



Patienten helfen

The System of the Patient Advocacies in Austria

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Dr. Gerald Bachinger
NÖ Patienten- und Pflegeanwalt

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The chapter of this book was written by Dr. Gerald Bachinger, Spokesman of the Patient Advocates in Austria.

3.1. Introduction

In the relationship between patient and physician conflicts and disagreements may occur which are based upon a legal claim or may be based on it; there may also be conflict situations not based upon legal claims, however.

The extrajudicial dispute settlement is a method enabling a resolution of conflicts in the relationship between patients and healthcare professionals to the satisfaction of all conflict parties. The purpose of an extrajudicial dispute settlement is to achieve a result with particular consideration of the interpersonal-communicative and psychological aspects etc. of the patient-physician relationship on the one hand, and to protect the patients' legal claims on the other hand.

There are two institutions dealing with the majority of cases of extrajudicial settlement of disputes, i.e. the patient advocacies (patient representations) and the arbitration boards of the Chambers of Physicians of the Federal States.

Impressum

Es ist enorm wichtig, permanent von den Patienten zu lernen. Im Letter PATIENTEN HELFEN stellt NÖ Patienten- und Pflegeanwalt Dr. Gerald Bachinger wichtige Erfahrungen von mit Patienten für Patienten und ihre Helfer vor. Dieser Letter ist ein Beitrag der NÖ Patienten- und Pflegeanwaltschaft, um vermeidbaren Problemen im Gesundheitswesen vorzubeugen. Er erscheint unregelmäßig, in der >NÖ Edition Patientenrechte<, seit Juli 2001 auf www.patientenanwalt.com zum Download.

Herausgeber und für den Inhalt verantwortlich: Dr. Gerald Bachinger, NÖ Patienten- und Pflegeanwaltschaft
A 3109 St. Pölten, Rennbahnstrasse 29, Tel: 02742/9005-15575, Fax: 02742/9005-15660, E-mail: post.ppa@noel.gv.at

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Overview:

Patient advocacies (patient representations) are operating in each of the nine Federal States. They are established based upon the regional State Acts and they are responsible for all the hospitals of the Federal State and for all the patients treated in these hospitals. Their major task is to represent patient interests and rights.

They should be distinguished from patient advocates (though they have the same name) exclusively representing and supporting patients in psychiatric hospitals (at psychiatric departments). These patient advocates are employees of the Association of Solicitors and Patient Advocacies. Based upon the Hospitalization Act they represent patients in the compulsory hospitalization procedure and also provide information and advice to patients who voluntarily stay in a psychiatric hospital (psychiatric department).

In most of the Federal States, **arbitration boards** are operated by the regional Chambers of Physicians themselves, or they cooperate with them or involve them. Their major task is the extrajudicial dispute settlement in conflicts between patient and physician in cases where a medical treatment error is claimed. In addition, there are arbitration boards for dentists' fee disputes.

Patient compensation funds have been created as a new option of support and an additional possibility of extrajudicial dispute settlement.

3.2 Extrajudicial dispute settlement in the relationship between patients and healthcare professionals

Extrajudicial dispute settlement means that it is attempted to resolve a conflict without involving courts.

Many institutions operating in Austria offer dispute settlements, arbitration or processing of complaints, such as e.g. institutions

- based upon laws or bye-laws, e.g. the patient advocacies, the ombudsman board, arbitration boards, the advisory council of psychologists, the advisory council of psychotherapy;
- traditionally focusing on legal work, such as e.g. lawyers, mediators;
- dealing with consumer protection in general, such as e.g. Chambers of Labour or the Association of Consumer Information.

Conflicts related to healthcare and social matters may include a wide variety. They range from conflicts in which legal claims are asserted and enforced, to interpersonal conflicts and disagreements. Often both areas are interwoven and can hardly be separated when a tolerable or acceptable attempt of solution is developed.

The purpose of an extrajudicial dispute settlement in a conflict based upon a legal claim is to achieve an amicable resolution accepted by all conflict parties. To achieve this purpose, it is thus necessary

- to bring about a result in accordance with the legal order and
- to respect and consider the interpersonal/emotional area as well.

This method has a real chance to be accepted, to appear effective and to be permanently accepted by all conflict parties.

***Example:** A patient complains that a physician has started an examination and continued a treatment without introducing himself by name and function. In addition, the physician has failed to inform the patient about the nature of the disease and the appropriate therapy, in spite of the patient's repeated questions. The patient advocacy tries to clarify whether there is a medical treatment error (lack of information resulting in damage). By offering a discussion to physician and patient, it should be achieved at the same time, that the patient feels he is taken seriously with his justified concern about respectful interpersonal treatment, and that the physician receives a feedback.*

- **Practical advice:** *The objective of such a discussion is to mediate to both parties how an actual situation is subjectively estimated by the other party in question. The objective finding of truth is not the primary issue, however.*
- **Practical advice:** *In the majority of conflict situations in which a legal claim is asserted (even if associated with other conflict reasons) it is sensible to strive for an extrajudicial attempt of resolution. In practice, there are extremely rare cases in which a healthcare institution or a liability insurance is unwilling to get into an extrajudicial dispute settlement.*

3.2.1 Voluntariness

There is **no legal compulsion** for an extrajudicial dispute settlement. An extrajudicial dispute settlement is therefore only possible, if both parties involved voluntarily strive for such a procedure and solution model and are willing to implement it.

A physician's participation in an extrajudicial dispute settlement is possible and desired by the legislator. In the Physicians Act (section 58a, para 2) it is expressed that the participation of the insurant in the objective finding of facts is no violation of duties resulting in a release of liability by the insurer.

