Supreme Court of Guam
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HON. F. PHILIP CARBULLIDO
CHIEF JUSTICE

HANNAH G. ARROYO
CLERK OF COURT

VIA EMAIL

July 12, 2021

The Honorable Therese M. Terlaje
Speaker, *I Mina'trentai Sais Na Liheslaturan Guåhan*
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

RE: Testimony on Bill No. 112-36 (COR)

Håfa Adai, Speaker Terlaje,

Thank you for your invitation to provide testimony on Bill No. 112-36 (COR) ("Bill 112"). While I, in my capacity as the head of the Judicial Branch, do not take a position either in support of or against Bill 112, I believe it would help our legislators as they consider the substance of the bill to share information on the capacity of the Judiciary to meet the mandates of Bill 112, which, if passed, would enact the Medical Malpractice Pre-Trial Screening Act. My testimony is strictly limited to the potential effects of Bill 112 on the operations of the Judicial Branch, generally, and on the Superior Court of Guam, specifically.

At the outset, I note that, in its present form, Bill 112 does not have a prospective effective date, and therefore would become effective at midnight on the day it is approved. Under this scenario, the Judiciary would not be ready to immediately implement Bill 112 should it become law. The mandates that the bill would place upon our justice system require that specific processes be put in place to handle pre-trial screenings of malpractice claims. This would require time to consider whether specific rules for such pre-trial screenings are necessary and to promulgate such rules.[1] We respectfully request that language be added to Bill 112 to give it a prospective effective date of up to one year to allow the Judiciary sufficient time to prepare for malpractice lawsuits. We must ensure that adequate processes are established to carry out the new mandates created by Bill 112.

[1] Some states courts that have promulgated pre-screening rules include: New Hampshire https://www.courts.state.nh.us/rules/supercr-new/supercr-new-301.htm; Kansas https://casetext.com/rule/kansas-court-rules/kansas-rules-relating-to-district-courts/motions-discovery-pretrial-procedures-and-related-matters/rule-142-medical-and-professional-malpractice-screening-panels; Maine https://casetext.com/rule/maine-court-rules/maine-rules-of-civil-procedure/special-rules-for-certain-actions/rule-80m-medical-malpractice-screening-panel-procedure; and Massachusetts https://www.mass.gov/superior-court-rules/superior-court-rule-73-medical-malpractice-cases

Aside from the lack of current rules and procedures to handle these proceedings, the Judiciary also lacks the budget and other resources to efficiently and effectively conduct pre-trial screening of malpractice claims. The primary feature of Bill 112 is the requirement that a Magistrate Judge preside over pre-trial screenings of malpractice claims.[2] A potential influx of malpractice claims caused by passing Bill 112 will be difficult to manage given the following:

- The Judiciary is currently addressing and processing a large backlog of civil and criminal cases caused by the COVID-19 public health emergency. This backlog affects not only Superior Court Judges but also Magistrate Judges who conduct countless pre-trial criminal and civil proceedings.

- The recent retirement of Judge Anita Sukola has required that Magistrate Judges be appointed as Judges Pro Tempore to preside over those cases.

- The delay in the Legislature's confirmation of Alberto Tolentino as Judge of the Superior Court has prevented the re-assignment of such cases from the Magistrate Judges to a newly confirmed Superior Court Judge. The Judiciary received notice on July 9, 2021, that a public hearing on the appointment of Attorney Tolentino to serve as Judge of the Superior Court of Guam is scheduled for July 16, 2021.

- The moratorium on foreclosures and eviction proceedings was lifted on July 1, 2021, by Executive Order 2021-13. The Judiciary is expecting a large influx of foreclosure and eviction proceedings. Magistrate Judges will be expected to cover most of these foreclosure and eviction proceedings.

- Magistrate Judge duties were recently expanded in P.L. 35-113 (enacted Dec. 11, 2020) to allow them to cover proceedings that formerly required a Superior Court Judge. Magistrate Judges do more now than ever before.

- The Judiciary has only two Magistrate Judges who are already heavily occupied with judicial proceedings.

Moreover, Bill 112 requires consideration of "medical records and medical care facility records, contentions of parties, examination of x-rays, test results and treatises." These complex matters will require specialized training and education of our Magistrate Judges, for which the Judiciary has neither the funding nor the internal expertise to accomplish. The complex nature of medical malpractice claims would likely require the hiring of expert witnesses and/or masters, which would involve significant costs. The costs of expert witnesses and masters are usually assigned to the parties under existing court rules. The Judiciary should not be expected, and does not have the means, to shoulder these costs.

