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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. Our research shows about 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 reforms are responsible. There have been too many changes in tort laws, court rules, and health care practices to isolate the overall impact of the prelitigation hearings.

During the 1970s and 1980s many believed the rising cost and number of medical malpractice claims was threatening the availability of health care services in the state. In response, the Utah State Legislature enacted a number of reforms to the legal system. One reform was the prelitigation requirement enacted in 1985. This reform requires that before a case can be filed in court, litigants have 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 litigants to resolve their disputes early. Some have proposed eliminating the prelitigation process altogether. 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 the need for 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. While prelitigation hearings appear to encourage the early resolution of some disputes, it is impossible to separate the impact of prelitigation hearings from the impact of other tort reforms, changes in civil procedures, and improved risk management programs. To decide whether the hearings should continue in their present form, legislators must make their own subjective judgement of the

information presented in this report.

Our results suggests the panel rulings provide some useful information, but participants should not decide whether to pursue a claim in court based solely on the recommendation of the panel. The data show that panel rulings accurately predicted 67% of the eventual outcomes of the cases. We also determined that 60% of the cases reviewed by the panels enter the legal system in spite of the advice of the panels. One reason more claims are not resolved early is that most plaintiff attorneys do not believe the panels are impartial. In addition, some claims are so complex that even the experts cannot agree as to whether the injury was the result of 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 31% of claims reviewed by the panels are dropped after the hearings. Another 8% 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.

Alternatives For Improving Prelitigation. Health care providers have proposed several reforms which would penalize litigants who do not follow the advice of the prelitigation panels. However, we found that both plaintiff and defense attorneys are opposed to such reforms. Plaintiff attorneys are suspicious of any proposal to improve the prelitigation process because they believe such efforts are designed to create obstacles to the court system. As long as prelitigation remains a requirement, their preference is that it remain unchanged. Most defense attorneys also oppose penalties against those who disregard the advice of the panels. They believe that such reforms will not have a significant impact on the number of claims entering the legal system. In addition, many have expressed concern for the unanticipated consequences which might result from new reforms.

As an alternative to reforming the tort system, 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.

Looking Beyond the Tort System for Solutions. We have concluded there is a limit to what a tort-based strategy alone can do to reduce the number of medical malpractice claims which enter the legal system. We also believe there are problems which the tort-based system does not address. If legislators wish to respond to these problems, they should consider adopting any one of a number of alternative dispute resolutions systems which have been proposed.

However, before legislators consider any new reforms, they must first demonstrate the reforms are aimed at a valid public need. A recent Utah Supreme Court ruling questions whether a medical malpractice crisis 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 choosing one of the alternative dispute resolutions systems which have been proposed.

Chapter I
Introduction

The prelitigation hearings required by **Utah Code** 78-14-12 for all medical malpractice actions are only one of many reforms that have affected the early resolution of medical malpractice disputes. While prelitigation hearings appear to encourage the early resolution of some disputes, it is impossible to separate the impact of prelitigation hearings from the impact of other tort reforms, changes in civil procedures, and improved risk management programs. Also, many plaintiffs and defendants choose to ignore the advice of the prelitigation panels and prefer to wait until the case is filed in court before they resolve their disputes. If legislators decide additional action is needed, they should consider alternative dispute resolution systems rather than continuing to rely on an approach based on tort reforms alone.

The purpose of the prelitigation hearings is to give litigants in a medical malpractice dispute a quick and independent review of the merits of the case before they undergo the time and expense of formal legal proceedings. Prelitigation hearings are held before a panel selected by the Division of Occupational and Professional Licensing (DOPL). The panels consist of a lawyer who chairs the panel, a lay member, and one health care practitioner in the specialty of each health care provider named in the suit. These two-hour hearings are not governed by formal rules of evidence and both sides may present whatever information they wish. The panel members rely on the statements from the parties involved, the medical records, and other evidence provided by the litigants to decide whether a claim is "meritorious" or "nonmeritorious." Although the panel's decision has no binding force, participation in the process is required before a case can be filed in court.

In recent years, some have questioned the usefulness of the prelitigation requirement. Many attorneys who represent injured parties believe the prelitigation process has failed to accomplish its objectives. They contend very few malpractice claims are actually resolved as a result of the hearings because defendants are rarely willing to settle even if the panel rules a claim to be meritorious. Most plaintiff attorneys are not willing to drop claims ruled nonmeritorious because they do not believe the panels can give a fair and impartial review of a case. They claim the physician panel members have a conflict of interest because they are often personally acquainted with the defendant and in many cases are insured by the same medical malpractice insurer.

Some believe the prelitigation process would function more effectively if plaintiff attorneys were forced to take the prelitigation process more seriously. Representatives of the health care industry have proposed statutory changes that would penalize litigants for ignoring the panel rulings. Plaintiffs would face a $5,000 penalty if they chose to ignore the advice of the panel and were unsuccessful in pursuing a "nonmeritorious" claim in court. In the event of a

meritorious panel ruling, plaintiffs and defendants would be required to attend a settlement conference before a judge. If the defendant were to reject the judge's settlement figure and lose in court, they would likewise be subject to a $5,000 penalty.

Legislators must carefully consider the impact penalties could have on the prelitigation process. Currently, the panel rulings are only advisory in nature. However, many have expressed concern that tougher rules would require that the hearing be conducted according to formal rules of evidence and that attorneys be given the opportunity to cross-examine witnesses. This, they say, would turn the process into a second trial and would dramatically increase the time and cost to complete the process.

Our findings suggest there is a limit to what tort reforms alone can do to further reduce the number and cost of medical malpractice claims filed in court. If legislators still believe there is a medical malpractice "crisis," they should consider a number of alternative dispute resolution systems. In addition, all health care providers should be encouraged to adopt early intervention programs in order to reduce the cost of medical malpractice litigation.

Prelitigation Panels Are Only One of Many Reforms

Prelitigation panels are only one of many reforms aimed at reducing the number and cost of medical malpractice claims filed in court. Since 1976 the Utah State Legislature has enacted a large number of medical malpractice reforms. More recently, the judiciary modified a few of its rules of civil procedure to encourage attorneys to do a better job of screening their claims before they are filed in court. Also, the state's major health care institutions report having made substantial improvements to their risk management programs. All of these changes, along with changes in the economy, medical technology, and social attitudes, have affected the number and cost of medical malpractice claims filed in Utah.

Utah Has Adopted Most Suggested Medical Malpractice Tort Reforms

The Utah Health Care Malpractice Act,**Utah Code** 78-14, contains most of the medical malpractice tort reforms[1] recommended by the American Medical Association. Many felt special changes to the medical malpractice laws were needed to protect the health care system from what had become known as the "medical malpractice crisis." Some believed the rising

[1]Tort laws apply to any wrongful act which results in injury to another's person, property reputation, or the like and for which the injured party is entitled to compensation. In this report "tort reform" refers to special modifications to the tort laws as they apply to medical malpractice claims.

cost and lack of availability of medical malpractice insurance would discourage physicians from providing care in certain high risk specialties. Some have also been concerned that the rising number of medical malpractice claims encourages physicians to practice "defensive" medicine by ordering tests and procedures that had little medical justification but that would protect them from potential lawsuits. For these reasons, the Legislature enacted the laws shown in Figure I that govern the process of resolving medical malpractice disputes.

Figure I

Tort Reforms Affecting Medical Malpractice Litigation

Tort Reform	Summary of Reform	Section	Date* Enacted
No Ad Damnum Clause Allowed	When filing a complaint, the attorney may not specify a dollar amount sought.	78-14-7	1976
Notice of Intent Required	Ninety days before filing, plaintiffs must notify prospective defendants of their intent to file suit.	78-14-8	1976
Statute of Limitation	Medical malpractice suits must be filed within two years of the time plaintiff discovers injury.	78-14-4	1976
Frivolous Law Suit Penalty	Attorneys who file frivolous claims may be assessed the defendant's legal costs.	78-27-56	1981
Arbitration Option	If all concerned parties agree, the prelitigation panel may act as binding arbitration.	78-14-16	1985
Attorney Fee Restricted	Attorney contingency fees are limited to 33.3% of the amount recovered.	78-14-7.5	1985
Collateral Source Rule Limitation	Court awards for medical malpractice claims may be reduced by the amount of other sources of compensation to the client such as medical or disability insurance.	78-14-4.5	1985
Prelitigation Review Panel	Each medical malpractice claim must be reviewed by a pretrial screening panel before it may be filed in court.	78-14-12	1985
Periodic Payment of Damages an Option	Court awards for future damages exceeding $100,000 may be paid in periodic amounts rather than by lump sum payment.	78-14-9.5	1986
Non-economic Damages Limited	Noneconomic damages for pain and suffering are limited to $250,000 no matter how bad the injury.	78-14-7.1	1986
Joint and Several Liability Restricted	The financial liability of defendants is limited to the extent they participated in the event that caused the injury.	78-27-40	1986

**** Many of these reforms have been revised since their original creation.***

It is extremely difficult to isolate the impact of any one of these reforms because it takes several years for the impacted claims to work their way through the legal system. As new reforms are made each year and old laws are revised, it becomes difficult to determine how any single law has affected the number and cost of claims being filed. This is one reason most major studies of the effects of tort reforms on medical malpractice claims have difficulty showing a strong connection between any given reform and the cost or number of medical malpractice claims.

Most representatives from the health care industry, and those who insure them, believe the tort reforms have helped alleviate the effects of the "medical malpractice crisis." For example, the following statement was made by Timothy Graham, the Vice President of Actuarial Services of the St. Paul Insurance Co., the nation's largest insurer against medical malpractice:

> *While passage of tort reform may ultimately have an impact on loss costs, it is important to understand that it simply is not possible to predict with any reasonable degree of accuracy the extent of the dollar savings which might result from any given change in the tort system. . . . Unfortunately, in long tail lines--like medical liability--any impact will not likely be realized for several years.*

Like Mr. Graham, most of Utah's medical malpractice insurers believe tort reforms, including prelitigation, are having a small but positive effect on the number of medical malpractice claims entering the legal system. However, no one is able to say with certainty which reforms have helped and which have not. The medical malpractice system is influenced by too many other factors besides the tort laws. Among those which we believe have also had a positive effect are changes in Utah's court rules and improved risk management programs by the state's major health care institutions.

New Court Rules Encourage Attorneys To Screen Their Cases

In 1985, the year the prelitigation law was enacted, several changes were made to the Utah court rules to encourage attorneys to do a better job of verifying the validity of their claims before filing them in court. The procedural rules that govern the Utah court system are contained in the **Utah Rules of Civil Procedure**. In 1985, changes to Rule 11 required the court to penalize attorneys found to have filed a frivolous law suit. A revision to rule 26 enacted in 1986 allowed one party to force the other to identify expert witnesses for discovery purposes. This means, for example, if a plaintiff could not identify an expert witness to substantiate the claim, the defendant could ask for a "summary judgement" and have the claim thrown out of court.

Rule 11 Requires Attorneys to Verify the Validity of a Claim. Rule 11 relates to the process of preparing a claim for filing in court. Before 1985, attorneys were allowed to file medical malpractice claims with little assurance the claim was, in fact a valid one. Rule 11 only required an attorney to certify "to the best of his knowledge, information and belief there is good ground to support" the claim. In September 1985, a change in the rule held attorneys to a higher standard of conduct by requiring them to do a much better job of verifying their claims as valid. The new rule added the requirement that attorneys certify:

> *. . . after reasonable inquiry it [the claim] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.*

There were also other changes to Rule 11 to assure action would be taken against those found to have filed an unsubstantiated claim. The old rule said those found to be in violation "**may** be subjected to appropriate disciplinary action." However, the new language required a penalty:

> *The court . . . **shall** impose . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

This tougher language encourages plaintiff attorneys to make sure they have substantial evidence of malpractice before filing a claim in court. Plaintiff attorneys tell us this rule affects the way they practice. However, several defense attorneys have told us the tougher language still does not discourage frivolous claims because most judges are not willing to enforce the rule. In addition, the courts have ruled Rule 11 does not require attorneys to obtain a favorable expert medical opinion before filing a medical malpractice action.[2]

Changes to Rule 26 Required Attorneys to Have an Expert Witness. Rule 26 regulates the discovery process in court. In 1986, a change to Rule 26 encouraged attorneys to obtain advice from a medical expert before initiating a malpractice action. One attorney told us that before the change plaintiff counsel would often "bluff" their way into court by pretending to have had the case reviewed by an expert at the time of filing the claim. The rule change made it possible for the defense to ask the judge to dismiss the case if the plaintiff could not produce an expert's affidavit. After such a motion, plaintiff attorneys would either have to find an expert witness to substantiate their claim or risk having the judge dismiss the case through a "summary judgement."

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[2]Deschamps v. Pulley, 784 P.2d 471 (Utah Ct. App. 1989).