- **Practical advice:** *A physician can and should inform the patient advocacy or the arbitration board about his/her perceptions. He/she can and should provide statements concerning the actual facts. This facilitates and accelerates the extrajudicial dispute settlement in the interests of both parties. In addition, the physician thus has the opportunity to complement the fact finding with his/her personal perceptions, which can not always be consistently included in the documentation. The institutions involved in the extrajudicial dispute settlement thus get a picture that comprehensively reflects the actual facts from all parties and perspectives.*
- **Practical advice:** *The physician is not allowed (this is a usual part of insurance contracts) to indicate an acknowledgment of fault, however. The liability insurance reserves the right to acknowledge a legal liability claim. If a physician nevertheless acknowledges a medical treatment error, this may result in a release of liability by the liability insurance.*
- **Practical advice:** *If the conflict parties are unwilling to accept an extrajudicial settlement, the only way possible to enforce rights is a legal action.*

3.2.2 Effect

The amicable resolution accepted by both parties has the same effect as a legally binding judgment. Just like this, it settles the claim/conflict from a legal point of view. The resulting damage must be compensated to the patient (= civil right damages).

The result is a formal **lump-sum offer** entirely resolving the claim/conflict, if the damage can already be clearly determined. If the damage is not yet clearly foreseeable, future developments can be left open. In such cases an acknowledgement of damage (for future causal damage) or at least a waiver of the limitation period should be indicated.

In principle, such a lump-sum offer is prepared and discussed between the liability insurance of the involved healthcare institutions and the patient representation (patient advocacy or lawyer). The patient is currently informed. The formal completion of the settlement (acceptance of the lump-sum offer) is effected by the patient.

➤ **Practical advice:** *These settlements are usually called “lump-sum declarations”.*

3.2.3 Limitation of claims

In principle, civil right claims are subject to a limitation period of 3 years starting as of the time the damage and the injurer are known. The procedure for extrajudicial dispute settlement provides specific conditions for the limitation period, if the patient advocacy or medical arbitration boards are involved (section 58a, para 1 of Physicians Act).

If a patient advocacy or a medical arbitration board receives a written request for mediation from a reportedly injured person, a **suspension** of the period of limitation commences as of the day of receipt of this request. This suspension of the 3 year period of limitation is effective for a maximum of 18 months. The suspension ends and the limitation period expires, if for instance the suspected injurer makes a written declaration that he considers the settlement negotiations collapsed.

3.2.4 Benefits of extrajudicial dispute settlement

The extrajudicial assessment of medical treatment errors does not only offer major benefits to the patients, but also to the healthcare institutions concerned:

- a quick, unbureaucratic and common settlement of the conflict,
- no cost risk for the conflict parties,
- no risk of “losing face” for any of the persons involved,
- therefore no “cementation” of positions,
- proposals for resolution without the strain and excitement of a lawsuit associated with a **filter function**,
- a high emotional acceptance, since there is no sentence and the amicable solutions are worked out together.

The **orientation function** of the extrajudicial dispute settlement for the patients should be particularly emphasized. By a qualified and complete assessment of the complaint, lawsuits without a prospect of success are avoided.

***Example:** During appendectomy an arm nerve is squeezed and the patient suffers from restricted arm movement (damage due to wrong bedding) for several weeks. She believes that this nerve injury is a treatment error.*

The assessment by the patient advocacy shows that it is a question of an informed complication. The patient is thoroughly informed about the results of the assessment, the legal position and the estimation of lawsuit chances. She accepts and says, “If somebody had explained this to me immediately, I would not have complained.”

- **Practical advice:** *Even if no amicable settlement can be achieved, preliminary work has been performed at least and an orientation and clarification of the positions is given. Both conflict parties are thus able to better estimate the risk of a lawsuit.*
- **Practical advice:** *Particularly in damage events with high potential damage claims (e.g. suspected medical treatment error associated with childbirth), it is sensible to attempt an extrajudicial dispute settlement. In the course of this initial solution attempt, the patients are already given intensive advice, support and information. The results gained from the investigations, from the legal and medical assessments and/or from extrajudicial expert opinions can prevent unrealistic initial positions and expectations.*

3.3 Patient advocacies – Patient representations

The discussion concerning the improvement of the patients' legal position, which has been going on for decades, has gradually resulted in a more patient friendly attitude of the legal rules and jurisdiction.

The patient rights have been extended as a specific legal matter, a process which is still an ongoing. As an example, the patient chartas already concluded between the Federation and most Federal States should be mentioned. They have allowed an easier access and better understanding of the already existing key patient rights by summarizing them in one document.

In addition to the development and extension of the patient rights, also special institutions to support patients have been created. They are supposed to enable a professional and cost free legal prosecution and protection of patient interests. In some Federal States these institutions are called patient advocacies, in others patient representations. These are only different names for institutions with the same intention and purpose, however.

Historical development:

- 1991 Carinthian Patient Advocacy and Upper Austrian Patient Representation
- 1992 Viennese Patient Advocacy and Styrian Patient Representation
- 1994 Lower Austrian Patient and Nursing Advocacy
- 1995 Patient Representation of Salzburg
- 1996 Patient Representations of the Tyrolean state and district hospitals
- 1999 Patient Advocacy of Vorarlberg
- 2001 Healthcare and Patient Advocacy of Burgenland

3.3.1 Overall concept of patient advocacies

The patient advocacies perceive themselves as

- organ for patients who are – for any reasons whatsoever - not able to make themselves adequately understood;

- mirror for hospital and medical office staff – thus an external provider of feedback;
- an external contribution to quality-control, since they evaluate the complaints and forward the results to the decision makers;
- a possibility to release emotionally strained situations, to channelize emotions and enhance the willingness to talk;
- an extrajudicial institution to enforce legal claims in an unbureaucratic manner, whereas it is ensured at the same time that none of the involved persons has to “lose his/her face”.

3.3.2 Support and assistance both for patients and healthcare professionals

During the last decades it has become clear that the mere creation and extension of patient rights is not sufficient. Both patients and healthcare professionals need professional support and assistance in order that the patient rights are taken care of in daily practice. As a consequence, patients and medical staff have for instance to be provided with understandable information and advice.

The patient advocacies are **no authorities** which are entitled to exert legal enforcement. The patient advocacies are service institutions which have to convince with coherent and comprehensible arguments.

