Wyoming Healthcare Commission

ALTERNATIVE DISPUTE RESOLUTION

MEDIATION AND ARBITRATION

Executive summary

Wyoming does not mandate arbitration in medical malpractice actions because the Wyoming Supreme Court held mandatory arbitration unconstitutional as a violation of equal protection under Hoem v. State (Wyo. 1998).[1] Constitutional Amendment C on the 2004 General Election Ballot passed and allows for mandatory alternative dispute resolution or review by a medical review panel before the filing of a civil action against a healthcare provider.[2] Currently, arbitration is governed in Wyoming by Supreme Court Rules of Civil Procedure Rule 40 and Wyoming Statute 1-36-101-119.

Many states are allowing, encouraging and/or mandating alternative dispute resolution for medical malpractice claims, but little tracking is done to determine whether funneling a particular type of civil case through different rules reduces the number of "frivolous" suits, increases the likelihood of a speedy resolution or impacts medical malpractice premiums.

Thirteen states' statutes "allow" for arbitration. Twelve states' statutes "mandate" arbitration, but in three states, only in cases of $150,000 or less. In at least nine states, a review panel is attached to the arbitration statute as a piece of the process or a substitution for arbitration. Almost without exception, states allow the option of civil litigation to co-exist with the panels or arbitration requirement.

The Wyoming Healthcare Commission compiled a brief review of state statutes and state practices based on telephone and email conversations with state officials, nonprofit organization directors and lobbyists across the country, and combined it with an Internet literature review of arbitration in medical malpractice, at the request of Wyoming state legislators. An accompanying report on medical review panels also was provided to the Legislature in December. Copies are available from the Wyoming Healthcare Commission or online at www.wyominghealthcarecommission.org.

[1] Brian C. Schuck and Susan Martin, "Wyoming Tort Reform and the Medical Malpractice Insurance Crisis: A Second Opinion," 28 Land and Water Law Review, 593, 625 (1993)
[2] Wyoming Secretary of State, http://soswy.state.wy.us/election/2004/const-c.htm

What is alternative dispute resolution?

States have established several ways to resolve medical malpractice claims other than through litigation. Arbitration and mediation, as defined by Black's Law Dictionary, are:

- **Arbitration:** A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.[3]

- **Mediation:** A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. Also termed conciliation.[4]

Proponents of alternative dispute resolution say it is faster and cheaper, and may eliminate excessive jury verdicts. Therefore, medical liability costs, including premium costs, could be lower. Opponents say litigation alternatives may encourage injured people to pursue claims that they might not take to court, either because the amount is not substantial or the evidence is weak, thereby increasing liability costs. Others argue that when voluntary, alternatives are seldom used. Also, if the decisions reached through alternative systems are nonbinding, claims can still be filed in the courts, thus extending claim resolution times and increasing overall liability costs. Furthermore, the deterrent effect provided by the threat of litigation may be removed if no-fault approaches are adopted.[5]

Arbitration

Arbitration has not been widely used in medical malpractice cases. Reasons for this include:

1. Judicial hostility that questions the use of arbitration in the malpractice context;
2. State statutes intended to facilitate arbitration created detailed requirements that may have become a barrier to arbitration, and empirical research has shown that malpractice arbitration statutes have not increased the incidence of medical malpractice arbitration;
3. "Repeat players" in the litigation context such as malpractice insurers and defense attorneys have a certain comfort level with the protections afforded by the litigation process including judicial encouragement of settlement, availability of summary judgment, and other motion activities while the plaintiffs' bar perceives arbitration as being biased towards the defendant;
4. Arbitration does not alleviate the concerns inherent in the litigation system, but simply replaces a judge with an arbitrator.[6]

Even within the alternative dispute resolution (ADR) arena, there is no consensus that arbitration is the best form of ADR for medical malpractice since there may be a predisposition toward making compromise decisions that may not fully compensate harm. If a truly simple approach to administrating these cases were found, then there is a concern that the number of malpractice claims would increase. [7]

Who is using arbitration now?

Two factors were found to relate to the incidence of arbitration in medical malpractice claim agreements:

1. Insurer support for the agreements and
2. Physician practice within HMOs.

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[3] Black's Law Dictionary, 7th Edition, Bryan A Garner, Editor in Chief, St. Paul Minn., 1999

[4] Black's Law Dictionary, 7th Edition, Bryan A Garner, Editor in Chief, St. Paul Minn., 1999

[5] October1999 GAO Report to Congress on Effect of Varying Laws in the District of Columbia, Maryland, and Virginia, http://www.gao.gov/new.items/he00005.pdf

[6] Medical Malpractice Arbitration In The New Millennium: Much Ado About Nothing? By Ann H. Nevers, J.D., L.L.M., Pepperdine Dispute Resolution Law Journal (2000) Copyright © Pepperdine Dispute Resolution Law Journal and Ann H. Nevers, J.D., L.L.M.

