Medical Malpractice Panels: The Wisconsin Approach

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The so-called medical malpractice crisis of 1975 generated a multitude of bills in state legislatures and Congress. The extent of the crisis varied from state to state, but it was precipitated by the panic of physicians and hospital administrators over their inability to pay soaring malpractice insurance premiums. In addition, many insurance companies announced they intended to terminate malpractice liability coverage in a number of states. There were reports of doctors striking, curtailing and even closing their practices, and of hospitals refusing to treat patients unless they required emergency care. Since the availability of health care is of concern to everyone, it was obvious that something had to be done to bring the situation under control. State legislatures responded to the problem in a variety of ways; the type of legislation passed depended on the severity of the problem in the particular state.

This article examines the background of the medical malpractice crisis and Wisconsin's response — the creation of patient compensation panels.

I. BACKGROUND

Medical malpractice litigation ostensibly performs two important functions: deterrence of lax, careless or negligent behavior of health care professionals toward patients, and compensation of patients injured by errors in treatment. Without a comprehensive social insurance plan, this tort system, or a modification thereof, appears the only viable means of compensating those injured through adjudication of liability and damages.

Beginning in the late 1960's, however, individuals within the health care industry recognized problems developing in medical malpractice as the volume of litigation consistently
increased. In 1971, the Secretary of Health, Education and Welfare commissioned a study to investigate the issues and present possible solutions.\(^1\) This study was issued in June, 1973, but most states, including Wisconsin, did nothing to implement its recommendations until events forced legislative action in 1975.

The crisis arose when insurance companies which provided malpractice coverage to the nation's health care providers threatened to cancel or raise premiums substantially because of the tremendous increase in the number of suits filed and damages awarded. Doctors and hospitals then petitioned state legislatures for changes in the existing system for bringing malpractice claims.

A controversy arose between health care providers, their insurers, and defense attorneys on the one hand, and plaintiff-oriented attorneys on the other. The former blamed plaintiffs' attorneys for increasing costs, while the latter blamed physicians for failing to provide high quality medical care.

Physicians and their supporters believed attorneys filed nuisance claims for minor injuries, knowing physicians would rather settle than pay court costs and attorneys' fees. They claimed the contingency fee system, in which the attorney often takes in excess of one-third of the ultimate award, inflated the amount of damages asked, so attorneys could increase their fees.\(^2\) They charged that attorneys played on the emotions of juries and were able to use insubstantial evidence to win large judgments. Physicians charged that delays in trials harmed their reputations and caused them emotional stress. This led to forced settlements of claims which, in the physicians' eyes, were not justified.\(^3\) Health care providers distrusted the jury system because they believed courts and juries were ill-equipped to consider technical facts presented in a malpractice suit.\(^4\) It was claimed that the trier of fact often granted recovery without finding the necessary element of fault because

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4. Id. at 264.
it was known the physicians and hospitals were insured. Even when a jury tried to determine fault, it often based its finding on the conflicting testimony of two expert witnesses, which resulted in a guessing game.

Insurance companies also blamed the legal system for their troubles. They claimed that statutes of limitations allowed minors to sue many years after the occurrence of an injury, necessitating the maintenance of huge reserves to guard against the "long tail" of potential malpractice claims. Insurers also believed that specific *ad damnum* clauses, that part of the petition in which plaintiff claims damages, encouraged asking for huge amounts. Among the reforms they contemplated were changes in the statute of limitations, elimination of *ad damnum* clauses, and compulsory arbitration.

Plaintiffs' attorneys defended the tort liability system, claiming that modifying the legal process would have no effect on reducing the primary cause of malpractice claims—negative medical outcomes.

The Wisconsin Trial Lawyers Association urged the legislature to retain use of the jury trial and refrain from adoption of screening panels or arbitration. It stressed the positive aspects of the jury system in "weeding out" incompetent physicians. The Association also called for an investigation of insurance companies.

In 1974, in response to the growing concern expressed by state physicians and their insurers, the Wisconsin Legislative Council appointed the Special Committee on the Liability of Health Professionals. The Committee was assigned to explore "alternatives to current methods of settling health professional liability claims." It reviewed legal doctrines and took testi-


6. Id.

7. The "long tail" concept refers to the extended period of time between the rendering of the medical service out of which a claim later arises and the time of the disposition of the claim. Note, 4 FLA. ST. U. L. REV. 50, 56-57 (1976).


