NOTES

Medical Malpractice Arbitration: Time for a Model Act

I. INTRODUCTION

In the mid-1970s the health care field suffered what was termed a medical malpractice "crisis."[1] Increasing numbers of malpractice verdicts against doctors, hospitals, and other health service providers resulted in rapidly escalating malpractice insurance costs[2] and a general deterioration of the medical profession's liability insurance marketplace.[3] Several insurers reduced the scope of available malpractice liability coverage,[4] and in some regions physicians experienced difficulty in obtaining insurance at any price.[5] This crisis led to a

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1. *See generally* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 1ST SESS., AN OVERVIEW OF MEDICAL MALPRACTICE 30 (Comm. Print 1975); U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, PUB. NO. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 4 (1973) [hereinafter cited as HEW REPORT]; Altman, *Malpractice Rates Drive Up Doctor Fees*, N.Y. Times, July 27, 1975, § 1, at 1, col. 4; Bassis, *Arbitration of Medical Malpractice Disputes—Some Problems*, 676 INS. L.J. 260 (1979); Lerner, *The Medical Malpractice Crisis: Response v. Reaction*, in AMERICAN ARBITRATION ASS'N, WIDE WORLD OF ARBITRATION 140 (1978) [hereinafter cited as *Medical Malpractice Crisis*].

2. *See, e.g.*, Altman, *supra* note 1, at 1; Heintz, *Medical Malpractice Arbitration: A Viable Alternative*, 34:4 ARB. J. 12, 13 (1979); *Medical Malpractice Crisis*, *supra* note 1, at 140. *See also* SENATE SUBCOMM. ON EXECUTIVE REORGANIZATION, 91ST CONG., 1ST SESS., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 1-6 (Comm. Print 1969) [hereinafter cited as PATIENT VERSUS PHYSICIAN].

As early as 1969, the increase in the number of medical malpractice claims and the amounts of settlements had been reflected in sharply increased premiums. *Id.* at 9. Between 1968 and 1969, premiums in Utah increased by more than 1300%. *Id.* Meanwhile, the Nettleship Company of Los Angeles, a large southern California carrier, had increased its premiums by an average of 110%. *Id.*

3. Heintz, *supra* note 2, at 13. *See also* PATIENT VERSUS PHYSICIAN, *supra* note 2, at 1-6.

4. *See, e.g.*, *Medical Malpractice Crisis*, *supra* note 1, at 140-41. One change in available coverage was the advocacy of "claims made" policies instead of "claims occurrence" policies. *Id.* Under a "claims made" policy, coverage will be provided only for claims actually filed during the life of the policy. *Id.* With a "claims occurrence" policy, the insurer must cover any alleged acts of malpractice that took place during the policy period regardless of whether the policy is still in effect when the claim is actually brought. *Id.* The use of a "claims made" policy forces the purchase of additional or "tail" coverage for any claims made after the initial policy expires. *Id.* at 141.

5. *See id.* at 140-41. Several states faced the problem of a dearth of medical malpractice liability insurance coverage. *Id.* at 140. The number of malpractice carriers in California decreased from ten to four during the period from 1974 to 1975. *Id.* By January 1, 1975, "high risk" physicians in Indiana had lost coverage entirely. *Id.* In New York, Argonaut Insurance Co., which had replaced Employers Insurance Company of Wausau as the sponsored underwriter for the Medical Society of the State of New York, announced that it would cease writing policies on July 1, 1975. *Id.*

general increase in the cost of medical care[6] and a decrease in the availability of medical services in some areas.[7]

Faced with the twin spectres of diminishing medical services and increasing prices, every state responded by enacting some type of medical malpractice reform legislation.[8] Typically, the new statutes placed limits on the liability of health care providers,[9] reduced applicable statutes of limitations,[10] restricted the use of res ipsa loquitur,[11] established screening panels[12] and encouraged voluntary binding arbitration.[13]

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6. *See* sources cited in notes 1-2 *supra*. The increase resulted from the physicians passing along the cost of increased liability coverage to their patients. PATIENT VERSUS PHYSICIAN, *supra* note 2, at 9. In addition, the fear of malpractice suits made health service providers defensive, leading them, for example, to perform more diagnostic tests, whether necessary or not, "just to be safe." *Id.* at 2, 6-7.

7. *See* sources cited in notes 1-2 *supra*. In high risk specialties, health service providers became more prone to refuse certain cases. PATIENT VERSUS PHYSICIAN, *supra* note 2, at 7-8. The high cost of premiums in some locales also encouraged relocation. *See generally* sources cited in notes 1-2 *supra*.

8. *See* Ladimer, *Medical Malpractice Claims*, in ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS 301, 302 (A. Widiss ed. 1979).

9. *See, e.g.*, IND. CODE ANN. § 16-9.5-2-1 (Burns Supp. 1980) (liability of individual health care provider limited to $100,000 per claim).

10. *See, e.g.*, IOWA CODE ANN. § 614.1(9) (West Supp. 1980) (two-year statute of limitations from date of notice of injury giving rise to claim, to a maximum of six years from date of occurrence).

11. *See, e.g.*, N.H. REV. STAT. ANN. § 507-c:2 (Cum. Supp. 1979) (use of doctrine of res ipsa loquitur prohibited in medical malpractice cases).

12. Screening panels were established by several medical malpractice reform statutes. *See, e.g.*, 40 PA. CON. STAT. ANN. § 1301.309 (Purdon Cum. Supp. 1980). Under such statutes, submission of a dispute to a panel is a condition precedent to a court trial of the case and thus does not result in a final resolution of the controversy. *See* HEW REPORT, *supra* note 1, at 91. Typically, the panel is composed of three members, a doctor, an attorney, and a layperson, who hear the medical malpractice claims prior to their submission to the courts. The panel presents only the "relevant" evidence, the pertinent equitable considerations, and a tentative decision to the court, thereby promoting judicial efficiency. *See, e.g.*, N.J. CT. R. 4:21 (Pressler ed. 1980). Although their decisions are not binding, the panels were created in order to encourage settlements of meritorious claims and discourage meritless ones. *Id.*

The use of screening panels as a mandatory precedent to access to the courts was challenged in several jurisdictions as violative of due process and the right to a jury trial, because the panel's decision could be used as evidence in the subsequent trial, thus influencing the jury's fact-finding role. The seventh amendment right to a jury trial in civil actions has not been incorporated into the fourteenth amendment and is therefore not applicable to the states. *See, e.g.*, Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); Walker v. Sauvinet, 92 U.S. 90 (1875). The constitutions of every state except Colorado and Louisiana, however, do expressly guarantee the right to a jury trial in civil actions. *See* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, PUB. NO. (OS) 73-89, APPENDIX TO REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 318 (1973) [hereinafter cited as HEW APPENDIX]. Screening panels were found to be unconstitutional by some state courts. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); State v. Gaertner, 583 S.W.2d 407 (Mo. 1979); Simon v. St. Elizabeth Medical Center, 3 Oh. Op. 3d 164, 355 N.E.2d 903 (C.P. 1976). For an examination of the constitutionality of the screening panel concept see Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322 (1977).

Florida's statute, FLA. STAT. ANN. § 768.44(3) (West Cum. Supp. 1979), which provides for mandatory submission of malpractice disputes to a nonbinding screening panel, was recently found to be violative of the due process clauses of the United States and Florida Constitutions because of the arbitrary and capricious nature of the law's time limit on the panel's jurisdiction. Aldana v. Holub, 381 So. 2d 231 (Fla. 1980).

Of the newly enacted statutes, thirteen endorsed the concept of arbitration in some form.[14] Arbitration, an alternative to litigation,[15] generally results in a final resolution of the dispute.[16] The parties agree to submit their dispute to impartial third parties, who render a binding decision called an award.[17] Among the claimed advantages of

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The viability of screening panels continues to be questioned. *See, e.g.*, Margolick, *Mediation Isn't Cure for Patients' Claims*, NAT'L L.J., Feb. 4, 1980, at 34, col. 2. Critics cite delays in administration, the chilling effect of a panel decision on jurors, and a negligible impact on court calendars. *Id.*

13. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5041 (MICH. STAT. ANN. § 27A.5041 (Callaghan 1980)) (arbitration of existing and future medical malpractice permitted). For a discussion of the various medical malpractice statutory reforms, see Bassis, *supra* note 1, at 263; Ladimer, *supra* note 8, at 301-02.

14. ALA. CODE § 6-5-485 (1977); ALASKA STAT. § 09.55.535 (Cum. Supp. 1979); CAL. CIV. PROC. CODE § 1295 (West Cum. Supp. 1980); GA. CODE ANN. §§ 7-401 to -424 (Cum. Supp. 1979); ILL. ANN. STAT. ch. 10, §§ 201-214 (Smith-Hurd Supp. 1980-1981); LA. REV. STAT. ANN. §§ 9:4230-:4236 (West Cum. Supp. 1951-1979); ME. REV. STAT. ANN. tit. 24, §§ 2701-2715 (West Cum. Supp. 1979-1980); MICH. COMP. LAWS ANN. §§ 600.5040-.5065 (MICH. STAT. ANN. §§ 27A.5040-.5065 (Callaghan 1980)); N.D. CENT. CODE §§ 32-29.1-01 to -10 (Supp. 1979); OHIO REV. CODE ANN. §§ 2711.21-.24 (Page Supp. 1978); S.D. CODIFIED LAWS ANN. §§ 21-25B-1 to -3 (1979); VT. STAT. ANN. tit. 12, § 7002 (Cum. Supp. 1980); VA. CODE § 8.01-581.12 (1977).

In Alabama, Louisiana, Maine, Ohio, North Dakota and Virginia, voluntary binding arbitration is offered as an option to mandatory submission of claims to screening panels.

15. Arbitration is a system of nonjudicial resolution of disputes, whereby the parties submit their differences to an impartial third party or parties. HEW REPORT, *supra* note 1, at 92. Arbitration differs from mediation or conciliation in that the latter do not result in a binding decision by the impartial third party. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 1.02, at 3-4 (1968) [hereinafter cited as COMMERCIAL ARBITRATION]. In mediation and conciliation the parties use the neutral party to offer compromise settlements or otherwise suggest methods of resolving the impasse. The recommended solution is not binding on the parties and may not be judicially enforced. *Id.* Irving Ladimer, Joel Solomon, and Stanley House have noted several characteristics distinguishing litigation from arbitration: (1) formal pleadings in a suit, as compared with a statement of the dispute's nature and a possible answering statement in an arbitration; (2) pretrial procedures such as discovery and examinations before trial, versus a paucity of such procedures in arbitration; (3) court trial by judge or jury, as opposed to an arbitration hearing before party-appointed arbitrators who usually have expertise in the dispute's subject matter; (4) adherence to rules of evidence in trials, as compared with relaxation of such rules in arbitration; (5) a court decision based on rules of law, compared with an arbitration award that is equitable but not necessarily in conformity with rules of law; (6) a right to appeal a court decision, versus final and binding arbitration awards, subject only to limited review; and (7) public court proceedings (generally) with subsequent reporting of decision, as contrasted with private arbitration hearings with the ultimate decision only announced to the parties. I. LADIMER, J. SOLOMON, & S. HOUSE, DEMOCRATIC PROCESSES FOR MODERN HEALTH AGENCIES 151 (1979).

16. *See, e.g.*, Friedman, *Correcting Arbitrator Error: The Limited Scope of Judicial Review*, 33:4 ARB. J. 9 (1978). The scope of judicial review of arbitration awards is generally limited to questions of fraud, evident partiality, misconduct, or actions in excess of authority by the arbitrators. *See, e.g*, 9 U.S.C. § 10 (1976). Awards will not be overturned for mere errors of law. Wilko v. Swan, 346 U.S. 427, 436-37 (1953).

17. An award is analogous to a court decision and under modern statutes must be in writing, although a formal opinion with findings of fact and conclusions of law is usually not required. *See* AMERICAN ARBITRATION ASS'N, A DICTIONARY OF ARBITRATION AND ITS TERMS 32 (K. Seide ed. 1970) [hereinafter cited as DICTIONARY].

arbitration are speed,[18] economy,[19] informality of proceedings,[20] knowledgeable or expert triers of fact,[21] and relative finality.[22] By allowing the parties to use arbitration, the thirteen state legislatures with such statutes sought ultimately to reduce the number of malpractice cases, thereby decreasing the cost of liability coverage and medical care.[23]

The availability of the benefits of medical malpractice arbitration has been limited by the lack of a consistent approach to such arbitration and a resulting absence of facilitating statutes in many states.[24] In states where no arbitration system for medical malpractice claims

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18. *See* HEW REPORT, *supra* note 1, at 94; Heintz, *supra* note 2, at 15-17; Nocas, *Arbitration of Medical Malpractice Claims*, 13 FORUM 254, 257 (1977). Heintz summarized a study of the Southern California Arbitration Project, a hospital-based arbitration pilot program. See text accompanying notes 65-73 *infra* for an examination of the procedures utilized in the project. Comparing the experiences of the hospitals that had agreed to submit claims to arbitration to those of hospitals that had followed the litigation route, Heintz found that the arbitration group had realized a "net average savings" of 22.02% in time expended between the filing of a claim and its final resolution, for the period examined. Heintz, *supra* note 2, at 16. *See also* Heintz, *Medical Malpractice Arbitration: A Successful Hospital-Based Application*, 680 INS. L.J. 515, 521-22 (1979).

19. *See generally* HEW REPORT, *supra* note 1, at 94; U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, PUB. NO. (HRA) 76-3159, AN ANALYSIS OF THE SOUTHERN CALIFORNIA ARBITRATION PROJECT JANUARY 1966 THROUGH JUNE 1975 (1975); Heintz, *supra* note 2, at 16-17. Heintz found that the speed at which malpractice arbitrations were resolved resulted in a cost reduction for participants in the project. *Id.* Overall defense costs for the period studied were 21% lower for the arbitration hospital group. *Id.* The cost of settling individual claims was 58.93% less for the arbitration patient group. *Id.* Heintz attributed much of the decrease to reduced insurance premiums:

> A basic insurance theory often suggested is that the longer a meritorious claim remains unsettled, the more difficult it becomes to resolve amenably from both the claimant and insurer's perspective. . . . Further, the time value of money in an inflationary economy dictates the necessity of recouping greater sums to provide legal recompense for the claimant and to defray the increasing accumulation of expenses associated with contesting a case. Hence, the findings of such magnitude with respect to savings in time should theoretically translate into reduced losses or settlements paid claimants under the arbitration project.

Id. at 16-17.

20. *See* HEW REPORT, *supra* note 1, at 94; Nocas, *supra* note 18, at 255-57. In arbitration, strict rules of evidence are generally relaxed. *See, e.g.*, AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES § 31 (Mar. 1, 1981) ("The arbitrator should be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary"); COMMERCIAL ARBITRATION, *supra* note 15, § 24.02, at 235. Thus, whereas medical testbook evidence would be of limited use in litigation, F.R. EVID. 803(18), an arbitrator can permit the entry of such evidence.

21. *See* COMMERCIAL ARBITRATION, *supra* note 15, § 21.01, at 202; HEW REPORT, *supra* note 1, at 94; Nocas, *supra* note 18, at 254. Nocas has observed that medical malpractice arbitrations are typically heard by three arbitrators, an attorney, a physician, and a layperson. *Id.* Medical malpractice arbitration statutes generally provide for this type of composition, with minor variations. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5044(2) (MICH. STAT. ANN. § 27A.5044(2) (Callaghan 1980)) (three arbitrators: one physician, one layperson who is not a doctor, lawyer, or representative of a hospital or an insurance company, and one attorney, who serves as chairman). See text accompanying notes 277-293 *infra* for a discussion of arbitrators.

22. See note 16 *supra*.

23. *See, e.g.*, introductory statement to 1976 VA. ACTS ch. 611, amending VA. CODE § 8.

24. See text surrounding notes 264-307, 326-329 *infra*.

has been enacted,[25] problems arise when parties seek to enforce an agreement to arbitrate by reference to the state's general arbitration law.[26]

There are signs of a recurrence of the mid-1970s crisis.[27] When such a crisis situation is coupled with the shortcomings of medical malpractice statutes that do not incorporate provisions for arbitration[28] and with the problems of enforcing arbitration agreements in jurisdictions without medical malpractice statutes, the need for a consistent approach that would facilitate adoption of arbitration of these disputes in all jurisdictions becomes urgent. This Note will examine the use of voluntary binding arbitration as a means of settling medical malpractice claims. Existing medical malpractice arbitration statutes will be analyzed and compared, as will the case law in jurisdictions without such statutes. The primary focus will be on the problems created by the diverse approaches to medical malpractice arbitration by states that have enacted specialized medical malpractice arbitration laws and those that have not. The Note will suggest the need for a model act for the arbitration of medical malpractice claims and present a draft for such a model act.

II. Varieties of Medical Malpractice Arbitration

Arbitration had its informal origins in antiquity.[29] It did not come into widespread use, however, until the first modern arbitration act was passed in New York in 1920.[30] Prior to the enactment of arbitration statutes, the process was governed by common law.[31] At common law, courts were often reluctant to enforce agreements to arbi-

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25. *See, e.g.*, N.Y. Jud. Law § 148-a (McKinney Cum. Supp. 1979-1980), which provides for submission of medical malpractice claims to a screening panel established by each appellate division.

26. See notes 42-52 and accompanying text *infra*.

27. *See* Chapman, *Medical Malpractice Claims Rise—Is Another Crisis Looming?* Nat'l L.J., Feb. 4, 1980, at 34, col. 1. St. Paul Fire & Marine Insurance Co., the nation's largest medical malpractice insurer, reported a 12% increase in claims against physicians in 1978. *Id.* Such claims had dropped by up to 11% during the preceding two years. The Illinois State Medical Society stated that more claims were filed in Cook County in September 1979 than in any month during the prior four years. *Id.*

28. See note 12 and accompanying text *supra*. *See also* Ad Hoc Comm. on Medical Malpractice Panels, Report to the Chief Administrative Judge of the State of New York on the Operation of Medical Malpractice Panels (March 19, 1980), which concludes that the screening panel system in New York State has not met the legislative objectives and recommends elimination of the system.

29. *See, e.g.*, J. Ralston, International Arbitration from Athens to Locarno 153-173 (1929).

30. *See* N.Y. Civ. Prac. Act §§ 1448-1450 (1920) (current version at N.Y. Civ. Prac. Law §§ 7501-7514 (McKinney 1980)).