Should Bill 112 become law, the Judiciary respectfully requests that the Legislature consider appropriating additional funds for the hiring of one additional Magistrate Judge and necessary support staff and for required specialized training.

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[2] The use of a Magistrate Judge for pre-trial screening of medical malpractice claims appears to be a novel concept. We have been unable to find any jurisdictions that use Magistrate Judges alone for this process. *See* Heather Morton, *Medical Liability/Malpractice ADR and Screening Panels Statutes* (Apr. 20, 2014), https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-adr-and-screening-panels-statutes.aspx.

Without providing additional resources to the Judiciary, Bill 112 would almost certainly exacerbate the Judiciary's current heavy backlog of cases and critically affect our operations and the administration of justice. While Bill 112 states in its legislative intent section that the "goal of any legislation addressing medical malpractice claims should be . . . to prevent the filing in court of actions against healthcare providers for liability in situations where the facts do not permit a reasonable judgement [sic] of malpractice," this bill would actually require filing a court action to initiate a malpractice claim. Bill 112 in effect doubles the judicial review of a malpractice claim—first by a Magistrate Judge for pre-trial screening, then through actual litigation before a Superior Court Judge.

To gain better insight into pre-trial screening practices in medical malpractice cases, the Judiciary has surveyed other jurisdictions to learn various ways medical malpractice claims are handled and what the role is of the respective court systems under various models. Without espousing a position for or against Bill 112—or for or against any other jurisdiction's model—we briefly summarize our research for this body's information and consideration. (Please see Attachment A.) Please note that this survey is by no means exhaustive, as it was prepared during the short time between your June 30 letter inviting my testimony and the July 12 hearing date.

In conclusion, Bill 112 replaces the arbitration panel, currently in 10 GCA Chapter 10, with a Magistrate Judge to perform pre-trial screening of malpractice claims. The Judiciary does not have the financial or personnel resources to meet the mandates of Bill 112 should it become law in its present form. Without adequate funding to support the required resources, the Magistrate Judges cannot effectively and efficiently conduct pre-trial screening and processing of malpractice claims as contemplated by Bill 112. The Judiciary respectfully requests consideration of additional appropriations and a prospective effective date for Bill 112. The Judiciary remains committed to doing its part as it has always done in the effective and efficient administration of justice consistent with the laws of Guam. The Judiciary will effectively and efficiently execute its mandates should Bill 112 become law with the inclusion of adequate resources for the Judiciary and reasonable time being provided for implementation of Bill 112.

Senseramente,

F. Philip Carbullido
Chief Justice

Attachment A

Brief Summaries of Medical Malpractice Related Statutes

Alabama:

- The parties may agree to settle such dispute by arbitration. Such agreement must be in writing and signed by both parties. Any such agreement shall be valid, binding, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.
- Pursuant to the provisions of this section, the claimant shall select one competent and disinterested arbitrator, and the party or parties against whom the claim is made shall select one competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or, if unable to agree thereon within 30 days, then, upon request of any party, such third arbitrator shall be selected by a judge of a court of record in the county in which the arbitration is pending.
- The arbitrators shall then hear and determine the question or questions so in dispute in accordance with the procedural rules established by the American Arbitration Association. The decision in writing of any two arbitrators shall be binding upon all parties. Each party shall pay fees of his own arbitrator, and split the expenses of the third. Arbitration shall be conducted in the county in which the claim arose. A judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Alaska:

- A patient and any health care provider may execute an agreement to submit to arbitration any dispute, controversy, or issue arising out of care or treatment by the health care provider during the period that the agreement is in force or that has already arisen between the parties. Execution of an agreement under this subsection by a patient may not be made a prerequisite to receipt of care or treatment by the health care provider.
- Upon the filing of a malpractice claim that is subject to an agreement to arbitrate, the claim shall be submitted to an arbitration board. The arbitration board shall consist of three arbitrators: one arbitrator designated by the claimant or claimants, one arbitrator designated by the health care provider or providers against whom the claim is made, and a third arbitrator designated by mutual agreement who shall serve as chairperson of the board. If the parties cannot agree on the third person, the court will provide a choice of three or more persons who might serve as chairperson of the arbitration board, which shall be from a list of qualified arbitrators furnished by the attorney general. Claimant or claimants together and health care provider or providers together may each strike one or more names so that after each side has done so at least one name remains, providing a basis for the final selection by the court.
- If the parties do not agree to arbitrate, the court shall appoint within 20 days after the filing of an 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.