11. Id. at 49.
mony relating to the scope of the malpractice crisis in the state.

Although hampered by a lack of accurate and complete data, the Committee discovered that Wisconsin was affected by a national crisis that was unrelated to its own needs, rather than a genuine state crisis.\footnote{The insurance companies were not required to fill out uniform forms in 1975. As a result, some companies listed reserves and others did not, some told how much it cost to defend claims, others did not. The three major malpractice carriers did admit, however, that they took in $5,099,242 in premiums from Wisconsin physicians, but paid out only $944,620 in claims. Wineke, \textit{Malpractice Insurance Premiums Top Payouts}, Wisconsin State Journal; Mar. 13, 1976, §1, at 1, col. 1.} Podiatrists and osteopaths were the only Wisconsin specialists finding difficulty purchasing insurance. The cost of insurance for other medical fields varied among different specialties, but was not exorbitant. Insurers said there was no intention to stop writing insurance in the state. A member of the Committee wrote, "The data obtained was certainly inadequate to justify a wholesale revision of the tort liability system or significant changes in the legal doctrines in the state."\footnote{Czerwinski, \textit{supra} note 10, at 50-51.} The Committee suggested an existing arbitration statute, Chapter 111, be used; it did not, however, recommend screening panels.

Shortly after the Special Committee had issued its reports, the St. Paul Fire and Marine Casualty Company announced that, after July 1, 1975, it would offer malpractice insurance only on a "claims made" basis, insuring the practitioner against claims brought only during the insured period from treatment given at any previous time. Malpractice insurance had formerly protected the insured forever against claims arising from treatment given while the policy was in force, allegedly creating forecasting problems in an inflationary economy.\footnote{Dean Richard Rosett of the Graduate School of Business of the University of Chicago, quoted in O'Connell, \textit{An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries}, 60 MINN. L. REV. 501, 513 (1976).}

Physicians quickly responded, claiming they could not practice with coverage limited in this way and with the additional cost. When the Insurance Commissioner began to issue only "claims made" policies, the pressure on the legislature to enact more far-reaching measures than the Special Committee had proposed became more intense.

On April 3, 1975, Senate Bill 299 was introduced. It called
for a mandatory review of all malpractice claims by a panel unless the patient had rejected this procedure by written notice to the health care provider prior to being injured. The bill provided for a state-wide panel consisting of one physician, one attorney and one public member. It limited maximum recovery to $255,000. Contingency fees for attorneys were limited to twenty percent of recovery. The statute of limitations for minors was changed to three years from the occurrence of injury. Furthermore, the bill required that the health care providers involved pay for the administrative costs of the program.

Both the insurance industry and the physicians favored this bill;\(^\text{15}\) two other groups, however, did not. The Wisconsin Trial Lawyers Association did not like S.B. 299, preferring instead to retain the jury trial system. The Wisconsin Bar Association wanted limits on the maximum liability to be assumed by health care providers with the excess assumed by a state wide pool.\(^\text{16}\) Since the senate subcommittee and the committee assigned to study the bill could not reach an agreement among the interested groups, they proposed a substitute amendment which became the basis for the bill passed by the senate.

The final senate bill provided for coverage of physicians and registered nurses only, a limit on awards, elimination of a specific \textit{ad damnum}, and creation of a screening panel for each individual case, with an additional member for nonphysician health care providers. This bill passed the senate on June 25, 1975, only a few days before the July 1 deadline set by insurance companies as the date on which many insurance policies for physicians would expire.

The Wisconsin Assembly studied the issue from the insurance point of view, initiating umbrella coverage for large claims and a basic insurance plan for health care providers unable to find insurance on the private market. The Insurance and Banking Committee held a hearing on June 30, 1975, to review more current data than that to which the senate had access. Although still incomplete, the figures convinced the members of the Committee that the tort system was not responsible for the crisis.\(^\text{17}\) Both houses desired to make insurance more readily

\(^\text{15}\) Czerwinski, \textit{supra} note 10, at 52.
\(^\text{16}\) \textit{Id.} at 53.
\(^\text{17}\) \textit{Id.} at 54-55.

The data indicated that 87% of the claims closed in 1974 were settled before
available, but only the senate action had provided changes in the tort system. A committee of conference was appointed, and on July 23, 1975, Chapter 655 of the Wisconsin Statutes, relating to health care liability and patients' compensation, was enacted and became effective. Its application was solely prospective.

