

MAINE STATE LEGISLATURE

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ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document

No. 727

S. P. 205

In Senate, February 24, 1977

Referred to the Committee on Judiciary. Sent down for concurrence and 2,000 ordered printed.

MAY M. ROSS, Secretary

Presented by Senator Conley of Cumberland.

Cosponsors: Senator S. Collins of Knox and Senator Snowe of Androscoggin.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

**AN ACT to Implement the Recommendations of the Pomeroy Commission
on Medical and Hospital Malpractice Insurance.**

Be it enacted by the People of the State of Maine, as follows:

24 MRSA c. 21 is enacted to read:

CHAPTER 21

MAINE HEALTH SECURITY ACT

SUBCHAPTER I

PROFESSIONAL COMPETENCE REPORTS

§ 2501. Short title

This Act shall be known as the Maine Health Security Act.

§ 2502. Definitions

As used in this chapter, unless the context indicates otherwise, the following words shall have the following meanings.

1. Board. "Board" means the Board of Registration in Medicine or the Board of Osteopathic Examination and Registration.

2. Health care provider. "Health care provider" means any hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine or surgery in this State and which is licensed or otherwise authorized by the laws of this State.

3. **Physician.** "Physician" means any natural person authorized by law to practice medicine or osteopathic medicine within this State.

4. **Professional competence committee.** "Professional competence committee" means a committee of members of a professional society or other organization of physicians formed pursuant to state and federal law and authorized to evaluate medical and health care service, or a committee of licensed professionals authorized or privileged to practice in any health care facility, provided the medical society or other organization or the medical staff or the health care facility operates pursuant to written bylaws that have been approved by the governing body of such society, organization or facility.

5. **Professional society.** "Professional society" means a state professional organization of physicians, surgeons or osteopathic physicians.

§ 2503. Hospital duties

The governing body of every licensed hospital shall assure that:

1. **Organization of medical staff.** Its medical staff is organized pursuant to written bylaws that have been approved by the governing body;

2. **Provider privileges.** Provider privileges extended or subsequently renewed to any physician are in accordance with those recommended by the medical staff as being consistent with that physician's training, experience and professional competence;

3. **Program for identification and prevention of medical injury.** It has a program for the identification and prevention of medical injury which shall include at least the following:

A. One or more professional competence committees with responsibility effectively to review the professional services rendered in the facility for the purpose of insuring quality of medical care of patients therein. Such responsibility shall include a review of the quality and necessity of medical care provided and the preventability of medical complications and deaths;

B. A grievance or complaint mechanism designed to process and resolve as promptly and effectively as possible grievances by patients or their representatives related to incidents, billing, inadequacies in treatment and other factors known to influence malpractice claims and suits;

C. A system for the continuous collection of data with respect to the provider's experience with negative health care outcomes and incidents injurious to patients, whether or not they give rise to claims, patient grievances, claims, suits, professional liability premiums, settlements, awards, allocated and administrative costs of claims handling, costs of patient injury prevention and safety engineering activities, and other relevant statistics and information; and

D. Education programs for the provider's staff personnel engaged in patient care activities dealing with patient safety, medical injury prevention, the legal aspects of patient care, problems of communication and rapport with patients and other relevant factors known to influence malpractice claims and suits; and

4. External professional competence committee. Where the nature, size or location of the health care provider makes it advisable, the provider may, upon recommendation of its medical staff, utilize the services of an external professional competence committee or one formed jointly by 2 or more providers.

§ 2504. Professional societies

Every state professional society shall establish a professional competence committee of its members pursuant to written bylaws approved by the society's governing board. The committee shall receive, investigate and determine the accuracy of any report made to the society of any member physician's acts amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs or professional incompetence.

§ 2505. Committee reports

Any professional competence committee within this State and any physician licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician in this State if, in the opinion of the committee, physician or other person, the committee or individual has reasonable knowledge of acts of the physician amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs or professional incompetence.

§ 2506. Provider reports

A health care provider shall within 60 days report in writing to the appropriate board the name of any member of the medical staff or any other physician practicing in the facility whose privileges have been revoked, limited or terminated, or who has been otherwise formally disciplined by the provider or the provider's medical staff, together with pertinent information relating to such action, if such revocation, limitation, termination or discipline is the result of negligence, habitual drunkenness, addiction to the use of drugs, gross incompetence or repeated acts of incompetence.

§ 2507. Society reports

Any professional society within this State which takes formal disciplinary action against a member relating to professional ethics, medical incompetence, moral turpitude, or drug or alcohol abuse shall, within 60 days of the action, report in writing to the appropriate board the name of the member, together with pertinent information relating to the action.

§ 2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board shall not, in and of itself, preclude any action by a hospital or other health care facility or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

§ 2509. Board records

1. **Record of physicians.** Each board shall create and maintain a permanent record of the names of all physicians licensed by it or otherwise lawfully practicing in this State and subject to the board's jurisdiction along with an individual historical record for each physician relating to reports or other information furnished the board under this chapter or otherwise pursuant to law. The record may include, in accordance with rules established by the board, additional items relating to a physician's record of medical practice as will facilitate proper periodic review of the physician's professional competency.