[7] Pepperdine and Nevers

Fifty-seven percent of physicians who were members of a professional liability coverage provider that strongly encouraged arbitration agreements used arbitration agreements in their practice compared with 6 percent of physicians insured by other providers. Thirty-one percent of the physicians use arbitration agreements because it is the policy of their practice group, while 34 percent use them because they believe arbitration is a more cost effective way to resolve disputes. Of those with arbitration agreements in place, 96 percent of physicians were satisfied with them. In contrast, the California Association of Health Maintenance Organizations (CAHMO) reported that while 71 percent of the HMOs used arbitration agreements with their members, none of the PPOs used arbitration agreements. While HMO arbitration clauses could be used for coverage disputes or medical malpractice issues, the survey found that the arbitration agreements were used in coverage disputes and the total number of arbitrations actually held were less than four per million. The study concluded that few disputes take place through private binding arbitration, yet arbitration agreements are becoming more common in the marketplace as a result of pro-arbitration organizational policies.[8]

Arbitration contract protections

Medical malpractice arbitration contracts have been attacked on the grounds that they are unconscionable adhesion contracts. An adhesion contract is defined as a standardized contract form offered to a consumer on a take it or leave it basis without affording the consumer a realistic opportunity to bargain so that the consumer does not have a choice to accept or refuse it. **Procedural protections include having the agreement on a separate document that does not provide an unfair advantage to the doctor or limit his liability**, contract provisions that draw attention to the fact that the right to a jury trial is being waived, and provision of a revocation period are all elements that allow the member to make an informed choice.[9]

A well-drafted arbitration clause can be "self-executing." This means that it will allow the party to go forward with the arbitration including the appointment of the arbitrator and the arbitration hearing *whether the other party agrees to arbitrate or not.* A self-executing clause "shifts the burden to the party resisting arbitration to obtain an order from the court staying the arbitration by making a showing that the dispute is beyond the scope of the arbitration agreement, or contains an illegal aspect precluding the resolution of the dispute by arbitration." Language that indicates that the party seeking arbitration has the right to proceed despite the refusal of the opposing party, and that "arbitration may only be avoided by a valid court order" would create a self-executing arbitration agreement.[10]

Notice of the agreement to should be provided so that the patient is aware that he or she waived the right to have a judge or jury decide the claim, perhaps within a separate consent form and patient booklet describing arbitration. The arbitration clause provision itself should contain:

1. Information regarding any standards that limit the arbitrator's decision,
2. Designate how the parties will submit their dispute to arbitration,
3. Indicate choice of law provisions.
4. Require the arbitrator to prepare a written opinion explaining the basis and reasons for the arbitrator decision.[11]

Some state statutes provide for a period of time to revoke an arbitration clause. For example, a California statute provides for a 30-day revocation. Colorado gives 90 days to revoke an agreement. Louisiana and New York limit revocation to a specific period of time as long as treatment has not been rendered. The Alabama Medical Liability Act requires that an agreement to arbitrate a medical liability dispute be agreed to after the medical services were rendered and the claim has arisen.[12]

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[8] Pepperdine and Nevers

[9] Pepperdine and Nevers

[10] Pepperdine and Nevers

[11] Pepperdine and Nevers

[12] Pepperdine and Nevers

Statutes of limitations were enacted in the 1970s as part of tort reform legislation. These statutes were to fix the problem of the "long tail" in which claims for injuries are not immediately apparent and may not be apparent for a number of years. The slowness of the claims development process made it difficult to project claims experience, losses, and payouts. Every state now has a statute of limitations that applies specifically to medical malpractice claims. On the average, medical malpractice statutes of limitations are about two years. Typically, they run from the date of the occurrence of the negligence, date of discovery, or date of discovery with maximum time from occurrence. Provisions that have been found to be unconstitutional are those with a maximum time from occurrence because the right to sue could be precluded before the plaintiff has a chance to discover the wrong. [13]

Mediation

Unlike arbitration, in which the arbitrator makes a decision for the parties, **in mediation the parties decide how they will resolve the dispute**. Generally, mediation:

1. Has lower costs than litigation;
2. Can finalize the dispute much more quickly, and reduce the emotional toll of adversarial litigation;
3. Parties are often more satisfied with the process because of their ability to control the outcome of the settlement.[14]

Health care providers may prefer mediation because of:

1. The cost and time efficiency;
2. Privacy of the forum that protects the reputation of the health care provider;
3. The ability to participate in the outcome of the case and preclude jury trials.

Patients may prefer mediation because of:

1. The ability to communicate dissatisfaction with the clinical care received;
2. Achieve redress through monetary and non- monetary compensation;
3. The ability to structure an agreement that includes incentives to preclude further medical negligence;
4. The ability to resolve the dispute quickly and efficiently.

In medical malpractice disputes there is the advantage that:

1. The communication process of mediation will help maintain the doctor-patient relationship;
2. The mediation process can help the parties focus on the issues of concern to the parties in contrast to the legal theories of proof that are required in the courtroom;
3. Mediation can increase satisfaction with the outcome when the parties are empowered to come to their own decision in the dispute.

Mediation raises potential concerns that:

1. Patients will receive less compensation for injury than through litigation;
2. Patients will be intimidated into a premature settlement;
3. Mediation merely delays the process of litigation.[15]

In 1994 a study of several hundred medical malpractice cases arising in a hospital that provided a voluntary, informal complaint process for patients. The complaint process was less formal than mediation and involved complainants and hospital staff discussing the dispute. The intent was to encourage early settlement of claims. The study found that about half of the complaint-based disputes were resolved without filing a lawsuit. Of the 465 cases that ended up in court, only 26 were tried to a verdict and plaintiffs won only four cases. **The study found that the manner in which the case was resolved did not depend on whether there had been participation in the informal complaint process**. However, those cases that did settle at the complaint stage settled for about one-third the amount of settlement at later stages of the

[13] Pepperdine and Nevers

[14] Pepperdine and Nevers

[15] Pepperdine and Nevers

lawsuit. The study concluded that the informal complaint process was an effective way to facilitate the flow of information between the hospital and patients.[16]

National guidelines for medical malpractice arbitration

1. ***Uniform Arbitration Act:*** The adoption of the Uniform Arbitration Act in a state provides statutory framework favoring arbitration. Any medical malpractice arbitration could take place under the Uniform Arbitration Act enacted in any of the states by complying with any specific provisions of the statute within that state. Some states have also enacted medical malpractice specific arbitration statutes. *(Note: Wyoming incorporated the UAA Wyoming Statutes, Title 1, Civil Procedure, Chapter 36, Arbitration – see Attachment B).* These statutes provide a more specific framework for arbitration in the medical malpractice context.