II. THE WISCONSIN LEGISLATION

The compromise bill indicated no less than eleven basic reasons for the need for legislation in the field of health care liability. The legislature found that the number of suits and claims for damages arising from patient care had increased tremendously in the past several years and large awards and settlements had caused the insurance industry to increase the cost and limit the availability of malpractice coverage. These factors discouraged many young physicians from entering into the practice of medicine in the state and forced established doctors to curtail or cease the practice. Furthermore, increased insurance costs were passed on to patients and were reflected in increased charges for health care services. Many insurance liability carriers were forced to withdraw completely from the field. The rising number of suits and claims required the practice of defensive medicine by health care providers, and as a result, extensive diagnostic procedures had further spiralled the cost of patient care. The net effect was detrimental to the health care providers, the patients, and the public in general.

A. Major Provisions

The Wisconsin legislation mandates minimum limits of financial responsibility for health care providers of $100,000 per claim and $300,000 per year, to be established through liability insurance, cash, or surety bond. The law further empowers the Insurance Commissioner to establish mandatory risk sharing plans for health care liability insurance, covering medical

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and osteopathic physicians, nurse-anesthetists and hospitals practicing and operating within the state. The plans provide minimum coverage of $100,000 per claim and $300,000 per policy year to entitled health care providers unable to secure coverage through the voluntary market.

Beyond the higher of $200,000 per claim and $600,000 per year, or the maximum liability for which he is insured, the health care provider has no personal liability. Effective July 1, 1975, judgments over the $200,000/$600,000 limits are paid out of a general patients compensation fund, composed of funds secured from the various health-care providers' annual fees.

The ad damnum clause has been eliminated, except to state whether the damages claimed were $10,000 or less, or over $10,000. The Chapter does not change existing statutes of limitations.

Attorneys' fees are also affected by this new law. Determination of the contingent fee is not to reflect amounts previously paid for medical expenses, nor payment for future medical expenses exceeding $25,000. Attorneys are required to offer to charge any client on a per diem or per hour basis.

The legislation also establishes a forty-five hour triennial continuing medical education requirement for medical and osteopathic physicians as a prerequisite for liability protection under Chapter 655.

The greatest innovation of Chapter 655 is the creation of formal and informal patients' compensation panels administered by the Office of the Administrative Director of Courts.

27. The administrative Director of Courts is responsible for the operation of both the formal and the informal patients compensation panels, and he is charged with the additional responsibilities as follows:

(1) To promulgate rules under Chapter 227, as necessary. Wis. Stat. § 655.003 (1975).

(2) To prepare and cause to be printed upon request and furnished free of charge such forms and materials as he deems necessary to promote efficient administration of the Chapter. Wis. Stat. § 655.01 (1975).

(3) To establish patients compensation panels situated throughout the state, in-
The informal panel hears all claims, regardless of the amount in controversy, unless some affirmative action is taken. A claim of $10,000 or less must be heard by an informal panel, unless all of the parties stipulate in writing that the controversy shall be heard by a formal panel. Should the claim involve an amount in excess of $10,000, all that is necessary to convene a formal panel is a request in writing, by one of the parties that the controversy be heard by such a panel. Wisconsin's panel system functions to screen out nonmeritorious claims; there is no attempt at mediation between the parties. It is similar to most of the methods used in other states to combat the medical malpractice crisis, requiring a mandatory hearing before a screening panel. However, if parties have not stipulated in writing to be bound by the panel's determination and filed the including four formal panels and as many informal panels as necessary. Wis. Stat. § 655.02 (1975).

(4) To appoint professional members of the formal screening panels by a random selection process. Wis. Stat. § 655.03(1)(a-d) (1975).

(5) To determine good cause and excuse any persons from membership on the panels. Wis. Stat. § 655.03(1)(f) (1975).

(6) To appoint the members to the informal panels. Wis. Stat. § 655.03(2) (1975).

(7) To assign the submission of controversy filed by the claimant to each panel. Wis. Stat. §§ 655.03(3)(a), 655.04(1)(b) (1975).

(8) To determine the location for the hearing on the controversy. Wis. Stat. § 655.03(3)(a) (1975).

(9) To arrange to pay each panel member $75 per diem, plus actual and necessary travel expenses. Wis. Stat. § 655.03(3)(e) (1975).


(11) To serve notice of the filing of the submission of controversy to all named health-care providers by first-class mail. Wis. Stat. § 655.04(3) (1975).

