

ALASKA'S MEDICAL MALPRACTICE EXPERT ADVISORY PANEL: ASSESSING THE PROGNOSIS*

I. THE CONCEPTION

In May 1976, as the country was embroiled in what was then perceived as a medical malpractice crisis,¹ the Alaska Legislature passed a package of legislation designed to alleviate the effects of that crisis. As part of that package, Alaska created an expert advisory panel to screen medical malpractice cases prior to trial.² Approximately one-half of the states had already created screening panels.³

Alaska's expert advisory panel consists of three health care providers who are given broad authority to collect evidence and hear testimony in order to determine whether a defendant met the appropriate standard of care.⁴ After its investigation, the panel composes a final report that is admissible in a subsequent trial.⁵ The panel members themselves can also be called to testify.⁶ The panel's all-medical composition and its members' role in a subsequent jury trial represent Alaska's attempt to create a body of purely neutral, court-appointed expert witnesses.

In 1988, the Alaska Supreme Court assessed the constitutionality of the expert advisory panel in *Keyes v. Humana Hosp. Alaska, Inc.*⁷ The court upheld the validity of the panel process, limiting the scope of its holding to the facts of that particular case. By so restricting its holding, the

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1. REPORT OF THE GOVERNOR'S MEDICAL MALPRACTICE INSURANCE COMMISSION, 1, 14-15 (Oct. 1, 1975).

2. For the current text of the expert advisory panel statute, see *infra* note 46.

3. Reginald W. Rhein, Jr., *Malpractice: Grim Outlook for '76*, MED. WORLD NEWS, Jan. 12, 1976, at 71-73.

4. See *infra* part III.

5. See *infra* part III.

6. See *infra* part III.

7. 750 P.2d 343 (Alaska 1988).

supreme court left the door open for a future factual challenge to the constitutionality of the expert advisory panel. If new evidence were to demonstrate that the expert advisory panel was violating constitutionally protected rights or was failing to realize its purposes, the panel might not withstand such a challenge.

This note examines Alaska's expert advisory panel, currently codified at Alaska Statute section 09.55.536. While countless charges have been leveled against the panel process, rarely have the facts directly supported or refuted these charges. By combining anecdotal evidence from lawyers, judges, and others operating in the malpractice arena with factual data from the court systems and insurance companies, this note assesses the true effectiveness of Alaska Statutes section 09.55.536.

The next section of this note tracks the legislative history of the expert advisory panel statute, from the legislation initially recommended by the Governor's Medical Malpractice Insurance Commission ("GMMIC"),⁸ through the House and the Senate, to the governor's desk. This section highlights the various legislative attempts to remove the expert advisory panel from the medical malpractice legislative package. By examining the various sections of the expert advisory panel statute, Civil Rule 72.1, and related case law, part III illustrates how the expert advisory panel is designed to work. Part IV analyzes the *Keyes* decision and examines the door left open for future challenge. Part V surveys and evaluates the various problems affecting the expert advisory panel. The note concludes by suggesting several revisions to the expert advisory panel process.

II. THE DELIVERY OF THE LEGISLATIVE PACKAGE

On January 15, 1976 Governor Jay Hammond transmitted to the Alaska House of Representatives a package of medical malpractice legislation recommended by the Governor's Medical Malpractice Insurance Commission.⁹ The package was read on the floor of the House and

8. In July, 1975, Governor Jay Hammond appointed a group of Alaska citizens to serve in the GMMIC. Letter from Langhorne A. Mottley, Chairperson, Governor's Medical Malpractice Insurance Commission, to Governor Jay Hammond (Oct. 1, 1975) (on file with the *Alaska Law Review*). According to the chairperson of the panel, the Commission was appointed "to study and make recommendations concerning the problem of adequate professional liability insurance available for the medical profession." *Id.*

9. H. JOURNAL, 9th Leg., 2d Sess. 40-42 (1976). One year earlier, Governor Hammond had vetoed a package of medical insurance legislation because, he said, the legislation fell "far short of yielding an adequate solution to the [medical malpractice] problem." Veto message from Jay S. Hammond, Governor of Alaska, to the Honorable Chancy Croft, President of the Senate, Alaska State Legislature (July 2, 1975).

The Governor's Commission stressed three factors that contributed to the need for the new legislation. First, the country was embroiled in a malpractice crisis, and the

referred to the Judiciary Committee.¹⁰ The proposed legislation comprised the recommendations of the Governor's Commission and was submitted in three parts: (1) House Bill 574, the bulk of the new legislation; (2) a second bill, House Bill 575, that created a Medical Injury Adjudication Board to replace the jury in medical malpractice cases; and (3) a joint resolution, House Joint Resolution 48, proposing to remove the jury trial requirement in medical malpractice cases.¹¹ The creation of the Medical Injury Adjudication Board was to take effect only upon passage of the joint resolution.¹²

The Judiciary Committee began hearings on January 21, 1976 and analyzed the legislation point by point.¹³ Much of the discussion at the hearings centered on the bill's insurance provisions and the creation of an indemnity corporation and a joint underwriting association. The inclusion of the expert advisory panel, however, was not ignored. Witnesses testified to the panel's benefits and costs, and committee members expressed their support and concerns.¹⁴

One committee member twice tried to delete the expert advisory panel from the House bill. In his first motion, Representative Brown argued that the expert advisory panel only provided information that a plaintiff was otherwise entitled to receive.¹⁵ The other members of the committee noted his objection, but his motion failed.¹⁶ Later, as the end of the committee hearings approached, Representative Brown again tried to delete the expert advisory panel.¹⁷ He claimed that the panel would increase costs and complicate litigation.¹⁸ This time his motion passed, and for a short while the expert advisory panel was eliminated from the draft of the

Commission predicted that Alaska would soon be faced with the same crisis. REPORT OF THE GOVERNOR'S MEDICAL MALPRACTICE INSURANCE COMMISSION, 1, 14-15 (Oct. 1, 1975). Second, the Alaska medical community was growing frustrated with various aspects of its medical malpractice insurance protection. The Commission noted that "the medical community in Alaska was becoming frustrated by the frequent shifting of markets, the lack of clear and reliable commitments of coverage and rates and misunderstanding about the degree of protection provided by the claims-made form of insurance." *Id.* at 2. Third, members of the medical community were threatening to discontinue medical service unless relief was forthcoming. In an already small medical community, such a threat had serious implications. *Id.* at 2.

10. H. JOURNAL, 9th Leg., 2d Sess. 43 (1976).

11. *Id.* at 40-41.

12. *Id.* at 41.

13. *Hearings on H.B. 574 Before the House Judiciary Committee*, 9th Leg., 2d Sess. 156 (1976).

14. *Id. passim.*

15. *Id.* at 170.

16. *Id.*

17. *Id.* at 183.

18. *Id.*

Judiciary Committee Substitute for the House Bill.¹⁹ Later the same day, however, another committee member moved to restore the expert advisory panel.²⁰ By a 4-3 vote, the committee agreed to put the expert advisory panel back into the legislation.²¹ House Bill 574 was signed out of the committee with the expert advisory panel intact and with support from various medical associations.²²

The Judiciary Committee Substitute for House Bill 574 was then read to the full House. Again an attempt was made to delete the expert advisory panel from the legislation, but this motion failed 5-34.²³ The bill was then read a third time, passed the House 39-0, and was sent to the Senate.²⁴

After amending the House bill, the Senate passed its version by a vote of 19-0.²⁵ A Free Conference Committee ("FCC") reconciled the House and the Senate versions of the medical malpractice legislation. The FCC preserved the expert advisory panel with one alteration -- it gave trial courts discretion over whether a given case warranted the formation of an expert advisory panel.²⁶

The FCC Bill was passed by voice vote in the House²⁷ and by a vote of 17-3 in the Senate.²⁸ The House then transmitted the final bill to the

19. *Id.*

20. *Id.* (motion by Representative Specking).