2. **Reports without merit; removal and destruction.** Upon determination by the board that any report submitted to it is without merit, the report shall be removed from the physician's individual historical record and destroyed.

3. **Forms; acceptance of other forms.** The board shall provide forms for filing reports pursuant to this chapter. Reports submitted in other forms shall be accepted by the board.

4. **Disclosure to physician.** A physician shall be provided with a written notice of the substance of any information received pursuant to this chapter and placed in his individual historical record.

5. **Examination of records by physician; response to information.** A physician or his authorized representative shall have the right, upon request, to examine the physician's individual historical record which the board maintains pursuant to this chapter, and to place into the record a statement of reasonable length of the physician's view of the correctness or relevance of any information existing in the record. The statement shall at all times accompany that part of the record in contention. **This subsection shall not apply to material submitted to the board in confidence prior to licensure by the board.**

6. **Court action for amendment or destruction.** A physician shall have the right to seek through court action pursuant to the Maine Rules of Civil Procedure the amendment or destruction of any part of his historical record in the possession of the board.

7. **Destruction of information within 2 years.** Except as to information relating to biographical background, education, professional training and practice, prior disciplinary action by any entity or that which the board may be otherwise required by law to maintain, the board shall destroy information in a physician's historical record unless the board has initiated a proceeding for a hearing upon the information within 2 years of its placement into the historical record.

§ 2510. Confidentiality of information

1. **Confidentiality; exceptions.** Any reports, information or records received and maintained by the board pursuant to this chapter, including any material received or developed by the board during an investigation or hearing shall be confidential; provided that the board may disclose any confidential information only:

A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to such disciplinary hearing;

B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care providers located within or outside this State which are concerned with granting, limiting or denying a physician's hospital privileges, provided that the board shall include along with the transfer an indication as to whether or not the information has been substantiated by the board;

C. As required by section 2509, subsection 5;

D. Pursuant to an order of a court of competent jurisdiction; or

E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted.

2. Confidentiality of disciplinary orders. Orders of the board relating to disciplinary action against a physician shall not be confidential.

3. Availability of confidential information. In no event shall confidential information received, maintained or developed by the board, or disclosed by the board to others, pursuant to this chapter, or information, data, incident reports or recommendations gathered or made by or on behalf of a health care provider pursuant to this chapter, be available for discovery, court subpoena or introduced into evidence in any medical malpractice suit or other action for damages arising out of the provision or failure to provide health care services.

4. Penalty. Any person found guilty of the unlawful disclosure of such confidential information possessed by the board shall be guilty of a Class E crime.

5. Physician-patient privilege; proceedings by board. The physician-patient privilege shall, as a matter of law, be deemed to have been waived by the patient and shall not prevail in any investigation or proceeding by the board acting within the scope of its authority, provided that the disclosure of any information pursuant to this subsection shall not be deemed a waiver of such privilege in any other proceeding.

6. Disciplinary order; when made, temporary suspension. Except in matters requiring dismissal because they are frivolous and clearly unfounded on their face or which fall outside the board's jurisdiction, a disciplinary order or other disposition of a report before the board shall not be made until the physician has been provided with an opportunity for a hearing before the board; provided that the board may temporarily suspend a physician's license simultaneously with the institution of proceedings for a hearing before the board, if the board determines that evidence in its possession indicates that a physician's continuation in practice would constitute an immediate danger to the public; provided further that in the event of the temporary suspension or restriction, without a hearing, a hearing must be held within 15 days of the action or on a later date as the physician requests.

§ 2511. Immunity

Any person acting without malice, and any physician, health care provider, professional society, or member of a professional competence committee or of the board, in making any report or other information available to the board pursuant to law, or in assisting in the origination, investigation or preparation of such information, or in assisting the board in carrying out any of its duties or functions provided by law, shall be immune from civil or criminal liability, except as provided in section 2510, subsection 4, for any such actions.

§ 2512. Appeal

Any person against whom disciplinary action is taken by the board pursuant to this chapter shall have the right of judicial appeal as provided in the Maine Rules of Civil Procedure, Rule 80B, provided that no person shall be allowed to practice medicine in violation of any disciplinary order or action of the board while any appeal is pending.

SUBCHAPTER II

LIABILITY CLAIMS REPORTS

§ 2601. Report of claim

Every insurer providing professional liability insurance in this State to a person licensed by the Board of Registration in Medicine or the Board of Osteopathic Examination and Registration or to any health care provider shall make a periodic report of claims made under the insurance. For purposes of this section, a claim is made whenever the insurer receives information from an insured, a patient of an insured or an attorney that an insured's liability for malpractice is asserted. The report shall include:

1. Date and place. The date and place of the occurrence for which each claim was made;
2. Name of insured; classification of risk. The name of the insured or insureds and the classification of risk;
3. Incident or occurrence for claim. The incident or occurrence for which each claim was made;
4. Amount. The amount claimed;
5. Arbitration agreement. Whether or not each reported claim is subject to an arbitration agreement;
6. Filing of suit or arbitration. Whether or not suit has been filed or arbitration demanded at the time of report on each report claim; and
7. Other information. Such other information as may be required pursuant to section 2603.