2. ***Healthcare Quality Improvement Act:*** The Health Care Quality Improvement Act (HCQIA) of 1986 requires reporting of medical malpractice awards to the National Practitioner Data Base (NPDB). Liability insurers are required to report all malpractice payments made on behalf of doctors whether through jury verdict, arbitration award, or settlement. The intent was to create a database that could be accessed by Medical Boards, hospital staff privileging entities, and managed care organizations and others seeking information about physician qualifications as part of quality of care monitoring and credentialing decision making. Hospitals, managed care organizations, and other interested parties can access the database to find out about a physician's malpractice award history. These awards are then used for credentialing of physicians by hospitals and HMOs to decide if the doctor should be included in their network or have privileges at their hospital. Mandatory reporting can make physician hesitant to settle lawsuits and can encourage them to fight to protect their good name since even a settlement in which there is no liability will be reported. Some states specifically require reporting of malpractice verdicts and awards to the State Board of Medicine. The states then prepare a physician profile that includes information about the physician that can be used to compare practitioners.[17]

3. ***Federal Arbitration Act:*** The Federal Arbitration Act (FAA) was established to promote and encourage arbitration. The act states that "A written provision of any…contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court in interpreting the FAA has established that the FAA is substantive rather than procedural law that was enacted pursuant to the power of congress to regulate interstate commerce. FAA preempts state law when interstate commerce is affected to the extent that state law is inconsistent with the FAA or stands as an obstacle to the objectives of Congress.[18]

National organization resources

1. ***American Arbitration Association:*** The American Arbitration Association is non-profit corporation founded in 1926. It specializes in business-related arbitration. In 1992, the AAA established Health Care Claims Settlement Procedures, which establishes procedures for health care settlement of disputes through mediation and arbitration. Participation in the program is voluntary. The parties have the right to be represented by an attorney or non-attorney at any time. In 1997, it was reported that there had been approximately 300 arbitration cases under the AAA Health Care rules. ***However, as a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate.*** This change was effective on January 1, 2003.

[16] Pepperdine and Nevers
[17] Pepperdine and Nevers
[18] Pepperdine and Nevers

AAA has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute. Distinguishing a patient undergoing health care treatment from other situations involving an individual, AAA has determined that they will continue to administer pre-dispute agreements to arbitrate in all areas outside of the health care field, as long as there are appropriate due process safeguards as defined by the courts.[19]

2. ***American Health Lawyers Association:*** AHLA's ADR Service was formed in 1992 to respond to the healthcare field's search for an alternative to the long delays and costs of litigation. The ADR Service offers competent, trained dispute resolvers with expertise in key areas of healthcare services for a single, reasonably priced fee-for-service. The service provides unique flexibility: parties have to agree on procedural questions, fee payment, and dispute resolver selection before the resolution process begins. It has established Rules of Procedure for Arbitration and Mediation. In 2003–2004, the ADR Service is likely to handle over 80 cases. The Service currently has 193 resolvers eligible to serve as a mediator or arbitrator in cases administered by it.[20]

State-by-state summary

Many states are allowing, encouraging and/or mandating alternative dispute resolution for medical malpractice claims, but little tracking is done to determine whether funneling a particular type of civil case through different rules reduces the number of "frivolous" suits, increases the likelihood of a speedy resolution or impacts medical malpractice premiums.

The following states' statutes "allow" for arbitration:

- Alabama
- California
- Florida
- Georgia
- District of Columbia
- Illinois
- Minnesota
- New York
- Tennessee
- Texas
- Washington
- Wisconsin
- Wyoming

The following states' statutes "mandate" arbitration:

- Alaska (mandates arbitration if the parties do not agree to arbitrate)
- Delaware (cases of less than $100,000)
- Hawaii (cases of less than $150,000)
- Indiana (unless waived by both parties)
- Louisiana
- Maryland
- Michigan
- Montana
- New Jersey (in cases of less than $20,000)
- North Carolina
- Utah
- West Virginia

[19] http://www.adr.org/index2.1.jsp?JSPssid=15729

[20] http://www.healthlawyers.org/docs/AHLA_AnnualReport.pdf, 2003-2004 AHLA Annual Report

In some states, a medical review panel is attached to the arbitration statute as a piece of the process or a substitution for arbitration (Idaho, Hawaii, Indiana, Kansas, Louisiana, Montana, Utah, Wisconsin, Virginia). Almost without exception, states allow the option of civil litigation to co-exist with the panels or arbitration requirement.

Alabama
Alabama law allows arbitration of medical malpractice claims with the written consent of both parties. The agreement is binding and irrevocable. (Ala. Code § 6-5-485 (1993)).[21]

Alaska
Alaska mandates arbitration of medical malpractice claims if the parties do not agree to arbitrate. The court appoints a three-member panel made up of medical experts within the field in controversy (A.S. § 09.55.536)[22] However, the panel system has not been used in several years *(see WHCC Medical Review Panel Report, 12/2/04)*.