31. *See* Dictionary, *supra* note 17, at 52 (definition of common-law arbitration).

trate, viewing them as an unlawful means of ousting the judiciary from its jurisdiction.[32] The courts were especially reluctant to enforce agreements to arbitrate future disputes.[33] Modern arbitration statutes, however, provide for judicial enforcement of agreements to arbitrate future disputes as well as existing disputes.[34]

The application of arbitration to resolving medical malpractice claims has not resulted in a wholesale incorporation of all the features of modern arbitration acts.[35] The variations on the use of arbitration play a key role in hindering the usefulness of arbitration in this context.

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32. Wallace v. Brotherhood of Locomotive Firemen & Enginemen, 230 Iowa 1127, 1133-34, 300 N.W.2d 322, 325-26 (1941); *see* COMMERCIAL ARBITRATION, *supra* note 15, § 3.01, at 16-18.

33. Meacham v. Jamestown, F. & C.R. Co., 211 N.Y. 346, 351-52, 105 N.E. 653, 655 (1914).

34. *See, e.g.*, United States Arbitration Act, 9 U.S.C. §§ 1-14, 201-208 (1976). Professor Domke had noted the following general characteristics of most modern arbitration acts: (1) irrevocability of an agreement to arbitrate future disputes; (2) judicial power to compel a party to arbitrate under the agreement; (3) judicial power to stay litigation of an arbitrable dispute; (4) judicial authority to appoint arbitrators where parties refuse to or cannot do so; and (5) limited scope of judicial review. COMMERCIAL ARBITRATION, *supra* note 15, § 4.01, at 20. Some 40 states now have some form of modern arbitration act. *See* ALASKA STAT. §§ 09.43.-.010 to -.220 (1973); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1956 & Cum. Supp. 1957-1979); ARK. STAT. ANN. §§ 34-511 to -532 (Cum. Supp. 1979); CAL. CIV. PROC. CODE §§ 1280-1295 (West 1972 & Cum. Supp. 1980); COLO. REV. STAT. §§ 13-22-201 to -223 (Cum. Supp. 1978); CONN. GEN. STAT. ANN. §§ 52-408 to -424 (1960 & Cum. Supp. 1980); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1974); FLA. STAT. ANN. §§ 682.01-.22 (West Cum. Supp. 1979); GA. CODE ANN. §§ 7-101 to -224 (1973 & Cum. Supp. 1979); HAWAII REV. STAT. §§ 658-1 to -15 (1976); IDAHO CODE §§ 7-901 to -922 (1979); ILL. ANN. STAT. ch. 10, §§ 101-123 (Smith-Hurd 1975 & Cum. Supp. 1979); IND. CODE ANN. §§ 34-4-2-1 to -22 (Burns 1973 & Cum. Supp. 1980); KAN. STAT. ANN. §§ 5-401 to -422 (1975); LA. REV. STAT. ANN. §§ 9:4201 to :4217 (West 1951); ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (West 1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1974); MASS. ANN. LAWS ch. 251, §§ 1-19 (Michie/Law. Co-op 1968 & Supp. 1980); MICH. COMP. LAWS §§ 600.5001-.5035 (MICH. STAT. ANN. §§ 27A.5001-.5035 (Callaghan 1980)); MINN. STAT. ANN. §§ 572.08-.30 (West Cum. Supp. 1980); MO. ANN. STAT. §§ 435.350-.470 (Vernon Cum. Supp. 1980); NEV. REV. STAT. §§ 38.015-.205 (1977); N.H. REV. STAT. ANN. §§ 542:1-:10 (1974); N.J. STAT. ANN. §§ 2A:24-1 to -11 (1952); N.M. STAT. ANN. §§ 44-7-1 to -22 (Supp. 1978); N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1976); N.C. GEN. STAT. §§ 1-567.1-.20 (Cum. Supp. 1979); OHIO REV. CODE ANN. §§ 2711.01-.16 (Page Supp. 1979); OKLA. STAT. ANN. tit. 15, §§ 801-818 (West Cum. Supp. 1979-1980); OR. REV. STAT. §§ 33.210-.340 (1977); PA. STAT. ANN. tit. 5, §§ 161-179 (Purdon 1963 & Supp. 1980-81); R.I. GEN. LAWS §§ 10-3-1 to -20 (Supp. 1978); S.C. CODE §§ 15-48-10 to -240 (Supp. 1979); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to -38 (1979); TEX. REV. CIV. STAT. ANN. art. 224-238 (Vernon 1973 & Cum. Supp. 1980); UTAH CODE ANN. §§ 78-31-1 to -22 (1977); VA. CODE §§ 8.01-577 to -581 (1977); WASH. REV. CODE ANN. §§ 7.04.010-.220 (1961); WIS. STAT. ANN. §§ 298.01-.18 (1958); WYO. STAT. §§ 1-36-101 to -119 (1977). Twenty-three of the states indicated above—Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas and Wyoming—have adopted some form of the Uniform Arbitration Act.

35. See notes 264-307 and accompanying text *infra*.

A. *Voluntary or Mandatory*

Medical malpractice arbitration may be either mandatory[36] or voluntary.[37] Under a voluntary system, the parties involved agree to submit their differences to arbitration.[38] In states having medical malpractice arbitration statutes,[39] formal details of the agreement to arbitrate and the procedures to be utilized in the arbitration are controlled by law.[40] Parties in states not having these statutes are of

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36. Under Puerto Rico's statute, all medical malpractice claims based on injuries sustained after the effective date of the law must be submitted to binding arbitration before a three-member panel designated by the Administrator Judge of the Superior Court. P.R. LAWS ANN. tit. 26, §§ 4101-4106 (Supp. 1977). Under this act, there is no right to a trial de novo following the arbitration proceeding. *Id.* § 4106. A trial de novo is generally conducted as though there had not been a prior hearing, and all issues, whether legal or factual, may be raised again. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 1ST SESS., AN OVERVIEW OF MEDICAL MALPRACTICE 248 n.1 (Comm. Print. 1975). One of the features of screening panels is the parties' right to a trial de novo following the screening panel proceeding. See note 12 *supra*.

37. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5041 (MICH. STAT. ANN. § 27A.5041 (Callaghan 1980)) (person receiving health care "may, if offered, execute an agreement to arbitrate a dispute").

38. *See, e.g., id.*; COMMERCIAL ARBITRATION, *supra* note 15, § 1.02, at 3, 5. Disputes may be arbitrated, even in the absence of any arbitration statute, but they will then be governed by common law. At common law, agreements to arbitrate were revocable by either party prior to the issuance of an award and were valid only as to existing disputes. *See, e.g.*, Joseph L. Wilmotte & Co. v. Rosenman Bros., 258 N.W.2d 317, 328 (Iowa 1977).

39. The states with such statutes are Alabama, Alaska, California, Georgia, Illinois, Louisiana, Maine, Michigan, North Dakota, Ohio, South Dakota, Vermont, and Virginia. See note 14 *supra*.

40. *See* ALA. CODE § 6-5-485 (1977) (agreement must be in writing and signed by both parties); ALASKA STAT. § 09.55.535(b) (Cum. Supp. 1979) (agreement must comply with form approved by attorney general); CAL. CIV. PROC. CODE § 1295 (West Cum. Supp. 1980) (agreement must contain detailed explanation of implications of arbitration and bold-faced notice of waiver of court or jury trial right); GA. CODE ANN. § 7-407 (Cum. Supp. 1979) (submission must be in writing signed by parties or representatives with "clear and accurate" statement of matter in dispute, agreement as to payment of arbitration costs, procedure to be followed, list of witnesses, names of arbitrators, time and place of hearing, and "other matters that may be pertinent"); ILL. ANN. STAT. ch. 10, §§ 202(d), 209 (Smith-Hurd Cum. Supp. 1980) (agreement must be in writing, signed by parties, stating services covered, and must contain bold-faced notice as to waiver of court trial, revocability of agreement, and fact that patient cannot be forced to sign agreement as prerequisite to medical treatment); LA. REV. STAT. ANN. §§ 9:4231, :4235 (West Cum. Supp. 1951-1979) (agreement must be in writing and signed by patient or guardian and health care provider and must be voluntary. Statute offers model arbitration clause. Patient must be informed of right to revoke and procedures for revocation); ME. REV. STAT. ANN. tit. 24, § 2702 (West Cum. Supp. 1978-1979) (agreement must be signed and in writing, with a bold-faced notice as to waiver of court or jury trial and revocability, and be accompanied by explanatory brochure); MICH. COMP. LAWS ANN. §§ 600.5041-.5042 (MICH. STAT. ANN. §§ 27A.5041-.5042 (Callaghan 1980)) (agreement must be signed and in writing and contain bold-faced notice as to revocability and fact that signature of patient is not necessary for medical treatment, and must be accompanied by explanatory brochure); N.D. CENT. CODE § 32-29.1-02(2) (Supp. 1979) (agreement must be in writing and filed with court); OHIO REV. CODE ANN. § 2711.23 (Page Supp. 1978) (agreement must provide that care will be rendered regardless of whether agreement to arbitrate is signed by patient, that it may be revoked, that court trial is waived, and that expenses of arbitration will be divided equally); S.D. CODIFIED LAWS ANN. § 21-25B-3 (1979) (agreement must contain bold-faced notice of waiver of court trial and non-requirement of patient signature for receipt of medical care); VT. STAT. ANN. tit. 12, § 7002(a) (Cum. Supp. 1980) (agreement to submit existing claim to arbitration must be in writing); VA. CODE § 8.01-581.12 (1977) (agreement must be in writing and provide for revocation).

course free to arbitrate under the general arbitration law,[41] but their probability of success in enforcing the agreement is low. In *O'Keefe v. South Shore Internal Medicine Associates*,[42] the Supreme Court of New York, which sits in a state that does not have a statute providing for medical malpractice arbitration, refused to enforce an agreement to arbitrate that facially complied with the state's general arbitration statute.[43] Plaintiff, the administratrix of her husband's estate, had commenced a wrongful death action[44] against the South Shore Medical Group and three physicians, alleging acts of medical malpractice resulting in the death of her husband.[45] Only one of the four defendants, however, had contracted with the decedent to arbitrate any claim or dispute arising out of the parties' relationship, except disputes for services rendered and claims under $1,000.[46] The signing

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41. *See, e.g.*, N.Y. CIV. PRAC. LAW § 7501 (McKinney 1976) (written agreement to submit any future or existing dispute to arbitration is enforceable).

42. 102 Misc. 2d 59, 422 N.Y.S.2d 828 (Sup. Ct. 1979).

43. *Id.* at 65, 422 N.Y.S.2d at 832. N.Y. CIV. PRAC. LAW § 7501 (McKinney 1976) provides that "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and enter judgment on an award."

44. See text surrounding notes 224-244 *infra* for a discussion of the arbitrability of wrongful death actions.

45. 102 Misc. 2d at 61, 422 N.Y.S.2d at 829.

46. *Id.* at 63, 422 N.Y.S.2d at 832. The entire agreement read:

OPTIONAL OFFICE ARBITRATION AGREEMENT

NOTICE: BY SIGNING THIS AGREEMENT TO HAVE ANY CLAIM OF MEDICAL MALPRACTICE DECIDED BY A PANEL OF THREE ARBITRATORS YOU ARE WAIVING YOUR RIGHT TO A TRIAL BY JUDGE OR JURY.

I understand that my doctor(s) has (have) already agreed to arbitrate any claim or dispute, except for disputes over charges for services rendered and claims under $1,000, which may arise in the future out of, or in connection with, our medical relationship.

I understand that I can choose trial by judge or jury or arbitration to resolve such a claim or dispute. I freely choose arbitration which I understand is a procedure by which a panel of three people, usually mutually chosen by the parties to a dispute, decide the facts and the law of the case rather than a judge or jury. I also understand that any arbitration will be conducted in accordance with New York Law, the Commercial Arbitration Rules of the American Arbitration Association (AAA) and the Medical Arbitration Rules, which are incorporated by reference in this agreement, and shall be administered by the AAA.

In consideration of this agreement by my doctor(s) to arbitrate all such claims, I agree to arbitrate, under the provisions of this document, any such claims that may arise in the future.

I understand that I may have to pay my share of the expenses of an arbitration up to a maximum of $500.00. I understand that this agreement to arbitrate is binding on me, my infant or incompetent and all my agents, representatives, heirs, assigns, and the professional corporation or partnership, if any, employees, partners, agents, representatives, heirs and assigns of my doctor(s).

THIS AGREEMENT TO ARBITRATE IS NOT A REQUIREMENT FOR HEALTH CARE. YOU OR YOUR LEGAL REPRESENTATIVE MAY REVOKE THIS ARBITRATION AGREEMENT UP TO THIRTY (30) DAYS AFTER YOU SIGN IT BY A LETTER TO YOUR DOCTOR(S).

physician moved to compel arbitration under the doctor-patient agreement,[47] which also bound the heirs of the decedent.[48] The court cited several reasons for its refusal to order arbitration: the possibility of multiple actions;[49] the lack of discovery in arbitration;[50] and the absence of any legislative guidelines as to the form, scope, and duration of the agreement to arbitrate.[51] Although it found that arbitration was a viable alternative to litigation, the court held that under existing law the use of arbitration to settle medical malpractice disputes in New York was premature and called on the legislature to establish uniform guidelines for arbitration in order to resolve the areas of concern the court had defined.[52]

Arbitration of medical malpractice disputes is mandated only in Puerto Rico.[53] Because enforcement of this mandatory arbitration statute deprives medical malpractice defendants of a jury trial, questions would seem to arise as to the statute's constitutionality.[54] The

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NOTICE: BY SIGNING THIS AGREEMENT TO HAVE ANY CLAIM OF MEDICAL MALPRACTICE DECIDED BY A PANEL OF THREE NEUTRAL ARBITRATORS YOU ARE WAIVING YOUR RIGHT TO A TRIAL BY JUDGE OR JURY.

I certify that I have read this agreement or have had it read to me and that I fully understand its contents and execute this agreement of my own free will.

Id. at 62, 422 N.Y.S.2d at 830.

47. *Id.* at 61, 422 N.Y.S.2d at 829.

48. *Id.* at 62, 422 N.Y.S.2d at 832.

49. *Id.* at 64, 422 N.Y.S.2d at 831. The court noted that medical malpractice actions involving one plaintiff and one defendant are "the exception rather than the rule." *Id.* Thus, the resolution of the claim would necessarily be split if the arbitration agreement were enforced, with the claim against the signing doctor being subject to arbitration, and the dispute with the other three defendants being referred to litigation. The court questioned whether this type of procedure would result in an expeditious, inexpensive resolution of the claim. *Id.* In addition, multiple proceedings created the "possibility of inconsistent findings, the spectre of collateral estoppel, and issues of . . . contribution, including third party practice." *Id.*

50. *Id.* The court observed that the scope of discovery in arbitration is limited and is subject to the discretion of the arbitrator. The patient, therefore, is at a distinct disadvantage, since he usually is less likely than the doctor to have knowledge of proper medical procedures and the like. *Id.*

51. *Id.* at 64-65, 422 N.Y.S.2d at 831-32.

52. *Id.* The court stated that areas of concern included the size and composition of the arbitration panel, the availability of discovery, the right of revocation, and whether arbitration agreements should be voluntary or mandatory, apply to future or present claims, and be of prescribed format. *Id.* at 64, 422 N.Y.S.2d at 832.

In Hubbard v. Cohen, N.Y.L.J., March 21, 1980, at 12, col. 6 (Sup. Ct.), the court refused to enforce a patient-physician agreement in a case involving only the signatories of that document, citing the lack of a notice of the right to a jury trial and ambiguity in the terms of the arbitration language. Thus, even where there was no concern about multiplicity of actions, a New York court still refused to enforce a medical malpractice arbitration agreement that at least facially complied with the state's general arbitration statute. *Id.* at 13, col. 2. See text surrounding notes 126-28 *infra*.

For a discussion of the need for medical malpractice arbitration guidelines in New York State see Lipsig, *Arbitration of Medical Malpractice Claims*, N.Y.L.J., Jan. 24, 1980, at 1, col. 1; 2, col. 4.

53. *See* P.R. LAWS ANN. tit. 26, §§ 4101-4106 (Supp. 1977).

54. *See* Note, *Constitutional Law—Right to Jury Trial—Delegation of Judicial Functions to Nonjudicial Medical Review Panel Held Violative of State Constitution*, 1977 BRIGHAM YOUNG

statute appears to be constitutional, however, because the commonwealth does not guarantee the right to a jury trial in civil cases.[55] Although various constitutional challenges have also been made against statutes providing for voluntary binding arbitration of medical malpractice claims,[56] these laws have been upheld, chiefly because of the voluntary nature of the parties' agreement to arbitrate.[57]

L. REV. 189, 198. The author notes that with the exception of state worker's compensation laws, "a statute enacting a system of compulsory arbitration for general civil cases would probably be declared unconstitutional in every state . . . ." *Id.*

55. *See, e.g.*, Mercado v. Superior Court, 99 P.R.R. 287, 297 (1970): "[J]ury trials for civil actions do not exist in Puerto Rico, because that is foreign to our civil juridical tradition, because neither our laws nor our Rules of Civil Procedure provide for it, and because our legislation provides for civil suits to be tried before the court without a jury." The Puerto Rico statute provides for limited review of the panel's decision by the superior court and right of appeal to the Supreme Court of Puerto Rico. P.R. LAWS ANN. tit. 26, §§ 4105(6), 4106 (Supp. 1977).

Puerto Rico's law requiring arbitration of malpractice claims, and the laws requiring initial submission to screening panels, should not be confused with so-called compulsory nonbinding "arbitration" systems in several jurisdictions. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1141.11-.28 (West Cum. Supp. 1979), which provides for mandatory arbitration of certain civil actions involving monetary claims of $15,000 or less. Under such plans, disputes must first be submitted to an established arbitration panel administered by the court, but the parties have the right to a trial de novo. *See, e.g., id.* §§ 1141.11(a), .20-.22. Although these procedures are loosely termed arbitration systems, true arbitration is an alternative, rather than a condition precedent, to litigation of a case. See note 15 *supra*. Challenges to the validity of these systems under the constitutions of individual states and under the seventh amendment to the United States Constitution have been largely unsuccessful, because the parties may ultimately present their case to a jury, and the panel's decision is not admissible as evidence in the subsequent jury trial. *See, e.g.*, Kimbrough v. Holiday Inn, 478 F. Supp. 566, 571 (E.D. Pa. 1979) (upholding constitutionality of Department of Justice's compulsory nonbinding arbitration system for civil suits involving money claims for less than $50,000 in the Eastern District of Pennsylvania, District of Connecticut, and Northern District of California).