(12) To maintain information on the status of the panels and controversies under sixty-day mandate for the panel to hear the matter subsequent to the notice of hearing. Wis. Stat. § 655.04(4) (1975).

(13) To prescribe forms upon which all pleadings before the panel must be filed. Wis. Stat. § 655.13 (1975).

(14) To receive and file a copy of the order and award in every case. Wis. Stat. § 655.065(3) (1975).


(16) To pay the suit tax into the Patients Compensation Fund. Id.


(18) To compensate witnesses before the panel for fees and mileage and pay other specific fees. Wis. Stat. § 655.17(3), (5) (1975).

(19) To review the program revenue elements. 1975 Wis. Laws, ch. 37, § 3.


proper forms, any party to a panel hearing may, within 120 days after the date of an order made by a panel, commence an action for a trial in the circuit or county court for the county designated in the submission of controversy.\(^3\)

The findings, order, and award of a panel may well become binding upon all parties, not only by the filing of such a stipulation, but by the failure of a party to commence an action in time. Furthermore, after the time for petitioning the court for a trial has passed, any party may file a certified copy of the order containing the award with the county or circuit court for the county of residency of any respondent named in the order, and the court shall then render judgment in accordance with those provisions.\(^3\)

Each panel, whether formal or informal, determines whether there was negligence and whether the negligence was causal, and determines and awards compensation and benefits either to the patient or claimant or to the personal representative on the death of a patient. A finding of negligence by the claimant diminishes any award proportionately. An award is payable by the liable health care provider who has a right of comparative contribution or indemnity. The panel is also able to consolidate several claims if it determines that to be in the public interest.\(^3\)

In the case of a trial subsequent to a formal panel hearing, the court may award actual court costs and reasonable attorneys' fees in excess of statutory limitations to the prevailing party.\(^4\) This should act as a deterrent to the filing and prosecution of spurious or nonmeritorious claims.\(^5\)

The panels' operation is funded by the patients compensation fund. The sources of the patients compensation fund are the fees collected as a suit tax on the submission of controversy (the form filed to commence panel proceedings), fees collected from physicians permanently practicing in the state and fees collected from hospitals on a per bed basis.\(^6\) Each member on


\(^{34}\) Wis. Stat. § 655.19(1) (1975).

\(^{35}\) Minutes of the Nov. 30, 1976 meeting of the Wisconsin Legislature's Malpractice Committee.

both types of panels is paid $75 per day for attending panel meetings, as well as actual and necessary travel expenses.³⁷

B. Formal Patients Compensation Panels

In Wisconsin, the Administrative Director of Courts is charged with establishing four formal panels by geographical region.³⁸ Accordingly, Figure 1 depicts four regions nominally designated as the Milwaukee region, “F-1”; the Madison region, “F-2”; the Eau Claire region, “F-3”; and the Green Bay region, “F-4.” The population density of the three regions outside of Milwaukee is approximately 750,000 to 850,000 persons, while the Milwaukee region includes a population of no less than 1.7 million in a seven-county region.

The five member formal panel is made up of the following members:

a. One physician licensed to practice medicine in this state, appointed at random by the administrator for a six-month term or for the duration of any case pending at the expiration of such term, from a list submitted by the Medical Examining Board;
b. If any respondent in a panel hearing is a physician, one additional physician licensed to practice medicine in this state and who is engaged in a practice of medicine similar to that of the respondent and appointed at random by the administrator . . . ;
c. If any respondent in a panel hearing is not a physician, then one person from the same field of health care as that of the respondent who is licensed in this state and appointed at random by the administrator . . . . In the event that a claim involves more than one respondent, and that the respondents are specialists in different areas of medical practice, the administrator shall determine the specialty to be represented on the panel;
d. One attorney licensed to practice law in the state, appointed by the administrator;
e. Two public members appointed by the governor for two-year staggered terms.39

From these provisions, it is clear that, depending on the number and identity of the respondents, the panel may exceed five members. No individual appointed by the Administrator may decline to serve on a panel unless a good cause excuse is given, nor can any person serve on a panel if he has a professional or personal interest in the claim under consideration.40 No physician may serve on more than one formal panel in a five-year period.41

The members on the formal patients compensation panel are selected by means of a random selection process through the use of 3" x 5" index cards grouped geographically, and in the case of health care providers, by specialty. The appropriate set of health care provider cards are rotated in a jury roller drum, a few randomly drawn, and potential panel members are contacted. Unless good cause is shown, those individuals con-

41. Id.
tacted are then seated on the formal panel convened within the region in which they practice. The statute makes no provision whatsoever for strikes or challenges of the formal panel members by any of the parties.

