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## NOTE

### MEDICAL MALPRACTICE MEDIATION PANELS: A CONSTITUTIONAL ANALYSIS

#### I. INTRODUCTION

The recent medical malpractice crisis—essentially the great increase in medical malpractice insurance rates<sup>1</sup>—has resulted in much legislation aimed at halting the increase in rates and ensuring that all medical personnel and facilities can obtain adequate insurance.<sup>2</sup> Although it is arguable that the laws benefit the entire public (as potential patients) by keeping medical fees reasonable and ensuring sufficient medical care,<sup>3</sup> it is the relatively small group of society, comprised of the medical community and their insurers, that actively seeks lower insurance rates and greater protection against malpractice claims.<sup>4</sup> It is clearly not in the injured patient's interest to limit or make more remote the negligent doctor's or hospital's liability. In addition, any prelitigation mediation system adds to a plaintiff's financial burden in litigating a malpractice suit.<sup>5</sup> Therefore, there are competing interests for the legislature to resolve: the need to keep malpractice insurance rates under control and the right of every person to have his claims decided fairly and correctly.<sup>6</sup>

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1. The increase in both the number of malpractice cases and the amounts of jury awards has caused the increase in insurance rates. Morris, *The Rise of Medical-Liability Suits*, in *The Best of Law & Medicine* 70/73, at 171 (1974); Comment, *Pre-trial Screening of Medical Malpractice Claims Versus the Illinois Constitution*, 10 J. Mar. J. Prac. & Proc. 133, 133-34 (1976) [hereinafter cited as John Marshall]; see ch. 37, § 1(1)(a)-(1)(b), 1975 Wis. Laws 33.

2. See Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 *Fordham L. Rev.* 1003, 1077-84 (1977).

3. Most states claim a public policy interest as a justification for this legislation. No. 638, § 15, 1975 Ark. Acts \_\_\_\_ (“[L]ack of adequate malpractice insurance by physicians and dentists constitutes an immediate danger to the health, safety and welfare of the people of the state of Arkansas.”); ch. 278, § 1, 1976 Idaho Sess. Laws 953 (“It is the declaration of the legislature that appropriate measures are required in the public interest to assure that a liability insurance market be available to physicians and hospitals . . . It is, therefore, further declared to be in the public interest to encourage nonlitigation resolution of claims against physicians and hospitals by providing for prelitigation screening of such claims by a hearing panel as provided in this act.”); Memoranda of the Executive Department and the Governor of New York, 1975 N.Y. Laws 1599, 1739 (The purpose of the statute is “[t]o deal comprehensively with the critical threat to the health and welfare of the State by way of diminished delivery of health care services as a result of the lack of adequate medical malpractice insurance coverage at reasonable rates.”); ch. 37, § 1(k), 1975 Wis. Laws 34.

4. Some legislatures have recognized this special interest purpose. See, e.g., N.M. Stat. Ann. § 58-33-2 (Interim Supp. 1976).

5. If a settlement is not reached at the panel stage, a trial will be conducted as before. The overall cost is higher since the panel procedure adds time and expense for both plaintiff and defendant.

6. Since the jury system has historically been the method of determining cases fairly and correctly, contrary panel decisions would be considered per se unfair and incorrect. See generally DeVito, *Medical-Malpractice Legislation, 1975-76*, 176 N.Y.L.J., Dec. 22, 1976, at 1, col. 1;

The attempted remedial legislation has taken many forms,<sup>7</sup> but an effective cost reducer is the mediation panel, or, in the alternative, arbitration.<sup>8</sup> The main function of these two systems is ultimately the same: quick disposition of all medical malpractice claims. Arbitration replaces the trial process and substitutes a panel of arbitrators to recommend an equitable, binding solution. On the other hand, medical malpractice mediation panels are used at the onset of litigation to screen out unmeritorious claims and to encourage settlement of valid ones, and do not supplant the normal trial process. In the event that no disposition can be agreed upon, or where there exists some purely factual dispute, it is hoped that trials can proceed more quickly and efficiently.<sup>9</sup> As a result of savings in litigation, insurance costs would be steadied or lowered.

Although court-created and bar-medical association-sponsored mediation panels have existed in limited form for a number of years,<sup>10</sup> statutorily-

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Note, *The New Mexico Medico-Legal Malpractice Panel—An Analysis*, 3 N.M.L. Rev. 311 (1973) [hereinafter cited as *New Mexico*].

7. E.g., Fla. Stat. Ann. §§ 769.42, .45, .53 (West Cum. Supp. 1976) (guarantee of minimum insurance, burden of proof for the standard of care, joint underwriting association); N.M. Stat. Ann. §§ 58-33-6, -25 (Interim Supp. 1976) (maximum recovery, patient's compensation fund); N.Y. Civ. Prac. Law § 214-a (McKinney Cum. Supp. 1976) (statute of limitations); N.Y. Ins. Law §§ 681, 682(3), 695 (McKinney Cum. Supp. 1976) (insurance association, guarantee of minimum insurance, authorization for participation in federal re-insurance plan); N.Y. Pub. Health Law § 2805-d (McKinney Cum. Supp. 1976) (informed consent definition); Ohio Rev. Code Ann. § 2307.43 (Page Supp. 1976) (maximum recovery).

8. Report of the Special Advisory Panel on Medical Malpractice, State of New York 127 (1976) [hereinafter cited as *Special Advisory Panel*]. Expressed as a percentage of insurance costs, the mediation panel was expected to account for nearly half (5%) of a total savings of 12% produced by the 1975 amendments. Ch. 109, 1975 N.Y. Laws 134. The reason that panels are expected to achieve such a great savings is the high amount of every insurance dollar that is paid to attorneys and the relatively small amount that actually compensates injured patients. John Marshall, *supra* note 1, at 133 (60% for litigation costs); Note, *The Montana Plan for Screening Medical Malpractice Claims*, 36 Mont. L. Rev. 321, 322 (1975) (50% for litigation costs and 25% for compensation of patients).

9. New Mexico, *supra* note 6, at 321. See also Bergen, *Mediation of Liability Claims*, in *The Best of Law and Medicine 70/73*, at 177-78 (1974) [hereinafter cited as *Bergen*]. It is a practice of many insurance companies to settle minor dubious claims for amounts less than what a full trial might cost, thus saving money in the long run. The Bergen Record, Feb. 17, 1977, at C-1, col. 1. Insurers, no doubt, hope that panels will cost less and eliminate the need to settle.

10. For a discussion of the well-known Pima County, Arizona, panel and the Southern California Hospital plan, see J. Waltz & F. Inbau, *Medical Jurisprudence* 83 (1971); Comment, *Rx for New York's Medical Malpractice Crisis*, 11 Colum. J.L. & Soc. Prob. 467 (1975) [hereinafter cited as *Columbia*]. The major defect of these plans was their limited jurisdiction. Another such plan was the Stevens Panel, upon which the New York statute was modeled. For a detailed discussion of this plan, see Comment, *The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation*, 2 Hofstra L. Rev. 261 (1974).

One of the reasons for instituting such a plan was the "conspiracy of silence" which prevented many plaintiffs from obtaining an expert witness. For example, for many years in New Jersey there was little chance of a successful suit on account of an "unwritten but absolutely inviolate agreement among members of the medical profession that they would not appear voluntarily as

created panels resulted almost exclusively from legislation in 1975 and 1976 as a response to the malpractice insurance crisis. The statutes vary widely among the states in both structure and effectiveness.<sup>11</sup> There are, however, some common, serious constitutional questions—involving the right to trial by jury, equal protection, and due process—regarding many of these statutes.<sup>12</sup> The object of this Note is to examine each of these constitutional issues in relation to the mediation panel statutes. After discussing the constitutional problems, a model malpractice mediation plan within constitutional limits will be proposed.

## II. PANELS AND ARBITRATION SYSTEMS

There are now twenty-seven states with recently established systems for reviewing potential or actual malpractice claims: twenty-one have prelitigation mediation panels,<sup>13</sup> three offer arbitration systems,<sup>14</sup> and three have

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expert witnesses against a fellow member of the medical profession." Karcher, *Malpractice Claims Against Doctors: New Jersey's Screening Procedure*, 53 A.B.A.J. 328, 328 (1967). Other commentators have cited this as a reason for creation of these panels. See, e.g., Soden, *Medical Malpractice: A Panel*, Fed'n Ins. Counsel Q., Winter 1969-70, at 13, 14 (plaintiffs won only two cases in forty years in New Hampshire) [hereinafter cited as Soden]; New Mexico, *supra* note 6, at 312-13. Although New Jersey in 1959 and New Hampshire in 1971 established their voluntary panels in order to provide for an expert witness in certain situations, only five states recently enacting statutes which have created panels have included such provisions. Ariz. Rev. Stat. § 12-567(J) (Supp. 1976); Ill. Ann. Stat. ch. 110, § 58.8(5) (Smith-Hurd Cum. Supp. 1977); Mass. Ann. Laws ch. 231, § 60B (Michie/Law. Co-op Cum. Supp. 1977); Nev. Rev. Stat. § 41A.090 (1975); N.M. Stat. Ann. § 58-33-23 (Interim Supp. 1976). For a discussion of the conspiracy of silence, see W. Curran & E. Shapiro, *Law, Medicine, and Forensic Science* 581-89 (2d ed. 1970).

11. See appendices I-III. These statutes apply uniform rules to all courts within each state. The aim is to counter in a coherent fashion what is invariably a statewide problem. The New Jersey court rule, since it has statewide application, will be discussed in addition to all the statutes creating voluntary, mandatory, and discretionary panels. Statutes that merely validate medical services contracts which include arbitration provisions or the use of general arbitration rules, but do not institute any new procedures, will not be discussed since they do not present the same constitutional questions.

12. Some commentators have noted the possible constitutional issues, but have withheld any opinion. See, e.g., Columbia, *supra* note 10, at 506 n.275; Note, *The Florida Medical Malpractice Reform Act of 1975*, 4 Fla. St. U.L. Rev. 50, 76 n.144, 85 (1976) [hereinafter cited as Florida].

13. Alaska Stat. §§ 09.55.535-.536 (Cum. Supp. 1976); Ariz. Rev. Stat. § 12-567 (Cum. Supp. 1976); Del. Code tit. 18, §§ 6803-6814 (Cum. Supp. 1976); Fla. Stat. Ann. §§ 768.133-.134 (West Cum. Supp. 1976), noted in Florida, *supra* note 12, at 76-89; Idaho Code §§ 6-1001 to 1013 (Cum. Supp. 1977); Ill. Ann. Stat. ch. 110, §§ 58.2-.10 (Smith-Hurd Cum. Supp. 1977) (held unconstitutional), noted in John Marshall, *supra* note 1, at 133-47; Ind. Code Ann. §§ 16-9.5-9-1 to 9-10 (Burns Cum. Supp. 1976), noted in Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 Val. U.L. Rev. 303, 307-12 (1976); Kan. Stat. §§ 65-4901 to 4908 (Cum. Supp. 1976); La. Rev. Stat. Ann. § 40:1299.47 (West Cum. Supp. 1977); Mass. Ann. Laws ch. 231, § 60B (Michie/Law. Co-op Cum. Supp. 1977); Mo. Ann. Stat. §§ 538.010-.080 (Vernon Cum. Supp. 1976); Neb. Rev. Stat. §§ 44-2840 to 2847 (Cum. Supp. 1976); Nev. Rev. Stat. §§ 41A.010-.090 (1975); N.H. Rev. Stat. Ann. §§ 519-A:1 to A:10 (1974); N.M. Stat. Ann. §§ 58-33-1 to 33-28 (Interim Supp. 1976); N.Y. Jud. Law § 148-a (McKinney Cum. Supp. 1976); R.I. Gen. Laws §§ 10-19-1 to 19-10 (Supp. 1976); Tenn. Code Ann. §§ 23-3401 to

hybrid arbitration-panel plans.<sup>15</sup> Several states which provide mandatory or voluntary panels also offer the parties the option of binding arbitration.<sup>16</sup>

As mentioned above, arbitration is generally a final, binding method of resolving a claim. Mediation panels need not provide a final resolution; however, in many instances, a panel is available subsequent to the rendering of its decision to aid the parties in reaching a final settlement for damages or discontinuance.<sup>17</sup> Overall, the panel provides flexibility,<sup>18</sup> which accounts for its greater acceptance among those states which provide some alternative to litigation.<sup>19</sup>

Certain general characteristics appear in these systems. The majority are mandatory, either as a prerequisite to the filing of the complaint or as a requirement prior to trial, but after the action has been commenced in court.<sup>20</sup> Three states have taken an intermediate position by specifically providing that panels are to be used *only* in the discretion of the presiding judge.<sup>21</sup> A relatively small number of states have established voluntary

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3421 (Cum. Supp. 1976); Va. Code §§ 8-911 to 922 (Cum. Supp. 1976); Wis. Stat. Ann. §§ 655.02-.21 (West Spec. Pamphlet 1977); ch. 219, §§ 2-11 to 20, 1976 Haw. Sess. Laws 523, 526-30; ch. 434, §§ 40-47, 1976 Neb. Laws 151, 165-70.

