

MAINE STATE LEGISLATURE

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
118TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 773, L.D. 1050, Bill, "An Act to Revise the Prelitigation Malpractice Screening Panel Procedures, Criteria and Composition"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place:

'Sec. 1. 24 MRSA §2852, sub-§2, ¶B, as amended by PL 1989, c. 361, §§1 and 10, is further amended to read:

B. Upon notification of the Chief Justice's choice of chair, the clerk who received the notice of claim under section 2853 shall notify that person and provide that person with the clerk's lists of health care practitioners, health care providers and attorneys created under subsection 1. The chair shall choose from those lists 2 or 3 additional panel members as follows:

(1) The chair shall choose one attorney;

(2) The chair shall choose one health care practitioner. A health care practitioner who is insured by the same professional liability insurance company as the person accused of professional negligence is disqualified from serving on the panel. If possible, the chair shall choose a practitioner who practices in the specialty or profession of the person accused of professional negligence;

COMMITTEE AMENDMENT

(3) Where When the claim involves more than one person accused of professional negligence, the chair may choose a 4th panel member who is a health care practitioner or health care provider. If possible, the chair shall choose a practitioner or provider in the specialty or profession of a person accused; and

(4) When agreed upon by all the parties, the list of available panel members may be enlarged in order to select a panel member who is agreed to by the parties but who is not on the clerk's list.

The Chief Justice of the Superior Court shall establish the compensation of the panel chair. Other panel members shall serve without compensation or payment of expenses.

The clerk of the Superior Court in the judicial region in which the notice of claim is filed under section 2853 shall, with the consent of the Chief Justice of the Superior Court, provide clerical and other assistance to the panel chair.

Sec. 2. 24 MRSA §2853, sub-§4, as amended by PL 1995, c. 571, §1, is further amended to read:

4. Filing of records; time for hearing; extensions. Within 20 days of entry of appearance, the person or persons accused shall ~~contact the claimant's counsel and by agreement shall designate a timetable for filing~~ file all the relevant medical and provider records necessary to a determination of the panel ~~and for completing discovery. If the parties are unable to agree on a timetable within 60 days of the entry of appearance, the claimant shall notify the chair of the panel. The chair shall then establish a timetable for the filing of all relevant records and reasonable discovery, which must be filed at least 30 days before any hearing date.~~ Within 40 days of filing of the medical and provider records, each party shall file any additional admissible evidence, including, but not limited to, statements by experts without the necessity of the experts appearing at the hearing. The hearing may not be later than 6 4 months from the service of the notice of claim upon the clerk, except when the time period has been extended by the panel chair in accordance with this subchapter.

Sec. 3. 24 MRSA §2853, sub-§5, as amended by PL 1991, c. 505, §3, is further amended to read:

5. Lawsuits. The pretrial screening may be bypassed if all parties agree upon a resolution of the claim by lawsuit or if the hearing has not been held within 4 months from the service of the notice of claim and the plaintiff has not requested that the time

period be extended. All parties to a claim may, by written agreement, submit a claim to the binding determination of the panel, either prior to or after the commencement of a lawsuit. Both parties may agree to bypass the panel and commence a lawsuit for any reason, or may request that certain preliminary legal affirmative defenses or issues be litigated prior to submission of the case to the panel. The panel has no jurisdiction to hear or decide, absent the agreement of the parties, dispositive legal affirmative defenses, except: compliance with practice parameters or risk management protocols adopted under section 2973 if the defendant is a participant in the medical liability demonstration project established under subchapter IX and intends to introduce evidence of compliance at trial; and comparative negligence. The panel chair may require the parties to litigate, by motion, dispositive legal affirmative defenses in the Superior Court prior to submission of the case to the panel. Any such defense, as well as any motion relating to discovery that the panel chair has chosen not to rule on, may be presented, by motion, in Superior Court without the necessity of a complaint having first been filed.

Sec. 4. 24 MRSA §2853, sub-§7, as amended by PL 1991, c. 505, §4, is further amended to read:

7. **Extension of time.** All requests for extension of time under this subchapter must be made to the panel chair. The chair may extend any time period under this subchapter for good cause, except that the chair may not extend any time period that would result in the hearing being held more than one-year 6 months from the filing of notice of claim upon the clerk unless good cause is shown.

