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A Survey of Practitioners' Perceptions of Utah's Medical Malpractice Pre-Litigation Program

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I. INTRODUCTION

During the early 1970's, cases involving medical malpractice claims were on the rise. Accompanying malpractice damage awards climbed to astronomical heights.[1] The rise in the malpractice insurance claims as well as the decline in the availability of insurance coverage moved state legislators to take note.[2]

By 1980, forty-eight state legislatures had enacted statutes aimed at ending the perceived medical malpractice crisis or at least managing the number and the size of the awards.[3] Since the mid-1970's, thirty

1. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE, PUB. NO. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, app. 33 (1973).

2. Note, *Medical Malpractice Screening Panels: A Judicial Evaluation of Their Practical Effect*, 42 U. PITT. L. REV. 939, 941 (1981).

3. *Id.* at 941 (citing Chapman, *Are the New State Malpractice Laws Working to Protect*

states have enacted legislation that authorized pre-litigation panels as a solution to the problem; six of these states de-activated their panels soon after authorizing them.[4] These panels were designed to "make use of legal and medical expertise to eliminate frivolous actions, promote prompt settlement of valid claims, and assist in trial preparation."[5]

In 1985, some time after the national tide of adoptions of medical malpractice legislation, Utah legislators enacted the legislation that required mandatory pre-litigation review panels.[6] These panels hear actions involving personal injury and wrongful death and claims for damages arising out of the provision or alleged failure to provide health care. The proceedings are informal and non-binding, but are compulsory as a condition precedent to commencing litigation. They are also confidential, privileged and immune from civil process.[7]

II. UTAH'S MEDICAL MALPRACTICE PRE-LITIGATION STATUTE

Under the Utah Code, the party initiating a medical malpractice action files a request for hearing with the Department of Business Regulation within sixty days after filing an intent to commence action.[8] The request is mailed to all health care providers named in the notice of intent to commence action and the request. The department then appoints a panel to hear the complaints of negligence and damages and sets the matter for review. The filing of the request tolls the statute of limitations until sixty days following the issuance of the panel's opinion.[9]

The panels are composed of a resident lawyer who serves as chairman of the panel, a health care provider practicing in the same specialty as the proposed defendant (if there is a claim against a hospital or its employees, the panel member is a hospital administrator), and a lay person who is a citizen of the state.[10] These members must certify under oath that they are without bias or conflict of interest.[11] No record is made of the proceedings. The panel has the authority to issue subpoenas; there is no discovery and formal rules of evidence do not ap-

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You?, 8 LEGAL ASPECTS OF MED. PRAC. NO. 5, at 41 (May 1980).

4. Daughtrey, Smith & Boyle, *Medical Malpractice Review Panels in Operation in Virginia*, 19 U. RICH. L. REV. 273, 282 (1985).

5. P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 198 (1985).

6. UTAH CODE ANN. §§ 78-14-1 to 78-14-16 (1988).

7. *Id.* § 78-14-15.

8. *Id.* § 78-14-8.

9. *Id.* § 78-14-12(3).

10. *Id.* § 78-14-12(4).

11. *Id.* § 78-14-12(5).

ply.[12] At the proceeding's conclusion, the panel renders an opinion as to whether the claim is meritorious or non-meritorious. If meritorious, the opinion states whether the conduct complained of resulted in harm to the claimant.[13]

There is no judicial review or appeal of the panel's decision and the panel's opinion is not admissible as evidence in a subsequent court action.[14] Further, the panelists cannot be compelled to testify concerning the subject matter of the panel's review.[15] Upon written agreement by all parties, the proceeding may be considered a binding arbitration.[16]

III. Attorney Opinion Survey of Utah's Medical Malpractice Pre-Litigation Program

This article presents data concerning the efficiency and effectiveness of the Utah Medical Malpractice Pre-Litigation Program. To prepare this article, a study was conducted by the authors in cooperation with the Utah Division of Occupational and Professional Licensing (the "Division") the Utah State Bar Association, and the Utah Medical Association. The following describes the methodology and results of the study.

A. Methodology

After consultation with a professional research team,[17] a questionnaire was formulated and then approved by the above-named parties. The Division provided a pre-litigation case summary for each party involved in panel hearings from the inception of the program in January 1985 through December 1987.[18] Questionnaires were mailed to counsel for both petitioners and respondents.[19]

The survey solicited attorneys' response to five statements regarding the program. They were asked to rank the statements on a scale of strongly disagree (SD), disagree (D), neither agree nor disagree (N), agree (A), or strongly agree (SA). Space for comment accompanied four of the five statements.

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12. *Id.* § 78-14-13(1).

13. *Id.* § 78-14-14.

14. *Id.* §§ 78-14-14 to 78-14-15.

15. *Id.* § 78-14-15.

16. *Id.* § 78-14-16.

17. Interview with Stan Weed, Ph.D., Director, Institute for Research and Evaluation (June, 1987).

18. *See infra* Appendix I for sample of case summary.

19. *See infra* Appendix II for sample of questionnaire.

B. Results of Survey

The survey solicited responses from attorneys in 317 cases that had gone before the pre-litigation panel. A total of one hundred seventy-two attorneys responded to the questionnaire.[20] Of those, one hundred two (59.3%) were counsel for petitioners; while seventy (40.7%) represented respondents.[21] One hundred forty-two (82.6%) of the cases in the study received a non-meritorious ruling from the panel. Most of the attorneys that made comments in the space provided on the questionnaire were those with strong negative feelings about the program. As a result, more negative than positive comments are reported in this article.

