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COMMENTS

An Obstacle Course to Court: A First Look at Wyoming's Medical Review Panel Act

In response to a perceived medical malpractice insurance crisis¹ and hence under pressure from doctors and the insurance industry, the 1986 Wyoming Legislature passed the Wyoming Medical Review Panel Act (the Act).² The bill was signed by the Governor and became effective on July 1, 1986.³

The Act follows a current trend among state legislatures to enact a series of so-called "tort reforms" in an attempt to balance the perceived injustices of longstanding laws.⁴ This comment examines the Wyoming Medical Review Panel Act and critically analyzes some of the Act's potential difficulties. Because the Act is in its infancy, some problems are yet to be encountered. A look at the review panel experience in other jurisdictions, however, sheds light on what Wyoming can expect, both in terms of substantive and procedural difficulties and the probable results of this legislation.⁵

THE WYOMING MEDICAL REVIEW PANEL ACT

By its definitions the Act encompasses potential malpractice claims against physicians, dentists or health care facilities such as sanatoriums and nursing homes.⁶ Under the Act's mandate, all claims against health care providers must be addressed by a review panel before they can be filed in court.⁷

The Director

The Attorney General or his designee serves as the director of the Act.⁸ The director does not sit on or vote in any panel but is the administrator

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1. See Comment, *Medical Malpractice Insurance Crisis: The Boys Who Cry "Wolf"*, XXI LAND & WATER L. REV. 203 (1986).

2. WYO. STAT. ANN. § 9-2-1501 to -1511 (Supp. 1986).

3. *Id.* § 9-2-1506(a).

4. See Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

5. A current list of jurisdictions which have some form of medical review panel includes: ALASKA STAT. § 9.55.536 (1979); ARIZ. REV. STAT. ANN. § 12-567 (1982); CONN. GEN. STAT. ANN. §§ 38-19b to -19f (1977 & Supp. 1986); DEL. CODE ANN. tit. 18, §§ 6803-6814 (Supp. 1986); FLA. STAT. ANN. § 768.57 (1986); IDAHO CODE §§ 6-1001 to -1013 (1979 & Supp. 1986); ILL. REV. STAT. ch. 110, §§ 2-1012 to -1020 (Supp. 1986); IND. CODE §§ 16-9.5-9-1 to -10 (1983); KAN. STAT. ANN. §§ 65-4901 to -4908 (1985); LA. REV. STAT. ANN. § 40:1299.47 (West 1977 & Supp. 1986); ME. REV. STAT. ANN. tit. 24, §§ 2851-2859 (Supp. 1986); MONT. CODE ANN. §§ 27-6-101 to -704 (1985); NEB. REV. STAT. § 44-2844(2) (1978); NEV. REV. STAT. §§ 41A.003 to .069 (1985); N.H. REV. STAT. ANN. §§ 519-A:1 to :10 (1974); N.M. STAT. ANN. §§ 41-5-14 to -24 (1986); N.Y. JUD. LAW § 148-a (McKinney 1983 & Supp. 1987); N.D. CENT. CODE § 32-29.1-02(1) (1979); UTAH CODE ANN. §§ 78-14-12 to -16 (Supp. 1986); VA. CODE §§ 8.01-581.1 to .12 (1984 & Supp. 1986). This list does not include states which use court-annexed arbitration.

6. WYO. STAT. ANN. § 9-2-1503 (Supp. 1986).

7. *Id.* § 9-2-1507(a).

8. *Id.* § 9-2-1505(b).

of the Act. He may promulgate regulations, select panelists and provide for panelists' compensation.⁹

The director's chief substantive task is to select panelists. The panelists are selected from lists of submitted names. Within five days of receipt of a claim, the director must notify the state licensing agency of the health care provider involved and the Wyoming State Bar.¹⁰ Then the licensing agency and the Wyoming State Bar each provide the director with a list of twelve proposed panelists.¹¹ The director chooses two people from each list to serve on the review panel for a given claim.¹²

The Panel

Each panel which reviews malpractice claims is composed of five members: two health care providers, two attorneys and a lay panelist who can neither be an attorney, a health care provider nor an employee of a health care provider.¹³ The four professional members of the panel are subject to challenge by the parties. Upon a party's affidavit stating a belief that a panelist would not be impartial, the panelist is automatically disqualified. Each party may disqualify a maximum of three panelists.¹⁴ The director makes a new selection upon disqualification of a panelist.¹⁵

The lay panelist is chosen by the unanimous vote of the four professional panelists.¹⁶ Neither the Act nor the regulations¹⁷ provide procedures for when unanimity cannot be achieved. The panel then selects a chairman from among its five members to preside over panel proceedings.¹⁸ All panel members must be residents of the state of Wyoming.¹⁹ Although the director may disqualify any panelist "if the panelist feels his presence on the panel would be inappropriate under the circumstances,"²⁰ the statute provides no procedures by which the parties may disqualify the lay panelist.