Sec. 5. 24 MRSA §2854, as amended by PL 1989, c. 361, §§7 and 10, is repealed and the following enacted in its place:

§2854. Hearing or presentation

1. Procedure. The claimant or a representative of the claimant shall present the case before the panel. The person accused of professional negligence or that person's representative shall make a responding presentation. The chair shall determine whether the presentations are to be made in writing or orally in a hearing before the panel.

A. When a hearing is held, the proceedings are informal and the Maine Rules of Evidence do not apply.

B. The chair may not permit discovery or perpetuation of testimony in the proceedings other than depositions of the parties, except upon special order of the chair for good cause shown demonstrating extraordinary circumstances.

2 C. The chair shall make all procedural rulings, and the
3 rulings are final.

4
5 D. A tape recorded record must be maintained by the panel.
6 Except as provided in section 2857, the record may not be
7 made public and the hearings may not be public without the
8 consent of all parties.

9
10 E. No party has the right to cross-examine or rebut or to
11 demand that the customary formalities of civil trials and
12 court proceedings be followed.

13
14 F. Evidence must be admitted if it is the kind of evidence
15 upon which reasonable persons are accustomed to rely in the
16 conduct of serious affairs. The panel shall make such
17 findings upon evidence that is presented at the hearing, the
18 records and any expert opinions provided by or sought by the
19 panel or the parties.

20
21 G. Communications between the panel and the parties, except
22 the testimony of the parties on the merit of the dispute,
23 must be disclosed to all other parties.

24
25 H. After presentation by the parties as provided in this
26 section, the panel may request from either party additional
27 facts, records or other information to be submitted in
28 writing or at a continued hearing, which must be held as
29 soon as possible. The same members of the panel who have
30 sat on all prior hearings in the same claim shall attend the
31 continued hearings unless otherwise agreed by all parties.

32
33 2. Settlement; mediation. The chair of the panel shall
34 attempt to mediate any differences of the parties before
35 proceeding to findings.

36
37 3. Failure to comply. Failure of a party, without good
38 cause, to submit written presentations, to attend a properly
39 scheduled hearing, to participate in authorized discovery or to
40 otherwise substantially comply with this subchapter must result
41 in a finding made by a majority of the panel against that party
42 and that finding has the same effect as a finding against that
43 party under section 2857.

44
45 **Sec. 6. 24 MRSA §2855, sub-§1, as amended by PL 1991, c. 505,**
46 **§5, is further amended to read:**

47 **1. Negligence and causation.** At the conclusion of the
48 presentations, the panel shall make its findings in writing
49 within 30 days by answering the following questions:
50

2 A. Whether the evidence presented, including any
3 stipulations by the parties, permits a reasonable inference
4 that the acts or omissions complained of ~~ex-found-by-the~~
5 ~~panel-to-exist, ex-as-agreed-by-the-parties,~~ constitute a
6 deviation from the applicable standard of care by the health
7 care practitioner or health care provider charged with that
8 care;

10 A-1. If the defendant is a participant in the medical
11 liability demonstration project established under subchapter
12 IX and has raised as an affirmative defense compliance with
13 the practice parameters or risk management protocols adopted
14 under section 2973, whether the evidence presented permits a
15 reasonable inference that the defendant ~~complied~~ did not
16 comply with an applicable parameter or protocol establishing
17 the applicable standard of care;

18 B. Whether the evidence presented, including any
19 stipulations by the parties, permits a reasonable inference
20 that the acts or omissions complained of proximately caused
21 the injury complained of ~~ex-as-found-by-the-panel-or-as~~
22 ~~agreed-by-the-parties;~~ and

23 C. If a reasonable inference of negligence on the part of
24 the health care practitioner or health care provider is
25 found raised, whether the evidence presented permits a
26 reasonable inference that any negligence on the part of the
27 patient was equal to or greater than the negligence on the
28 part of the practitioner or provider.

29 **Sec. 7. 24 MRSA §2855, sub-§2, as repealed and replaced by PL**
30 **1989, c. 361, §§8 and 10, is repealed.**

31 **Sec. 8. 24 MRSA §2855, sub-§3 is enacted to read:**

32 **3. Standard of proof. The standard of proof used by the**
33 **panel must be whether, in viewing the evidence and all reasonable**
34 **inferences from the evidence, any reasonable basis exists upon**
35 **which a jury could find for the plaintiff on the issues of**
36 **negligence and causation.**

37 **Sec. 9. 24 MRSA §2857, sub-§1, as enacted by PL 1985, c. 804,**
38 **§§12 and 22, is repealed.**

39 **Sec. 10. 24 MRSA §2857, sub-§1-A is enacted to read:**

40 **1-A. Proceedings before panel confidential. Except as**
41 **provided in this section, all proceedings before the panel,**
42 **including its final determinations, must be treated in every**

respect as private and confidential by the panel and the parties to the claim.