QUESTION 1(a)

Question number 1(a) asked whether the division's administrative procedures prior to the hearing were adequately handled. One hundred and twenty-seven (73.8%) attorneys felt that the division's administrative procedures were adequately handled with respect to their client(s). Twenty-eight (16.3%) felt that the procedures were inadequate.[22]

In the space provided for comments on this question, a number of attorneys explained their ratings. Generally, these comments were split. While one attorney felt that his claim was handled efficiently, another commented that communications with the department were "slow, confused and inadequate."[23] Still others complained of delays due to backlogging in the system that exceeded the statutory 30-day limitation.

Table I

1(a) - The division's administrative procedures: notices, rulings, etc. prior to the hearing were adequately handled with respect to you and your client.

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20. Administrative difficulties prohibit an exact reporting of the percentage of the total mailings. The estimated response rate for the total mailing is 20%.

21. Due to a greater number of responses from counsel for petitioners than those representing respondents, the authors acknowledge the potential for selective bias in this study.

22. For responses categorized by petitioner or respondent, see *infra* Tables I through XIII, and Tables XV through XVII.

23. The source of this comment is the result of the confidential survey conducted in November 1987. The same survey is the source of all undocumented quotations in this article.

Rating Code[24]	Number of Responses	Percent
SD	8	(4.7)
D	20	(11.6)
N	16	(9.3)
A	116	(67.4)
SA	11	(6.4)
No response	1	(0.6)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	8	(7.8)
D	13	(12.7)
N	8	(7.8)
A	62	(60.8)
S	10	(9.8)
No response	1	(1.0)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	7	(10.0)
N	8	(11.4)
A	54	(77.1)
SA	1	(1.4)
No response	0	(0.0)

QUESTION 1(b)

Question 1(b) addressed the issue of whether the time lapse between the request for hearing and the actual hearing was reasonable. Eighty-four (48.8%) of the responding attorneys felt that the time lapse was reasonable; seventy-three (42.5%) felt that the delay was unreasonable. Upon closer examination, the data reveals that thirty-five (34.3%) of petitioner counsel felt that the time lapse was reasonable, while forty-nine (70%) of the respondent counsel agreed that the lapse was reasonable. By contrast, sixty (58.8%) petitioner attorneys disagreed

24. (SD) = strongly disagree, (D) = disagree, (N) = neither agree nor disagree, (A) = agree, and (SA) = strongly agree.

that the lapse was reasonable, but only thirteen (18.6%) of the attorneys for respondents disagreed.

Table II

1(b) - The time lapse between the request for hearing and hearing was reasonable.

Rating Code	Number of Responses	Percent
SD	34	(19.8)
D	39	(22.7)
N	13	(7.6)
A	79	(45.9)
SA	5	(2.9)
No response	2	(1.2)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	30	(29.4)
D	30	(29.4)
N	6	(5.9)
A	31	(30.4)
SA	4	(3.9)
No response	1	(1.0)

Respondents

Rating Code	Number of Responses	Percent
SD	4	(5.7)
D	9	(12.9)
N	7	(1.0)
A	48	(68.6)
SA	1	(1.4)
No response	1	(1.4)

QUESTION 1(c)

Question 1(c) solicited attorneys' opinions as to whether the time lapse between the request and the hearing had an effect on the outcome of the hearing. One hundred and twenty-seven (73.8%) felt that the lapse did not affect the outcome of their hearing, however, thirteen (7.6%) did perceive a negative effect. Some attorneys expressed concern that such delay had the potential for prejudicing their client's case and

complained that long time lags increased litigation costs and discouraged their clients. One attorney noted, "Plaintiffs in these actions are usually poor and injured. They are not as able as the doctors and their insurance carriers to sustain protracted litigation."

One attorney expressed frustration with the delays: "I had to wait almost one and a half years from filing to hearing. It is outrageous when last minute requests for continuances are routinely granted." Forty-seven of the surveys in the study indicated the granting of continuances, thirty cases reported one continuance, nine cases had two continuances and eight others had three continuances. Two attorneys reported that their clients died before their cases could come before the panel!

Table III

1(c) - The time lapse between the request and the hearing did not affect the outcome of the hearing.

Rating Code	Number of Responses	Percent
SD	3	(1.7)
D	10	(5.8)
N	26	(15.1)
A	112	(65.1)
SA	15	(8.7)
No response	6	(3.5)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	3	(2.9)
D	9	(8.8)
N	21	(20.6)
A	55	(53.9)
SA	9	(8.8)
No response	5	(4.9)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	1	(1.4)
N	5	(7.1)
A	57	(81.4)
SA	6	(8.6)
No response	1	(1.4)

Question 2

Question number two dealt with the competency, fairness and professionalism of the panel members. Several attorneys made general comments about the lack of advance notice as to the composition of the panel. One attorney stated, "We never get notice of the composition of the panel so that we can research them and object if necessary." Another commented, "The hearing panel does not come fresh to the hearing, that is the attorney and lay person on the panel have listened to numerous cases over a period of days or weeks. Some panel members are much better than others."

In addition, one attorney commented on the special panel needs in cases involving multiple defendants. He observed, "I think it would be useful to look again at the number of panel members needed in a multiple defendant-respondent case. In our case there was confusion. No expert was provided to cover the specialty our respondent was in."

Question 2(a)(1)

Question 2(a)(1) asked whether the attorney on the hearing panel was competent. One hundred and twenty-nine (75%) rated this member of the panel as competent; eight (4.6%) rated him incompetent.

Table IV

2(a)(1) - The attorney on the hearing panel was competent.