The Claim and Answer

As previously mentioned, a claim must be heard by a review panel before a plaintiff can proceed in a court action against a health care provider. The plaintiff must address the claim to the director in the form of a signed statement setting out the conduct or omission constituting the

9. *Id.* §§ 9-2-1505(b), -1508(b). The director does not set panelists' compensation; section 9-2-1505(c) sets panelist fees at \$40.00 per hour.

10. *Id.* § 9-2-1508(b).

11. *Id.*

12. *Id.* The Act does not specifically say that a new review panel is drawn for each claim, but the statutory scheme indicates this.

13. *Id.* § 9-2-1508(a).

14. *Id.* § 9-2-1508(d).

15. *Id.*

16. *Id.* § 9-2-1508(b).

17. MEDICAL REVIEW PANEL RULES, reprinted in IX WYO. LAW. 26 (June 1986) [hereinafter PANEL RULES].

18. WYO. STAT. ANN. § 9-2-1508(c) (Supp. 1986).

19. *Id.* § 9-2-1508(a).

20. *Id.* § 9-2-1508(e).

alleged malpractice.²¹ The claim must also authorize the release of all pertinent medical records to the panel for its privileged and confidential review.²²

The health care provider must file an answer to the claim with the director. The answer must be filed within thirty days after service of the claim, and the answering party must also submit to review panel inspection of medical records.²³ These records do not include the findings or proceedings of peer review organizations. Peer review findings are absolutely privileged by the Wyoming Statutes.²⁴

Upon receipt of the claim by the director, the Act tolls the statute of limitations for the malpractice action until thirty days after the panel's decision is served on the claimant.²⁵ Thus while the claim is pending with the review panel, time to prepare for later litigation is not lost.

The Hearing

The hearing before the panel must take place within 120 days of the director's receipt of the claim, "unless the director or the panel finds good cause to delay the hearing."²⁶ If panel members deem it necessary, the panel may also request a supplemental hearing which must be held within thirty days of the original hearing.²⁷ The Act calls for the hearing to be "informal", without the constraints of the Wyoming Rules of Evidence or the Wyoming Administrative Procedure Act except when so specified.²⁸ The panel does have the power to subpoena witnesses at the hearing,²⁹ but there is no pre-hearing discovery authorized by the statute.

The panel must decide if there is: "(i) [s]ubstantial evidence that the acts complained of occurred and that they constitute malpractice; and (ii) [a] reasonable probability that the patient was injured as a result of the acts complained of."³⁰ The decision of the panel is made by a majority of its members.³¹ The panel's written decision is served on both parties as well as the state licensing board of the health care provider. The decision is in no way binding on any party.³²

More importantly, in a successive civil action no panel member may be called to testify concerning panel deliberations, because all panel actions are strictly confidential.³³ All panel members and witnesses are

21. *Id.* § 9-2-1507(a).

22. *Id.*

23. *Id.* § 9-2-1507(d).

24. *Id.* § 35-17-105.

25. *Id.* § 9-2-1506(a).

26. *Id.* § 9-2-1509(a).

27. *Id.* § 9-2-1509(c).

28. *Id.* § 9-2-1509(b). The Wyoming Administrative Procedure Act only applies to the Wyoming Medical Review Panel Act in the promulgation of regulations, *id.* § 9-2-1505(b), and the subpoenaing of witnesses, *id.* § 9-2-1509(b).

29. *Id.* § 9-2-1509(b).

30. *Id.* § 9-2-1510(a).

31. *Id.* § 9-2-1510(b).

32. *Id.* § 9-2-1510.