- Not more than 30 days after selection of the panel, the panel shall make a written report to the parties and to the court, answering the following questions and other questions submitted to the panel by the court in sufficient detail to explain the case and the reasons for the panel's answers: (1) Why did the claimant seek medical care? (2) Was a correct diagnosis made? If not, what was incorrect about the diagnosis? (3) Was the treatment or lack of treatment appropriate? If not, what was inappropriate about the treatment or lack of treatment? (4) Was the claimant injured during the course of evaluation or treatment or by failure to diagnose or treat? (5) If the answer to question 4 is "yes," what is the nature and extent of the medical injury? (6) What specifically caused the medical injury? (7) Was the medical injury caused by unskillful care? Explain. (8) If a medical injury had not occurred, what would have been the likely outcome of the medical case?

Arizona:

- No statute provided specific to medical malpractice screening panel.

Arkansas:

- No statute provided specific to medical malpractice screening panel.

California:

- Allows health care providers and patients to contract for the arbitration of disputes. Entering contract is binding and removes option for trial.
- Any health care service plan that requires binding arbitration to settle disputes must disclose whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.

Colorado:

- An arbitration agreement shall be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider.
- Making the use of arbitration agreements a condition to the provision of medical malpractice insurance shall constitute an unfair insurance practice and shall be subject to remedies and penalties.

Connecticut:

- Requires a mandatory mediation for all civil actions brought to recover damages resulting from personal injury or wrongful death, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider.
- Prior to the close of pleadings in such civil action, the presiding judge of the civil session of the court of the judicial district in which the action is pending shall refer the action to mandatory mediation or any other alternative dispute resolution program agreed to by the parties. The duration of the referral shall not exceed one hundred twenty days unless the court, for good cause shown, extends the duration of the referral. The court shall stay the time periods within which all further pleadings, motions, requests, discovery and other procedures must be filed or undertaken, including, but not limited to, filings under section 52-192a, except with respect to any apportionment complaint under section 52-102b.

- Mediation under this section shall begin as soon as practicable, but not later than twenty business days after the date the action is referred under subsection (b) of this section. The first mediation session shall be conducted by the presiding judge or, at the discretion of the presiding judge, a different judge of the Superior Court or a senior judge or judge trial referee. At the first mediation session, the judge, senior judge or judge trial referee conducting the mediation session shall determine whether the action can be resolved at such mediation session, or, if the action cannot be resolved at that mediation session, whether the parties agree to participate in further mediation. If the action is not resolved at the first mediation session and the parties do not agree to further mediation, mandatory mediation under this section shall end. If the action is not resolved at the first mediation session and the parties agree to further mediation, the presiding judge of such civil session shall refer the action for mediation before an attorney who has experience as an attorney related to such civil actions and who has been a member of the bar of the state of Connecticut for at least five years. Upon such referral, mediation shall begin as soon as practicable, but not later than twenty business days after the referral. Fifty per cent of the cost of such mediation shall be paid by the plaintiffs, and fifty per cent of the cost of such mediation shall be apportioned among all defendants who are parties to the mediation.
- If such mediation does not settle or conclude the civil action, and if all parties in attendance at such mediation agree, the mediator and all such parties may file a stipulation with the court setting forth any matter or conclusion that the parties and the mediator believe may be useful or relevant to narrow the issues, expedite discovery or assist the parties in preparing the civil action for trial.

Delaware:

- Medical Negligence Review Panels shall be composed of five voting members and shall include two health care provider members, at least one of whom shall be a physician, and the other one of whom shall be, if available, from one of the health care disciplines involved in such action, one attorney and two lay persons who are not health care providers nor licensed to practice law nor associated with the insurance industry.
- The panel shall, within 30 days, render to the Court a written opinion, including any minority opinion or opinions, signed by the chairperson expressing one or more of the following findings: (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care; (2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care; (3) There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the Court or jury, which issue of fact shall be identified in the opinion; or (4) The conduct complained of was or was not a factor in the resultant damages, and if so, whether the plaintiff suffered: a. Any disability and the extent and duration of the disability; and b. Any permanent impairment and the percentage of the impairment.
- The opinion reached by the medical negligence review panel shall be admissible as prima facie evidence in the pending Superior Court action brought by the claimant, but such opinion shall not be conclusive.