Rating Code	Number of Responses	Percent
SD	4	(2.3)
D	4	(2.3)
N	28	(16.3)
A	112	(65.1)
SA	17	(9.9)
No response	7	(4.1)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	4	(3.9)
D	3	(2.9)
N	24	(23.5)
A	59	(57.8)
SA	11	(10.8)
No response	1	(1.0)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	1	(1.4)
N	4	(5.7)
A	53	(75.7)
SA	6	(8.6)
No response	6	(8.6)

QUESTION 2(a)(2)

Question 2(a)(2) asked whether the attorney on the hearing panel was fair. One hundred and nineteen (69.2%) of those responding to the questionnaire thought that he was fair, while twelve (7.0%) felt that he was unfair.

Table V

Question 2(a)(2) - The attorney on the panel was fair.

Rating Code	Number of Responses	Percent
SD	3	(1.7)
D	9	(5.3)
N	30	(17.4)
A	108	(62.8)
SA	11	(6.4)
No response	11	(6.4)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	3	(2.9)

D	7	(6.9)
N	26	(25.6)
A	54	(52.9)
SA	8	(7.8)
No response	4	(3.9)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	2	(2.9)
N	4	(5.7)
A	54	(77.1)
SA	3	(4.3)
No response	7	(10.0)

QUESTION 2(a)(3)

Question 2(a)(3) asked whether the attorney on the panel was professional. One hundred and forty (81.4%) responded favorably while five (2.9%) indicated that he was unprofessional.

Table VI

2(a)(3) - The attorney on the hearing panel was professional.

Rating Code	Number of Responses	Percent
SD	2	(1.2)
D	3	(1.7)
N	19	(11.0)
A	124	(72.1)
SA	16	(9.3)
No response	8	(4.7)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	1	(1.0)
D	3	(2.9)
N	17	(16.7)
A	65	(63.7)
SA	12	(11.8)
No response	4	(3.9)

Respondents

Rating Code	Number of Responses	Percent
SD	1	(1.4)
D	0	(0.0)
N	2	(2.9)
A	59	(84.3)
SA	4	(5.7)
No response	4	(5.7)

QUESTION 2(b)(1)

Question 2(b)(1) asked whether the medical professional on the panel was competent. One hundred and nineteen (69.2%) of those responding indicated that he acted competently; eleven (6.4%) disagreed. The breakdown reveals that fifty-seven (55.8%) of the petitioners' counsel agreed that the medical professional was competent while sixty-two (88.6%) of the respondents' attorneys agreed with this statement. However, in examining the number of attorneys that either disagreed that the medical member was competent or responded neutrally, forty-one (40.2%) of the petitioners fell into those categories while only three (4.3%) of the respondents did so. (This analysis, and the analysis under questions 2(b)(2), 2(c)(1), 2(c)(2) and (3)(a) groups together the "neutral" and "disagree" categories in order to highlight a strong divergence between the petitioners and respondents.) Some attorneys expressed concern that the health care professional on the panel was not in the same area of specialty as the respondent.

Table VII

2(b)(1) - The medical professional on the hearing panel was competent.

Rating Code	Number of Responses	Percent
SD	3	(1.7)
D	8	(4.7)
N	33	(19.2)
A	88	(51.2)
SA	31	(18.0)
No response	9	(5.2)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	3	(2.9)

D	7	(6.9)
N	31	(30.4)
A	49	(48.0)
SA	8	(7.8)
No response	4	(3.9)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	1	(1.4)
N	2	(2.9)
A	39	(55.7)
SA	23	(32.9)
No response	5	(7.1)

Question 2(b)(2)

Question 2(b)(2) asked whether the medical professional on the hearing panel was fair. Ninety-four (54.7%) felt that this panel member was fair; forty (23.3%) disagreed with their assessment. Within that group, thirty-seven (36.3%) of the petitioners' attorneys believed that this member was fair; fifty-seven (81.4%) of the respondents' attorneys agreed. In examining the responses of the two groups in the "Strongly Disagree", "Disagree", and "Neither Agree or Disagree" categories, sixty-two (60.8) of the petitioners' attorneys answered this question in these negative/neutral categories while eight (11.4%) of the respondents' attorneys did so.

Several of the petitioners' comments indicated that they felt that the medical profession was biased. One attorney commented: "Prior to the start of the hearing, the doctor on the panel spoke with the defendant. In my client's presence, he told the defendant words to the effect, 'don't worry, I'm glad that I could come help you out.' " Another attorney commented, "The doctor on the panel typically dominates the discussions and conclusions of the panel in favor of the physician."

Table VIII

2(b)(2) - The medical professional on the hearing panel was fair.

Rating Code	Number of Responses	Percent
SD	14	(8.1)
D	26	(15.1)
N	30	(17.4)
A	68	(39.5)
SA	26	(15.1)
No response	8	(4.7)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	13	(12.7)
D	23	(22.5)
N	26	(25.5)
A	29	(28.4)
SA	8	(7.8)
No response	3	(2.9)

Respondents

Rating Code	Number of Responses	Percent
SD	1	(1.4)
D	3	(4.3)
N	4	(5.7)
A	39	(55.7)
SA	18	(25.7)
No response	5	(7.1)

QUESTION 2(b)(3)

Question 2(b)(3) asked whether the medical professional on the hearing panel was professional. The majority, one hundred and eighteen (68.6%), indicated that they perceived him to be professional; thirteen (7.6%) saw him as unprofessional. Within that general finding, fifty-four (52.9%) of those representing petitioners indicated that the medical member was professional; sixty-four (91.4%) of the respondents' counsel agreed that he was professional. Additionally, twelve of the petitioners' group (11.8%) ruled him unprofessional, while only one (1.4%) of the respondents' found him to be unprofessional.

Table IX

2(b(3) - The medical professional on the hearing panel was

professional.

