Arbitration agreement

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*Brooklyn, NY*

ARBITRATION AGREEMENT

By signing this agreement, you are:

1. Waiving your statutory right to a jury trial, and
2. Agreeing to arbitrate all claims arising out of or
3. Related to your orthodontic care and treatment.

The term “Doctors” refers to Dress (insert the name of every owner or shareholder) and their corporate owners, agents, contractors, employees, administrators, and licensees, and all afﬁliates thereof. The term “Patient” means and includes any legal representative, family member, agent, executor, guardian, power of attorney, or any other person acting for or on behalf of the Patient.

1. Arbitration provisions
   1. Agreement to arbitrate

The Patient agrees that all claims or controversies between the Doctors and the Patient arising out of or in any way relating to orthodontic services rendered to the Patient by the Doctors, including disputes regarding interpretation of this agreement, whether arising out of state or federal law, and whether based upon statutory duties, breach of contract, tort theories, or other legal theories, shall be submitted to ﬁnal and binding arbitration. It is understood that any dispute as to dental malprac- tice, that is, whether any dental services rendered to the Patient by the Doctors were unnecessary or un- authorized, or were improperly, negligently, or incompetently rendered, as well as any claims for personal injury, loss of consortium, or any other injury or loss incurred, arising out of or in any way relating to the diagnosis, treatment, or care of the Patient, will be determined by submission to arbitration.

* 1. Waiver of the right to a jury trial

Both parties, by signing this contract, agree to give up their constitutional right to have any dispute between them decided in a court of law before a judge and jury. Instead, the parties are accepting

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the use of binding arbitration. The resolution of claims covered by this agreement will be deter- mined by a neutral panel of arbitrators and not a judge or jury. The arbitrator's award shall be ﬁnal and binding without the right of appeal except as may be provided under the laws of the state of (insert state name).

* 1. Applicable law

Except as herein provided, the arbitration shall be conducted and governed by any currently existing statutory provisions governing or pertaining to arbi- tration in the state of (insert state name). In addi- tion, the arbitrator(s) shall apply the laws of (insert state name) governing or pertaining to dental malpractice including but not limited to the stan- dards of care for orthodontic providers, the use of expert witnesses, the laws of evidence, and the applicable statute of limitations.

* 1. Presuit notice demands

Before commencing any action under this agree- ment, the Patient must comply with any presuit notice, investigation, or requirements as mandated by state law. Any demand for arbitration shall be made in writing and be submit- ted to the other party to this agreement via certiﬁed mail, return receipt requested. If either party to this agreement refuses to go forward with arbitration, the party compelling arbitration reserves the right to proceed with arbitration as set forth in this agree- ment, without the participation of the party opposing arbitration, or despite his or her absence at the arbitration hearing.

* 1. Venue, fees, and costs

The arbitration proceedings shall take place in

County, state of

, and be administered by, and under the rules of, the American Arbitration Associ- ation. (At this point, you can elect to have 1 or 3 ar- bitrators. If 1, he or she is mutually agreed upon. If 3, each side chooses 1, and the 2 arbitrators choose the third.) The arbitrator's fees and costs associated with the arbitration shall be divided equally between the parties. The parties shall bear their own attorney's fees and costs and hereby expressly waive any stat- utory right to recover attorney's fees or costs from the opposing party.

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* 1. One proceeding binding on all parties

All claims based upon the same occurrence, incident, or care rendered shall be arbitrated in 1 proceeding. It is the intention of the parties that this agreement

1. Had the opportunity to consult with an attorney
2. Agreed to be bound by its terms and conditions.

(Name of practice or doctor) Patient:

shall bind all parties whose claims may arise out of or

relate to the treatment or services provided by the Doctors as well as to the Patient, the Patient's estate,

By:

Doctor's representative

Date:

By: Patient or legal representative Date:

spouse, heirs, or children at the time of the occur-

rence giving rise to the claim. In the case of a preg- nant woman, the term “Patient” herein shall mean both the mother and her expected child or children. By signing this agreement, the parties consent to the participation in this arbitration of any person or en- tity that would otherwise be a proper additional party in any court action.

* 1. Other provisions
     1. Entire agreement

This agreement constitutes the entire agreement be- tween the parties regarding the subject matter of this agreement and supersedes any prior under- standings, agreements, or representations by or among the parties, written or oral.

* + 1. Severability

If any provision of this agreement is declared invalid or unenforceable, the remaining provisions shall remain in full force and shall not be affected by the invalidity of any other provision.

* + 1. Alternative providers

It is understood by the Patient that: (1) he or she is not required to use the Doctors for his or her orthodontic needs, and (2) that there are other or- thodontists or dentists who provide orthodontic services within the locale of doctor's ofﬁce(s) who are qualiﬁed to perform orthodontic treatment.

* + 1. Withdrawal

Each party shall have 3 business days from the execution of this agreement to cancel the agree- ment by notifying the other party in writing, by certiﬁed mail, return receipt requested, of its desire to cancel this agreement. It is understood by the Patient, that if a doctor-patient relationship has already begun and the Patient decides not to agree to the provisions herein, then the Doctors have the right to withdraw from rendering further treat- ment to the Patient as long as withdrawing the services will not unduly affect the health of the Patient.