33. *Id.* § 9-2-1511(a), -(b).

absolutely immune from civil actions relating to service on the panel.³⁴ Further, the panel's decision is not admissible as evidence.³⁵

POTENTIAL PROBLEMS AND CHALLENGES

Other jurisdictions have experienced some difficulties with legislation similar to the Wyoming Medical Review Panel Act. The state of Montana has had a mandatory medical review panel act since 1977.³⁶ The constitutionality of that act was challenged in the case of *Linder v. Smith*.³⁷ Linder had been injured while under the care of a physician and attempted to file a medical malpractice lawsuit. The suit was dismissed on the ground that Linder had not first filed a claim with the review panel, as mandated by the Montana act.³⁸ Linder then filed a declaratory judgment action seeking a determination of the constitutionality of the act. He alleged *inter alia* that the review panel denied his right of access to the courts as guaranteed by the Montana constitution.³⁹ In rejecting this argument, the Montana Supreme Court held that the right of access to the courts is not a fundamental right and that the purpose of the legislation was rationally related to the perceived medical malpractice insurance crisis.⁴⁰

In a subsequent case not dealing with Montana's medical review panel,⁴¹ the same court held that the right to bring a civil action for personal injuries is a fundamental right and that the statutory scheme affecting that right "must be measured by a strict scrutiny test."⁴² This suggests that, had Linder framed his complaint in the declaratory judgment action differently, for example, as a right to file a civil action for personal injuries, the court may have had a more difficult time overcoming his argument. It also raises the question of how the court reasonably differentiated between the right of access to the courts and the right to file a civil action for personal injuries.

The argument that mandatory medical review panels deny free access to the courts has been addressed by virtually every state which has passed screening panel legislation. The majority of jurisdictions have upheld the legislation in the face of this argument.⁴³ However, some of the jurisdictions which have declared medical screening panels to be constitutional have language in their constitutions which differs from that found in Wyoming's constitution.⁴⁴ Still other states which have upheld the legisla-

34. *Id.* § 9-2-1506(b).

35. *Id.* § 9-2-1511(c).

36. The Montana Medical Legal Panel Act, MONT. CODE ANN. §§ 27-6-101 to -704 (1985).

37. 629 P.2d 1187 (Mont. 1981).

38. *Id.* at 1188.

39. *Id.* at 1190.

40. *Id.* at 1190-91.

41. *White v. State*, 661 P.2d 1272 (Mont. 1983).

42. *Id.* at 1274-75.

43. *Linder*, 629 P.2d at 1190.

44. See, e.g., ARIZ. CONST. art. II, § 110 (administered openly and without unnecessary delay); ALASKA CONST. art. I (no such provision); MD. CONST. art. 19; NEV. CONST. art. I (no such provision).

tion have medical screening panels which initiate proceedings *subsequent* to the filing of a lawsuit.⁴⁵

A minority of jurisdictions have declared medical review panels to be unconstitutional.⁴⁶ The argument chiefly accepted has been the *Linder* position that mandatory screening panels deny free access to the courts.⁴⁷

The state of Missouri has declared its medical screening panel act unconstitutional for this reason.⁴⁸ The case revolved around the actions of a circuit court judge for the city of St. Louis, Carl Gaertner. A minor and her parents had filed a malpractice action against a physician and a children's hospital. Judge Gaertner overruled a defense motion for dismissal⁴⁹ for noncompliance with Missouri's new medical review panel act.⁵⁰ A provisional writ of prohibition was issued against Judge Gaertner, but the Missouri Supreme Court vindicated the judge, quashed the writ and declared the entire act unconstitutional.⁵¹

In so doing the court said that:

[t]he right of access to the courts is said to trace back to the Magna Charta. It has been held to be an aspect of the right to petition the government contained in the first amendment to the United States Constitution. Most importantly it is explicitly preserved in the Constitution of Missouri.

We hold that Chapter 538 violates Art. I, § 14 of the Constitution of Missouri and must be held invalid for that reason.⁵²

The Declaration of Rights, Article I of the Wyoming Constitution, states that "[a]ll courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or *delay*."⁵³ Since by its own terms the Wyoming Medical Review Panel Act is nonbinding on the parties, it cannot be argued that the panel's actions constitute "the administration of justice." The delay caused by the imposition of the review panel is substantial. The act itself envisions a delay of at least four months to complete the review panel process.⁵⁴ Statistics from the state of Montana show that in 1984 it took an average of 144 days, well over four months, for the review panel to

45. See, e.g., N.Y. JUD. LAW § 148-a (McKinney 1983 & Supp. 1987); ILL. REV. STAT. ch. 110, §§ 2-1012 to - 1020 (Supp. 1986).