§ 2602. Report of disposition

1. Report; finality of judgment or award. If any claim subject to section 2601 results in:
 - A. A final judgment or award to the claimant in any amount;

- B. A settlement involving payment in any amount of money or services; or
- C. A final disposition not involving any payment of money or services, the insurer shall make a report of disposition as provided in subsection 2.

For purposes of this section, a judgment or award is final when it cannot be appealed, and a disposition is final when it results from judgment, dismissal, withdrawal or abandonment.

2. Information included: The report of disposition required pursuant to subsection 1 shall include:

- A. The name, address and specialty coverage of the insured;
- B. The insured's policy number;
- C. The date and place of the occurrence which created the claim;
- D. The date of suit, if filed or arbitration if demanded;
- E. The date and amount of judgment, award or settlement, if any;
- F. The allocated claim expense, if any;
- G. The date and reason for final disposition, if no judgment, award or settlement;
- H. A summary of the occurrence which created the claim; and
- I. Such other information as may be required pursuant to section 2603.

§ 2603. Place and form of reports

Claims reports and reports of disposition required by this subchapter shall be made to the Superintendent of Insurance, who shall prescribe the form and content of the reports. The superintendent shall determine the frequency of claims reports, provided the period covered by the reports shall not be less than one month nor more than one year. Reports of disposition shall be made within 60 days of the judgment, award, settlement or other disposition of the claim as provided under section 2602.

§ 2604. Records of superintendent

For the purpose of evaluation of policy provisions, rate structures and the arbitration process and for recommendations of further legislation, the Superintendent of Insurance shall retain the information and maintain the files in the form and for such period as he shall determine necessary. The superintendent shall maintain the data and information filed in accordance with this section as strictly confidential records and shall release the same only for bona fide research, educational or legislative purposes, or as required by section 2605. The superintendent shall determine the validity of any request for the information. Reports made to the superintendent and records thereof kept by the superintendent shall not be subject to discovery and shall not be admissible in any trial, civil or criminal, other than proceedings brought before or by the board.

§ 2605. Report to board

The superintendent shall, within 30 days of their receipt, submit to the appropriate board a copy or summary of reports received pursuant to section 2601 or section 2602.

§ 2606. Immunity

There shall be no liability on the part of and a cause of action of any nature shall not arise against an insurer reporting hereunder or its agents or employees, or the superintendent or his representatives for any action taken by them pursuant to this subchapter.

SUBCHAPTER III

MEDICAL MALPRACTICE ARBITRATION

§ 2701. Application

1. Application to arbitration; type of injury; cause. The provisions of this subchapter shall be applicable to the arbitration of a dispute, controversy or issue arising out of or resulting from injury to, or the death of, a person caused by the alleged error, omission or negligence in the performance of professional services by a health care provider, physician or the agent or employee of a provider or physician, or based on a claimed performance of the services without consent, in breach of warranty or in violation of contract.

2. Agreement to arbitrate; validity. An agreement to arbitrate executed pursuant to this chapter shall be presumed to be valid, but a court of competent jurisdiction may stay arbitration, modify, correct or refuse to confirm an award as provided by law or court rule.

3. Conflicts. In an arbitration agreement or proceeding under this chapter, the provisions of this chapter shall govern if a conflict arises between such provisions and those of Title 14, chapter 706.

§ 2702. Agreements permitted

1. Person admitted to health care provider. A person admitted to a health care provider may execute an offered agreement to arbitrate any dispute, controversy or issue arising out of health care or treatment provided by the provider or its employees.

A. No person receiving emergency treatment or care shall be offered the option of an arbitration agreement until such emergency treatment or care is completed.

B. Every arbitration agreement offered pursuant to this subsection shall contain the following provision in 12-point boldface type immediately above the space for signature of the parties:

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO BE ADMITTED TO (name of provider) OR TO RECEIVE TREATMENT THEREIN. THIS AGREEMENT PROVIDES THAT

ANY CLAIM YOU MAY ASSERT RELATIVE TO YOUR CARE HERE WILL BE SUBMITTED TO A PANEL OF ARBITRATORS RATHER THAN A COURT FOR DETERMINATION BY A JURY OR A JUDGE.

UNLESS YOU ARE PARTY TO AN EXISTING ARBITRATION AGREEMENT IN CONNECTION WITH MEMBERSHIP IN A NON-PROFIT HOSPITAL OR MEDICAL SERVICE ORGANIZATION, THIS AGREEMENT MAY BE CANCELLED BY YOU WITHIN 30 DAYS OF YOUR DISCHARGE BY OR DEPARTURE FROM (name of provider). TO EFFECT SUCH CANCELLATION, YOU MUST NOTIFY (name and address of provider) IN WRITING BY CERTIFIED MAIL.

C. An agreement executed pursuant to this subsection may be revoked by the person receiving health care or treatment within 30 days of discharge by or departure from the health care provider, or by the person's legal representative within 30 days of the person's death occurring within the period of revocability. No agreement may be revoked after commencement of arbitration proceedings. Revocation shall be effected by delivery of written notice to the health care provider or by depositing the notice properly addressed as certified mail. An arbitration agreement may not be revoked by the health care provider. This paragraph shall not preclude the inclusion of irrevocable provisions for arbitration pursuant to this chapter in contracts of nonprofit hospital or medical service organizations with their members or hospitals.