Rating Code	Number of Responses	Percent
SD	3	(1.7)
D	10	(5.8)
N	35	(20.3)
A	91	(52.9)
SA	27	(15.7)
No response	6	(3.5)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	3	(2.9)
D	9	(8.8)
N	31	(30.4)
A	45	(44.1)
SA	9	(8.8)
No response	5	(4.9)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	1	(1.4)
N	4	(5.7)
A	46	(65.7)
SA	18	(25.7)
No response	1	(1.4)

Question 2(c)(1)

Question 2(c)(1) asked whether the lay person on the hearing panel was competent. Ninety-four (54.7%) responded that the lay member of the panel was competent, while sixteen (9.3%) disagreed with that response. Forty-three (42.2%) of the petitioners' attorneys indicated that they felt that the lay member was competent while fifty-one (72.9%) of the respondents' group agreed. By contrast, fifty-six (55%) of those representing petitioners either disagreed with or were neutral about this member's competency, but only seventeen (24.3%) of the respondent attorneys answered in that manner. One attorney observed, "The lay people on the panels seemed intimidated by the experts, particularly the medical professional on the panel."

Table X

2(c)(1) - The lay person on the hearing panel was competent.

Rating Code	Number of Responses	Percent
SD	8	(4.7)
D	8	(4.7)
N	57	(33.1)
A	85	(49.4)
SA	9	(5.2)
No response	5	(2.9)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	6	(5.9)
D	7	(6.9)
N	43	(42.2)
A	38	(37.3)
SA	5	(4.9)
No response	3	(2.9)

Respondents

Rating Code	Number of Responses	Percent
SD	2	(2.9)
D	1	(1.4)
N	14	(20.0)
A	47	(67.1)
SA	4	(5.7)
No response	2	(2.9)

QUESTION 2(c)(2)

Question number 2(c)(2) asked whether the lay member of the panel was fair. Ninety-one (52.9%) of the total group of attorneys agreed, while twelve (7.0%) disagreed with this statement. Of the petitioner group, forty-two (41.2%) agreed that this member acted fairly; forty-nine (70.0%) of the respondent attorneys agreed. Within the overall statistics, fifty-three (52.0%) of the petitioners either disagreed or were neutral about the lay person's fairness; seventeen (24.3%) of the respondent group answered in these categories.

Table XI

2(c)(2) - The lay person on the hearing panel was fair.

Rating Code	Number of Responses	Percent
SD	3	(1.7)
D	9	(5.2)
N	58	(33.7)
A	82	(47.7)
SA	9	(5.2)
No response	11	(6.4)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	2	(2.0)
D	7	(6.9)
N	44	(43.1)
A	37	(36.3)
SA	5	(4.9)
No response	7	(6.9)

Respondents

Rating Code	Number of Responses	Percent
SD	1	(1.4)
D	2	(2.9)
N	14	(20.0)
A	45	(64.3)
SA	4	(5.7)
No response	4	(5.7)

QUESTION 3(a)

Question 3(a) asked whether the finding of the panel was equitable and correct based upon the evidence placed before it. Ninety-five (55.2%) of all the attorneys polled thought that it was equitable while sixty-two (36.0%) disagreed. Specifically, thirty-four (33.3%) of the petitioner group agreed that the finding was equitable and correct; sixty-one (87.1%) of those representing the respondents agreed. On the other hand, sixty-eight (66.7%) of the petitioners disagreed or felt neutrally about this statement, but only nine (12.9%) of the respondent group did so.

Several attorneys commented that they were uncertain as to the

basis upon which the panel rendered its opinion. Another attorney commented that he felt that the panel had exceeded its scope, "My impression was that the panel was deciding whether the plaintiff should win on the merits not whether the case was sufficient to justify litigation."

Table XII

3(a) - The finding of the panel was equitable and correct based upon the evidence placed before it.

Rating Code	Number of Responses	Percent
SD	31	(18.0)
D	31	(18.0)
N	15	(8.7)
A	58	(33.7)
SA	37	(21.5)
No response	0	(0.0)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	29	(28.4)
D	25	(24.5)
N	14	(13.7)
A	26	(25.5)
SA	8	(7.8)
No response	0	(0.0)

Respondents

Rating Code	Number of Responses	Percent
SD	2	(2.9)
D	6	(8.6)
N	1	(1.4)
A	32	(45.7)
SA	29	(41.4)
No response	0	(0.0)

QUESTION 3(b)

Question 3(b) asked the attorneys whether their opinion changed as a result of the hearing. Eight (4.7%) of those responding felt that their opinion did change as a result of the panel hearing. However, an

overwhelmng majority of the attorneys, 155 (90.1%), stated that their opinion was unchanged. Several of the group viewed the fact that their opinion had not changed as a positive factor and commented that their evaluations of their cases were confirmed and strengthened by the panel decisions. Others saw the lack of change in a negative light, pointing to the delay caused by the panel proceedings, "These panels merely serve to delay matters and cause increased expenses and procedural traps for litigants in favor of the health care providers." One attorney commented on the futility of the panel, "We have received non-merit responses on every case we've brought up and most were eventually settled or prevailed at trial."

Table XIII

3(b) - Your opinion of your case did not change as a result of the hearing.

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	8	(4.7)
N	8	(4.7)
A	78	(45.3)
SA	77	(44.8)
No response	1	(0.6)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	3	(2.9)
N	6	(5.9)
A	44	(43.1)
SA	49	(48.0)
No response	0	(0.0)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	5	(7.1)
N	2	(2.9)
A	34	(48.6)
SA	28	(40.0)
No response	1	(1.4)

QUESTION 4

Question number four sought information from the attorneys concerning the current status of the case or cases specified on the cover sheet that accompanied the questionnaires. Twenty-eight (16.3%) of the cases had been settled, twenty-five (14.5%) of them with consideration given the petitioner and three (1.7%) without consideration given. In eighty-four (48.8%) of the reported cases, filing in district court had either already occurred (seventy-eight or 45.3%) or was planned (six or 3.5%). Five (2.9%) of the cases were resolved in district court with one (0.6%) with a finding for the petitioner and four (2.3%) with a finding for the respondent.