56. *See, e.g.*, Madden v. Kaiser Foundation Hosps., 17 Cal.3d 699, 703, 712-14, 552 P.2d 1178, 1180, 1186-87, 131 Cal. Rptr. 882, 884, 890-92 (1976) (en banc). The court held that parties voluntarily entering into arbitration agreements "know and intend that disputes arising under such agreements will be resolved by arbitration, not by juries." Agreements to arbitrate medical malpractice claims were not violative of the right to a jury trial granted by the state constitution. *Id.* In Pipper v. DiMusto, 88 Mich. App. 743, 745, 279 N.W.2d 542 (1979), the lower court's finding that the statute did not violate due process even though one of the panel members was a doctor was left undisturbed by the court of appeals. The constitutional issue raised by the patient was not addressed because the trial court had prematurely granted accelerated judgment. In Malek v. Jayakar, No. 78-802-604 NM, slip op. at 10-11 (Mich. Cir. Ct. Feb. 5, 1979), the fact that a minority member of the panel might possibly experience an increase in his malpractice insurance rates as an indirect result of an award in the patient's favor was held to be "too remote to offend due process." *But see* Manuel v. Pierce, No. 79-929-209-NM (Mich. Cir. Ct. May 22, 1980) (fact that one member of three-person panel was a physician or hospital administrator held to be violative of due process right to trial by impartial tribunal). *See also* Dickinson v. Kaiser Foundation Hosps., ____ Cal. App. 3d ____, ____, 169 Cal. Rptr. 493, 494 (1980) (section 1284.2 of the California Code of Civil Procedure, which states that absent an agreement to the contrary costs of arbitration shall be borne by parties on a pro rata basis, does not unconstitutionally deny equal protection to parties who arbitrate medical malpractice claims, as compared to those who litigate such claims, and may recover all costs, in view of voluntary nature of arbitration agreement).

57. *See, e.g.*, Madden v. Kaiser Foundation Hosps., 17 Cal.3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976) (en banc).

B. *Preclaim or Postclaim*

The volitional nature of an agreement to arbitrate medical malpractice claims is not always determinative of the agreement's enforceability. The law of some states distinguishes between preclaim and postclaim agreements to arbitrate,[58] finding only the latter—those agreements made after a claim has arisen—enforceable.[59] The law of other states makes no such distinction, finding that agreements to arbitrate both existing and future disputes are enforceable.[60]

Preclaim agreements, under which all parties consent to submit any future disputes arising out of the medical relationship to binding arbitration, may appear in a variety of contractual forms.[61] Typically,

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58. *See* Ladimer, *supra* note 8, at 305.

59. *See* ALA. CODE § 6-5-485(a) (1977); GA. CODE ANN. § 7-403 (Cum. Supp. 1979); N.D. CENT. CODE § 32-29.1-02 (Supp. 1979); VT. STAT. ANN. tit. 12, § 7002(a) (Cum. Supp. 1979).

60. *See* ALASKA STAT. § 09.55.535(a) (Cum. Supp. 1979); CAL. CIV. PROC. CODE § 1295(a) (West Cum. Supp. 1980); ILL. ANN. STAT. ch. 10, § 203 (Smith-Hurd Supp. 1979); LA. REV. STAT. ANN. § 9:4231 (West Cum. Supp. 1951-1979); ME. REV. STAT. ANN. tit. 24, § 2702 (West Cum. Supp. 1978-1979); MICH. COMP. LAWS ANN. §§ 600.5041-.5042 (MICH. STAT. ANN. §§ 27A.5041-.5042 (Callaghan 1980)); OHIO REV. CODE ANN. § 2711.22 (Page Supp. 1978); S.D. CODIFIED LAWS ANN. § 21-25B-1 (1979); VA. CODE § 8.01-581.12(A) (1977).

61. Contractual arbitration agreements can arise between patient and physician, patient and hospital, and subscriber and health plan. *See, e.g.*, Madden v. Kaiser Foundation Hosps., 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976) (en banc) (prepaid health plans); Rhodes v. California Hosp. Med. Center, 76 Cal. App. 3d 606, 143 Cal. Rptr. 59 (1978) (hospitalization); Miner v. Walden, 101 Misc. 2d 814, 422 N.Y.S.2d 335 (Sup. Ct. 1979) (preoperative office visit).

The arbitration agreement utilized by the Ross-Loos Group, a prepaid health plan, reads:

> ARBITRATION: In the event of any controversy between a Member (whether a minor or an adult), or the heirs-at-law or personal representatives of a Member, as the case may be, and Ross-Loos (including its agents, employed physicians or employees), whether involving a claim in tort, contract, or otherwise, the same shall be submitted to binding arbitration. Within fifteen (15) days after any of the above named parties shall give written notice to the other of demand for arbitration of said controversy, the parties to the controversy shall each appoint an arbitrator and give notice of such appointment to the other. Within a reasonable time after such notices have been given the two arbitrators so selected shall select a neutral arbitrator and give notice of the selection thereof to the parties. The arbitrators shall hold a hearing within a reasonable time from the date of notice of selection of the neutral arbitrator. All notices or other papers required to be served shall be served by United States mail. Except as herein provided, the arbitration shall be conducted and governed by the provisions of the California Code of Civil Procedure.

HEW APPENDIX, *supra* note 12, at 445. A California hospital-patient agreement states:

> ARBITRATION OPTION: Any legal claim or civil action in connection with this hospitalization, by or against hospital or its employees or any doctor of medicine agreeing in writing to be bound by this provision, shall be settled by arbitration at the option of any party bound by this document in accordance with the Commercial Arbitration Rules of the American Arbitration Association and with the Hospital Arbitration Regulations of the California Hospital Association . . ., unless patient or undersigned initials below or sends a written communication to the contrary to the hospital within thirty (30) days of the date of patient discharge.
>
> If patient, or undersigned, does not agree to the 'Arbitration Option,' then he will initial here. _____

Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 350 n.2, 133 Cal. Rptr. 775, 779 n.2 (1976) (case not decided under 1975 amendment to California Code of Civil Procedure requiring boldfaced notice as to waiver of right to court trial).

these binding arbitration provisions are found in doctor-patient or hospital-patient contracts, and are enforceable if they comply with the statutorily required format.[62] Included in preclaim agreements are certain plans and programs devised by hospital, medical, and legal associations, insurers, and medical benefit plans.[63] Under these plans, the participating organizations agree to offer arbitration as an option to patients. If the patient accepts the arbitration offer, the agreement becomes binding on the individual member of the plan or program.[64]

One of the first hospital-based plans was the Southern California Plan, which was jointly sponsored by the California Hospital Association and the California Medical Association, in 1969.[65] The pilot program initially involved eight hospitals in the Los Angeles vicinity, but grew to more than 200 hospitals statewide.[66] All the hospitals participating in the program offered arbitration to incoming patients.[67] By signing the agreement or not objecting to the inclusion of the arbitration clause in the hospital's admission form, the patient would agree to arbitrate all disputes arising out of the hospitalization.[68] Patients were permitted to revoke the arbitration agreement within thirty days of discharge from the hospital.[69] Cases were initiated by the filing of a demand for arbitration[70] with the Los Angeles office of the American Arbitration Association (AAA),[71] which administered disputes arising out of the plan.[72] Arbitrators were appointed by the AAA, with the panel consisting of an attorney, an individual involved in health care, and a person representing consumer interests.[73] A study of the plan compiled in 1975 found that during the period from 1970 through 1975 patient acceptance of the plan was high; more than ninety-nine percent of the patients involved agreed to arbitrate.[74]

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62. See note 40 *supra*.

63. *See* Ladimer, *supra* note 8, at 306; Ladimer & Solomon, *Medical Malpractice Arbitration: Laws, Programs, Cases*, 653 INS. L.J. 335, 350-53 (1977).

64. Ladimer, *supra* note 8, at 306.

65. *See* Bassis, *supra* note 1, at 264; Heintz, *supra* note 2, at 13-14; Ladimer, *supra* note 8, at 326.

66. *See* sources cited in note 65 *supra*.

67. *See id.*

68. Bassis, *supra* note 1, at 264; Heintz, *supra* note 2, at 14.

69. *Id.*

70. A demand for arbitration is the initial notice by one party to the other of an intention to arbitrate their dispute under the arbitration clause in their agreement, and is analogous to a complaint in a civil action. DICTIONARY, *supra* note 17, at 72. The demand is in writing, and indicates the names of the parties, describes the dispute, contains a copy or quotation of the arbitration clause, and states the relief sought. *Id.*

71. The American Arbitration Association is a private not-for-profit organization that was founded in 1926 "to foster the study of arbitration, and to perfect the techniques of this voluntary method of dispute settlement." *See* DICTIONARY, *supra* note 17, at 11.

72. Heintz, *supra* note 2, at 14.

73. *Id.*

74. *Id.* at 13. The extraordinarily high patient acceptance rate in California may be due in large part to the type of arbitration agreement in use at that time. The agreement was usually

Group prepaid health care plans or contracts frequently provide that disputes arising under the plan must be resolved by arbitration.[75] The first such plan was established in 1929 by the Ross-Loos Group in California.[76] In typical group prepaid health care arrangements an employer or a union negotiates and executes a master contract covering the employee group that it represents.[77] The master contract in the Ross-Loos program states that arbitration of disputes, including malpractice claims, is mandatory.[78] A more extensive program was later devised by the Kaiser Foundation Health Plan, which covers some three million subscribers in four states.[79] Where permitted by statute, the health care agency can include an arbitration provision in the master policy which will apply to any future disputes arising out of services rendered by participating physicians and hospitals, without the necessity of executing a separate arbitration agreement for each patient, as long as the contract clearly informs subscribers that the plan has an arbitration provision.[80]

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contained in a lengthy conditions of admission form and required the patient to initial at a certain location if arbitration was not agreeable. Failure to initial the space provided indicated acceptance of the arbitration clause. See arbitration provision set out in note 61 *supra*.

A Michigan Insurance Bureau study of a hospital-based arbitration plan covering 15 hospitals revealed that arbitration was accepted by 74% of out-patients, 69% of in-patients, and 59% of emergency room patients. *See* Schoonmaker, *The Medical Malpractice Arbitration Program in Michigan*, 653 INS. L.J. 370, 374 (1977). Revocations of arbitration agreements averaged between five and six per 10,000 patients. *Id.*

Physicians affiliated with hospitals participating in the Southern California program also viewed the arbitration option favorably. Approximately 90% of the physicians in the pilot program agreed to participate. Heintz, *supra* note 2, at 13. For a general discussion of physician acceptance of arbitration, see Peck, *Binding Arbitration: Most Doctors Are For It*, MEDICAL ECONOMICS, April 4, 1977, at 135, col. 1.

75. *See* Ladimer & Solomon, *supra* note 63, at 352-53.

76. *See* HEW APPENDIX, *supra* note 12, at 425.

77. *Id.* at 424.

78. The majority of subscribers in the Ross-Loos Medical Group were union employees who entered the plan pursuant to contracts negotiated by their unions. *Id.* The union would negotiate a master contract for health care with the group, which would contain an arbitration clause. *Id.* Union members enrolling in the plan would be subject to the arbitration provision. *Id.* For a discussion of an agent's capacity to bind its principal, see notes 174-223 and accompanying text *infra*.

79. *See* Ladimer & Solomon, *supra* note 63, at 352-53. The Kaiser Group has four separate arbitration plans, affecting Northern California, Southern California, Oregon-Washington, and Hawaii. *Id.* at 352.

80. *See, e.g.*, CAL. CIV. PROC. CODE § 1295(f) (West Cum. Supp. 1980):

> Subdivisions (a), (b), and (c) [mandating that the patient has signed the prescribed form of arbitration agreement] shall not apply to any health care service plan contract . . . which contains an arbitration agreement if the plan complies with . . . Health and Safety Code, or otherwise has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision, and the plan contracts conform to subdivision (h) of Section 1373 of the Health and Safety Code.

Section 1295(f) was challenged as an unconstitutional denial of equal protection, because the statute differentiates between those signing individual health care agreements and those enrolling in group health care plans as to the requirements for a proper waiver of a jury trial. Dinong v. Superior Ct., 102 Cal. App. 3d 845, 162 Cal. Rptr. 606 (1980). The court ruled that the law was constitutionally sound inasmuch as equal protection only requires that "persons similarly

Somewhat similar to plan-offered arbitration is prescribed arbitration. Pursuant to statutory mandate, certain health service providers are required to offer arbitration that, if accepted by the patient, becomes binding on the offeror.[81] Michigan's statute provides that medical malpractice liability insurers must require covered hospitals to offer arbitration options to patients[82] and require nonemployee health care providers such as physicians to make offers to arbitrate disputes arising out of services rendered in these institutions.[83]

Postclaim agreements to arbitrate can arise in any of the situations described above.[84] These agreements can be enforced in a larger number of jurisdictions than can preclaim agreements, since an agreement to submit pending disputes to arbitration is valid under common law,[85] modern general arbitration laws,[86] and all medical malpractice arbitration laws.[87] Some state and regional plans encourage health care participants to offer arbitration as an alternative to litigation once a claim has arisen.[88] Fewer challenges can be raised to such agreements because the waiver of a court or jury trial occurs after the dispute develops.

III. Validity of Agreements to Arbitrate Medical Malpractice Claims

The legal basis for arbitration is an agreement to arbitrate.[89] When

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situated receive equal treatment under the law," and individuals signing hospital admission contracts or individual health care plans were not similarly situated with employees enrolling in negotiated group health care plans. *Id.* at 853, 162 Cal. Rptr. at 610.

81. *See* Ladimer, *supra* note 8, at 306. The concept of making arbitration mandatory for the provider and optional for the consumer is not confined to the medical malpractice area. For example, under New York's no-fault law, N.Y. INS. LAW §§ 670-678 (McKinney Cum. Supp. 1980-1981), automobile liability insurers are required to offer covered persons the option of submitting disputes over entitlement to no-fault benefits to arbitration. *Id.* § 675.

82. MICH. COMP. LAWS ANN. § 500.3053(1) (MICH. STAT. ANN. § 24.13053(1) (Callaghan Cum. Supp. 1979)) provides as follows:

> As a condition of doing business in this state a malpractice insurer shall not offer a policy of professional liability insurance to any hospital unless the policy contains a provision in the form and upon such other conditions as the commissioner shall approve, which requires the insured to offer a form of arbitration agreement to each patient treated or admitted.

83. MICH. COMP. LAWS ANN. § 500.3051(f) (MICH. STAT. ANN. § 24.13051(f) (Callaghan Cum. Supp. 1979)). Insured hospitals must also require employees to arbitrate. *Id.* § 500.3061(1) (MICH. STAT. ANN. § 24.13061(1)).

84. See note 61 *supra*.

85. *See* DICTIONARY, *supra* note 17, at 52. Common law arbitration derived from court decisions on enforcement of arbitration agreements. *Id.* At common law, only agreements to arbitrate existing disputes may be enforced, whereas modern arbitration acts will enforce an agreement to arbitrate future disputes as well as existing disputes. See notes 31-33 and accompanying text *supra*. Thus, a common law agreement to arbitrate an existing dispute can also be enforced in a jurisdiction with a modern arbitration act.

86. For a listing of modern arbitration statutes, see note 34 *supra*.

87. See note 14 *supra*.

88. *See* Ladimer, *supra* note 8, at 306; Ladimer & Solomon, *supra* note 63, at 52.

89. An arbitration agreement is "[t]hat part of a contract . . . which pledges the parties concerned to use arbitration as a means of settling any present or future dispute." DICTIONARY,

a party seeks to compel arbitration[90] of any claim by virtue of the existence of an arbitration clause, the courts initially have to determine whether the arbitration agreement is valid.[91] If the agreement is formally deficient, the courts may refuse to enforce it.[92] The circumstances surrounding the execution of the contract will also be subject to judicial examination if it is apparent that a party was unaware of the arbitration agreement's existence or effect.[93] Finally, enforcement may also be denied where an agent exceeded his authority in binding his principal to an arbitration agreement.[94]

A. *Notice of Arbitration Provision*

1. Statutory Notice Requirements

The issue of whether the patient was aware of the existence of an arbitration agreement has engendered a significant amount of the litigation in the medical malpractice area in recent years. By signing an agreement to arbitrate, a patient relinquishes the right to judicial determination of causes of action arising out of acts of medical malpractice.[95] Notice and understanding of the arbitration agreement and its

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supra note 17, at 25. *See also* ILL. ANN. STAT. ch. 10, § 202(d) (Smith-Hurd Supp. 1980), which defines a health care arbitration agreement as "a written agreement between a patient and a hospital or health care provider to submit to binding arbitration a claim for damages . . . ." If the arbitration agreement meets the statutory requirements, it will be enforced under modern arbitration statutes. *See, e.g.*, 9 U.S.C. § 2 (1976).

90. A motion to compel arbitration is a summary action brought in a court having competent jurisdiction by a party to an arbitration agreement to obtain an order directing the other party or parties to the agreement to proceed to arbitration. The United States Arbitration Act, which applies to cases involving transactions evidencing interstate commerce and maritime disputes, 9 U.S.C. §§ 1, 2 (1976), provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (1976).

91. The United States Arbitration Act requires that the court hearing a motion to compel arbitration be satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* Similarly, under the Act, an agreement to arbitrate is enforceable "save upon such grounds as exist at law or in equity." *Id.* § 2.

92. See statutory requirements outlined in note 40 *supra*. There is a dearth of litigation on the various formal requirements for arbitration agreements contained in the medical malpractice arbitration statutes. This is perhaps attributable to the relative clarity of those portions of the acts.

93. See notes 95-133 and accompanying text *infra*.

94. See notes 174-244 and accompanying text *infra*.

95. If a party to an arbitration agreement institutes a litigation concerning an arbitrable issue, another party to the agreement may obtain an order staying the litigation pending arbitration of the dispute. *See* 9 U.S.C. § 3 (1976). Under the United States Arbitration Act, the court having jurisdiction over the matter is directed to order a stay of litigation "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." *Id.*

consequences are so important that some state legislatures require in their malpractice statutes that prescribed notice forms be included in arbitration agreements.[96] Ohio's statute suggests that arbitration agreements be captioned in ten-point type with a statement advising the patient that signing the agreement results in a waiver of the right to a trial in court.[97] Agreements that incorporate this suggestion by following a sample set forth in the act will be presumed valid.[98] The statutes of five other states go further, providing that notices of a prescribed type size and content must be included in an arbitration agreement in order for it to be presumptively valid.[99] To ensure that the patient understands the arbitration agreement, some laws also require that the patient be furnished an explanatory booklet along with the arbitration option.[100]

2. Notice in the Absence of a Statutory Requirement

If a jurisdiction has neither a medical malpractice statute nor a notice requirement in its general arbitration statutes, then the enforceability of an arbitration clause depends largely upon the factual setting surrounding the execution of the agreement.