Arizona
Arizona law does not mandate arbitration in medical malpractice actions.[23]

California
California law does not mandate arbitration of medical malpractice actions. However, California does allow health care providers to execute agreements to arbitrate under Cal. Civil Proc. Code § 1295.[24]

Colorado
Colorado law does not mandate arbitration of medical malpractice actions.[25]

Connecticut
Connecticut law does not mandate arbitration or expert panels in medical malpractice actions.[26] Connecticut created a medical malpractice pre-trial screening panel (CGS § 38a-32).[27] However, the purely voluntary screening panel system is unused *(see WHCC Medical Review Panel Report, 12/2/04)*.

Delaware
Delaware has mandatory medical malpractice review panels to prevent controversies from advancing to litigation. Del Code Ann. tit. 18, § 6803 (1989). The panel's decision in effect allows the case to go to court if it shows that the health care provider failed to comply with the standard of care. Del. Code Ann. tit. 18, § 6811 (1989).[28] However, the last medical negligence review panel convened in Delaware in 1976 *(see WHCC Medical Review Panel Report, 12/2/04)*. Superior Court spokesman Maureen Fredericks said that last year, there were 74 medical (and a few legal) malpractice suits filed last year, 97 were disposed of, 124 were pending and 83 were tried in a civil trial. She noted that cases claiming less than $100,000 in damages are arbitrated while cases of more than that amount proceed to trial.[29]

District of Columbia
In the District of Columbia, all cases, including medical malpractice, are eligible for arbitration (D.C. Super. Ct. Civil Arb. Prog. Rules, Rule I et seq. (1997)). The arbitrator's decisions may be entered in a court of law as the final judgment. This would give the decision the same weight and validity as if a judge had made the decision. However, either party may

[21] Medical Malpractice Arbitration by Michael Ahearn, Law Student, Widener University School of Law, 12/1/01, www.adrlawinfo.com/medmal.html.
[22] MMA by Michael Ahearn
[23] MMA by Michael Ahearn
[24] MMA by Michael Ahearn
[25] Impact of Legal Reforms on Medical Malpractice Costs, Appendix A, State Medical Malpractice Reforms,
[26] MMA by Michael Ahearn
[27] Connecticut Office of Legal Research, Jerome Harleston, Senior Attorney, April 29, 2003, "Medical Malpractice Pretrial Screening Panels, 2003-4-0401, http://www.cga.state.ct.us/2003/olrdata/ins/rpt/2003-R-0401.htm.
[28] MMA by Michael Ahearn.
[29] Telephone call, 9/24/04, (302) 255-0798

instigate a civil suit after the arbitrator's decision. If this is done, the evidence used in the arbitration may also be used in the court proceedings, but it cannot be identified as evidence used in arbitration and the jury cannot be told that there was arbitration.[30]

Florida
Florida law requires a pre-suit investigation (766.203) prior to filing a claim for medical malpractice. Florida does not, however, mandate arbitration in medical malpractice actions. Judges may refer the cases to non-binding arbitration (Fla. Stat. Ann. § 766.107).[31]

Georgia
Georgia law does not mandate arbitration in medical malpractice actions. However, after the alleged malpractice has occurred, the parties may agree to appoint a referee from the Superior Court (Ga. Code Ann § 9-9-61). The findings of the arbitration have the same weight and effect as a final court judgment. The findings are also conclusive as to fact, so they cannot be overturned unless there is an error of law, fraud or is unsupported by the evidence (Ga. Code Ann. § 9-9-80 (Supp. 1997)).[32]

Hawaii
The State of Hawaii Department of Commerce and Consumer Affairs Office of Administrative Hearings operates a Medical Claims Conciliation Panel that hears all medical malpractice complaints against physicians, osteopaths, surgeons and hospitals. Hawaii also offers claimants nonbinding arbitration in personal injury cases of less than $150,000. There are not a lot of medical malpractice cases in that program because most medical malpractice claims are more than $150,000.[33]

Idaho
Idaho law does not mandate arbitration of medical malpractice actions but does require all claims to be presented to an informal and non-binding hearing panel that is established by the Idaho State Board of Medicine. The findings are not admissible in any subsequent civil action (Idaho Code § 6-1001 to 6-1011).[34] Statistics in the Idaho Board of Medicine Spring 2004 newsletter show that more than two-thirds of claims result in a finding of "without merit" in pre-litigation screening *(see WHCC Medical Review Panel Report, 12/2/04).*

Illinois
Illinois does not mandate arbitration of medical malpractice actions. However, Illinois does allow arbitration under 710 Ill. Comp. Stat. Ann. §15/1 to 15/10.[35]

Indiana
Indiana law mandates a review panel for medical malpractice actions where the amount in controversy is over $15,000 unless both parties waive this option in writing (Ind. Code Ann. § 34-18-8-4 to 34-18-8-6). The panel, which consists of one attorney and three health care providers, issue an expert opinion as to whether the defendant failed to comply with the standard of care (Ind. Code. Ann. § 34-18-10-2, § 34-18-10-22). The opinion is not conclusive but is admissible in subsequent litigation (Ind. Code Ann. § 34-18-10-23).[36]

Iowa
Iowa does not mandate arbitration of medical malpractice actions.[37]

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[30] Michael Ahearn
[31] Michael Ahearn
[32] Michael Ahearn
[33] Hawaii State Judiciary Center for Alternative Dispute Resolution Director, telephone call, 9/22/04, 808-539-4237.
[34] Michael Ahearn
[35] Michael Ahearn
[36] http://www.in.gov/legislative/ic/code/title34/ar18/ch10.pdf
[37] Michael Ahearn

Kansas
Kansas's law does not mandate but allows either party or the judge to submit the case to a medical screening panel. The panel's opinion is admissible in subsequent court proceedings and either party may call the panel members as witnesses (Kan. Stat. Ann. § 65-4901, 65-4904).[38]