Table XIV

4 - What is the current status of your case?		
—Settled with consideration given to petitioner.	25	(14.5%)
—Settled without consideration given to petitioner.	3	(1.7%)
—Further action not being pursued.	31	(18.0%)
—Filing in District Court is planned.	6	(3.5%)
—Filing has been made in District Court.	78	(45.3%)
—Resolved in District Court with finding for petitioner.	1	(0.6%)
—Resolved in District Court with finding for respondent.	4	(2.3%)
—Other	11	(6.4%)
—No response	13	(7.6%)

QUESTION 5(a)

Question number 5(a) asked whether the pre-litigation hearing helped to define the issues or generally assisted in reaching a settlement or decision not to pursue the action in District Court. Of all the attor-

neys that responded to this question, eighty-five (49.4%) disagreed that the panel was of assistance in settling the case; while sixty-three (36.6%) found the hearing helpful in encouraging settlement between the parties. Within this total, twenty-eight (27.5%) of the petitioners' attorneys agreed that the proceedings were helpful; thirty-five (50%) of the respondent group agreed. By contrast, sixty-five (49.4%) of the petitioners disagreed that the hearing was helpful in defining issues and reaching a settlement, while twenty (28.6%) of the respondent attorneys answered negatively.

One attorney that did find the panel to be effective in assisting to settle their case commented, "The pre-litigation panel helps to get the parties together early on to pursue settlement. This is beneficial." In the same vein, another attorney stated, "In my opinion the most valuable benefit of the program is to allow the parties to see how each side views the case at an early date. This provides an important frame of reference for subsequent settlement discussions."

An attorney who did not view the process as helpful offered, "If you don't know what the issues are and don't know whether litigation will be pursued prior to the pre-litigation hearing, you are probably either incompetent or at least not adequately prepared." Another concluded bluntly, "The procedure does not foster settlement. It only gives the medical provider more protection by the mandated steps required before litigation can be pursued. It is another way for medical providers to avoid liability. I believe it should be done away with."

Table XV

5(a) - The pre-litigation hearing helped to define the issues or otherwise assisted in reaching a settlement or decision not to pursue the case in District Court.

Rating Code	Number of Responses	Percent
SD	43	(25.0)
D	42	(24.4)
N	20	(11.6)
A	49	(28.5)
SA	14	(8.1)
No response	4	(2.3)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	38	(37.3)

D	27	(26.5)
N	8	(7.8)
A	23	(22.5)
SA	5	(4.9)
No response	1	(1.0)

Respondents

Rating Code	Number of Responses	Percent
SD	5	(7.1)
D	15	(21.4)
N	12	(17.1)
A	26	(37.1)
SA	9	(12.9)
No response	3	(4.3)

QUESTION 5(b)

Question 5(b) asked whether the pre-litigation process is beneficial in screening from District Court action some medical malpractice cases that are without merit. Of the entire group surveyed, ninety-one (52.9%) agreed that the panel process is beneficial, while fifty-five (32.0) disagreed with that conclusion. Within that total group, thirty (29.4%) of the petitioners answered affirmatively while sixty-one (85.7%) of the respondents agreed that the process is beneficial in this respect. On the negative/neutral side of the responses, seventy (68.6%) of the petitioner attorneys answered in these categories; seven (12.8%) of the respondent attorneys did so.

One attorney explained his stance that the panel process is beneficial, "About one-third of my malpractice cases are resolved by pre-litigation hearings which makes them very time and cost efficient." On the opposite side of this discussion, one attorney offered, "Experienced attorneys cannot afford to undertake non-meritorious claims, so the decision to litigate is made long before the hearing."

Table XVI

5(b) - The pre-litigation process is beneficial in screening from District Court action some medical malpractice cases that are without merit.

Rating Code	Number of Responses	Percent
SD	35	(20.3)
D	20	(11.6)
N	22	(12.8)
A	72	(41.9)
SA	19	(11.0)
No response	4	(2.3)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	34	(33.3)
D	16	(15.7)
N	20	(19.6)
A	24	(23.5)
SA	6	(5.9)
No response	2	(2.0)

Respondents

Rating Code	Number of Responses	Percent
SD	1	(1.4)
D	4	(5.7)
N	2	(2.9)
A	48	(68.6)
SA	13	(18.6)
No response	2	(2.9)

QUESTION 5(c)

Question 5(c) asked whether the medical malpractice pre-litigation program should be retained. Eighty-nine (51.7%) of the attorneys responding concluded that it should be retained, while sixty-four (37.2%) disagreed with their conclusion. Of the petitioners' attorneys, twenty-nine (28.4%) felt that the program should be retained, while sixty (85.7%) of the respondents' attorneys agreed with that conclusion. Seventy-two (70.6%) of the petitioner attorneys either disagreed or felt neutrally about the retention of the pre-litigation program; only nine (12.9%) of the those representing the respondents fell into those categories. Even though over one-half of the attorneys that responded to the questionnaires felt that the program should be retained, none of them took the opportunity to comment as to why they came to that conclu-

sion. However, numerous comments were offered by those opposed to retaining the program. One of them stated, "I originally had high hopes for this panel because my specific job at my firm was to weed out the frivolous claims and determine whether to pursue a medical malpractice action. I thought the panels would be a great help but I have been immensely disappointed." Another offered, "In principle, I agree with the pre-litigation screening process. The process presently utilized in Utah does not fulfill the objectives envisioned by this process."