District of Columbia:

- After an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The mediation schedule shall be included in the scheduling conference order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC.
- Each party shall submit a confidential mediation statement to the mediator no later than 10 days prior to the initial mediation session. Unless not already stated in the complaint and answer, the mediation statement shall: (1) Include a brief summary of facts; (2) Identify the issues of law and fact in dispute and summarize the party's position on those issues; (3) Discuss whether there are issues of law or fact the early resolution of which could facilitate early settlement or narrow the scope of the dispute; (4) Identify the attorney who will represent the party at the mediation session and the person with settlement authority who will attend the mediation session; (5) Include any documents or materials relevant to the case which may assist the mediator and advance the purposes of the mediation session; and (6) Present any other matters that may assist the mediator and facilitate the mediation.
- The mediation session shall be confidential. All proceedings at the mediation, including any statement made by any party, attorney, or other participant, shall be privileged and shall not be construed as an admission against interest. Any statement at such proceedings shall not be used in court in connection with the case or any other litigation. A party shall not be bound by anything said or done at the mediation unless a settlement is reached.

Florida:

- Does not require that medical malpractice actions be referred to an arbitrator, although judges are authorized to refer cases to non-binding arbitration. Does have the system of voluntary binding arbitration for the determination of damages, which gives defendants an option to limit non-economic damages in return for admitting liability.
- Within 120 days after the suit is filed, unless such period is extended by mutual agreement of all parties, all parties shall attend in-person mandatory mediation in accordance with §44.102 if binding arbitration under §766.207 has not been agreed to by the parties.
- In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, the court shall require a settlement conference at least three weeks before the date set for trial**.**
- Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. The arbitration panel shall be composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. In the event of multiple plaintiffs or multiple defendants, the arbitrator selected by the side with multiple parties shall be the choice of those parties. If the multiple

parties cannot reach agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and the director of the Division of Administrative Hearings shall appoint the arbitrator from among such nominees.

- Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations: (a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments. (b) Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50 percent reduction in his or her capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages. (c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to §766.202(9) and shall be offset by future collateral source payments. (d) Punitive damages shall not be awarded.
- Within 20 days after the determination of damages by the arbitration panel in the first arbitration proceeding, those defendants who have agreed to voluntary binding arbitration shall submit any dispute among them regarding the apportionment of financial responsibility to a separate binding arbitration proceeding.

Georgia:

- In addition to any other legal procedure for the resolution of medical malpractice claims, the parties to a medical malpractice claim may submit the claim for arbitration in accordance with this article.
- The arbitrators shall make a written finding on each of the matters in controversy contained in the submission. If the arbitrators shall fail to agree on any finding, then any two of them may make the finding, which shall have the same force and effect as if made by all.
- After the arbitrators have made their findings, the referee shall furnish each of the parties with a copy thereof. The original shall be entered on the minutes of the court authorizing the arbitration; it shall have all the force and effect of a judgment or decree of the court and may be enforced in the same manner at any time after the adjournment of the court.

Guam:

- Any claim for medical malpractice must be submitted to arbitration.
- Arbitration sessions are heard by three-member panels comprised of an attorney, a physician and a layperson. At least two of these three members must be residents of Guam.
- A majority of the panel of arbitrators may grant monetary damages only deemed equitable and just. The award in the arbitration proceeding shall be in writing and shall be signed by the arbitrators or a majority of the panel of arbitrators. An award cannot be rendered unless it is signed by a majority of the arbitrators.
- The award shall include a determination of all the questions submitted to arbitration by each party, the resolution of which is necessary to determine the dispute, controversy, or issue.

Hawaii:

- A medical inquiry and conciliation panel shall be formed for each inquiry filed pursuant to §671-12 and shall be disbanded after an inquiry is resolved, a notice of termination is filed, or a suit based on the circumstances of the injury is filed in a court of competent jurisdiction. Each medical inquiry and conciliation panel shall consist of one chairperson who shall be an attorney licensed to practice in the courts of the state and experienced in trial practice and the personal injury claims settlement process and one physician, osteopathic physician, or surgeon licensed to practice under chapter 453. The chairperson shall be appointed by the director of Commerce and Consumer Affairs from a list of eligible persons approved by the chief justice of the supreme court of Hawaii. The physician, osteopathic physician, or surgeon shall be appointed by the chairperson and shall be licensed and in good standing under chapter 453.
- Any person or the person's representative having concerns regarding the existence of a medical tort shall submit an inquiry to the medical inquiry and conciliation panel before a suit based on the circumstances of the inquiry may be commenced in any court of this state. Inquiries shall be submitted to the medical inquiry and conciliation panel in writing and shall include the facts upon which the inquiry is based and the names of all parties against whom the inquiry is or may be made who are then known to the person or the person's representative.
- Every inquiry regarding a medical tort shall be processed by the medical inquiry and conciliation panel within 30 days after the last date for filing a response. The proceedings shall be informal. During the proceedings or at any time before termination, the panel may encourage the parties to settle or otherwise dispose of the inquiry voluntarily.
- No statement made in the course of the proceedings of the medical inquiry and conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action; provided that the statements may be admissible for the purpose of §671-19. No decision, conclusion, finding, statement, or recommendation of the medical inquiry and conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the medical inquiry and conciliation panel proceeding, or the counsel or other representative of a party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury; provided that the decision, conclusion, finding, or recommendation may be admissible for the purpose of §671-19.
- Any person or the person's representative claiming that a medical tort has been committed or any health care provider against whom an inquiry has been made may elect to bypass the court annexed arbitration program under §601-20 after the inquiry has been submitted to the medical inquiry and conciliation panel and the panel has been terminated pursuant to §671-15 if the party meaningfully participated in panel proceedings, an alternative dispute resolution process has been terminated pursuant to §671-16.6, or the panel or alternative dispute resolution process has not completed proceedings within the tolling period of the statute of limitations under §671-18.
- Any inquiry initially filed with the medical inquiry and conciliation panel may be subsequently submitted to an alternative dispute resolution provider upon the written agreement of all of the parties and with the written approval of the director of Commerce and Consumer Affairs.

- Notwithstanding §671-12, any inquiry may be submitted directly to an alternative dispute resolution process upon the written agreement of all parties without first submitting the inquiry to a medical inquiry and conciliation panel.
- No statement made in the course of the approved or agreed upon alternative dispute resolution process shall be admissible in evidence as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action. No decision, conclusion, finding, or recommendation of the approved or agreed upon alternative dispute resolution provider on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the approved or agreed upon alternative dispute resolution hearing, their counsel, or other representative of the party, refer or comment thereon in an opening statement, in an argument, or at any time, to the court or jury.

Idaho:

- Idaho State Board of Medicine provides a hearing panel, in the nature of a special civil grand jury, for pre-trial consideration of claims.
- Panel: a licensed practitioner of medicine, [a hospital administrator if the claim is against a hospital], a lawyer, and a lay person appointed by the other panelists (who is not a doctor, lawyer or hospital employee).
- Compulsory as a condition precedent to litigation.
- Informal and non-binding, formal rules of evidence do not apply.
- Panel issues a report (or reports if panelists are not unanimous) on whether the claim is frivolous, meritorious, or other description.
- If Panel is unanimous regarding an amount of money damages it may so advise the parties.

Illinois:

- Provides for parties to enter a Health Care Arbitration Agreement submitting to binding arbitration for medical malpractice claims.
- This agreement is not a condition to rending health care services.

Indiana:

- Review and opinion by a medical review panel is necessary before litigation.
- There is an exception the to the medical review panel if the patient submits a declaration that the claim is not greater than $15,000.
- Panel consists of three medical professionals and one attorney (the chair) and must give one or more expert opinion on:
    - the evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint
    - the evidence does not support the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint
    - there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury
    - the conduct complained of was or was not a factor of the resultant damages (and, if so, whether the plaintiff suffered any disability or permanent impairment)
- Panel expert opinion is admissible as evidence but is not a conclusive decision.

Kansas:

- For any medical malpractice action, a settlement conference not less than 30 days before trial is required.
- Settlement conference is conducted by the judge or the judge's designee.
- Upon a party's request, the judge convenes a screening panel consisting of a healthcare provider designated by defendant, a healthcare provider designated by plaintiff, a healthcare provided designated by defendant and plaintiff, an attorney selected by the judge (non-voting chair).
- Panel determines if there was a departure from standard practice of healthcare and if there is a causal relationship between damages and such departure.
- Panel's written report is evidence.

Louisiana:

- All claims must be reviewed by a medical review panel before any legal action.
- Panel consists of three licensed health care providers and one attorney.
- Panel provides one or more of the following expert opinions
    - the evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint, and, if so, that the conduct complained of was or was not a factor of the resultant damages
    - the evidence does not support the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint
    - that there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court
- Opinion can be submitted as evidence but is not a conclusive finding.