***Example:** A physician calls up the patient advocacy and would like to deliver a denunciation, since he has treated a child and there is a strong suspicion of sexual abuse.*

The physician is informed by the patient advocate about the legal position (Section 54 Physicians Act) and the different case constellations the relevant law stipulates. He has to inform the authorities about his suspicion.

3.3.3 Functions

The key functions of the patient advocacies are described in the Federal Hospitals Act (KAKuG):

“To assess possible complaints and to ensure patient interests on request, independent patient representations (patient spokespersons, ombuds-institutions or other such representative bodies) must be available.”

Additional functions **differ among the specific states**, e.g.:

- Consultation and providing information;
- Support in case of disagreements and disputes concerning questions of hospitalization, treatment, medical support and care;
- Assessment of and proposals for legal provisions, regulations and other legal rules from the point of view of the patient advocacy;
- Mediation in conflict situations as well as attempts to achieve an extrajudicial settlement of damages after treatment errors;
- Participation in commissions and panels dealing with patient right questions (e.g. Ethics committees, Regional Health-Funds, Quality-Control Commissions etc.).

- **Practical advice:** *One of the key functions is to provide adequately prepared information both to the patients and the staff of healthcare and social institutions. Many patient advocacies provide folders, brochures and information guidebooks on patient rights for instance. All patient advocacies release an annual report on their activities, which is provided on request. Some patient advocacies generate websites, from which additional and more detailed information can be obtained and downloaded.*

3.3.4 Scope of functions

The patient advocacies have a factual and a local scope of functions. The factual scope includes the specific functions assigned to the patient advocacy. The regional scope specifies the region for which the patient advocacy operates.

Some patient advocacies have a comprehensive factual scope of functions including the entire healthcare and social system, such as hospitals, pharmacies, emergency services, convalescent homes, nursing homes, home nursing. This applies to the patient advocacies of Burgenland, Lower Austria and Vienna.

The factual scope of other patient advocacies only include hospitals. This applies to the patients representations of Salzburg, Styria, Upper Austria and Tyrol.

The patient advocacy of Carinthia is responsible for hospitals and office based physicians and the patient representations of Vorarlberg and Styria for hospitals and nursing homes.

The regional scope of functions of a patient advocacy depends on the location of the healthcare or social institution affected by a complaint. The complainant's residence is irrelevant.

Example: *A patient with residence in Salzburg wants to complain about a hospital in Lower Austria, because an operation was not so "successful" as the patient had expected. The patient advocacy of Lower Austria is responsible for the assessment.*

3.3.5 Organization

In most cases a jurist is head of the patient advocacies (in Carinthia it is a physician, in Salzburg a psychologist). Additional specialists are available for professional advice and assistance of the patients (jurists, physicians, nursing staff).

3.3.5.1 Organization of the individual patient advocacies

All patient advocacies are established **centrally for the entire region of a Federal State**.

Based upon the hospital laws in Upper Austria and Vorarlberg, specific information and complaint centers have been established for each hospital in addition to the patient advocacy. In the other Federal States there are **ombuds-institutions** (complaint centers) in many hospitals directly operating on site. These are service centers of the legal entities of the hospitals, which are neither based upon laws, nor do they possess constitutionally guaranteed independence. For processing of complaints and nuisances associated with nursing homes, a nursing home ombudsman was instituted in Vienna in 2003.

The mentioned ombuds-institutions cooperate with the patient advocacies and primarily take care of interpersonal complaints.

3.3.5.2 Cooperation of patient advocacies

In order to achieve networking among the patient advocacies together with a cooperation going beyond the individual states, a patient advocacy working group (PA WG) supported by all patient advocacies was founded in 2000.

The **objectives** of the WG are the following:

- Support and development of patient rights
- Coordinated processes of the individual patient advocacies/ representations and coordination of activities
- Exchange of information and experience
- Further development and standardization (if possible) of the structures of patient representations

As an umbrella organization, the WG is for instance involved in all expertise procedures related to patient rights. The representatives of the WG are invited as experts in working parties and commissions. The experience, perceptions and patients' requirements collected from the daily management of complaints are thus also made accessible to healthcare decision makers.

3.3.6 Independence

Professional complaint management is necessarily based upon confidence on the part of all conflict parties. The conflict parties must feel confident that within the scope of its functions the patient advocacy acts to the best of its knowledge and that its service is provided under consideration of professional aspects only. This is an essential difference compared with health administration, which is subject to a hierarchy of instructions.

Based upon the legal conditions of the Federal States, none of the patient advocacies is subject to instructions, so that they are able to act independently.

This (constitutionally guaranteed) independence ensures that the patient advocacies are not subject to any manifestation of exertion of influence.

3.3.7 Working methods

Patients' requests include a wide variety:

- Requests, information and consultation in healthcare and social system matters;
- Complaints, in the broadest sense, based upon communication deficiencies or interpersonal conflicts;
- Complaints claiming the presence of medical treatment errors.

The patient advocacies have primarily been established to provide the patients with a **specialized and qualified representation** of their interests and rights.

➤ **Practical advice:** *All services provided by the patient advocacies (e.g. information, consultation, information brochures, expertises from court certified experts) are cost free not only for the patients, but also for healthcare professionals.*

However, the consequences of the assessment of complaints should go beyond the support of the individual patients. The patient advocacies transfer their experience (negative as well as positive) based upon the management of a wide variety of single cases to the responsible institutions of healthcare policy and thus achieve preventive and structural effects.

Example: *Complaints about a hospital where patients are treated disrespectfully, are noticed to accumulate at the patient advocacy. The assessment of the single cases shows that most of the complaints are related to one single physician. The patient advocacy asks the hospital management for a meeting and forwards these perceptions and evaluations to the responsible decision maker.*

All Federal State laws (except for Carinthia) explicitly stipulate that the legal entities of hospitals have to cooperate with the patient advocacies. They have for instance to arrange that information and statements are made available. This implies that also the involved physicians are obliged to cooperate in this respect. Beyond this legal requirement, a factual and in most cases efficient cooperation with all hospitals has developed.