Kentucky
Kentucky law does not mandate arbitration of medical malpractice actions.[39]

Louisiana
Louisiana law does not mandate arbitration of medical malpractice actions; however, a medical review panel must review all malpractice claims. Louisiana also allows patients to enter into arbitration agreements. The medical panel does not review cases that go to arbitration.[40]

Maine
Mandatory Pre-Litigation Screening Panel review of all medical professional liability claims is required under Maine's Health Security Act. This panel process is a mandatory but non-binding form of alternative dispute resolution for malpractice claims. The purpose of the panels is to identify claims of professional negligence which merit compensation and encourage early resolution of those claims prior to litigation; also the intent is to identify non-meritorious professional negligence claims, encouraging early withdrawal or dismissal. The Health Security Act was enacted in 1977. By amendment, mandatory pre-litigation screening of malpractice claims became part of the act in 1985.[41]

Maryland
In 1976, the Health Claims Arbitration Office was established (Chapter 235, Acts of 1976). For medical injury malpractice claims in excess of $25,000, the Office provides a system of mandatory arbitration. Each medical malpractice claim is heard by a three-person panel of arbitrators, including an attorney, a health care provider, and a public member. The panel determines who is liable with respect to the claim and, if a health care provider is liable, considers and assesses damages. To reverse or modify the award, the rejecting party must file an appeal with the Circuit Court. *Any party wishing to waive the arbitration process and proceed at the Circuit Court level may elect to waive arbitration and file a complaint at the appropriate Circuit Court. If the parties mutually agree, the courts may refer health care malpractice claims to the Health Claims Arbitration Office for the purpose of neutral case evaluation* (Chapter 458, Acts of 1999).[42] The state of Maryland Health Claims Arbitration Case Statistics through June 2004 show that the number of cases waiving arbitration have steadily increased since 1983. In 2003, 692 cases were filed, panels closed none, non-panel closings totaled 616 (with 558 waiving arbitration) and 76 remained open. A total of 15,046 medical malpractice cases have been filed in Maryland since 1977 (when there were only two), and of those, panels closed only 2,685, and 5,986 waived arbitration.

Massachusetts
In Massachusetts, "every action for malpractice, error or mistake against a provider of health care" is first heard by a tribunal. "Provider of health care" includes licensed physicians, hospitals, clinics, nursing homes, dentists, registered/licensed nurses, optometrists, podiatrists, chiropractors, physical therapists, psychologists, acupuncturists, or their employees. The tribunal panel is composed of a district court judge, a physician and an attorney, unless the claim is against someone other than a physician and then he/she is replaced by a representative of that field of medicine.[43] Videoconferencing tribunals are being tested as a means of encouraging more physicians to participate in tribunals.

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[38] Michael Ahearn
[39] Michael Ahearn
[40] Michael Ahearn
[41] Medical Mutual Insurance Company of Maine, Michael McCall, Vice President, Claims and Risk Management, "The Medical Mutual Advocate," Third Quarter 2002 and January/February 2003, www.medicalmutual.com
[42] http://www.mdarchives.state.md.us/msa/mdmanual/25ind/html/42healcf.html (Maryland Health Claims Arbitration Web Site)
[43] Dana Leavitt, Commonwealth of Massachusetts, The Superior Court, J.W. McCormack Post Office and Courthouse, 90 Devonshire Street, Room 1517, Boston, MA 02109, (617) 788-7305

Massachusetts General is participating by hosting tribunals using hospital equipment and meeting space. Five other hospitals were being courted in May.[44] The Massachusetts Legislature is experiencing so much pressure to deal with medical malpractice issues, they are considering legislation that would create a commission to look into the feasibility of establishing a separate court system to address nothing but medical malpractice.[45]

Michigan
Michigan enacted a voluntary arbitration program called the Michigan Medical Malpractice Arbitration Program in 1975. The Michigan program required that at or near the time of treatment, hospitals, insured by companies licensed to write malpractice policies in Michigan, offer patients the opportunity to sign agreements to arbitrate any further disputes arising out of the care or treatment provided. Although not required, self-insured hospitals and healthcare providers could offer arbitration agreements as well. Participation was voluntary and arbitration agreements would cover a single admission that could be revoked within 60 days of discharge. Patients who did not sign an initial arbitration agreement could request arbitration if malpractice did arise. Cases were heard by a three-person panel consisting of an attorney, healthcare provider and a layperson. Panel decisions were based on a majority ruling and were binding. The U.S. General Accounting Office (GAO) conducted an analysis of the program in 1990. GAO found that the program had an extremely low participation rate and therefore made it difficult to determine its effect on medical malpractice insurance rates. However, GAO found that those claims it did resolve took less time to resolve and generally resulted in lower awards. Because of lack of consumer interest, the program is no longer operational.[46] Michigan law now requires mandatory review of all medical malpractice actions before a mediation panel. The panel has 14 days to determine standard of care. A party may reject the opinion, but must pay the opposing party's actual costs if there is an unfavorable verdict. The parties may also agree to binding arbitration if the amount in controversy is less than $75,000.[47]

Minnesota
Minnesota law does not mandate arbitration of medical malpractice actions. However, the courts are permitted to establish a system of non-binding arbitration (Minn. Stat. Ann. Mich. § 484.73).[48]

Mississippi
Mississippi does not mandate arbitration of medical malpractice actions.[49]

Missouri
Missouri does not mandate arbitration of medical malpractice actions.[50]