D. The form of the agreement promulgated shall be accompanied by an information brochure which clearly details the agreement and revocation provision. The brochure shall be furnished the person receiving health care at the time of execution. The person receiving health care shall be furnished with either an original or duplicate of the agreement.

E. Each admission to a health care provided shall be treated as separate and distinct for the purposes of an agreement to arbitrate, but a person receiving outpatient care may execute an agreement with the provider which provides for continuation of the agreement for a specific or continuing program of health care or treatment under the provisions of subsection 2.

2. Person receiving health care or treatment from physician. A person who receives health care or treatment from a physician other than as an employee of a health care provider may execute an offered agreement to arbitrate any dispute, controversy or issue arising out of the care or treatment.

A. Every arbitration agreement offered pursuant to this subsection shall contain the following provision in 12-point boldface type immediately above the space for signature of the parties:

NOTICE TO PATIENT

THIS AGREEMENT PROVIDES THAT ANY CLAIM YOU MAY ASSERT RELATIVE TO TREATMENT BY (name of provider) WILL

BE SUBMITTED TO A PANEL OF ARBITRATORS RATHER THAN A COURT FOR DETERMINATION BY A JURY OR A JUDGE AS WOULD BE YOUR CONSTITUTIONAL RIGHT IN THE ABSENCE OF THIS AGREEMENT.

B. An arbitration agreement under this subsection shall expire one year after its execution, but may be renewed by execution of a new agreement. An expired agreement shall apply to claims relative to care or treatment provided while the agreement was in force.

C. The form of agreement and brochure shall be furnished to the person receiving health care or treatment as provided in subsection 1, paragraph D.

§ 2703. Parties

1. Health care provider covered by agreement; physician not covered. If a claim is asserted in connection with health care or treatment delivered in a health care provider covered by an agreement executed pursuant to section 2702, subsection 1 and the attending physician is not covered by such agreement or an agreement executed pursuant to section 2702, subsection 2, all issues of the provider's liability shall be determined by arbitration and all issues of the physician's liability shall be determined by judicial process, except as provided in subsection 3.

2. Health care provider not covered by agreement; physician covered. If a claim is asserted in connection with health care or treatment delivered in a health care provider not covered by an agreement executed pursuant to section 2702, subsection 1 and the attending physician is covered by an agreement executed pursuant to section 2702, subsection 2, all issues of the physician's liability shall be determined by arbitration and all issues of the provider's liability shall be determined by judicial process except as provided in subsection 3.

3. Nonparty intervention in arbitration; consent. If arbitration is instituted, a person who is not a party to the arbitration agreement may join in the arbitration with the consent of all parties and shall have all the rights and obligations of the original parties.

4. Minor children. A minor child shall be bound by a written agreement to arbitrate disputes, controversies or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement.

5. Consolidation of disputes involving common questions of law or facts. In cases involving a common question of law or fact, if separate arbitration agreements exist between a plaintiff and a number of defendants or between defendants, the disputes, controversies and issues shall be consolidated into a single arbitration proceeding.

§ 2704. Commencement of proceedings and reparation offers

1. Commencement; notice; statement of claim. Arbitration proceedings under this chapter shall be commenced by serving a notice of demand for arbitration, together with a statement of the claim and cause of action, on all

parties to the arbitration agreement from whom damages are sought. The statement of the claim and cause of action shall be substantially in the form of a complaint under the Maine Rules of Civil Procedure. Service of the notice and statement shall be by any method authorized for service of complaints under the rules or by certified mail. For purposes of any statute of limitations, notice of a demand for arbitration to any party from whom damages are sought, whether by certified mail or any other valid process, shall be deemed to have tolled that statute as to all parties served with notice.

2. Potential claim; demand for arbitration. In a case where a potential claim is identified by a physician or a health care provider or where reparations, in its judgment, are not appropriate, the provider may, at its option, file a demand for arbitration, which demand shall identify the potential claim and deny liability.

3. Offer of reparations prior to institution of proceeding order. Prior to the institution of a proceeding or claim by a patient, any offer of reparations and all communications incidental thereto made in writing to a patient by a health care provider or a physician are privileged and may not be used by any party to establish the liability or measure of damages attributable to the offeror.

4. Period of acceptance or rejection of offer. The offer shall provide that a patient has 30 days to accept or reject the offer, or the lesser period of time as may be necessitated by the condition of health of the patient.

5. Demand for arbitration after rejection or lapse. After any rejection or the lapse of the applicable time, any party may demand arbitration, where an arbitration agreement is in effect.

6. Patient's right to consult legal counsel. Any offer to a patient shall include a statement that the patient may consult legal counsel before rejecting or accepting the offer.

§ 2705. Arbitrators

1. Panel of arbitrators; membership. An arbitration under this chapter shall be heard by a panel of 3 arbitrators. One shall be an attorney who shall be the chairman and shall have jurisdiction over prehearing procedures, one shall be a physician, preferably but not necessarily from the respondent's medical specialty, and the 3rd shall be a person who is neither doctor, lawyer or representative of a provider or insurance company. Where a case involves a provider only, a provider administrator may be substituted for a physician.