➤ **Practical advice:** *Though physicians, working outside (external) of a hospital, are not obliged to cooperate with patient advocacies, there is a factual and efficient cooperation with a large majority of them as well.*

The patient advocacies have different working styles, but the following methods are basically the same:

- **Requests**

In the case of requests or need for information (which in the strict sense is no complaint) consultation is provided and the patients are at least referred to the responsible institutions; e.g. requests concerning patient rights, living wills, social support, nursing allowance, outpatient treatment fees etc.

- **General complaints**

General complaints are cleared together with the patients. They are related to the patients' experiences concerning respectful and human treatment, protection of dignity etc. The responsible centers are confronted with the complaint and asked for a statement. Here the point is to resolve or at least reduce conflicts which have developed. It should be emphasized that it is not the purpose to unearth the objective truth and to administer "justice", as this is the case in a lawsuit.

The purpose is to make a patient's subjective view of a certain situation understood and accepted by the responsible persons. This feedback prepared by the patient advocacies/representations is supposed to allow a forming of opinions and sensibility for the patients' perception. This feedback should trigger future, patient-oriented attitudes of the affected responsible centers. But also the patients can learn to understand the physician's behaviour (at first sight not understandable for laypersons) due to professional/medical reasons.

- **Suspected medical treatment error**

If patients report a complaint potentially caused by a medical treatment error, a legal and/or medical assessment (also involving court certified medical experts) is performed. These assessments are based upon the patients' report, the requested documentation (medical history etc.), the statement by the hospital or the office based physician involved.

Patient advocacies' procedures:

- If for legal or medical reasons **a treatment error can be excluded**, the patient is provided with detailed information and advice (e.g. a thoroughly and correctly clarified complication). These complaints are often due to “simple” communication and information deficiencies. A comprehensive legal and especially medical explanation mostly resolves the complaint. The frequently existing uncertainties on the part of the patients resulting in assumptions concerning the occurrence of errors can be cleared with detailed consultation.
 - **Complaints in the case of obvious treatment errors** and solid evidence can in most cases be resolved in direct negotiations with the liability insurance. The patient advocacies do the necessary preliminary work for the conclusion of settlements (= compensation declarations). The regulations concerning the award of damages are completely and entirely applied. As a matter of course, the purpose is to achieve a complete compensation and not a “bad” or “poor” compromise. The patient is afforded his rights without a big expenditure of time and without any financial risk.
 - If **no direct settlement with the liability insurance** is possible (e.g. due to different opinions or inconsistent expertises), the arbitration boards are entrusted on behalf of the patient. A settlement proposal (assessment of the case on the merits and amount of payment for pain and suffering) is prepared by the arbitration boards. Further negotiations are often performed by the patient advocacies, e.g. concerning additional expenses, loss of income, need of care etc. Neither the patient nor the legal entity of the hospital (liability insurance) is bound to this proposal. The patient thus always has the option to file a lawsuit, if he/she does not agree with the proposal. According to experience this only occurs in very few cases and the above mentioned procedures thus avoid a lot of lawsuits.
- **Practical advice:** *The collected data and evaluations of the patient advocacies show that after legal and medical examination, about 70% of complaints reported as suspected medical treatment errors, have to be classified as interpersonal errors. These complaints result from information and communication deficiencies causing the patients (due to uncertainty) to assume a medical treatment error.*

3.4 Arbitration boards

The common objective of the arbitration boards (also called arbitration commissions) is to achieve an extrajudicial agreement based upon an arbitration procedure. Civil suits have disadvantages both for physicians and patients, including the long duration, the financial risk, the potential damage to the physician's "honor" and "reputation", the impact on the relation of confidence between physician and patient and the necessity to prove a physician's causal and culpable behaviour. In the interest of both parties these disadvantages are avoided by the arbitration procedure. The arbitration boards were created on the background of saving patients and physicians from long and cost-intensive lawsuits. The objective of the Chambers of Physicians is to preserve and enhance the confidence in the medical community by this form of dispute settlement.

In most Federal States arbitration boards are operated either directly by the Chambers of Physicians of the Federal States or with their cooperation and participation. Their major task is the extrajudicial dispute settlement in conflicts between patients and physicians, if a medical treatment error is claimed:

- In **Burgenland** the arbitration board was instituted by a resolution of the Chamber of Physicians (plenum). It is responsible for hospitals and medical offices.
- In **Lower Austria, Upper Austria** and **Vienna** the arbitration boards were instituted by a resolution of the Chamber of Physicians (managing board).
- In **Carinthia** the institution and services of the arbitration board are based upon a contract between the Federal State of Carinthia, the Chamber of Physicians and the Federal Chamber for Employees.
- In **Salzburg** arbitration sessions (for the hospital area) are held by the patient representations of Salzburg within the scope of their function as patient representatives. The Chamber of Physicians of Salzburg offers an "intervention center" for office based physicians, which tries to achieve settlements in contradictory procedures. In Salzburg there is no "arbitration board" comparable to those of the other Federal States.
- In **Styria** the institution and services of the arbitration board (for the hospital area) are based upon an agreement between the Styrian Chamber of Physicians and the Styrian Hospital Corporation. An identical agreement was concluded between the Chamber of Physicians and the legal entities of private hospitals and the hospitals of

the Austrian Accident Insurance. A separate arbitration board has been established by the Chamber of Physicians for office based physicians.

- In **Tyrol** the activities of the arbitration board in medical liability questions are based upon an agreement between the Tyrolean Chamber of Physicians and the Austrian Insurance Association.
- In **Vorarlberg** the activities of the arbitration commission are based upon the Patient and Consumer Protection Law of Vorarlberg. The arbitration commission is appointed by the Federal State Government.

For fee disputes between patients and dentists, the Chambers of Physicians of each of the Federal States have established separate arbitration boards. At second instance, a Federal Arbitration Board has been established at the Austrian Chamber of Physicians (Federal curia dentists).

3.4.1 Agencies

The agencies of the arbitration boards of Burgenland, Lower Austria, Upper Austria, Styria, Tyrol and Vienna are located at the regional Chambers of Physicians. In Carinthia and Vorarlberg, the arbitration boards have their agency at the office of the patient advocacy. The agency of the arbitration board of Salzburg (for hospitals) is located at the patient representation, the intervention center (for office based physicians) at the Chamber of Physicians.