21. *Id.*

22. *Id.* at 195. See Letter from Richard C. Hess, M.D., Secretary-Treasurer, Fairbanks Medical Association, to Rodman Wilson, M.D., President, Alaska State Medical Association (Dec. 7, 1975) (endorsing all proposals); Letter from Edward D. Spencer, M.D., Secretary-Treasurer, Sitka-Mt. Edgecumbe Medical Society, to Rodman Wilson, M.D., President, Alaska State Medical Association (Dec. 22, 1975) (endorsing all proposals); Letter from Paul Steer, M.D., Secretary-Treasurer, Anchorage Medical Society, to Rodman Wilson, M.D., President, Alaska State Medical Association (Dec. 22, 1975) (supporting entire package of legislation); Letter from Peter O. Hansen, M.D., Secretary, Kenai Peninsula Medical Society, to Gary Hedges, M.D., President, Alaska State Medical Association (Jan. 5, 1976) (fully supporting the malpractice insurance legislation); Letter from David E. Johnson, M.D., Secretary, Ketchikan Medical Society, to Rodman Wilson, M.D., President, Alaska State Medical Association (Dec. 30, 1975) (endorsing most of the recommendations); *but see* Letter from Willard Andrews, President, Juneau Medical Society, to Rodman Wilson, M.D., President, Alaska State Medical Association (Oct. 14, 1975) (endorsing report with significant reservations); Letter from Keith E. Brown, President, Alaska Bar Association, to the Honorable Robert Boochever, Chief Justice, Alaska Supreme Court (Jan. 22, 1976) (expressing concerns over inclusion of the expert advisory panel) (all letters on file with the *Alaska Law Review*).

23. H. JOURNAL, 9th Leg., 2d Sess. 432 (1976).

24. *Id.* at 433.

25. S. JOURNAL, 9th Leg., 2d Sess. 460 (1976); *see also* Plumley v. Hale, 594 P.2d 497, 499 (Alaska 1979) (highlighting the legislative history of Alaska Statutes section 09.55.536).

26. *Plumley*, 594 P.2d at 499 n.5.

27. H. JOURNAL, 9th Leg., 2d Sess. 1535 (1976).

28. S. JOURNAL, 9th Leg., 2d Sess. 1314 (1976).

governor and on May 29, 1976 the Free Conference Substitute for the Senate Committee Substitute for the Judiciary Committee Substitute to House Bill 574 was signed into law as part of section 33, chapter 102 of the 1976 Session Laws of Alaska.²⁹

The legislative history of the expert advisory panel did not end with its passage in 1976. In 1977, a new bill went through the House concerning medical malpractice and insurance coverage.³⁰ The bill -- amending Alaska Statutes section 09.55.536 by adding a twenty day time limit to cases in which the court must appoint an expert advisory panel -- was referred to the Judiciary and Commerce Committees.³¹ The House adopted the Judiciary Committee Substitute for the bill.³² During the floor debate, one representative moved to amend the bill so as to repeal the expert advisory panel.³³ The deletion of the expert advisory panel was adopted by unanimous consent, the final version of the legislation was read for a third time, and it was transferred to the Senate.³⁴

On a local cable news program, Representative Terry Gardiner explained to his constituents his colleagues' reasons for deleting the expert advisory panel.³⁵ First, he explained, many legislators believed that the jury-centered adversarial system worked effectively without an expert panel. Second, opponents reasoned that the expert advisory panel merely added a complicating voice to any subsequent jury trial. Third, peer pressure within the medical community left doctors reluctant to serve on the panels. Finally, the panels hesitated to hand down rulings that were unfavorable to the doctors.

The Senate, however, refused to accept the House version of the legislation without the expert advisory panel.³⁶ The House debated whether to recede from its amendment eliminating the panel. Supporters of the advisory panel argued that it served to clarify the technical gray areas common to medical malpractice cases³⁷ and fostered out-of-court settlements.³⁸ Opponents focused on problems with the panel procedure, arguing that it was difficult to persuade the panel to pass unbiased

29. H. JOURNAL, 9th Leg., 2d Sess. 1591, 1716 (1976).

30. H. JOURNAL, 10th Leg., 1st Sess. 1556 (1977).

31. H. JOURNAL, 10th Leg., 2d Sess. 1663 (1978).

32. *Id.* at 1665-66.

33. *Id.* at 1665.

34. *Id.* at 1665-66.

35. *Capital '78* (Alaska cable television broadcast, July 15, 1978) (video tape on file with the *Alaska Law Review*).

36. S. JOURNAL, 10th Leg., 2d Sess. 1508 (1978).

37. *Capital '78* (Alaska cable television broadcast, July 16, 1978) (video tape on file with the *Alaska Law Review*).

38. *Id.*

judgement on another doctor.³⁹ Further, opponents noted many doctors' distaste for serving on the panels.⁴⁰ Finally, one representative argued that the panels were included in the medical malpractice package in 1976 only as a means of selling the whole package to the doctors.⁴¹ The representative concluded that there was no longer a need to make this concession.⁴²

Following these debates, the House voted 29-8 to strike the language that eliminated the expert advisory panel.⁴³ With the panel restored, the Senate voted on the House version of the bill and concurred in the House amendments, 16-2.⁴⁴

III. AN X-RAY OF ALASKA STATUTES SECTION 09.55.536

Currently, twenty states employ some type of screening panel in medical malpractice cases.⁴⁵ While the characteristics of these screening panels differ significantly from state to state, Alaska Statutes section 09.55.536⁴⁶ establishes what is in some ways a typical screening panel.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. H. JOURNAL, 10th Leg., 2d Sess. 1703 (1978).

44. S. JOURNAL, 10th Leg., 2d Sess. 1521 (1978).

45. See ALASKA STAT. § 09.55.536 (Supp. 1991); CONN. GEN. STAT. ANN. § 38.19b (West 1987); DEL. CODE ANN. tit. 18, § 6803 (1989); FLA. STAT. ANN. § 766.106 (West Supp. 1992); HAW. REV. STAT. § 671-11 (Supp. 1991); IDAHO CODE § 6-1001 (Supp. 1992) (effective until 1993); IND. CODE ANN. § 16-9.5-9-1 (Burns 1990); KAN. STAT. ANN. § 65-4901 (1985); LA. REV. STAT. ANN. § 40:1299.47 (West 1992); MASS. ANN. LAWS ch. 231, § 60B (Law. Co-op. Supp. 1992); MICH. COMP. LAWS ANN. § 600.4901 (West 1987); MONT. CODE ANN. § 27-6-101 (1992); NEB. REV. STAT. ANN. § 41A.003 (Michie Supp. 1991); NEV. REV. STAT. § 41A.003 (Supp. 1991); N.H. REV. STAT. ANN. § 519-A:1 (1974); N.M. STAT. ANN. § 41-5-14 (Michie 1989); PA. STAT. ANN. tit. 40, § 1301.101 (1992); UTAH CODE ANN. § 78-14-12 (1992); VA. CODE ANN. § 8.01-581.1 (1992); WIS. STAT. ANN. § 655.42 (West Supp. 1991) (mediation system; claimant must request mediation prior to court action).

46. Alaska Statutes section 09.55.536 provides in relevant part:

(a) In an action for damages due to personal injury or death based upon the provision of professional services by a health care provider when the parties have not agreed to arbitration of the claim under AS 09.55.535, the court shall appoint within 20 days after filing of answer to a summons and complaint a three-person expert advisory panel unless the court decides that an expert advisory opinion is not necessary for a decision in the case. When the action is filed the court shall, by order, determine the professions or specialties to be represented on the expert advisory panel, giving the parties the opportunity to object or make suggestions.

(b) The expert advisory panel may compel the attendance of witnesses, interview the parties, physically examine the injured person if alive, consult with the specialists or learned works they consider appropriate, and compel the production of and examine all relevant hospital, medical, or other records or materials relating to the health care in issue. The panel may meet in camera, but shall maintain a record

In 1990, Professor Jean Macchiaroli suggested eight general features that every medical malpractice screening panel statute should have:

(1) [A] complete statement of the purposes and goals of the screening process; (2) a definition of covered actions; (3) a provision establishing the panel as a mandatory prerequisite to litigation of the claim; (4) a provision declaring the composition of the panel, featuring attorney and health care provider members; (5) a delineation of panel proceedings; (6) provisions regarding use of panel findings in subsequent litigation of the same case; (7) the threat of costs for proceeding to trial with a baseless claim or defense; and (8) a position statement on the application of the panel requirements in federal diversity actions.⁴⁷

Alaska's expert advisory panel statute addresses most of Professor Macchiaroli's suggestions. The statute does not, however, completely correspond to her model, most strikingly in the expert advisory panel's all-medical composition.

Alaska Statutes section 09.55.536 mandates the use of the expert advisory panel in all malpractice cases against a health care provider⁴⁸

of any testimony or oral statements of witnesses and shall keep copies of all written statements it receives.