Until 1986, Rule 26 allowed the defense to call for the name of the plaintiff's expert only "upon showing exceptional circumstances under which the party seeking discovery is not able to obtain the discovery of requested facts . . . by other means." In other words, the defense could not ask to take a deposition from the plaintiff's expert unless there was no other source of expert testimony. In the case of medical malpractice, the defense could rarely justify asking for the names of the plaintiff's experts because the defense would already have had access to other experts practicing in the same medical field.

In 1986 the term "exceptional circumstances" was eliminated. Plaintiff attorneys view this as a significant change because it allowed the defense to use the discovery rule to make sure the plaintiff had an expert witness. If not, the defense could then make a motion for "summary judgement" and the judge would issue a ruling as to whether there was a basis for filing the claim. If a plaintiff could not produce an expert witness to support his/her claim, the judge could issue a summary judgement and dismiss the case. However, defense attorneys argue the change to Rule 26 has had little impact because judges routinely allow plaintiffs to have more time to obtain an expert.

Utah Medical Insurers and Providers Have Implemented Quality Assurance and Risk Management Programs

Improvements to the risk management and early intervention programs of the state's major health care institutions have also helped alleviate the effects of the state's medical malpractice "crisis." They tell us these programs not only decrease the number and cost of malpractice cases but they also help encourage many claims to be resolved without entering the legal system.

Many of the state's major health care institutions have risk management programs designed to ensure health care providers offer the highest quality medical care possible. They make an ongoing effort to identify medical techniques and procedures that have a high likelihood of resulting in an adverse outcome. Once risky practices are identified, risk management staff develop new procedures and instructional programs to help health care providers avoid them. We were not able to audit the effectiveness of these programs. However, each group that employs a risk management program is convinced they help reduce the number of injuries due to medical malpractice and, in turn, the number of claims filed in court.

Several organizations have also created early intervention programs to reduce the cost of resolving medical malpractice claims. Under these programs, hospitals respond immediately to incidents of medical malpractice by assuring the patient that remedial care and an appropriate level of compensation will be provided. Hospital administrators believe this approach reduces the time and cost to the hospital of resolving medical malpractice claims and puts more money in the hands of the injured party. Health care providers have found early intervention to be a much more effective means of dealing with medical malpractice than ignoring the problem until

a claim is filed in court. They recognize that any claim filed in court automatically requires them to bear the costs of hiring expert witnesses and defense counsel, conducting discovery of the facts, and deposing witnesses. In addition, the plaintiff attorney receives 33% of any settlement or award. Although we have not verified their claims, the advocates of early intervention believe it is not only an effective means of reducing the high cost of litigation but also a humane way to respond to medical injuries.

It appears that risk management and early intervention programs, as well as the changes in the state's court rules, have helped to reduce the number of malpractice claims being filed in court. In the following section, we show that many malpractice claims are being resolved before they enter the legal system. However, because each of these were developed roughly within the same time period, we could not isolate the impact any one factor on the number of medical malpractice claims filed in court.

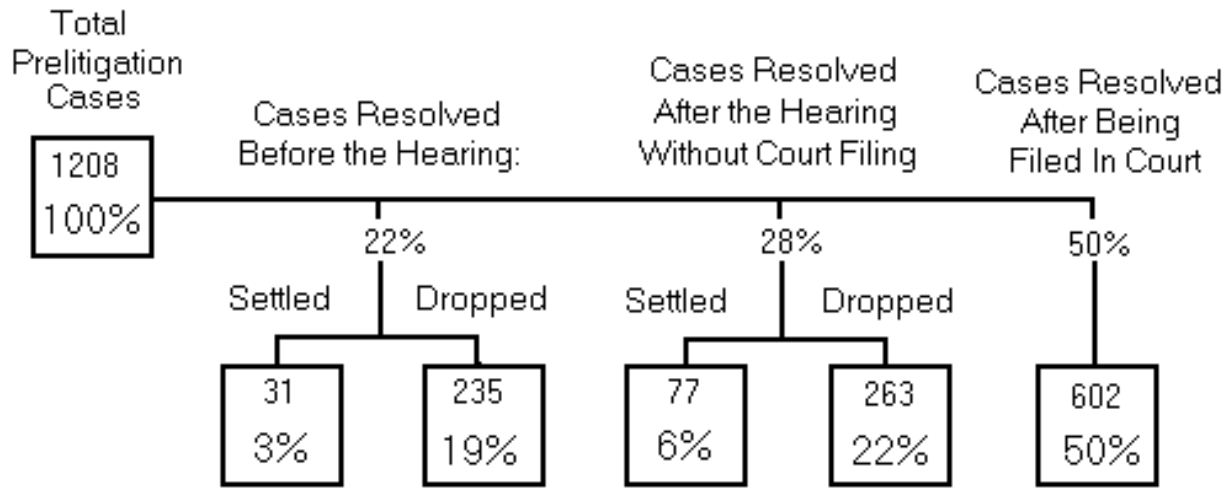
Half Of Those Who Request A Prelitigation Hearing Never File Their Claims In Court

Although we cannot be sure of the cause, our research shows half of those who request a prelitigation hearing either drop or settle their claims before they enter the legal system. In addition, two health care institutions report a decline in the percentage of the malpractice claims being filed in court.

Half of the Prelitigation Cases Are Dropped Or Settled Without Being Filed In Court

We tracked the outcome of nearly every case in which someone claimed to have been injured by medical malpractice and then requested a prelitigation hearing between July 1, 1985 and June 30, 1990. From hospital and insurance records, through a written survey of plaintiff and defendant attorneys, and by reviewing court records, we discovered half of the cases were either settled or dropped without ever entering the legal system. See Figure II.

Figure II
Fifty Percent of Claims are Resolved Before they are Filed in Court



Note: Each box contains the raw data and % of cases from 7/85 to 6/90.

During our study period between July 1, 1985 and June 30, 1990, we identified the outcome of 1,208 of the 1,214 medical malpractice cases for which prelitigation hearings were requested. We found 22% of the cases were dropped or settled before the date of the hearing. Another 28% were resolved by the litigants after the hearing and without formally filing the complaint in the district court. The remaining 50% of the plaintiffs who requested a prelitigation hearing pursued their claim in the legal system. Although we could not determine the degree to which prelitigation panels are responsible, we take it as a positive sign that 22% of the claims are dropped and 6% are settled after the litigants have participated in a prelitigation hearing.

A Declining Percentage of Claims are Filed in the District Court

One major health care provider and a medical malpractice insurer in Utah have reported that a declining percentage of malpractice claims are being filed in court. This suggests something has discouraged a progressively larger percentage of claims from entering the court system each year. Perhaps it is the state's prelitigation process, other changes to the state's tort laws, changes to the judicial code, or early intervention programs.

State law requires a person to send their health care provider a notice of intent to file a

medical malpractice lawsuit at least 90 days before the claim can be filed in the state district court. After sending a notice of intent, the individual who wishes to pursue the claim must then ask the Division of Occupational & Professional Licensing to schedule a prelitigation hearing. After attending the hearing, a person is given an "affidavit of compliance" with the prelitigation process. This affidavit authorizes the person to pursue their claim by filing a complaint with the state district court.

We designed a test to determine how many claims each year are initiated through a notice of intent and are then filed in court in spite of the prelitigation process. We asked one of the state's major medical malpractice insurers and a major health care institution to identify the total number of notices of intent they received each year between 1981 and 1991 and the number of those cases that were later filed in court. Figure III identifies the percent of claims filed in court for both of these institutions.

Figure III
Percent of Malpractice Claims Filed in Court

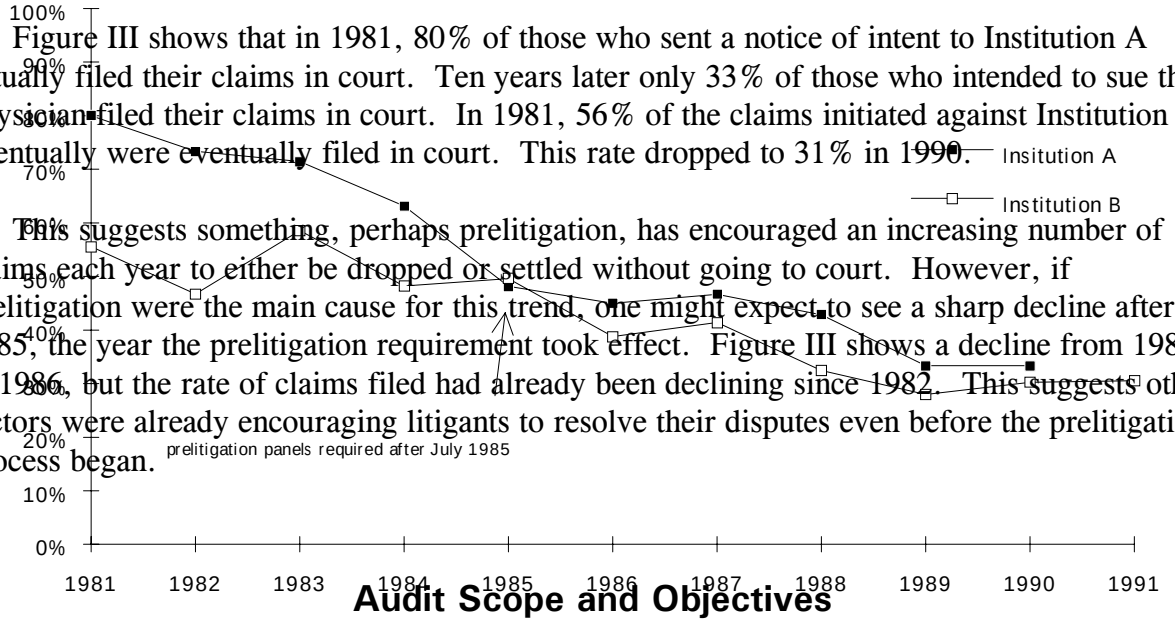


Figure III shows that in 1981, 80% of those who sent a notice of intent to Institution A actually filed their claims in court. Ten years later only 33% of those who intended to sue their physician filed their claims in court. In 1981, 56% of the claims initiated against Institution B eventually were eventually filed in court. This rate dropped to 31% in 1990.

This suggests something, perhaps prelitigation, has encouraged an increasing number of claims each year to either be dropped or settled without going to court. However, if prelitigation were the main cause for this trend, one might expect to see a sharp decline after 1985, the year the prelitigation requirement took effect. Figure III shows a decline from 1985 to 1986, but the rate of claims filed had already been declining since 1982. This suggests other factors were already encouraging litigants to resolve their disputes even before the prelitigation process began.

Audit Scope and Objectives

This audit had two primary objectives: (1) to determine whether prelitigation hearings are an effective means of encouraging litigants to either drop or settle their disputes without going to court, and (2) to determine whether the panels are fair and impartial. There were also a number of secondary issues pertaining to the cost and operations of the prelitigation process.

To accomplish the objectives of this audit we obtained information from a variety of

sources. There has been a great deal of research done on medical malpractice litigation nationwide. However, most of the research does not offer conclusive results because of the difficulty researchers have in isolating the impact of tort reform on the legal system. We also attended 12 prelitigation hearings and reviewed several dozen case files. We also investigated several specific cases to determine the validity of complaints that the physician panel members had ignored obvious evidence of malpractice.

Most of the statistical data provided in this report were obtained through an extensive study of all 1,214 cases that were reviewed by prelitigation panels between July 1985 and June 1990. Through a number of different sources we identified the ultimate outcome of 1,208 of the cases. We compared the panel rulings for each case with the ultimate outcome in court or in out-of-court negotiations. Several health care institutions were very cooperative and went to a great deal of trouble to provide us with the information we needed. These included Intermountain Health Care, The University of Utah Medical Center and the Utah Medical Insurance Association. We also conducted an extensive written survey of plaintiff and defense attorneys to identify the case outcomes not reported by the major institutions. The attorneys who we interviewed and who responded to our surveys were very helpful and demonstrated a sincere interest in providing us with accurate and reliable data. Finally, the Office of the Court Administrator helped us by providing us with access to their computerized court records which enabled us to obtain information we could not obtain from other sources and to verify some of our written survey responses. See Appendix B for a complete description of the results of the study of case outcomes.

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Chapter II
A Majority of Cases Are Filed in Court After the Prelitigation Hearing

It is difficult to assess the overall effectiveness of prelitigation panels in discouraging frivolous suits and encouraging early settlement of "meritorious" claims. Since we could not precisely identify the impact of the prelitigation process, we have summarized the data available to assist legislators in making their own judgement about the overall effectiveness of this process. Of the cases for which prelitigation hearings were held, we found 60% were filed in court after the hearings. One reason is many litigants are unwilling to drop or settle claims until they have had the opportunity to conduct a formal investigation of the facts. This normally requires that the case be filed in court. In addition, some medical malpractice disputes are too complex to be easily resolved in a two-hour hearing. To decide whether the prelitigation process is effective, legislators must weigh the benefits of holding the hearings against the cost and amount of time they require.