Table XVII

5(c) - The medical malpractice pre-litigation program should be retained.

Rating Code	Number of Responses	Percent
SD	46	(26.7)
D	18	(10.5)
N	17	(9.9)
A	71	(41.3)
SA	18	(10.5)
No response	2	(1.2)

Breakdown of responses by petitioners and respondents:

Petitioners

Rating Code	Number of Responses	Percent
SD	46	(45.1)
D	14	(13.7)
N	12	(11.8)
A	25	(24.5)
SA	4	(3.9)
No response	1	(1.0)

Respondents

Rating Code	Number of Responses	Percent
SD	0	(0.0)
D	4	(5.7)
N	5	(7.1)
A	46	(65.7)
SA	14	(20.0)
No response	1	(1.4)

IV. Summary Analysis

The majority of attorneys that answered Question One, "Preliminary," stated that the Division's administrative procedures were adequately handled, that the time lapse between the request and the hearing was reasonable, and that any lapse in time did not affect the hearing. However, upon examination of the individual statistics for petitioner and respondent, some divergence should be noted. While a majority in both groups, seventy-two (70.6%) of the petitioner attorneys and fifty-five (78.5%) of the respondent attorneys, agreed that the administrative procedures were adequately handled, they were not in such close agreement when questioned as to whether the time lapse between request for hearing and the hearing was reasonable. Only thirty-five (34.3%) of the petitioner group agreed on this point, but forty-nine (70.0%) of the respondent attorneys agreed with this statement.

A majority of both groups did agree with the statement in 1(c) that the time lapse did not affect the outcome of the hearing. However, the majority was more pronounced in the respondent group, sixty-three (90.0%); the petitioner majority was at sixty-four (62.7%). This response was somewhat unexpected in light of the statistics showing that the average delay between request and hearing was just over seven months. The delays ranged from one to sixteen months in duration. A contributing factor to the delays was the fact that 27% of the cases reported in this study had from one to three continuances granted.

As to Question Two, "Panel", the attorneys generally expressed positive feelings about the members of the panel. The majority of both groups surveyed, seventy (68.6%) of petitioners and fifty-nine (84.3%) of the respondents, rated the attorney on the panel as competent. Likewise, sixty-two (60.7%) of the petitioner group and fifty-seven (75.4%) of the respondent group agreed that this member was fair; and seventy-seven (75.5%) of the petitioners and sixty-three (90.0%) of the respondents found him or her to be professional.

More variation occurred in the statistics concerning the medical panel member. While a majority of both the petitioner and respondent groups agreed as to his or her competency, fifty-seven (55.8%) of the petitioners and sixty-two (88.6%) of the respondents, only thirty-seven (36.2%) of the petitioners rated this member as fair. By contrast, fifty-seven (81.4%) of the respondents agreed that he or she was fair. The accompanying comments seemed to indicate that the petitioners' perception of unfairness was based upon the medical professional's frequent dominance of the panel proceedings as well as a perceived bias by the medical member for the respondent(s). The overall outcome of these proceedings, over 80% receiving a non-meritorious ruling, may have

also shaded the petitioners' feelings about the fairness of this panel member.

With regard to this member's professionalism, fifty-four (52.9%) of the attorneys for the petitioners agreed that he or she acted on the panel in a professional manner; sixty-four (91.4%) of the respondent group agreed with this assessment.

The majority of the respondents, fifty-one (72.9%), agreed that the lay panel member was competent, but only forty-three (42.2%) of the petitioners agreed on this point. A similar split was registered on the question concerning this member's fairness. Forty-nine (70%) of the respondents rated him or her as fair, while 41.2% of the petitioners agreed. A number of those doubting the fairness of this member expressed concern in the comments that the lay person was unduly influenced during the proceedings by the professionals, particularly the medical member, on the panel.

In Part A of Question Three, "Outcome", thirty-four (33.3%) of the petitioner group felt that the outcome of the panel was equitable; sixty-one (87.1%) of the respondents believed in the equity of the proceedings. Part B of this question asked both groups if their opinion of their case changed as a result of the panel hearing. A resounding majority in both groups, ninety-three (91.1%) of the petitioners and sixty-two (88.6%) of the respondents, agreed that their opinion had not changed.

In Question Four, the attorneys reported the current status of their case. A relatively low number, twenty-eight (16.2%) of the cases had been settled. In thirty-one (18.0%) of them, no further action was being pursued. Eighty-nine (51.7%) had proceeded to District Court. The above statistics would have been more meaningful if a comparison could have been made of the outcome of medical malpractice cases prior to the instigation of the pre-litigation panel review requirement. This comparison was not possible due to the fact that such information was inaccessible.

The final section of the questionnaire, "Evaluation," addressed the effectiveness of the hearing process. Only a minority of both groups combined, sixty-three (36.6%), felt that the panel hearing assisted in defining issues which facilitated reaching a settlement. Within this statistic, however, only twenty-eight (27.4%) of the petitioner attorneys found the process helpful while thirty-five (50.0%) of the respondents did so. As to its effectiveness in screening cases from District Court action, thirty (29.4%) of the petitioners and sixty-one(87.2)% of the respondents agreed that it did so. The last part of this question asked whether this program should be retained. A minority of the petitioner attorneys twenty-nine (28.4%) felt that it should be while a decided

majority of the respondent group, sixty (85.7%), voted for its retention.