2. Selection. Arbitrator candidates shall be selected pursuant to rules promulgated by the Superintendent of Insurance. The rules shall provide for:

- A. Reasonable participation of all parties through selection or deletion of names from a pool of candidates generated by the superintendent;
- B. A method of appointment or selection in the event a panel cannot be formed by agreement;
- C. Procedures for screening for bias or partiality; and

D. Protection against unauthorized communication between parties and candidates.

3. Parties agreement concerning arbitrators. Notwithstanding the foregoing, the parties may agree upon arbitrators or any method of selecting arbitrators or the number of arbitrators, provided the agreement is made after the commencement of arbitration proceedings or appears in or is pursuant to an agreement with a nonprofit hospital or medical service organization.

§ 2706. Depositions; discovery; length of proceeding

1. Depositions; discovery. After the appointment of the panel of arbitrators, the parties to the arbitration may take depositions and obtain discovery regarding the subject matter of the arbitration and, to that end, use and exercise the same rights, remedies and procedures, and be subject to the same duties, liabilities and obligations in the arbitration with respect to the subject matter thereof, as if the subject matter of the arbitration were pending in a civil action before the Superior Court of this State.

2. Expeditious proceedings. The panel shall conclude the entire proceeding as expeditiously as possible.

3. Commencement of discovery. Discovery shall commence not later than 20 days after all parties have received a copy of the demand for arbitration and shall be completed within 6 months.

4. Extension of time for discovery. A party may be granted an extension of time to complete discovery upon a showing that the extension is not the result of neglect and that the extension is necessary in order to avoid substantial prejudice to the rights of the party.

§ 2707. Conduct of proceedings

1. Counsel; standard of care; damages.

A. The parties may be represented by counsel, be heard, present evidence material to the controversy and cross-examine any witness. A party may appear without counsel and shall be advised of such right and the right to retain counsel in a manner calculated to inform the person of the nature and complexity of a proceeding.

B. The prevailing standard of duty, practice or care applicable in a civil action shall be the standard applied in the arbitration.

C. Damages or remedial care shall be without limitation as to nature or amount unless otherwise provided by law.

2. Expert witness. A party is entitled to disclosure of the name of any expert witness who will be called at the arbitration and may depose the witness.

3. Hearing.

A. A hearing shall be informal and the rules of evidence shall be as provided for an administrative proceeding in this State, except that the panel

shall adhere to civil rules of evidence where the failure to do so will result in substantial prejudice to the rights of a party.

B. Testimony shall be taken under oath and a record of the proceedings shall be made by a tape recording. Any party, at that party's expense, may have transcriptions or copies of the recording made or may provide for a written transcript of the proceedings. The cost of any transcription ordered by the panel for its own use shall be deemed part of the cost of the proceedings.

C. Expert testimony shall not be required, but where expert testimony is used, it shall be admitted under the same circumstances as in a civil trial and be subject to cross-examination.

D. The party with the burden of establishing a standard of care and breach thereof shall establish such standards whether by the introduction of expert testimony, or by other competent proof of the standard and the breach thereof, which may include the use of works as provided in paragraph E.

E. Authoritative, published works on the general and specific subjects in issue may be admitted and argued from, upon prior notice to all other parties.

F. The panel shall accord such weight and probative worth to expert evidence as it deems appropriate. The panel may call a neutral expert on its own motion, which expert witness shall be subject to cross-examination by the parties. The cost of the expert shall be deemed a cost of the proceeding.

4. Subpoenas. The panel or its chairman in the arbitration proceeding shall, upon application by a party to the proceeding and may upon its own determination, issue a subpoena requiring a person to appear and be examined with reference to a matter within the scope of the proceeding and to produce books, records or papers pertinent to the proceeding. In case of disobedience to the subpoena, the chairman or a majority of the arbitration panel in the arbitration proceeding may petition the Superior Court in the county in which the hearing is being held to require the attendance and testimony of the witness and the production of books, papers and documents. The court, in case of contumacy or refusal to obey a subpoena, may issue an order requiring the person to appear and to produce books, records and papers and give evidence touching the matter in question. Failure to obey the order of the court may be punished by the court as contempt.

5. Discovery.

A. For the purpose of enforcing the duty to make discovery, to produce evidence or information, including books and records, and to produce persons to testify at a deposition or at a hearing, and to impose terms, conditions, consequences, liabilities, sanctions and penalties upon a party for violation of a duty, a party shall be deemed to include every affiliate of the party as defined in this section. For that purpose, the personnel of an affiliate shall be deemed to be the officers, directors, managing agents,

agents and employees of that party to the same degree as each of them, respectively, bears that status to the affiliate; and the files, books and records of an affiliate shall be deemed to be in the possession and control of, and capable of production by, the party.

B. As used in this section, "affiliate" of the party to the arbitration means and includes a party or person for whose immediate benefit the action or proceeding is prosecuted or defended or an officer, director, superintendent, member agent, employee or managing agent of that party or person.