The prelitigation process does provide some benefits. The hearings appear to encourage plaintiffs to drop some of their weaker claims. For example, 31% of the claims for which a hearing was held were dropped without being filed in court. Another 8% were settled without being filed in court. The hearings seem to be especially useful to attorneys who have little experience in medical malpractice litigation. This group tends to drop a significant portion of their claims after the hearings. Finally, there appear to be benefits 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.

The reason more claims are not resolved early is most participants are unwilling to follow the advice of the prelitigation panels. Many plaintiff attorneys believe the panels are biased and they cannot get a fair review of their claims. They also believe that even if the panels aren't biased, they are often wrong. They believe the panel hasn't seen enough information to make the correct decision. On the other hand, defendants have told us they often make reasonable settlement offers after the hearings but plaintiffs rarely accept the offer until just before the trial date. In addition, insurers tell us they can not offer a settlement for tens of thousands of dollars without verifying the appropriate value of the claim.

We could not find an objective way to determine whether the prelitigation process has been a success. However, the process appears to screen out the most obviously frivolous claims

before they enter the legal system. In addition, some claims which are clearly meritorious are settled without going to court. Most disputes must continue on to court in spite of the results of the prelitigation hearing either because the litigants cannot agree on a settlement amount or because the cases are so complex even the experts cannot agree as to whether there was malpractice or not. For these claims, the courts may be the only appropriate setting to resolve the dispute. In addition, it may be unfair to expect litigants to resolve some of their disputes without undergoing a formal discovery of the facts. Before attorneys can begin the discovery process, the claim must be filed in court.

A Majority of Cases Ruled Nonmeritorious Were Filed in Court

Plaintiff attorneys file a majority of their claims in court even when the panels say they are without merit. One reason is that many plaintiff attorneys view the hearings as a waste of time and do not try to actively participate. Of the 119 who responded to our written survey, 82% said the prelitigation process does not offer enough benefits to justify its continued use. In addition, 86% said the process generally does not encourage the early resolution of claims. Although most attempt to make a good presentation of their claims, a few do not make a serious effort to present a convincing legal argument that malpractice occurred. Many plaintiff attorneys also believe the physicians who sit on the panels have a bias against plaintiffs and they tend to sway the other panel members to rule in favor of the defendant.

Figure IV shows 54% of the claims ruled nonmeritorious by the panel were filed in court anyway. Another 40% percent were dropped and 6% were settled without being filed.

Figure IV

Most Claims Ruled Nonmeritorious Are Filed in Court

Prelitigation Cases from July 1985 to June 1990

Nonmeritorious Claim Activity	Number of Claims	Percent
Filed in Court	318	54%
Dropped After Prelitigation	232	40
Settled After Prelitigation	33	6
Total:	583	100%

Figure IV shows that between 1985 and 1990 over half of the plaintiff attorneys disregarded

the panels' advice that their cases had no merit and filed a claim in court anyway. However, the data also suggests the prelitigation hearings may offer some benefit because a significant portion of the "nonmeritorious" cases were dropped after the hearings. As discussed in Chapter I, we do not know the extent to which the prelitigation hearings were responsible for these claims being dropped.

Plaintiff Attorneys Believe the Panels are Biased

The perception that the panels are biased is the main reason many plaintiff attorneys are not willing to follow the advice of the prelitigation panels. A majority of the plaintiff attorneys who responded to our written survey indicated they do not believe the panels offer an impartial review of a claim because one of the members of the panel must be a physician in the defendant's area of specialization.[3] To test for panel bias, we decided to compare each panel ruling with the eventual outcome of the case. Our results show the panels were able to predict the outcome of 67% of the claims. This suggests the panel rulings provide some useful information but they should not be relied on as the only basis for deciding whether or not to pursue a case in court. In addition, the data provide little evidence the panels are blatantly biased against plaintiffs.

Fifty-Nine Percent Of Plaintiff Attorneys Believe Physician Panel Members Are Not Objective. To our written survey question "Do most physicians on the panel attempt to be objective?" fifty-nine percent of respondents answered "no." In their written responses, many plaintiff attorneys expressed the opinion that physician panel members have a conflict of interest because a majority of the state's private physicians are covered by the same medical malpractice insurer. In addition, because of Utah's relatively small size, the physicians in each specialty group are frequently acquainted with each other and have difficulty ruling against a colleague. The following statement is typical of those we received from plaintiff attorneys who are critical of the process:

> *There is no way you are going to get an unbiased opinion from a panel of Utah medical doctors that are self insured. My hearing was a farce. In my opinion all doctors present knew that a cover up was in the making--yet ignored the facts. It was necessary to employ 7 medical doctors--4 from Mass. and 3 from Washington before the case was settled. There is very little chance that a self insured Utah Medical doctor is going to make a finding against a fellow self insured Utah medical doctor with the end result being that the doctors (both) will be paying.*

Obviously, plaintiff attorneys who believe they cannot receive a fair hearing will be reluctant to actively participate in the process and take the advice of the panels.

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[3]See Appendix E for a summary of plaintiff attorney responses.

Plaintiff Attorneys Believe Prelitigation Is Designed to be a Barrier To The Courts. Some plaintiff attorneys are not convinced the prelitigation process is intended to be of service to their clients but instead is merely designed to discourage medical malpractice claims. One attorney had the following to say about the motive behind the prelitigation process: "It serves only as an unjustifiable waste of time and expense and is used by the insurance companies to increase the cost of resolution and to delay and 'wear down' the plaintiff." Another attorney said: "It is a farce. The entire process seems focused on protecting the doctor." These and other similar statements show many members of the plaintiff bar believe the prelitigation process is mainly intended to prevent them from filing their clients' claims in court.

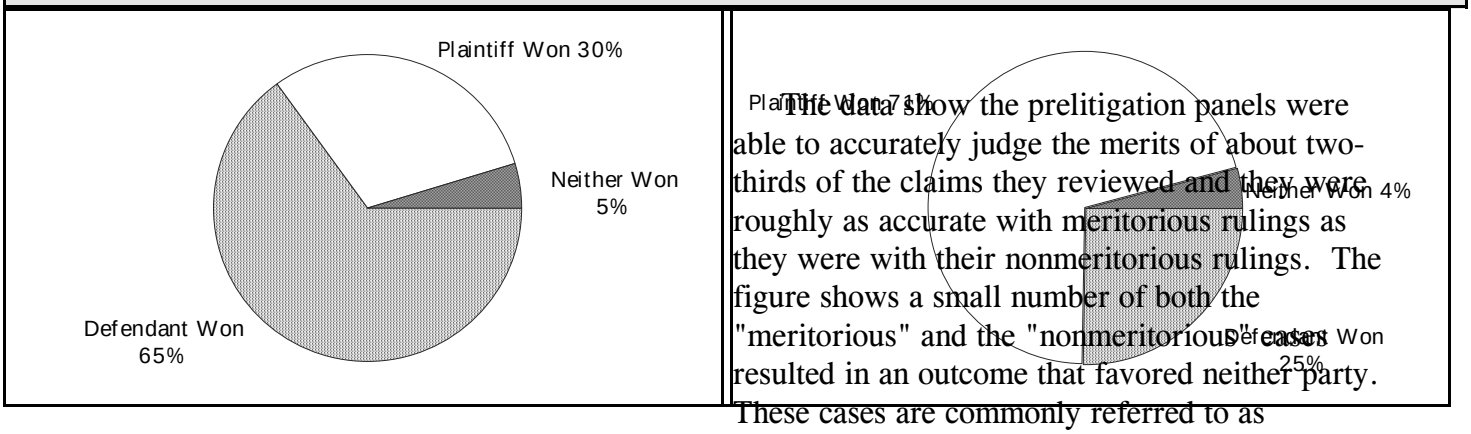
Panels Accurately Predicted the Ultimate Outcome of 67% of Cases. We did not have the capability to conduct an independent review of each case to determine whether the panel was biased. To be completely objective we would have had to hire a panel of medical and legal specialists from out of state to review a sample of cases. As an alternative, we compared the panel rulings with the ultimate outcomes of the cases.

We studied all of the medical malpractice claims for which prelitigation hearings were requested between July 1, 1985 and June 30, 1990. As mentioned above, there were 1,214 requests for a prelitigation hearing during this period. However, only 870 hearings were held because many decided to drop or settle their claims before the date of the hearing. From hospital and insurance records, from a written survey of attorneys, and from a review of court records, we were able to identify the outcome of 864 out of those 870 cases.[4]

Our results show the panels are sometimes unable to accurately predict the ultimate outcome of the cases they review, but their accuracy is fairly consistent between claims they rule to be nonmeritorious and those they rule to be meritorious. Specifically, 67% of all panel rulings were an accurate prediction of what was to eventually happen in court or during settlement negotiations. Figure V describes how accurate the panel was when it made meritorious rulings and how accurate it was with its nonmeritorious rulings.

[4]See Appendix B for the complete results of this study.

Figure V
Ultimate Outcome Of Cases



The data show the prelitigation panels were able to accurately judge the merits of about two-thirds of the claims they reviewed and they were roughly as accurate with meritorious rulings as they were with their nonmeritorious rulings. The figure shows a small number of both the "meritorious" and the "nonmeritorious" cases resulted in an outcome that favored neither party. These cases are commonly referred to as "nuisance" or "economic" settlements, which means the litigants agreed to settle in order to avoid further legal expenses but for an amount that would not be considered fair compensation for the alleged injury.

We are not sure whether we should expect the panels to offer a more accurate prediction of case outcomes. After all, the panels are expected to make a decision after a brief two-hour hearing of the case. In addition, the hearings always take place before the attorneys have had a chance to gather all the facts surrounding a case. This means some information will be presented in court that was not available to the panels. Finally, some plaintiff attorneys intentionally avoid presenting all their evidence and fail to offer the panel a legal argument that medical malpractice occurred.

The fact that the panels are sometimes unable to predict what will happen in court suggests the litigants 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 also consider other information. It is hoped that the panels' written opinions, the discussion during the hearings, and the advice of litigants' trusted medical experts will provide them with the information they need to know whether to settle, drop or pursue their action in court.

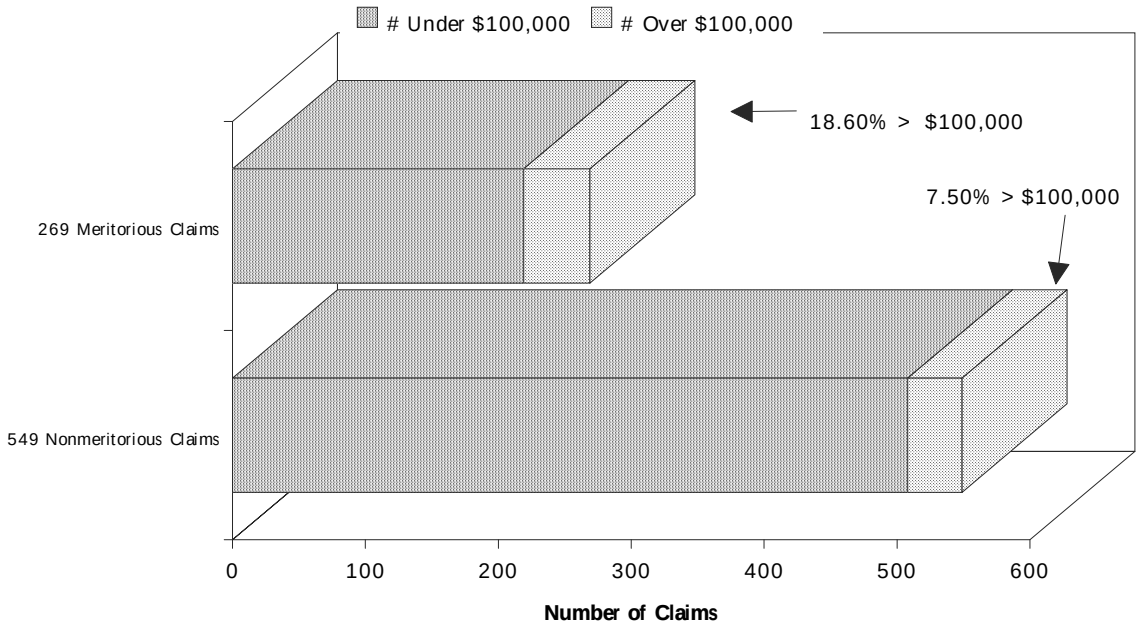
Some "Nonmeritorious" Claims Result in Awards or Settlements Over $100,000. Because some "nonmeritorious" claims result in awards or settlements over $100,000, plaintiff attorneys see this as evidence the prelitigation process is unfair. We have concluded, however, this only shows the panels are sometimes unable to accurately predict the ultimate outcome of some claims and these sometimes include claims that result in very high awards.