3.4.2 Members of arbitration boards

All arbitration boards consist of

- one judge as chairperson (in Salzburg the patient representative is the chairperson)
- one medical expert
- one further legal expert (lawyer) in most cases.

The other members clearly vary from one region to the other: in Carinthia a representative of the Chamber of Labor has to be included, in Styria and Tyrol a forensic doctor, in Vorarlberg a member of elevated medical-technical services. In Burgenland and Vienna a representative of the patient advocacy is a member of the arbitration board.

3.4.3 Entrusting the arbitration boards

The arbitration boards can only be activated, when they are entrusted and thus assigned to attempt a dispute settlement. Those authorized to call are:

- the affected patient,
- his/her legal or authorized representative (e.g. patient advocate or lawyer),
- the heirs after accepting the inheritance or the legal administrator before declaration of inheritance, respectively,
- the involved physician,
- the legal entity of the hospital of the involved physician.

➤ **Practical advice:** *Some patient advocacies very closely cooperate with the medical arbitration boards. In Lower Austria almost all cases in which the arbitration board of the Lower Austrian Chamber of Physicians is assigned to settle the dispute, are submitted by the patient advocacy.*

In all Federal States the arbitration boards can only be involved as long as the limitation period has not been expired.

Since civil rights lawsuits should be avoided, the terms and conditions of the arbitration boards indicate that the arbitration boards are only activated, when no court is involved. This means that no civil rights lawsuit is pending.

In the terms and conditions of the arbitration boards of Burgenland and Vorarlberg, this is explicitly stated. The terms and conditions of Carinthia, Tyrol and Vienna include the general statement “not pending with a court”. In Styria the arbitration boards can also be entrusted, when a claim was asserted, but the case has been dismissed. In Lower Austria the arbitration board of the Chamber of Physicians can also be entrusted on request of the legal entity or the affected physician, after the proceeding has been discontinued/concluded.

3.4.4 Working method

All arbitration boards only introduce an arbitration procedure on request of a concerned person. In Carinthia the procedure is started after previous involvement of the patient advocacy. In Vorarlberg the patient advocate has to be consulted prior to the

application. A written report by the patient advocate of Vorarlberg must be attached to the application to the arbitration commission.

The application is immediately forwarded to the chairperson; then the case is assessed and, if necessary, medical expertises are obtained. They are incorporated in the decision of the commissions.

The patient has to declare (in the course of the procedure with most arbitration boards) that he/she:

- will not initiate a civil lawsuit before completion of the arbitration procedure,
- agrees that his/her data (medical history etc.) are forwarded to the arbitration board.

The legal entity of the hospital, the liability insurance or the involved office based physician, respectively, in return declare to abandon raising the objection of time limitation during the term of the arbitration procedure.

After receipt of the documentation (medical records etc.), of a statement by the involved physician or hospital and of possible medical expertises, an oral discussion takes place in most cases. This is documented in a protocol provided to all persons involved in the procedure.

The result of the arbitration procedure (proposal of dispute settlement) may be

- an evaluation by the commission that there is no medical treatment error,
- an evaluation that the patient has the right to receive damages on the merits; further negotiations take place between the liability insurance and the patient's representative (patient advocacy or lawyer), or
- a proposal as to the amount of the payment for pain and suffering. Thereafter, possible further claims (causal expenses, loss of income etc.) are mostly negotiated with the liability insurance by the patient's representatives.

➤ **Practical advice:** *Whatever the proposal of dispute settlement is, the procedure is cost free both for the patient and the concerned physician/hospital. The expenses for an involved lawyer or private expert, however, have to be borne by the person who has involved the lawyer or private expert.*

➤ **Practical advice:** *The solution proposals of the arbitration boards are not binding. The patient still has the possibility to take legal action and to lodge a civil claim. In practice, most of the solution proposals are accepted by the involved persons, however.*

3.5 Patient compensation funds

For damage events in the course of medical (nursing care etc.) examinations and treatments, the civil right rules of damages are applied. The patient can prosecute his/her civil right claims (e.g. payment for pain and suffering) before civil court; the different forms of extrajudicial dispute settlement complement the judicial possibilities. In practice, there have been particular damage events where neither a satisfactory judicial nor extrajudicial settlement of damages could be achieved.

Such cases are

- damage events with (lack of) evidence problems and
- damage events not eligible for compensation according to the provisions of the tort law, which have resulted in an uncommon and extraordinarily severe damage for the patient, however.

3.5.1 Viennese settlement concerning support in medical damage

A first step toward a compensation fund (established as of 1998) was the “Viennese settlement concerning rapid financial support in hardship cases of medical malpractice” (the so-called “Hardship Fund”). This fund allows compensation of medical malpractice by an advisory board chaired by the Viennese Patient Advocacy.

A **condition to receive financial support** is that a person (with main residence in Vienna) has suffered material or immaterial damage by

- a medical examination, treatment or non-treatment,
- in a hospital or nursing home of the City of Vienna.

For a single damage event a maximum amount of € 36.300,- is provided. There is no legal claim for this support and it is still permitted to take legal action.

The present Viennese settlement concerning support in hardship cases of medical malpractice will not be cancelled, but simultaneously practiced with the recently established patient compensation fund.

3.5.2 Purpose of the patient compensation funds

As a complementary and additional instrument of extrajudicial dispute settlement the patient compensation funds were instituted as of 2001 as a sort of “last resort” and/or to optimize the civil liability rights.

The donation of the compensation funds is provided by the solidary community of patients. The patient compensation funds are thus a kind of “damage insurance”. Every patient hospitalized in a non-profit hospital basically pays an amount of € 0.73,- per day. The obligation to pay is limited to a maximum of 28 days per year, in cases of poverty there are exceptions to this payment obligation.