46. *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980); *State ex rel. Cardinal Glennon Mem. Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979); *Wright v. Central DuPage Hosp. Ass'n.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

47. E.g., *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980); *State ex rel. Cardinal Glennon Mem. Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979).

48. *Cardinal Glennon*, 583 S.W.2d at 110.

49. *Id.* at 108.

50. Mo. REV. STAT. §§ 538.010 to .080 (Supp. 1976).

51. *Cardinal Glennon*, 583 S.W.2d at 110-11.

52. *Id.* at 110 (citations omitted).

53. WYO. CONST. art. I, § 8 (emphasis added).

54. WYO. STAT. ANN. § 9-2-1509(a) (Supp. 1986).

dispose of a claim.⁵⁵ If a comparable hearing process occurs in Wyoming,⁵⁶ review panels taking up to 150 days or more may be common. Such a lengthy delay in getting to court may also constitute an absolute denial of court access in that the entire review panel process, although mandatory, is not subject to appellate review.

As previously stated, the Wyoming Medical Review Panel Act tolls the statute of limitations during the review panel process. However, this does not answer the constitutional question of undue delay. A potential lengthy delay is still present regardless of the fact that the statute of limitations is not running. Thus in the extreme situation where the head of a household with little or no insurance has been injured at the hands of a negligent malpractitioner, going through the review panel process could bring about utter financial ruin. Such a scenario has been depicted by at least one commentator, and is well within the realm of possibility.⁵⁷

The Wyoming Supreme Court already faces constitutional challenges to the medical review panel act. At least one challenge to the Act has been mounted in the form of a declaratory judgment action brought in the Wyoming District Court for Albany County.⁵⁸ The case has been certified to the Wyoming Supreme Court and should be decided sometime this year.

Aside from the potential constitutional difficulty, the Wyoming act is fraught with procedural problems and loopholes. These could lead to inequitable manipulation of the process or additional delays. For example, the Act calls for all panelists to be residents of the state.⁵⁹ Section 9-2-1508(a) states that:

[i]f feasible one (1) member of the panel shall be from the health care provider's profession or specialty. In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, if feasible one (1) member shall be from the health care provider's profession or specialty and one (1) member shall be from the profession or specialty of the health care provider named as employer, master or principal.⁶⁰

Attempting to find a specialist in the health care provider's field or waiting until a specialist can attend a hearing could well build additional delays into an already torpid system. It is possible that Wyoming's rural char-

55. G. ZINS, MONTANA MEDICAL-LEGAL PANEL 1977-1985: REPORT OF THE PANEL 11 (Aug. 1986) (copy on file at Land & Water Law Review office).

56. In a few respects, the Montana Medical Legal Panel Act, *supra* note 36, differs from Wyoming's Act: the Montana statute is considerably longer, it is administered through the Montana Supreme Court and funded by a surcharge on health care providers. The substantive provisions of the Wyoming and Montana acts, however, are nearly identical: a claimant must go through the panel process before filing a lawsuit; the panel is composed of both attorneys and physicians and the panel's decisions are not binding nor admissible in evidence. Thus the hearing process is nearly the same in both states.

57. Stanfield, *An Empty and Cruel Promise*, 7 COFFEE-HOUSE NEWSLETTER 1 (Summer 1986).

58. Hoem v. State, No. 87-41 (Wyo. filed Feb. 4, 1987).

59. WYO. STAT. ANN. § 9-2-1508(a) (Supp. 1986).

60. *Id.*

acter and low population may cause further delays in the panel process. Other sparsely populated states such as Idaho, Nebraska and North Dakota have experienced lengthy panel delays for this reason.⁶¹ Also, many specialists have complained of overwork on the panels because of the frequency with which they are called to serve.⁶²

Even though Section 9-2-1508(a) is not mandatory, the problem is that, if specialists in a given field are not called upon to serve on the panels, the effectiveness and accuracy of panel determinations may be significantly reduced. In such a situation neither the prospective plaintiff's claim nor the health care provider's defense may be given adequate consideration.