§ 2708. Fees and costs

1. Fees and mileage of subpoenaed witnesses. Except for the parties to the arbitration and their agents, officers and employees, all witnesses appearing pursuant to subpoena are entitled to receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions. The fee and mileage of a witness subpoenaed upon the application of a party to the arbitration shall be paid by that party. The fee and mileage of a witness subpoenaed solely upon the determination of the arbitrator or the majority of a panel of arbitrators shall be paid in the manner provided for the payment of the arbitrator's expenses.

2. Cost of arbitrators fees and expenses; assessment against party. The cost of each arbitrator's fee and expenses, together with any administrative fee, may be assessed against any party in the award or may be assessed among parties in such proportions as may be determined in the arbitration award.

§ 2709. Awards

1. Majority of panel; relief. A majority of the panel of arbitrators may grant any relief deemed equitable and just, including money damages, provision for hospitalization, medical or rehabilitative procedures, support or any combination thereof.

2. Submission of written briefs. The panel may order submission of written briefs within 30 days after the close of hearings. In written briefs each party may summarize the evidence in testimony and may propose a comprehensive award of remedial or compensatory elements.

3. Rendering panel award and opinion; time. The panel shall render its award and opinion within 30 days after the close of the hearing or the receipt of briefs, if ordered.

4. Written award; signature; determination of question. The award in the arbitration proceedings shall be in writing and shall be signed by the chairman or by the majority of a panel of 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.

§ 2710. Opinions

1. Written opinion; dissenting opinion. In addition to the award, the panel shall render a written opinion which states its reasoning for the finding

of liability or nonliability and the reasoning for the amount and kind of award, if any. A panel member who disagrees with the majority may write a dissenting opinion.

2. Determination of degree of party fault. The panel shall determine the degree to which each respondent party was at fault for the total damages accruing to any other party to the arbitration.

3. Schedule of contributions. The panel shall prepare a schedule of contributions according to the relative fault of each party, which schedule shall be binding as between those parties, but such determination shall not affect a claimant's right to recover jointly and severally from all parties where such rights otherwise exist in the law.

§ 2711. Noncash awards

1. Current cash value of noncash award element. In the case of an award, any element of which includes remedial services, annuities or other noncash award element, the panel shall determine the current cash value of each element of the award and shall also determine a total current cash value of the entire award.

2. Award of remedial surgery or care. An award of remedial surgery or care shall not require that the patient undergo treatment or care by the health care provider whose conduct resulted in the award.

3. Refusal of noncash award element. A claimant need not accept the benefits of an award for remedial surgery or other noncash award element and refusal shall not affect the claimant's right to receive any other part of the award, nor the current cash value of the portion refused.

§ 2712. Review

An appeal from the arbitration award shall be under the procedure and for the grounds permitted under the general arbitration law and applicable court rules.

§ 2713. Administration and costs

1. Administration. The administration of this subchapter shall be by the Superintendent of Insurance, who may promulgate such rules as are necessary for its implementation.

2. Administration fund. The superintendent shall create an arbitration administration fund which shall be funded annually as necessary to defray the actual costs of administration.

§ 2714. Insurance

No professional liability or medical malpractice insurer doing any business in this State shall refuse to offer or continue insurance to any health care provider or any physician for the reason that the insured or applicant has entered, offered to enter, intends to enter or offers to enter agreements authorized by this subchapter, and no such insurer shall limit policy coverage to the absence of the agreements.

SUBCHAPTER IV
MALPRACTICE ADVISORY PANELS

§ 2801. Purpose

The purpose of Professional Malpractice Advisory Panels shall be:

1. Prevention of unreasonable malpractice actions. To prevent, where possible, the filing of court actions against physicians for professional malpractice in situations where the facts do not allow at least a reasonable inference of malpractice; and

2. Fair and equitable disposition of claims. To make possible the fair and equitable disposition of such claims against physicians as are, or reasonably may be, well founded.

§ 2802. Formation

1. Membership. There shall be created a panel of 18 persons of whom 6 shall be licensed attorneys, 6 shall be physicians licensed by the Board of Osteopathic Examination and Registration and 6 shall be physicians licensed by the Board of Registration in Medicine. Such persons shall be known as the Professional Malpractice Advisory Panel. The chairman of the panel shall be an attorney-member elected by the vote of a majority of the panel members.

2. Appointment; term. Selection of the panel shall be as follows: 6 attorneys designated by the Maine State Bar Association, 6 physicians designated by the Maine Osteopathic Association and 6 physicians designated by the Maine Medical Association. Each association shall notify the Superintendent of Insurance of the name and mailing address of each panel member so selected. Panelists shall serve for a term of 4 years, the first of which shall begin 30 days from the effective date of this Act.

3. Replacement members. If any panel member is unable or unwilling to serve in any matter or is challenged by any person who is a party to a proceeding before a panel, the sponsoring association shall select a replacement and so notify the superintendent.