(c) Not more than 30 days after selection of the panel, it shall make a written report to the parties and to the court

(d) The report shall include copies of all written statements, opinions, or records relied upon by the panel and either a transcription or other record of any oral statements or opinions; shall specify any medical or scientific authority relied upon by the panel; and shall include the results of any physical or mental examination performed on the plaintiff. . . . [H]owever, a member may, instead of signing the report, submit a concurring or dissenting report which complies with the requirements of this subsection. . . .

(e) The report of the panel with any dissenting or concurring opinion is admissible in evidence to the same extent as though its contents were orally testified to by the person or persons preparing it. The court shall delete any portion that would not be admissible The jury shall be instructed in general terms that the report shall be considered and evaluated in the same manner as any other expert testimony. Any member of the panel may be called by any party and may be cross-examined as to the contents of the report or of that member's dissenting or concurring opinion.

(f) No discovery may be undertaken in a case until the report of the expert advisory panel is received. However, the court may relax this prohibition upon a showing of good cause by any party. If the panel has not completed its report within the 30-day period prescribed in (c) of this section, the court may, upon application, grant it an additional 30 days.

(g) Members of the panel are entitled to travel expenses and per diem All expenses incurred by the panel shall be paid by the court. However, in any case in which the court determines that a party has made a patently frivolous claim or a patently frivolous denial of liability, it shall order that all costs of the expert advisory panel be borne by the party making that claim or denial.

(h) Parties to the case and their counsel may not initiate communication out of court with members of the panel on the subject matter of its inquiry and report or cause or solicit others to do so, except through ordinary discovery proceedings.

ALASKA STAT. § 09.55.536 (Supp. 1991).

47. Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 239 (1990).

48. See ALASKA STAT. § 09.55.560 (Supp. 1991) (defining a health care provider as a

unless (1) the parties have agreed to arbitrate the case pursuant to Alaska Statutes section 09.55.535,⁴⁹ or (2) the court finds it unnecessary to submit the claim to an expert advisory panel.⁵⁰ If a panel is to be used, the parties propose the specialties of the panelists⁵¹ and the court submits the request to an appropriate medical association, which selects potential panelists from its general membership list.⁵²

The statute mandates that the court must appoint a panel within twenty days of the filing of the answer to a malpractice complaint; the parties to the suit then have ten days in which to challenge the panel's composition.⁵³ The panel members also have ten days to bring any conflicts or biases to the attention of the court.⁵⁴

Panel proceedings may be conducted privately, but the members are required to record testimony and oral statements.⁵⁵ Additionally, the panel has broad powers. It can compel the attendance of witnesses, conduct physical examinations of the injured person, consult other specialists or learned works, and compel the production of "all relevant . . . records or materials relating to the health care in issue."⁵⁶ The attorneys

statutorily licensed acupuncturist, audiologist, chiropractor, dental hygienist, dentist, nurse, dispensing optician, neuropath, optometrist, pharmacist, physical therapist or occupational therapist, physician, podiatrist, psychologist or psychological associate, hospital, or employee of a health care provider acting within the scope of employment).

49. Alaska Statutes section 09.55.535 is a voluntary arbitration provision.

50. ALASKA STAT. § 09.55.536(a) (Supp. 1991). Doctor Rodman Wilson, one of the early architects of Alaska's expert advisory panel statute, gives several reasons why a judge might choose to forgo the panel process: (1) The case may involve damages only (i.e., liability may be admitted), (2) extraordinary delay in composing a screening panel may prejudice a party's interests, or (3) financial considerations may prevent the acquisition of specialists. Telephone Interview with Dr. Rodman Wilson, Doctor of Internal Medicine, Anchorage (Nov. 1, 1992).

51. ALASKA R. CIV. P. 72.1(a).

52. Telephone Interview with Diane Alford, Legal Technician, Anchorage Clerk of Court (Sept. 15, 1992).

53. ALASKA STAT. § 09.55.536(a) (Supp. 1991); ALASKA R. CIV. P. 72.1(b)(1). According to Dr. Rodman Wilson, the composition of the expert advisory panels is frequently challenged on the basis of bias, conflict-of-interest, and improper specialty. Telephone Interview with Dr. Rodman Wilson, Doctor of Internal Medicine, Anchorage (Nov. 1, 1992). The Third Judicial District, Anchorage, is experimenting with a survey designed to screen for potential panel bias before the panel is composed. The survey, which each prospective panelist must complete, seeks to determine whether the potential panel member (1) has spoken about the case with anyone, (2) has had a doctor-patient relationship with either the plaintiffs or defendants, (3) has had a business relationship with either the plaintiffs or defendants, (4) has ever been sued by the plaintiff or defendant, and (5) has a strongly held view that would make it impossible to present an unbiased expert opinion. The survey is new and no information yet exists concerning its success. Telephone Interview with Judge Brian Shortell, Superior Court Judge, Third Judicial District (Apr. 20, 1992).

54. ALASKA R. CIV. P. 72.1(b)(2).

55. ALASKA STAT. § 09.55.536(b) (Supp. 1991); ALASKA R. CIV. P. 72.1(e)(5).

56. ALASKA STAT. § 09.55.536(b) (Supp. 1991).

for the parties may attend their client's panel proceedings with advance notice to the panel members, but they may not participate in the proceedings.⁵⁷ Communications outside of the panel process between the panel members and the parties to the case are prohibited.⁵⁸

The statute also serves to limit discovery, at least until the panel has had the opportunity to independently gather evidence and reach its conclusions.⁵⁹ Under the statute, discovery is not allowed until the conclusion of panel proceedings unless the court, upon petition of either party showing good cause, relaxes the express discovery prohibition.⁶⁰

The panel must submit a written report within thirty days of its selection, unless the court grants an extension.⁶¹ The report must answer eight statutorily prescribed questions:

- (1) What was the disorder for which the plaintiff came to medical care?
- (2) What would have been the probable outcome without medical care?
- (3) Was the treatment selected appropriate for the case?
- (4) Did an injury arise from the medical care?
- (5) What is the nature and extent of the medical injury?
- (6) What specifically caused the medical injury?
- (7) Was the medical injury caused by unskilled care?
- (8) If a medical injury had not occurred, how would the plaintiff's condition differ from the plaintiff's present condition?⁶²

The report is admissible at a subsequent trial.⁶³ Further, either party has the right to call any of the panel members to testify at a subsequent trial.⁶⁴ If members of the panel are called, they must limit their testimony to the contents of the panel report or their own concurring or dissenting opinion.⁶⁵ The jury is instructed to treat the report and accompanying

57. ALASKA R. CIV. P. 72.1(f)(1).

58. ALASKA STAT. § 09.55.536(h) (Supp. 1991).

59. *Id.* § 09.55.536(f).

60. *Id.* See also *Roethler v. Lutheran Hospitals & Homes Soc'y of Am., Inc.*, 709 P.2d 487, 489 (Alaska 1985) (holding an 80-day delay from the time of filing a claim to be good cause as a matter of law).

61. ALASKA STAT. § 09.55.536(c) (Supp. 1991).

62. *Id.*

63. *Id.* § 09.55.536(e). Material that will be inadmissible at the subsequent trial is removed from the panel report. *Id.*

64. *Id.*

65. *Id.* The Alaska State Medical Association further advises its panel members: "At deposition or in court be careful to limit your testimony to how you reached the expert advisory panelist opinion you came to. Explain your reasoning, but *do not* act at this point as an expert in general *Do not* expatiate on the case or bring up material or matters not explicitly considered by the panel." Memorandum from the Alaska State Medical Association to expert advisory panelists (June 1987) (emphasis in original) (on file with the *Alaska Law Review*).

testimony as it would any other expert opinion.⁶⁶ According to one Anchorage plaintiffs' attorney, juries generally follow that instruction: "The panel has a lot of credibility. Jurors see the members as court-appointed experts."⁶⁷

Members of the panel are paid at the state per diem rate "for days on which [they spend] an appreciable amount of time on the case."⁶⁸ Though all panel expenses are incurred by the court, costs can be transferred to a party making a frivolous claim.⁶⁹ Costs, however, are transferred infrequently.⁷⁰

IV. THE EXPERT ADVISORY PANEL GETS A SUPREME COURT CHECK-UP

Throughout the 1980's and the early 1990's, several states' pre-screening panels were repealed or held unconstitutional.⁷¹ In 1988, Alaska's panel faced such a challenge. In *Keyes v. Humana Hosp. Alaska, Inc.*,⁷² the plaintiff in a medical malpractice suit sought a protective order in the superior court to prevent the submission of an expert advisory panel report as evidence in a jury trial. Petitioner Keyes claimed that the expert advisory panel process was unconstitutional. Judge Shortell of the Third Judicial District denied the motion, and Keyes petitioned the supreme court

66. ALASKA STAT. § 09.55.536(e) (Supp. 1991).

67. Telephone Interview with William J. Donohue, Attorney, William J. Donohue, P.C. (April 15, 1992).

68. Memorandum from the Alaska State Medical Association to expert advisory panelists (June 1987) (on file with the *Alaska Law Review*). In Anchorage, the state per diem rate varies depending on the season. During the off-season (September - May), the rate is \$95 per day. During the peak season (May - September), the rate is \$115 per day. Telephone Interview with Office Clerk, Anchorage Administrative Accounting Office (Nov. 1, 1992).