The listing and selection of panelists also pose potential problems. The Wyoming State Bar and the licensing agency of the health care provider compile the lists of attorneys and physicians who may serve as panelists.⁶³ Any member of the state bar can ask to be on the list of prospective panelists. It is conceivable that the list given to the director could contain a substantial number of defense bar or insurance company lawyers. Conversely, the medical professional list could contain doctors who frequently serve as plaintiff's expert witnesses in malpractice litigation. In either case, the parties may not get a fair and impartial hearing.

Even if the lists of potential panelists *do* represent an adequate cross-section of attorneys and health care providers, the unfettered discretion placed in the director's hands could lead to unfavorable results. Under the statute the director is not forced to observe any criteria for selection of the panelists.⁶⁴ A biased director could select panelists whom he thinks may render a decision favorable to the director's viewpoint. Even upon disqualification the replacement panelists are again selected by the director.⁶⁵

The Act's implementing regulations give no further guidance regarding panel selection criteria. In fact, the regulations are drafted by the director and are not subject to approval by the Wyoming Supreme Court.⁶⁶ The Montana Act mandates that regulations passed pursuant to the statute be subject to supreme court veto.⁶⁷ The state of Montana has attempted to check the director's power by having the supreme court administer the panel.⁶⁸ Wyoming would be wise to place this quasi-judicial proceeding under supreme court supervision.

61. Carlin, *Screening Panels—Do We Need a Second Opinion?* 9 LEGAL ASPECTS OF MEDICAL PRACTICE 6 (Aug. 1981).

62. *Id.*

63. WYO. STAT. ANN. § 9-2-1508(b) (Supp. 1986).

64. *Id.*

65. *Id.* § 9-2-1508(d).

66. *Id.* § 9-2-1505(b).

67. MONT. CODE ANN. § 27-6-204 (1985). The author does not suggest that the current director of the Wyoming Medical Review Panel Act is biased or unfair, but only points out that the director, a political appointee, wields an excessive amount of power.

68. *Id.* § 27-6-104.

At least one commentator has objected to the Wyoming Act, claiming that the standard of proof borne by a claimant in the panel hearing is greater than the burden borne by a plaintiff in court.⁶⁹ The act calls for the panel to find "substantial evidence" that the act or acts occurred.⁷⁰ Of course, a plaintiff's burden in a civil case is one of a preponderance of the evidence. Standards of clear and convincing evidence or of proof beyond a reasonable doubt are not applicable to medical malpractice cases.

The term "substantial evidence" is not defined by the statute.⁷¹ Substantial evidence is defined in the regulations as:

such relevant and competent evidence as a reasonable mind might accept as adequate to make a finding of fact. It may be less than the weight of the evidence but it cannot be clearly contrary to the overwhelming weight of the evidence. More is required than a mere scintilla of evidence or suspicion of the existence of a fact to be established.⁷²

A cursory reading of these words indicates that less than a preponderance of the evidence is required. However, the phrase "[i]t may be less than the weight of the evidence"⁷³ raises more questions than it answers. This could mean that if evidence on both sides of the case is counterbalanced, "substantial evidence" may be less than one-half. If this is the case then the drafters of the regulations should have plainly said, "it may be less than a *preponderance* of the evidence." Failure to use this standard, well-understood legal concept may lead to future interpretational problems. Although the substantial evidence standard is generally well understood on the level of appellate review, it may be questionable that it has the same meaning at an evidentiary hearing. One can also question whether or not it is proper to use an appellate standard of review at an evidentiary hearing.

WILL THE ACT FULFILL ITS PURPOSES?

Perhaps the most serious problem with the Wyoming Medical Review Panel Act is that it may not fulfill its professed purposes. One such purpose is to prevent the filing of spurious claims.⁷⁴ Yet the Act also provides that "[t]he panel's decision is not binding upon any party."⁷⁵ It seems nearly impossible to reconcile these two provisions. By the act's own terms a claimant who receives a negative decision from the review panel can still proceed in court against the health care provider. Conversely, a health care provider found liable by the panel can still refuse settlement and proceed with its defense. In these situations of inflexible parties, the money

69. Stanfield, *supra* note 57, at 4.

70. WYO. STAT. ANN. § 9-2-1510(a).

71. *Id.* § 9-2-1503.

