforceable

To help explain what should work, it is first useful to describe what will not work. Asking a patient to forego all remedies is not a workable solution. For example, demanding that a patient not sue for any reason will not be enforceable. Public policy dictates that patients must have some remedy for negligence. That remedy is usually through the courts, although arbitration is another viable option. Having a patient sign a blanket release would be considered an "abuse of power," and courts routinely have dismissed such agreements.

If, however, the demands of a contract are narrower, the contract should withstand challenges to enforceability. The contract defines expectations regarding resolution of concerns, specifically that the physician cannot be sued for a frivolous reason and that should there be a dispute, each side will use experts who follow the code of ethics of the physician's specialty society.

The following considerations for the patient-physician contract are suggested:

- Be clear on the mutuality of agreement.
- Do not make any attempt to change the physician's duty to the patient within the agreement.
- Call the patient's attention to contractual provisions.
- Allow the patient the opportunity to think about the contract and its consequences and to ask questions.
- Do not seek the patient's agreement when care is needed urgently or emergently. A better approach is to obtain agreement later (for example, in a post-hospitalization office visit) and to make the agreement retroactive—as long as the effective date of the agreement is clearly reflected.
- Do not condition the patient's treatment on signing the agreement.

Tests of Enforceability Under Case Law

One test determining enforceability is whether the document is a contract of adhesion. An adhesion contract, as defined in Sanford v. Castleton Health Care Center, is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." While "adhesion contract" is usually viewed as a pejorative label, one court, in Ingles v. State Farm Mutual Insurance, has recognized the basic truth that most contracts fit that description. As the Ingles court noted, however, the important task is to distinguish which adhesion contracts are appropriate and therefore enforceable, and which are not.

The usual term to describe the unenforceable adhesion contract is "unconscionable." The court in Sanford v. Castleton wrote that "a contract is unconscionable if a great disparity in bargaining power exists between the parties, such that the weaker party is made to sign a contract unwillingly or without being aware of its terms." The court proceeded to cite the definition of "unconscionable" according to a 1989 Indiana appellate court opinion: "The contract must be such as no sensible man not under delusion, duress, or in distress would make, and such as no honest and fair man would accept."

Unconscionability is a fact-sensitive, case-by-case issue. As addressed by the court in Sosa v. Paulos, there are two aspects to unconscionability: procedural and substantive. The procedural aspect addresses the way the contract is reached. The substantive aspect refers to the actual terms.

Two provisions of agreement that likely would not be considered unconscionable

are first the promise not to bring a frivolous lawsuit and second the mutual promise to use only experts who follow the code of ethics for the physician's specialty society.

The first promise could be "unconscionable" only if the court concludes that it is intended to have a chilling effect on bringing lawsuits, which, the argument would state, is against public policy. Such a promise, however, is nothing more than an obligation already imposed on litigants. People are not supposed to file frivolous lawsuits. This principle is reflected in numerous statutes. For example, an Indiana statute permits the winning party to recover attorney fees if the losing party's lawsuit was frivolous.

The second promise focuses on how evidence may be brought forward. The well-reputed treatise on contract law, Williston on Contracts, Fourth Edition, states: "There is a growing tendency for courts to uphold the right of parties to prescribe certain rules of evidence should a lawsuit arise out of the bargain between them, so long as it does not unduly interfere with the inherent power and right of the court to consider relevant evidence."

As to the option of arbitration, it is well established that patients and physicians can contractually use arbitration. Arbitration asks the plaintiffs to forego their right to trial by judge or jury. Yet imposing reasonable conditions on expert witness behavior is clearly less restrictive than arbitration. Agreements to arbitrate are a far greater intrusion into the traditional judicial system.

Recent cases on arbitration are split among jurisdictions. However, close analysis suggests that the cases in which arbitration was not enforced were so decided because the way the contract was reached was unconscionable, not because arbitration was unconscionable in and of itself. In Sosa v. Paulos, an agreement to arbitrate was presented to the patient immediately before knee surgery, after the plaintiff was in his surgical gown, and the agreement was presented for signature without explanation. Neither was there any explanation of the documents at any postoperative visits. The Utah Supreme Court found this agreement unconscionable because of the way the patient was asked to make the agreement. When, however, the troublesome facts reflected in Sosa v. Paulos have not been present, agreements to arbitrate have been held to be not unconscionable and, therefore, enforceable.

In the Buraczynsky v. Eyring and Sanford v. Castleton cases, the courts relied on several factors to find that the contracts were not unconscionable and therefore were enforceable. Those factors included:

- Contractual provisions were not hidden, but highlighted.
- There was opportunity to read the contract unrushed and to ask questions.
- The language was easy to read and understand.
- The language did not change the physician's duty to use reasonable care.
- The contract did not limit liability of the provider to the patient.

Contract Enforceability for Nonsignatory Parties

A contract can mandate that any attorney a patient-plaintiff hires follows the same rules. Further, falling back on the arbitration analogy, there are precedents for holding nonsignatory parties to agreements.

A minor child can be bound by the mother in an agreement to arbitrate made during the prenatal period. The court in Wilson v. Kaiser Foundation Hospitals interpreted the arbitration clause to apply to any claim arising from services under the agreement, even though the plaintiff had not been born when the agreement was signed. In Gross v. Recabaren, the spouse of a contract signatory filed a lawsuit for loss of consortium because of a physician's negligence. The court found that when a patient contracts to arbitrate claims of negligence, all claims arising from the alleged malpractice must be arbitrated. Similarly, in Herbert v. Superior Court, heirs in a wrongful death action were found to be bound by the decedent's agreement to arbitrate because the contract required claims by the "member's heir or personal representative" to be arbitrated.

A note on retroactive enforcement: Physicians often have long-term relationships with patients. Is it possible to script a new contract to address past actions? The answer is maybe. In California the Coon v. Nicola ruling provided precedent for retroactive activation of an arbitration agreement.

What Is "Frivolous"?

The fact remains that what is frivolous to one person might be entirely legitimate to another. How can the definition be tightened to make a contract to avoid pursuing a frivolous case meaningful?

One solution is to focus on frivolous testimony as a determinant of breach. For example, a conclusion by the professional conduct committee of an organization such as the AANS might serve as the basis that the expert testimony was indeed frivolous. Labeling definitions and rules of procedure are often embedded in contracts. Hence, the definition of frivolous or the process for determining if testimony is frivolous could likewise be incorporated into a contract.

In summary, contracts can be used with patients to decrease the likelihood that the physician will be sued for a frivolous reason. There is ample precedent with arbitration contracts to believe that such contracts can be enforced. However, proper attention must be paid to the content and the procedure used for obtaining agreement. Given that tort reform may not be the best tool to deal specifically with frivolous lawsuits, contract law should help to fill the gaps. ■

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