V. Attorney Recommendations

In the space provided for comment on the questionnaire, a number of attorneys took the opportunity to make recommendations regarding modification of the existing program. These suggestions fell into the following general categories:

A. Give the panel more authority

One attorney suggested, "It would be good to put 'teeth' into our panel opinions. Require a bond of $500 to be forfeited on unsuccessful court action after petitioner has previously been found to have a non-meritorious case." Another attorney proposed that mandatory attorney fees be required if they were unsuccessful in representing a client whose case had received a non-meritorious finding.

B. Use Rule 11 to screen cases

An attorney commented, "I think that the new Rule 11 of the Utah Rules of Civil Procedure should be used more to require plaintiff's counsel to better screen cases before they're filed and to punish attorneys and litigants who file frivolous cases without adequate prior investigation."

C. Improve effectiveness and impartiality of panel members

In order to assure that the panel members come "fresh" to the hearing, one attorney suggested that the Division limit the number of hearings before each panel on a given day to a reasonable amount. Another commented that attorneys should be notified in advance of the panel's composition. To support this position, one attorney related the following, "I traveled from Cedar City to Salt Lake with a client. Upon arrival at the hearing, the lay person disclosed that she was a former patient of the defendant. We were given the choice of another continuance or proceeding with the matter with her on the panel. Because of costs we had no alternative but to proceed." Prior notification would also eliminate the problems that arise when the medical panel member does not have the same specialty as the respondent.

Finally, one attorney recalled, "The physician during the hearing admitted his friendship with the doctor and conducted himself with total partiality." Thus, the program should screen panel members to avoid potential bias that could arise when the medical professional on the panel is a close associate of the respondent.

D. Panel should give basis for its opinion

Several of the attorneys commented on the need for the panel to state some basis for their opinion. To illustrate, one attorney noted, "I have no idea on what basis the panel based its decision. I simply got back a cryptic set of three 'X's' in a box marked non-meritorious."

E. Formulate and implement procedural rules

Numerous attorneys complained of the lack of procedural rules to govern the panel process, "The panel is worthless because the members have no guidance as to the function of the panel." Another expressed concern stating, "My impression was that the panel was deciding whether the plaintiff should win on the merits not whether the case was sufficient to justify litigation."

VI. Conclusions and Inferences Based Upon the Data

The statistics indicate that the program is ineffective: an overwhelming majority of the practitioners surveyed stated that their opinion of the case did not change as a result of the hearing. Further, only a slight majority of the total group saw the process as beneficial in defining the issues or in screening cases from District Court.

In addition, unlike most forms of alternative dispute resolution that statistically favor the petitioner/plaintiff, the data from this study shows an opposite result. Here, over 80% of the cases pre-screened received a non-meritorious finding. Such a reversal might be a result of the dominance of the medical professional on the panel or the non-binding nature of the proceedings.

The panel program is costly in several important respects. It is a financial drain on state funds: budget requests by the Division for the year 1986 to 1987 to administer the screening panel process exceeded one million dollars. It is also expensive for the litigants in terms of additional attorney fees and other costs associated with the delay. The proceedings cost the professionals on the panel in that they are only nominally compensated for their time.

During the first year of the program (1985), filings for hearings exceeded Division expectations by two hundred percent.[25] Such a statistic poses a question of whether this panel approach may actually in-

25. Utah State Division of Professional & Occupational Licensing (Department of Business Regulation), Health Care Malpractice Program for Pre-Litigation Hearings & Request and Justification for Increase in Division Budget Allocation and Proposed Increases in License Renewal Fees (1986).

crease the number of cases that are pursued.[26] The cost efficiency of such a program is also drawn in question by the possibility that additional expenses incurred in connection with mandatory non-binding arbitration may outweigh the savings realized by a reduced number of cases going to trial.[27] "Moreover, once the costs of a panel hearing have been incurred, the incremental costs of proceeding to trial are reduced, which tends to encourage litigation."[28]

VII. Perspective: Other Issues and Alternatives

The data herein reported does not address all of the concerns surrounding such a program. Serious questions have been raised in other states about the constitutionality of medical malpractice screening panels. The grounds for attacking these panels have been varied, as have been the results. They have ranged from claims of arbitrary and capricious application of the statute to specific Fourteenth Amendment violations. Plaintiffs have brought claims based upon due process, separation of powers, right to trial by jury, right to confrontation and equal protection.[29]

In addition state courts have examined claims of constitutionality based upon the statutes' operation, in that they denied access to courts by creating long delays.[30] This finding is based upon the fact that participation in the program creates significant delays, thus effectively denying both petitioners and respondents access to the courts.

The process may also be in violation of equal protection in that it singles out health care providers as a class receiving special treatment. In a recent Wyoming case, *Hoem v. State,*[31] the state supreme court held a similar pre-litigation statute unconstitutional as a denial of equal protection. The court agreed with the plaintiff that "on the one hand,

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26. Danzon, *supra* note 5, at 200.

27. D. Hensler, A. Lipson & E. Rolph, Judicial Arbitration in California: The First Year 68 (1981).

28. Danzon, *supra* note 5, at 199.

29. *See generally,* Colton v. Riccobono, 67 N.Y.2d 571, 496 N.E.2d 670 (1986) (holding that under a due process theory, a widow failed in her efforts to challenge the statutory requirement that a screening panel to hear a malpractice case prior to trial denied her access to the courts); Bernier v. Burris, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (holding that the claimant was successful in challenging the constitutionality of the procedures for review panels in that the court found them to be an unconstitutional burden on the right to a jury trial); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343 (Alaska 1988) The *Keyes* court held that a mandatory requirement of panel review did not infringe on the plaintiff's constitutional right to trial by jury, and did not unconstitutionally vest power in the nonjudicial members of the panel. Further, the panel requirement did not violate equal protection guarantees as it was a reasonable legislative response to the malpractice insurance crisis and did not deny the plaintiff access to the courts. *Id.*

30. *See* Daughtrey & Smith, *supra* note 4, at 284.