69. ALASKA STAT. § 09.55.536(g) (Supp. 1991).

70. Telephone Interview with Office Clerk, Anchorage Administrative Accounting Office (Nov. 1, 1992). The staff of the Administrative Accounting Office could not recall a single occasion where costs had been transferred to a party making a frivolous claim. *Id.*

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-567 (repealed 1989); COLO. REV. STAT. § 13-22-401 (repealed 1991); FLA. STAT. ANN. § 768.44 (held unconstitutional on due process - delay grounds in *Aldana v. Holub*, 381 So.2d 231 (Fla. 1980)); ME. REV. STAT. ANN. tit. 24, § 2801 (repealed 1987); N.J. CT. C.P.R. 4:21 (deleted 1988); N.Y. JUD. LAW § 148-a (repealed Oct. 1991); 40 PA. CONS. STAT. ANN. § 1301.101 (held unconstitutional on due process - delay grounds in *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980)); TENN. CODE ANN. § 29-26-101 (repealed 1985); WYO. STAT. § 9-2-1501 (held unconstitutional on equal protection grounds in *Hoem v. State*, 756 P.2d 780 (Wyo. 1988)). Paul C. Weiler gives several reasons for the failure of so many screening panels, including long scheduling delays, costly pretrial presentation, lack of evidence showing beneficial results, and barriers to court access. PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* 42 (1991).

72. 750 P.2d 343 (Alaska 1988).

for review. Keyes alleged that Alaska Statutes section 09.55.536 violated her right to a jury trial, deprived her of due process of law, and violated separation of powers principles.⁷³ She argued that by requiring her to submit her case to an advisory panel before allowing a jury trial, Alaska Statutes section 09.55.536 increased her burden of persuasion without due process of law.⁷⁴ She further contended that the panels were inherently biased and that they bore no relationship to their asserted goals.⁷⁵

The Alaska Supreme Court upheld the constitutionality of the expert advisory panel, affirming the lower court's denial of the protective order.⁷⁶ The court, however, left open the possibility of a different result in a future case supported by better evidence.

The court expressly noted that Keyes had offered no statistics to support her claim that the expert advisory panel process violated a plaintiff's constitutional rights.⁷⁷ The court distinguished a 1980 Pennsylvania case that found lengthy delays in a panel process to deprive a litigant of her right to a jury trial, noting that "the court [in *Mattos v. Thompson*⁷⁸] based its decision on statistical evidence."⁷⁹ The court continued:

Not only does the Alaska panel review procedure ensure that a malpractice plaintiff's case proceeds along the normal path to litigation after a maximum delay of eighty days, but the parties to this appeal have proffered no statistical evidence such as that relied on to invalidate the arbitration procedure in *Mattos*.⁸⁰

73. Brief for Petitioner at xiv, 22, *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343 (Alaska 1988) (No. S-1848).

74. *Id.* at 9.

75. *Id.* at 12, 14, 19.

76. *Keyes*, 750 P.2d at 359.

77. *Id.* at 350.

78. 421 A.2d 190 (Pa. 1980).

79. *Keyes*, 750 P.2d at 349. The court highlighted the *Mattos* court's reasoning:

The findings made by the Commonwealth Court indicate that the arbitration panels provided for under the Act are incapable of providing the "prompt determination and adjudication" of medical malpractice claims which was the goal of the Act. . . . Papers filed with this Court included a statistical analysis of the health care panels [revealing] that 73 per cent of the cases filed with the administrator have not been resolved. Even worse, six of the original 48 cases filed in 1976 remain unresolved. . . . Furthermore, . . . 38 per cent of the claims filed in 1977, 65 per cent of the claims filed in 1978, and 85 per cent of the claims filed in 1979 remain unsolved. Such delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system. Most importantly, these statistics amply demonstrate that "the legislative scheme is incapable of achieving its stated purpose."

Id. at 349-50 n.9 (quoting *Mattos*, 421 A.2d at 195). See also *Aldana v. Holub*, 381 So.2d 231 (Fla. 1980) (striking down a screening panel on similar grounds).

80. *Keyes*, 750 P.2d at 350 (citation omitted). The court explained its "80-days" reasoning this way:

Thus, the court did not conclude that delays in the panel process were immune from constitutional attack, but rather that Keyes failed to prove the existence of delays of the magnitude present in *Mattos*.

Keyes raised two additional due process claims that the court similarly rejected. She argued that the difference in treatment accorded medical malpractice litigants in contrast with other litigants bore no rational relation to a legitimate state interest, and that the inherent bias of the panel deprived her of due process.⁸¹ The court concluded that Keyes had not shown that the expert advisory panels failed to achieve their purpose.⁸² Further, Keyes produced no evidence indicating that the panels were inherently biased.⁸³

The court also summarily rejected Keyes's separation of powers claim. After noting that only one court in the country had ever upheld such a claim,⁸⁴ the court easily distinguished the Alaska expert advisory panel from the Illinois panel at issue in that case.⁸⁵ A "critical difference" between the Alaska and the Illinois panel review statutes, wrote the court, was that the Illinois panel's determination could serve as the sole basis for entry of judgment, "whereas in Alaska it serves only as an expert opinion at trial."⁸⁶

Keyes' brief also incorporated an equal protection claim that she anticipated would be brought by intervening parties.⁸⁷ Though the court denied all motions to intervene, it addressed the equal protection claim because Keyes raised the issue and the respondent rebutted it.⁸⁸ The equal protection argument posits that Alaska Statutes section 09.55.536 violates the equal protection guarantees of the Alaska Constitution by

The panel must be appointed within 20 days after the defendant files an answer to the complaint and must submit its written report to the parties and the court within 30 days after the appointment. Upon application, the court may grant the panel a 30-day extension to complete its report, and discovery may commence upon receipt of the report.

Id. at 350 n.10 (citations omitted).

81. *Id.* at 351. Non-medical malpractice litigants are not required to submit their claims to a screening panel.

82. *Id.* at 352. The purpose of panel review, wrote the court, "was to alleviate the effects of the malpractice insurance crisis." *Id.* (citing REPORT OF THE GOVERNOR'S MEDICAL MALPRACTICE INSURANCE COMMISSION, 1-3, 26 (Oct. 1, 1975); Letter from Langhorne A. Motley to Governor Jay Hammond (Oct. 1, 1975) (accompanying Report); Roethler v. Lutheran Hosp. & Homes Soc'y of Am., Inc., 709 P.2d 487, 489 (Alaska 1985)).

83. *Keyes*, 750 P.2d at 354.

84. *Id.* at 355; see *Wright v. Central Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976).

85. *Keyes*, 750 P.2d at 356.

86. *Id.*

87. Brief for Petitioner at 3, *Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343 (Alaska 1988); *Keyes*, 750 P.2d at 357 n.27.

88. *Keyes*, 750 P.2d at 357.

creating an impermissible classification in "treating medical malpractice litigants differently from those involved in other kinds of tort cases."⁸⁹ The court, applying a "relatively low level of scrutiny," found that Keyes had made no showing that the expert advisory panel violated a party's equal protection rights.⁹⁰ It is unclear whether this section of the opinion amounts to holding or dicta.

The court left the door open to a future finding of an equal protection violation by implying that the result might be different if a party could show that the statute was unlikely "to encourage settlement and reduce litigation over malpractice claims."⁹¹ The court concluded that "[petitioner Keyes] has presented no factual support for her allegations that the expert panel review procedure bears no reasonable or substantial relation to the legislature's goal to encourage settlement and reduce litigation of malpractice claims."⁹² Thus, the result of a future claim with the proper factual foundation might differ.