The formal patients compensation panel has specific powers when presiding over malpractice actions. The panel is bound by the law applicable to civil actions, but may conduct such hearings and make investigations as in its judgment are best adapted to ascertain and determine the substantial rights of the parties. The panel may prescribe the procedures necessary to implement the statutes and is given the right to administer oaths, order physical examinations, subpoena witnesses and apply to any county or circuit court to secure the attendance and testimony of witnesses or the production and examination of written materials.

Witnesses called by the panel shall be allowed actual and necessary travel expenses and reasonable fees fixed by the Administrator which are to be collected and paid either by the party requesting the witness or by the Administrator if the panel makes the request.

Proof may be made by oral testimony, deposition or interrogatories, and such evidence may be introduced without regard to the availability of the witness to testify at the time of the hearing. A party to the controversy may subpoena a witness to testify under the law applicable to civil actions. X-rays and medical records are to be admitted without the necessity of other identification or authentication, unless there is a question raised as to their authenticity or accuracy. It must be noted that any report, deposition, or recorded testimony of the physician in the case shall be retained in a private record of the panel and be opened to the inspection of the parties or their attorneys but not to the general public, unless, in the opinion of the panel, the public interest so requires. It is the practice of the Administrative Director of Courts to require that all panel members destroy copies of these medical records at the

46. Id.
conclusion of the panel's work, saving only one copy to keep in the locked files of the Court Administrator's Office.

The panel may order, at any time, upon a proper showing or on its own motion with appropriate notice, that any additional claimant or respondent be joined when it deems the inclusion of such party necessary and proper to a just determination of the claim.\footnote{49. Wis. Stat. § 655.10 (1975).}

In addition to size and powers, a major distinction between the formal and the informal panels is that a complete stenographic record is made of the formal panel's entire proceedings.\footnote{50. Wis. Stat. § 655.18(1) (1975).} Furthermore, the findings and the order of any formal panel shall be admissible in any subsequent court action, and the amount of damages awarded may, at the court's discretion, also be admissible in such action.\footnote{51. Wis. Stat. § 655.19(1) (1975).} This is specifically prohibited with regard to informal panels. In fact, no statement or expression of opinion made in the course of an informal panel hearing is admissible in evidence, either as an admission or otherwise, in any court action.\footnote{52. Wis. Stat. § 655.19(2) (1975).}

C. The Informal Patients Compensation Panel

The informal patients compensation panel is normally a three man panel, although if there are multiple defendants who practice in different health care areas, the panel will be larger. Panel members include an attorney selected from a roster supplied by the State Bar of Wisconsin, a layman selected from petit juror lists for the county in which the submission of controversy has been filed, and a health care provider in the same area as each defendant, selected from the file kept by the Administrator.\footnote{53. Wis. Stat. § 655.03(2)(a) (1975).}

The Administrator selects three names in each of these categories through direct telephone contact with the individuals. The potential panel member is screened with regard to any good cause excuse for that individual.\footnote{54. Wis. Stat. § 655.03(2)(b) (1975).} A discussion as to the elements of the case, the parties involved, and their counsel is utilized for the purpose of avoiding any possible conflicts of interest or challenge to the panel member subsequently. Once
the Administrator has secured three names in each category, these names are submitted to the claimant or his counsel, and within ten days the party is expected to return two names in each category for ultimate submission to all of the respondents.\textsuperscript{55} The respondents, acting in concert, have ten days to mutually agree upon an additional strike in each category, and the remaining individuals are then seated on that particular informal panel.\textsuperscript{56}

As noted, the hearing before an informal panel is without any stenographic record, and the panel itself, after deliberation, must prepare a formal statement of its decision that is forwarded to all of the parties and is filed with the Administrator's office, as are the findings of the formal panel.\textsuperscript{57} All parties may be represented at the hearing by an attorney and failing an appearance, the Administrator may order an investigation.\textsuperscript{58}

The findings and the order of any informal panel are not to be admissible in any court action, and as noted, no statement or expression of opinion made during the presentation of the informal panel shall be admissible in evidence in any subsequent trial.\textsuperscript{59}

