

Digest Of A Performance Audit of Medical Malpractice Prelitigation Panels

We found it to be extremely difficult to determine whether the prelitigation process encourages litigants to either settle or drop their medical malpractice disputes without going to court. There have been too many other changes in tort laws, court rules, and health care practices to isolate the overall impact of these hearings. Our research shows half of those who request a prelitigation hearing either drop or settle their claims before they enter the legal system. However, we could not determine which, if any, of the state's tort reforms are responsible.

Through the mid 1970s and 1980s the Utah State Legislature observed that the rising cost and number of medical malpractice claims was threatening the availability of health care services in the state. A number of reforms were enacted during this period to address what many referred to as the "medical malpractice crisis." The prelitigation requirement, enacted in 1985, was aimed at reducing the cost of resolving medical malpractice disputes by encouraging litigants to meet and discuss their claims before a prelitigation screening panel. The panel, consisting of an attorney, a physician and a lay person, offers the litigants non-binding advice as to whether the case is "meritorious" or "non-meritorious."

In recent years, there has been a debate over the effectiveness of the prelitigation requirement in encouraging an early resolution of claims. Some have proposed eliminating the prelitigation requirement. Others wish to make the process tougher by penalizing those who ignore the advice of the panels. Although we found no conclusive evidence to support either strategy, this report provides information which should help legislators decide whether to continue the prelitigation process, enact additional reforms, or pursue other alternatives.

The specific findings in this report include:

A Majority of Cases Are Filed in Court After the Prelitigation Hearing. We have concluded there is no objective way to determine whether the prelitigation process has been a success. To decide whether the prelitigation process should continue in its present form, legislators must make their own subjective judgement of the information presented in this report. Much of the data presented in this report is based on our study of five years of medical malpractice claims. For example, our results show that panel rulings were an accurate prediction of 67% of the eventual outcome of the case. This suggests the panel rulings provide some useful information, but participants should not decide whether to pursue their claim in court based solely on the recommendation of the panel. There is enough uncertainty in the panels' advice that the parties should consider other information.

We also determined that 60% of the cases reviewed by the panels enter the legal system

regardless of the advice of the panels. One reason more claims are not resolved early is because most plaintiff attorneys do not trust the panels. In addition, some claims are so complex that even the experts cannot agree as to whether the injury should be considered malpractice. For these cases, the courts may be the only appropriate setting to resolve the dispute. Finally, it may be unfair to expect litigants to resolve some of their disputes without undergoing a formal investigation of the facts. Before attorneys can begin the discovery process, the claim must be filed in court.

Even though the prelitigation process does not result in an early resolution of most claims, the process does provide some benefits. About 40% of claims reviewed by the panels are dropped after the hearings. Another 15% are settled without entering the legal system. In addition, the hearings appear to be particularly useful to attorneys who have little experience in medical malpractice litigation. This group drops a larger percentage of their claims after the hearings than their more experienced colleagues. Finally, there appears to be a benefit to having the litigants discuss the case in an informal setting even if they do not resolve their disputes immediately. The sooner litigants begin talking about a case and understand the other side's point of view, the easier it is for them to settle their disputes when the case does go to court.

Alternatives For Improving Prelitigation. Most plaintiff and defense attorneys oppose proposals that would provide incentives to make the participants take the panel rulings more seriously. Plaintiff attorneys are suspicious of any proposal to improve the prelitigation process because they believe such efforts are designed to create further obstacles to the court system. As long as it remains a requirement, their preference is that it remain unchanged. Most defense attorneys also oppose proposals to exact penalties against those who disregard the advice of the panels. They believe most reforms will not likely have a significant impact on the number of claims entering the legal system. In addition, many are concerned about the unanticipated consequences of further reforms that could make the process even less effective.

As an alternative to new reforms, we recommend a number of ways each major interest group can help improve the prelitigation process. The Division of Occupational and Professional Licensing, which administers the prelitigation process, should create a task force made up of the various participant groups to clarify a number of procedural issues. The bar association should do more to inform its members about how to comply with its code of ethics for medical malpractice. The bar should also provide training for members who wish to handle medical malpractice litigation. The Utah Medical Association should encourage its members to show a greater willingness to settle claims ruled to be meritorious and it should also encourage qualified physicians to serve as panel members.⁰

Look Beyond the Tort System for Solutions. We have concluded there is a limit to what a tort-based strategy alone can do to address the state's medical liability problems. If legislators wish to take further action to dramatically reduce the number and cost of medical malpractice claims, they should consider alternatives dispute resolution systems rather than attempting additional reforms to the tort system.

Before legislators consider any new reforms, they must first determine whether the state

even has a medical malpractice crisis. A recent State Supreme Court ruling questions whether a medical malpractice crisis even existed at the time the legislature began implementing tort reforms in 1976. If legislators determine that the number and cost of medical malpractice claims are rising to intolerable levels or if they wish to address other problems with the state's medical liability system, only then should they consider a number of alternative dispute resolutions systems which have developed.

Although many different alternative systems which the legislature could consider, this report reviews the fault-base, administrative system has been proposed by the American Medical Association and studied in Utah. Legislators could also consider a no-fault system, forced arbitration, or any one of a number of other alternative mediation systems. We also describe the early intervention programs currently being used by a few of Utah's major health care institutions. We recommend that every health care institution and insurance company interested in reducing the cost of medical malpractice litigation should consider adopting an early intervention program.