Prior to 1975 there was no requirement in California that a notice of the waiver of the right to judicial relief be included in medical malpractice arbitration contracts,[101] and courts did not impose such a

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96. California, Illinois, Maine, Michigan, Ohio, and South Dakota. For a discussion of the respective statutes of these states, see notes 97-108 *infra*.

97. OHIO REV. CODE ANN. § 2711.24 (Page Supp. 1978).

98. *Id.*

99. CAL. CIV. PROC. CODE § 1295(b) (West Cum. Supp. 1980); ILL. ANN. STAT. ch. 10, § 209(d) (Smith-Hurd Supp. 1980) (upper-case print, 3/16 inch in height, immediately above the signature line); ME. REV. STAT. ANN. tit. 24, §§ 2702(1)(B), (2)(A) (West Cum. Supp. 1979) (twelve-point bold-faced type immediately before signature space); MICH. COMP. LAWS ANN. §§ 600.5041, .5042 (MICH. STAT. ANN. §§ 27A.5041, .5042 (Callaghan 1980)) (twelve-point bold-faced type immediately above space for patient's signature advising agreement is not prerequisite for receipt of treatment and may be revoked within 60 days of hospital discharge or date of execution); S.D. CODIFIED LAWS ANN. § 21-25B-3 (1979) (twelve-point bold-faced type immediately above space for signature). The notice requirement of California's statute is typical:

> Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:
>
> "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

CAL. CIV. PROC. CODE § 1295(B) (West Cum. Supp. 1980).

Under the California malpractice statute, an arbitration contract complying with the notice requirement and following the prescribed general format will not be considered "a contract of adhesion, nor unconscionable nor otherwise improper." CAL. CIV. PROC. CODE § 1295(e) (West Cum. Supp. 1980). For a dicussion of adhesion, see notes 136-73 and accompanying text *infra*.

100. *See* ME. REV. STAT. ANN. tit. 24, §§ 2702(1)(D), (2)(C) (West Cum. Supp. 1979); MICH. COMP. LAWS ANN. § 600.5041(6) (MICH. STAT. ANN. § 27A.5041(6) (Callaghan 1980)).

101. Section 1295 of the California Code of Civil Procedure, the section pertaining to medical malpractice arbitration, was added by the Medical Injury Reform Act of 1976, 1975 Cal. Stats.,

requirement.[102] At that time California hospitals commonly used an agreement that offered patients the option to refuse an arbitration clause contained in the admission form by initialing a designated space.[103] The hospital admission form provided that, unless the patient indicated otherwise, all disputes arising from the parties' medical relationship would be arbitrated.[104]

In *Wheeler v. St. Joseph Hospital*,[105] a case decided under the pre-1975 statute,[106] plaintiff Wheeler had entered the hospital for diagnostic tests related to a coronary insufficiency. After the tests were performed, Wheeler suffered a stroke which rendered him quadriplegic and unable to communicate except by blinking his eyes.[107] Wheeler and his wife filed suit for medical malpractice.[108] The hospital moved to compel arbitration based on the existence of an arbitration clause contained in the "Conditions of Admission" signed by Wheeler when he entered the hospital.[109] The "Arbitration Option" in this document provided for arbitration of disputes unless the patient initialed a line in the option or canceled the agreement within thirty days of discharge.[110] Wheeler had neither initialed the form nor revoked the agreement within the prescribed time period.[111]

Plaintiffs argued that Wheeler had signed the form without reading the conditions and thus was unaware that his failure to initial the designated space would result in the forfeiture of his right to litigate

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2d Ex. Sess. 1975-1976, ch. 1, § 26.6, at 3975. Prior to the enactment of § 1295, a specialized section of the arbitration statute for California, medical malpractice arbitrations were governed by the state's general arbitration law, CAL. CIV. PROC. CODE §§ 1280-1289 (West 1972).

102. Prior to the 1975 amendment of California's arbitration statute, which requires a bold-faced notice of waiver of the right to a court or jury trial, the supreme court of the state held in Madden v. Kaiser Foundation Hosps., 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976) (en banc), that an arbitration provision in a health care plan did not have to expressly waive the parties' right to litigation in order to be valid. *Id.* at 713-14, 552 P.2d at 1187, 131 Cal. Rptr. at 891. The court found that such a requirement would be artificial and "disastrous." *Id.*

103. For an example of the usual arbitration agreement contained in hospital-patient agreements prior to the 1975 amendments, see Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d at 350 n.2, 133 Cal. Rptr. at 779 n.2.

104. *Id.*

105. 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1976).

106. *Id.* at 358-59 n.9, 133 Cal. Rptr. at 784-85 n.9. The court took note of the new law but expressly decided the case under the pre-1975 law applicable to general arbitration cases. *Id.*

107. *Id.* at 349, 133 Cal. Rptr. at 778.

108. *Id.* Wheeler's wife brought an action for damages for loss of her husband's service and consortium, and emotional distress from having witnessed the results of infliction of the injuries upon her husband. *Id.*

109. *Id.* at 350-52 & n.2; 133 Cal. Rptr. at 778-80 & n.2.

110. *Id.* at 350, 133 Cal. Rptr. at 779.

111. *Id.* Wheeler could have revoked his consent to arbitration in writing within 30 days of his discharge. *Id.* The Wheelers' attorney, however, had not revoked the agreement to arbitrate until more than 18 months after Mr. Wheeler's admission to the hospital. *Id.* at 351-52 n.3, 133 Cal. Rptr. at 780 n.3.

any claims for malpractice.[112] Wheeler maintained that no one at the hospital directed his attention to the arbitration option.[113] The court of appeal, stating that absent notification and at least some explanation the patient could not be said to have exercised a "real choice" in selecting arbitration over litigation, ruled that Wheeler had not knowingly waived his right to a court trial.[114] The court concluded that a hospital would henceforth be required to call the patient's attention to the arbitration provision and to give a reasonable explanation of its meaning and effect before an agreement contained in its conditions of admission form would be enforced.[115]

Prior to *Wheeler*, a California Court of Appeal in *Burton v. Mount Helix General Hospital*[116] had upheld an arbitration agreement that was on a separate form and was presented to the patient along with other forms as she was admitted to the hospital.[117] Although the patient had the right to revoke the arbitration agreement at any time, it was valid as to any alleged acts of malpractice that occurred prior to revocation.[118] Burton signed the form without reading it, and later, claiming that she did not understand the implications of her action, sought to avoid arbitration of her malpractice claim.[119] The court found that the patient's failure to read or understand the arbitration provision was no defense to enforceability as it would later prove to be in *Wheeler*.[120] The explanation for the disparity is that the arbitration agreement in *Burton* was not located in a lengthy and complex admission form, but was contained in a separate form that was handed to the patient.[121]

A Michigan circuit court, in *Malek v. Jayakar*,[122] distinguished *Wheeler* from a situation in which the patient had been handed a separate form containing the arbitration option. The patient in *Malek* was advised that arbitration was not a prerequisite to the receipt of medical care, was given a booklet explaining the effect of electing

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112. *Id.* at 351, 133 Cal. Rptr. at 780. Neither Mr. nor Mrs. Wheeler was aware of the provision, nor had they been provided with a copy of the form. *Id.*

113. *Id.*

114. *Id.* at 361, 133 Cal. Rptr. at 786.

115. *Id.*

116. 127 Cal. Rptr. 791 (Ct. App. 1976) (withdrawn from publication). The *Burton* case was originally published in the advance sheets of volume 127 of the California Reporter. By order of the California Supreme Court the case was ordered withdrawn from publication. 127 Cal. Rptr. at 791 n.*. The case did not appear in the California Appellate Reports, Third Series, and is not published in the bound edition of volume 127 of the California Reporter. *Id.* The citations to the *Burton* case contained herein correlate to the advance sheets of volume 127, a copy of which is on file at the Rutgers Law Review.

117. *Id.* at 793.

118. *Id.*

119. *Id.* at 793-94.

120. *Id.* at 794.

121. *Id.* at 795. The court stated that it is not unusual for a patient to be asked to sign various consent forms before being admitted. *Id.*

122. No. 78-802-604 NM (Mich. Cir. Ct. Feb. 5, 1979).

the arbitration option, and was clearly advised of the right to revoke consent to the arbitration.[123] The cumulative effect of the safeguards in *Malek* ensured that the patient entered freely into the arbitration agreement and was aware of its impact,[124] factors lacking in *Wheeler*.[125]

In *Hubbard v. Cohen*,[126] a New York supreme court found that a voluntary patient-physician arbitration agreement was unenforceable because it did not expressly advise the patient that signing the form resulted in a waiver of the right to a jury trial.[127] The agreement was also void because it did not state specifically that malpractice claims were subject to arbitration.[128]

In the Colorado case of *Guthrie v. Barda*,[129] plaintiff patient, who was foreign-born, had no formal education, and could not read or write English,[130] contended that neither the physician nor his employees explained the form to him before he signed it.[131] Evidence indicated that plaintiff's wife, who spoke English clearly, helped him complete the form.[132] The trial court thus dismissed the claim, concluding that the patient was aware of the nature and effect of the agreement to arbitrate.[133] The trial court's judgment was ultimately upheld by the Colorado Supreme Court.[134]

B. *Adhesion*

In addition to questions of proper notice, charges have been made that the arbitration agreements which are usually contained in preprinted forms offered to the patient by the health service provider[135] are contracts of adhesion.[136] In a simple physician-patient contract,

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123. *Id.*, slip op. at 17.
124. *Id.*, slip op. at 17-18.
125. *See* Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d at 361, 133 Cal. Rptr. at 786.
126. N.Y.L.J., March 21, 1980, at 12, col. 6 (Sup. Ct.).
127. *Id.* at 13, col. 2.
128. *Id.* at 13, col. 1.
129. 188 Colo. 124, 533 P.2d 487 (1975), *rev'g* 34 Colo. App. 1, 523 P.2d 155 (1974).
130. Barda v. Guthrie, 34 Colo. App. 1, 4, 523 P.2d 155, 157 (1974). The patient was born in the Ukraine. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* A New York court refused to uphold an arbitration option signed by a Czechoslovakian-born patient who had difficulty with the English language. Linden v. Baron, N.Y.L.J., July 21, 1977, at 4, col. 3 (Sup. Ct.). "For a litigant to waive her rights . . . to a trial by jury, a very clear understanding must be had . . . of the nature of the agreement which was signed." *Id.* at 4, col. 4.
134. Guthrie v. Barda, 188 Colo. 124, 533 P.2d 487 (1975), *rev'g* 34 Colo. App. 1, 523 P.2d 155 (1974).
135. *See* HEW APPENDIX, *supra* note 12, at 334.
136. *See* Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d at 357, 133 Cal. Rptr. at 783. An adhesion contract has been defined as "[a] standard form printed contract prepared by the more powerful party and submitted to the weaker on a take it or leave it basis. The terms . . . are not

the arbitration provision is set forth in an office agreement.[137] Other arbitration clauses are found in hospital admission forms[138] and health plan contracts.[139] The agreement usually provides for arbitration of any claims, whether in tort, contract, or otherwise, arising out of the medical services rendered.[140] Because the contracts are essentially non-negotiated, questions of adhesion arise.

Under general contract law, agreements appearing on preprinted forms that are presented by a stronger party to a weaker party on a "take it or leave it" basis are usually held to be contracts of adhesion.[141] A contract is not automatically adhesive, however, merely because it is preprinted.[142] Whether a particular medical malpractice arbitration agreement is adhesive and therefore unenforceable depends upon the form of the agreement, the circumstances of its execution, and whether the particular jurisdiction has a medical malpractice statute providing for arbitration.

1. Consensual Agreements

Numerous consensual agreements[143] have been challenged for adhesion. In *Wheeler*, for example, the court observed that the hospital's printed "Conditions of Admission" form had all the characteristics of a contract of adhesion.[144] Of particular importance to the court was that plaintiff Wheeler realistically had no chance to select hospitals nor to reject a plan offered by his employer in favor of an individual contract for health care services.[145]

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reached as a result of any bargaining process." *See* DICTIONARY, *supra* note 17, at 3. *See generally* Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

137. See note 46 *supra*.

138. *See* Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d at 350 n.2, 133 Cal. Rptr. at 779 n.2.

139. See note 61 *supra*.

140. See arbitration clause set out at note 61 *supra*.

141. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 1-3, at 6 (2d ed. 1977).

142. *See, e.g.*, McFarland v. Mount Helix Gen. Hosp., No. 4 Civ. No. 14166, slip op. at 8 (Cal. Ct. App. Feb. 17, 1976) (not certified for publication).

143. Consensual agreements to arbitrate medical malpractice claims can appear in physician-patient, hospital-patient, or health plan-individual subscriber contracts. *See* sources cited at note 61 *supra*. Agreements to arbitrate that have been negotiated for the patient by an agent such as an employer or a union as part of an overall health care benefits plan, and that are usually contained in a master policy, have also been challenged on an adhesion basis, but these cases have been disposed of largely on agency principles. *See, e.g.*, Madden v. Kaiser Foundation Hosps., 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976) (en banc) (agreement negotiated on behalf of state employees by administrative board was binding on employees by virtue of board's authority to act as agent of employees). For a discussion of a third party's right to agree to arbitration on behalf of a patient, see text accompanying notes 174-244 *infra*.

144. Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 357, 133 Cal. Rptr. 775, 783 (1976).

145. *Id.* at 366, 133 Cal. Rptr. at 789. The court stated that a patient like Wheeler "realistically has no choice but to seek admission to the hospital to which he has been directed by his physician and to sign the printed forms necessary to gain admission. To posit otherwise would require us to ignore the stress, anxiety, and urgency which ordinarily beset a patient seeking hospital admission." *Id. But cf.* Malek v. Jayakar, No. 78-802-604 NM, slip op. at 17 (Mich.

In *Miner v. Walden*,[146] a case involving a patient-physician agreement in a state without a medical malpractice arbitration statute, the New York trial court found that the particular agreement involved was adhesive.[147] The arbitration option agreement was mailed to the patient along with a surgical authorization and preoperative and surgical appointments. The covering letter stated that the patient's signature was required on all of the documents. The patient had signed the agreement although he maintained that the arbitration option was never explained to him.[148] The language of the arbitration agreement specifically exempted from arbitration "claims of money due for services rendered."[149] Weighing these factors, the court stated that the classic elements of unconscionability were present in this case: unequal bargaining power and a resulting contract that was not merely more favorable to the physician but actually for his sole benefit.[150]

Another way for judges to avoid enforcement of a contract such as that found in *Miner* is to declare the agreement void for lack of consideration. This can affect clauses that specifically exempt fee disputes from the operation of the arbitration provision.[151] Under these clauses, the patient in effect agrees to arbitrate any possible claim arising from the contract, while the health service provider declines to arbitrate the one claim it may realistically have—a dispute over the payment of fees. In these situations, it may be determined that the health service provider has not parted with anything in exchange for the patient's promise to arbitrate all his claims.[152]

Cir. Ct. Feb. 5, 1979) ("[a]dequate safeguards are provided in the form used and in the distribution of the [explanatory] booklet to prevent the contract from being one of adhesion").

146. 101 Misc. 2d 814, 422 N.Y.S. 2d 335 (Sup. Ct. 1979).

147. *Id.* at 816-17, 422 N.Y.S.2d at 337.

148. *Id.* at 815, 422 N.Y.S.2d at 337.

149. *Id.* at 819, 422 N.Y.S.2d at 339.

150. *Id.* at 818, 422 N.Y.S.3d at 338. The court was influenced by the disparity in the parties' educations. The patient had an eleventh grade education, and the doctor had attended college and medical school. *Id.* at 817, 442 N.Y.S.2d at 338. *See also* Linden v. Baron, N.Y.L.J., July 21, 1977, at 4, col. 4 (Sup. Ct.) ("[w]hile there can be little doubt that a patient and physician both with full knowledge of the facts and circumstances, may enter into a contract of this kind relating to possible future acts of malpractice by the physician, such agreements must always be looked upon with a critical eye in view of the unevenness of the relationship between physician and patient").

151. See arbitration agreement quoted in note 46 *supra*.

152. In Hubbard v. Cohen, N.Y.L.J., March 21, 1980, at 12, col. 6 (Sup. Ct.), the arbitration option signed by the patient excluded claims for services rendered by the physician. *Id.* at 13, col. 1. The court refused to enforce the arbitration agreement against the patient when the doctor later sought to bar a medical malpractice action arising out of an abortion he had performed. *Id.* at 13, col. 2. Among the grounds for invalidating the agreement was lack of consideration. *Id.* Although the patient had in effect agreed to arbitrate any claims she might have against the physician, the court found that the doctor had agreed to arbitrate all claims "except those he might actually have." *Id.* at 13, col. 1. *Cf.* Mount Helix Gen. Hosp. v. Silva, No. 4 Civ. No. 12689 (Cal. Ct. App. May 13, 1974) (not certified for publication) (arbitration agreement void for lack of consideration where hospital did not sign form).

2. Statutory Anti-adhesion Safeguards

Some medical malpractice arbitration statutes contain provisions that are designed to forestall the negotiation of contracts of adhesion. Under some of these laws, the signing of an agreement to arbitrate cannot be a condition precedent to the receipt of medical care.[153] Although a few laws require a bold-faced notice to that effect[154] or at least mandate that such language be included in the arbitration agreement,[155] others preclude the offer of an arbitration option while the patient is in pain or under duress, or is receiving or is about to receive emergency treatment.[156] In *Pipper v. DiMusto*,[157] the plaintiff brought a malpractice action against a doctor and a hospital for the doctor's failure to diagnose her ectopic pregnancy. The hospital had successfully argued to the lower court that the matter was subject to arbitration under an agreement which the patient had signed.[158] The Michigan Court of Appeals ruled that the trial court had acted prematurely when it granted the hospital's motion for an accelerated judgment dismissing the patient's malpractice suit.[159] The court reasoned that an accelerated judgment should not have been entered since there was a triable issue of fact as to whether the patient had signed the agreement prior to receiving emergency care or treatment.[160] Michigan's arbitration statute prohibits the offer of an arbitration agreement until the completion of emergency care.[161] The patient argued that when she signed the agreement to arbitrate upon her admission to the hospital, she was suffering from abdominal bleeding

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153. *See* ALASKA STAT. § 09.55.535(b) (Supp. 1979); ILL. ANN. STAT. ch. 10, § 209(d) (Smith-Hurd Supp. 1980); ME. REV. STAT. ANN. tit. 24, § 2702(1) (West Cum. Supp. 1979); MICH. COMP. LAWS ANN. §§ 600.5041(5), .5042(4) (MICH. STAT. ANN. §§ 27A.5041(5), .5042(4) (Callaghan 1980)); OHIO REV. CODE ANN. § 2711.23(A) (Page Supp. 1978); S.D. CODIFIED LAWS ANN. § 21-25B-3 (1979).