By signing this agreement, I acknowledge that I have:

1. Carefully read and understand its terms
2. Voluntarily entered into this agreement

Description of legal authority

COMMENTARY

So, are you interested in possibly changing the rules of the game? Think about it. No more worries about pa- tients suing you. No more having to undergo the stresses associated with civil litigation. No more having to take an untold number of days out of the ofﬁce to defend yourself. No more wondering what a jury will decide. Maybe this really is the other way to skin the cat.

But, is it really that simple? If so, why hasn't everyone done it? I still have malpractice insurance to cover any award that an arbitrator might come up with, right? Maybe, maybe not. Each state may yield a different answer, but here are some of the questions. Most malpractice policies have some type of clause written into them that states, in essence, that you will not interfere with the company's ability to defend you and that if you do, the company might not have to indemnify you for any losses suffered. A typical clause might read something like this: “An insured shall do nothing to prejudice the company's ability to investi- gate, defend, and or settle any matter to which this policy applies.” In addition, many policies have a clause speciﬁcally relating to your assistance and cooperation; eg, “An insured shall fully cooperate with the company and any assigned defense counsel in the investigation, defense, and settlement of any matter to which this policy applies. Such cooperation shall include but not be limited to your attendance at any deposition, trial, or hearing requested by the company, as well as the in- sured's assistance in securing and giving evidence and testimony.”

The question then becomes, if you and your patient agree to binding arbitration, does that interfere with your malpractice carrier's ability to adequately defend you? If it does, then the carrier might not have to indem- nify you for any award the arbitrator determines is appropriate. Maybe your carrier wants to put this in front of a jury. Maybe the carrier believes that the preponder- ance of the evidence is in your favor or that its experts can create enough doubt in the mind of a jury that they would ﬁnd for you at trial. Obviously, before you

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decide to change the rules of the game, you must speak with your carrier to see whether (1) you will still be covered for any losses or awards made by the arbitrator and (2) the carrier will still cover any defense costs (attor- neys' fees and other costs) that you would otherwise have to pay out of pocket.

Another clause in a standard malpractice policy that also must be adhered to is called a reporting require- ment. This means that you are obligated to report any claim, potential claim, threat of litigation, or any other matter for which the company might have to indemnify you in a timely manner, usually in writing. You also must cooperate with forwarding all communications relating to the dispute that you receive to the company. If you fail to meet your contractual responsibilities regarding these issues, then your carrier might not have to indem- nify you for any losses you suffer. The bottom line here is that as far as the insurance carrier is concerned, it is all about the bottom line—the carrier's. The carrier stands to lose less money if trial is the way it wants to go since 75% of all malpractice suits that go to trial are settled in favor of the doctor. Therefore, guess what? You're going to go to trial. This is because as far as the bottom line is concerned, arbitration might not be in the carrier's best ﬁnancial interests.

Okay, suppose you decide that an arbitrator's award will not rise to the level of what a jury might award, and so you decide to self-insure. State laws will have a lot of input on this issue. Some states allow it but often require the posting of a bond to cover a certain mini- mum amount. You might be able to secure reinsurance for anything over that amount, but now you still have the issue of attorney's fees that could easily reach into the low to mid 5 ﬁgures.

So, what do you think? Still want to go the arbitra- tion route? I'll tell you what I think. At ﬁrst blush, it seems great. It's clean, easy, no trials, blah, blah, blah. However, orthodontic litigation is a small player, a really bit part, in the Passion play called medical malpractice. As long as you have not drunk the Kool- Aid—and I don't care what brand it is—meaning as long as you are not a devotee of any particular guru or approach causing you to see the world of malocclu- sion through any particular spectacles with blinders on the sides to prevent you from seeing anything else, and

as long as you are not an egomaniac to the point where you believe you can do no wrong, and as long as you have more than a thread or two of common sense mak- ing up the professional fabric that cloaks you as you go about your day-to-day clinical activities, and, ﬁnally, as long as you are not an impersonal cold ﬁsh who is blind to the needs of the members of society who make up your patient base, I don't see the need to change the status quo.

What I mean is, why do we carry insurance, any insur- ance? Are you afraid to drive your car to the ofﬁce? Of course not. Why? Because you have automobile insur- ance. You don't play bumper cars every time you commute; you have the insurance because sometimes you make mistakes; sometimes you have accidents. Often? Of course not. If you did, it might be time to think about another way to earn a living. Are you afraid that someone will slip and fall at the ofﬁce and hurt himself? Of course not. Why? Because you have premises liability insurance. Think about all the other insurance policies you carry and why.

I've said it hundreds of times. If someone wants to sue me for malpractice, I don't care (well, I do, but only because it's an ego thing). Why don't I care? Because I have professional liability insurance. I didn't do anything wanton or willful. I didn't do whatever they are claiming on purpose. Whatever it was, if it truly was anything, it was an accident, an oversight, an omis- sion. I'm not perfect. That's why I carry insurance.

I would much rather let the attorneys deal with it. Here are the records, here's what happened, take care of it. If you need something, call me; otherwise, that's what you get paid for. Sure, I'll cooperate. Just let me get on with my practice and treating my patients; most of them are extremely happy with and grateful for the services I provide. Lose hair, lose sleep, lose weight (well, maybe the last one is okay)—not me, no way. How can I say this? I can do so because that's the type of peace of mind that my insurance provides.

Arbitration? From my perspective, it just puts more on my plate, and I'm already overfed—oops, I mean over- worked. On the other hand, for some, it's probably the cat's meow. Growing up in the 1960s, I heard this

phrase: “Different strokes for different folks.” As the French say, “Vive la diff'erence.”