As part of our study of the outcomes of prelitigation cases, we attempted to identify all of

the claims that resulted in an award or settlement of $100,000 or more. We identified 91 in our five-year study period. As shown in Figure VI, 51 of these had been ruled meritorious by the prelitigation panel and the other 40 had been ruled nonmeritorious.

Figure VI
Cases with Awards or Settlements Over $100,000

Again, in our opinion, this does not necessarily indicate that the panels are biased. There are many factors that affect the ultimate outcome of a case. It may mean there was not enough information available in the two-hour hearing to make an informed ruling or it could mean the plaintiff attorney chose not to present a complete case.



The Panel Rulings are Sometimes Incorrect but not Blatantly Biased. We found most panel members take their role very seriously and try to be impartial. We also found most medical malpractice claims to be hotly disputed and both sides can become very emotional about their claims. Often the physician panel members are accused of bias when they rule a claim has no merit. However, panel members do not always have enough time in a two-hour hearing to review all the evidence. In addition, panel members often have difficulty deciding how to rule because they have questions about the case that cannot be answered with the information presented during the hearings.

The accusations of bias often result from the different philosophical viewpoints physicians and plaintiffs have toward what constitutes medical malpractice. For example, some plaintiffs are willing to base their claims on the legal argument that the "facts speak for themselves." This means if there was an injury during surgery, it had to be the fault of the surgeon. However, physicians are often unwilling to blame the injury on the surgeon without evidence the injury was directly caused by the surgeon's negligence and not by unavoidable circumstances that could be attributed to the patient's physical condition. Even so, there appears to be have been a few cases in which the panel members disregarded evidence supporting the validity of a claim. However, these cases appear to be rare.

Some Plaintiff Attorneys Do Not Take The Prelitigation Process Seriously

Although some attorneys blame biased panel members for their inability to obtain a meritorious ruling, we found the plaintiff attorney's attitude toward the hearing process can also affect his or her ability to obtain a favorable ruling from the panel. Plaintiff attorneys who take the prelitigation process seriously and try to present a well argued case are more likely to receive a meritorious ruling than those who do not. However, some attorneys who resist participating in the prelitigation hearing are just as likely to obtain a settlement or an award for their client as attorneys who actively participate.

The impact an attorney's attitude can have on the results of the hearings can be illustrated by comparing the effectiveness of two prominent plaintiff attorneys who each handle a large number of medical malpractice claims. We will refer to them as Attorneys "A" and "B." Attorney "A" is renowned for refusing to actively participate in the prelitigation process. He usually does not bring his clients to the prelitigation hearing. He does not make a serious attempt to present his claims to the panel and rarely provides evidence to back up his claims. Not surprisingly, Attorney "A" received a meritorious ruling for only two of the 12 claims he presented to the panel during our five-year study period.

In contrast, Attorney "B" told us he takes the prelitigation process quite seriously. He prepares and presents a good case and provides the panel with as much evidence as he can. He also says he goes to the hearing with the expectation that he may learn something new about the case. Not surprisingly, 10 of Attorney "B's" 13 claims were ruled meritorious by the panel. There was, however, very little difference between the ultimate success of the two attorneys in litigation. Attorney "A" won 58% of his claims in court and Attorney "B" won 57%. See Appendix C for a comparison of the performance of some of the state's major plaintiff and defense attorneys.

We also tried to develop a broader measure of how well plaintiff attorneys participate in the prelitigation hearings. However, we found this was difficult because attorneys seem to participate in varying degrees depending on the circumstances surrounding their cases. For this reason we decided to assess plaintiff attorneys' support of the prelitigation process by simply asking them to tell us whether or not they take the prelitigation process seriously. Fifty-six percent of the plaintiff attorneys said they take the prelitigation process seriously, while 44% percent said they did not. Figure VII compares the success of these two groups in prelitigation with their effectiveness in eventually getting compensation for their clients. The "serious" group received meritorious rulings for 44% of their claims compared to a rate of 31% for the "not serious" group. The "serious" group also had a favorable outcome in court 55% of the time which was slightly better than the 49% achieved by those who were "not serious" about the prelitigation process.

Figure VII

Attorneys Who Take the Hearings Seriously Are More Successful in Prelitigation and in Court

Attorney	Percent Meritorious in Prelitigation	Percent Favoring Plaintiff in Ultimate Outcome
Serious	44%	55%
Not Serious	31	49

We conclude the willingness of plaintiff attorneys to actively participate in the prelitigation process can affect the ability of the panel to issue a fair and accurate ruling. The fact that some attorneys do not try to do a good job of presenting their clients' claims to the panels may explain why the panels sometimes have difficulty predicting the ultimate outcome of a case.

An Attorney's Experience in Medical Malpractice Seems to Make a Difference

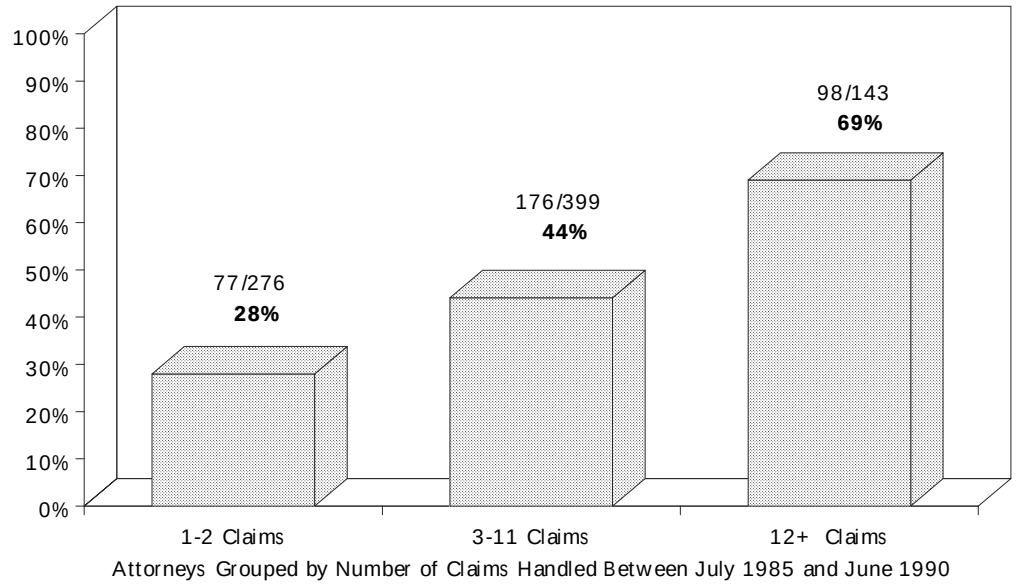
We were told by several defense and plaintiff attorneys that inexperienced attorneys are largely responsible for weak or "frivolous" malpractice claims. For this reason, we designed a test to determine whether a plaintiff attorney's experience in medical malpractice litigation was related to his or her success in eventually obtaining an award or settlement. Our findings suggest the prelitigation process is a useful tool in educating attorneys about the quality of the case. However, those who benefit the most are the attorneys who are relatively new to medical malpractice litigation.

We found that attorneys who rarely handle malpractice claims are not as successful at identifying valid cases as those who specialize in medical malpractice. Fortunately, these less experienced attorneys seem to benefit from the prelitigation hearings because they drop many of their claims after the hearing. By comparison, prelitigation does not seem to benefit the most experienced attorneys nearly as much because they are less likely to drop a claim and more likely to win those they do file in court. The reason appears to be that the more experienced attorneys do a much better job of screening their cases than others do.

During our five-year study period, from July 1985 to June 1990, the attorneys who handled only one or two medical malpractice claims were successful in obtaining compensation in only 28% of their claims. In contrast, the most experienced group of attorneys (those who handled over 12 claims) were successful in obtaining an award or settlement in 69% of their claims. Those who fell in the middle category (3 to 11 claims) succeeded in 44% of their claims.

Figure VIII

Percent of All Cases Receiving Award or Settlement

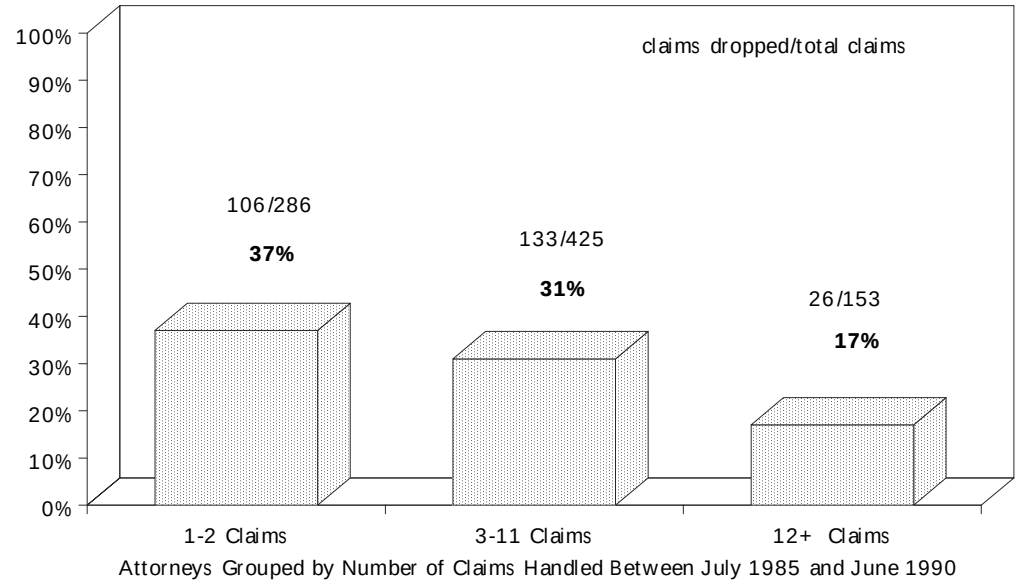


There are several possible explanations for the apparent lack of success of the less experienced attorneys. These attorneys may not be as well versed in the special laws and procedures surrounding medical malpractice litigation and may be more likely than their more

experienced colleagues to make procedural errors that result in a dismissal of their claim. In addition, they may not be screening their cases as well as the more experienced attorneys. Or, the most experienced attorneys may be getting the best claims because they have a reputation as specialists in medical malpractice litigation and receive more referrals and more cases to choose from than their less-experienced colleagues.

The data also show the least experienced attorneys are more likely to use the hearings to screen out weak cases. After the prelitigation hearing, they were much more likely than their more experienced colleagues to drop a claim without filing it in court. Figure IX shows that 106 cases initiated by the least experienced group, or 37% of all their claims, were dropped sometime after the prelitigation hearing without being filed in court.

Figure IX
Percent of Cases Dropped Without Being Filed in Court



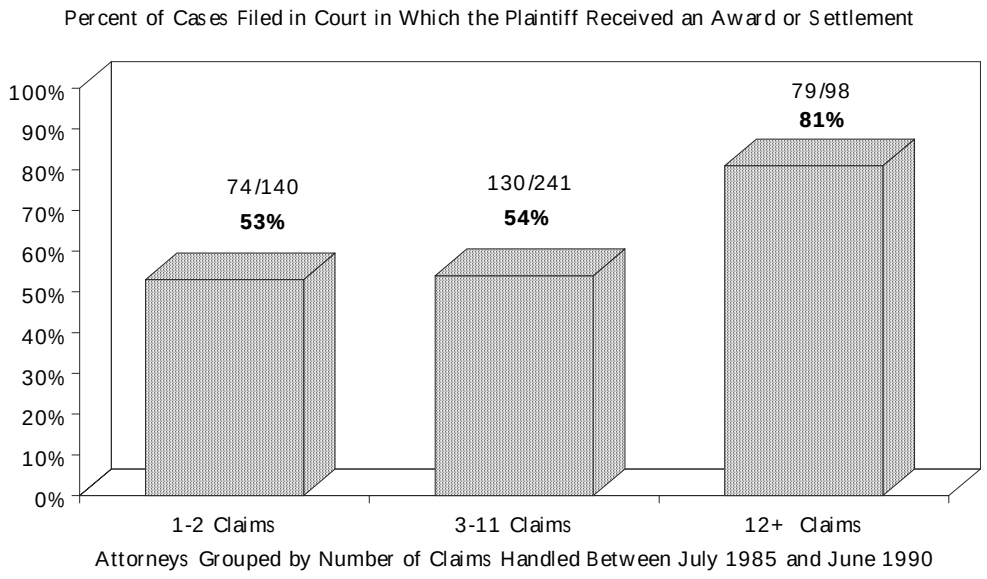
Although Figure VIII suggests attorneys who have the least experience in medical malpractice litigation are more likely to initiate weak claims, the data in Figure IX above suggest the least experienced group also seem to benefit the most from the hearings.