154. *See* ILL. ANN. STAT. ch. 10, § 209(D) (Smith-Hurd Supp. 1980) (3/16 inch bold-faced capital letters); ME. REV. STAT. ANN. tit. 24, §§ 2702(1)(B), (2)(A) (West Cum. Supp. 1979) (twelve-point bold-faced capital letters); MICH. COMP. LAWS ANN. §§ 600.5041(5), .5042(4) (MICH. STAT. ANN. §§ 27A.5041(5), .5042(4) (Callaghan 1980)) (twelve-point bold-faced type); S.D. CODIFIED LAWS ANN. § 21-25B-3 (1979) (twelve-point bold-faced type).

155. *See* ALASKA STAT. § 09.55.535(b) (Supp. 1979); OHIO REV. CODE ANN. § 2711.23(A) (Page Supp. 1978). Ohio's statute provides, however, that "[t]o the extent it is in ten-point type . . . an arbitration agreement of the type stated in section 2711.23 . . . shall be presumed valid and enforceable . . . ." OHIO REV. CODE ANN. § 2711.24(A) (Page Supp. 1978).

156. *See* ME. REV. STAT. ANN. tit. 24, § 2702(A) (West Cum. Supp. 1979) (no offer of arbitration option to patient receiving emergency treatment or care until completion of care or treatment); MICH. COMP. LAWS ANN. § 600.5042(1) (MICH. STAT. ANN. § 27A.5042(1) (Callaghan 1980)) (person receiving emergency care may be offered arbitration option only after completion of treatment); OHIO REV. CODE ANN. § 2711.23(H) (Page Supp. 1978) (arbitration option may not be offered when patient's condition prevents a rational decision).

157. 88 Mich. App. 743, 279 N.W.2d 542 (1979).

158. *Id.*

159. *Id.* at 745, 279 N.W.2d at 543.

160. *Id.* at 745, 279 N.W.2d at 544.

161. MICH. COMP. LAWS ANN. § 600.5042(1) (MICH. STAT. ANN. § 27A.5042(1) (Callaghan 1980)).

and was in extreme pain.[162] In reversing the lower court, the Michigan Court of Appeals remanded the case for a determination of whether the plaintiff's emergency care treatment had been completed prior to her signing of the arbitration agreement.[163]

California's medical malpractice arbitration act specifically states in section 1295(e) that any contract complying with the statutory notice requirement and following the prescribed general format will not be considered adhesive, unconscionable, or otherwise improper.[164] The California Court of Appeal held in *Ramirez v. Superior Court,*[165] however, that in order to avoid constitutional defects, the statute must be read as permitting a challenge to an arbitration agreement on the ground that it was not knowingly entered into, notwithstanding compliance with section 1295(e).[166]

In *Ramirez,* the infant patient's mother had signed a Spanish version of an arbitration agreement as her daughter was being admitted to the emergency room for treatment of an elevated temperature, pulse, and respiration rate.[167] The child was sent home without being diagnosed, and it was later discovered that she was suffering from meningitis.[168] When Mrs. Ramirez attempted to sue the hospital for the child's blindness and paralysis, allegedly resulting from the hospital's negligence, the hospital moved successfully in the superior court to compel arbitration pursuant to the arbitration agreement Mrs. Ramirez had signed on her daughter's behalf.[169] The plaintiff, claiming that she had not knowingly waived her right to a jury trial,[170] petitioned the court of appeal for a writ of mandate to vacate the trial court's order compelling arbitration.[171] The lower court had construed section 1295(e) as prohibiting such an attack on an arbitration agreement that met the statute's formal requirements. The court

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162. 88 Mich. App. at 745, 279 N.W.2d at 544.
163. *Id.*
164. CAL. CIV. PROC. CODE § 1295(e) (West Cum. Supp. 1980).
165. 103 Cal. App. 3d 746, 163 Cal. Rptr. 223 (1980).
166. *Id.* at 749, 163 Cal. Rptr. at 224.
167. *Id.*
168. *Id.* at 750, 163 Cal. Rptr. at 225.
169. *Id.*
170. Mrs. Ramirez contended that no one had explained the arbitration agreement to her, that she had not been told that signing the agreement was not a condition precedent to receipt of medical care by her child, and that she had not read the agreement before signing it. 103 Cal. App. 3d at 750, 163 Cal. Rptr. at 225. Although the law does not require that a patient be advised that signing the agreement is not necessary in order to be treated, the court questioned why the hospital's English version of the agreement contained such language and the Spanish version did not. *Id.* at 757 n.4, 163 Cal. Rptr. at 229 n.4.
171. *Id.* Under California law, an order compelling arbitration is nonappealable. CAL. CIV. PROC. CODE § 1294 (West 1976 & Cum. Supp. 1980). A party may, however, seek appellate review via a petition for a writ of mandate. *Id.* §§ 1084-1087. *See also* Bertero v. Superior Court, 216 Cal. App. 2d 213, 30 Cal. Rptr. 719 (1963) (review of order compelling arbitration permissible by writ of mandate).

of appeal disagreed, holding that in view of the absolute right to a jury trial in civil cases, the state constitution requires that a party to a medical malpractice arbitration agreement is entitled to attack the validity of the agreement on the limited grounds that he was coerced into signing it, did not read the waiver notices, and did not realize that the agreement required him to arbitrate.[172] The court interpreted section 1295(e) as describing the effect of an arbitration agreement provided the court finds that one exists. Prior to that finding, however, a party could challenge the very existence and validity of the agreement.[173]

C. *Power to Bind Third Parties*

Another factor having an impact on the enforceability of a medical malpractice arbitration agreement is the authority of one party to bind another to arbitrate. Medical malpractice claims seldom involve only two parties, the patient and the health service provider.[174] Arbitration clauses, therefore, often include language purporting to bind the patient's spouse, heirs, guardian, assignees, and the like, to arbitrate any controversies arising out of the health care provider's treatment of the patient.[175] In addition, arbitration agreements are occasionally entered into by an agent of the patient or other beneficiary. Whether such an agreement negotiated by an agent is enforceable against the de facto beneficiary depends upon the relationship of the claimant to the entity attempting to bind him.[176]

1. Parent's Authority to Bind Minor Child

Parental power to bind a child to a medical malpractice arbitration agreement has been questioned in the past. The seminal case on this issue is *Doyle v. Giuliucci*.[177] The contract involved therein between the parent subscriber and the Ross-Loos Medical Group contained a

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172. *Id.* at 756, 163 Cal. Rptr. at 227-28. The right to a jury trial is guaranteed by CAL. CONST. art. 1, § 16.

173. 103 Cal. App. 3d at 726 n.3, 163 Cal. Rptr. at 229 n.3.

In contrast to California's statute, Michigan's medical malpractice arbitration law affords a presumption of validity to arbitration agreements meeting the formal requirements of the act. MICH. COMP. LAWS ANN. § 600.5042(8) (MICH. STAT. ANN. § 27A.5042(8) (Callaghan 1980)). In Capman v. Harper-Grace Hosp., 96 Mich. App. 510, 294 N.W.2d 205 (1980), the court held that notwithstanding the statutory presumption of validity or the presence of a statutory notice in the arbitration agreement stating that signing the document was not a condition precedent to receipt of health care, a patient would be permitted to challenge the validity of the agreement she had signed on the ground of coercion. *Id.* at 516, 294 N.W.2d at 207. Unlike the California court in *Ramirez*, however, the *Capman* court did not base its decision on the right to a jury trial in civil actions guaranteed by the state constitution. *Id.* See text accompanying notes 165-171 *supra*.

174. *See* Ladimer, *supra* note 8, at 313.

175. See note 61 *supra*.

176. See notes 186-223 and accompanying text *infra*.

177. 62 Cal. 2d 606, 401 P.2d 1, 43 Cal. Rptr. 697 (1965).

clause providing for arbitration of "any controversy between a Subscriber or a dependent" and the group.[178] The subscriber's minor child sustained injuries through the allegedly negligent acts of a group physician and the father brought suit on behalf of the child.[179] The Supreme Court of California found that the power to enter into a medical care contract binding the child to arbitrate future disputes was "implicit in a parent's right and duty to provide for the care of his child," and ruled that the arbitration clause was binding on the child.[180] Although the father contended that the clause unreasonably limited the minor child's rights, the court found that the arbitration provision was a reasonable restriction because it did not limit the child's right to recovery but only specified a forum for dispute resolution.[181] One factor that influenced the court's decision was its fear that a contrary ruling would cause medical groups to avoid entering into medical care contracts that provide for the minor children of the subscriber, since minors would be able to disaffirm such contracts.[182] The court concluded that children could only be assured of the availability of the benefits of group medical services if their parents could contract on their behalf.[183]

Under the present statutory scheme in six states, a minor child can be bound to arbitrate by his parents or legal guardian.[184] In jurisdictions that have not enacted medical malpractice arbitration statutes, enforcement of an agreement against a minor child must rely on general statutory or case law. Enforcement can thus be difficult if the existing law creates impediments to such actions.[185]

2. Employer's Power to Bind Employee

Employers may enter into health service plans on behalf of their employees, and in so doing attempt to bind them to arbitrate dis-

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178. *Id.* at 607, 401 P.2d at 2, 43 Cal. Rptr. at 697.
179. *Id.* at 608, 401 P.2d at 2, 43 Cal. Rptr. at 698.
180. *Id.* at 610, 401 P.2d at 3, 43 Cal. Rptr. at 699.
181. *Id.*
182. *Id.*
183. The results of the *Doyle* case are now codified in CAL. CIV. PROC. CODE § 1295(d) (West Supp. 1980).
184. ALASKA STAT. § 09.55.535(d) (Supp. 1979); CAL. CIV. PROC. CODE § 1295(d) (West Supp. 1980); ILL. ANN. STAT. ch. 10, § 207 (Smith-Hurd Supp. 1980); ME. REV. STAT. ANN. tit. 24, § 2703(4) (West Cum. Supp. 1979); MICH. COMP. LAWS ANN. § 600.5046(2) (MICH. STAT. ANN. § 27A.5046(2) (Callaghan 1980)); S.D. CODIFIED LAWS ANN. § 21-25B-2 (1979). Under Michigan's statute an incompetent can also be bound to arbitrate.

The law of Illinois states that an arbitration agreement executed on behalf of a minor child will not be voidable even if the parent, too, is a minor. ILL. STAT. ANN. ch. 10, § 207 (Smith-Hurd Supp. 1980).

185. *See, e.g.*, N.Y. CIV. PRAC. LAW § 1209 (McKinney 1977) ("A controversy involving an infant or person judicially declared to be incompetent shall not be submitted to arbitration except pursuant to a court order made upon application of the representative of such infant or incompetent.").

putes arising under the master policy. The power of an employer to bind its employees to arbitration provisions contained in master health service contracts is based largely on agency principles.[186] If the employer, as the negotiating agent of its employees, acts within the scope of its authority in entering into the contract, the arbitration provision will be enforced in most jurisdictions.[187] The focus of judicial inquiry, therefore, is on whether the agent exceeded its authority in executing the agreement.

In *Madden v. Kaiser Foundation Hospitals*,[188] the board of administration of the state employees retirement system had entered into a contract for group medical services with the Kaiser Health Plan.[189] The master policy contained an arbitration provision and bound all state employees who enrolled in the plan.[190] Plaintiff Madden, a state employee, sought to avoid the arbitration clause by proceeding to litigate her claim that blood transfusions that she had received had induced serum hepatitis.[191] The plaintiff employee challenged the state administrative board's power to enter into an agreement compelling her to arbitrate disputes.[192] Madden argued that absent her express grant of authority to the board, it could not validly bind her to arbitrate claims arising out of the health care plan.[193] The court's ruling in favor of the health care group seeking to invoke the arbitration clause turned on state law authorizing an agent to "do everything necessary or proper and usual" for carrying out the purpose of the agency.[194] The court found that arbitration was a proper and usual method of resolving medical malpractice disputes, and that an agent that was empowered to negotiate a group

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186. *See, e.g.*, BLACK'S LAW DICTIONARY 85-86 (rev. 4th ed. 1970), which defines an agent as:

> A person authorized by another to act for him . . . . One who represents and acts for another under the contract or relationship of agency . . . . One who deals not only with things, as does a servant, but with persons using his own discretion establishing contractual relations between his principal and third parties.

187. This authority may be implied or statutory. *See, e.g.*, Madden v. Kaiser Foundation Hosps., 17 Cal. 3d 699, 702, 552 P.2d 1178, 1180, 131 Cal. Rptr. 882, 884 (1976) (state administrative board had implied authority to bind state employees to arbitration agreement); Beynon v. Garden Grove Medical Group, 100 Cal. App. 3d 698, 707, 161 Cal. Rptr. 146, 151 (1980) (employer had implied authority to negotiate master policy for employees).

188. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976) (en banc).

189. *Id.* at 702, 552 P.2d at 1179, 131 Cal. Rptr. at 883.

190. *Id.* at 704, 552 P.2d at 1181, 131 Cal. Rptr. at 885.

191. *Id.* The plaintiff had entered the hospital for a hysterectomy. During the operation, her bladder was perforated, necessitating blood transfusions. *Id.* Although the plaintiff's malpractice action included the blood banks as defendants, they did not claim to be parties to the arbitration agreement and were not involved in the appeal. *Id.* at n.3.

192. 17 Cal. 3d at 702, 552 P.2d at 1180, 131 Cal. Rptr. at 884.

193. *Id.* at 707, 552 P.2d at 1183, 131 Cal. Rptr. at 887.

194. *Id.* at 706, 552 P.2d at 1182, 131 Cal. Rptr. at 886. The court pointed out that arbitration of disputes arising out of group contracts had been previously approved by the courts. *Id.*

medical contract had the implied authority to agree also to the inclusion of an arbitration provision.[195] The court found no material difference between the underlying principles of the case at bar and those of *Doyle v. Giuliucci*,[196] since both an agent and a parent have fiduciary responsibilities to the parties on whose behalf they contract.[197] Thus, if a parent has implied authority to agree to arbitrate a child's malpractice claims, an agent has the same authority with respect to his principal.[198]

The court also rejected the plaintiff's contention that the agreement was a contract of adhesion, and concluded that no great disparity in bargaining strength existed because the Kaiser plan was the result of negotiation between two parties of comparable bargaining strength—Kaiser and the board.[199] The court found it to be irrelevant that the patient did not personally negotiate the contractual terms, because the board, as the patient's representative, was able to obtain more favorable benefits than any individual employee could have secured.[200] The bargained-for arbitration procedure affected both parties equally and thus could not be considered adhesive.[201]

In *Dinong v. Superior Court*,[202] a government employee at an army depot had enrolled in a group health benefits plan negotiated by the United States Civil Service Commission. Seeking later to avoid the arbitration agreement contained in the plan, the plaintiff attempted to distinguish *Madden*, arguing that the commission, which was not the employees' elected representative, had no authority to negotiate the arbitration agreement on the employees' behalf.[203] The court of appeal, however, declined to read *Madden* as requiring that elected representatives of employees be involved in the negotiation of the contract containing the arbitration agreement.[204] The commission was empowered by law to contract for

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195. *Id.*

196. 62 Cal. 2d 606, 401 P.2d 1, 43 Cal. Rptr. 697 (1965).

197. 17 Cal. 3d at 709, 552 P.2d at 1184, 131 Cal. Rptr. at 888.

198. *Id.* The analogy between an employer, acting as the agent of its employees, and a parent, acting as a fiduciary for a minor child, is not wholly accurate. An employee can avoid the impact of an arbitration clause by declining to avail himself of the plan's coverage and seeking individual care. A minor child does not have this option.

199. *Id.* at 703, 710, 552 P.2d at 1180, 1185, 131 Cal. Rptr. at 884, 889.

200. *Id.*

201. *Id.* at 711, 552 P.2d at 1186, 131 Cal. Rptr. at 890. The *Madden* court distinguished the facts of the case from those in Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963). In *Tunkl*, the patient was presented a document entitled "Conditions of Admission" which included a provision releasing the hospital from liability for all wrongful or negligent acts. The *Madden* court observed that "[T]hus the patient [in *Tunkl*] had no realistic choice but to assent to a standardized agreement under which he waived his right to recover for negligently inflicted injuries." 17 Cal. 3d at 712, 552 P.2d at 1186, 131 Cal. Rptr. at 890. The agreement in *Tunkl* was held to be adhesive. 60 Cal. 2d at 102, 383 P.2d at 447, 32 Cal. Rptr. at 39.

202. 102 Cal. App. 3d 845, 162 Cal. Rptr. 606 (1980).

203. *Id.* at 853, 162 Cal. Rptr. at 610.

204. *Id.*

group health care plans for employees,[205] and the plaintiff was therefore bound by the arbitration agreement contained therein.[206]

Where, however, the arbitration provision in an employee health plan was not directly negotiated by an employer or agent, was not called to the employee's attention, and greatly and unexpectedly limited the obligations of the health plan and health care providers, the arbitration agreement has been held to be unenforceable.[207] In *Beynon v. Garden Grove Medical Group*,[208] the arbitration clause permitted only the health plan and health service providers, but not the plan purchasers, to reject an award rendered by the arbitrators and to resubmit the dispute de novo to a new panel comprised of three physicians.[209] The plaintiff joined the plan in 1974 by executing an enrollment card that entitled her to coverage as described in a master agreement and policy, but neither a copy of the master policy nor the arbitration agreement was provided to the patient when she enrolled in the plan.[210] Unlike the situation in *Madden*, the plan containing the arbitration provision was not negotiated by the patient's employer, but by a business league to which the employer belonged.[211]

A malpractice claim that subsequently arose was submitted to arbitration pursuant to the master policy, and the patient prevailed.[212] On the patient's motion to confirm the award into a judgment the health plan successfully cross-moved for an order compelling rearbitration pursuant to the master policy provision.[213] The court of appeal, however, reversed the lower court's decision, finding that the rearbitration provision was adhesive.[214] The court distinguished this case from *Madden*, noting that the arbitration provision in *Beynon* did not affect the parties equally, but rather unreasonably limited the

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205. *See* 5 U.S.C. § 8902 (1976).