Montana
Montana law requires all medical malpractice claims not under an arbitration agreement to be reviewed by a medical panel before filing a complaint. Although the panel's opinion determines whether the defendant is liable for malpractice, the decision is not binding and is not admissible in court (Mont. Code Ann §§ 27-6-105, 701, 692, 606, 704).[51] "There's been a significant decrease in court cases to less than two a year. We're one of the four best states relative to frequency," according to the Montana Medical Legal Panel's director, Brian Zin. There has been a downward trend in the absolute number of lawsuits, slightly higher numbers of jury trials, fewer appeals -- which accelerated downward after the enactment of the "cap" on non-economic damages -- with an increase in the number of claims of malpractice involving increasing numbers of physicians, Zin reported in February 2004.[52]

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[44] Dana Leavitt, Commonwealth of Massachusetts, The Superior Court
[45] Dana Leavitt, Commonwealth of Massachusetts, The Superior Court
[46] National Governors Association Center for Best Practices, Issue Brief, December 5, 2002, Health Policy Studies Division, Emily V. Cornell, (202) 624-7879
[47] Michael Ahearn
[48] Michael Ahearn
[49] Michael Ahearn
[50] Michael Ahearn
[51] Michael Ahearn
[52] Brian Zin, Director, Montana Medical Legal Panel, 2021 11th Ave. Suite 1, Helena, MT 59601, (406) 443-1110, Montana Medical Legal Panel, Claims, Settled and Dropped Claims, Lawsuits, Jury Trials and Appeals in Montana Medical Liability Cases, 1977-2003, February 27, 2004

Nebraska
Nebraska law used to require all medical malpractice actions be reviewed by a medical panel before filing the complaint. The panel determined if the defendant complied with the standard of care and whether the damage suffered was the proximate cause of the defendant failing to act within the standard of care, according to the Nebraska Medical Association's attorney. "When the act was first put in place in 1976, medical review panels were required in the hope that an independent review would settle a lot of cases. That didn't work out. After a dozen years or so, the plaintiffs and defense attorneys agreed to make it optional rather than mandatory and it's used now, but only sparingly. There are several cases a year but usually when it's used, it's used for a different purpose than originally intended. It holds the statute of limitations. If a plaintiff is close to the deadline but not really ready to file a case, he/she can file for a review panel. That stops the statute of limitations from running out. It provides a chance to stall. Even though medical review panels are highly touted in some states, we didn't find them to be of value here. But I think we made a mistake when we made it optional even though the plaintiffs and defense lawyers didn't care for them. They provided the doctors with some degree of comfort that they weren't going to trial without an independent review. After the passage of Nebraska's reform package, medical malpractice insurance went from being nearly unavailable to very – Nebraska is fourth or fifth lowest in the nation for insurance rates. It was the fund with a lid that made the rates go down, not the medical review panels. But I think you should try it. Some states found it successful. There was just something for us that didn't prove to be successful."[53]

Nevada
Nevada law no longer mandates all medical malpractice actions be reviewed by a screening panel before a complaint can be filed. Nev. Rev. Stat. Ann § 41A.016 (Michie 1996).[54] The panel was eliminated as part of the tort reform package that passed in the Legislature's Special Session held in Summer 2002. No attempt has been made to measure the impact of disbanding the screening panel. Physicians believe there has been an increase in frivolous claims filed since the panel was disbanded. There was a failed attempt to resurrect the panel during the 2004 session and there may be another attempt during the 2005 session. It is the Commissioner's recommendation that any new panel be made up of permanent, full-time members to avoid the scheduling problems that befell the volunteer panel.[55]

New Hampshire
New Hampshire law does not mandate arbitration of medical malpractice actions.[56]

New Jersey
New Jersey law only mandates arbitration in personal injury claims where the amount in controversy is less than $20,000. The arbitrator's decision is neither admissible in subsequent litigation nor binding.[57]

New Mexico
New Mexico mandates medical malpractice claims be reviewed by a medical commission but the findings are not binding and cannot be used in subsequent court proceedings (N.M. Stat. Ann §§ 41-5-14, 20).[58] The New Mexico Medical Review Commission began in 1962 operates under the authority of the Supreme Court, working closely with the New Mexico State Bar. Each panel consists of three lawyers and three doctors who review medical records and literature, and hear medical testimony from the plaintiff and the defense. The panel considers whether there is substantial evidence that the act(s) complained of occurred and if so, whether they constitute malpractice and whether there is a reasonable medical probability that the patient was injured thereby. All of the panelists volunteer their time. In 2003, 495 professionals volunteered their evening(s) to attend a three- to four-hour hearing. From 1962 to 1976, there was a gradual increase in

[53] Charles Pallesen, Medical Association attorney, (402) 474-6900
[54] MMA by Michael Ahearn
[55] Janice Moskowitz, Lead Actuary, Property/Casualty Section, Department of Business and Industry, Division of Insurance, 788 Fairview Drive, Suite 300, Carson City, Nevada 89701-5491, (775) 687-7270, Nevada Medical/Dental Screening Panel (Discontinued, 2002))
[56] Michael Ahearn
[57] Michael Ahearn
[58] Michael Ahearn

the total number of malpractice cases in New Mexico. During these years, the percentage of plaintiffs requesting a panel hearing also increased. In the mid-1970s, New Mexico experienced a crisis in malpractice insurance coverage and enacted malpractice statutes that contained provision for an obligatory screening panel hearing prior to filing a suit in any district court. The statute making the panel obligatory was enacted in 1976. The result of a panel hearing has never been transmissible to district court. The system is run by the New Mexico Medical Review Commission, an arm of the New Mexico Medical Society. It is funded by an annual appropriation from the New Mexico Legislature.[59]