The data in Figure X show once the prelitigation hearing has been held and the least experienced group has dropped their weaker claims, the claims they file in court have roughly the same success rate as other attorneys who have slightly more experience in medical

malpractice litigation. However, both groups have much lower success rates than the most experienced attorneys who win 81% of their cases.

Figure X

Percent of Cases Filed in Court in Which The Plaintiff Received an Award or Settlement



Our study of plaintiff attorney experience provides some insight into how prelitigation may be helping to reduce weak lawsuits. One interpretation is the hearings are a useful means of educating inexperienced attorneys about the quality of their claims and the likelihood of their success in court. In addition, the data also suggest the most experienced attorneys are fairly good at screening out weak claims and are the least likely to benefit from the hearings. However, even members of the most experienced group drop a few of their claims after the prelitigation hearing, suggesting they sometimes benefit from the hearings as well. Additional testing would be required to determine whether the prelitigation process was the primary reason these claims were dropped.

Most "Meritorious" Claims Are Not Settled Until After They Have Been Filed In Court

Many plaintiff attorneys have told us the reason they do not take the prelitigation process more seriously is that even when they obtain a meritorious ruling the defense is rarely willing to settle the case. They suggest the defendants are just as reluctant to follow the advice of the

prelitigation panels as the plaintiff attorneys are. Although most "meritorious" claims eventually are settled, Figure XI shows the settlement usually does not occur until after the claim has been filed in court.

Figure XI
Settlement Usually Occurs
After Cases are Filed in Court

"Meritorious" Claim Activity	Number of Claims	Percent
Total:	285	
Total which eventually settled:	188	100%
Settled without being filed in court:	44	23%
Settled after being filed in court:	144	77%

Our study shows there were 285 cases which the prelitigation panel considered to be meritorious from July 1985 to June 1990.[5] This means the panels felt medical malpractice had occurred and the plaintiff should be compensated. In addition, 188 of these eventually settled. However, only 23% of the 188 settled without entering the court system, whereas 77% had to be filed in court before the parties were able to agree to a settlement. This means even when the prelitigation panels identify "meritorious" claims, an early resolution of the claim is not always the result. Our results also show that 17 "meritorious" claims were filed in court and went to trial.

Plaintiff Attorneys Are Discouraged by The Reluctance of Defendants to Settle "Meritorious" Claims

Many plaintiff attorneys contend there is no incentive for them to participate in the prelitigation hearings because even if they receive a meritorious ruling the defense is rarely willing to negotiate a settlement. Instead, they say defendants will force the case to go to court regardless of the panel ruling. Plaintiff attorneys argue it is not reasonable for the state to expect them to actively participate in the prelitigation hearings and present all of their evidence if they are forced to file the claim in court regardless of the panel ruling. They get nothing out of the hearing and it only gives the defense an early knowledge of their legal strategy. One plaintiff attorney said:

[5]See Appendix B for a complete description of the results of this study.

Many of the defendant's attorneys use the prelitigation process in order to obtain factual information from the plaintiff before any of the doctors or medical providers are deposed. Therefore, there are significant disadvantages to `exposing your hand' at the prelitigation process. For this reason, on some occasions I do not present the details of my case at the prelitigation hearing. In these instances, my case might appear to the panel to be weaker than it actually is, but because the prelitigation process does not seem to encourage settlement of meritorious cases, there is no incentive for me to risk exposing the factual details of my case before the defendant's depositions are taken. Plaintiff attorneys tell us they would be more willing to participate in the process if the defense would show a greater willingness to settle claims that are ruled meritorious.

Defendants Want Additional Proof Before They are Willing to Settle "Meritorious" Claims

One of the state's malpractice insurers offered several reasons why they are not able or willing to settle many "meritorious" claims immediately after the hearings. The following summarizes the insurer's explanation why most "meritorious" claims must be filed in court:

1. **Some claims must be filed to meet the statute of limitations.**

   The Statute of Limitations is an issue with a number of medical malpractice claims. Therefore, the plaintiff attorney will proceed with filing a Summons and Complaint after the Prelitigation Hearing to avoid the statute running.

2. **The plaintiff, not the defense, is responsible for putting a value on the claim.**

   There is a need on the part of the plaintiff to establish damages in a case. This information may or may not be readily available, and securing it may require subpoenaing medical records and deposing medical experts on the issue of damages.

3. **The panel ruling is not enough. Plaintiffs still need to prove their case.**

   Even though the Panel rules the case to be meritorious, there may essentially be no damages as a result of any negligence. In addition, the plaintiff needs to be able to show a deviation from the acceptable standard of care in medical practice to prevail in a malpractice action. Finally, the panel ruling may in fact not be valid . . . the burden of proof necessary to get a meritorious ruling from the Prelitigation Panel is not as stringent as the requirement to obtain a verdict through a trial.

4. Physicians must approve settlements.

> *The majority of professional liability policies, including [ours] require consent from the insured physician before settlement can be effected. On a number of occasions, the defendant physician will not be convinced that the case warrants settlement until some degree of discovery has been completed and the medical records have been reviewed by other expert physicians.*

These reasons show the defendants and their physicians demand a high level of verification of the validity of a claim before they are willing to consider settlement negotiations. In addition, the insurers believe it would be imprudent for them to hand out $50,000 or $100,000 at a time without evidence of the claim's validity. We cannot argue with their need to delay payment on "meritorious" claims until they have verified whether malpractice occurred. However, if defendants need a formal discovery of the facts before they can settle a claim, plaintiffs must also be extended a similar right to postpone dropping a "nonmeritorious" claim until they have conducted an adequate discovery of the facts.

Some defense attorneys have also pointed out that even when they agree that medical malpractice has occurred, it is often difficult for plaintiffs and defendants to agree on a settlement amount. Often the parties are unwilling to begin serious discussion of the value of a claim until just before the trial date. Defendants also claim they are often unable to evaluate damages because plaintiff attorneys do not furnish sufficient documentation of the injury, outstanding medical expenses, future wage losses, etc., so that proper valuation of the case can be made.

The Limitations and the Benefits of the Prelitigation Process

We conclude there are some benefits as well as problems with the state's prelitigation process. There is no easy way to know whether the overall impact of the process is positive or whether the costs outweigh the benefits. In making this judgement, it is important to recognize there are limitations to what the prelitigation process can do to encourage litigants to resolve their disputes early. Certainly this process cannot be expected to resolve all disputes in a two-hour hearing. Some claims are so complex that even after a thorough investigation of the facts the experts often disagree as to whether malpractice has occurred. It may be expecting too much for a panel to always offer an accurate review of a case after a two-hour hearing--especially when some participants are reluctant to provide all the information they have about a case.

This does not necessarily mean the prelitigation process does not offer enough benefits to

justify its use. Though we do not know how many, some claims are resolved early as a result of these hearings. In addition, there are benefits to requiring disputing parties to meet together and discuss their claims. Perhaps for the first time, it gives the physician and the patient a chance to openly discuss the case and the events that led to the injury in a manner that would not be possible once a lawsuit is filed. To decide whether the prelitigation process should continue in its present form, legislators must weigh the benefits of holding these hearings against the cost and amount of time these hearings add to the process of resolving medical malpractice disputes.

The Benefits of Prelitigation

Although we do not know the extent to which the hearings are responsible, 40% of the claims that are reviewed by the panels are either dropped or settled without going to court. We do not know whether 40% is enough to justify the time and expense of the prelitigation hearings. The legislators who proposed this requirement in 1985 were not clear about their objectives for this process. At the time, some suggested the prelitigation process could reduce the number of malpractice claims by 30%. In Figure III in Chapter I, we show there has been a decline in the percentage of claims being filed in court. However, as shown in Appendix A, two health care institutions report that even though the total number of malpractice claims initiated has increased, the number filed in court has remained relatively flat or has declined slightly.

We are also unsure whether the 40% of claims that were dropped or settled can be attributed directly to the prelitigation process. We did not ask plaintiffs to explain their reasons for dropping or settling claims after the hearings. When asked whether they thought the process generally helped encourage the early resolution of claims, only 14% of plaintiff attorneys said it did. However, all of the defense attorneys with whom we spoke could identify at least a few cases in which they believed the plaintiff dropped their claims because of information revealed during the hearings. In addition, we found the process seemed to benefit the less experienced attorneys who use the prelitigation process as a screening mechanism to help them decide whether or not they want to pursue a claim.

According to many defense attorneys, plaintiff attorneys, and insurers of medical malpractice, another benefit to the prelitigation process is it gives the patient and the physician the chance to openly discuss the facts surrounding the case. This discussion can lower the level of emotion felt by both parties and help them understand one another's point of view. For the plaintiffs in particular, this discussion can be something of a "catharsis" because it allows them to vent their frustration about the poor treatment they may have received. Such an open and frank discussion generally cannot occur once the claim is formally filed in court because all communication must then go through the attorneys.

Whether or not the plaintiff is suing out of anger, there appear to be benefits to having the

litigants discuss the case in a low-cost, informal setting. The sooner litigants begin talking about a case and understand the other side's point of view, the more likely they will be to come to some sort of resolution. Quite often, the main obstacle to a negotiated settlement is the reluctance of both sides to take the first step toward discussing the possibility of an agreement. It is hoped that having a frank and open discussion during prelitigation will make it easier for the parties to arrive at an early settlement.

Prelitigation Adds to the Time and Cost of Resolving Medical Malpractice Disputes

Legislators need to weigh the benefits of the prelitigation process against the added time and cost. The prelitigation hearings add an average of three months to the time it takes to resolve a medical malpractice dispute and defendants report it costs them between $1,300 and $2,000 to prepare for a hearing. We assume many plaintiffs spend a comparable amount of time and money to prepare.

Claims are delayed an average of three months. One disadvantage of the prelitigation process is it delays the plaintiff's chance to file a claim in court. We took a random sample of 10% of the prelitigation hearings held during fiscal year 1992 and calculated the number of days between the date the plaintiff requested a hearing and the date the agency sent the affidavit of compliance.[6] We discovered it took an average of three months to complete the process. In addition, 20% of the claims in our sample took over five months to complete the prelitigation process. One took over eight months.[7]

To someone who has been injured and is in need of compensation, three months is a long time to wait and eight months would seem to be an excessive amount of time. However, malpractice claims generally take two years to work their way through the legal system. This means the prelitigation process adds a few months to what is normally a very long process. In some cases, it may shorten the amount of time it takes to resolve a claim if the hearings encourage the litigants to settle.

The time spent on the prelitigation process does not put plaintiffs at risk of losing their claims because of the expiration of the statute of limitations. The **Utah Code** 78-14-12 states the running of the two-year statute of limitations is suspended from the time a request for a hearing is made until 60 days after the panel opinion is issued.

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[6] The Affidavit of Compliance is the document plaintiffs receive from DOPL that authorizes them to pursue their claim in court.

[7] See Appendix D for greater detail.

Prelitigation is Expensive for the Participants, Not for the State. The cost of administering the prelitigation process is not funded through tax dollars. Instead, the state's costs are paid for out of licensure fees paid by the health care providers. In FY 1992, the state's direct cost for the prelitigation program was $87,573.

A much greater cost of the prelitigation program is borne directly by the participants in terms of their own time and their legal expenses. One major provider of hospital services reports spending an average of $1,300 in legal expenses to prepare for a prelitigation hearing. A major insurer of medical malpractice reported their average legal bill is $2,000 per hearing. We assume the plaintiff attorneys spend a comparable amount. This adds up to a significant expense considering in 1992 there were 267 prelitigation hearings to which 561 health care providers and their legal counsel were in attendance. To the legal expense we can also add the cost of the physicians who take time away from their medical practices. However, some of the expenses of preparing for the prelitigation hearings are not wasted because some of the preparation would have been done anyway if the cases were filed in court.

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Chapter III
Alternatives For Improving Prelitigation

Making changes to improve the prelitigation process is not an easy task. Unfortunately, all major participants are distrustful of each other, believing the proposed changes are further attempts by their opponents to gain an unfair advantage. Most plaintiffs and their attorneys would like to see the panels eliminated because they view them as biased and as a barrier to the court system. Health care providers, medical insurers, and their attorneys believe too many frivolous law suits are filed which result in unnecessary harassment and increased medical costs. Given these polarized points of view, it will be very difficult for these groups to agree on a strategy to improve the process.

Several reforms have been proposed to encourage litigants to participate more actively in panel hearings and to take the advice of the panels more seriously. One reform would impose a penalty of either $5,000 or attorneys fees (whichever is lowest) to those who ignore prelitigation panel decisions and later lose in court. The penalty would be charged to plaintiffs who receive a nonmeritorious ruling, file their claim in court, and lose. In the event of a meritorious panel ruling, litigants would be required to attend a settlement conference before a judge to determine the amount of the plaintiff's damages. The penalty would be imposed on either the defendant or the plaintiff who reject the settlement amount proposed by the judge and then lose in court.