206. 102 Cal. App. 3d at 853, 162 Cal. Rptr. at 610.

207. Beynon v. Garden Grove Medical Group, 100 Cal. App. 3d 698, 704, 161 Cal. Rptr. 146, 149 (1980).

208. *Id.*

209. *Id.* at 703 & n.2, 161 Cal. Rptr. at 148 & n.2. The rearbitration clause stated:

> If a dispute involves the quality or necessity of care and the Health Plan or a Medical Group rejects the decisions of such arbitration within thirty (30) days of receipt of the written decision thereof, the decision shall not be binding, and the dispute shall be submitted to a panel of three (3) qualified doctors licensed to practice medicine in the State of California . . . . The written decision of this panel shall be binding on all parties involved.

Id. at 703 n.2, 161 Cal. Rptr. at 148 n.2.

210. *Id.* at 702, 161 Cal. Rptr. at 148.

211. *Id.* at 706, 161 Cal. Rptr. at 150-51. The patient's employer was a member of the United Business League, which had negotiated the health plan with the California Medical Group Health Plan, Inc. *Id.* at 706, 161 Cal. Rptr. at 151.

212. *Id.* at 703, 161 Cal. Rptr. at 148. The patient was awarded the sum of $60,000 by the first arbitration panel. *Id.*

213. *Id.* at 703, 161 Cal. Rptr. at 148-49.

214. *Id.* at 705, 161 Cal. Rptr. at 149.

health plan and health care provider's obligations and defeated the reasonable expectations of the enrollee.[215] Of importance to the court in finding that the contract was adhesive was the lack of a clear representation of the employee group.[216] Madden's employer had directly negotiated the agreement on behalf of its employees, whereas Beynon's employer had merely acquiesced to a plan that had been negotiated for it by the business league of which it was a member.[217] Although the court questioned whether the business league could be considered the employee's agent, it found that even if the league had this status, its agreement to the unusual arbitration clause did not comport with the requirement that an agent act in a "proper and usual" manner on behalf of its beneficiary.[218]

The *Madden* court had found that the subscriber's actual knowledge of the arbitration provision was not necessary to validate a prenegotiated health plan,[219] but the court in *Beynon* construed that ruling to apply only to the usual arbitration provision.[220] The court found the arbitration clause in *Beynon* to be especially disadvantageous for the intended beneficiary and stated that it could not be enforced unless it had been called to her attention in some way.[221] Although the rearbitration portion of the clause was invalid, the court held that it was severable from the valid parts of the agreement to arbitrate malpractice claims.[222] Accordingly, the basic arbitration agreement was upheld, and the patient's award as rendered by the arbitration panel was enforceable against the defendants.[223]

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215. By giving only the health plan and health care providers the right to reject an arbitration award without cause and to demand rearbitration, the provision enabled them to transform the arbitration agreement into what the court termed a virtual "heads I win, tails you lose" proposition. *Id.* at 705, 161 Cal. Rptr. at 150.

216. *Id.* at 707, 161 Cal. Rptr. at 150-51.

217. *Id.* The court was not at all certain that the United Business League had acted as the employee's agent in negotiating the plan. *Id.* at 707, 161 Cal. Rptr. at 150-51. The court, however, did not discuss whether the unique and apparently one-sided arbitration provision was agreed to by the League in exchange for a large discount in the cost of the coverage. *Id.*

218. *Id.* at 707, 161 Cal. Rptr. at 151. The court found that the agent's agreement to the provision granting only the health service provider the right to reject an arbitration award without cause, and to require a new arbitration before a second panel of arbitrators comprised solely of physicians, was neither proper nor usual. *Id.*

219. 17 Cal. 3d at 709 & n.11, 552 P.2d at 1184 & n.11, 131 Cal. Rptr. at 888 & n.11.

220. 100 Cal. App. 3d at 707, 161 Cal. Rptr. at 151.

221. *Id.* at 708. The court also found that the defendant's failure to call the rearbitration provision to the patient's attention resulted in a waiver of the right to arbitration. *Id.* at 713, 161 Cal. Rptr. at 155. This ruling was based on the California Supreme Court's holding in Davis v. Blue Cross of N. Cal., 25 Cal. 3d 418, 600 P.2d 1060, 158 Cal. Rptr. 828 (1979). In *Davis*, the health care provider had routinely denied applications for Blue Cross benefits without apprising subscribers of their right to demand arbitration of disputed claims or advising them how to initiate the process. The court held that this was a breach of the insurer's duty of good faith and fair dealing that resulted in a waiver of its right to compel arbitration of the subscriber's cause of action. *Id.* at 431, 600 P.2d 1067, 158 Cal. Rptr. at 835.

222. 100 Cal. App. 3d at 714, 161 Cal. Rptr. at 154-55.

223. *Id.* at 714, 161 Cal. Rptr. at 155. *But cf.* Tatham v. Hoke, 469 F. Supp. 914, 919 (W.D.N.C. 1979). An arbitration clause contained in an unenforceable provision limiting medi-

3. Decedent's Power to Bind Heirs to Arbitrate Wrongful Death Actions

If the alleged act of malpractice results in the patient's death, the issue arises as to whether the decedent may bind his heirs to arbitrate wrongful death claims against the health service provider.

Notwithstanding language in a preclaim agreement that appears to bind the decedent's heirs to arbitrate disputes arising from the death of the patient, courts have been reluctant to enforce such clauses.[224] A wrongful death action is a statutory tort arising on behalf of the decedent's heirs upon the death of the decedent, against the party or parties wrongfully causing the demise of the decedent.[225] Because a wrongful death action is a separate cause of action vesting in the heirs, the decedent's authority to commit his heirs to arbitrate this action is questionable.

In *Rhodes v. California Hospital Medical Center*,[226] the decedent had signed an arbitration agreement upon admission to the hospital. Because there had been some doubt as to the decedent's competence, her husband, acting as her agent, also had signed an arbitration agreement on her behalf.[227] During the course of her hospitalization, the patient leaped to her death from a hospital window.[228] Wrongful death actions were initiated by her husband and son, and the hospital moved to compel arbitration under the agreements executed by the decedent Mrs. Rhodes and her husband.[229] The trial court refused to order arbitration.[230] On appeal, the California Court of Appeal determined that the decedent had no power to bind her heirs to arbitrate wrongful death actions, regardless of language in the contract to that effect.[231] Even though Mr. Rhodes had also signed an arbitration agreement, he did so on behalf of his wife as her agent. Therefore, neither Mr. Rhodes nor his son had ever agreed to forgo their individual rights to have their own cause of action determined in a jury trial.[232]

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cal malpractice claims to $15,000 and precluding claims not filed within 30 days after treatment was dependent on enforcement of the illegal provision and was not severable from it or enforceable.

224. *See, e.g.*, Ladimer, *supra* note 8, at 311.

225. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 127, at 902 (4th ed. 1971); Note, *California Medical Malpractice and Wrongful Death Actions*, 51 S. CAL. L. REV. 401, 407 (1978).

226. 76 Cal. App. 3d 606, 143 Cal. Rptr. 59 (1978).

227. *Id.* at 608, 143 Cal. Rptr. at 60.

228. *See* Note, *California Medical Malpractice and Wrongful Death Actions*, 51 S. CAL. L. REV. 401, 408 (1978).

229. 76 Cal. App. 3d at 608, 143 Cal. Rptr. at 60.

230. *Id.*

231. *Id.* at 609-10, 143 Cal. Rptr. at 61.

232. *Id.* The court was aware of the strong public policy in favor of arbitration, but held that this policy did not extend to parties who have neither signed an arbitration agreement nor authorized someone to do so on their behalf. *Id.*

The court differentiated this case from *Doyle v. Giuliucci*, noting that in *Doyle* the parent had an implied right to make an arbitration contract on behalf of the child, whereas the patient in *Rhodes* had no such authority to bind her heirs.[233] The *Rhodes* court declined to hold that the patient's agreement to arbitrate all future disputes operated to bar her heirs from bringing their own independent malpractice actions.[234]

A different result was reached in *Hawkins v. Superior Court*,[235] a California case also involving a wrongful death action brought by the spouse of the decedent. The arbitration clause was contained in a health plan contract executed by the decedent on behalf of himself and his wife with the Kaiser Foundation Health Plan.[236] The petitioner's husband had died of cancer after receiving treatment under the plan.[237] The wife filed a wrongful death action against the plan, alleging negligence in failing to quickly diagnose the cancer.[238] The superior court granted the respondent's petition to compel arbitration pursuant to the arbitration clause contained in the master policy,[239] and Hawkins petitioned the court of appeal for a writ of mandate setting aside the arbitration order.[240] The petitioner maintained that she was not bound by the arbitration agreement because she neither personally consented to arbitrate nor authorized her husband to do so on her behalf.[241] The court of appeal, finding that the case was governed by *Doyle* and *Madden*, declined to disturb the order compelling arbitration.[242] Unlike the decedent in *Rhodes*, who had contracted only for herself, Mr. Hawkins had exercised an implied right to enter into the contract on his wife's behalf by virtue of his obligation to support his spouse.[243] The court, however, avoided the question whether an heir who was not covered by the plan could be

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233. *Id.* at 609, 143 Cal. Rptr. at 61. *Cf.* Weeks v. Crow, ___ Cal. App. 3d ___, 169 Cal. Rptr. 830 (1980) (arbitration agreement signed by parents prior to childbirth held not applicable to parents' cause of action for wrongful death of newborn child arising out of alleged malpractice in care and treatment of baby).

234. *Id.* at 609-10, 143 Cal. Rptr. at 61.

235. 89 Cal. App. 3d 413, 152 Cal. Rptr. 491 (1979).

236. *Id.* at 415, 152 Cal. Rptr. at 492. The enrollment application filed by Hawkins entitled him and his wife to benefits contained in a master contract applicable to the coverage sought. Section 10 of the master contract contained the arbitration clause. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 415-16, 152 Cal. Rptr. at 492-93.

240. *Id.* at 414-15 & n.1, 152 Cal. Rptr. at 492 & n.1. See note 171 *supra*.

241. 89 Cal. App. 3d at 416, 152 Cal. Rptr. at 493. The plaintiff did not argue that the contract was adhesive. *Id.* at 417 n.3, 152 Cal. Rptr. at 493 n.3.

242. *Id.* at 418-19, 152 Cal. Rptr. at 494-95.

243. *Id.* at 418-19, 152 Cal. Rptr. at 495. The court recognized that spouses have mutual obligations to care for and support each other, including the duty to provide for medical care. Hawkins had an implied authority arising from that obligation, to agree for himself and his wife to arbitrate medical malpractice claims. *Id.*

compelled to arbitrate a wrongful death action under an arbitration provision that attempted to bind heirs of the plan member.[244]

D. *Revocation of Agreement to Arbitrate*

One way of ensuring that the patient has knowingly agreed to arbitrate is to provide him with an opportunity to revoke the agreement after a statutorily prescribed period. In this way, both the patient and the health service provider have an added measure of security: the patient has an opportunity to reassess the decision to arbitrate after the pressures accompanying the initial offer to arbitrate have abated, and the health service provider can be reasonably assured that the clause will not be challenged after the period for revocation has expired.

Many of the medical malpractice arbitration statutes require that any agreement specifically reserve the right of revocation.[245] The period in which a party may revoke varies in duration and in terms of the operative dates.[246] Some statutes permit either party to revoke;[247] others permit only the patient to revoke.[248] Under Louisiana's and South Dakota's statutes, any alleged acts of malpractice that took place prior to revocation remain subject to arbitration.[249] The statutes of other states are silent on this issue.

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244. *Id.* at 419 n.5, 152 Cal. Rptr. at 495 n.5. *But cf.* ME. REV. STAT. ANN. tit. 24, §§ 2702(1)(C), (2)(B) (West Cum. Supp. 1979) (death of patient during period for revocation acts as automatic revocation of agreement to arbitrate).

245. ALASKA STAT. § 09.55.535(c) (Cum. Supp. 1979); CAL. CIV. PROC. CODE § 1295(c) (West Cum. Supp. 1980); ILL. ANN. STAT. § 209(c) (Smith-Hurd Supp. 1980); LA. REV. STAT. ANN. § 9:4233 (West Cum. Supp. 1951-1979); ME. REV. STAT. ANN. tit. 24, § 2702(1)(C) (West Cum. Supp. 1979); MICH. COMP. LAWS ANN. §§ 600.5041(3), .5042(3) (MICH. STAT. ANN. §§ 27A.5041(3), .5042(3) (Callaghan 1980)); OHIO REV. CODE ANN. § 2711.23(B) (Page Supp. 1978); S.D. CODIFIED LAWS ANN. § 21-25B-1 (1979); VA. CODE § 8.01-581.12(A) (1977).

246. ALASKA STAT. § 09.55.535(c) (Cum. Supp. 1979) (revocation by patient within 30 days of execution of agreement); CAL. CIV. PROC. CODE § 1295(c) (West Cum. Supp. 1980) (30 days after execution by patient); ILL. ANN. STAT. ch. 10, § 209(c) (Smith-Hurd Supp. 1980) (revocation within 60 days of discharge or last treatment); LA. REV. STAT. ANN. § 9:4233 (West Cum. Supp. 1951-1979) (agreement voidable by either party within 30 days of execution); ME. REV. STAT. ANN. tit. 24, §§ 2702(1)(C), 2702(2)(B) (West Cum. Supp. 1979) (revocation by patient within 30 days of discharge from hospital, or within 60 days of last treatment by doctor); MICH. COMP. LAWS ANN. §§ 600.5041(3), .5042(3) (MICH. STAT. ANN. §§ 27A.5041(3), .5042(3) (Callaghan 1980)) (60 days from discharge from hospital or execution of agreement with physician); OHIO REV. CODE ANN. § 2711.23(B) (Page Supp. 1978) (60 days after discharge); S.D. CODIFIED LAWS ANN. § 21-25B-1 (1979) (revocation on notice from either party); VA. CODE § 8.01-581.12(A) (1977) (60 days after termination of health care).

The heirs of a decedent are permitted additional time to revoke the decedent's agreement to arbitrate under a few of the laws. *See, e.g.*, ILL. ANN. STAT. ch. 10, § 209(c) (Smith-Hurd Supp. 1980) (decedent's representative may cancel agreement within 60 days of appointment; next of kin may revoke up to eight months after death of patient if no representative has been appointed within six months of death of patient).

247. LA. REV. STAT. ANN. § 9:4233 (West Cum. Supp. 1951-1979); S.D. CODIFIED LAWS ANN. § 21-25B-1 (1979).

248. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.5041(3), .5042(3) (MICH. STAT. ANN. §§ 27A.5041(3), .5042(3) (Callaghan 1980)).

249. LA. REV. STAT. ANN. § 9:4233 (West Cum. Supp. 1951-1979); S.D. CODIFIED LAWS ANN. § 21-25B-1 (1979).

In *Amwake v. Mercy-Memorial Hospital*,[250] the court construed a Michigan statute that gave patients sixty days after their discharge from a hospital to revoke an arbitration agreement.[251] The patient became comatose after surgery on March 22 and was transferred to another hospital on March 25.[252] On May 24 her estranged husband filed a malpractice suit on her behalf.[253] The trial court, granting the defendant's motion for an order compelling arbitration, found that the agreement signed by the patient had not been revoked within the statutory time limit.[254] The court of appeal, reversing, found three bases for upholding the patient's right to sue: (1) the transfer of the patient from one hospital to another did not constitute a discharge within the meaning of the statute;[255] (2) the action against the hospital was filed on the sixtieth day after her alleged discharge and acted as a timely revocation of the arbitration agreement;[256] and (3) even if the sixty-day period had passed by the time the suit was filed, the patient's unconscious condition rendered her unable to revoke and thereby tolled the running of the period until the disability was removed.[257]

The Michigan Court of Appeals, in *Capman v. Harper-Grace Hospital*,[258] refused to apply the so-called discovery rule to the statutory sixty-day period for revocation of a medical malpractice arbitration agreement.[259] Under the discovery rule, a judge-made device, the statute of limitations does not begin to run until a plaintiff has discovered or should have discovered the existence of the allegedly wrongful act.[260] The patient in *Capman* had revoked the agreement more than sixty days after her discharge from the hospital, but less than sixty days after she had discovered the alleged acts of malpractice.[261]

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250. 92 Mich. App. 546, 285 N.W.2d 369 (1979).

251. MICH. COMP. LAWS ANN. § 600.5042(3) (MICH. STAT. ANN. § 27A.5042(3) (Callaghan 1980)).

252. 92 Mich. App. at 549, 285 N.W.2d at 371.

253. *Id.* at 549-50, 285 N.W.2d at 371.

254. *Id.* at 550, 285 N.W.2d at 371.

255. *Id.* at 552, 285 N.W.2d at 372. The court found that a simple transfer made while the patient still needed treatment for a condition that arose in the hospital was not a discharge. Otherwise, hospitals would be able to transfer patients from one hospital to another in order to start the running of the 60-day period. *Id.*

256. *Id.*

257. *Id.* at 553, 285 N.W.2d at 372-73. The court drew a parallel to the statutory exceptions to the running of the statute of limitations under the state's Revised Judicature Act, MICH. COMP. LAWS ANN. § 600.5851(1) (MICH. STAT. ANN. § 27A:5851(1) (Callaghan 1980)). Alaska's medical malpractice arbitration law provides that the patient's incapacitation tolls the running of the period for revocation. ALASKA STAT. § 09.55.535(c) (Cum. Supp. 1979).

258. 96 Mich. App. 510, 294 N.W.2d 205 (1980).

259. *Id.* at 516-17, 294 N.W.2d at 208.