V. DIAGNOSING THE PANEL'S DISEASE

Generally, a malpractice screening panel is supposed to prevent, where possible, the filing in court of non-meritorious actions against health care providers, "make possible the fair and equitable disposition of legitimate claims against physicians," and expedite the disposition of cases.⁹³ The Alaska screening panel is frequently charged that it not only fails to realize its own goals, but that it creates more problems than it solves. This section explores some of the more common objections to Alaska Statutes section 09.55.536.

89. *Id.* The court also noted that Keyes alluded to the equal protection argument within the due process section of her brief. *Id.* See *supra* notes 73-75 and accompanying text.

90. *Id.* at 358.

91. *Id.*

92. *Id.* at 359-60.

93. Documentary Supplement, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 695, 705 (1972).

A. Bias

It's like going to a golf club and asking three doctors out of a foursome to act as experts against the fourth.

-- *Plaintiffs' Attorney*⁹⁴

Many attorneys are convinced that the Alaska panel is inherently biased toward medical defendants. Not coincidentally, most of these objectors are plaintiffs' attorneys. One Anchorage plaintiffs' attorney even stated that there was a zero percent chance of ever obtaining a pro-plaintiff panel decision.⁹⁵ The court records of the Third Judicial District reveal better odds. From 1989 to September 1992, Anchorage Superior Court handled 84 medical malpractice claims, 23 of which resulted in a panel decision.⁹⁶ In approximately 20% of those cases, the panel's report favored the plaintiff.⁹⁷ Figures compiled by the Medical Insurance Exchange of California ("MIEC")⁹⁸ reveal an even higher percentage of

94. Quotations such as this one at the head of each subsection are intended to illustrate the issue to be discussed in that subsection. They are not meant to be attributed to any particular individual, but rather to exemplify common conceptions and misconceptions concerning the expert advisory panel process. The quotations were taken from telephone interviews conducted and letters received from December 1991 to June 1992.

95. Telephone Interview with anonymous plaintiffs' attorney (Apr. 15, 1992). [Ed. note: The author of this note has honored the request of this attorney to remain anonymous.]

96. CLERK OF COURT, THIRD JUDICIAL DISTRICT, ANCHORAGE MEDICAL MALPRACTICE CASES — 1989 TO PRESENT (1992) (providing data as of September 2, 1992). The following table summarizes the disposition of the 84 medical malpractice cases filed in Anchorage. Note that the total number of cases adds up to 85. One case is counted twice because the panel found injury toward one defendant and no injury toward another. The total number of cases used to calculate the percentages found in the text is therefore 84.

<u>Number of Cases</u>	<u>Disposition</u>
19	Panel; no injury arising from medical care
5	Panel; injury arising from medical care
6	Panel waived
18	Case not at issue (response not yet filed)
9	Awaiting appointment of panel
4	Awaiting submission of report
24	Other (settlements, removals, dismissals)
<hr/>	
85	Total

It is necessary to provide a disclaimer here because the precise meaning of the figures is ambiguous. Supporters of the panel process argue that the figures indicate that the panels are willing to find a injury arising from medical care. Other observers, however, contend that the figures are misleading because a finding of injury arising from medical care does not necessarily indicate injury due to physician negligence. See *supra* text accompanying note 62. Because of the dearth of collected data, the arguments cannot be reconciled and the figures will have to be considered in light of the competing interpretations.

97. *Id.*

98. "MIEC is California's first physician-owned professional liability insurance

panel reports favoring plaintiffs. Of the seventeen Alaska screening panel cases involving MIEC coverage, five (29%) resulted in a panel decision favoring the plaintiff.⁹⁹ These figures are consistent with studies assessing the probability of winning a medical malpractice trial.¹⁰⁰ This consistency cuts against the bias charge.

Either because the data is unknown or uncompiled, or because its meaning is disputed, opponents of the panel process maintain that the panel is inherently biased. The all-physician composition of the expert advisory panel fosters these charges. Alaska's panel consists of three health care providers, while most other states' panels include at least one non-health care provider, usually an attorney.¹⁰¹ But even panels comprised of both physicians and attorneys have been attacked as being biased. Michigan's Medical Malpractice Arbitration Panel, for example, was the subject of such a constitutional attack in 1984 in *Morris v. Metriyakool*.¹⁰² Michigan's panel was comprised of an attorney, a physician, and someone who was neither an attorney nor a licensee of the health care profession.¹⁰³ Plaintiffs contended that the panel was biased.¹⁰⁴ They argued that the bias stemmed inherently from the panel members' interest in lower malpractice premiums, an interest that would be advanced by decisions favorable to the defendant health care provider.¹⁰⁵ The court held that any bias on the part of panel members did not rise to the level of

company It was started in 1975 by six Northern California medical societies MIEC now insures more than 5,000 health care professionals in California, Alaska, Hawaii, Idaho and Nevada." MEDICAL INSURANCE EXCHANGE OF CALIFORNIA ("MIEC"), ALASKA PROFESSIONAL LIABILITY INSURANCE INFORMATION AND CLAIMS-MADE PREMIUM SCHEDULE, preface (1992).

99. MEDICAL INSURANCE EXCHANGE OF CALIFORNIA ("MIEC"), SCREENING PANEL STUDY (July 21, 1991) (unpublished study, on file with the *Alaska Law Review*).

100. See Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 LAW & CONTEMP. PROBS. 43, 49-53 (Winter 1991). Metzloff's figures are based on a three-year study of malpractice cases filed in North Carolina. He found that plaintiffs won a favorable award in only 26 out of 110 cases (23.6%). This figure includes an adjustment for cases settled at or after trial and for plaintiff's verdicts that should be considered functional defense victories because of an insignificant award.

In another study, a group of researchers found that as compared to litigants in other personal injury trials, a medical malpractice plaintiff has the lowest chance of winning a jury verdict. Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5, 22-24 (Winter 1991); see also WEILER, *supra* note 71, at 25 n.25.

101. See Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 189 n.25 (1990). Macchiaroli argues that an ideal medical malpractice screening panel should be composed of one attorney and two health care providers. *Id.* at 243-44.

102. 344 N.W.2d 736 (1984).

103. *Id.* at 738; see also MICH. COMP. LAWS ANN. § 600.5044(2) (West 1987).

104. *Morris*, 344 N.W.2d at 740.

105. *Id.* at 739.

constitutional significance.¹⁰⁶ A concurring opinion also noted that a strong showing of proof was necessary to overcome the presumption of constitutionality that attaches to legislative action.¹⁰⁷ A similar presumption attaches in Alaska.¹⁰⁸

In Alaska, the bias charges are less compelling when the panel process is viewed in terms of its ability to provide an expert opinion than when it is viewed as a group of doctors deciding the propriety of a peer's conduct. As Anchorage Superior Court Judge Brian Shortell rhetorically asks, "who better to evaluate a doctor and issue an expert opinion than another doctor?"¹⁰⁹

The charges of bias will most likely continue even in the face of contradictory, or at least inconclusive, data. When confronted with an adverse panel report, a plaintiffs' attorney is able to say to a jury, "well, what do you expect, that's what happens when you ask three doctors to pass judgement on one of their colleagues." Of course, the jury trial system is itself predicated on the jury's responsibility to weigh the credibility of parties, witnesses and experts.¹¹⁰

B. Complexity

The expert advisory panel just burdens the process by adding a third complicating voice to the eventual jury trial.

-- *State Legislator*

Numerous plaintiffs' attorneys explained that even if a panel issues a report favorable to the plaintiff, it is still necessary to hire an independent expert. "Because you can't prepare the panel members for trial, you just don't know what they are going to say," explained one Anchorage attorney.

106. *Id.* at 740.

107. *Id.* at 743 (Williams, J., concurring).

108. *See, e.g.,* Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769, 777 (Alaska 1980) (noting a stronger than usual presumption of constitutionality under its specific facts); *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979) (noting that a validly enacted statute comes with a presumption of validity).

109. Telephone Interview with Judge Brian Shortell, Presiding Judge, Alaska Superior Court, Third Judicial District (Apr. 20, 1992).

110. The Supreme Court of Indiana rejected a bias challenge to its medical screening panel precisely with this reasoning. The court wrote:

[I]f there is a risk that the panel opinion will favor the health care provider, as perceived by appellants, simply by reason of the makeup of the panel, the jury can be made aware of it through articulate and imaginative advocacy. We are convinced that the jury drawing upon its collective experience and good sense . . . will be fully capable of according the panel opinion the weight and credit to which it is justly entitled.

Johnson v. St. Vincent Hosp. Inc., 404 N.E.2d 585, 593 (Ind. 1980).