The New Jersey system, instituted by court rule, is also a prelitigation panel. N.J. Civ. Prac. R. 4:21. Since this rule has been in effect for some time and served as a forerunner of the statutorily created panels, it will also be discussed.

14. Ohio Rev. Code Ann. §§ 2711.21-.24 (Page Supp. 1977) (held unconstitutional), *noted in Note, Ohio's Rx for the Medical Malpractice Crisis: The Patient Pays*, 45 U. Cin. L. Rev. 90, 101-02 (1976); S.D. Compiled Laws Ann. §§ 21-25B-1 to 25B-26 (Supp. 1977); Vt. Stat. Ann. tit. 12, §§ 7001-7008 (Cum. Supp. 1976). Since arbitration is an often mentioned alternative to the panel and has many similar constitutional problems, and because compulsory arbitration for all small claims has been tried in New York as well as in other states, such systems will also be discussed and compared.

15. Ark. Stat. Ann. §§ 34-2601 to 2612 (Cum. Supp. 1975); Md. Cts. & Jud. Proc. Code Ann. §§ 3-2A01 to 2A09 (Cum. Supp. 1976); Pa. Stat. Ann. tit. 40, §§ 1301-.301-.309 (Purdon Cum. Supp. 1977).

16. See appendix I.

17. E.g., Fla. Stat. Ann. § 768.133(8) (West Cum. Supp. 1976); S.D. Compiled Laws Ann. § 21-25B-21 (Supp. 1977).

18. Most arbitration panels are composed of professional arbitrators, usually attorneys. See 5A Moore's Federal Practice ¶ 53.03, at 2921-22 (2d ed. 1975). On the other hand, every screening panel includes at least one member of the medical profession. See appendix II. The purpose of a medical expert on the panel is to provide an intelligent and objective, rather than sympathetic, opinion on the question of liability.

19. Most states were not inclined to substitute such a system for the trial process in order to lessen litigation costs, especially since such a procedure is constitutionally suspect as a violation of the right to trial by jury and due process. See part III(A) & (C) *infra*.

20. See appendix I. The establishment of mandatory panels may be a reaction to the decreasing use of voluntary court-created and bar-medical association-sponsored panels. See note 10 *supra* & note 195 *infra* and accompanying text.

21. See appendix I. It is apparent that a judge has similar discretion in those states that require panel hearings after a complaint has been filed. The possibility that a motion to dismiss or a motion for summary judgment would be granted, and a trial and a pretrial panel thereby avoided, is sufficient reason to grant judicial discretion over the utilization of panels. Illinois

systems.<sup>22</sup> Voluntary arbitration, because of its finality, is more useful than a voluntary non-binding panel which tends only to waste time and expense prior to litigation.<sup>23</sup> Furthermore, if validly agreed upon as an alternative to a jury trial,<sup>24</sup> voluntary systems avoid most of the constitutional pitfalls of the mandatory systems.<sup>25</sup>

Most arbitration involves professional arbitrators, usually attorneys.<sup>26</sup> A typical mediation panel includes a member of the legal profession,<sup>27</sup> at least one member of the medical profession,<sup>28</sup> and some nonlegal, nonmedical, noninsurer member,<sup>29</sup> and is intended to provide for a fair, intelligent, and efficient decision-making body. In essence, the panel can be likened to a smaller, more sophisticated jury<sup>30</sup> or group referee.<sup>31</sup> Although the composition of the panel presents mostly practical and political, as opposed to constitutional, questions,<sup>32</sup> it is also relevant to the issue of whether nonjudicial officers may, under state constitutions, perform judicial functions.

The jurisdiction of arbitration and mediation panels varies from state to state. Some states limit the use of and access to panels to cases involving physicians and/or hospitals.<sup>33</sup> Others use the ambiguous term "health care providers."<sup>34</sup> Logically, this term could be defined narrowly, and limited to direct health care providers such as physicians, nurses, and hospitals, or defined broadly, and extended to indirect providers such as pharmacists and

requires a certain time lapse after the filing of the complaint, perhaps for the foregoing reason. Ill. Ann. Stat. ch. 110, § 58.3 (Smith-Hurd Cum. Supp. 1977).

22. See appendix I.

23. See ABA, Interim Report of the Commission on Medical Professional Liability 4-5 (1976).

24. See *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1976), for a discussion of the questions of duress and adhesion contracts relating to voluntary agreements to arbitrate.

25. See part III(A) & (C) *infra*.

26. See note 18 *supra*.

27. The attorney or judge usually decides motions and often has no vote unless there is a tie among the other members of the panel. See appendix II.

28. Usually the medical member specializes in the same field as the defendant; when there are numerous defendants, provision is made for which specialty is chosen. *E.g.*, N.Y. Jud. Law § 148-a(3)(b) (McKinney Cum. Supp. 1976).

29. See appendix II.

30. Juries are generally not considered sophisticated. Florida, *supra* note 12, at 77; Comment, *Medical Malpractice in North Carolina*, 54 N.C.L. Rev. 1214, 1247 (1976); Documentary Supplement, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 Wm. & Mary L. Rev. 693, 710 (1972) [hereinafter cited as Documentary Supplement].

31. Referees or masters are common in the federal court system. See Fed. R. Civ. P. 53.

32. At least one court has found no legal right infringed upon by the absence of a specialist on the panel. *Kletnieks v. Brookhaven Memorial Ass'n, Inc.*, 53 App. Div. 2d 169, 385 N.Y.S.2d 575 (2d Dep't 1976). See also note 212 *infra*.

33. *E.g.*, Idaho Code § 6-1001 (Cum. Supp. 1977); Ill. Ann. Stat. ch. 110, § 58.2 (Smith-Hurd Cum. Supp. 1977) (held unconstitutional); Ohio Rev. Code Ann. § 2711.21(A) (Page Supp. 1977) (held unconstitutional).

34. See appendix II.

lab technicians. While definitions provided by the states vary widely,<sup>35</sup> only a few include such obvious health care providers as dentists and nurses.<sup>36</sup> Arbitrary designations of this nature have led to claims of discrimination from both excluded and included parties.<sup>37</sup>

The operation of medical malpractice panels also varies widely. Only a slight majority allow the decision of the panel into evidence at a subsequent trial.<sup>38</sup> With one exception,<sup>39</sup> these states provide that the decision of the panel is not binding upon the jury; rather, the jury is to ascribe to it whatever weight it chooses.<sup>40</sup> Some states place an affirmative burden upon the party losing at the panel stage to reject the panel's findings or be bound by them after a certain time lapse.<sup>41</sup> Such provisions affect a party's right to a trial by jury. There are numerous other operational aspects which do not directly affect a party's constitutional rights.<sup>42</sup>

Clearly, the medical malpractice mediation system has no "typical" plan. The majority of the states' plans include the following elements: (1) the plans are panels rather than arbitration systems; (2) the plans are mandatory rather than voluntary; (3) the decision of the panel is admissible at trial; and (4) the jurisdiction of the panel is over "health care providers." However, only five of twenty-seven states have all four of these provisions.<sup>43</sup> These elements raise

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35. *E.g.*, the panels in New Mexico, Virginia, and Wisconsin apply to only a few persons. N.M. Stat. Ann. § 58-33-3(A) (Interim Supp. 1976); Va. Code § 8-911(i) (Cum. Supp. 1976); Wis. Stat. Ann. § 655.001(8) (West Spec. Pamphlet 1977). Those in Maryland, Missouri, and Tennessee apply to a larger category of defendants, including nurses and technicians. Md. Cts. & Jud. Proc. Code Ann. § 3-2A01(e) (Cum. Supp. 1976); Mo. Ann. Stat. § 538.010(2) (Vernon Cum. Supp. 1976); Tenn. Code Ann. § 23-3402(4) (Cum. Supp. 1976). Other states provide no definition.

36. *See* note 35 *supra*. One justification may be that fewer cases arise with these parties as defendants.

37. *See* part III(B) *infra*.

38. *See* appendix III.

39. Md. Cts. & Jud. Proc. Code Ann. § 3-2A06(d) (Cum. Supp. 1976). This statute provides that the decision of the panel is presumptively correct, but not binding. The party against whom the panel decided has the burden of disproving the decision.

40. *E.g.*, N.Y. Jud. Law § 148-a(8) (McKinney Cum. Supp. 1976).

41. *See* appendix III.

42. Most states have some maximum time limitation on the panel's jurisdiction. *See, e.g.*, Kan. Stat. § 65-4904 (Cum. Supp. 1976). This provision is used to ensure that claims do not last forever in the panel stage where no resolution may result. Additionally, most states regulate discovery in order to expedite the panel hearing. *E.g.*, ch. 219, § 2-13, 1976 Haw. Sess. Laws 527 (prohibits all discovery). States also differ on the following questions: (1) whether an expert is provided either for the benefit of the panel or for a plaintiff successful at the panel stage; (2) whether a member of the panel may be called to testify at trial; and (3) the nature and basis of the panel's decision. *See* appendix III. Regarding the provision of expert witnesses, *see* note 10 *supra*. Most states have considered each of these aspects important enough to warrant statutory specification of the desired approach. Generally, all panels provide for informal hearings with no strict adherence to the rules of evidence. *E.g.*, Kan. Stat. § 65-4903 (Cum. Supp. 1976).

43. The states are Indiana, Louisiana (whose statute is nearly identical to Indiana's), Massachusetts, Nebraska, and Tennessee. Ind. Code Ann. §§ 16-9.5-9-1 to 9-10 (Burns Cum.

certain constitutional questions which apply to most malpractice screening systems.

### III. CONSTITUTIONAL CONSIDERATIONS

While most legislatures believe that it is in the best interest of the public to encourage prelitigation disposition of claims, some plaintiff-patients do not agree.<sup>44</sup> Challenges to the constitutionality of medical malpractice panels can be made on several grounds: the right to trial by jury, equal protection, due process of law, and either the performance of nonjudicial functions by judges or the performance of judicial functions by nonjudicial personnel.<sup>45</sup>

#### A. Right to Trial by Jury

The seventh amendment, which guarantees the right to trial by jury on the federal level, has not been made applicable to the states through the fourteenth amendment.<sup>46</sup> However, every state except Colorado and Louisiana<sup>47</sup> has provided a jury trial guarantee in civil cases through its state constitution. The typical provision states that this right shall remain "inviolable" in all cases where it was guaranteed at common law.<sup>48</sup> Thus, the plaintiff in a medical malpractice action, alleging injury as a result of tortious conduct, has a right to trial by jury. The two questions presented here are: first, whether any mandatory panel procedure as a *prerequisite* to a jury trial is a burden on the right to trial by jury; and second, whether the admissibility of the panel's findings and decision into evidence at trial usurps the jury's function. If there

Supp. 1976); La. Rev. Stat. Ann. § 40:1299.47 (West Cum. Supp. 1977); Mass. Ann. Laws ch. 231, § 60B (Michie/Law. Co-op Cum. Supp. 1977); ch. 434, §§ 40-47, Neb. Rev. Stat. §§ 44-2840 to 2847 (Cum. Supp. 1976); Tenn. Code Ann. § 23-3401 to -3421 (Cum. Supp. 1976). See appendices I-III.