The difference among the Federal States concerning the number of inpatient care days results from the different amounts of financial resources, each year provided to the funds for compensatory payments. The funds in Lower Austria and Vienna will have available approximately 1 Mil. € per year, the fund in Vorarlberg approximately € 200,000.-

The new patient compensation funds are supposed to provide an (at least partial) compensation for a damage, if the liability of the legal entity of a hospital is not definitely proven. The state laws and the already issued terms and conditions of the compensation commissions include general statements (in order to allow flexible and special procedures in each single case) and do not define in detail what is meant by “liability not definitely proven” (the terms and conditions of the Lower Austrian and Viennese funds include slightly more detailed rules concerning the conditions of a compensatory payment.

The following two constellations will be included in particular:

- **Damage events with insufficient (lack of) evidence**, where it is highly probable (i.e. prior to a lawsuit) that no sufficient evidence can be expected in order to fulfil the civil right requirements for receiving damages. A successful enforcement of the claim by legal action, as well as the liability, is extremely uncertain in these cases and there is thus a very high risk of losing a lawsuit (with the consequential charges). In such damage events with questionable liability, it has also been impossible so far to achieve an acceptable solution for the patients via an extrajudicial dispute settlement,

since the liability insurance (understandably) is not willing to provide satisfactory solutions. The liability insurance policies occasionally offer a compensation for legal charges under such circumstances, which is far from covering the damage, however.

***Example:** A patient reports a complaint to the Lower Austrian Patient Advocacy, since her urinary bladder has been injured during a complicated operation. Due to this operation the patient is in a very poor state of health and she had to retire prematurely. Prior to the operation, the patient was informed about the possibility of urinary bladder injury.*

The Lower Austrian Patient Advocacy collected the complete medical record, described the circumstances of the case and the assessment result and submitted these data to the arbitration board for evaluation. The arbitration board concluded that the question of guilt could not be proven beyond doubt. The patient advocacy was then asked to involve the patient compensation fund. After decision by the compensation commission, the patient received a partial compensation for damage.

- **Damage events** in which it would be unfair not to grant a compensatory payment, since the patient has suffered an uncommon and extraordinarily severe damage, though not all liability requirements for damages are fulfilled.

***Example:** A patient reports a complaint to the Lower Austrian Patient Advocacy, since a massive disturbance of wound healing occurred after a “routine” appendectomy. This complication was sufficiently explained by the physician and is documented in a comprehensible manner. But the course of the disease was unusually severe and the patient’s state of health strongly and persistently damaged. Since this complication was clarified, no damages can be expected according to the provisions of civil rights. The patient’s considerable damage (payment for pain and suffering, loss of income etc.) can at least partially be compensated by the patient compensation fund, however.*

The new model matches with the extrajudicial compensation procedure, since it is based upon the existing extrajudicial compensation proceedings of the patient advocacies and the arbitration boards, and it complements them.

The liability insurance is not supposed to be discharged by the payments of the compensation funds. If there are definite legal liability aspects, damages are handled – as previously by the patient advocacies - according to the existing provisions of the civil rights, e.g. by entrusting the arbitration boards of the Chambers of Physicians or in direct negotiations with the liability insurance, respectively.

3.5.3 Conditions for a compensation

The Federal Hospitals Act only includes a few Federal legal conditions, thus resulting in different systems and procedures in the Federal States.

The following key points are basically stipulated in the Federal State laws:

- The existing civil liability rights are not substituted, but complemented;

Practical advice: *Even if a compensation is granted by the funds, filing a claim for a compensation by civil legal action is still possible (within the legal limitation period).*

- It must be a damage caused by medical (nursing care etc.) treatments, examinations or lack of treatment;

Example: *A patient slips in the hospital hall on the cleaned and still wet floor and breaks his/her leg. This damage can not be compensated from the compensation fund.*

- The responsible compensation fund is that of the region (Federal State) where the hospital in which the damage occurred, is located; the patient's residence is not relevant;

Example: *A patient suffered damage in a non-profit hospital in Salzburg. Her main residence is in Styria. The compensation fund of Salzburg is responsible.*

- The patient advocates are involved;
- The members of the compensation commissions are independent of any instructions (except for Burgenland);
- The procedure is cost free for the patient;
- The sessions are not public;
- Compensatory payments can only be granted, if the limitation period has not been expired yet;
- If an action is pending with a civil court, the fund can not be involved (double track approaches should be avoided);
- There is no legal claim to receive a compensatory payment;

- The awarding or denial of a payment from the fund is not subject to a verification by authorities or court;
 - There is a repayment obligation.
- **Practical advice:** *Only damage events, in which the treatment, examination etc. occurred as of January 1, 2001, are included, since the patient's contributions were only collected as of this time.*
- **Practical advice:** *The only included damages are those in hospitals where based upon the Hospital Laws an amount of € 0.73 per day is collected from the patients. Patient damages caused in private profit-making hospitals, convalescent homes, nursing homes or medical offices can not be compensated by the fund for the time being.*
- **Practical advice:** *In order to enable the funds to perform their tasks, it is stipulated in the regional laws, that the relevant documentation (medical history etc.) must be provided by the legal entities of the fund hospitals or the fund hospitals themselves, respectively.*

3.5.4 Individual features in the Federal States

The following is stipulated (included in the laws and in the terms and conditions of the funds) in the rules of the Federal States:

3.5.4.1 Burgenland

The board of trustees (= compensation commission) deciding on damages is established as an organ of the Hospital Financing Fund of Burgenland.

The following members belong to the board of trustees:

- The state government member responsible for hospital related matters (President of the Hospital Corporation of Burgenland),
- The state government member responsible for the state budget,
- The deputy president of the Hospital Corporation of Burgenland,
- The healthcare and patient advocate of Burgenland, participating with voting rights
- A legal representative of each hospital, with consultative voice.

Experts can be involved for advice and support.

An application for compensation can be submitted up to one year after a valid conclusion of a legal action. However, it must be mentioned in the judgment that there is no clear liability, which has caused a dismissal of the claim (due to a lack of evidence).

The application has to include a description of the facts and a definite claim. The board of trustees is involved after the application has been assessed by the Patient Advocacy of Burgenland (as clearing center), particularly as to whether or not the case is eligible for provable liability.