"The process is crazy, time-consuming, and non-productive."¹¹¹ Most plaintiffs' attorneys agree that in all but the most unusual cases, it is necessary to supplement the panel report with an outside expert. At the same time, however, most attorneys (defense and plaintiffs') admit that juries are significantly swayed by the panel report. The report is presented to the jury as an independent neutral expert opinion sponsored by the court, an innovation several commentators applaud.¹¹² One scholar, for example, in a recent book concerning the use of courtroom experts, suggests that the "strongest antidote" to current problems with unreliable expert testimony is the use of court-appointed experts.¹¹³ Of course, if the jury perceives the panel and its opinion in this way, it will greatly benefit whichever party the panel report favors.

A related issue concerns the expert advisory panel's role in assisting a jury in understanding the complex medical issues involved in a malpractice case. While the expert advisory panel adds a third opinion, it may not render the issues any easier for the jury to grasp. As one observer noted during the 1976 legislative debate, "why is a third opinion better?"¹¹⁴ In fact, argued the Alaska Bar Association, "[t]o the extent that the proposed expert medical panel finds its genesis in the notion that jurors are simply not able to grasp the complexities of medical testimony, it is not well founded."¹¹⁵ Many commentators, however, are satisfied that such a foundation does exist.¹¹⁶ For example, one commentator suggests that "[l]ay juries in malpractice cases are ill-equipped to resolve the arcane issues involved."¹¹⁷ Both sides of this debate can offer only conclusory arguments. Because juries deliberate behind closed doors and our judicial system similarly conceals the deliberative process, the issue, for now, remains unresolved.

111. Telephone Interview with Roger Holmes, Attorney, Biss & Holmes (Apr. 15, 1992).

112. See, e.g., Interview with Thomas Metzloff, Professor, Duke University School of Law, in Durham, N.C. (Nov. 1, 1992); PETER W. HEUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* 206 (1991).

113. HEUBER, *supra* note 112, at 206.

114. *Alaska House Judiciary Committee Hearing* (1976) (anonymous personal notes).

115. Letter from Keith E. Brown, President, Alaska Bar Association, to Chief Justice Robert Boochever, Alaska Supreme Court (Jan. 22, 1976) (on file with the *Alaska Law Review*).

116. See, e.g., Elliott M. Abramson, *The Medical Malpractice Imbroglia: A Non-Adversarial Suggestion*, 78 KY. L. J. 293, 295 (1989-90) ("Juries frequently cannot understand the technical, confusing, and often conflicting testimony of medical experts." (citation omitted)).

117. Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1370 (1989).

C. Quality of Review

The quality of the [panel] review determines the success of the panel process. If the members of the advisory panel do not objectively perform their responsibilities in carrying out the process, then the process can be unfair. . . . I believe some form of standardized overseeing of panel participation, meetings, mandatory interviews of the parties, required research, etc., is necessary.

-- Defense Attorney

Defense and plaintiffs' attorneys agree that the quality of panel review varies significantly. This is due in part to the varying degrees of effort expended by panel members, but it is also due in part to a lack of guidelines or standards under which panel members must perform their duties. As one Anchorage attorney commented, "there needs to be a way to instruct potential panelists. Some are great and others do everything wrong. The quality and depth of the panels are very inconsistent."¹¹⁸

Currently, when a health care provider is contacted by her medical society to serve on an expert advisory panel, she receives little guidance concerning the task that lay ahead. The Alaska State Medical Association, for example, sends each panelist a basic list of fifteen points of "advice about serving on an expert advisory panel."¹¹⁹ The advice directs the panelist to read the statute, choose a chairperson, review the records, conduct interviews as a group or individually, discuss the case with other members of the panel, and draft a report.¹²⁰ The materials do not explain what records should be studied, what parties should be interviewed, or what information should be included in the panel report beyond the eight statutory questions.¹²¹ The Alaska State Medical Association, as well as local and specialized medical societies, offers additional guidance to panel members on a case-by-case basis.¹²² While this might help alleviate the problem in isolated instances, the quality of reviews will continue to vary until clear and complete statewide guidelines are adopted.

118. Telephone Interview with Keith Brown, Attorney, Hagans, Brown, Gibbs & Moran (Apr. 15, 1992).

119. Memorandum from the Alaska State Medical Association to expert advisory panelists (June 1987) (on file with the *Alaska Law Review*).

120. *Id.*

121. See *supra* text accompanying note 62.

122. Memorandum from the Alaska State Medical Association to expert advisory panelists (June 1987) (on file with the *Alaska Law Review*).

D. Panel Participation

It is very hard to get panel members. More than once we have had to go to Seattle to get a qualified specialist.

-- *Superior Court Judge*

Due to the small size of the Alaska medical community,¹²³ it is often very difficult to find panel members who are not directly acquainted with the defendant. The Alaska State Medical Association often has had to request specialists from various military bases within the state in order to find doctors who are unfamiliar with the defendant in a given case.¹²⁴ Additionally, in some specialties, it is often difficult to find any qualified panel members at all. Sometimes, therefore, the panels are required to operate without specialists. One Anchorage attorney noted that more and more frequently, general practitioners serve in panels that should be composed of specialists.¹²⁵

There are other reasons for the difficulties in adequately filling the expert advisory panels. Health care providers do not relish serving on the panels. The process requires a large amount of time and effort and panel members receive minimal compensation.¹²⁶ Writes one Fairbanks attorney:

[T]he true 'shortcomings' of the panel process have to do with the lack of adequate numbers of health care providers in the State of Alaska who are willing to devote the amount of time and effort required by the process. I have authored several letters to the Alaska Medical Association and the Alaska Dental Society imploring the members to freely participate in the panel process since it was passed for their benefit and at their urging.¹²⁷

He feels that his attempts have been unsuccessful.¹²⁸

Panel service entails not only preparing for and conducting the hearings, but the parties to the suit also have the right to depose and call the panel members into court in a subsequent trial.¹²⁹ Furthermore,

123. Currently, about 800 physicians practice in Alaska. Of these, 600 are in private practice and 200 are in public practice. LEGISLATIVE RESEARCH AGENCY, *STATE APPROACHES TO MEDICAL MALPRACTICE*, 6 (1992) (prepared by Maureen Weeks).

124. Telephone Interview with Deborah Carlson, Associate Director, Alaska State Medical Association (Mar. 30, 1992).

125. Telephone Interview with Roger Holmes, Attorney, Biss & Holmes (Apr. 15, 1992).

126. See ALASKA STAT. § 09.55.536(g) (Supp. 1991).

127. Letter from Marcus R. Clapp, Attorney, Hughes, Thorsness, Gantz, Powell & Brundin, to Jon Aronie, Note Editor, *Alaska Law Review* (Apr. 28, 1992) (on file with the *Alaska Law Review*).

128. *Id.*

129. ALASKA STAT. § 09.55.536(e) (Supp. 1991).

according to at least one attorney, some attorneys take advantage of independent experts by conducting long, drawn-out depositions.¹³⁰ Panel members who do not have lawyers present are often annoyed by this process.¹³¹

E. Delays

Although the panel statute . . . contemplate[s] an expeditious appointment and decision by the panel, in my experience this never happens. In fact, as I dictate this letter [April, 1992], I am currently scheduled to begin trial on a medical negligence case. This case was filed in 1990. We have not yet received a panel report.

-- *Plaintiffs' Attorney*

The advisory panel statute mandates that an expert advisory panel be appointed within twenty days of the answer to the complaint, and that the panel complete its report not more than thirty days after its selection.¹³² In practice, however, delays can be substantial.¹³³ Judge Shortell blames much of the delay on the difficulty in finding panel members.¹³⁴ But interviews with various attorneys indicate that delays often occur even after the panel has been selected.¹³⁵ Other states' panels have similarly been troubled by delays. Indiana's medical panel process,¹³⁶ for example, was fraught with delays brought about by various sources.¹³⁷ The parties contributed to delay by not following proper panel procedures or by improperly filing complaints or responses; the panel members contributed by frequently exceeding the statutory period to submit its report.¹³⁸ Alaska is certainly not immune from these problems and is even burdened by a cause of delay unique to itself -- the tremendous amount of time it may take to compose and convene a panel.¹³⁹

130. Telephone Interview with Roger Holmes, Attorney, Biss & Holmes (Apr. 15, 1992).

131. Telephone Interview with Dr. Rodman Wilson, Doctor of Internal Medicine, Anchorage (Nov. 1, 1992).

132. ALASKA STAT. § 09.55.536 (Supp. 1991).

133. Due to a lack of data, the frequency and duration of delay cannot be reliably quantified.

134. Telephone Interview with Judge Brian Shortell, Presiding Judge, Alaska Superior Court, Third Judicial District (Apr. 20, 1992). See *supra* part V.D.