We surveyed both defense and plaintiff counsel about these and other proposed reforms. Surprisingly, there is some agreement between plaintiff and defense counsel. While most plaintiff attorneys would prefer to have the prelitigation process eliminated altogether, as long as it remains a requirement, their preference is for the process to remain unchanged. Most of the principal defense attorneys in the state also told us they want the process to remain unchanged. Members of both groups are concerned additional reforms will defeat the purpose of the panels by greatly increasing the time and cost of the process. Short of eliminating the panels or enacting new tort reforms, we believe there are alternatives that should be considered. In this chapter we identify several ways each interest group can help make the prelitigation process more successful. However, even if these recommendations are implemented, we do not believe the state will see a dramatic decline in the number of medical malpractice claims entering the court system. We question whether a strategy based on tort reforms alone will ever dramatically reduce the number and cost of medical malpractice claims. If legislators have this goal in mind, they should consider some of the alternative dispute resolution systems that have been proposed.

Most Plaintiff and Defense Attorneys Oppose Changing the Process

Most plaintiff and defendant attorneys with whom we spoke said they do not believe a new round of tort reforms will result in any improvement. Instead, they are concerned the reforms will produce unanticipated consequences that could dramatically affect the time and cost of the prelitigation process.

The Plaintiff Bar Opposes New Prelitigation Rules

As mentioned earlier, the plaintiff attorneys' preferred option is eliminating the panels altogether. Eighty-two percent of those who responded to our survey said the process does not offer enough benefits to justify its use. Similar results were obtained when plaintiff attorneys were asked about six suggested reforms. They were opposed to all but one, and the one they supported replaced the prelitigation process with a pretrial settlement conference before a judge. Figure XII summarizes their position on six suggested reforms.

Figure XII
Plaintiff Attorneys' Views Toward Prelitigation Reforms

Would an early resolution of claims be more likely . . .	Yes	No
1. if plaintiff attorneys were required to certify having a "good-faith belief" that malpractice occurred, and be prepared to describe to the panel what evidence they obtained to arrive at that conclusion?	20%	80%
2. if, before the hearing, plaintiff attorneys were required to submit an affidavit stating a physician has reviewed the case and found enough evidence to suggest at least the possibility of malpractice?	23	77
3. if the prelitigation process were replaced by a pretrial settlement conference before a judge?	68	32
4. if the panel ruling (whether meritorious or nonmeritorious) were admissible in court?	22	78
5. if sanctions (legal costs, etc.) were imposed on plaintiffs who proceed with "nonmeritorious" cases and lose in court, and on defendants who refuse to make a reasonable settlement offer on "meritorious" cases?	22	78
6. if, after a meritorious ruling, defendants were required to make a settlement offer? Plaintiffs who decline the offer would pay a portion of the defendant's additional legal costs if they fail to obtain a higher amount in court. The plaintiff's additional costs would be charged to defendants whose offers were found to be unreasonable when compared to the eventual court award.	45	55

Defense Attorneys Do Not Support Major Reforms

While defense counsel want the panel process retained, most are opposed to significantly changing the process. There are 10 firms that defend 71% of all medical malpractice disputes in Utah. We talked to a least one senior member of each firm and found the majority of them believe the prelitigation process is already doing a reasonably good job of eliminating frivolous lawsuits and should not be changed. Ten of the 12 attorneys we interviewed were concerned the proposals to strengthen the process would require major changes in the format of the hearing. They predict if new penalties are imposed on those who ignore the panel rulings, the litigants will demand stricter rules of evidence, the ability to introduce expert testimony, and the opportunity to cross-examine witnesses. Based on

what they have seen happen in other states, they predicted the tougher rules would change prelitigation from a two-or-three-hour hearing into a second trial lasting two or three days.

Plaintiff and Defense Counsel Warn New Reforms May Have Unanticipated Consequences

Many attorneys who specialize in medical malpractice litigation have warned us of the unanticipated consequences that often result from changes in the tort laws. Both plaintiff and defense attorneys provided us with several examples from Utah and other states showing how efforts to strengthen the prelitigation process have had negative impacts that were not anticipated. Their concern is there may be unanticipated consequences that may do more harm than good.

Two Utah Reforms Have Had Unanticipated Consequences. Several plaintiff attorneys have told us they believe some of Utah's past tort reforms have had negative side effects that were not anticipated by their creators. They said some reforms aimed at reducing the number and cost of medical malpractice claims have actually resulted in more physicians being named in medical malpractice lawsuits. Because of these laws, plaintiffs are not only filing claims against the primary physician suspected of medical malpractice, but they are also naming all the other physicians involved in the case, the hospital, and hospital personnel. This greatly multiplies the number of health care providers who must hire legal counsel, attend the prelitigation hearing, and respond to a lawsuit.

Plaintiff attorneys claim the shortened statute of limitations requires them to expand the list of defendants named in a lawsuit. Because they have a short time in which to file their claims, plaintiffs have to name every person and institution who may have been involved in a case. Otherwise they may later learn of an unnamed party who was actually responsible for the injury. According to these attorneys, the shortened statute of limitations that many hoped would reduce the number of lawsuits has actually increased the number of physicians who have to respond to a malpractice claim. Because many of these physicians may have had little to do with the case, the medical community is led to believe that an excessive number of frivolous claims are being filed.

Plaintiff attorneys have also told us the state's restrictions on the joint and several liability rule, passed in 1986, has had a similar impact. A change to this rule in 1986 made defendants liable for damages only to the extent they participated in the health care treatment. This means if the plaintiff fails to name a party in the lawsuit who was jointly responsible, they will lose the opportunity to collect the damages corresponding to that person's involvement in the case.

Some Believe An Arizona Reform Made the Problem Worse, not Better. We spoke with two prominent defense attorneys who believe a tort reform in Arizona law has had the opposite effect from that which legislators intended. When legislators passed a law allowing

the findings of the prelitigation panel to be used as evidence in court, they assumed it would encourage participants to take the prelitigation hearings more seriously and do a better job of participating in the process. Those who practice medical malpractice law in Arizona believe the tort reform has had the opposite effect. They say plaintiff attorneys now refuse to provide the panel with any evidence or a presentation of their claims. They do this so that if the defense tries to use the panel ruling as evidence in court, the plaintiff attorneys can claim the panel ruling is unfounded because it was not based on a review of the plaintiff's evidence.

A legal challenge was made arguing that plaintiffs had to present their claims in order to comply with the state's prelitigation requirement. However, the Arizona Supreme Court ruled plaintiffs can choose not to present any evidence at the prelitigation panel review. As a result, the very reforms that were designed to make the prelitigation process more effective have weakened the process by allowing plaintiffs to decline to participate.

Attorneys Are Concerned That Changes Proposed for the Utah Statute May Also Have Negative Side Effects. Many plaintiff and defense attorneys are concerned the proposed statutory changes may have negative side effects. Most are not sure exactly how the reforms will affect Utah's prelitigation process but they are concerned it could make the process much more complicated and time consuming.

Several attorneys are concerned Utah will be forced to adopt a much more formal panel process if the proposed changes are put in place. Currently Utah's prelitigation hearings are very informal. The panel rulings are only advisory in nature and formal rules of evidence do not apply. These attorneys say other states in which the panel ruling has some kind of binding effect on events after the hearings have had to adopt a much more formal process. For example, Utah attorneys who practice in Nevada and Wyoming say the hearings in those states are very cumbersome because the panel rulings are not just advisory but have some effect. Litigants demand the ability to present expert testimony, cross-examine witnesses and conduct the hearings according to formal rules of evidence. This dramatically increases the time and cost of the prelitigation process. In Wyoming, the court eventually ruled the process unconstitutional because the hearings were taking too long.

These examples from Utah and other states show how difficult it can be to predict the impact of any given change in a state's tort laws. Most plaintiff and defendant attorneys who we spoke with said they prefer to leave the prelitigation process as it is rather than to try to improve the process and risk possible negative side effects. They are concerned the reforms will only make the process more lengthy and increase the cost of litigation without significantly reducing the number of claims filed in court. As an alternative to putting "teeth" in the process, we propose a number of ways in which each of the major stakeholder groups can help improve the existing prelitigation process by clarifying procedures and by developing strategies to encourage litigants to more actively participate in the process.

Each Participant Group Has a Role in Improving the Prelitigation Process

Many participants are frustrated with the lack of consistency in how prelitigation hearings are conducted. For some, this apparent lack of consistency appears to diminish the confidence and trust panel participants place in the process. We believe each participant group can do more to improve consistency, which may make the panels more effective. However, there are limitations to what the prelitigation process can do to encourage the early resolution of malpractice claims. Currently 40% of the claims reviewed by the panel do not go on to court. Perhaps some additional disputes may be resolved early by improving the participants' trust and confidence in this process. However, it may not be reasonable to expect all the participants to resolve their claims early. There will always be some litigants who will not be willing to drop or settle their claims until they have had the chance to further investigate the facts surrounding their case. In most cases this requires filing the claim in court so a formal discovery of the facts may occur.

The Division of Occupational and Professional Licensing Should Clarify Some Procedures

For the most part, the Division of Occupational and Professional Licensing (DOPL) has been effective in administering a very difficult and contentious prelitigation process. Most of the problems we have observed with the prelitigation process have been caused by the participants themselves and should not be blamed on DOPL. However, there are a few procedural issues DOPL can address to improve the manner in which the prelitigation hearings are conducted.

In 1991, DOPL created a task force to establish guidelines for the prelitigation hearings. We believe another task force should be created to further clarify a number of issues which we identify below. This task force should consist of representatives from the health care industry, the insurance industry, the plaintiff bar, the defense bar, and the Utah Medical Association. By asking the participant groups to address the procedural issues themselves, we believe better solutions will result, and the participants will feel ownership in the process and be more likely to comply. However, DOPL must ensure the policies and procedures proposed by the task force are consistent with the Legislature's intent that the prelitigation hearings be an informal discussion of the merits of a claim, with relaxed rules of evidence, and that the rulings be advisory in nature.

1. A Better Definition of "Meritorious" May Be Needed. Many participants, especially plaintiff attorneys, complain that the panels are not consistent in their interpretation of what a meritorious decision means. Perhaps the definition for "meritorious" has not been adequately defined in the rules. In addition, the participants and panel members

may need instruction regarding the definition of "meritorious" and what evidence should be considered to arrive at a "meritorious" decision.

The current administrative rules state:

> *`Meritorious claim' means that there is a basis in fact and law to conclude that the standard of care has been breached and the petitioner has been injured thereby, such that the petitioner has a reasonable expectation of prevailing at trial.*

One problem with this definition is that it is very difficult to establish the required "basis in fact" because a formal investigation of the facts is not normally permitted until after the prelitigation hearings. Nor are there guidelines regarding the type of evidence panel members should consider to arrive at a meritorious ruling. This may leave panel members too much flexibility in how they decide a case. We have observed that some panel members expect clear evidence of malpractice before they will issue a meritorious ruling. Others are willing to be more flexible in what kind of evidence they require.

Some plaintiff attorneys have also told us that they are unsure what a meritorious ruling means and what kind of evidence they must provide to the panel. The statute requires the proceedings to be "informal and formal rules of evidence are not applicable." However, some panel members do not know how to weigh the evidence presented to them, particularly when hearsay evidence is presented.

To correct this problem DOPL needs to more clearly define what constitutes a "meritorious" claim and what evidence panel members must consider to arrive at such a decision. For example, must there be a preponderance of the evidence to support a meritorious ruling or must the plaintiff attorneys merely show they have made a "good faith effort" to determine there was a basis in fact for filing their claim?

2. Panel Chairs Need to Prepare Thoroughly Written Opinions. Many participants told us the written panel opinions can be useful when deciding how to proceed with a case. However, the quality of the opinions vary significantly. Some are thoroughly prepared, outlining the reasoning behind the panel's decision. Others give little indication about how the panel arrived at their decision. These are usually handwritten and prepared immediately after the hearing, while the more valuable opinions are fairly lengthy documents that clearly explain the panels' findings. To make sure the panel chair writes a complete opinion, the DOPL should establish guidelines describing how these opinions should be prepared. DOPL may also need to increase the compensation paid to the panel chairperson for the additional time required to write the opinions.

3. The Division Should Monitor the Performance of Panel Members. Since there are few guidelines about how hearings are to be conducted, procedures can vary among hearings

depending on the individual style used by the panel chair to conduct the hearings. Also, plaintiff and defense attorneys told us the individual abilities of panel members vary significantly. DOPL needs to find ways to monitor the performance of panel members without violating the confidential nature of the hearings. In addition, DOPL should provide better instructions to panel chairpersons so they can improve the consistency in the process and help their fellow panel members to be more effective.