The compensation consists in a one-time payment, the amount of which is determined in each single case, the determination being primarily based upon medical and nursing care aspects. The amount of the compensation is limited to € 21,800.- for a single case. In very special hardship cases the maximum amount can be exceeded.

3.5.4.2 Carinthia

The Hospital Fund of Carinthia has established a Hardship Board, which decides on compensatory payments.

The **Hardship Board** consists of the following members:

- The president of the Independent Administration Senate,
- A representative proposed by the Umbrella Organization of patient self-help groups,
- A physician who is a court certified expert.

The patient advocate participates in the sessions with consultative voice.

The board reviews the cases forwarded and endorsed by the Carinthian patient advocate. The size of damages depends on the extent of the objective hardship for the claimant, on the suffered harm (social situation, loss of income and property etc.) and on the actual and necessary expenses causally related to the damage event.

Carinthia is the only Federal State in which no limit of damages is defined.

3.5.4.3 Lower Austria

A patient compensation fund has been established. As its organ, the patient compensation commission decides on the award of damages.

The **commission** includes

- The Lower Austrian patient advocate as president,
- A representative of the department of the Lower Austrian state government responsible for legal matters,
- A legally trained person (judge),
- A representative of the Working Party of medical directors of the public hospitals of Lower Austria,
- A representative of the umbrella organization of the Lower Austrian patient self-help groups.

A compensation from the fund can only be applied for, if the other possibilities for extrajudicial dispute settlement have been exhausted or a priori have no reasonable chance (“ultima ratio”).

In a first step of the procedure, the Lower Austrian Patient Advocacy assesses whether or not damages can be awarded based upon civil right conditions. The procedure is thus identical to what has been the key function of the patient advocacy. Expert assessments are performed and (if necessary) expert opinions obtained from court certified experts. Then an attempt is made to achieve an extrajudicial settlement of damages either by direct negotiations with the liability insurance or via the arbitration board of the Lower Austrian Chamber of Physicians.

In a second step, the Lower Austrian patient compensation commission is activated, after the Patient Advocacy has tried to achieve a compensatory payment based upon the civil rules for the award of damages. The patient receives a partial compensation for his/her damage, if the requirements are fulfilled.

This applies when

- a damage has occurred due to a medical examination, treatment or non-treatment in a fund hospital and there is no sufficient evidence available concerning the remaining elements of the case eligible for compensation (causal relationship, illegality, guilt), or

- a very uncommon and at the same time very serious complication has occurred,
- an informed complication has occurred, the course of which was extraordinarily severe and caused serious damage.

The amount of damages is based upon the civil jurisdiction concerning the determination of compensation. The following is applied as a reference in the case of

- Pain: approximately one third of the payment for pain and suffering to be calculated according to civil jurisdiction;
- Loss of income: the social situation (income, property situation);
- Other causal expenses: approximately one third of the resulting expenses.

Basically, the total amount of damages must not exceed € 21,801.- In the case of exceptional social hardship up to an amount of € 36,336.-. In cases of very big damage up to an amount of € 70.000.-

3.5.4.4 Upper Austria

A patient compensation fund has been established in Upper Austria. As its organ, the compensation commission decides on the award of damages.

The **compensation commission** consists of

- The Upper Austrian patient advocate as president,
- A representative of the department of the Upper Austrian state government responsible for legal hospital matters,
- A representative of the department of the Upper Austrian state government responsible for medical matters,
- A legally trained member proposed by the Upper Austrian Chamber of Lawyers,
- A physician licensed to practice independently proposed by the Upper Austrian Chamber of Physicians

The Upper Austrian Patient representation checks on its own or via the arbitration board for adverse treatment events at the Upper Austrian Chamber of Physicians, whether or not a settlement is possible in favor of the patient according to the existing rules. Only if this is impossible, damages can be awarded in a second step via the Upper Austrian patient compensation fund. The assessment of the cases in preparation for the

decisions of the compensation commission is performed by the Upper Austrian Patient Representation.

The size of damages is based upon the civil jurisdiction concerning the determination of damages. The following is applied as a reference in the case of

- Pain: approximately one third of the payment for pain and suffering calculated according to civil jurisdiction;
- Loss of income: the social situation (income, property situation);
- Other causal expenses: approximately one third of the resulting expenses.

Basically, the total amount of damage must not exceed € 22,000.- In the case of exceptional social hardship this amount can be exceeded by up to 50%.

3.5.4.5 Salzburg

A patient compensation fund has been established in Salzburg; its organ is the compensation commission which decides on damages.

The compensation commission consists of the following members:

- The patient representative of Salzburg as the president,
- A legally trained employee of the state government of Salzburg with special knowledge and experience in the area of the healthcare and hospital system and
- A referee of hospital physicians proposed by the Chamber of Physicians of Salzburg.

An oral or written claim for damage can be submitted to the Patient Representation of Salzburg as the agency of the fund. The Patient Representation of Salzburg assesses whether a liability associated with damages can be achieved for the patient according to liability rules. Only if the assessment shows that the patient will not be awarded damages, a further evaluation can take place and a compensatory payment can be granted from the fund.

Payments for pain and suffering, loss of income and causal expenses are considered as damages. The size of damages has to be in accordance with the civil liability jurisdiction. The following references apply for

- Payment for pain and suffering: a maximum of one third of the payment for pain and suffering determined by civil jurisdiction;
- Loss of income: the social situation of the affected person (income and property situation, responsibilities for support etc.)
- Causal expenses: a maximum of one third of the resulting expenses.

The total amount of damages must not exceed € 22,000.-, or € 36,000.- in extreme social hardship.

3.5.4.6 Styria

An incorporated patient compensation fund has been established, its agency is at the office of the Styrian state government. Organs of the fund are the patient compensation commission and the president.

The patient compensation commission includes

- The legally trained president, with experience in liability rights
- A member from the circle of legally trained regional civil servants
- A medical expert proposed by the Styrian Chamber of Physicians.