135. See, e.g., Letter from John C. Dittman, Attorney, Kelly, Cossman & Associates, to Jon Aronie, Note Editor, *Alaska Law Review* (Apr. 16, 1992) (on file with the *Alaska Law Review*).

136. See IND. CODE ANN. § 16-9.5-1 (Burns 1982).

137. James D. Kemper et al., *Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later*, 19 IND. L. REV. 1129 (1986).

138. *Id.* at 1134.

139. See *supra* part V.D. See also *infra* Thomas B. Metzloff, 9 ALASKA L. REV. 429

Delays not only obstruct the panel process, but they also increase its cost. Parties may begin discovery if the statutory eighty-day period passes without the completion of the panel report.¹⁴⁰ This discovery may prove wasteful and worthless if the eventual panel decision induces the parties to dispose of the case without going to trial. Thus, a panel report issued within the statutory time frame not only upholds the letter of the statute, but can often limit the cost of trial preparation.

While delays do occur and can be substantial, the frequency with which they occur is often exaggerated. According to the Anchorage court clerk's office, the majority of cases proceed without significant delay.¹⁴¹ Although very few panels submit their report within the eighty days allowed before discovery may proceed, few panels transgress the time constraints by more than a month or two.¹⁴² Occasionally, one or two cases may take months to go through the panel process.¹⁴³ When this happens, the judge will eventually waive the panel.¹⁴⁴

Even if less commonplace than opponents assert, delays could provoke a new constitutional challenge to Alaska's expert advisory panel. In *Mattos v. Thompson*,¹⁴⁵ for example, the Pennsylvania Supreme Court held that frequent and lengthy delays violated the Constitution.¹⁴⁶ While it appears that the delays in Alaska do not reach the level of those present in *Mattos*, the absence of reliable statistics renders it impossible to predict unequivocally the result of such a constitutional challenge.¹⁴⁷

(1992) (recommending that Alaska reform its expert advisory panel by creating a single-physician, mandatory arbitration panel).

140. See ALASKA STAT. § 09.55.536(f) (Supp. 1991); see also *supra* note 80 and accompanying text.

141. Telephone Interview with Diane Alford, Legal Technician, Anchorage Clerk of Court (Sept. 8, 1992).

142. *Id.*

143. *Id.* See, e.g., *Barnes v. Lipke*, No. 90-09060 (D. Alaska filed Nov. 1990) (panel appointed Feb. 1992; report due Mar. 1992; currently, a new panel has been requested), cited in CLERK OF COURT, THIRD JUDICIAL DISTRICT, ANCHORAGE MEDICAL MALPRACTICE CASES — 1989 TO PRESENT (1992).

144. Telephone Interview with Diane Alford, Legal Technician, Anchorage Clerk of Court (Sept. 8, 1992).

145. 421 A.2d 190 (Pa. 1980). See *supra* notes 78-80.

146. *Id.* at 195. See *supra* note 79.

147. It is worth comparing Indiana's malpractice screening panel to Alaska's expert advisory panel. See IND. CODE ANN. § 16-9.5-1 (Burns 1982). In 1985, the Supreme Court of Indiana upheld Indiana's panel process against a challenge based on unconstitutional delays. See *Cha v. Warnick*, 476 N.E.2d 109 (Ind. 1985); see also *Kemper et al.*, *supra* note 137. The *Cha* court found that the delays were not enough to hold the act unconstitutional. *Cha*, 476 N.E.2d at 112. A medical malpractice case going through the Indiana panel process took an average of 23.4 months from the date the case was filed, but a few cases far exceeded that average. *Id.* at 111. The panel process was designed to take only nine months. *Kemper, et al.*, *supra* note 137, at 1133.

F. Cost

The expert advisory panel increases the cost of litigating a medical malpractice claim.

--Insurance Claims Manager

One insurer, the Medical Insurance Exchange of California ("MIEC"),¹⁴⁸ has asserted that its average defense cost ("ALAE")¹⁴⁹ of cases going through Alaska's expert advisory panel is significantly higher as a result of the panel process.¹⁵⁰ MIEC's conclusion derives from an internal study of its defense and indemnity costs in the four states that MIEC covers that employ a medical screening panel.¹⁵¹ For several reasons, however, MIEC's findings are dubious. First, the sample sizes used in the study vary greatly among the four states; several states had so few cases that generalized conclusions are impossible.¹⁵² Second, panel procedures differ from state to state.¹⁵³ Finally, the date on which MIEC began its coverage differs in each state and does not always coincide with the date on which the corresponding state's panel statute was enacted.¹⁵⁴

But even with warranted skepticism, Alaska's panel process appears to raise the cost of litigating a medical malpractice claim,¹⁵⁵ albeit not to the extent MIEC asserted. In a 1991 letter to the Alaska State Medical

148. See *supra* note 98.

149. The common unit for measuring defense costs is known as "allocated loss adjustment expense" ("ALAE"), which represents all direct expenses associated with the defense of a particular claim. Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 LAW & CONTEMP. PROBS. 43, 53 n.37 (Winter 1991).

150. MEDICAL INSURANCE EXCHANGE OF CALIFORNIA, SCREENING PANEL STUDY (July 21, 1991) (unpublished study, on file with the *Alaska Law Review*). MIEC compared defense costs of medical malpractice cases that went through a screening panel to its defense costs of all closed medical malpractice law suits. MIEC found that its defenses costs were about 75% higher in Alaska, about 33% lower in Hawaii, about 33% lower in Idaho, and about 50% lower in Nevada. *Id.*

151. The four states are Alaska, Hawaii, Idaho, and Nevada.

152. For example, the Alaska figures were taken from a pool of only 17 screening panel cases. In Nevada, only five screening panel cases were dismissed and only two settled. *Id.*

153. Because the Idaho malpractice panel, for example, screens cases before lawsuits are filed, see IDAHO CODE § 6-1001 (Supp. 1992), the MIEC figures for Idaho probably involve many small, inexpensive cases, thereby lowering the cost of cases proceeding through its screening panel.

154. In Nevada, for example, MIEC's coverage began ten years before Nevada's medical screening panel was adopted. Telephone Interview with Harry Miller, Claims Supervisor, MIEC (Sept. 2, 1992). See NEV. REV. STAT. § 41A.003 (Supp. 1991). A comparison between the cost of screening panel cases and the cost of all closed law suits is therefore problematic because MIEC's sample of closed law suits in Nevada includes 10 years of cases prior to the formation of the panel. Further, during those 10 years, the lower cost of litigation generally and lower cost of legal expenses specifically skews the figures.

155. MEDICAL INSURANCE EXCHANGE OF CALIFORNIA, SCREENING PANEL STUDY (July 21, 1991) (unpublished study, on file with the *Alaska Law Review*).

Association, an MIEC claims manager suggested some causes of this problem.¹⁵⁶ The letter placed much of the blame on the all-physician composition of the expert advisory panel. Because each panel member can be called as an expert witness for either side at a subsequent trial, MIEC incurs significant costs prior to the panel review in order to support its position at panel hearings.¹⁵⁷ In this regard, the Alaska expert advisory panel, it appears, often becomes a mini-trial in itself. Insurers take the panel process very seriously and devote substantial time and expense to supporting their position at that stage. Explained the claims manager who drafted the letter to the medical association: "We have to live with the panel's findings and find it very labor intensive to support our position."¹⁵⁸

G. A Few Areas of Success

The criticisms discussed above represent only some of the complaints of panel opponents. Attorneys also argue that the process should be adversarial rather than informal, that the process should be voluntary rather than mandatory, that discovery should not be prohibited during the panel deliberations, and that the process as a whole is unconstitutional.¹⁵⁹ Despite these criticisms, however, there do exist some areas of success. Alaska's expert advisory panel appears successful in weeding out unwarranted claims. MIEC's figures illustrate that 50% of Alaska's panel decisions favorable to the doctor are never taken to trial.¹⁶⁰ On the other hand, only 20% of the cases in which it is found that the physician did not meet the required standard of care are not pursued to trial.¹⁶¹ These figures generally correspond to the averages of the other states included in the MIEC study.¹⁶² The statistics from the Third Judicial District's Clerk's Office in Anchorage are even more pronounced. Of the nineteen Anchorage cases in which an expert advisory panel issued an opinion favorable to the defendant, twelve (63%) were subsequently dismissed by stipulation.¹⁶³

156. Letter from Stephen D. Stimel, Claims Manager, Medical Insurance Exchange of California, to Joni M. Tanner, Associate Director, Alaska State Medical Association (July 17, 1991) (on file with the *Alaska Law Review*).