Maine:

- All claims must be reviewed by a screening panel,
- Panel consists of three to four members: one retired or active retired justice or judge to serve as the panel's chairperson; one attorney; one health care practitioner; and, when more than one defendant has been named, a second health care provider.
- Panel considers relevant evidence and provides written answers to the following questions:
    - whether the acts or omissions complained of constituting a deviation from the applicable standard of care by the health care practitioner or health care provider charged with that care;
    - whether the acts or omissions complained of proximately caused the injury complained of;
    - if negligence on the part of the health care practitioner or health care provider is found, whether any negligence on the part of the patient was equal to or greater than the negligence on the part of the practitioner or provider.
- Expert opinions provided by a panel cannot be admitted as evidence in court proceedings.
- Medical screening process can be bypassed if all parties involved agree unanimously to proceed straight to litigation. Alternatively, the screening panel can be empowered to dispose of the case through a binding decision if all parties consent.

Maryland:

- Arbitration of claims is generally required.
- Parties can agree to waive arbitration by filing a certificate of merit written by a qualified expert health professional.
- Court may order parties to engage in alternative dispute resolution.

Massachusetts:

- Every medical malpractice claim must be heard by a tribunal of three members.
- Tribunal consists of: one justice of the state's superior court, one licensed healthcare professional; and one attorney.
- Panel determines if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result.
- If panel finds in favor of the plaintiff, the case can proceed to litigation.
- If panel finds in favor of a defendant, plaintiffs must first file bond (usually $6,000) before proceeding to civil court.
- Tribunal's expert opinion becomes admissible as evidence at trial.

Michigan:

- If total amount of claim is $75,000 or less, parties may agree to binding arbitration.
- All legal actions involving medical malpractice must be referred to mediation,
- The mediation panel consists of: three licensed attorneys, one licensed or registered health care provider selected by the defendant, and one licensed or registered health care provider selected by the plaintiff. A judge may be a member of the panel but may not preside at trial.
- Selection of panel members is governed by court rules.
- Panel is required to make an "evaluation" within 14 days, including a specific finding on the applicable standard of care at issue in the case. If the panel's five voting members unanimously agree that the plaintiff's claim is frivolous, the plaintiff is required to post a $5,000 bond before proceeding to a subsequent trial. That applies to defendants with frivolous defenses as well, who are also obligated to post bond before trial.

Montana:

- Claims must be submitted to a medical legal panel before filing a complaint in court.
- Panel consists of up of six members: three physicians and three attorneys.
- In cases that involve a health care facility, two of the panel members must be administrators of similar health care facilities, who are joined by one physician and three attorneys.
- Panel hearings are informal and official transcripts are not allowed.
- Panel must decide whether substantial evidence exists to suggest that the acts complained of occurred and constitute malpractice and a reasonable medical probability that the patient was injured by the alleged malpractice.
- Panel's decision is not binding and not admissible as evidence in a subsequent court proceeding. Medical legal panels in Montana have the authority to approve settlement agreements, which shall be binding on all parties involved.

Nebraska:

- Medical review panels review all malpractice claims prior to filing such actions. But claimant can affirmatively waive right to panel and file claim directly in court.
- Panels consist of 3 voting physicians and 1 non-voting attorney. Each party selects 1 physician, and the 2 physicians select the third physician. Parties agree on attorney member. Written challenges without cause may be made to a proposed panelist.
- All physicians in active practice in the state are available for selection and must serve unless excused by a judge for good cause.
- Each panelist paid $50 per day for all work performed as member of panel; fees paid equally by each side.

Nevada:

- Mandatory pretrial settlement conference. All parties involved in the action, along with their insurers and attorneys, are required to attend. Settlement conferences heard by a district judge other than judge assigned to preside over the court case.

New Hampshire:

- Pretrial screening panels comprised of attorneys and health care practitioners.
- Chief justice of the superior court shall maintain a list of retired judges, persons with judicial experience, and other qualified persons, from which the chief justice shall choose a panel chairperson.
- Chief justice shall also maintain lists of health care practitioners and attorneys with litigation experience, recommended by their respective professional organizations to serve on screening panels.
- Panel chairperson shall choose 2 or 3 panel members from list of health care practitioners and attorneys. Only challenges for cause allowed.
- Chief justice establishes compensation of panel chairperson if chairperson not otherwise compensated by state. Other panel members shall serve without compensation or payment of expenses.

New Jersey:

- Malpractice cases involving damage amounts of $20,000 or less must be referred by court to arbitration.
- For amounts in controversy in excess of $20,000, court may refer matter to arbitration if all parties consent and court determines case does not involve novel legal or unduly complex factual issues.
- Number or selection of arbitrators may be stipulated by mutual consent of all parties. If parties fail to stipulate, arbitrators shall be selected from a list of arbitrators compiled by assignment judge, to be comprised of retired judges and qualified attorneys.
- Compensation for arbitrators set by rules adopted by Supreme Court of New Jersey. Supreme Court may also establish a schedule of fees for attorneys representing parties to the dispute and for witnesses.