The patient representation (with consultative voice) is invited to all sessions and negotiations and is authorized to access the files.

A written application for patient compensation has to be submitted to the agency by the injured person or his/her legal successor. The application has to be claimed within three years starting from the time when the injured person has knowledge of the damage.

However, an application is also allowed within 6 months after expiry of this period, if a civil lawsuit is closed and legally binding and it is expressed in the judgment that the liability for a treatment damage is not clearly proven and this has led to a dismissal of the claim. The same applies to the decisions of the arbitration board of the Styrian Chamber of Physicians.

An application is not allowed

- if a claim for damages has been awarded by a civil court or by the arbitration board or private insurance companies,
- if a civil lawsuit or a procedure is ongoing at the arbitration board of the Styrian Chamber of Physicians.

The size of damages is based upon the individual situation. When determining damages, the legal principles of liability and the criteria developed by jurisdiction have to be considered, in particular

- duration and severity of pain,
- physical and mental consequences,
- the patient's social necessity.

The compensatory payment is a one-time payment amounting to a maximum of € 21.800.-

The maximum limit can be exceeded in special hardship cases, particularly in case of

- an extraordinarily severe damage,
- serious loss of income,
- the patient's special need of social protection.

3.5.4.7 Tyrol

A Tyrolean patient compensation fund has been established, its organs are the compensation commission, the president and a designee of compensation.

The compensation commission has the following members:

- A president, i.e. a legally trained active civil servant of the office of the Tyrolean state government with special knowledge and experience in healthcare and hospital matters,
- A further legally trained active civil servant of the office of the Tyrolean state government and
- A physician from the circle of active civil servants of the office of the Tyrolean state government.

A written application has to be submitted to the compensation commission for the attention of the designee of compensation. Prior to involving the compensation commission the patient has to file a written claim to the legal entity of the hospital.

The designee of compensation has to collect the necessary documents and information, and the facts relevant for the decision, and must assess the application with the assistance of the patient representative. The assessment should particularly deal with the question whether a liability by the legal entity of the hospital is clearly proven or not. The application is provided to the president of the compensation commission together with a report and a decision proposal by the designee of compensation. The commission is not bound to this proposal.

The award of damages requires that

- a damage is present,
- the occurrence of the damage is causally related to a treatment,
- a successful enforcement of the claim for damages by legal action is uncertain,
- the damage is not covered by other measures.

The amount of damages is basically in accordance with the legal practice of the courts and it takes into account the financial resources. Social circumstances can be considered. The maximum amount of the payment is € 22,000.-

3.5.4.8 Vorarlberg

The patient advocate can award a compensation (e.g. on proposal of the arbitration commission).

The applications have to be submitted to the patient advocate who has to assess whether a compensatory payment is possible. A compensatory payment is only possible, if the liability is neither clearly evidenced nor clearly excluded:

- The liability of the legal entity must not be clearly evidenced, this means that in spite of thorough expert assessment, no sufficient clarity could be achieved concerning the question of liability.
- The liability must not have been excluded, this means that after thorough expert assessment, liability appears to be excluded.

The award of damages requires that an extrajudicial settlement with the legal entity has been attempted.

A compensatory payment has to be awarded based upon equity within the scope of the available financial resources.

The amount of the compensatory payment has to be in accordance with the civil jurisdiction concerning damages.

The following compensatory payments are possible:

- Payment for pain and suffering
- Loss of income
- Causal expenses (e.g. home help, transportation and therapy costs)
- Disfigurement compensation

The compensatory payment can exceed € 5,000.-, only if the arbitration commission has provided a solution proposal. A compensatory payment can in no case exceed € 20,000.-

3.5.4.9 Vienna

At the Viennese Patient Advocacy (which acts as an agency), a patient compensation fund has been established. Compensatory payments are awarded on the recommendation of an advisory board established at the Viennese Patient Advocacy.

The advisory board includes the following members:

- The patient advocate as president
- A nursing care expert
- A representative of the profession of lawyers
- A legally trained representative of healthcare and hospital matters
- A competent medical examiner of the Viennese Patient Advocacy

The advisory board is involved by the Patient Advocacy after previous assessment of the conditions. A compensatory payment can be awarded, if

- a clear proof of the damage causality or guilt is a serious problem, or

- a so far unknown or very uncommon, but at the same time serious complication has occurred and led to a significant damage,
- an informed, but at the same time serious complication has occurred and led to a significant damage.

A compensatory payment covers claims for damages (completely or partially), especially payments for pain and suffering. As a rule, the compensatory payment should not exceed the amount of € 70,000.- The award of a compensation can be linked with conditions or requirements, respectively. Damage events with clear evidence are in no case to be covered by the financial resources of the fund.

Entrusting the Viennese Hardship Fund, or a legal assertion of claims is not in opposition to the involvement of the patient compensation fund. If a lawsuit or other extrajudicial attempts for settlement are ongoing, the procedure by the fund is resting.

3.5.5 Repayment

Since this is an additional, compensatory payment, the state laws also include provisions concerning the repayment of effected compensatory payments, so that a lawsuit is not excluded at a later time. A “double compensation” of the same damage event is thus avoided. If later a compensation is paid for the same damage event following a lawsuit or extrajudicial settlement (e.g. by the liability insurance or by the legal entity of the hospital), there is an obligation of repayment.

However, the compensation paid by the fund has to be returned only to the extent covered by legally awarded damages or amounts paid by the liability insurance of the legal entity of the hospital.

***Example:** Due to a damage event, a patient has been awarded damages amounting to € 15,000.- A later lawsuit related to the same damage event concluded with damages amounting to € 8,000.- The patient has to pay back an amount of € 8,000.- to the fund.*

In case of social hardship the compensation commission can entirely or partially abandon repayment in single cases (in Burgenland this is impossible).

Dr. Gerald Bachinger
Patient Advocate of the Province of Niederösterreich
Spokesman of the Patient Advocacies of Austria

gerald.bachinger@noel.gv.at
www.patientenanwalt.com

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Autor: Patientenanwalt Dr. Gerald Bachinger

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