§ 2803. Submission of cases

1. Written requests; signatures; content. Any attorney may submit a case of asserted medical malpractice for the consideration of the panel by a request in writing signed by both the party and his attorney and delivering the original and 6 copies thereof to the chairman of the panel. This written request shall contain the following:

A. A brief statement of the facts of the case, showing the persons involved, the dates and the circumstances, so far as they are known, of the alleged act or acts of malpractice;

B. A statement authorizing the panel, by its chairman, to obtain all medical and hospital records and information pertaining to the incident complained of, which statement shall be accompanied by true copies of any and

all medical and hospital records then in the possession of said party or his attorney, and which, for only the purpose of the panel's consideration of the matter, waives privileges as to the contents of such records. The statement shall not be construed as waiving the privilege for any other purpose or any other contest, in or out of court;

C. A statement that the deliberations and the discussion of the panel and of any member of the panel in the deliberation of the case shall be confidential and privileged, and that no panel member will be asked in any action to testify concerning the deliberations, discussions and internal proceedings of the panel;

D. A statement that the party or attorney understands and subscribes to the purpose of screening medical malpractice cases and has advised his client thereof and that the client agrees to the submission of the facts pursuant to the plan;

E. A request that the panel consider the merits of the claim and render its report.

2. Notice to physician; agreement; waiver. Upon receipt of the request, the chairman shall immediately forward a copy to the physician involved who, if he agrees to the submission, shall forthwith forward to the chairman a statement as provided in subsection 1, paragraphs B, C, D and E. Neither the party making the original request pursuant to subsection 1 nor his attorney shall be bound by any waiver or agreement made thereunder until the chairman shall have received from the physician a like written waiver or agreement.

3. Hearing committee. Upon receipt of the statement provided in subsection 2, the chairman shall immediately designate and convene a hearing committee of panel members to consider the case. Such committee shall consist of 2 attorneys, one of whom shall be designated chairman, and 2 physicians licensed by the board that licensed the physician involved. The call of meeting may be oral or written and the place and time shall be as determined by the panel chairman. The committee chairman shall attempt to have available at the meeting all medical and hospital records and information pertaining to the case.

§ 2804. Hearing

1. Presentation of case; counter presentation; other information. The hearing on a request for review shall require the presence of both attorney-members and the 2 physician-members who were called. At the time of hearing, the attorney submitting the request shall present the case before the committee. The physician involved shall be entitled to be present at the hearing and likewise make such counter-presentation as he deems necessary and appropriate. Wide latitude shall be afforded the parties by the committee in the conduct of the hearing, including but not limited to the right of an examination and cross-examination by attorneys. No official record of the proceedings before the committee at said hearing shall be kept. Neither the parties nor the committee shall inquire into or become involved in any way with the question of monetary damages.

2. Continued hearing. After presentation by the parties as herein provided, the committee may request from either party additional facts, records or other information to be submitted in writing or at a continued hearing, which continued hearing shall be held as soon as possible. The continued hearings shall be attended by the same members of the committee who have sat on all prior hearings in the case.

3. Procedure. The committee shall determine all matters of procedure governing hearings.

§ 2805. Determination by panel committee

At the conclusion of the presentation, the committee shall take the case under advisement, and shall within 15 days thereafter, by majority vote taken by secret ballot, determine the following questions:

1. Reasonable probability of professional negligence. Whether there is a reasonable probability that the acts complained of constitute professional negligence, and if so,

2. Reasonable probability of injury. Whether there is a reasonable, medical probability that the party was injured thereby.

§ 2806. Notification of determination

Written answers to these questions, signed by the chairman of the hearing committee, acting on behalf of the entire committee, shall forthwith be submitted to the parties involved and their attorneys. A copy of the original request and of the report of determination shall be retained in the permanent files of the panel, which files shall remain in the possession of and under the direct supervision and control of the chairman. Thereupon, all exhibits, reports, records and other data submitted to the panel shall be returned to the persons submitting the same. Other writings pertaining to the case shall be destroyed by the panel chairman forthwith.

§ 2807. Confidentiality

All proceedings before the panel, including its final determinations, shall be treated in every respect as confidential by the panel and the parties to the case. No report or other writings of the panel shall be used in any other proceedings.

§ 2808. Effect of determination by panel

In fulfillment of the statement of purposes contained herein, a determination by the panel of any case hereunder shall be implemented as follows:

1. Affirmative determination. If the determination of both questions contained in section 2805 is in the affirmative, the appropriate society of physicians shall utilize its best efforts to obtain for and make available to the party a competent physician skilled and recognized as such in the field or fields involved, who will consult with and testify on behalf of the party for a reasonable fee.

2. Negative determination. If the determination of either of said questions contained in section 2805 is in the negative, the attorney for the party

shall thereafter refrain from filing any court action based thereon unless personally satisfied that strong and overriding reasons compel such action to be taken in the interest of his client, and that it is not done to harass or gain advantage in the negotiation for settlement.

It is not intended that the submission of any case to the panel shall be considered as a waiver by the attorney or his client of the right to decide for themselves whether an action should be commenced. However, any attorney who brings a case before the panel shall weigh its conclusions in the greatest professional good faith.

§ 2809. Statute of limitations

The statute of limitations shall be tolled for a period of 10 days from the date upon which the chairman of the panel receives a request for submission pursuant to section 2803, subsection 1. In the event the submission is agreed to and a hearing held, the statute shall be further tolled until the day following the day upon which the parties receive notification pursuant to section 2806.

SUBCHAPTER V GENERAL PROVISIONS

§ 2901. Ad damnum clause

No dollar amount or figure shall be included in the demand in any malpractice complaint, but the prayer shall be for such damages as are reasonable in the premises.