\textbf{D. Procedures}

Any action under Chapter 655 to convene a patients compensation panel is commenced by the filing of a submission of controversy form and a simultaneous filing of an $11 suit tax.\textsuperscript{60} The filing of a submission of controversy tolls any applicable statute of limitations, and the statute of limitations remains tolled until thirty days after the panel issues its written decision or the jurisdiction of the panel is terminated.\textsuperscript{61}

Upon receipt of the submission of controversy and the $11 suit tax, the Administrator acknowledges the action and assigns a case number and caption to the matter, sets up a file and docket, as well as cross reference cards, and forwards an acknowledgment letter and receipt to the claimant or the claimant's counsel. At the same time, a notice to the health

\footnotesize{\textsuperscript{55} Wis. Stat. § 655.03(2)(c) (1975).}
\footnotesize{\textsuperscript{56} Id.}
\footnotesize{\textsuperscript{57} Wis. Stat. § 655.18(1) (1975).}
\footnotesize{\textsuperscript{58} Wis. Stat. § 655.18(2) (1975).}
\footnotesize{\textsuperscript{59} Wis. Stat. § 655.19(2) (1975).}
\footnotesize{\textsuperscript{60} Wis. Stat. § 655.04(1)(a) (1975).}
\footnotesize{\textsuperscript{61} Wis. Stat. § 655.04(6) (1975).}
care provider form is prepared, and a letter informing the named respondents of the filing of this action is forwarded as well. This letter will also include no less than three answer forms and three cross-complaint forms that can be used at the option of the respondents.

In those matters involving alleged malpractice victims who are either minors or incompetents, a guardian ad litem must be appointed by the panel on the order signed by the chairman. Such appointment is made as soon as is practicable once the controversy has been assigned to the panel for hearing. The guardian ad litem must be an attorney admitted to practice in Wisconsin. He continues to act until the panel issues its findings, order, and award, unless earlier discharged by the panel. The guardian ad litem is to be compensated for his services at a reasonable rate determined by the panel. This expense may be paid by any or all of the parties, or out of the patients compensation fund, according to the panel’s discretion. It is further understood that the guardian ad litem shall not be appointed or appear in the same matter for different persons whose interests may be conflicting.

The members of the panel, formal or informal, are chosen and advised of their selection, the case name and number, and the time of the initial panel meeting to review the statutory requirements and procedures to be utilized in the hearing. The Administrator appoints the attorney member of each panel, formal and informal, as the panel chairman. During the initial meeting, dates are set for the hearing itself and a prehearing conference between the parties, the Administrator, and the chairman of that panel. This prehearing conference is usually scheduled two to four weeks prior to the hearing. The purpose of the conference is to narrow the issues, reach any stipulations, enter any orders that would be relevant to the conduct of the hearing and make known the rules of panel procedure. The

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63. Wis. Stat. § 655.06(2) (1975).
64. Wis. Stat. § 655.06(4) (1975).
67. Id.
70. Wis. Stat. § 655.04(4)(b) (1975) allows the panel to determine its own internal procedures.
parties are also reminded that they must submit to the panel all pertinent written material, including pleadings and medical and hospital reports, or authorization to obtain the same no less than two weeks prior to the date set for hearing, although some panels have extended that period to three or four weeks to permit the Administrator to make the necessary photocopies and disseminate all material to opposing counsel and panel members. A meeting of the panel can be called by the chairman or a majority of its members.

Within thirty days after the hearing, the panel is required to render its decision in writing. All pleadings, including the submission of controversy, shall be filed in triplicate. The submission of controversy itself shall be filed in sufficient quantity to permit service of a copy on each respondent. Pleadings, subsequent to the submission of controversy, motions or other papers filed with the panel, shall contain an affidavit noting that on or before the date of filing, opposing counsel or the other parties, if there is no counsel of record, were served with a copy. All forms prepared by the Administrator's office contain the affidavit portion printed in the lower section of the pleading. Notices and other papers may be served by first class mail; service by mail is complete upon mailing, and proof of mailing is prima facie evidence of service.

III. Positive Effects of the Panel Approach

Screening panels have been in operation in various parts of the country since the mid-1960's. In Pima County, Arizona, Montana, New Mexico, and one judicial district of New York State, screening panels have proved most effective. This is a major reason why so many states passed similar laws in 1975 and 1976. (See Figure 2).