72. PANEL RULES, *supra* note 17, ch. I, § 3(a)(xi), at 29.

73. *Id.*

74. WYO. STAT. ANN. § 9-2-1502.

75. *Id.* § 9-2-1510(d).

and time savings envisioned by the drafters of the Act is not only lost but is compounded by the additional expense and delay of the review panel.

Neither party can introduce any evidence of the panel's findings in court, nor can they call any panel member to testify about the panel's deliberations.⁷⁶ Thus, although the drafters of the law did not wish to have it declared unconstitutional as an invasion on the province of the jury, any teeth which the Act might have had were pulled before it left the senate chambers.

Since the Act was passed in the wake of a perceived medical malpractice insurance crisis, its ultimate goal is to slow the increase in malpractice premiums. One way to reduce premiums is to promote the early settlement or disposal of claims, thus avoiding long and costly trials. This is the other express purpose of the Act.⁷⁷ However, legal scholars and judges have been critical of the inducement to settle which review panels purport to create. Consider the remarks of a New York judge who handled malpractice cases both before and after New York passed its mandatory screening panel act:

Plaintiffs who have received a unanimous panel recommendation have been notorious in demanding extremely high settlements and in proceeding to trial with increased determination to carry the case to verdict or costly settlement. Concomitantly, where defendants have received a unanimous finding of no liability, they have been rarely willing to discuss settlement.⁷⁸

Thus, in some jurisdictions, the review panel experience has been an abysmal failure. In Rhode Island the mandatory review panels had been unable to secure early settlement or disposal of claims. Until the Rhode Island Act was declared unconstitutional,⁷⁹ the screening panels had only resolved 57 of 266 controversies.⁸⁰

The state of Montana has had its screening panel act in place for nine years. Statistics from this jurisdiction indicate that often the review panels do not promote early claim settlement. Through 1985, six percent of all Montana claims resulted in a tie vote of the panel.⁸¹ Only sixty-one percent of all claims filed against health care providers resulted in a unanimous vote of the panel.⁸² The tie vote is precluded in Wyoming because five members sit on each convened panel.⁸³ If these statistics from our northern neighbor hold true for Wyoming, up to four out of ten panels could have substantial internal disagreement over liability. With panelists straddling each side of the fence, it is difficult to see how such a time consuming process can promote effective settlement.

76. *Id.* §§ 9-2-1511(b), -(c).

77. *Id.* § 9-2-1502.

78. 1 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶ 1.07, at 1-28 (1986).

79. *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983).

80. 1 D. LOUISELL & H. WILLIAMS, *supra* note 78, ¶ 1.07, at 1-27.

81. G. ZINS, *supra* note 55, at 5.

82. *Id.*

83. WYO. STAT. ANN. § 9-2-1508(a) (Supp. 1986).

These statistics demonstrate that reasonable minds can differ over facts presented to them. In such cases it fits our American system of civil justice to allow juries of peers to make the ultimate decision, not to place such determinations in the hands of medical and legal professionals.

"Tort reforms" such as mandatory medical review panels were legislated in response to an alleged medical malpractice insurance rate crisis.⁸⁴ It logically follows that if malpractice lawsuit filings decrease with the imposition of review panels and other "tort reforms", a somewhat analogous decrease in malpractice insurance rates should follow. Such has not been the case. Nationwide, a United States Senate committee has acknowledged that malpractice premiums have risen 73% from 1975 to 1982.⁸⁵ This is despite the fact that over thirty states have passed some form of "tort reform" in the mid-1970's.⁸⁶ Such statistics suggest that although mandatory review panels and other "tort reforms" may have reduced the number of malpractice cases filed, they may not have succeeded in reducing or even slowing the increase of medical malpractice premiums.

A POSSIBLE SOLUTION

Recent innovations in the court system may be applicable to malpractice litigation. These techniques fall under the general rubric of "alternative dispute resolution" (ADR).⁸⁷

One such method which may be well suited to malpractice litigation is the summary jury trial. This is a non-binding process which may be utilized under both the Federal⁸⁸ and the Wyoming Rules of Civil Procedure.⁸⁹ It has been seldom used in the past, but recently federal courts in Montana and other jurisdictions have held summary trials either by the bench or a jury. Many cases have been disposed of with positive and cost saving results for both litigants.⁹⁰