A. The findings and other writings of the panel, any evidence and statements made by a party or a party's representative during a panel hearing are not admissible and may not otherwise be submitted or used in any way for any purpose in any subsequent court action and may not be publicly disclosed, except that:

(1) Any testimony or writings made under oath may be used in subsequent proceedings for purposes of impeachment; and

(2) The party who made the statement or presented the evidence may agree to the submission, use or disclosure of that statement or evidence.

B. If the panel findings as to any question under section 2855 are unanimous and unfavorable to the claimant, the findings are admissible in any subsequent court action for professional negligence against the person accused of professional negligence by the claimant based on the same set of facts upon which the notice of claim was filed. The findings are admissible only against the claimant.

The confidentiality provisions of this section do not apply if the findings were influenced by fraud.

Sec. 11. 24 MRSA §2857, sub-§3, as enacted by PL 1989, c. 931, §2, is amended to read:

3. Discovery; subsequent court action. The Maine Rules of Civil Procedure govern discovery conducted under this subchapter. The chair has the same authority to rule upon discovery matters as a Superior Court Justice. Notwithstanding subsection 1-A, in a subsequent Superior Court action all discovery conducted during the prelitigation screening panel proceedings is deemed discovery conducted as a part of that court action.

This subsection applies to all claims of professional negligence in which the notice of claim is served or filed on or after January 1, 1991.

Sec. 12. 24 MRSA §2858, as enacted by PL 1985, c. 804, §§12 and 22, is repealed.

Sec. 13. Application. Notwithstanding the Maine Revised Statutes, Title 1, section 302, the following provisions of this

Act apply to pending actions for professional negligence for which a hearing before a panel has not been held as of the effective date of this Act:

1. That section of this Act the repeals and replaces Title 24, section 2854;

2. That section of this Act that amends Title 24, section 2855, subsection 1;

3. That section of this Act that repeals Title 24, section 2855, subsection 2;

4. That section of this Act that enacts Title 24, section 2855, subsection 3;

5. That section of this Act that repeals Title 24, section 2857, subsection 1;

6. That section of this Act that enacts Title 24, section 2857, subsection 1-A; and

7. That section of this Act that repeals Title 24, section 2858, subsections 1 and 2.'

Further amend the bill by inserting at the end before the summary the following:

FISCAL NOTE

The additional costs associated with providing and maintaining adequate tape recorded records of prelitigation screening panel hearings can be absorbed by the Judicial Department utilizing existing budgeted resources.'

SUMMARY

This amendment replaces the bill.

The purpose of this amendment is to expedite and reduce costs related to the operation of prelitigation screening panels under the Maine Health Security Act.

The amendment prohibits a health care practitioner who is insured by the same professional liability insurance company as the person accused of professional negligence from serving on the prelitigation screening panel. The amendment provides that, unless the plaintiff has requested that a time period be

2 extended, the hearing may be bypassed completely if it has not
3 been held within 4 months. This amendment shortens certain time
4 periods and allows experts to submit written statements rather
5 than testify in person. It allows the panel chair to require the
6 parties to make their presentations of the case in writing. It
7 allows the panel chair to limit discovery. This amendment also
8 clarifies the role of the prelitigation screening panels by
9 changing the standard of proof used by the panel. Under this
10 amendment, the panel must determine whether the evidence
11 presented to it and the permissible inferences from the evidence
12 raise issues of fact as to negligence and causation. This
13 amendment prohibits the presentation to the jury of a unanimous
14 panel finding against the person accused of professional
15 negligence. A unanimous panel finding against the claimant may
16 be presented at trial, but the current prohibition on an
17 accompanying explanation is deleted. This amendment allows the
18 use of testimony made under oath in the panel proceedings to be
19 used in subsequent proceedings for the purpose of impeachment;
20 there is no other change to the confidentiality provisions. The
21 current provisions concerning the effect of the findings are
22 repealed. This amendment also corrects cross-references.

23 The revisions to the panel findings, the standard of proof,
24 the use of the findings in subsequent proceedings and the use of
25 testimony given under oath apply to pending cases if the hearing
26 before the panel has not been held before the effective date of
27 this Act.

28 The amendment also adds a fiscal note to the bill.