44. In states where experts are hard to obtain, such plans should be more acceptable. See Soden, *supra* note 10, at 14 (only two successful plaintiffs in forty years in New Hampshire); Columbia, *supra* note 10, at 499 (82% of plaintiffs took binding option to obtain expert). However, the greater availability of experts today has lessened the attractiveness of these plans and even New Jersey's plan is not now working. Columbia, *supra* note 10, at 495 n.189.

45. Courts in only four states have specifically ruled upon the constitutionality of a mandatory panel or arbitration system—Florida, Illinois, New York, and Ohio. These states are evenly split on the question. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977) (constitutional); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (unconstitutional); *Comiskey v. Arlen*, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (2d Dep't 1976) (constitutional); *Halpern v. Gozan*, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976) (constitutional); *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. C.P. 1976) (unconstitutional). Only in Illinois are panel findings inadmissible at a subsequent trial. See appendix III.

46. 1 C. Antieau, *Modern Constitutional Law* § 7:17, at 549 (1969).

47. Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 Val. U.L. Rev. 303, 326 n.134 (1976). See also Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 Fordham L. Rev. 1003, 1079 n.510 (1977). The discussion in part III(A), dealing with the violation of the right to trial by jury, would not be applicable to the Louisiana panel.

48. See, e.g., Fla. Const. art. 1, § 22; N.Y. Const. art. 1, § 2; Ohio Const. art. 1, § 5.



is a burden on plaintiff's constitutional right, possible justifications must be considered.

### 1. Prerequisite of a Panel

The initial challenge to the constitutionality of the panels concerns the burden placed on an individual's right to a jury trial by mandatory compliance with any panel procedure prior to trial.<sup>49</sup> No state substitutes entirely the panel procedure for a trial, as is common in workmen's compensation and no-fault statutes.<sup>50</sup> However, although the right to trial by jury is preserved, the parties must comply with certain procedural requirements before they may exercise that right. Such a precondition might appear unconstitutional.

The Florida Supreme Court has rejected such a conclusion. In *Carter v. Sparkman*,<sup>51</sup> that court reversed a trial court holding that Florida's statute violated the right to "timely access to the courts"<sup>52</sup> guaranteed by the state constitution. The lower court had reasoned that any mandatory prerequisite to trial by jury burdened that right.<sup>53</sup> The supreme court majority, however, held that this pretrial requirement of mandatory compliance with the malpractice panel procedure, though at the "outer limits of constitutional tolerance," was not a burden and was constitutional.<sup>54</sup> The concurring opinion likened the mediation panel to a pretrial settlement conference which, though possibly harsh to some parties, was not unreasonable.<sup>55</sup>

At least one court has accepted the theory that a mandatory prerequisite to trial by jury can be an impermissible burden upon that right. The Illinois Supreme Court in *Wright v. Central Du Page Hospital Association*<sup>56</sup> affirmed the trial court's declaratory judgment that the Illinois statute requiring a hearing by a malpractice panel prior to trial was unconstitutional. The supreme court based its decision, however, on the invalidity of the form of

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49. Voluntary systems do not involve the same constitutional question. In addition, voluntary binding panel or arbitration plans often provide that the plaintiff be made aware that he has given up his jury trial right. See, e.g., S.D. Compiled Laws Ann. § 21-25B-3 (Supp. 1977).

50. Workmen's compensation statutes provide for employer liability as a *quid pro quo* for exclusivity of remedy. 2A A. Larson, Workmen's Compensation Law § 65.10, at 12-4 (1976). Such a procedure has been held constitutional. *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972). No-fault statutes provide a similar *quid pro quo* of immediate, unquestioned payment of all costs regardless of fault. It should be noted that, as with the malpractice panel, Illinois has found the no-fault concept unconstitutional. *Grace v. Howlett*, 51 Ill. 2d 478, 282 N.E.2d 474 (1972).

51. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977), *rev'g* 43 Fla. Supp. 107 (Cir. Ct. 1975). Another circuit court had found the statute unconstitutional. *Solomon v. Memorial Hosp.*, 43 Fla. Supp. 105, 107 (Cir. Ct. 1975). Apparently, this case was not appealed.

52. *Solomon v. Memorial Hosp.*, 43 Fla. Supp. 105, 107 (Cir. Ct. 1975). This presents the same issue as the infringement of the right to trial by jury resulting from a mandatory prerequisite to a jury trial.

53. *Sparkman v. Carter*, 43 Fla. Supp. at 109.

54. 335 So. 2d at 806.

55. *Id.* at 807 (England, J., concurring).

56. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

that state's pretrial procedure, and concluded: "Because we have held that these statutes providing for medical review panels are unconstitutional, it follows that the procedure prescribed therein as the *prerequisite* to jury trial is an impermissible restriction on the right of trial by jury . . ." <sup>57</sup> The pretrial procedure at issue involved a malpractice panel composed of a judge, an attorney, and a physician. The Illinois Supreme Court found that the judge was not devoting full time to his judicial duties and that nonjudicial members of the panel were performing a judicial function. <sup>58</sup> The composition of the panel was, therefore, unconstitutional, and as a result any decision-making by such a panel was held an unconstitutional procedure that necessarily improperly burdened an individual's right to trial by jury. The court, however, limited its holding to situations where a panel's composition was constitutionally defective: "[W]e do not imply that a valid pretrial panel procedure cannot be devised." <sup>59</sup> Accordingly, the *Wright* decision cannot be construed as precedent for finding a mandatory prerequisite to a jury trial an impermissible burden on that right.

There is further support for the validity of mandatory pretrial panels. The right to a trial by jury obviously does not guarantee a jury trial on every set of facts. <sup>60</sup> In addition to jury trials, masters and special referees are often used to hear certain issues and to render findings of fact and conclusions of law. <sup>61</sup> This precondition to a jury trial is not an unconstitutional burden on the right to trial by jury. <sup>62</sup> Indeed, the reference of a particular matter to a master is as much a part of the litigation procedure as a pretrial conference. <sup>63</sup>

Analogous to the medical malpractice mediation system are workmen's compensation and no-fault insurance plans. Each substitutes a new procedure for a trial by jury; nevertheless, each system has been found to be constitutional. <sup>64</sup> Initially, only voluntary workmen's compensation plans were held constitutional. <sup>65</sup> Subsequently, even compulsory workmen's compensation plans were held constitutional based upon the implied consent of the parties. <sup>66</sup>

57. *Id.* at 324, 347 N.E.2d at 741 (emphasis added).

58. See notes 168-75, 181-82 *infra* and accompanying text.

59. 63 Ill. 2d at 324, 347 N.E.2d at 741.

60. Indeed, if a jury trial were necessary in every case, motions to dismiss or motions for summary judgment would rarely, if ever, be granted.

61. See, e.g., Fed. R. Civ. P. 53.

62. *Irving Trust Co. v. Trust Co.*, 75 F.2d 280, 282 (2d Cir. 1935). See also 5A Moore's Federal Practice ¶ 53.14[3], at 3037-38 (2d ed. 1975).

63. One judge has likened the medical malpractice panel procedure to a pretrial conference. *Carter v. Sparkman*, 335 So. 2d 802, 807 (Fla. 1976) (England, J., concurring), *cert. denied*, 429 U.S. 1041 (1977).

64. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917) (workmen's compensation); *Montgomery v. Daniels*, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975) (no-fault). *Contra*, *Grace v. Howlett*, 51 Ill. 2d 478, 282 N.E.2d 474 (1972) (no-fault). See generally, 1 A. Larson, *Workmen's Compensation Law* § 5.20 (1972); Hart, *The Constitutionality of the New York State Comprehensive Automobile Insurance Reparations Act*, 43 Fordham L. Rev. 379 (1974) [hereinafter cited as Hart].

65. See Comment, *No-Fault Insurance in Kentucky—A Constitutional Analysis*, 62 Ky. L.J. 590, 593 (1974) [hereinafter cited as Kentucky].

66. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

One commentator has suggested that the implied consent theory can be used to justify mandatory no-fault statutes.<sup>67</sup> Thus, in the case of automobile accidents, the reasoning is that one impliedly consents to the provisions of a state's no-fault statute by driving on its roads. The application of similar logic to the medical malpractice liability situation, however, has little merit, since a person who is ill must submit to a doctor's care.

Although compulsory workmen's compensation and no-fault plans completely eliminate any jury trial in applicable circumstances, they do not impermissibly burden an individual's right to trial by jury.<sup>68</sup> Therefore, the prerequisite of a panel—a nonbinding proceeding—should not burden that right. While the analogy is compelling, it must be remembered that countervailing sacrifices are made by each party in workmen's compensation (strict employer liability for exclusivity of the workman's remedy) and no-fault (immediate and certain compensation for both parties without regard to fault) cases which justify the disregard of the right to trial by jury. There appears to be no compensating sacrifice on the part of the medical profession to offset a burden on a patient's constitutional rights. It is unlikely, then, that the comparison with workmen's compensation and no-fault cases alone would justify the view that the prerequisite of a panel is not a burden on an individual's right to trial by jury. However, if considered in conjunction with the argument that panels do not replace the trial process, but merely postpone it, and if the panel meets all other constitutional tests,<sup>69</sup> the fact that a mandatory prerequisite to a jury trial exists should not of itself unconstitutionally burden the right to trial by jury.

## 2. Admissibility of Decision as Evidence

The panel's decision is, in some states, admissible into evidence at trial,<sup>70</sup> if there is no resolution as a result of the panel's consideration of the claim. Although the statutes also provide that the decision of the panel is not binding,<sup>71</sup> it is questionable whether the jury will find adversely to the panel's decision. While the effect of a divided panel's opinion may be minimal, a unanimous decision may be considered controlling by the jury. In addition, the decision of one member of the panel—such as a judge or physician—may be given greater weight.<sup>72</sup> In these circumstances, the adverse effect on the

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67. Kentucky, *supra* note 65, at 595, 600-01.

68. See note 64 *supra* and accompanying text.

69. The procedure must also pass the tests of equal protection and due process, and not infringe upon any constitutional provisions requiring judges to devote full time to their judicial duties or prohibiting nonjudicial members from performing judicial functions. See part III(B)-(D) *infra* for a detailed discussion of these issues.

70. See appendix III. Some states limit the admissibility of decisions to unanimous ones, or to findings of liability and fact. However, this discussion has no applicability to states which do not provide for the admissibility of a panel's findings or decision into evidence at a trial. In those states the right to a jury trial will be an issue only if the panel is a mandatory prerequisite to trial. See part III(A)(1) *supra*.

71. See notes 38-41 *supra* and accompanying text.

72. For example, the jury may perceive the physician's opinion as more reasonable since he has more expertise in the area.

jury may result in a burden on the parties' right to trial by impartial jury.<sup>73</sup>

An Ohio trial court accepted this rationale and held that state's compulsory medical malpractice mediation system unconstitutional in *Simon v. St. Elizabeth Medical Center*.<sup>74</sup> In the words of the court, the procedure, which permitted introduction of the panel's findings into evidence at a subsequent trial, "effectively and substantially reduces a party's ability to prove his case, because that party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts."<sup>75</sup> The court further stated that "strings" on the right to trial by jury made it a "far less effective right" and that the testimony of the arbitrators would be "prejudicial."<sup>76</sup> The admissibility into evidence of the panel's findings was, therefore, the cornerstone of the Ohio court's dissatisfaction with the malpractice panel system. In this regard, the Ohio court did state, however, that a compulsory arbitration rule established by another Ohio state court was constitutional since the decision of the arbitrators was inadmissible at trial.<sup>77</sup> The *Simon* court did not object to the mandatory nature of the system, but to the admissibility of the panel's decision into evidence as a burden on the right to trial by jury.