New Mexico:

- Medical review panels hear all malpractice claims before a legal complaint can be filed in court. Panel comprised of 6 voting members (3 health care providers and 3 attorneys) and 1 non-voting chairperson. Panel members selected by provider's state professional society or association and state bar association, who shall each select 3 panelists.

New York:

- Mandatory settlement conference within 45 days of filing of note of issue and certificate of readiness, which signal to court that discovery is over and trial can be set.
- Defendant may demand that plaintiff elect whether to consent to arbitration of damages upon a concession of liability. Within 20 days after receipt of such demand, plaintiff shall elect whether to arbitrate damages in such an action pursuant to such concession of liability by defendant.

North Carolina:

- No formal pretrial screening mechanism. Parties may agree to submit dispute to arbitration before or after action has been filed. $1 million cap on arbitrator's award.
- Fees and expenses of arbitrator shared equally by the parties.

North Dakota:

- Claimant and health care provider shall make a good-faith effort to resolve part or all of the malpractice claim through alternative dispute resolution before the claimant initiates a malpractice action in court.

Northern Mariana Islands:

- Statutes unavailable on Westlaw.

Ohio:

- No formal pretrial screening mechanism. Upon agreement of all parties, malpractice claim shall be submitted to an arbitration board for nonbinding arbitration. If decision of the arbitration board is not accepted by all parties, the claim shall proceed as if it had not been submitted to nonbinding arbitration. The decision of the arbitration board and any dissenting opinion written by any board member are not admissible into evidence at trial.
- Arbitration board shall consist of one person designated by plaintiff, one person designated by defendant, and one person designated by the court. Court's designee shall serve as chairperson of the board.
- Each member of arbitration board shall receive a reasonable compensation based on the extent and duration of actual service rendered and shall be paid in equal proportions by the parties. In a claim accompanied by a poverty affidavit, the cost of the arbitration shall be borne by the court.

Oregon:

- All medical malpractice claims must be sent through some form of alternative dispute resolution (i.e., arbitration, mediation, or judicial settlement conference) within 270 days of lawsuit's filing unless (1) the action is settled or otherwise resolved within 270 days after the action is filed, or (2) all parties agree in writing to waive dispute resolution

Pennsylvania:

- No formal pretrial screening mechanism. Upon request of a party to a medical professional liability claim within the state's Medical Care Availability and Reduction of Error Fund coverage limits, the Insurance Department of the Commonwealth may provide for a mediator in instances where multiple insurance carriers disagree on the disposition or settlement of a case. Upon the consent of all parties, the mediation shall be binding.

Puerto Rico:

- Judge presiding over malpractice claim may refer case to an arbitration panel when alternative dispute resolution is deemed an expedient way of resolving the claim or clarifying the medical controversies involved.
- Arbitration panel comprised of 3 members selected at sole discretion of judge from a list of candidates maintained by Chief Justice. The Secretary of Health and the Bar Association shall provide Chief Justice with a list of possible candidates to serve on arbitration panels.
- Court determines per diem of each panelist. Per diems and expenses incurred by panel shall be defrayed by the party against whom judgment is rendered in a manner proportional to the number of persons included by such party in the lawsuit. Court shall have the discretion to dismiss, totally or partially, any of the persons of the party against whom judgment has been rendered from the proportional payment of the per diems, if it is proven that said person's financial resources do not allow him to make the payment, in which case, the party shall contribute with the amount determined by the court, and the remainder shall be defrayed as prorated among the other persons in the party against whom judgment has been rendered.

Rhode Island:

- No statute provided specific to medical liability/malpractice cases. Pretrial screening appears to have been repealed.

South Carolina:

- Mandatory pretrial mediation; parties in a medical malpractice claim must participate in mediation at some point before trial. Parties may also agree to participate in binding arbitration, nonbinding arbitration, early neutral evaluation, or other forms of alternative dispute resolution.
- If the matter cannot be resolved through mediation, plaintiff may initiate a civil action.

South Dakota:

- Statutes governing voluntary arbitration agreements between hospitals or physicians and patients.
- Arbitration agreement between hospitals or physicians and patients shall contain the following provision in 12-point boldface type immediately above the space for signature of the parties: "The agreement to arbitrate is not a prerequisite to health care or treatment. By signing this contract you are agreeing to have any issue of medical malpractice decided by neutral arbitration and you are giving up your right to a jury or court trial."