From our own observations and from the comments of several attorneys, we have determined there is a great deal of variation in how panel hearings are conducted. For example, even though there is not supposed to be cross-examination of parties, some panel chairs allow participants to freely discuss the case and ask questions of each other. Others use a more formal style in how they conduct the hearings and limit participant discussion to issues they believe are relevant. Many of the attorneys we talked with would like more consistency in the panel process.

DOPL also needs to avoid selecting panel members who, in the past, have had difficulty conducting themselves in an impartial manner. We observed one hearing, and have been told of others, in which the physician panel member advocated the position of the defendant. On the other hand, some lay members tend to advocate the plaintiff's point of view during the hearing. This can lead participants to believe the panels are unfair. Perhaps the role of the panel members needs to be clarified. DOPL must decide whether panel members should act as advocates for one side or the other or refrain from expressing judgement on a case until after the hearing and limit their participation to asking questions of the participants. If panel members are to show complete impartiality during the hearings, DOPL should avoid selecting panel members who have a tendency to show preference for one side or the other.

In the past, the division's strategy has been to informally monitor the performance of panel members. Panel members who have repeatedly been the source of conflict or who demonstrated bias have not been asked to serve again. The division also tries to bring some consistency to the process by providing panel chairpersons with instructions regarding how to conduct the hearings. We encourage the division to continue these efforts. If, however, the division and the participants believe a more structured approach is needed, the division can adopt stricter procedures for the selection of panel members and for how the hearings are to be conducted. If panel members need formal training, DOPL should provide that training and raise physician licensure fees to cover the additional cost to the program.

4. Rules Regarding the Use of Panel Information Should be Clarified. Some are concerned DOPL investigators are using information obtained from the division's prelitigation files as a basis for initiating investigations against physicians. They are concerned this may be a violation of the confidential status of the prelitigation proceedings. Physicians believe the division should only pursue formal complaints made directly by patients to the division. However, DOPL believes the information gained through the prelitigation process can be a useful means of identifying physicians who may be putting the public at risk. For this reason,

they believe it is appropriate for division investigators to use whatever information is available to them to protect the public. We are unsure whether the division's internal use of prelitigation files is consistent with the requirement to keep the proceedings "confidential, privileged, and immune from civil process" (**Utah Code** Section 78-14-12 (c)). We recommend DOPL obtain an opinion from the Attorney General regarding the division's internal use of this information.

5. Continued Efforts are Needed to Reduce the Time to Schedule Hearings. All participants must work with DOPL to reduce the time needed to schedule hearings. It has been an ongoing challenge for DOPL to schedule the prelitigation hearings and try to hold participants to a schedule. The occasional delays and rescheduling have been a source of frustration to many participants. As previously mentioned in Chapter II, we found the process takes an average of three months to complete and some claims wait several months to complete the process.[8]

For the process to work effectively, participants must show their support for the prelitigation hearing by preparing their cases early and not allowing other activities to take precedence. We believe DOPL's recent efforts to improve the scheduling process may be sufficient to reduce the time it takes to complete the prelitigation process. If DOPL is not successful in reducing the time it takes to complete the prelitigation process, the Legislature should consider limiting the time the division has jurisdiction over a claim. The original prelitigation statute contained a provision that limited the state's jurisdiction over medical malpractice claims to 90 days. If the prelitigation hearing could not be held by that date, the statute freed the claimant from the prelitigation requirement. This provision was later dropped. If DOPL is unable to further reduce the time it takes to complete the hearings, perhaps the division's jurisdiction should be limited once again. If 90 days is considered to be too short, a more reasonable time period could be enacted. Perhaps a 120 or 140 day jurisdiction would be sufficient to offer relief to litigants who have difficulty scheduling a hearing.

DOPL should also determine under what circumstances the prelitigation hearings might be waived. If, for example, a plaintiff is terminally ill it may be appropriate for the division to waive the prelitigation requirement.

The Bar Association Can do More to Prepare its Members

The Utah Bar Association can do more to prepare its members to handle medical malpractice cases. Specifically, we believe the Utah Bar should do more to inform its members about how to comply with its Code of Ethics for medical malpractice cases and to better train its members in how to take a case through the state's unique system for resolving

[8] See Appendix D for further details.

medical malpractice disputes.

The Utah State Bar and the Utah Medical Association have issued a Legal/Medical Interprofessional Code for Utah that, among other things, provides guidelines for the legal and ethical conduct of attorneys who handle medical malpractice claims. Section X of the Interprofessional Code states:

> *. . . attorneys have a legal duty and ethical obligation to fairly evaluate medical malpractice claims against physicians, and to refrain from prosecuting any action against physicians unless there is either objective evidence of a breach in the applicable standard of care resulting in injury, or a legitimate, good faith belief that the care provided fell below the applicable standard of care.*
>
> *Even if initially an attorney may have been justified in bringing an action against a physician, continuation of the action is not justified if it becomes clear, after pretrial discovery, that the claim of malpractice is not meritorious.*

We believe the Utah Bar needs to do more to inform and train its members about their responsibilities in light of their professional code of conduct. As discussed in Chapter II, we suggest one way to reduce the number of malpractice filings is to improve the skills of the attorneys who handle these technically difficult and complex cases. The Bar should encourage members who wish to practice medical malpractice law to obtain specialized training in this area. Many of the plaintiff and defense attorneys we spoke with suggested the Bar should consider offering a certification program in this specialized field of law.

The Utah Bar Association should also encourage its members to adopt practices which will promote the early settlement of claims. One ongoing complaint from both sides of the debate has been that the other side does not work toward an early settlement. The bar should establish guidelines which will help litigants to identify the amount of damages for a case well before the filing of a summons and complaint.

The Utah Medical Association (UMA) Can Encourage Physician Support

In our opinion, there are two ways UMA can help improve the prelitigation process. First, UMA can encourage its members to settle claims that have been ruled meritorious. As explained in Chapter II, plaintiffs claim defendants tend to wait until "meritorious" claims are filed in court before they are willing to consider settlement. If health care providers were to show a greater willingness to settle "meritorious" claims soon after the hearings, plaintiffs would have a greater incentive to take the panel process seriously. UMA's insurer, the Utah Medical Insurance Association, already has the capability to settle claims quickly. However, according to UMIA management, they must obtain the insured doctor's permission before they

can settle a claim, which is sometimes difficult. We encourage UMA to work

with its members to turn over "meritorious" claims to its insurer for possible early settlement.

Second, we encourage UMA to do more to identify and encourage qualified physicians to serve on panels. Historically, DOPL has had great difficulty finding qualified physicians to serve as panel members, particularly in some specialties. In fact, DOPL staff have contacted as many as 28 physicians to find one physician willing to serve. UMA needs to take a more active role in encouraging physicians to participate as panel members. Perhaps UMA could offer continuing education credit to physicians who participate or possibly they could work with DOPL to make panel service a licensure requirement.

Recommendations

1. We recommend the Division of Occupational and Professional Licensing form a task force consisting of representatives of the various stakeholders in the prelitigation process to clarify the following procedural issues:

    a. define clearly for the participants and the panel members what is meant by a meritorious ruling;

    b. define the type of evidence panel members should consider to arrive at a meritorious decision;

    c. establish guidelines describing the contents required of written panel opinions; and

    d. determine whether a more structured approach is needed for the hearings and, if so, establish guidelines for panel chairpersons who oversee the conduct of the hearings.

Before adopting any recommendations of the task force, the division must ensure they are consistent with **Utah Code** 78-14-12.

2. We recommend the Division of Occupational and Professional Licensing obtain an opinion from the Attorney General regarding the division's internal use of the information gathered during the prelitigation process.

3. We recommend the Division of Occupational and Professional Licensing continue its efforts to reduce the time required to complete the hearings by continuing to improve scheduling techniques. If the division is unable to ensure that hearings are held within a reasonable time, we recommend that the Legislature place new limits on the state's jurisdiction over medical malpractice claims.

4. We recommend the Division of Occupational and Professional Licensing identify and recommend to the Legislature circumstances in which the prelitigation hearings should be waived.

5. We recommend the Utah Bar Association develop a strategy for informing its members about how to comply with its Legal/Medical Interprofessional Code pertaining to medical malpractice litigation.

6. We recommend the Utah Bar Association develop a training program or some other strategy for improving the training and skills of its members who wish to participate in medical malpractice litigation.

7. We recommend the Utah Bar Association establish guidelines which will help litigants identify and discuss the amount of damages for a case well before the filing of a summons and complaint.

8. We recommend the Utah Medical Association encourage its members to settle claims ruled to be meritorious as soon as they can verify that medical malpractice has occurred.

9. We recommend the Utah Medical Association develop a strategy to encourage qualified physicians to serve as panel members.

Chapter IV
If A Problem Still Exists, Look Outside the Tort System for Solutions

There is a limit to what a tort-based strategy alone can do to reduce the number of medical malpractice claims entering the legal system. If the Legislature still believes and can demonstrate the state has a medical liability problem and wishes to further reduce the number of claims entering the legal system, we believe there are three reasons why the legislature should look outside the tort system for solutions. First, national researchers have discovered there are only three tort reforms that have a measurable impact on the number and cost of medical malpractice claims. Because Utah has already adopted all three of these, it is unlikely additional tort reforms will provide much improvement. Second, some believe the current legal system is not always a fair and equitable means of resolving medical malpractice disputes and the high cost of litigation discourages many from pursuing their claims. Third, many within the state's health care industry believe the state is about to experience another upsurge of medical malpractice litigation. Although there are many alternative dispute resolution systems that legislators might consider, this chapter only describes two: (1) the fault-based, administrative system proposed by the American Medical Association, and (2) the early intervention programs currently being used by many major health care institutions.

Before the Legislature enacts additional reforms aimed at reducing medical malpractice litigation, it must first demonstrate that the legislation serves a valid public need. A recent Utah Supreme Court ruling questions whether the Legislature adequately demonstrated the need for the medical malpractice reforms it enacted under the Utah Medical Malpractice Act in 1976. In upholding a challenge to the statute of limitations for minors found in the Utah Health Care Malpractice Act (**Utah Code** 78-14-4), the court found the Legislature did not adequately demonstrate a compelling public need to limit the access of minors to the courts. Although the court ruling only addressed the constitutionality of a narrow section of the statute, the ruling puts into question whether the Legislature has adequately demonstrated the need to pursue special legislation aimed at medical malpractice litigation.

There are Limits to What a Tort-Based Strategy Can Accomplish

If the Legislature can demonstrate a need for additional legislation to curb the rising cost and amount of medical malpractice litigation, they should recognize the limits of continuing a

tort-based approach to the problem. Since 1976, Utah has adopted almost every tort reform recommended by the American Medical Association. Nationwide, researchers have had difficulty measuring the effects of these reforms. The most widely cited studies suggest there are only three reforms that affect the number and cost of claims. These include (1) caps or limits on the amount of damages; (2) collateral source offsets (reducing awards by the amount a plaintiff receives from other sources of compensation); and (3) a reduced statute of limitations. Researchers concluded the prelitigation panels and other tort reforms did not have a measurable impact on either the number or average cost of claims. Because Utah has already adopted the three reforms that were found to be effective, it is unlikely that a strategy based solely on new tort reforms will provide a further reduction in malpractice claims of any significance.

National Studies Provide No Clear Evidence of the Effectiveness of Tort Reform

The results of most studies of medical malpractice reforms must be considered cautiously because researchers have found it extremely difficult to isolate the impact of any one tort reform. Once a new reform is enacted, the claims affected by that reform take years to work their way through the legal system. In the meantime, those claims are affected by other changes in the legal system, in social attitudes toward medical malpractice, and in the economy. As a result, it is very difficult to prove a direct causal relationship between one tort reform and a state's claims experience. In addition, researchers have found it extremely difficult to find a consistent database from which to conduct their research. The medical malpractice insurance market has undergone significant changes since the mid-1970's. Several major insurers have withdrawn from the market and some major institutions and medical associations have begun self-insurance programs and joint underwriting associations. The market has also changed from "occurrence" policies (which cover all claims arising out of medical incidents occurring in the policy year regardless of the date of claim filing) to "claims-made" coverage (which covers only claims filed in the policy year regardless of the date of injury).

Because of the problems inherent to any study of medical malpractice tort reforms, most major researchers warn that caution should be used when interpreting their results. Unfortunately, some lesser "studies" present an argument for or against a certain program of tort reform without sufficient empirical evidence to support their claims. For this reason we are skeptical of much of the research done in this area.