In 1969, the Montana Medical Association and the Montana Bar Association established the Medicolegal Screening Panel to assess malpractice claims. The panel rules on the

75. Id.
| Issue                                                                 | AL | AK | AZ | AR | CA | CO | CT | DE | FL | GA | HI | ID | IN | IA | KS | MO | MS | MO | MT | NE | NV | NH | NJ | NM | NY | NC | ND | OH | OK | OR | PA | RI | SC | SD | TN | TX | UT | VA | VT | WA | WV | WI | WY |
|---------------------------------------------------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Eliminates ad damnum clauses                                       | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Clarify informed consent provisions                                | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Establish pre-trial screening panels or arbitration panels        | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Provides peer review immunity                                      | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Regulate or schedule attorney contingent fees                      | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Advance payments not admissible as evidence and/or not admission of liability | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Establishes patients compensation fund or establishes over-all "cap" amount recoverable. | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Amend statute of limitations                                       | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Permits collateral sources as evidence                             | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
| Establish limitations on amount recoverable                        | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  | X  |
merits of the case, but its decision is not binding.\textsuperscript{79} The number of malpractice cases heard in the courts between 1970 and 1972 was one-half the number heard between 1967 and 1969.\textsuperscript{80} One major insurer decreased premiums in 1972.\textsuperscript{81} Panels are lauded as the reason for this decline.\textsuperscript{82}

New Mexico has had a voluntary plan since 1963 and instituted a mandatory one in 1976.\textsuperscript{83} Between 1963 and 1973, in fifty-six of the ninety-one cases heard, 58.3 percent, "no negligence" was found.\textsuperscript{84} Forty-one of these cases, 75.4 percent, were dropped and ten were settled before trial.\textsuperscript{85} According to the New Mexico Chairman of the Medico-Legal Malpractice Committee, these figures alone justify panel operations.\textsuperscript{86}

In the First Judicial Department of New York, from September 27, 1971 through June 15, 1972, 26 percent of the cases heard by the panels were settled.\textsuperscript{87} A review of all cases processed through March 1, 1973, showed that 42 percent had been settled and 4 percent were discontinued.\textsuperscript{88} The increase was thought necessary due to greater experience on the part of the panels and the fact that more recent cases were heard.\textsuperscript{89}

Settlement of cases through the panel has saved New York courts approximately five trial days per case.\textsuperscript{90} Because those involved in the pilot program believed the panels produced very favorable results, panels became state wide in September, 1974.\textsuperscript{91} Since that time, 116 panels were convened, and 80 were completed.\textsuperscript{92} Of these cases, 38 were settled by panel efforts; 42 went to the courts.\textsuperscript{93} It is believed that settlement of many of

\textsuperscript{79} Id.
\textsuperscript{80} Id. at 29.
\textsuperscript{81} Id. at 30.
\textsuperscript{82} Id.
\textsuperscript{83} Letter from Erwin Moise, Chairman of the Medico-Legal Malpractice Committee of New Mexico to Jeffrey Kravat (January 27, 1976).
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{88} Id. at 275-76.
\textsuperscript{89} Id. at 276.
\textsuperscript{90} Id. at 278.
\textsuperscript{91} New York Medical Malpractice Program Report, 1 (November 17, 1975).
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 2.
the cases referred to the courts will be hastened as a result of the panel's recommendations. 94

"[T]he reduction in the volume of litigation in Pima County (in operation for fifteen years) which could be attributed to the screening panel is 24.5 per cent." 95 This is significant because less than half of all malpractice cases in the county go before a panel and if all were screened, 40 to 50 percent would be settled before trial. 96

While the panel system in Wisconsin has been in operation for only a short time, there are statistics available for a preliminary examination of the effects of the system on the disposition of claims. 97

By April 1977, there was a total of forty-two malpractice claims filed in Wisconsin. One-half called for a convening of a formal panel, while the other half utilized the informal panel. (See Figure 3). Of the forty-two cases, eighteen were venued in Milwaukee County with ten before the formal panel and eight before the informal panel. By April of 1977, seven of these cases in Milwaukee County were disposed of. In one instance, the panel dismissed the claimant's case at the conclusion of the claimant's presentation. 98 In another instance, there was a finding in favor of the claimant in the amount of $4,970. 99 Two other cases resulted in findings in favor of the health care providers after complete hearings were conducted before the panels. 100 Another two cases resulted in findings in favor of the claimants by way of settlement negotiations conducted after the panel had been convened 101 and a final case was disposed of in favor of the respondent health care provider before the matter was to be heard. 102

94. Id.
96. Id.
97. The information regarding Wisconsin Patients Compensation Panel cases discussed in the remainder of this article and charted in Figure 3 is available from the author as Director of Patients Compensation Panels for the state of Wisconsin. The file numbers assigned to the cases designate the type of panel, formal ("F") or informal ("I"), and the region in which the panel was convened (see Figure 1).
### Figure 3

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In the Madison region, by April of 1977, six formal panels and two informal panels had been convened. Of these six controversies, one of the matters was settled immediately prior to the hearing with the payment of $3,000 being made by the health care providers. In another case there was a finding in favor of the health care provider after three complete days of hearings were conducted before the panel. The remaining six cases include four formal panels and two informal panels and all are currently pending at the time of this writing.