Another objection to the admissibility of a panel's findings is that such evidence violates the "ultimate fact in issue" limitation on expert testimony.<sup>78</sup> Under this rule, while an expert is allowed to give his opinion regarding the applicable standard of care, he is not allowed to express his opinion as to liability, the ultimate question reserved for the jury. On the other hand, the expert's conclusion as to liability is usually apparent from his testimony regarding the standard of care.<sup>79</sup> For this reason, the Federal Rules of

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73. It has been suggested that in view of the weight juries have traditionally given to expert testimony, it is more than likely that an unfair decision of the panel will be carried over into a jury verdict. See, e.g., Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 Tul. L. Rev. 655, 681 (1976) ("[T]he prejudicial effect of an admissible, adverse panel report could be virtually impossible to overcome, thus carrying over an unjust panel determination into a judgment."); Note, *Ohio's Rx for the Medical Malpractice Crisis: The Patient Pays*, 45 U. Cin. L. Rev. 90, 102 (1976) ("jury may give undue weight to . . . findings"). For a discussion of whether juries have concurred with the panel's findings, see Documentary Supplement, *supra* note 30, at 720; New Mexico, *supra* note 6, at 323.

74. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. C.P. 1976). This case also held certain pleading requirements and maximum recovery limits unconstitutional. It should be noted that the Ohio system is labeled as arbitration; however, arbitration and panel systems present the same constitutional issue of violation of the right to trial by jury.

75. *Id.* at 168, 355 N.E.2d at 908.

76. *Id.* Several commentators have asserted that the admission of the panel's findings into evidence may be nearly impossible to overcome. See note 73 *supra* and accompanying text.

77. 3 Ohio Op. 3d at 169, 355 N.E.2d at 908-09.

78. The *Simon* court relied in part on this theory. *Id.* at 169, 355 N.E.2d at 908 (citing *Trebotich v. Broglio*, 33 Ohio St. 2d 57, 294 N.E.2d 669 (1973)). The "ultimate fact in issue" rule is not, of itself, an objection of constitutional dimensions. It is derived, however, from the right to trial by jury and the necessity not to infringe upon that right.

79. Most states provide that the majority opinion, dissenting opinion, and the vote count are

Evidence<sup>80</sup> and some state courts<sup>81</sup> have abolished the "ultimate fact in issue" rule. The notion that permitting this testimony would "usurp the power of the jury" has been considered "empty rhetoric."<sup>82</sup> It has been recognized that expert opinion is an aid to the jury, not an alternative to it.<sup>83</sup> Such considerations apply with equal force to the expert opinion of the medical malpractice panels. Of course, the opinion of a panel may have more weight than that of a single expert; nevertheless, the jury should still have the benefit of this information.

The view that the opinion of a medical malpractice mediation panel is merely some evidence and an aid to the jury has been accepted by at least two courts. In *Comiskey v. Arlen*,<sup>84</sup> after a New York trial court found that the admissibility of the panel's findings into evidence would "nullify plaintiff's constitutional right to a meaningful jury trial" since it was "unrealistic" to believe that the jury would do more than adopt the panel's findings,<sup>85</sup> the appellate court reversed, basing its decision on the historical independence of jurors.<sup>86</sup> This paralleled the reasoning of the only other New York case to have considered the issue, *Halpern v. Gozan*,<sup>87</sup> which, in praising the jury system, also cited the historical independence of jurors.<sup>88</sup> The *Halpern* court overruled an objection by the defendant to the introduction of the panel's unanimous decision into evidence and opined that if the judge properly instructs the jury regarding the panel's findings, a jury may find differently.<sup>89</sup> Since the panel's findings were not binding, and were given only "such weight as the jury . . . [chose] to ascribe to [them],"<sup>90</sup> there was found to be no unconstitutional infringement on the right to trial by jury.

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admissible and may be commented upon by counsel. See appendix III. Calling a panel member as a witness can help to ameliorate the impact of admissibility if the panelist's reasoning can be brought into question. See note 91 *infra*. However, few states permit a panelist to testify at trial. See appendix III.

80. Fed. R. Evid. 704.

81. *E.g.*, *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944); *Clifford-Jacobs Forging Co. v. Industrial Comm'n*, 19 Ill. 2d 236, 166 N.E.2d 582 (1960); *Dowling v. L. H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941); *Schweiger v. Solbeck*, 191 Ore. 454, 230 P.2d 195 (1951); Cal. Evid. Code § 805; Kan. Civ. Pro. Stat. § 60-456(d); N.J. Evid. R. 56(3)

82. 7 J. Wigmore, *Evidence* § 1920, at 17 (3d ed. 1940).

83. 11 Moore's Federal Practice § 704.10, at VII-66 (2d ed. 1975) ("Wisely, it seems to us, Rule 704 adopts a rational approach, which permits opinion testimony on ultimate issues, when helpful. This testimony will aid the trier, but not supplant nor invade his province, since it is the trier of fact who ultimately determines what weight to give the opinion testimony of the witness.")

84. 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (2d Dep't 1976).

85. *Id.* at 306, 390 N.Y.S.2d at 124.

86. *Id.* at 307, 390 N.Y.S.2d at 125.

87. 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976).

88. *Id.* at 759, 381 N.Y.S.2d at 748-49.

89. *Id.* at 759, 381 N.Y.S.2d at 748.

90. N.Y. Jud. Law § 148-a(8) (McKinney Cum. Supp. 1976). Every state that provides for the admissibility of the panel's decision uses the same formula with the exception of Maryland, where a panel finding is presumed to be correct and the burden is on the losing party to disprove it. Md.

Despite the reliance of the two New York cases on the jury's independence, one may indeed wonder whether a jury of laymen faced with a complex medical malpractice problem will find adversely to an expert panel's decision. A jury may be so overwhelmed by the panel's findings that the right to trial by jury—the right to an independent jury decision—will be severely eroded. Both proper and improper panel decisions may simply be carried over into a jury verdict. Nevertheless, although one party may stress the panel's decision, the other party is free to contradict the panel's findings and, in some states, question the panelists at the trial.<sup>91</sup> In addition, the party offering the panel's decision into evidence must still prove that it was correct.<sup>92</sup> Such is the procedure in federal and state courts when masters and special referees are used.<sup>93</sup> Thus, the United States Supreme Court has upheld the constitutionality of Federal Rule 53 which permits the use of masters even in jury cases.<sup>94</sup> The basis of the Court's decision has been interpreted as the ability of "the jury [to] accept or reject the master's findings as it sees fit . . ."<sup>95</sup> Since the statutes providing for malpractice screening panels use similar language, the admissibility of the panel's decision into evidence at trial should not, by analogy, impermissibly burden the right to trial by jury. Moreover, in most states panel decisions alone do not satisfy the burden of proof, as compared to a master's decision, which, if uncontradicted at trial, may be sufficient.<sup>96</sup> Similarly, the introduction into evidence of the panel's decision should also not be considered a usurpation of the jury's function. The jury still makes the final determination and must be satisfied by the proof offered at trial.

### 3. Possible Justifications

Although a compelling argument may be made that there is no burden on the constitutional right to trial by jury under either of the above theories, courts may yet find such a burden. In these circumstances, justifications for a burden on the right to trial by jury must be considered.<sup>97</sup> Two principal

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Cts. & Jud. Proc. Code Ann. § 3-2A06(d) (Cum. Supp. 1976). This presents an entirely different situation from the one considered by the New York and Ohio courts, and the constitutionality of such a rule is gravely suspect.

91. *E.g.*, N.Y. Jud. Law § 148-a(8) (McKinney Cum. Supp. 1976). A recent New York Supreme Court case has found this provision sufficient to justify the admissibility of the panel's decision without explanation or reasoning. Panelists called at trial could explain the decision. *Abrams v. Brooklyn Hosp.*, — Misc. 2d —, —, 398 N.Y.S.2d 114, 116 (Sup. Ct. 1977).

92. The panel's decision is only part of the evidence comprising the entire proof. Only in Maryland would this alone be sufficient to sustain a verdict. *See note 90 supra* and accompanying text. The usual provision that no presumption is drawn from the panel's decision is similar to that concerning masters in the Federal Rules. Fed. R. Civ. P. 53(e)(3).

93. *E.g.*, Fed. R. Civ. P. 53(e); Fla. Civ. Proc. R. 1.40(g). *Contra*, Cal. Civ. Proc. Code § 644. *See also* 5A Moore's Federal Practice ¶ 53.12[1], at 2998 (2d ed. 1975).

94. *Ex parte Peterson*, 253 U.S. 300 (1920).

95. 5A Moore's Federal Practice ¶ 53.14[3], at 3037 (2d ed. 1975).

96. *Id.* ¶ 53.14[4], at 3040.

97. The justification, of course, must be in response to a compelling state interest since a constitutional right is involved. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

theories can be offered to warrant burdening this right: the need for an expert and public policy.

Some attempt must be made to limit the steady increase in medical malpractice insurance rates and the resulting higher cost of medical care. A number of state legislatures have therefore relied on a public policy rationale—controlling the increase in malpractice insurance rates and medical costs—to support malpractice panels.<sup>98</sup> This justification was, however, rejected by the Ohio court in *Simon v. St. Elizabeth Medical Center*.<sup>99</sup> The court took note of the insurance crisis, but concluded that “in this Court’s opinion, there is no crisis situation, short of civil insurrection, sufficient to deprive, water down or make less valuable the right to seek redress of grievances . . . through the medium of a free and unfettered jury trial.”<sup>100</sup> Similarly, one commentator has espoused the public policy favoring jury trials as the basic reason for not replacing that system: “Clearly, the adoption of [malpractice panel] procedures is inconsistent with the spirit as well as the fundamental precepts of the traditional trial process; a process that has, in the overall, served us well.”<sup>101</sup> Such uncompromising adherence to the inviolate nature of the right to trial by jury does not allow for any infringement and characterizes the mediation panels as per se infringements susceptible of no policy justification. On the other hand, concern with the insurance crisis was sufficient to justify any possible constitutional burden imposed by automobile no-fault insurance plans.<sup>102</sup> However, any court viewing the right to trial by jury as strictly as the *Simon* court would accept no justification for burdening that right. Given these circumstances, it is questionable whether the public policy in favor of a reduction in insurance costs through a pretrial panel procedure would be sufficiently compelling to override the perceived infringement of a constitutionally-guaranteed jury trial right.

The other possible justification is the need for expert opinion in most medical malpractice actions and the historic difficulties in obtaining such an expert.<sup>103</sup> In other types of cases, masters or referees are used and their

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98. See note 2 *supra* and accompanying text.

99. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. C.P. 1976). The Ohio court, which was the only court to cite other cases dealing with the constitutional issues relevant to malpractice panel statutes, rejected both *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977), and *Halpern v. Gozan*, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976), as relying solely upon public policy. 3 Ohio Op. 3d at 171, 355 N.E.2d at 910-11. The Florida and New York cases had relied to some extent, but not exclusively, upon public policy. See 335 So. 2d at 805; 85 Misc. 2d at 755-56, 381 N.Y.S.2d at 746-47.

100. 3 Ohio Op. 3d at 172, 355 N.E.2d at 911-12.

101. DeVito, *Medical Malpractice Legislation, 1975-76*, 176 N.Y.L.J., Dec. 22, 1976, at 3, col. 2.

102. *Montgomery v. Daniels*, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975). Indeed, one of the New York courts upholding the constitutionality of that state’s malpractice panel statute cited *Montgomery* extensively and recognized that the insurance crisis caused by automobile accident cases, which led to no-fault statutes, was a reasonable legislative response. *Halpern v. Gozan*, 85 Misc. 2d 753, 757-58, 381 N.Y.S.2d 744, 747-48 (Sup. Ct. 1976).