31. 756 P.2d 780 (Wyo. 1988).

[the act] singles out a limited class of health care providers for special protection while, on the other hand, it places an added burden on persons injured by health care providers."[32]

In light of the concerns with effectiveness, cost efficiency and constitutionality with the Utah pre-screening requirement in malpractice cases, perhaps alternatives should be closely examined. Such alternatives are at work in other states at the present time.

The New York Medical Malpractice Reform Act requires that a pre-trial conference be scheduled before the case is placed on the trial calendar. "The purposes of this conference are to establish a timetable for discovery and trial, to encourage the settlement of the action, and to simplify and narrow the issues for trial. Attendance . . . is compulsory, and a party failing to attend is subject to sanctions."[33] Also, a Florida statute requires the attachment of corroborating written medical expert opinion to any notice of intent to commence action in a medical malpractice.[34]

Taking another approach, California law mandates peer review of health care providers that is aimed at avoiding suit.[35] Such a statute operates on the theory that a great number of medical malpractice claims could be eliminated by increasing self-policing and regulation activities within the health care profession. Also educational programs that encourage physicians to better communicate with their patients, instruct them on how to avoid medical malpractice claims, and assist them in developing self-evaluation skills would prove invaluable.

Another alternative aimed at prompt, equitable resolution of such cases is the "Mandated Demand for Judgment Plan."[36] This theoretical plan requires a plaintiff, within ninety days of filing suit, to make a demand for judgment. Various incentives are built into the plan to encourage both parties to engage in reasoned negotiations with each other.

An alternative that was mentioned under the "Attorney Recommendations" heading in this paper is the use of the sanctions under Federal (as well as Utah) Rule 11. The 1983 amendments to the federal rule have made a significant difference in its enforcement. During several decades prior to the adoption of the amendments, only eleven

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32. *Id.* at 782.

33. Note, *The 1985 Medical Malpractice Reform Act: The New York State Legislature Responds to the Medical Malpractice Crisis With a Prescription for Comprehensive Reform,* 52 BROOKLYN L. REV. 135, 157 (1986).

34. FLA. STAT. § 768.495(1) (West Supp. 1988).

35. CAL. PENAL CODE § 11161.8 (Deering 1982).

36. ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS, A FLORIDA LEGISLATURE TASK FORCE, FINAL RECOMMENDATIONS 117-120 (March 1, 1988) [hereinafter FLORIDA TASK FORCE].

cases had been reported that resulted in an affirmative finding under Rule 11.[37] However, during the two-year period that followed the adoption of the 1983 amendments, 159 published opinions indicated sanctions against counsel.[38]

The above discussion of alternatives is by no means an exhaustive one. However, such alternatives to the pre-litigation panel process or combinations thereof may more adequately meet the original goals of the Utah Medical Malpractice Pre-litigation Program without adding the complications that presently exist.

37. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 36 (1976).

38. *See* FLORIDA TASK FORCE, *supra* note 34, at 105.

APPENDIX I

Pre-Litigation Case Summary

DOPL FILE *#86-02-010*

DATE OF NOTICE:	*12-09-85*	
DATE OF REQUEST:	*02-07-86*	
CONTINUANCE REQUEST:		
HEARING SCHEDULED:		*None*
DATE OF HEARING:		*None*
ELAPSED TIME		*N/A*

BEVERLY PENROSE petitioner,:

-vs- :

DR. H. UNGRIGHT, SR. :

:

:

:

respondents:

:

DECISION FOR RESPONDENT(S) *MERITORIOUS NON MERITORIOUS*

EXPLANATIONS OF OTHER RESOLUTIONS

CASE EXCEEDED THE 90 DAY LIMIT ON JURISDICTION.

APPENDIX II

Medical Malpractice Pre-Litigation Program Survey

Please indicate how much you agree or disagree with the following statements. (Strongly Disagree = SD, Disagree = D, Neither Agree nor Disagree = N, Agree = A, and Strongly Agree = SA. Circle One).

1. PRELIMINARY:

   a. The Divisions' administrative procedures: notices, rulings, etc. prior to the hearing were adequately handled with respect to you and your client. SD D N A SA

   Comments: _____

   _____

   _____

   b. The time lapse between the request for hearing and hearing was reasonable. SD D N A SA

   Comments: _____

   _____

   _____

2. PANEL

   a. The *attorney* on the hearing panel was;

      1. competent SD D N A SA
      2. fair SD D N A SA
      3. professional SD D N A SA

   b. The *medical professional* on the hearing panel was:

      1. competent SD D N A SA
      2. fair SD D N A SA
      3. professional SD D N A SA

   c. The *lay person* on the hearing panel was:

      1. competent SD D N A SA
      2. fair SD D N A SA

3. OUTCOME

   a. The finding of the panel was equitable and correct based upon the evidence placed before it. SD D N A SA

   Comments: _____

   _____

b. Your opinion of your case did *not* change as a result of the hearing. SD D N A SA

Comments: _____

4. What is the current status of your case? (Check any which apply):

_____ Settled with consideration given to petitioner.
_____ Settled without consideration given to petitioner.
_____ Further action not being pursued.
_____ Filing in District Court is planned.
_____ Resolved in District court with finding for petitioner.
_____ Resolved in District court with finding for respondent.
_____ Other (describe): _____

5. EVALUATION

a. The pre-litigation hearing helped to define the issues or otherwise assisted in reaching a settlement or decision not to pursue the case in District Court. SD D N A SA

Comments: _____

b. The pre-litigation process is beneficial in screening from District Court action some medical malpractice cases that are without merit. SD D N A SA

Comments: _____

6. Additional Comments: _____