The Most Widely Cited Studies Indicate Only Three Reforms are Effective

Of all the research into the effects of medical malpractice tort reforms, the work of Patricia Danzon is most widely cited. Danzon has conducted several major studies of the effects of tort

reform on the number and cost of medical malpractice claims. Her results show there are three tort reforms that have had a verifiable impact on the frequency and severity[9] of medical malpractice claims: (1) a reduced statute of limitations was found to decrease the number of claims filed; (2) collateral source offsets (restricting payment of additional compensation) were found to decrease the average cost of claims paid and (3) caps or limits on the amount of damages that can be awarded were found to reduce average cost of claims paid. However, she concluded that prelitigation (or "screening") panels and several other reforms did not have a measurable effect on the number and the average cost of medical malpractice claims. Danzon summarized her research with the following statement:

> *Although claim frequency and severity have continued to rise despite reforms, this does not mean that the tort changes have had no effect. States that enacted shorter statutes of limitations and set outer limits on discovery rules have had less growth in claim frequency than states with statutes of limitations more lenient to plaintiffs. On average, cutting one year off the statute of limitations for adults appears to have reduced claim frequency by eight percent; the effect would presumably be greater for reduction from, say, four to three years than from ten to nine years.*
>
> *Statutes permitting or mandating the offset of collateral benefits have apparently reduced malpractice claim severity by 11 to 18 percent and claim frequency by 14 percent relative to comparable states without collateral source offset . . ..*
>
> *Caps on awards have reduced severity by 23 percent. This is the average impact of the various forms of caps over the period 1975-1984 . . ..*
>
> *None of the other reforms analyzed, including screening panels and limits on contingent fees, appears to have had any systematic impact on claim frequency or severity.*

Other research substantiates Danzon's claims that only these three major reforms (which Utah has already enacted) have an impact on the number and cost of claims. There was no statistical evidence to indicate the other reforms, including prelitigation hearings, had an impact on the number and cost of claims filed in court.

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[9]claims "frequency" and "severity" are terms commonly used by the insurance industry to refer to the respective average number and cost of insurance claims for any given population covered by insurance.

The Tort-based Approach Does Not Address Many Important Issues

In addition to debate over whether tort reform is an effective strategy for addressing the rising number and cost of claims, some are also concerned that the tort system does not address a number of other important issues. Although we have not performed any tests to verify their claims, some believe the tort system does not always offer completely fair results nor does it encourage filing by everyone who has been injured.

Tort System is Not Always Fair and Equitable

Many of those whom we interviewed expressed a concern about the inequities within the current legal system. Although we have done no testing to verify their claims, a judge, several defendant and plaintiff attorneys, several insurance executives, and a prominent physician have all told us the legal system is frequently unable to resolve medical malpractice claims in a fair and equitable manner. This, they said, is because medical disputes are often too complex for juries to understand. Because juries are presented with conflicting expert testimonies, they have no objective basis for judging the merits of a claim. As a result, many decisions are based on jurors' subjective analyses of the information presented, and in some cases jurors' sympathy for the plaintiff may affect their rulings. Unfortunately, this creates an environment that some say is more like a "lottery" than a judicial system. One plaintiff may win a multi-million dollar award while others with similar circumstances will lose their case and receive nothing.

Many Potential Claims are Not Brought into the Civil Justice System

Two landmark studies have shown that only a small fraction of the all injuries resulting from medical malpractice are eventually filed in court. One study by researchers in California determined only 1 of 10 incidents of medical malpractice were filed in court. A similar study was performed by a group from the Harvard University Medical School of hospitals in the State of New York. The group from Harvard determined only 1 of every 7.6 actual incidents of medical malpractice were filed in court. What this means it there is a large population of uncompensated claims that are not being addressed by the current system.

There appear to be many reasons why most malpractice claims are never pursued. For example, some patients are reluctant to disrupt the relationship they have with their physician, particularly if they are on Medicaid or Medicare and they are not sure whether they could find another physician. In addition, some patients may not be aware the injury was due to the

physician's negligence.

Another reason many claims are not pursued is the cost of litigation. Several plaintiff attorneys told us they only accept claims that have the potential for an award of $50,000 or more. One even told us he would not accept a case unless the likely award was at least $100,000. Some attorneys said they would accept smaller claims if they felt it would not be too difficult to prove medical malpractice had occurred. The problem of the high cost of litigation has led the United States General Accounting Office to conclude one of the major limitations of the current compensation system is "the need for the injured party to obtain a lawyer to gain access to the system."

Many Believe the Medical Malpractice Problem Is About to Become Worse

We have been told by representatives from many of the state's major health care institutions and providers of medical malpractice insurance that the state's tort reforms, including prelitigation panels, have helped to alleviate the rising number and cost of medical malpractice claims. They report that since 1986 there has been a slowing in the growth in the number of malpractice claims filed in court. However, they also told us their most recent claims data show a modest upturn in the number of claims filed in court. Some believe this indicates another period of rising medical malpractice claims is on the way.

Since 1986, Utah health care providers reported a relatively moderate growth in the number of malpractice claims filed in court. Several institutions and insurers were willing to provide us with a history of their claims frequency and severity experience. Historical information relating to claims frequency and severity can be found in Appendices A, F and G. The slowing in the growth of claims frequency was followed by a leveling off and in some cases a decline in malpractice insurance rates. See Appendix H for information regarding medical malpractice rates.

Unfortunately, the moderate growth in claims frequency appears to have been temporary. Many are now reporting a renewed growth in the number of claims filed in court. For example, the St. Paul Co., the nation's largest provider of medical malpractice insurance, reported the following in last year's annual report, quoting Joseph B. Nardi, President of St. Paul's Medical Services Division:

> *`The dramatic decline in frequency we witnessed during the second half of the 1980s has ended,' said Nardi. `And the trend would appear to be upward. But we are continuing to view this data cautiously.' Severity is still increasing at a modest pace. `While the rate of increase in severity has*

been notably higher in the last two years, it is still within a predictable and manageable range,' said Nardi. `The first significant increases in both frequency and severity in several years were noted last year at this time,'

said Nardi. `But to avoid overreacting, we took a cautious wait and see approach.'

Representatives from several local health care institutions reported their latest claims data suggest they are about to experience a similar rise in claims frequency as that reported above by the St. Paul Company. They believe they are in the initial stages of another upsurge in the frequency of claims similar to those experienced by the industry nationwide during the early 1970s and 1980s. Although representatives from the St. Paul Insurance Co. told us that Utah tends to follow the national trends, they said they consider this state to be among those with a relatively low level of medical malpractice liability.

Alternatives to Tort-based Litigation

If legislators wish to have a greater impact on claims frequency and severity, and address the other problems of fairness, equity and cost effectiveness, we recommend they consider alternatives to a purely tort-based strategy for addressing the state's medical liability problems. In addition, each health care institution in the state should adopt a policy of early intervention into incidents of medical malpractice. Institutions that have already developed such programs have found they can be an effective means of resolving medical malpractice disputes without going to court.

We have studied a variety of alternative dispute resolution systems that are designed to resolve medical liability disputes outside of the court system. In this chapter, we review the fault-based, administrative system which was developed by the American Medical Association. Patricia Danzon, an expert in medical malpractice reform, told us the fault-based, administrative system is one of the best alternatives dispute resolutions systems. However, legislators could also consider a no-fault system which is now being advocated by the Utah Medical Association or some type of forced arbitration system. We also recommend that all of the state's health care providers develop a program of early intervention into incidents of possible medical malpractice. Several of Utah's major health care institutions have found early intervention to be an effective means of resolving medical malpractice disputes without going to court.

AMA Fault-based Administrative System

The American Medical Association has developed a fault-based, administrative system as an alternative to the existing tort system for resolving medical malpractice disputes. In a manner similar to Utah's workers compensation system, the fault-based, administrative system would resolve medical malpractice claims administratively through a process of claims review

by reviewers, medical peers, defense and plaintiffs attorneys, administrative

judges and commissioners. Many experts believe this is a credible alternative to the legal system.

We spoke with Patricia Danzon, a leading expert on medical malpractice liability, who endorses the fault-based, administrative system. She gave us three reasons why "the fault-based system is one of the best alternatives available." First, the system for resolving medical malpractice claims would "feed into a mechanism for provider discipline--in weeding out the bad doctors." She said the claims payment process would first compensate those injured by malpractice and then alert the system to bad physician or medical practices and thereby allow the medical community to take immediate corrective action in order to further reduce liability within the system. Second, a fault-based system which compensates injured parties using a "schedule of damages" would replace the current system which offers million dollar verdicts to some and nothing to others with a more consistent and fair compensation based on a valuation of the injury. Third, the fault-based system would also reduce the cost of the process by replacing an expensive tort system with a lower-cost administrative system.

Utah is one of only a handful of states to test the feasibility of the fault-based, administrative system. Recently, the Utah Medical Association sponsored an in-depth simulation of the proposal. The simulation study included 500 closed claims and 500 incident reports from area insurers and hospitals. The claims were reviewed in a similar manner as would be followed under the proposed system by experienced claims reviewers, physicians, plaintiff attorneys, defense attorneys and administrative law judges. The consultant who administered the study reported the fault-based system would increase the total compensation to claimants and the total number of claims paid, while reducing the average payment on each claim.

Based on the results of the Utah study, and a similar study in Florida, the AMA estimated the legal and insurance overhead costs of the fault-based, administrative system in a "typical" state would be 14% lower than those of the traditional tort system. In addition, they predict 10% more would be paid in compensation to claimants than under the current system. This increase in compensation would result from an increase in the payments on small claims that are currently not entering the tort-based system.

According to many researchers, the reason these savings are possible is that the current tort system is very expensive. A U.S. Department of Health and Human Services study found only 16 to 40 cents of each dollar paid in malpractice insurance premiums is paid to compensate injured parties. The rest is spent on court fees, insurance industry costs, and defendant's legal costs. Those figures do not include the portion the plaintiff must pay to compensate their legal counsel. In Utah, the compensation paid to plaintiff attorneys is limited to 33% of the amount recovered for the plaintiff. The fault-based, administrative system proposes to reduce malpractice insurance rates and increase the number who can be compensated by reducing the costs of litigation.

As with the tort reforms, there may be unanticipated consequences from any alternative dispute resolution system. In previous chapters, we have already shown how difficult it is to isolate the effects of any reform and to predict its impact once implemented. In a totally dynamic environment there are many social, economic and technological factors that might affect a process in ways that were not evident in a simulation study. Although the UMA's research suggests the fault-based, administrative approach will provide some advantages over the legal system, legislators should be aware that the system might not work as effectively in actual practice as it did in the simulation.

All Health Care Providers Should Have An Early Intervention Program

Most major health care institutions recognize the futility of allowing a patient to feel ignored when they may have been injured because of the negligence of physicians or hospital staff. Sometimes the health care provider's response to a patient's claim of injury can be what induces the patient to take legal action. For this reason, most hospitals have developed early intervention programs to address possible cases of injury as soon as they occur. Several hospital administrators in the state have told us they have adopted early intervention programs not only because it is humane to deal with an injured client as soon as possible, but also because they have found it is cheaper to resolve a matter if immediate follow-up treatments are provided.

Health care institutions claim their early intervention programs are effective at helping them avoid formal litigation. One major institutional provider of hospital services in Utah reports having resolved a case in which a baby suffered brain damage at birth without having to go to court. If they had gone to court this case would have cost hundreds of thousands of dollars in litigation costs alone. Hospital administrators were pleased they could reach an agreement to compensate the injured party's family and meet the child's ongoing need for care without paying any legal expenses.

The advocates of early intervention programs have told us many people injured by medical malpractice are not primarily concerned about getting a large settlement amount from the health care provider. Instead, most clients are mainly concerned about receiving remedial care and about whether they will have to pay the cost of such care. They say once the patient and the patient's family are convinced the hospital is committed to their care and long-term needs, they have little interest in pursuing a medical malpractice claim. If they do, such claims are often easier to settle.

The main benefit of early intervention programs is that they help physicians develop a better response to possible incidents of medical malpractice. Several defense attorneys and insurance administrators have told us some physicians respond very poorly to possible incidents of medical negligence. Even though physicians might be able to resolve the matter by accepting responsibility for the problem, providing corrective treatment, or waiving the bill,

some physicians become defensive and refrain from further communication with the patient. According to the hospital administrators we have spoken to, this is the opposite response to that which they should use in such incidents.

In our opinion, if all of Utah's health care providers were to adopt an early intervention strategy, it is likely the incidence of malpractice court claims would decrease. In addition, the injuries that do occur would be dealt with in a more equitable, timely, and cost effective manner.

Recommendations

1. If legislators determine further action is required to address the state's medical liability problems, we recommend that they consider alternative dispute resolution systems that would attempt to resolve disputes outside of the legal system. However, before pursuing new reforms, legislators must address the recent supreme court ruling which suggests the Legislature demonstrate the public need for such reforms.

2. We recommend that the Legislature encourage Utah health care institutions and insurers to develop programs for early intervention into incidents of possible medical malpractice.

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Appendices

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Response Page