103. See note 10 *supra*.

findings are admissible in evidence, but the final decision is left to the jury.<sup>104</sup> The need for a master is based upon the complexity of the action.<sup>105</sup> Since malpractice actions can be both complex and highly technical, the use of a master-type panel in malpractice actions is clearly justifiable. The jury would have the benefit of the panel's expert opinion to aid them in their resolution of what are generally difficult factual issues.<sup>106</sup> One possible safeguard of the independence of the jury's opinion would be to admit the expert's opinion "subject to the ruling of the court upon any objections . . .,"<sup>107</sup> as is the procedure when masters are used in federal court. Such a procedure would go far in ensuring an independent jury decision, since prejudicial, irrelevant, and unsupported findings would be kept from the jury. However, this safeguard has been adopted, in the malpractice panel area, by only two states.<sup>108</sup> Nevertheless, the same justification that supports the use of masters is equally applicable to the use of mediation panels in medical malpractice actions, and the need for expert opinion may be sufficiently compelling to override any claim that a party's constitutionally-guaranteed right to trial by jury is threatened.

#### 4. Summary

It is submitted that the use of medical malpractice panels as a prerequisite to a trial by jury is not an impermissible burden on a party's constitutional right. The right remains intact; only its fulfillment is postponed. Admitting a panel's findings and decision into evidence at trial, though it might appear to usurp the jury's function, does not burden the right to trial by jury because the ultimate decision is always left to the jury. The panel's decision is merely an aid to which the jury may give whatever weight it chooses. Nevertheless, where state courts find that there is a burden on the right to trial by jury, the burden may still be justified either by public policy considerations, such as the reduction of litigation and insurance costs, or by the need for an expert opinion. Since, however, such justifications may not be sufficiently compelling to justify a burden on a constitutional right, it appears that whether malpractice panels will be upheld will depend upon an initial finding that there is not a burden upon the right to trial by jury.

### B. Equal Protection

#### 1. Introduction

The question of whether a party has been discriminated against can be examined in three different ways: (1) are parties to *all medical malpractice*

104. See, e.g., Fed. R. Civ. P. 53; see Note, *Medical Malpractice Litigation: Some Suggested Improvements and a Possible Alternative*, 18 U. Fla. L. Rev. 623, 633 (1966). The Federal Rule has been held constitutional in jury cases. *Ex parte Peterson*, 253 U.S. 300 (1920).

105. 5A Moore's Federal Practice ¶ 53.05[2], at 2946-47 (2d ed. 1975).

106. The purpose of a master's report is that of an "expert witness" on the matter. *Id.* ¶ 53.14[4], at 3039.

107. Fed. R. Civ. P. 53(e)(3).

108. Del. Code tit. 18, § 6811(d) (Cum. Supp. 1976); Ohio Rev. Code Ann. § 2711.21(C) (Page Supp. 1977).



suits treated alike; (2) are *all parties* to a medical malpractice suit treated alike; (3) are all parties to *all malpractice* or *tort* suits treated alike? The extent of the jurisdiction granted by each statute, that is, to which actions the panel applies, will determine which question is appropriate.<sup>109</sup>

If a court should find, in answer to any of the above questions, that a party is being treated unequally as a result of state action, it must then consider justifications for this discrimination in order to determine whether or not there has been a denial of the constitutional guarantee of equal protection.<sup>110</sup> The mere existence of discrimination does not automatically violate equal protection.<sup>111</sup> Two tests are used to determine whether discrimination results in a denial of equal protection. If a fundamental right<sup>112</sup> or a suspect classification<sup>113</sup> is involved, there must exist a compelling state interest to justify the discrimination.<sup>114</sup> However, the compelling interest doctrine is inapplicable here since neither a fundamental right nor a suspect class is involved. The second test, which demands only a rational basis to permit discrimination, is therefore applicable.<sup>115</sup>

## 2. Analysis

The jurisdiction of the mediation panels varies greatly from state to state. While some are limited to physicians or to physicians and hospitals, others apply to all "health care providers" or all medical malpractice claims.<sup>116</sup> The result in most states is that only in some medical malpractice claims is a panel required or permitted, while in other perhaps equally complex and important cases, they are not. Furthermore, in states with limited panel jurisdiction it is possible, in a given case, that some defendants will be subject to a panel while others are not. The denial of a panel in one case involving one defendant and the requirement of a panel in a second case involving another defendant has the effect of placing similarly situated parties in unequal positions.<sup>117</sup> In order

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109. See appendix II.

110. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

111. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

112. The term "fundamental right" encompasses most of the specific guarantees of the first eight amendments of the Constitution. See Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 *Fordham L. Rev.* 215, 224-26 (1975). It is broader than this, however, since it also includes liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)); accord, *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting). Such liberties would include, *inter alia*, the right of privacy, see *Roe v. Wade*, 410 U.S. 113 (1973), and the right to travel, see *Dunn v. Blumstein*, 405 U.S. 330 (1972).

113. To date, only classifications based on race, alienage, national origin, or illegitimacy have been found inherently suspect. See *Jimenez v. Weinberger*, 417 U.S. 628, 631-32 (1974); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

114. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

115. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); see note 119 *infra*.

116. See notes 33-37 *supra* and accompanying text.

117. A typical approach to discrimination cases generally asks whether or not similarly

to be nondiscriminatory, the same procedure must be applicable to the parties to all medical malpractice actions. States that limit the jurisdiction of the panels to less than all of the parties, such as only to physicians and hospitals, would be discriminating against all other parties to medical malpractice actions.

Though no court has considered this formulation of the question of discrimination, it has been considered in the analogous situation provided by workmen's compensation statutes which typically exclude farm workers from their coverage.<sup>118</sup> Such a distinction has been found to be both rational and permissible.<sup>119</sup> Likewise, although no-fault insurance laws may not apply, for example, to motorcyclists,<sup>120</sup> such classifications are usually upheld as reasonable.<sup>121</sup> Accordingly, it may be argued that medical malpractice mediation statutes which establish jurisdiction only over physicians and hospitals make reasonable classifications intended to remedy the most costly problems in the medical malpractice area. Certain members of the medical profession are more often involved in expensive litigation. Thus, it would be reasonable to require panels in actions involving physicians and hospitals, but not dentists and nurses. On the other hand, a distinction between types of physicians or between physicians and hospitals may be too arbitrary to be rational. Most malpractice panel statutes would, it appears, satisfy the rational basis test and would not be violative of equal protection.

The second question directed to the equal protection issue centers on the specific action before the court and the parties to that action. In some states, where panels are prerequisites to litigation,<sup>122</sup> the plaintiff must allege compliance in his complaint. However, in certain circumstances defendants can successfully avoid a hearing before the panel.<sup>123</sup> Thus, while panels are mandatory for plaintiffs, they are optional for defendants, seemingly, a discrimination against the plaintiffs in the particular action.

Such an argument was accepted by the Florida Supreme Court in *Carter v.*

situated parties are treated in the same manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 367-68 (1886). The initial question therefore is whether plaintiffs who are claiming discrimination are similarly situated with other persons who are treated differently. If not, there can be no discrimination. B. Schwartz, *Constitutional Law* § 153, at 286-87 (1972). For the purposes of this Note, it is assumed that parties to a medical malpractice action, be they patients, doctors, hospitals, or even X-ray technicians, are in fact similarly situated by virtue of their involvement in the action.

118. *E.g.*, 26 U.S.C. §§ 3306(c)(1), (k) (1970); N.Y. Work. Comp. Law § 2(4) (McKinney Cum. Supp. 1976).

119. *Romero v. Hodgson*, 319 F. Supp. 1201, 1203 (N.D. Cal. 1970) (per curiam, *aff'd*, 403 U.S. 901 (1971). *Contra*, *Gallejos v. Glaser Crandell Co.*, 388 Mich. 654, 658, 202 N.W.2d 786, 791 (1972). *See also* 20 Wayne L. Rev. 179 (1973).

120. *E.g.*, N.J. Stat. Ann. § 39:6A-2(a) (West 1973).

121. *Hart*, *supra* note 64, at 397-98.

122. *See, e.g.*, Fla. Stat. Ann. § 768.133(1)(a) (West Cum. Supp. 1976).

123. Defendant's failure to respond terminates the panel's jurisdiction in some cases. *E.g.*, Fla. Stat. Ann. § 768.133(1)(c) (West Cum. Supp. 1976).

*Sparkman*.<sup>124</sup> The defendant-appellant in that case argued that all plaintiffs in medical malpractice actions were treated alike<sup>125</sup> and that regulation of this specific class was permissible.<sup>126</sup> The plaintiff, however, argued that the panels were discriminatory because, while mandatory for all plaintiffs, defendants could cooperate or not as they wished.<sup>127</sup> The Florida Supreme Court accepted the plaintiff's formulation of the appropriate test:<sup>128</sup> whether all parties to the particular action are treated alike. Nevertheless, although the statute appeared to be mandatory only for the plaintiffs, a result which would have been discriminatory, the court construed the statute so as to *effectively* force the defendant to comply with the panel procedure or have the fact of his noncompliance (with the possible accompanying inference of liability) admissible into evidence at trial.<sup>129</sup> As long as the panel was effectively mandatory for both parties, the court found no discrimination and therefore no denial of equal protection.

Here the question of distinguishing between medical defendants in separate actions does not arise as only one particular action is involved. Only the imposition of different requirements upon plaintiff and defendant would be discriminatory.<sup>130</sup> If a state requires a panel, it should be mandatory for both plaintiff and defendant.<sup>131</sup> As the court in *Carter v. Sparkman*<sup>132</sup> found, there appears to be no rational justification for permitting different treatment of parties to the same action. Because the medical malpractice insurance crisis resulted in increases in both medical malpractice insurance rates and the cost of medical care, it affects medical defendants and patient-plaintiffs equally. Therefore, it would be unreasonable to allow one a choice of compliance while the other is bound by law to comply. Any discrimination on this basis would thus be unreasonable and have no justification, and would result in a denial of equal protection.

Finally, almost every state employs panels for the sole purpose of screening

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124. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

125. Brief for Appellee, *Sparkman v. Carter*, 43 Fla. Supp. 107, 121 (Cir. Ct. 1975).

126. *Id.* at 120.

127. Brief for Appellant, *id.* at 113-14. Plaintiff argued that this would cause unnecessary delay and expense.

128. 335 So. 2d at 805.

129. *Id.* In the Fourth Department of the Appellate Division in New York, failure to appear can result in default. 22 N.Y.C.R.R. § 1028.5(c) (App. Div. 4th Dep't 1975). Failure of a party to answer may result in dismissal of the action or judgment against him, a stronger remedy than that provided for by statute. *Compare id.* § 1024.7(b) with N.Y. Jud. Law § 148-a(5) (McKinney Cum. Supp. 1976).

130. Plaintiffs can circumvent panels in New York by filing a complaint in district or county court instead of supreme court. *Ernst v. Good Samaritan Hosp.*, 86 Misc. 2d 694, 382 N.Y.S.2d 915 (Dist. Ct. 1976). This, however, is an exceptional situation.

131. The same reasoning should also apply to voluntary panels, where one party is offered the choice of using a panel or not.

132. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

medical malpractice claims,<sup>133</sup> a procedure generally not followed for other tort actions or other professional liability cases. This raises the question of whether parties to medical malpractice actions are discriminated against by a requirement which entails additional burdens of time and expense, beyond those required in similar nonmedical suits. It has been argued in an analogous situation that no-fault insurance plans create a difference between automobile accident and other tort cases. Such a difference has been considered permissible and, since it is reasonably related to the legislative purpose of remedying the specific problems of automobile accident cases, not violative of equal protection.<sup>134</sup>

The Ohio court in *Simon v. St. Elizabeth Medical Center*<sup>135</sup> rejected this rationale and found its statute unconstitutional. The court concluded that benefits, such as a pretrial panel hearing, which were not available to defendants in other tort cases, had been conferred on the medical malpractice defendants.<sup>136</sup> The court apparently found the appropriate class by which to judge discrimination to be the class of all parties to all tort actions.<sup>137</sup> However, acceptance of this rationale, comparing medical malpractice actions to all other tort actions, absolutely prohibits different procedures for different tort actions, an impractical and unworkable situation. Common variations in tort actions, such as the requirement of specific interrogatories in all motor vehicle accident cases and pleading and proving special damages in certain libel cases, would be discriminatory. On the other hand, it would seem that special provisions for certain tort actions and, in particular, for medical malpractice actions, would not be discriminatory simply because they are reasonable classifications.<sup>138</sup>

The characterization of medical malpractice actions as a separate class appears reasonable because of the severity of both the medical malpractice insurance crisis and the consequent decrease in adequate medical care. Thus, a Federal District Court of Tennessee has decided that, based upon the Tennessee legislature's finding of a need for a malpractice panel, there was a rational justification for the use of panel procedures only in medical malpractice actions.<sup>139</sup> That state's mandated compliance with the terms of its mediation statute as a condition to the filing of a complaint was held to be "a

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133. New Hampshire's panel requirement also applies to attorneys. N.H. Rev. Stat. Ann. § 519-A:2 (1974).

134. Hart, *supra* note 64, at 394-95.

135. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. C.P. 1976).

136. *Id.* at 167, 355 N.E.2d at 906. The reverse argument could also be used: since an adverse finding of the arbitration panel is admissible as evidence only in medical malpractice cases, there is an unconstitutional discrimination against medical malpractice defendants.

137. When deciding whether a party is discriminated against, the court must first determine the class to which the party belongs. Discrimination is then decided within this class. It appears that the most appropriate class here is that of all participants in medical malpractice actions.

138. Legislative enactments are presumed valid, unless shown to be arbitrary and unreasonable. *Nebbia v. New York*, 291 U.S. 502 (1934).

139. *Flotemersch v. Bedford County Gen. Hosp.*, 69 F.R.D. 556 (E.D. Tenn. 1975).

reasonable and appropriate condition to the bringing of a lawsuit of a specified kind or class . . . ."<sup>140</sup> The court found that "the basis of distinction [was] real" and held that "the condition imposed [pretrial panels in medical malpractice actions] has a reasonable relation to a legitimate object."<sup>141</sup> Amelioration of the medical malpractice insurance crisis may therefore be a legitimate public policy objective, and establishment of malpractice panels to deal with the insurance crisis caused by the rise in such suits would not result in a denial of equal protection.

### C. *Due Process*

In most mediation panel cases the claim of denial of substantive due process is identical to the claim of denial of equal protection and is based upon the inequality of plaintiff and defendant in the action.<sup>142</sup> Substantive due process ensures that the legislature exercises its police power in a nonarbitrary manner and that the laws it passes bear a reasonable relationship to a legitimate object.<sup>143</sup> To satisfy substantive due process, the exercise of a state's police power demands the same justification as does the denial of equal protection.<sup>144</sup> Procedural due process, on the other hand, involves those rights which are "so fundamental to the protection of justice and liberty that 'due process of law' cannot be accorded without it."<sup>145</sup> What is due process of law depends on the circumstances. It varies with the subject matter and the necessities of the situation. The issue here is whether the states must guarantee a trial de novo to a plaintiff in a medical malpractice action or whether states may limit him to a panel or arbitration hearing, subject only to an appeal.

As noted earlier,<sup>146</sup> there is a basic distinction between panels and arbitration. While panels attempt to discourage frivolous claims and encourage the settlement of meritorious ones,<sup>147</sup> arbitration attempts to settle all claims by totally replacing the trial process. As a result, arbitration systems more often involve a due process question. Although such systems are not as common as mediation panels in the medical malpractice area, they do exist in a number of states on either a voluntary or mandatory basis. In the case of voluntary

140. *Id.* at 558.

141. *Id.*

142. *See, e.g.,* Solomon v. Memorial Hosp., 43 Fla. Supp. 105, 106 (Cir. Ct. 1975); Sparkman v. Carter, 43 Fla. Supp. 107, 108-09 (Cir. Ct. 1975), *rev'd*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

143. *See* note 144 *infra*.

144. A denial of substantive due process must be justified by a rational basis in the circumstances under discussion. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *see* B. Schwartz, *Constitutional Law* § 100, at 165-66, § 153, at 288 (1972).

145. *Duncan v. Louisiana*, 391 U.S. 145, 212 (1968).

146. *See* notes 8-9 *supra* and accompanying text.

147. Since panels usually never replace litigation, there is no need to question the right to a trial de novo in that context.

arbitration, since the parties have consented to arbitration, there is no question of due process.<sup>148</sup> However, when compulsory arbitration (and compulsory panels, if limited appeal provisions common to arbitration are included) is involved,<sup>149</sup> the demands of due process become more difficult to fulfill.

Compulsory, final, and binding arbitration, without more, violates due process because it eliminates an individual's right to a judicial hearing.<sup>150</sup> In this respect, mere appellate review, on the grounds normally invoked to overturn an arbitrator's award,<sup>151</sup> may be sufficient. Since a judicial hearing would be provided by an appeal, due process would appear to be satisfied. Thus, in a case involving compulsory arbitration of a labor dispute, the New York Court of Appeals in *Mount St. Mary's Hospital v. Catherwood*<sup>152</sup> held that only limited judicial review of an arbitration decision is necessary.<sup>153</sup> In determining the constitutionality of compulsory arbitration under the Labor Law,<sup>154</sup> the court stated: "There is no doubt that the legislature may establish a tribunal other than a court, to hear and determine disputes even where substantial property rights are involved, but there must be due process of law, both substantive and procedural."<sup>155</sup> There must be a review of both the legal and factual basis for the arbitrator's decision in order to satisfy due process.<sup>156</sup> As long as a limited appeal is permitted, to allow a reviewing court to determine whether there is a reasonable basis to support the award, due process is satisfied.

More clearly relevant to the medical malpractice area is the New York pilot program of compulsory arbitration of small claims.<sup>157</sup> Recent decisions in that area are apposite here because of New York's proposed bill providing for limited review of arbitration awards for all medical malpractice claims under \$25,000.<sup>158</sup> In *Bayer v. Ras*,<sup>159</sup> a lower court held that a trial de novo after compulsory arbitration was guaranteed by the constitutional requirements of

148. *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 355, 133 Cal. Rptr. 775, 782 (1976); see note 25 *supra*.

149. Although the question of limited appeal will be discussed in the context of arbitration, where it more often arises, the same analysis holds true for a panel from which only appellate review is permitted.

150. *Dorchy v. Kansas*, 264 U.S. 286, 289 (1924); *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 542-44 (1922).

151. N.Y. Civ. Prac. Law § 7511(b) (McKinney 1963). The usual grounds for the reversal of arbitration awards enumerated by the statute are fraud, prejudice, abuse of power by the arbitrator, and noncompliance with the applicable statutory provisions.

152. 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970).

153. *Id.* at 506, 260 N.E.2d at 515, 311 N.Y.S.2d at 873.

154. N.Y. Lab. Law § 716 (McKinney 1977). This section governs employment agreements at hospitals. Medical care, the subject of malpractice suits, is not covered by the statute.

155. 26 N.Y.2d at 505, 260 N.E.2d at 514, 311 N.Y.S.2d at 871.

156. *Id.* at 507-08, 260 N.E.2d at 515-16, 311 N.Y.S.2d at 873-74.

157. 22 N.Y.C.R.R. § 28.2 (Jud. Conf. 1973).

158. N.Y.S. 977, 1975-76 Reg. Sess., § 1 (1975).

159. 71 Misc. 2d 464, 336 N.Y.S.2d 261 (Monroe County Ct. 1972).

due process as well as by the statute. This holding is in accord with the leading Pennsylvania case of *In re Smith*,<sup>160</sup> in which a compulsory arbitration plan for small claims was held constitutional as long as it preserved the right to a trial de novo.

Also analogous to the medical malpractice area is the automobile no-fault insurance law. In *Grace v. Howlett*,<sup>161</sup> the Illinois Supreme Court held that the right to trial was violated by that state's no-fault law, which denied both a trial de novo and an appeal of mandatory arbitration decisions in all cases involving claims less than \$3,000 in Illinois. Its decision was based in part on the fact that the circuit court, to which the appeal had been allowed, was essentially a court of original jurisdiction,<sup>162</sup> and therefore due process could only be preserved in that court by providing a trial de novo.<sup>163</sup>

The standard procedure for determining workmen's compensation cases, on the other hand, is that of a panel substituted entirely for a trial.<sup>164</sup> By reason of the countervailing sacrifices demanded of both parties (the employer's strict liability weighed against the exclusivity of the workman's remedy), the courts have generally held this procedure not to be a violation of due process.<sup>165</sup> Also, because this procedure is deemed similar to a voluntary agreement to arbitrate, it is distinguishable from compulsory arbitration.

It is submitted that in the malpractice area, when there is compulsory arbitration, the right to a full trial is guaranteed: an appeal subsequent to arbitration is insufficient. The Court of Appeals of New York, in holding that only an appeal was necessary to satisfy due process for compulsory arbitration under the Labor Law,<sup>166</sup> reasoned that voluntary and compulsory arbitration presented the same question. According to the court, the only additional review required on appeal of compulsory arbitration awards is one to examine if there is reasonable evidence to support the award. It should be emphasized, however, that *Catherwood* involved the labor field where arbitration provisions are now common and well established. In the malpractice litigation area, as in the small claims and no-fault areas, arbitration is a very recent development and one which should not totally replace the right to a full trial subsequent to a panel hearing. It therefore appears that the most reasonable approach is not the *Catherwood* approach, for voluntary arbitration is not equivalent to compulsory arbitration. However, where voluntarily agreed upon, arbitration may replace the litigation process and appellate review will be sufficient to satisfy due process. But when compliance with either arbitration or a mediation panel is compulsory, a complete rehearing in a trial de

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160. 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* *Smith v. Weisler*, 350 U.S. 858 (1955).

161. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

162. *Id.* at 490-91, 283 N.E.2d at 480-81. The Illinois constitution provides for appeal of administrative decisions to the circuit courts. Ill. Const. art. 6, § 9.

163. 51 Ill. 2d at 490, 283 N.E.2d at 480.

164. *E.g.*, N.Y. Work. Comp. Law § 140 (McKinney 1965).

165. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

166. *See* notes 152-53 *supra* and accompanying text.

novo may be necessary to satisfy the guarantee of the parties' right of due process.<sup>167</sup>

#### D. *Judicial Function*

Nearly every statute providing for a mediation panel or arbitration requires at least one judge or attorney to be a member of the panel<sup>168</sup> in addition to some medical member or members. The panel hears cases in a manner analogous to that of a trial; the panel's function therefore closely resembles a judicial function. On the other hand, most states provide in their constitution that judges are to devote full time to their judicial duties,<sup>169</sup> and that only judges are to perform judicial functions.<sup>170</sup> The first issue is whether the panel performs a judicial function, and, if it does, whether nonjudicial officers are impermissibly performing judicial functions. Secondly, if the panel performs a nonjudicial function, there is the contrary problem of whether judges are performing nonjudicial functions, and therefore not devoting full time to their judicial duties.

The initial issue to resolve is whether the panel performs a judicial function. However, in *Wright v. Central Du Page Hospital Association*,<sup>171</sup> the Illinois Supreme Court ignored this issue. In Illinois, panels are employed only *after* a complaint has been filed.<sup>172</sup> The court noted that, at this stage in the litigation, and despite the fact that the case is under the panel's jurisdiction, the case appears to fall in the judicial domain.<sup>173</sup> In stating that judges were not devoting full time to their judicial functions because they participated in such panels,<sup>174</sup> the court appeared to hold that panels were nonjudicial functions. At the same time, however, it held that the findings of fact and conclusions of law made by the physician and attorney on the panel, over the dissent of the judge, were an exercise of a judicial function by nonjudicial officers and therefore impermissible under the Illinois constitution, which vests original jurisdiction in the courts.<sup>175</sup> Inasmuch as the physician and attorney were found to be performing a judicial function and the judge, by the same conduct, was not, the holding is highly confusing and contradictory. It would seem that the proper approach to the resolution of the issue is to question first whether the panel itself is performing a judicial function.