New York
New York law does not mandate arbitration for medical malpractice actions. However, a defendant can admit liability in exchange for an agreement to arbitrate damages. Also, health organizations may contract with patients to arbitrate before treatment commences as long as the patient is informed that they have a right to refuse the arbitration clause (N.Y. Pub. Health Law § 4406-a, N.Y. C.P.L.R. § 3405).[60]

North Carolina
North Carolina law mandates settlement conferences for all cases that allow the parties to select their own mediator. The General Assembly has authorized a system of court-ordered mediated settlement conferences for all types of cases to be implemented in every county under rules to be drawn up by the North Carolina Supreme Court. N.C. Gen. Stat. § 7A-38.1 (Supp. 1997). Those rules, which have recently been promulgated, allow the parties to select their own mediator, but require a court order and good cause to dispense with mediation altogether. N.C. Rules, Super. Ct. Mediated Settlement Conf. Rule 1 (1997). The conference is to be held between 120 and 180 days after the answer is filed. N.C. Rules, Super. Ct. Mediated Settlement Conf. Rule 3 (1997).[61] Court-ordered mediation has led to some out-of-court settlements, but has not lived up to its promise in North Carolina, said Thomas B. Metzloff, JD, a professor in the Duke University School of Law. The North Carolina program, enacted in 1991, is a judge-ordered step before going to court in a malpractice dispute. It has not worked better because doctors have been reluctant participants. That means that the whole point of mediation—bring disputants together to talk to diffuse their anger—'hasn't occurred in the vast majority of these cases. Of the 23 mediations observed by researchers, the doctor-defendants didn't say anything at all 14 times. Moreover, the doctors are more frequently being excused from even attending these mediation sessions.[62]

North Dakota
North Dakota requires that plaintiff and defense attorneys make a good faith effort to have the parties resolve the case through arbitration before filing a complaint. Both attorneys also must inform the parties of every alternative dispute resolution option available or be subject to sanction (N.D. Cent. Code § 32-42-03).[63] The Director of Governmental Affairs at the North Dakota Medical Association says there isn't any tracking being done: "Each case would be handled individually by a judge, who would check on compliance. It is not likely that the insurance department is able to track this either, but if you want to contact the Department, call 701-328-2440, or 1-800-247-0560[64].

Ohio
Ohio does not mandate, but allows arbitration that is non-binding and not admissible in subsequent proceedings (Ohio Rev. Code Ann. § 2711.21).[65]

Oklahoma
Oklahoma law does not mandate arbitration of medical malpractice actions.[66]

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[59] Dr. William W. Kridelbaugh, M.D., FACS, Albuquerque, N.M., and Donald J. Palmisano, M.D., FACS, Metairie, LA.
[60] Michael Ahearn
[61] McCullough, Campbell and Lane, Summary of Malpractice Law, http://www.mcandl.com/northcarolina.html
62 "Medical malpractice reform: finding a better way, New research shows no fault, arbitration and mediation each holds promise—and pitfalls," From the November 1997 *American College of Physicians Observer*, by Deborah Gesensway, http://www.acponline.org/journals/news/nov97/malpract.htm.
63 Michael Ahearn
64 David Peske, Director of Governmental Affairs, North Dakota Medical Association, dpeske@ndmed.com, email message 8/19/04
65 Michael Ahearn

Oregon
Oregon law does not mandate arbitration of medical malpractice actions.[67]

Pennsylvania
Pennsylvania law does not mandate arbitration of medical malpractice actions. Pennsylvania has held the former statute requiring arbitration unconstitutional. The Pennsylvania Supreme court has suspended a new statute allowing parties the option to have a settlement conference or mediation within 90 days of completing discovery.[68]

Rhode Island
Rhode Island law does not mandate arbitration of medical malpractice actions.[69]

South Carolina
South Carolina law does not mandate arbitration of medical malpractice actions.[70]

South Dakota
South Dakota does not mandate arbitration but allows parties to voluntarily proceed with their case to a medical panel to first determine liability and secondly let the parties determine the amount of damages. If the parties fail to agree on an amount in 30 days, the panel will then decide on damages (S.D. Codified Laws Ann. §§ 21-25B1 to 21-25B26).[71] According to the South Dakota Medical Association's health policy lobbyist, South Dakota's arbitration statute has never been used, probably because if parties go to arbitration, the decision is binding.[72]

Tennessee
Tennessee law does not mandate arbitration of medial malpractice actions but allows for voluntary submission to arbitration (Tenn. Code Ann. § 29-5-302).[73]

Texas
Texas law does not mandate arbitration of medical malpractice actions. However, each county is authorized to use some form of alternative dispute resolution program such as mediation, mini-trials, moderated settlement conferences, summary jury trials and arbitration which can be used prior to judicial proceedings. Texas also allows serious penalties for any healthcare provider who requests a patient sign an arbitration agreement without the signature of the patient's attorney (Tex. Civ. Stat. Ann. Art. 459oi, § 15.01, Tex. Civ. Prac. & Rem. Code. Ann §§ 152.001 to152.004, 154.073).[74]

Utah
Utah law mandates an informal and non-binding pre-litigation review panel which may be waived by the parties or converted into binding arbitration. Utah Code Ann. §§ 78-14-8, 78-14-12, 78-14-13 and 78-14-15 (1996 Supp. 1998). Results of the panel are also not admissible in future litigation.[75] The Pre-litigation Section of the Division of Occupational and Professional Licensing, was established in accordance with Sections 12 through 16 of the Utah Health Care Malpractice Act, to address the soaring number of suits and claims for damages and amount of judgments and settlements arising from health care. The primary purpose of the program is to expedite early evaluation and settlement of