260. *Id.*

261. *Id.* at 513, 294 N.W.2d at 206. The patient had been discharged from the hospital on December 5, 1976, and readmitted to the hospital on February 7, 1977. *Id.* She was discharged on February 17, 1977, and revoked the arbitration agreement on April 1, 1977. *Id.* The plaintiff maintained that she discovered the malpractice, which had been committed during the first hospitalization, sometime during her second confinement to the hospital. *Id.*

The court, drawing a distinction between the strict preclusion of a cause of action resulting from the running of the statute of limitations and the relegation of a dispute to an arbitral forum produced by the expiration of the revocation period, rejected the plaintiff's argument that the period for revocation prescribed by the Malpractice Arbitration Act was controlled by the discovery rule.[262] The court also distinguished *Capman* from *Amwake,* observing that a different situation would be presented where a patient was physically or mentally incapable of revoking the agreement during the sixty-day period.[263]

IV. Characteristics of Medical Malpractice Arbitration

Medical malpractice arbitration laws differ as to the method of case administration, parties covered, composition of the arbitration panel, method of arbitrator selection, duration of the agreement, and availability of discovery procedures. These variations are important, especially in cases involving several parties. A patient faced with a choice of law problem would, for example, opt to arbitrate under the law of the state whose arbitration statute included hospital employees, such as nurses, as parties against whom the arbitration agreement could be enforced. Similarly, parties may be concerned about the availability of discovery in a multiparty arbitration, a factor that can seriously delay the administration of a case.

An essential difference among arbitration procedures is the type of administration prescribed. Under Michigan's statute, the American Arbitration Association is the statewide administrator of medical malpractice arbitrations,[264] but under Alabama's law, only the AAA's procedural rules are used.[265] The statutes of some states require that the administrative procedures of the general arbitration law of the jurisdiction be followed,[266] whereas other states lodge supervisory authority in the courts.[267]

Except for Vermont's malpractice arbitration statute, which does not expressly define which parties are covered by the agreement,[268] all state statutes include as covered parties such health service providers as hospitals and physicians.[269] The term health service pro-

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262. *Id.* at 516-17, 294 N.W.2d at 208.

263. *Id.* The trial court in *Capman* had denied the hospital's motion to compel arbitration. *Id.* at 513, 294 N.W.2d at 206. The court of appeals found that the record was unclear as to whether the trial court had denied the motion based on application of the discovery rule or on a finding tht Mrs. Capman was incapacitated during the revocation period. *Id.* at 517, 294 N.W.2d at 208. The matter was remanded for consideration of this issue. *Id.*

264. Mich. Comp. Laws Ann. § 600.5040(2)(a) (Mich. Stat. Ann. § 27A.5040(2)(a) (Callaghan 1980)).

265. Ala. Code § 6-5-485(b) (1977).

266. *See, e.g.,* La. Rev. Stat. Ann. § 9:4234 (West Cum. Supp. 1951-1979).

267. *See, e.g.,* Va. Code § 8.01-581.11 (1977).

268. Vt. Stat. Ann. tit. 12, §§ 7001-7008 (Cum. Supp. 1979).

269. *See, e.g.,* Ga. Code Ann. § 7-401 (Cum. Supp. 1979), which provides:

> For purposes of this Chapter, the term "medical malpractice claim" shall mean any claim for damages resulting from the death of or injury to any person arising

vider can include a variety of participants in the medical care process depending on the definition used in the jurisdiction involved.[270] A patient seeking to enforce an arbitration agreement against all the professionals who treated him must look to the law of the particular state in order to determine whether all parties are covered by the arbitration clause.[271] Thus, a person bringing a claim arising from a hospitalization may find that nurses are not included in the statute's definition of health service provider.[272] Similarly, depending upon the jurisdiction, a physician who is not employed by the hospital and who has not executed a separate arbitration agreement with a patient may not be made a party to a subsequent arbitration.[273] The patient, therefore, may be forced to institute a separate judicial proceeding against his physician.[274] Although it seems likely that a noncovered physician would consent to be joined in the arbitration in order to avoid a lengthy litigation,[275] there is no assurance of this result. Some states do not permit the joinder of a nonsignatory party without the consent of all parties to the arbitration contract.[276]

The statutory composition of the arbitration panel varies widely among the states. One method of selection calls for each party to appoint a single arbitrator, with the two selected arbitrators appointing a neutral third arbitrator.[277] Under this system, there are usually no requirements as to the area of expertise of the party-appointed arbitrators.[278] A second method permits the parties to select jointly

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> out of (a) health, medical, dental or surgical: (1) service, (2) diagnosis, (3) prescription, (4) treatment, or (5) care, rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of such lawfully authorized person, or (b) care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility or institution, or by any officer, agent or employee thereof acting within the scope of his or her employment.

Id.

270. *Id.*

271. *See* Ladimer, *supra* note 8, at 312. Ladimer has found 23 categories of providers covered under the medical malpractice arbitration laws of 14 jurisdictions. *Id.*; *cf.* Calvin v. Schlossman, N.Y.L.J., June 16, 1980, p.1, at col. 6 (App. Div.) (independent laboratory held to be covered party under New York's screening panel statute).

272. *See, e.g.*, LA. REV. STAT. ANN. § 9:4230(1) (West Cum. Supp. 1951-1979).

273. *See, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2703(1) (West Cum. Supp. 1979).

274. *See, e.g.*, O'Keefe v. South Shore Internal Medicine Assocs., 102 Misc. 2d 59, 64, 422 N.Y.S.2d 828, 831 (Sup. Ct. 1979) (only one of four defendants in malpractice action had signed an arbitration agreement with the patient); ME. REV. STAT. ANN. tit. 24, § 2703(1) (West Cum. Supp. 1979) (separate proceedings called for where some defendants have signed arbitration agreement and some have not).

275. See note 74 *supra*.

276. *See, e.g.*, ME. REV. STAT. ANN. tit. 24, § 2703(3) (West Cum. Supp. 1979).

277. *See, e.g.*, ALA. CODE § 6-5-485(b) (1977). A variation of this procedure entails having the court appoint the third arbitrator if the two party-appointed arbitrators fail to do so within a set time. *See, e.g.*, GA. CODE ANN. § 7-408(b) (Cum. Supp. 1979).

278. *See, e.g.*, ALASKA STAT. § 09.55.535(f) (Cum. Supp. 1979).

all arbitrators from lists of candidates submitted by a court or an administering agency.[279] The qualifications of the arbitrators under this method of selection are usually specified in the statute.[280]

The number of arbitrators on an arbitration panel varies from one in California[281] to seven in Virginia.[282] Most states require three.[283] The mandated composition of panels operating under Michigan's law, requiring one health service provider representative on each three-member panel, has been challenged as violative of due process because doctors or hospital administrators would be naturally biased against the patient.[284] In one case, the patient argued that a doctor-arbitrator would be prejudiced against him because an award in the patient's favor would indirectly lead to an increase in the physician's malpractice insurance premiums.[285] Rejecting this contention, the state circuit court applied the well-established rule that arbitrator bias sufficient to overturn an award must be "certain and direct and not remote, uncertain or speculative."[286] In the court's view, the nexus between the individual arbitration and the doctor-arbitrator's liability insurance rate was too remote to offend due process.[287]

In another Michigan circuit court decision the judge found that the statutorily prescribed composition of the panel was unconstitutional.[288] The court reasoned that by including a physician or hospital administrator on each panel, the law placed a "natural enemy" of the patient on the tribunal, while failing to include a "natural ally."[289] This composition forced the patient to have his case decided by a panel with a natural bias in favor of doctors and hospitals, and thus infringed on the patient's due process right to a hearing before a

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279. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5044(2) (MICH. STAT. ANN. § 27A:.5044(2) (Callaghan 1980)) (three arbitrators selected by parties from lists supplied by the American Arbitration Association: one physician or hospital administrator, one attorney-chairperson, and one layperson specifically not an insurance company or hospital representative).

280. *Id.*

281. CAL. CIV. PROC. CODE § 1282 (a) (West 1972) (one arbitrator unless arbitration agreement provides to contrary).

282. VA. CODE § 8.01-581.3 (1977) (three impartial attorneys, three impartial health service providers, and one circuit court judge, presiding as chairman but having no vote except in case of ties).

283. *See, e.g.*, ILL. ANN. STAT. ch. 10, § 213(b) (Smith-Hurd Supp. 1980) (three arbitrators unless otherwise agreed to in arbitration option).

284. Pipper v. DiMusto, 88 Mich. App. 743, 279 N.W.2d 542 (1979) (per curiam) (constitutionality question not answered; case disposed of on procedural grounds); Malek v. Jayakar, No. 78-802-604 NM (Mich. Cir. Ct. Feb. 5, 1979).

285. Malek v. Jayakar, No. 78-802-604 NM, slip op. at 10 (Mich. Cir. Ct. Feb. 5, 1979).

286. *Id.*

287. *Id.*

288. Manuel v. Pierce, No. 79-929-209 NM (Mich. Cir. Ct. May 22, 1980).

289. *Id.*, slip op. at 12. The court stated that neither of the other two panel members, an attorney and a layperson, would necessarily be sympathetic to a patient, but a physician or hospital administrator would have a "natural empathy and sense of identification" with the defendant. *Id.*, slip op. at 11-12.

fair and impartial tribunal.[290] The conflict between the preceding two cases has yet to be resolved by an appellate court in Michigan.

In California, the court in *Wheeler v. St. Joseph Hospital*[291] sustained a challenge for bias against a panel's medical member who unintentionally failed to disclose a business relationship with the attorneys representing the defendant doctor.[292] Applying a disclosure rule set forth by the United States Supreme Court in another context, the court found that the arbitrator should have disclosed any dealings that might create an impression of possible bias.[293]

Although most medical malpractice arbitration laws do not limit the duration of an agreement,[294] a few do contain language setting time limitations on the life of the agreement. For example, under Louisiana's statute a medical malpractice arbitration agreement must expire no later than five years from the date of inception.[295] If a dispute arises out of an act or omission occurring during the term of the agreement, it is arbitrable even if the claim is brought after the expiration of the contract.[296] A one-year period from the date of execution of the contract is specified by the Illinois statute,[297] and patient-hospital agreements must be reaffirmed by the patient at the time of discharge in order to be valid.[298] Michigan's law is similar, providing a one-year term for doctor-patient agreements and permitting renewal of the contract.[299] Under Alaska's statute a person receiving outpatient treatment at a hospital or from another member of a health plan can execute an agreement with the health service provider lasting for the course of treatment or duration of membership.[300]

The Michigan Court of Appeals recently held that an arbitration agreement entered into by a physician and his patient after a first

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290. *Id.*, slip op. at 10. The court noted that under the statute, the parties could challenge individual arbitrators for cause, but concluded that the patient would in all cases be judged by a panel that included a "natural enemy"—the physician or hospital administrator. *Id.*, slip op. at 12.

291. 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1976).

292. *Id.* at 369-72, 133 Cal. Rptr. at 791-93 (arbitrator had appeared as defense witness on behalf of former client of defendant's attorney in arbitration proceeding before him).

293. *Id.* at 370-71, 133 Cal. Rptr. at 792. The court referred to Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968), *reh'g denied*, 393 U.S. 1112 (1969), in which the arbitrator in a construction case had failed to disclose a prior business dealing with the prime contractor, involving approximately $12,000 over a five-year period. Although neither party alleged fraud or bias on the part of the arbitrator, the Court held that the award should be vacated under 9 U.S.C. § 10 (1976), because arbitrators must disclose to the parties any dealings that might create even an impression of possible bias. 393 U.S. at 149.

294. *See, e.g.*, CAL. CIV. PROC. CODE § 1295(a) (West Cum. Supp. 1980).

295. *See, e.g.*, LA. REV. STAT. ANN. § 9:4236 (West Cum. Supp. 1951-1979).

296. *Id.*

297. ILL. ANN. STAT. ch. 10, § 209(c) (Smith-Hurd Supp. 1980).

298. *Id.* § 208.

299. MICH. COMP. LAWS ANN. § 600.5041(4) (MICH. STAT. ANN. § 27A.5041(4) (Callaghan 1980)).

300. ALASKA STAT. § 09.55.535(e) (Cum. Supp. 1979).

operation but before a second operation did not cover the negligent act that allegedly occurred during the first operation.[301] The arbitration provision in question was limited to disputes arising after its execution.[302] Moreover, the clause restricted claims to those arising out of medical care received within a one-year period following the agreement's consummation.[303] The court reasoned that these statements indicated that the arbitration provision was only to be prospectively enforced.[304]

The availability and scope of discovery under state-authorized arbitration is provided for in only seven states.[305] Those statutes permitting discovery generally adopt the procedures used in civil actions within the jurisdiction.[306] Where discovery is not incorporated into a malpractice act or where there is no governing statute providing for malpractice arbitration, parties seeking to compel disclosure are relegated to attempting to convince the arbitrators that they have the implicit power to order this procedure under their general grant of authority to resolve the dispute.[307]

V. Public Policy Factors

An important issue underlying the concept of binding voluntary arbitration of malpractice disputes is whether public policy should permit a patient to waive knowingly the right to a jury or court trial by the use of arbitration. Over the years, certain subjects have been declared nonarbitrable as a matter of public policy, chiefly because the issues involved are so important as to require judicial resolution regardless of the parties' intention to arbitrate.[308] Parties seeking to

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301. Miller v. Swanson, 95 Mich. App. 36, 289 N.W.2d 875 (1980).

302. *Id.* at 38-39, 289 N.W.2d at 876.

303. *Id.* at 43, 289 N.W.2d at 878.

304. *Id.*

305. Cal. Civ. Proc. Code § 1283.1(a) (West 1972) (discovery as provided in state arbitration act); Ga. Code Ann. § 7-413 (Cum. Supp. 1979) (discovery as in civil cases in superior court); Ill. Ann. Stat. ch. 10, § 211 (Smith-Hurd Supp. 1980) (discovery as provided in state arbitration act); Me. Rev. Stat. Ann. tit. 24, § 2706 (West Cum. Supp. 1979) (discovery as enjoyed in civil action in superior court); Mich. Comp. Laws Ann. § 600.5048 (Mich. Stat. Ann. § 27A.5048 (Callaghan 1980)) (discovery as if matter were a civil case); N.D. Cent. Code Ann. § 32-29.1-06 (Supp. 1979) (discovery under state rules of civil procedure); S.D. Codified Laws Ann. § 21-25B-23 (1979) (discovery under state rules of civil procedure); Vt. Stat. Ann. tit. 12, § 7003 (Cum. Supp. 1980) (discovery under state rules of civil procedure).

306. *See* statutes cited at note 305 *supra*.

307. *See* Friedman, *supra* note 16, at 15. In some jurisdictions discovery in arbitration, in the absence of a prior agreement of the parties or an authorizing statute, must be ordered by the court. *See, e.g.*, N.Y. Civ. Prac. Law § 3102(c) (McKinney 1963).

308. *See, e.g.*, Neville, *Enforcement of Arbitration Clauses in Investor-Broker Agreements*, 34:1 Arb. J. 5 (1979) (discussion of public policy forbidding enforcement of agreements to arbitrate future disputes arising under federal securities laws). For a discussion of nonarbitrable issues, see Sprinzen v. Nomberg, 46 N.Y.2d 623, 389 N.E.2d 456, 415 N.Y.S.2d 974 (1979).

enforce agreements to arbitrate antitrust,[309] bankruptcy,[310] discrimination,[311] federal securities act,[312] and patent[313] claims will be met by judicial resistance based on certain public policy norms.[314]

In medical malpractice cases where the public policy issue has been raised, the courts have uniformly ruled that there is no public policy against arbitration of such disputes, and that public policy encourages the use of arbitration, provided that the agreement has been entered into knowingly. Thus, in *Madden v. Kaiser Foundation Hospitals*, the Supreme Court of California stated that public policy favored the expeditious, inexpensive resolution of malpractice disputes that the use of arbitration offered.[315] The *Wheeler v. St. Joseph Hospital* court specifically held that "there is no rule or public policy against an agreement between a patient and a hospital to arbitrate any medical malpractice claim arising out of the hospitalization."[316] The court deciding *Burton v. Mt. Helix General Hospital* similarly found that "it is not against public policy to enforce a broadly drafted arbitration agreement settling medical malpractice claims."[317] Even

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309. American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (validity of licensing agreement within the meaning of the federal antitrust statutes ruled to be an inappropriate subject for arbitration).

310. *See, e.g.*, Allegaert v. Perot, 548 F.2d 432 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977) (trustee in bankruptcy of defunct securities firm not required to arbitrate claims based on arbitration provision in exchange's constitution).

311. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (submission of discrimination claim to arbitration does not foreclose statutory remedy under Title VII of Civil Rights Act of 1964); Wertheim & Co., Inc. v. Halpert, 48 N.Y.2d 681, 397 N.E.2d 386, 421 N.Y.S.2d 876 (1979) (employment discrimination under Title VII).

312. *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953) (agreement to arbitrate future disputes arising out of federal securities acts held to be unenforceable).

313. *See, e.g.*, Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55 (7th Cir. 1970), *cert. denied*, 410 U.S. 974 (1971) (validity of patent not a proper issue for resolution by arbitration).

314. The common denominator in the cases precluding arbitration of certain disputes on public policy grounds is the presence of a strong federal or state statutory scheme enacted for the protection of the general public. *See, e.g.*, Wilko v. Swan, 346 U.S. at 435, construing the Securities Act of 1933 to prohibit even a knowing waiver, in advance, of an investor's right to sue for violations of the Act's antifraud provisions. The Court's recognition of a need to protect the investor from signing away his right to judicial determination of fraud claims may perhaps be attributed to a desire to protect not merely the individual investor, but the investing public in general. This comports with one of the Act's purposes: the prevention of fraud. Securities Act of 1933, 15 U.S.C. § 77 (1976).

Because arbitration is generally a private proceeding, COMMERCIAL ARBITRATION, *supra* note 15, § 24.01, at 234, it would be possible for large-scale fraud affecting numerous parties to remain relatively unpublicized. By precluding arbitration, the Court forced cases involving securities fraud to come under the scrutiny of both the judiciary and, indirectly, the general public. By contrast, medical malpractice cases generally involve few parties; the need to look beyond the individual parties involved to the impact of the case on the public at large is consequently lessened.

315. 17 Cal. 3d 699, 711, 552 P.2d 1178, 1186, 131 Cal. Rptr. 882, 890 (1976) (en banc). The court observed that the legislature's enactment of § 1295 of the Code of Civil Procedure manifested "legislative acknowledgment of arbitration as a means of resolving malpractice disputes." *Id.* at 708 n.9; 552 P.2d at 1184 n.9; 131 Cal. Rptr. at 888 n.9.

316. 63 Cal. App. 3d 345, 354, 133 Cal. Rptr. 775, 781 (1976).