167. The question of the admissibility of the panel's findings into evidence should be treated as a question of the infringement of the jury trial right, not due process. See part III(A) *supra*.

168. See appendix II. Only Indiana, Kansas, Louisiana, and Nebraska provide that the attorney be merely an advisor and have no vote. Ind. Code Ann. § 16-9.5-9-3 (Burns Cum. Supp. 1976); Kan. Stat. § 65-4901 (Cum. Supp. 1976); La. Rev. Stat. Ann. § 40:1299.47(c) (West Cum. Supp. 1977); ch. 434, § 41(1), 1976 Neb. Laws 166.

169. *E.g.*, Fla. Const. art. 5, § 18; Ill. Const. art. 6, § 13.

170. *E.g.*, Ill. Const. art. 6, §§ 1, 9.

171. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

172. See Ill. Ann. Stat. ch. 110, § 58.3 (Smith-Hurd Cum. Supp. 1977).

173. 63 Ill. 2d at 321-22, 347 N.E.2d at 739.

174. *Id.* at 322-23, 347 N.E.2d at 739-40. For a more technical discussion of "judicial function," see John Marshall, *supra* note 1, at 140-42.

175. Ill. Const. art. 6, § 1.



Because the Illinois court failed to ask the important initial question, it is unclear from its opinion whether or not the panel does perform a judicial function and what panel composition would therefore be permissible.

Further support for the position that panels fall into the judicial domain is evident in the only other cases to consider this issue. A lower Florida court found that the judge's participation as referee on a panel, application to which was a mandatory prerequisite to the filing of a complaint,<sup>176</sup> was not the exercise of a judicial function.<sup>177</sup> The lower court further held that the statute providing for the panel was unconstitutional, among other reasons, on this basis. The Supreme Court of Florida, reversing, did not address the issue. Perhaps the most logical position on this issue, and one urged by the appellant in that case, is that a judge as "judicial referee" is necessarily performing a judicial function.<sup>178</sup> This view presupposes that the panel performs a judicial function. The failure of the supreme court to address this question, while, at the same time, holding the statute constitutional, can be construed as acquiescence in the appellant's reasoning (i.e., the panel performs a judicial function).<sup>179</sup> It would seem reasonable to conclude that a mediation panel, although instituted prior to the filing of a complaint but as a mandatory prerequisite to such filing, would serve some type of judicial function. Since the panel is so closely tied to the litigation of the claim, is required before litigation may proceed, and follows rules of law, it would be at least a quasi-judicial proceeding.

Assuming, then, that all panels perform judicial functions, it necessarily follows that a judge on a panel performs a judicial duty.<sup>180</sup> This result resolves the constitutional issue of judges devoting full time to their judicial duties.

The question of nonjudicial members performing judicial functions is more difficult to resolve. If no judge is a member of the panel, the operation of the panel involves the appearance of impropriety. However, the presence of a judge on the panel does not itself eliminate the appearance of impropriety. For example, in *Wright*, which involved a panel composed of a judge, an attorney, and a physician, the physician's and attorney's opinion prevailed over the judge's dissent.<sup>181</sup> Although the reasoning in *Wright* led to contradictory results, the fact that the opinion of the panel was opposite to that of the judge is striking<sup>182</sup> and may have been a contributing factor to the court's distrust of that state's panel system.

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176. Fla. Stat. Ann. § 768.133(1)(a) (West Cum. Supp. 1976).

177. *Solomon v. Memorial Hosp.*, 43 Fla. Supp. 105, 107 (Cir. Ct. 1975); *Sparkman v. Carter*, 43 Fla. Supp. 107, 109 (Cir. Ct. 1975), *rev'd*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

178. Brief for Appellant, *Sparkman v. Carter*, 43 Fla. Supp. at 124.

179. In fact, a concurring opinion did adopt this conclusion. *Carter v. Sparkman*, 335 So. 2d 802, 807-08 (Fla. 1976) (England, J., concurring), *cert. denied*, 429 U.S. 1041 (1977).

180. This consideration is inapplicable if there is no judge on the panel.

181. 63 Ill. 2d at 322, 347 N.E.2d at 739-40.

182. *Id.*

In the event that the use of nonjudicial members on these panels is considered impermissible, possible justifications must be considered. Having a medical member on panels may be justified by the need for expert opinion in order to adequately interpret the medical facts. The use of laymen on the panel may be justified by analogy to the use of laymen on juries regularly employed to decide such cases.<sup>183</sup> Attorneys on the panel provide knowledge of the law and, when there is no judge on the panel, decide motions as judicial referees.<sup>184</sup> These justifications find some support in the common practice in federal<sup>185</sup> (and some state)<sup>186</sup> courts of using masters or referees to hear all or certain portions of cases and make findings of fact and conclusions of law.<sup>187</sup> Most often the masters are attorneys, but special masters with expertise in the area involved may be appointed.<sup>188</sup> Although state rules of procedure are often not as liberal as the federal rules, which would by analogy validate panels with attorney or physician members, the same reasoning could be used to argue the validity of the use of attorneys and physicians on medical malpractice panels in state courts. However, while attorneys and medical members would be allowed to serve because of their expertise, this justification cannot be used to support the presence of laymen on panels.<sup>189</sup> There is an additional practical justification for having nonjudicial members on the panel. If no one except judges could be panelists, each panel would simply serve as a pretrial conference<sup>190</sup> and would have little additional utility. In sum, while the composition of the panels can be changed to meet specific state requirements, the reasonableness and necessity of including nonjudicial members on mediation panels in complex medical malpractice actions is ample justification for such members performing judicial functions.

#### IV. MODEL PLAN

Medical malpractice mediation varies extensively among the states. While the more informal—and less effective—systems present few constitutional problems, others are quite strict and involve grave constitutional difficulties. A model plan in conformity with the constitutional considerations outlined above is offered to present some guidance as to what provisions may or should be included by a state in its panel system in order to produce the most effective and constitutionally acceptable prelitigation panel possible. In doing

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183. Indeed, Idaho refers to its panel as in the nature of a special civil grand jury. Idaho Code § 6-1001 (Cum. Supp. 1977).

184. See, e.g., Md. Cts. & Jud. Proc. Code Ann. § 3-2A05(c) (Cum. Supp. 1976); Pa. Stat. Ann. tit. 40, § 1301.308(b) (Purdon Cum. Supp. 1977).

185. See Fed. R. Civ. P. 53.

186. E.g., N.Y. Civ. Prac. Law §§ 4317-4320 (McKinney 1963); Ohio Rev. Code Ann. §§ 2101.06-.07 (Page 1976).

187. Fed. R. Civ. P. 53(c).

188. Fed. R. Civ. P. 53(a). See also 5A Moore's Federal Practice ¶ 53.03, at 2921-22 (2d ed. 1975).

189. But see note 183 *supra* and accompanying text

190. See *Carter v. Sparkman*, 335 So. 2d 802, 807 (Fla. 1976), (England, J., concurring), *cert. denied*, 429 U.S. 1041 (1977).

so, it is assumed that the basic jury trial system, which has worked well in tort litigation, should be preserved.

First, the mediation system should be of the panel type.<sup>191</sup> A panel provides for a quick hearing of the claim, allows settlement if the parties are so disposed, and leads to a more efficient trial, if settlement should prove impossible.<sup>192</sup> Arbitration, on the other hand, works to a binding solution and is based on compromise.<sup>193</sup> As a result, arbitration should be only an alternative, limited to those situations where there is voluntary agreement between the parties.<sup>194</sup>

Second, the panel should be mandatory for the simple reason that voluntary panels have been relatively unsuccessful.<sup>195</sup> As discussed above, mandatory panels would not appear to infringe upon the right to trial by jury.<sup>196</sup> Neither would the right to due process appear to be violated, provided that a trial *de novo*, and not merely appellate review, is guaranteed.<sup>197</sup> In addition, mandatory panels force all claims through the same procedures, resulting in lower litigation costs and, therefore, lower insurance rates.<sup>198</sup>

Third, the decision of the panel must be admissible in evidence at a subsequent trial. Without this provision, the panel is ineffective; parties will not have to prepare their cases and will not feel compelled to comply with panel requests. The admissibility of the panel's decision forces all parties to prepare fully, and, therefore, may account for the fact that there have initially been few settlements.<sup>199</sup> If trial results were consistent with panel results, however, this pattern should change.<sup>200</sup> Furthermore, it appears that allowing the decision of the panel into evidence does not violate the right to trial by jury because it does not usurp the jury's power to render a final decision.<sup>201</sup> The decision of the panel should be considered as some evidence on the issue of liability, but should not carry any inference or presumption of liability.<sup>202</sup>

191. There is a split of opinion among commentators as to the best format. See generally Baker, *Proposal for a Medical Malpractice Arbitration Plan Using Cleveland, Ohio as a Model*, 1972 Ins. L.J. 625, 627-28 (Arbitration has the best chance of acceptance by all.); Florida, *supra* note 12, at 77 (A screening panel is the best alternative.); Note, *Ohio's Rx for the Medical Malpractice Crisis: The Patient Pays*, 45 U. Cin. L. Rev. 90, 101 (1976) (Arbitration has the widest support.).

192. See notes 17-19 *supra* and accompanying text.

193. *Id.*

194. The American Bar Association agrees and so recommends. See note 23 *supra*.

195. See note 10 *supra* and accompanying text.

196. See part III(A)(1) *supra*.

197. See part III(C) *supra*.

198. There is always the possibility of increased costs since the panel may or may not be used in addition to the trial. However, this should be offset by a greater number of settlements.

199. Special Advisory Panel, *supra* note 8, at 27, 48, 210. Where a party is as fully prepared as he would be for trial, he might be reluctant to accept an adverse settlement suggested by a panel, because a trial will cost little more in terms of time and preparation.

200. It is unlikely that a party would incur the extra expense of a trial if it were fairly certain that the result would be the same.

201. See part III(A)(2) *supra*.

202. *Contra*, Md. Cts. & Jud. Proc. Code Ann. § 3-2A06(d) (Cum. Supp. 1976).

Such weight should be given to the decision as the jury chooses to ascribe to it, based upon the reasoning of the decision and all other evidence. As a safeguard against prejudice and confusion, however, the decision should be subject to review by the trial judge before being read to the jury,<sup>203</sup> as is the procedure for masters' reports.<sup>204</sup> Unanimity should not be required for admissibility, but the vote of the panelists should be made known to the jury, so that they may weigh each member's decision and give it whatever weight they choose. At trial, the parties should be allowed to call panelists as witnesses (with the possible exception of a judge who was a member of the panel),<sup>205</sup> to question them concerning the decision of the panel and any particular area of their expertise. This would further minimize the effect of the panel's decision on the jury and would provide at least one expert already familiar with the facts of the case.

Fourth, the jurisdiction of the panel should cover either all medical malpractice actions or an unlimited category of health care providers. In this way, most equal protection challenges could be avoided.<sup>206</sup> The panels, however, must be utilized only after a complaint has been filed so that a judge will determine whether a panel is appropriate or necessary. If the case is so minor that the cost of a panel would be an undue burden, the panel procedure should not be made available. In addition, cases which may be disposed of by motion to dismiss or by motion for summary judgment will obviate the need for a panel. If a panel is subject to a judge's order, it is in effect discretionary, a procedure which would permit a desired flexibility.