157. *Id.*

158. *Id.*

159. *See supra* part IV.

160. MEDICAL INSURANCE EXCHANGE OF CALIFORNIA, SCREENING PANEL STUDY (July 21, 1991) (unpublished study, on file with the *Alaska Law Review*).

161. *Id.*

162. For the four states covered by MIEC, 75% of the decisions favorable to the doctor were not pursued to trial, while only 15% of the decisions favorable to the plaintiff were not pursued. *Id.*

163. *See supra* note 96.

The panel process may foster the early disposition of non-meritorious cases in another way as well. In *Kendall v. State Division of Corrections*,¹⁶⁴ the Alaska Supreme Court held that since a panel report is admissible at trial, it "is properly considered in deciding a summary judgment motion."¹⁶⁵ *Kendall* involved a challenge to a trial court's finding that the expert advisory panel report established the absence of genuine issues of fact. The supreme court upheld the use of the panel report, finding that "[t]he defendant's motion was sufficient to establish the absence of a genuine issue as to negligence since the experts who authored the report opined that [the plaintiff] had been properly cared for, and no evidence was presented in conflict with this view."¹⁶⁶ The potential use of the panel report in a summary judgment proceeding further assures that defendants and plaintiffs take the panel process seriously.

Another area of possible success concerns an attorney's preparation for a future trial. A risk manager in an Anchorage hospital explained that the panel process is useful in that the hospital's attorneys take their cues from the panel in deciding how to try a case.¹⁶⁷ From the hospital's point of view, she suggested, it was very helpful to have a group of neutral medical experts review the medical records prior to trial.¹⁶⁸

Finally, because the state funds the process,¹⁶⁹ the pre-trial screening panel can provide an indigent plaintiff with an opportunity to acquire a medical expert without having to pay for one. If, for example, a panel finds that a health care provider failed to exercise an appropriate standard of care, the plaintiff has the right to submit the panel report as evidence in a subsequent trial and call the panel members as witnesses.¹⁷⁰ However, this advantage may, to a certain extent, be limited by the fact that the plaintiff cannot prepare the witness prior to trial.

VI. THE PROGNOSIS

The picture that emerges from this analysis is one of a medical malpractice screening panel that adequately meets its institutional

164. 692 P.2d 953 (Alaska 1984).

165. *Id.*

166. *Id.*

167. Telephone Interview with Meribeth Richards, Risk Manager, Humana Hospital (Apr. 21, 1992).

168. *Id.*

169. See ALASKA STAT. § 09.55.536(g) (Supp. 1991).

170. *Id.* § 09.55.536(e).

objectives, albeit not perfectly. Far from the failed panacea its opponents label it, Alaska's expert advisory panel is a successful experiment in problem-solving in a state that by its very nature -- its geography, size, and population -- faces unique obstacles. To maintain and expand the panel's success, however, certain changes might prove helpful.

As the statistics from the Medical Insurance Exchange of California illustrate, Alaska's screening panel does result in increased litigation expenses.¹⁷¹ Two remedies are apparent. First, the expert panel report could be kept out of a subsequent trial. This would reduce the need for elaborate and costly preparation for a panel hearing, yet continue to provide the attorneys with a means to evaluate the merits of the case prior to trial. Yet, this remedy is worse than the disease. Eliminating the panel report from a subsequent trial would render the panel process impotent. Parties could dismiss the entire process as a waste of time and energy, indigent plaintiffs with viable claims would lose the benefit of a free expert, and the impetus to settle a non-meritorious case would be dramatically reduced.

Second, the panel could be given less discretion in determining what evidence it may consider, thereby also lessening the need to prepare so intensively for a panel hearing. By limiting the evidence an expert advisory panel may consider, the process would evolve into one looking less like a trial and more like a pre-trial review. Parties would be free to concentrate less resources on their preparation for a panel hearing because over-preparation would go unrewarded. Such a change might also help ensure that attorneys observe the statutory prohibition against discovery until the expert panel has issued its report.¹⁷²

The problem of increased litigation costs is troublesome.¹⁷³ But focusing solely on the average cost per-panel decision ignores the larger issue. Increased costs in cases going through the panel process might serve to decrease the number of non-meritorious -- and often costly -- claims which would otherwise be brought. In the long run, a reduction in the number of non-meritorious cases may reduce the cost of medical malpractice litigation generally. Moreover, the expert advisory panel was created to accomplish many objectives. Reducing the cost of malpractice litigation (and hence lowering malpractice insurance premiums) is but one of these. Alaska Statutes section 09.55.536 was passed for the benefit of the Alaska medical community.¹⁷⁴ It is not unreasonable for the doctors to bear the cost of a process designed to respond to their needs.

171. *See supra* part V.F.

172. ALASKA STAT. § 09.55.536(f) (Supp. 1991).

173. *See supra* part V.F.

174. *See supra* note 9.

Another remediable shortcoming of the Alaska panel process is the inconsistent quality of the panel reviews. So long as the panel reviews are conducted by men and women and not by machines, the quality of those reviews are going to vary. With comprehensive directions to panel members, however, the range in quality may be lessened. Currently, the brief words of advice given potential panel members by the various Alaska medical societies fail to provide sufficient information regarding the functions, powers, and responsibilities of the panels.¹⁷⁵ Such advice should be supplemented by court-composed guidelines. The guidelines should instruct generally upon what sort of information the panel should consider and whom the panel should interview. The guidelines should also provide the members with information concerning the various legal issues that might arise over the course of the panel process.

Another area of the Alaska panel process that must be explored concerns the delays created by the process itself.¹⁷⁶ This problem, however, is not as severe as some opponents of the panel suggest. While there are a few cases that far exceed the screening panel statute's time limits, these cases are anomalous. Further, the problem that does exist is largely beyond human control. The small size of Alaska's medical community and the lengthy distances between cities make it difficult to adequately fill the panels in a short time. This appears to be a problem that attorneys in Alaska must accept. In any event, so long as the delays stay relatively within control, as they appear to be currently, the benefits derived from the panels will continue to outweigh the costs of delay.

To meet the charge that the panel process is inherently biased toward defendants, the panels should be reviewed periodically by members of the judicial system or Alaska medical societies. Panel members who fail to adequately perform their duties should not be asked to participate in future panels. The reviewers should examine the material the panel considers, the questions the panel asks, and the testimony the panel receives. Regular reviews would help not only reduce the charges of bias, but would also heighten the quality and consistency of panel reviews. Admittedly, the small size of Alaska's medical community would make such a procedure difficult.

Opponents of the expert advisory panel frequently cite the all-medical composition of the panel to support their bias objections. While most other states include at least one non-health care provider on their panel, Alaska does not. The all-medical composition, however, is consistent with Alaska's goal of creating an *expert* advisory process. This process seeks

175. See *supra* notes 119-22 and accompanying text.

176. See *supra* part V.E.

to provide a truly neutral expert voice within the medical malpractice context. The expert advisory panel's all-medical composition is essential to meet this goal.

Finally, the already overburdened Alaska judiciary should be charged with yet one more task -- that of collecting data concerning the panel process. Keeping comprehensive records concerning the filing, movement, and final disposition of each medical malpractice case will allow the effectiveness of the expert advisory panel to be accurately assessed. Although the Third Judicial District currently tracks its medical malpractice cases, a more comprehensive collection of data is necessary. For example, data should be collected concerning the length of time from filing to panel appointment, the time from panel appointment to the submission of the panel report, and specific case disposition.

VII. POST-OP

Keyes opened the door for a future factual challenge to the constitutionality of Alaska's expert advisory panel. The foregoing analysis illustrates that while the panel process does have its weaknesses, Alaska's approach to medical malpractice litigation -- using neutral expert witnesses to make sense of complex medical issues -- is sensible. The expert advisory panel does not deny a party its rights and it appears to weed out non-meritorious claims. The panel's supposed bias is mostly presumed rather than proven and costs are less problematic than some opponents maintain. Keeping in mind the scarcity of statistical evidence in several areas, delays do appear to exist, but are less frequent and less severe than critics assert. Other benefits, such as reduced malpractice insurance premiums, may become evident in the future. A few fine adjustments and a little time may minimize the panel's weaknesses and maximize its strengths.

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