317. 127 Cal. Rptr. 791, 794 (Ct. App. 1976) (withdrawn from publication; on file at the Rutgers Law Review).

the *Rhodes v. California Hospital Medical Center* court, which had refused to enforce a decedent's arbitration agreement against her heirs, noted a "strong public policy in favor of arbitration as a means of resolving controversies."[318]

The judicial attitude in support of arbitration is not surprising. Arbitration appears to be prohibited only when there is a strong public interest in reserving jurisdiction for the courts.[319] Unlike the antitrust, bankruptcy, securities, and patent areas, there is no countervailing federal statutory scheme that would preempt the use of arbitration regardless of the parties' intentions. The distinguishing factor in medical malpractice arbitrations is perhaps the absence of issues that would affect the public in general.[320] Thus, in the absence of a compelling governmental interest in prohibiting the use of arbitration in this particular area, public policy would tend to support arbitration as an alternative to litigation.[321] In addition, the concept of arbitrating claims involving personal injuries is by no means novel or controversial. In many states disputes between injured persons and automobile liability insurers over no-fault and uninsured motorist benefits for injuries sustained in automobile accidents have been subject to arbitration for years.[322]

Concerns for the patient are manifest in the myriad statutory provisions requiring bold-faced notices, revocation options, controlled arbitrator qualifications, discovery, and so forth.[323] The promulgation of a model enactment would enable states to adopt medical malpractice arbitration statutes quickly and efficiently. This would in turn permit parties to make use of the benefits that arbitration has to offer[324] and would support the public policies of encouraging the use of arbitration and ensuring an adequate supply of medical services and malpractice liability coverage.[325]

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318. 76 Cal. App. 3d 606, 609, 143 Cal. Rptr. 59, 61 (1978).

319. *See* cases cited in notes 309-13 *supra*. In Wilko v. Swan, 346 U.S. 427 (1953), the Supreme Court found that there was a strong public policy interest in vesting exclusive jurisdiction in the courts for resolving claims arising out of the antifraud provisions of the federal securities acts. *Id.* at 435. Investors were therefore not even permitted knowingly to waive their right to a court trial of such claims. *Id.*

320. See note 314 *supra*.

321. See notes 314-18 *supra*.

322. See note 81 *supra*.

323. See, e.g., notes 95-100 and accompanying text *supra*.

324. See text surrounding notes 18-22 *supra*.

325. *See, e.g.*, introductory statement to 1976 VA. ACTS ch. 611, amending VA. CODE § 8 (statute amended to solve problem of decreasing availability of malpractice insurance and medical services). *See also* Madden v. Kaiser Foundation Hosps., 17 Cal. 3d 699, 711, 552 P.2d 1178, 1186, 131 Cal. Rptr. 882, 890 (1976) (en banc) (public policy favors use of arbitration to resolve medical malpractice cases); Rhodes v. California Hosp. Medical Center, 76 Cal. App. 3d 606, 609, 143 Cal. Rptr. 59, 61 (1978) (strong public policy in favor of arbitration); Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 354, 133 Cal. Rptr. 775, 781 (1976) (no rule or public policy against arbitration of medical malpractice claims).

VI. Conclusion: The Need for a Model Act

In view of the indications of a recurrence of the medical malpractice crisis[326] and the mounting disfavor with other methods of resolving malpractice disputes,[327] it seems likely that voluntary binding arbitration will play an increasingly important role in the resolution of medical malpractice cases. A model medical malpractice enactment would help arbitration become an effective alternative to litigation.[328] The diversity among those jurisdictions having only a general arbitration law applicable to many types of transactions and, to a lesser extent, those having independently drafted medical malpractice arbitration statutes, has created a situation similar to that which existed prior to the enactment of the Uniform Arbitration Act—a patchwork of inconsistent and sometimes contradictory laws varying by locale.

A model enactment would alleviate some of the problems that currently exist. A health care provider could be reasonably certain that its agreement could be enforced in any number of jurisdictions if it complied with the statutory criteria. Patients would have a clear conception of what subjects were covered and which individuals were bound by the agreement. The validity of an arbitration agreement would no longer be dependent on the vagaries of the general arbitration statute in the particular jurisdiction involved. A model law could also expand the possible uses of arbitration and include expedited procedures for small claims.[329] Complaints against pharmaceutical manufacturers arising out of injuries allegedly caused by their drugs might be covered as well. As a condition of doing business in states covered by the uniform law, drug manufacturers could be required to offer the ultimate consumer the option of arbitrating future disputes arising out of use of the product.[330]

The time and expense of state-by-state drafting and enactment of individual statutes would be reduced by the availability of a model act. With clear standards for arbitration agreements established, the parties could opt for arbitration and be fairly certain that the courts in their jurisdiction would honor their arbitration agreement.

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326. See note 27 *supra*.

327. See note 12 and accompanying text *supra*.

328. See notes 18-22 and accompanying text *supra*.

329. *See, e.g.*, Ladimer, *Arbitration: Medical Malpractice—Small Claims*, N.Y.L.J., July 13, 1978, at 1, col. 1. A possible drawback, however, to small claims arbitration lies in its potential to encourage claims that might otherwise not have been brought because of the small amounts involved. If malpractice insurers are confronted with yet another area of potential liability, rates would most likely increase, thereby fueling, rather than helping to handle, any future medical malpractice crises. See notes 2-7 and accompanying text *supra*.

330. This is analogous to the no-fault law enacted by New York, N.Y. Ins. Law §§ 670-678 (McKinney Cum. Supp. 1979-1980). Insurers writing policies in the state must give the policyholder the option of submitting disputes over entitlement to no-fault benefits to binding arbitration. This provision is mandatory for the insurer and optional for the insured. *Id.* § 675.

The model statute could take the form of an additional chapter of the Uniform Arbitration Act or an independent Model Medical Malpractice Arbitration Act. By incorporating the most useful features of the existing state medical malpractice arbitration laws, such as clear notice of waiver of jury trial, specified forms of agreements, right to revocation, broad party coverage, balanced three-person panels, and final and binding awards, the act could become a valuable tool for handling a new crisis. The time and expense involved in promulgating a uniform law would appear to be outweighed by the benefits to be gained by the enactment of such a statute. In view of the problems that now exist, and the uncertain future the medical care field faces, the effort involved may not be too great. A proposed model act is set forth below.

MODEL MEDICAL MALPRACTICE ARBITRATION ACT

Section 1. **Short title**

This Act shall be known and cited as the "Model Medical Malpractice Arbitration Act."

Section 2. **Definitions**

As used in this Act:

a. "Arbitration agreement" means a written agreement between a patient and a health care provider to submit to binding arbitration an existing or future claim for damages arising out of injuries or death to a patient due to the health care provider's alleged negligence or wrongful act.

b. "Association" means the American Arbitration Association or other entity authorized to administer arbitration disputes pursuant to this Act.

c. "Emergency treatment or care" means such care or treatment as is rendered in a situation calling for immediate action by the health care provider.

d. "Health care provider" means a person, partnership, or corporation lawfully engaged in the practice of medicine, surgery, chiropractic, dentistry, podiatry, optometry, physical therapy, or nursing, or a person dispensing drugs or medicines. As used in this subsection, "dispensing" means the prescription, administration, or distribution of drugs.

e. "Health care service plan" means an organization which offers to paid subscribers health care and treatment pursuant to an authorized plan.

f. "Hospital" means a person, partnership, corporation, or other entity lawfully engaged in the operation or administration of a hospital, clinic, nursing home, or sanitarium. A hospital is a health care provider within the meaning of section 2(d) of this Act.

g. "Supplier" means a person, corporation, partnership, or other entity that has manufactured, designed, sold, or otherwise provided any medication, device, equipment, other product or service used in the diagnosis or treatment of a patient.

Section 3. **Applicability; conflicts**

a. This Act shall apply to and govern all agreements to arbitrate claims arising out of or resulting from the injury to, or the death of, a person caused by an error, omission, or negligence in the performance of professional health care services by a health care provider, hospital, physician, or agent or employee of a provider, hospital, or physician.

b. In any arbitration arising under this Act, the provisions of this Act shall govern if a conflict arises between it and the provisions of [the state arbitration statute].

Section 4. **Arbitration agreements**

a. *Agreements permitted.* A person receiving treatment from a health care provider or admitted to a hospital may, if it is offered, execute an arbitration agreement. Said agreement is void unless signed by the patient, his agent, his guardian, or his parent.

b. *Clear caption.* Every arbitration agreement shall clearly be captioned "Health Care Arbitration Agreement."

c. *Separate instrument.* The arbitration agreement shall be a separate instrument complete in and of itself and shall not be a part of any other contract or instrument.

d. *Emergencies.* No person receiving or about to receive emergency care or treatment shall be offered an arbitration agreement until such emergency treatment or care is completed. If such agreement is offered under such circumstances, it shall be void unless ratified by the patient after such treatment has been completed.

e. *Condition precedent for receipt of care.* The agreement shall provide that its execution is not a prerequisite to receipt of health care or treatment.

f. *Revocability.* The arbitration agreement shall provide that the person receiving health care or treatment or his legal representative may revoke the agreement within 30 days of (1) execution of the agreement or (2) discharge from a hospital, whichever is later, by notifying the health care provider in writing. For purposes of computing the 30-day period, the day of execution of the agreement or discharge from a hospital shall not be included. If, during hospitalization or treatment, the patient becomes so disabled as to be incapable of revoking the agreement, the 30-day period shall be tolled until (1) a legal representative is appointed or (2) the patient's disability is removed, whichever is sooner. In the event that a patient dies during the period for revocation, said death shall act as a revocation of the

arbitration agreement. A health care provider may not revoke the agreement after its execution.

g. *Explanatory brochure.* An arbitration agreement shall be accompanied by an information brochure which clearly details the agreement. The brochure shall be furnished to the person receiving health care and the person executing the agreement at the time of execution. The person receiving health care shall also be furnished with either an original or a duplicate original of the agreement. Unless otherwise provided in the agreement, such brochure shall not be considered a part of the agreement.

h. *Scope.* Each admission to a hospital shall be treated as separate and distinct for purposes of executing an agreement to arbitrate, but a person receiving outpatient care may execute an agreement to arbitrate disputes arising out of such care or treatment.

i. *Mandatory provisions.* Immediately above the line for the signature of the patient must appear the following in at least 12-point bold red type:

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO A TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE.

THIS AGREEMENT MAY BE CANCELED BY YOU WITHIN 30 DAYS OF SIGNING OR 30 DAYS AFTER YOUR HOSPITAL DISCHARGE, WHICHEVER IS LATER, BY SO INFORMING THE HEALTH CARE PROVIDER IN WRITING.

THIS AGREEMENT PROVIDES THAT ANY CLAIMS WHICH MAY ARISE OUT OF YOUR HEALTH CARE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS, RATHER THAN TO A JUDGE OR JURY, FOR DETERMINATION. ALL PARTIES SIGNING THIS AGREEMENT ARE REQUIRED TO ABIDE BY THE DECISION OF THE PANEL OF ARBITRATORS.

j. *Presumed validity.* An arbitration agreement which complies with the provisions of this section shall be presumed valid, and shall be presumed not to be a contract of adhesion, nor unconscionable, nor otherwise improper. Any party may attempt to rebut the aforementioned presumption.

Section 5. **Health care service plans**

Health care providers rendering services pursuant to a health care service plan which contains an arbitration agreement shall not be required to offer arbitration agreements for each and every patient contact with plan subscribers or persons covered by the plan, provided that the plan has a procedure for clearly calling to the prospective

subscriber's attention the fact that the plan has an arbitration provision that is in compliance with section 4 of this Act.

Section 6. **Parties**

a. *Employees.* The employees of a hospital or health care provider shall be deemed to be parties to every arbitration agreement signed by their employer. An arbitration agreement may bar an action at law against any hospital or health care provider who is a party to the agreement on the grounds of respondeat superior for the negligence or other wrongful act of any employee reasonably alleged to have caused the injuries upon which the claim is based.

b. *Additional parties.* By consent of all parties to an arbitration proceeding, a party that is not a signatory to the agreement may be invited to participate in and be bound by the agreement, or may be accepted into the agreement upon an offer to be so bound. If such invitation or acceptance is made pursuant to the consent of the arbitration parties, no signatory of the agreement may refuse to arbitrate because of the participation of such additional party.

c. *Minor parties.* A minor child shall be bound by an arbitration agreement executed on his behalf by any parent, irrespective of whether that parent is also a minor. An agreement so executed shall not be voidable because of the parent's minority, and for such purposes, a minor who is a parent shall be deemed to have full legal capacity as if that parent were above the age of majority.

d. *Patient's heirs.* If the agreement so provides, the heirs of the patient shall be bound by the patient's agreement to arbitrate, as to survival claims of the patient. The arbitration agreement shall not bind any heir of the patient as to the heir's own claims arising out of the death of the patient.

e. *Consolidation of related disputes.* In cases involving common questions of law or fact, if separate agreements exist between a claimant and a number of defendants, or between defendants, the disputes shall upon application to a court of competent jurisdiction be consolidated into a single arbitration proceeding.

Section 7. **Commencement of proceedings**

a. *Demand for arbitration.* Arbitration proceedings under this Act shall be commenced by the service of a demand for arbitration, together with a statement of the claim and cause of action, on all parties to the health care arbitration agreement from whom damages are sought. A copy of the demand shall also be filed with the Association. Service of the demand for arbitration shall be by any method authorized for service of complaints under [the state's civil practice act].

b. *Locale.* The arbitration proceeding shall be held at a location agreed to by the parties in their agreement or in a later writing. If the locale is not designated within 7 days of the filing of the demand

for arbitration, the Association shall have the power to determine the locale, which decision shall be final and binding. If any party requests that the hearing be held in a specific locale and the other parties file no objection thereto within 7 days after notice of the request, the locale shall be the one requested.

Section 8. **Administration**

Administration of the proceeding shall be performed by the Association, pursuant to its rules, except where such rules are inconsistent with this Act.

Section 9. **Selection of arbitrators**

a. *Composition of panel.* An arbitration under this Act shall be heard by a panel of 3 arbitrators. One shall be an attorney who shall be chairperson, one shall be a physician, preferably but not necessarily from the respondent's medical specialty, and the third shall be a person who is not a doctor, lawyer, or representative of a hospital or insurance company. Where a case solely involves a hospital as defendant, a hospital administrator may be substituted for a physician.

b. *Selection of arbitrators.* Except as otherwise provided in subsection c of this section, arbitrators shall be selected pursuant to the rules and procedures of the Association from a pool of candidates generated by the Association.

c. *Agreements of parties regarding arbitrators.* Notwithstanding subsection b of this section, the parties may agree upon arbitrators or any method of selecting arbitrators or the number of arbitrators, provided the agreement is made after the initiation of arbitration proceedings.

d. *Screening for bias.* The Association shall make such initial screening for bias as may be appropriate and shall require a candidate for a particular case to complete a current personal disclosure statement under oath. If the statement reveals facts which suggest the possibility of partiality, the Association shall communicate these facts to the parties. In the event of an objection from any party to the continued service of the arbitrator, the Association shall make the final determination whether the arbitrator shall continue to serve on the panel.

Section 10. **Discovery**

a. *Nature.* After the appointment of the panel of arbitrators, the parties may take depositions and obtain discovery regarding the subject matter of the arbitration, pursuant to the Federal Rules of Civil Procedure. The panel shall conclude discovery as expeditiously as possible.

b. *Time limits.* Discovery shall commence not later than 20 days after selection of the panel and shall be completed within a period of

120 days. The arbitrators shall regulate and control the discovery procedure, and may grant extensions on the time for discovery in order to avoid substantial prejudice to a party.

c. *Disclosure of expert witness's name.* A party is entitled to disclosure of the name of any expert witness who will be called at the arbitration, and may depose said witness in accordance with the Federal Rules of Civil Procedure.

Section 11. **Conduct of proceedings**

a. *Counsel.* The parties may be represented by counsel, be heard, present evidence material to the controversy, and cross-examine any witness. Parties may appear without counsel and shall be advised of such right and of the right to retain counsel.

b. *Time and place of hearing.* The arbitrators shall fix the time and place for each hearing. The Association shall mail notice of same to each party at least 5 days prior to the hearing.

c. *Order of proceeding.* The complaining party shall present its claim, proofs and witnesses, who shall submit to questions or other examination. The defending party shall then present its defense and proofs and witnesses, who shall also submit to questions or other examination. The arbitrators shall have the discretion to vary this procedure but shall afford full and fair opportunity to all parties for the presentation of any material or relevant proofs.

d. *Evidence.* The hearing shall be informal, and strict rules of evidence shall not apply. The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrators may deem necessary. The arbitrators shall be the sole judges of the relevancy and materiality of the evidence offered. Expert testimony shall not be required. Authoritative published works on the subjects in issue may be admitted and argued from, upon prior notice to all other parties.

e. *Standard of care.* The prevailing standard of duty, practice, or care applicable in a civil action shall be the standard applied in the arbitration.

f. *Damages.* Damage awards or orders for remedial care shall be without limitation as to nature or amount unless otherwise provided by law.

g. *Subpoena.* The panel or its chairperson may upon application or its own initiative issue a subpoena requiring a person to appear and be examined with reference to a matter within the scope of the arbitration proceeding, or to produce books, records, or papers relevant to the proceeding. Subpoenas so issued shall be served, and upon application to a court of competent jurisdiction by a party with the consent of the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil actions.

Section 12. **Award of arbitrators**

a. *Majority award.* A majority of the arbitrators may render the award.

b. *Scope.* The award may grant any relief deemed just and equitable, including money damages, provision for hospitalization, medical or rehabilitative procedures, support, or combination thereof, within the scope of the subjects submitted to arbitration.

c. *Opinion.* The panel shall render a written opinion with the award which states its reasoning for the finding of liability or nonliability and its reasoning for the amount and kind of award.

d. *Time.* The panel shall render its award, concurrent with its opinion, within 30 days of the close of the hearing.

e. *Written award; signatures.* The award shall be in writing and shall be signed by the arbitrators or a majority thereof.

f. *Service.* The arbitrators or the Association shall deliver a copy of the award to each party personally or by certified or registered mail, return receipt requested.

g. *Confirmation.* An award may be confirmed under the procedure set forth in [the state arbitration statute].

h. *Review.* An award shall be subject to the same judicial review as awards rendered under [the state arbitration statute].

Section 13. **Insurance**

No professional liability or medical malpractice insurer doing business in this state shall refuse to offer or continue insurance to any health care provider or any physician for the reason that the insured or applicant has entered into, offered to enter into, intends to enter into or offers to enter into agreements authorized by this Act. No such insurer shall limit policy coverage to areas not governed by such agreements.

George H. Friedman