Fifth, the panel should be composed of a judge, an attorney, and at least one member of the medical profession.<sup>207</sup> Such a membership would provide a respectable, intelligent, and unbiased panel. Since the panel is activated after the complaint is filed and the parties are within the judicial domain, it is reasonably certain that the panel would perform a judicial function.<sup>208</sup> The use of nonjudicial members, on the other hand, is desirable for an effective panel and is justifiable for a number of reasons, including the practice of using masters and special referees in other types of pretrial proceedings.<sup>209</sup>

Other provisions which are included in the statutes of some states might add to the effectiveness of the panel. The panel's jurisdiction might be limited in time to six to nine months.<sup>210</sup> This would provide a reasonable time for discovery and preparation while helping to dispose of medical malpractice actions promptly. The mandatory hearing could itself be informal, but the decision of the panel should follow the law and be supported by adequate

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203. See notes 107-08 *supra* and accompanying text

204. See Fed. R. Civ. P. 53(e)(3).

205. There is the possibility of an appearance of impropriety in requiring judges to testify.

206. See part III(B) *supra*.

207. If possible, at least one medical member of the panel should be a specialist; otherwise, there should be a specialist as an additional panelist or consultant.

208. See part III(D) *supra*.

209. See notes 185-89 *supra* and accompanying text.

210. *E.g.*, Ind. Code Ann. § 16-9.5-9-3.5 (Burns Cum. Supp. 1976).

reasoning.<sup>211</sup> This procedure would allow the jury to question the basis of the panel's decision and, at the same time, inform the parties of their status so as to encourage an equitable settlement.

Other rules may be deemed necessary by a particular state, perhaps to satisfy a particular interest group.<sup>212</sup> However, the guidelines set forth above provide a basic procedure for screening medical malpractice claims that is both effective and constitutional.

## V. CONCLUSION

The medical malpractice screening panel can be an effective tool in controlling the increasing litigation in the malpractice field. The constitutional guarantees of right to trial by jury, equal protection, due process, and proper exercise of judicial function must, however, be preserved.<sup>213</sup> If the panels are intended merely to screen cases and to shorten the litigation process, they should be constitutionally acceptable. If decisions on the issue of liability and determinations of damages are admissible into evidence at trial and if the trial judge can exercise his discretion in overseeing this process, panels will be successful. Arbitration, the principal alternative to mediation panels and to litigation itself, appears constitutionally acceptable only where it is voluntary.<sup>214</sup> It must be recognized, however, that a completely voluntary approach cannot solve the growth in medical malpractice litigation.<sup>215</sup> Therefore, it is submitted that the best long-range constitutional solution to the current medical malpractice insurance crisis would be a mandatory medical malpractice screening panel similar to the proposed model panel.

*Edward F. Seavers, Jr.*

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211. *E.g.*, N.M. Stat. Ann. §§ 58-33-19(c), -20(c) (Interim Supp. 1976). *But see* *Abrams v. Brooklyn Hosp.*, — Misc. 2d —, —, 398 N.Y.S.2d 114, 116 (Sup. Ct. 1977) (reasoning not required).

212. Thus, in New York, plaintiff's attorneys demanded representation on the panel. *Martin, Critique of the Report of the Commission on Medical Malpractice*, in 1973 National Medicolegal Symposium 85, 86.

213. These constitutional rights must be preserved by the statutes or construed as such by the courts, as in *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

214. *See* notes 74-77, 146-67 *supra* and accompanying text.

215. *See* notes 10, 20-25 *supra* and accompanying text.

APPENDIX I.  
NATURE OF THE MEDIATION SYSTEM

STATE	PANEL	HYBRID	ARBI- TRATION	MANDATORY		VOLUNTARY	
				PRIOR TO COM- PLAINT	AFTER COM- PLAINT	PRIOR TO ACTION	DURING ACTION
ALAS.	X		(alt)		X <sup>a</sup>		
ARIZ.	X				X		
ARK.		X				X	
DEL.	X				X <sup>a</sup>		
FLA.	X			X			
HAW.	X			X			
IDAHO	X			X			
ILL.	X				X		
IND.	X			X			
KAN.	X				X <sup>a</sup>	X	
LA.	X		(alt)	X			
MD.		X		X			
MASS.	X				X		
MO.	X			X			
NEB.	X			X			
NEV.	X			X			
N.H.	X					X	
N.J.	X					X	X
N.M.	X			X			
N.Y.	X				X		
OHIO			X		X		
PA.		X		X			
R.I.	X				X		
S.D.			X			X	
TENN.	X				X		
VT.			X			X	
VA.	X		(alt)			X	X
WIS.	X		(alt)			X	X

a - discretionary with the judge

alt - alternative by voluntary agreement

APPENDIX II  
PANEL MEMBERS AND JURISDICTION

STATE	JUDGE	ATTY.	PHYS.	"HCP" <sup>g</sup>	LAYMAN	JURISDICTION
ALAS.			3 experts			health care providers
ARIZ.	X	X	X	(X)		medical malpractice claim
ARK.	X		X		X	physicians, dentists, chiropractors
DEL.		X	X	X	2	health care providers
FLA.	X	X	X			physicians, hospitals & med. facility
HAW.	X <sup>c</sup>	X	X			health care providers
IDAHO		X	X	(+X)	X	physicians, hospitals
ILL.	X	X	X			med., hosp. or healing art malpractice
IND.		X <sup>a</sup>	(1)	(2)		health care providers
KAN.		X <sup>a</sup>		3		health care providers
LA.		X <sup>a</sup>	3	(3)		health care providers
MD. <sup>c</sup>		X <sup>b</sup>		X	X	over \$5,000; health care providers
MASS.	X	X	X	(X)		health care providers
MO.	X <sup>a,b</sup>	2	2		X	health care providers
NEB.		X <sup>a</sup>	3			health care providers
NEV.		3	3			physicians and associates
N.H.	X	(X)	(X)	(X)	X	attorneys, physicians, dentists
N.J.	X	2	2			physicians
N.M.		X		3		health care providers
N.Y.	X	X	X			medical malpractice claim
OHIO			3 arbitrators			physicians, hospitals
PA.		12 <sup>b</sup>		2	3	health care providers
R.I.	master	X	X			physicians
S.D.		X	X <sup>f</sup>			present and future (under \$10,000)
		2	2 <sup>f</sup>			medical services (over \$10,000)
TENN. <sup>d</sup>	X	X	2	(2)	2	health care providers
VT.	X		X	(X)	X	medical malpractice claim
VA.	X <sup>a</sup>	3	3			health care providers
WIS.		X	2	(1)	2	health care providers (over \$10,000)
		X <sup>b</sup>		X	X	health care providers (under \$10,000)

( ) = if defendant is of this category, a person of this class replaces physician

(+) = if defendant is of this category, additional panelist

a = no vote

b = decides motions

c = may agree on one person in lieu of panel

d = statute calls for 7 on panel, but list adds to 6

e = chairperson, not necessarily judge

f = these pick one more panelist

g = "HCP" means health care provider and includes such miscellaneous panel members as dentists and hospital administrators.

APPENDIX III  
DECISION AND EFFECT ON TRIAL

STATE	BURDEN TO CONTINUE	DECISION ADMISSIBLE	CALL PANELIST AS WITNESS
ALAS.	None <sup>1</sup>	Yes	Yes <sup>4</sup>
ARIZ.	Plaintiff	Yes	No
ARK.	Plaintiff	No	No
DEL.	Court <sup>1</sup>	Yes	No
FLA.	Plaintiff	Yes	No
HAW.	Plaintiff	No	No
IDAHO	Plaintiff	No	No
ILL.	Plaintiff <sup>2</sup>	No	No
IND.	Plaintiff	Yes	Yes
KAN.	Plaintiff	No	Yes <sup>5</sup>
LA.	Plaintiff	Yes	Yes
MD.	Rejecting party	Yes	No
MASS.	Plaintiff	Yes	No
MO.	Plaintiff	No	No
NEB.	Plaintiff	Yes	Yes
NEV.	Plaintiff	No provision	No
N.H.	Plaintiff	No	No
N.J.	Plaintiff	No <sup>6</sup>	No
N.M.	Plaintiff	No	No
N.Y.	Court	If unanimous	Yes <sup>4</sup>
OHIO	Plaintiff	Yes	Yes <sup>7</sup>
PA.	Appealing party	Yes	No
R.I.	Appealing party	Yes	No
S.D.	Plaintiff	No	No
TENN.	Plaintiff	Yes	No
VT.	Appealing party <sup>3</sup>	Yes	No
VA.	Plaintiff	Yes	Yes
WIS.			
formal	Appealing party <sup>3</sup>	Yes	No
informal	Appealing party <sup>3</sup>	No	No

1. Action pending in court appears to continue automatically unless settled.
2. If it is a unanimous adverse decision, loser must timely reject.
3. Either party may file for confirmation of judgment.
4. Panelist may testify regarding the decision to extent that its contents are admissible.
5. Only Kansas allows a party to call a member of the panel as a witness, but does not allow the decision into evidence.
6. The decision is admissible with the consent of the parties.
7. Panelists may only be cross-examined regarding the decision.



APPENDIX IV  
MEDIATION PANEL AND ARBITRATION STATUTES  
CITATION

## STATE

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ALASKA	Alaska §§ 09.55.535-.536 (Cum. Supp. 1976).
ARIZONA	Ariz. Rev. Stat. § 12-567 (Cum. Supp. 1976).
ARKANSAS	Ark. Stat. Ann. §§ 34-2601 to 2612 (Cum. Supp. 1975).
DELAWARE	Del. Code tit. 18, §§ 6802-6814 (Cum. Supp. 1976).
FLORIDA	Fla. Stat. Ann. §§ 768.133-.134 (West Cum. Supp. 1976).
HAWAII	Ch. 219, §§ 2-11 to 20, 1976 Haw. Sess. Laws 523.
IDAHO	Idaho Code §§ 6-1001 to 1013 (Cum. Supp. 1977).
ILLINOIS	Ill. Ann. Stat. ch. 110, §§ 58.2-.10 (Smith-Hurd Cum. Supp. 1977).
INDIANA	Ind. Code Ann. §§ 16-9.5-9-1 to 9-10 (Burns Cum. Supp. 1976).
KANSAS	Kan. Stat. §§ 65-4901 to 4908 (Cum. Supp. 1976).
LOUISIANA	La. Rev. Stat. Ann. § 40:1299.47 (West Cum. Supp. 1977).
MARYLAND	Md. Cts. & Jud. Proc. Code Ann. §§ 3-2A01 to 2A09 (Cum. Supp. 1976).
MASSACHUSETTS	Mass. Ann. Laws ch. 231, § 60B (Michie/Law. Co-op Cum. Supp. 1977).
MISSOURI	Mo. Ann. Stat. §§ 538.015-.080 (Vernon Cum. Supp. 1976).
NEBRASKA	Neb. Rev. Stat. §§ 44-2840 to 2847 (Cum. Supp. 1976).
NEVADA	Nev. Rev. Stat. §§ 41A.010-.090 (1975).
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. §§ 519-A:1 to A:10 (1974).
NEW JERSEY <sup>1</sup>	N.J. Civ. Prac. R. 4:21.
NEW MEXICO	N.M. Stat. Ann. §§ 58-33-1 to 33-28 (Interim Supp. 1976).
NEW YORK	N.Y. Jud. Law § 148-a (McKinney Cum. Supp. 1976).
OHIO	Ohio Rev. Code Ann. §§ 2711.21-.24 (Page Supp. 1977).
PENNSYLVANIA	Pa. Stat. Ann. tit. 40, §§ 1301.301-.309 (Purdon Cum. Supp. 1977).
RHODE ISLAND	R.I. Gen. Laws §§ 10-19-1 to 19-10 (Supp. 1976).
SOUTH DAKOTA	S.D. Compiled Laws Ann. §§ 21-25B-1 to 25B-26 (Supp. 1977).
TENNESSEE	Tenn. Code Ann. §§ 23-3401 to 3421 (Cum. Supp. 1976).
VERMONT	Vt. Stat. Ann. tit. 12, §§ 7001-7008 (Cum. Supp. 1976).
VIRGINIA	Va. Code §§ 8-911 to 922 (Cum. Supp. 1976).
WISCONSIN	Wis. Stat. Ann. §§ 655.02-.21 (West Spec. Pamphlet 1977).

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1. Court rule.