The format of a summary trial is similar to that of a traditional civil trial. Introductory remarks are made by the judge, who then explains the summary trial process to the venire panel. The lawyers for each party will have interviewed witnesses and will have been asked to condense the evidence and present it in a narrative form. Prolonged voir dire of the potential jurors is discouraged, and counsel are asked to provide limited voir dire questions in advance. The jury is empaneled with full knowledge of the summary trial process, yet members do not know that their decision

84. See Comment, *supra* note 1, at 203-05.

85. *Defensive Medicine and Medical Malpractice: Hearing Before the Senate Committee on Labor and Human Resources*, 98th Cong., 2d Sess. 10 (1984) (statement of Patricia Danzon, Ph.D.). At the same time, doctors fees and hospital bed fees have increased even more than malpractice premiums. *Id.*

86. See *supra* note 5 and accompanying text; see also D. LOUISELL & H. WILLIAMS, *supra* note 78, ch. 1.

87. For an excellent treatment of ADR, see 69 JUDICATURE 253-314 (1986).

88. FED. R. CIV. P. 16(b).

89. WYO. R. CIV. P. 16.

90. Lambros, *The Summary Jury Trial—An Alternative to Resolving Disputes*, 69 JUDICATURE 286, 290 (1986).

is nonbinding. Depending on the complexity of the case and the number of parties involved, each counsel is allotted a fixed time for case presentation. This can range from one to three hours or more, which is split up into time limits for presentation, rebuttal and surrebuttal.⁹¹

After a verdict is reached, the jurors are often polled on the quality of the litigants' arguments and positions. This is a springboard toward settlement because each party can evaluate the case with the assistance of detached and neutral observers.⁹²

The variations and modifications available under the summary jury trial are endless. In an extremely technical case where expert testimony is absolutely required, the judge could limit each party to one expert witness in the summary trial. The process is adaptable and should be strongly advocated by the judge in medical malpractice cases as well as any other complex or lengthy litigation.

Even though both the summary jury trial and the actions of the panel are nonbinding, the summary jury trial may be preferable for at least two reasons. First, the summary jury trial is a substantive portion of the lawsuit; it is undertaken after binding discovery has occurred. This makes for a meaningful and informed summary trial which then serves as a strong springboard toward settlement negotiations. Without the benefit of discovery in the review panels, the inducement to settle is diminished because it becomes more difficult to adequately evaluate the merits of a claim or defense. Conversely, if discovery procedures are introduced into the review panel process, then a claimant is further delayed in even being able to file a malpractice action.

The other reason to prefer the summary jury trial is that it takes place before a duly empaneled jury. The reactions of the summary jury will likely be very similar to those of a jury in a full-scale civil trial. However, the reactions of four professionals and one layman may not be a very accurate barometer to forecast damages awarded by a jury. The damage assessments of the summary jury will more adequately reflect the amount of a binding verdict and therefore promote equitable yet serious settlement negotiations.

The architect of the summary jury trial, Judge Thomas Lambros⁹³ has reported that "virtually all of more than 100 suits handled through this method have been concluded without the need of a full trial."⁹⁴ These views were echoed by the Judicial Conference of the United States, which debated the merits of ADR in our court system. The Conference endorsed

91. *Id.* at 288-89.

92. *Id.* at 289-90.

93. Thomas D. Lambros is a United States District Judge in the Northern District of Ohio.

94. Lambros, *supra* note 90, at 290.

the "use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases."⁹⁵

CONCLUSION

The Wyoming Medical Review Panel Act was passed as an effort to stem rising malpractice costs. The Wyoming Legislature, however, may not be too certain about its actions, because the repeal of the Act has been debated only six months after its passage.⁹⁶

In many cases the Act may not fulfill its purposes of screening out frivolous claims or promoting early settlement. Other states which have passed such legislation have not seen the anticipated reduction in medical malpractice insurance rates. If the Act should be kept at all, it needs to be under the supervision of the Wyoming Supreme Court, as Montana has done.

Wyoming has taken a step in the wrong direction with the imposition of mandatory medical review panels. We need to have faith in our court system that it will work to protect both victims of malpractice and physicians who practice medicine with a high degree of skill. The civil justice system should not be stagnant, however, and should seek to improve itself with the use of new yet proven techniques.

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95. *Id.*

96. House Bill No. 176, 49th Legis., Gen. Sess. (Wyo. 1987) (Legislative Serv. Office No. 87LSO-0571.01).