- Presidents of state bar association, medical association, and hospital association shall select, respectively, 15 lawyers, 15 physicians, and 15 hospital association members to serve on health care services arbitration panel for a three-year term. Three-member panels selected for small claims; five-member panels selected for large claims or multiple-party claims.
- Before commencement of any arbitration action before the arbitration panel, claimant shall remit $100 to the state treasurer, who shall credit such funds to the health care services arbitration account of the general fund.
- Each panelist shall receive $100 per day plus expenses. The presiding judge of the circuit court shall fix the compensation of the arbitration officer. All compensation and expenses incurred by the panel shall be paid out of the health care services arbitration account.

Tennessee:

- No formal/mandatory pretrial screening mechanism.

Texas:

- No health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice as specified by statute. *But see Fredericksburg Care Co. v. Perez*, 461 S.W.3d 513 (Tex. 2015) (holding that Federal Arbitration Act preempts state law requiring that agreement to arbitrate a health care liability claim must contain written notice in bold-type, ten-point font that conspicuously warns patient of several important rights).

Utah:

- Claimant shall request a prelitigation panel review within 60 days after service of a statutory notice of intent to commence action. While the proceedings are informal and nonbinding, panel review is mandatory.
- Division of Occupational and Professional Licensing shall provide for and appoint a hearing panel in alleged medical liability cases.
- A panelist may not receive compensation or benefits for the panelist's service, but may receive per diem and travel expenses as provided by statute.
- In addition to the actual cost of administering the licensure of health care providers, the division may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.
- The claimant bears none of the costs of administering the prelitigation panel except upon a written agreement by all parties to consider the proceeding a binding arbitration hearing, in which case the parties are equally responsible for compensation to the members of the panel for services rendered.

Vermont:

- Voluntary arbitration and mediation statutes repealed (effective 2020).

Virginia:

- Any party may request a review by a medical malpractice review panel. Pretrial review is optional, not mandatory.
- Each review panel consists of four voting members: two impartial attorneys and two impartial health care providers. The judge of the circuit court in which the malpractice claim has been filed serves as the panel's non-voting chairperson.
- Each panelist shall be reimbursed for actual and necessary expenses and shall be paid at a rate of $50 per diem for work performed as panelist exclusive of time involved if called as a witness to testify in court. Per diem and expenses of the panel shall be borne by the parties in such proportions as may be determined by the chairperson in his or her discretion.
- The parties may agree to submit to binding arbitration.

Virgin Islands:

- No malpractice claim can be filed in court until the claimant's proposed complaint has first been filed with the Medical Malpractice Action Review Committee.
- The Committee's purpose is to arrange for expert review of malpractice claims. The cost of obtaining expert opinion shall be funded by the Medical Expert Fund.
- After reviewing medical evidence, a screening panel of attorneys and health care providers will render their opinion on the claim's merits. These findings can be used by either party as evidence in any subsequent court proceedings. However, if either party wishes to call the expert as a witness, the party must do so at his own cost.

Washington:

- All causes of action for damages arising from injury occurring as a result of health care are subject to mandatory mediation prior to trial, unless the parties have previously agreed to arbitration.
- The arbitrator may not make an award of damages under this chapter that exceeds $1 million for both economic and noneconomic damages.
- No right to a trial de novo on an appeal of the arbitrator's decision. An appeal of the arbitrator's decision is limited to the bases for appeal provided by law.

West Virginia:

- Health care provider may make a written demand for pre-litigation mediation.
- Results of mediation not admissible as evidence in any court proceeding unless the court, upon hearing, determines that failure to disclose the contents would cause a miscarriage of justice.

Wisconsin:

- Claimant may request mediation.
- No oral or written communication relating to mediation admissible as evidence except as specified.

Wyoming:

- Supreme court may promulgate rules to provide a screening procedure to expedite the prelitigation resolution of claims arising from any alleged act, error or omission in the rendering of licensed or certified professional or health care services.
- Unless the parties have agreed to arbitration, a claim must be filed with the Medical Review Panel which consists of two health care providers, two attorneys and one layperson.
- The panel's decision is not binding. The decision of the panel and any testimony, documents or materials submitted thereto and incorporated into the decision of the panel shall be admissible in whole or in part solely for purposes of impeachment in any subsequent trial of the matter, subject to the discretion of the trial court and in accordance with the Wyoming Rules of Evidence.
- No panel member may be called to testify in any proceeding concerning the deliberations, discussions, decisions and internal proceedings of the panel. The claim, answer, decision and any other pleadings served under this act shall not be admissible in any subsequent civil action brought by the claimant against the health care provider for alleged malpractice.