The Eau Claire formal panel had but two cases filed by April of 1977. The panel still has one of these matters pending, but the other was settled for $5,000 shortly before the hearing date.

There had been a total of five cases filed in the Eau Claire region requiring the convening of an informal panel with three of those cases being settled immediately before the panel hearing in favor of the claimant. A fourth case involved a full hearing before the panel with findings in favor of the healthcare provider after two full days of testimony. There is still one case pending in the Eau Claire region before an informal panel in Washburn County.

The panels in the Green Bay region, by April of 1977, had been convened on five different matters. One of these cases was settled shortly after the filing was completed; another case was inactivated on the motion of claimant’s counsel with the stipulation that the panel would reconvene at a future date. Of the remaining matters, one was still pending at this writing, and two cases resulted in finding in favor of the health care providers after complete hearings lasting three days and

two days respectively.\textsuperscript{14}

With respect to the informal panels convened, twelve cases had been disposed of by April 1977. Of these cases, seven concluded in favor of the health care providers after a full hearing on the issues with three of these cases being heard in Waukesha, two in Milwaukee and two in Eau Claire. Four cases concluded in settlement for the claimants prior to hearing by the panels with one being in Pierce County, two in La Crosse County and the remaining case in Milwaukee County. The remaining Milwaukee County case was settled in favor of the respondent health care provider. At present, nine cases are pending before informal panels.

Appeals have been taken from decisions reached by panels in at least two cases. One Milwaukee case originally brought before the formal panel is being appealed to the circuit court.\textsuperscript{15} In that case the panel dismissed the action at the conclusion of the claimant’s case, but prior to that there had been a dismissal of one of the physicians named as a respondent. No adjudication had been made regarding his negligence. At issue now is whether the claimant’s counsel may initiate proceedings directly in the trial court without a prior adjudication of the matter, especially with regard to any negligence on the part of the dismissed physician.

Several cases have been filed at this time naming health care providers as defined under the statute, as well as manufacturers of allegedly defective products. These manufacturers are brought in by cross-complaint or impleader on the theory of products liability, claiming the manufacturer of the product is either a joint contributor or the sole cause of the claimant’s injury. In one case, the manufacturer of an electronic device utilized in sterilization procedures had been named as a party-respondent by a co-respondent. It appears that such impleader is proper since the panel may order the joinder of an additional party whenever necessary for a just determination of the claim.\textsuperscript{16}

There has not been sufficient experience with the use of

\textsuperscript{14} Miller v. Mansell, F4-118 (1977); Pfaff v. St. Mary’s Kewaunee Area Memorial Hosp., F4-113 (1977).

\textsuperscript{15} Guember v. Wilde, Case no. 449-298 (Milwaukee County Cir. Ct., Milwaukee, Wisconsin, 1976).

\textsuperscript{16} Wis. Stat. § 655.10 (1975).
panels to draw any conclusions regarding any definite pattern of cases. A majority of cases though seem to involve obstetrics/gynecology claims, especially for sterilization or abortion related treatment. Those claims naming hospitals as respondents generally complain that the hospital's failure to properly restrain or assist the patient resulted in falls or aggravation of prior injuries.

IV. CONCLUSION

Screening panels represent a major innovation in the handling of malpractice claims. Nearly all of the laws passed in 1975 had some provisions for panels or arbitration, either voluntary or mandatory. The concept of the panel as a means of screening claims and the positive experience of pioneer jurisdictions have encouraged the belief that panels can solve some of the medical malpractice problems.

As yet, few negative experiences with panels have been found in any state. While panels may have disposed of some cases that would have been settled anyway, it is apparent that these medical-legal screening panels have greatly reduced the number of formal actions at law. At the very least, this formal method of delimiting issues, thereby forcing the parties to seriously develop their cases, is beneficial.

118. Id. at 2.