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66 Michael Ahearn
[67] Michael Ahearn
[68] Michael Ahearn
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[70] Michael Ahearn
[71] Michael Ahearn
[72] South Dakota Medical Association, (605) 695-3497, 12/13/04
[73] Michael Ahearn
[74] Michael Ahearn
[75] Michael Ahearn

malpractice claims.[76] According to Adele Bancroft, Pre-litigation Coordinator for the Utah Commerce Department, the number of cases found to be meritorious is quite small.[77]

Vermont
Vermont law requires that all medical malpractice actions be submitted to a review panel before trial. Either party may appeal the finding unless the parties agree on binding arbitration (Vt. Stat. Ann. Tit. 12 § 7002).[78] The Vermont Medical Society reports that the process outlined in Chapter 215 of Title 12 is not being used, or is used very infrequently. An amendment in 1991 to make this chapter mandatory was made contingent on the enactment of a universal access health care system - an event that has not occurred. There is, however, a court rule that requires alternative dispute resolution, Vermont Court Rules, RULES OF CIVIL PROCEDURE III. PLEADINGS AND MOTIONS, Rule 16.3. Alternative Dispute Resolution.[79].

Virginia
The Virginia Medical Malpractice Act provides a system of medical malpractice review panels to assess the validity of newly-filed medical malpractice claims. At the request of either party, the Supreme Court of Virginia appoints a panel to review the claim. Va. Code Ann. § 8.01-581.12 (LEXIS 2003).[80]

Washington
Washington law mandates mediation of medical malpractice actions that tolls the statute of limitations for one year but also allows a patient to demand a jury trial (Wash. Rev. Code Ann. §§ 7.70.100, 7.70.120). "Prior to this legislation we already heavily promoted and used voluntary mediation pre-litigation and during litigation. Therefore, this measure changed nothing and has had no impact on losses, premiums, or frequency of claims," according to Gary Morse, General Council, Physicians Insurance. No attempt is made to measure any cost savings that result from mediation, Morse said. "We and the plaintiff attorneys just know it works. The legislation was not needed. Like so much other legislation, it was adopted so the legislators could claim they did something about the problem."[81]

West Virginia
Cases filed on or after March 1, 2002, will require a screening certificate from a medical expert before they may be filed with a West Virginia court. Health care providers can insist upon pre-filing mediation, and pretrial mediation is required in all cases. In civil cases of medical liability, juries must be composed of 12 members, and consensus of nine is required for a decision. When all the parties agree, cases can be moved to a quicker and less expensive summary trial. Fees for filing a case were increased.[82]

Wisconsin
Wisconsin law does not mandate arbitration but allows mediation of all medical malpractice actions in which the plaintiff can request mediation prior to filing suit or up until 15 days after filing the complaint. In either case, the statute of limitations is tolled until the mediation is complete and the findings of the panel are inadmissible in subsequent litigation. Wis. Stat. Ann. §§ 655.42, 655.44, 655.445, 904.085 (West 1995 Supp. 1997). The Medical Mediation Panels codified in Chapter 655 of the Wisconsin Statutes were created in 1986. With limited exceptions, Chapter 655 requires all parties to a medical malpractice action to participate in the procedure described therein either prior to or immediately after the commencement of a court action. Although referred to in the statutes as "mediation," the procedure can be more accurately described as early neutral evaluation. This procedure was established in order to provide "an informal,

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[76] http://www.dopl.utah.gov/programs/prelitigation/
[77] Fax, 9/22/04
[78] Michael Ahearn
[79] Madeleine Mongan, Vice President for Policy, Vermont Medical Society
[80] *McCullough, Campbell and Lane, Summary of Medical Malpractice Law, June 2003, http://www.mcandl.com/virginia.html.*
[81] gary@phyins.com, email correspondence 9/15/04 and 9/16/04
[82] Addressing the Medical Malpractice Insurance Crisis, National Governor's Association Center for Best Practices, Dec. 2, 2002, Emily V. Cornell, http://www.nga.org/cda/files/1102MEDMALPRACTICE.pdf

inexpensive and expedient means for resolving disputes without litigation." Sec. 655.42(1), Stats. The system is funded by assessments against health care providers.[83] *(see WHCC Medical Review Panel Report, 12/2/04).*

Wyoming

Wyoming does not mandate arbitration in medical malpractice actions because the Wyoming Supreme Court held mandatory arbitration unconstitutional as a violation of equal protection under Hoem v. State (Wyo. 1998).[84] Constitutional Amendment C on the 2004 General Election Ballot allows for mandatory alternative dispute resolution or review by a medical review panel before the filing of a civil action against a healthcare provider.[85] Currently arbitration in Wyoming is governed by Wyoming Supreme Court Rules of Civil Procedure Rule 40 (Appendix A) and Wyoming Statute 1-36-101-119 (Appendix B).

[83] Medical Mediation Panels, Randy Sproule, Director, 110 East Main Street, Suite 320, Madison, WI 53703-3356, Phone: (608) 266-7711, Fax: (608) 261-2352, Wisconsin Court System web site, http://www.wicourts.gov/about/organization/offices/mmp.htm.

[84] Brian C. Schuck and Susan Martin, "Wyoming Tort Reform and the Medical Malpractice Insurance Crisis: A Second Opinion," 28 Land and Water Law Review, 593, 625 (1993)

[85] Wyoming Secretary of State, http://soswy.state.wy.us/election/2004/const-c.htm