§ 2902. Statute of limitations for hospitals and employees

An action for damages for injury or death against any hospital or its employee, whether based upon tort or breach of contract or otherwise, arising out of patient care, shall be commenced within 2 years after the cause of action accrues.

§ 2903. Notice of claim before suit

No action for death or injuries to the person arising from any medical, surgical or dental treatment, omission or operation shall be commenced until at least 90 days after written notice of claim setting forth under oath the nature and circumstances of the injuries and damages alleged is served personally or by registered or certified mail upon the person or persons accused of wrongdoing. Any applicable statute of limitations shall be tolled for a period of 90 days from service of notice.

§ 2904. Immunity from civil liability for volunteer activities

Notwithstanding any inconsistent provision of any public or private and special law, no licensed physician who voluntarily, without the expectation or receipt of monetary or other compensation, provides professional services within the scope of his licensure to a nonprofit organization or to an agency of the State or to members or recipients of services of that organization or state agency shall be liable for damages or injuries alleged to have been sus-

tained by the person nor for damages for the death of the person when the injuries or death are alleged to have occurred by reason of an act or omission in the rendering of professional services, unless it is established that the injuries or the death were caused willfully, wantonly, recklessly or by gross negligence of the licensed physician.

§ 2905. Informed consent to health care treatment

1. Disallowance of recovery on grounds of lack of informed consent. No recovery shall be allowed against any physician or any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

A. The action of the physician in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities and

B. A reasonable person, from the information provided by the physician under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other physicians engaged in the same field of practice in the same or similar communities or

C. A reasonable person, under all surrounding circumstances, would have undergone such treatment of procedure had he been advised by the physician in accordance with paragraphs A and B or this paragraph.

2. Presumption of validity of written consent; rebuttal. A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained through fraud, deception or misrepresentation of material fact.

3. Mental and physical competency. A valid consent is one which is given by a person who, under all the surrounding circumstances, is mentally and physically competent to give consent.

STATEMENT OF FACT

This bill proposes to statutorily codify the recommendations of the "Commission to Revise Laws Relating to Medical and Hospital Malpractice Insurance," commonly referred to as "The Pomeroy Commission." The Pomeroy Commission, chaired by Justice Charles A. Pomeroy of the Maine Supreme Judicial Court, was established by the 107th Legislature and directed

to prepare a proposal to insure the availability of medical and hospital malpractice insurance to physicians and hospitals throughout the State and to develop a more equitable system of relief for malpractice claims.

The commission to revise the laws relating to medical and hospital malpractice insurance has found that there is a substantial problem in the State concerning the availability and cost of malpractice insurance for physicians and hospitals. The commission has found further that the situation has affected the availability of health care in some areas and the cost of health care in all areas of the State. Further deterioration is inevitable unless action is taken now.

The proposed remedial legislation is a 4-directional attack on the problem, consisting of increased medical audit, data collection for future legislative review, new dispute resolution mechanism and tort law changes.

Subchapter I of the bill codifies the current practices of the leading hospitals in Maine and makes them a requirement for all hospitals to stimulate quality review of patient care. The statutory obligations will include examination of the necessity of medical care as well as its quality, the institution of an in-hospital patient grievance procedure and education to reduce patient injury. The bill also increases the physician incompetence and illness reporting obligations of hospitals, physicians and professional societies and grants a concomitant supporting immunity.

Subchapter II of the bill imposes a detailed reporting obligation on medical malpractice insurers. Reports of claims made and their disposition are to be made to the Superintendent of Insurance for his guidance, for legislative purposes and for use of boards of licensure. This reporting duty is also accompanied by an immunity provision.

Subchapters III and IV bring established dispute resolution procedures into the medical malpractice area in a specialized form and on a statewide basis. The first of these procedures is a voluntary binding arbitration system especially designed for use in medical disputes. Such a system must be voluntary under the Constitution of Maine. The bill permits hospitals and physicians, if they wish, to offer arbitration to patients who may agree if they wish. The bill contains various protections for patients, including notice and limited revocability. The intent of an arbitration system is to achieve speedier and expert resolution at reduced cost.

The 2nd dispute resolution procedure, subchapter IV, is a voluntary non-binding pretrial screening system designed to weed out ill-conceived lawsuits and expedite settlement of meritorious ones. It is a statewide system modeled upon one currently in use by agreement in one or 2 counties of the State.

Subchapter V of the bill contains several provisions designed to stabilize the cost of insurance by changes in the substantive and procedural law of Maine. The statute of limitations is changed to shorten the time for action against hospitals and their employees to the 2-year limit in the present law for physicians. In order to encourage settlement of disputes, the bill provides a mandatory 90-day notice before suit. To alleviate one of the unfortunate

results of the insurance pressure, the bill extends immunity under the "good samaritan" concept to physicians rendering voluntary services through state agencies and nonprofit organizations. The bill also codifies the law relating to actions based upon a physician's failure to adequately inform a patient as to the possible consequences of treatment. The codification will clarify and settle the Maine law in this difficult area. Finally, the bill will eliminate the recitation of actual dollar amounts of asserted damage in malpractice complaints. This is intended to minimize the harmful adverse publicity accompanying such lawsuits.