

# MAINE STATE LEGISLATURE

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EMERGENCY  
SECOND REGULAR SESSION

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ONE HUNDRED AND EIGHTH LEGISLATURE

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**Legislative Document**

**No. 2051**

H. P. 1964

House of Representatives, January 11, 1978

The Committee on Business Legislation suggested. Approved for introduction by the Legislative Council pursuant to Joint Rule 24.

EDWIN H. PERT, Clerk

Presented by Mr. Tierney of Lisbon Falls

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STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED  
SEVENTY-EIGHT

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**AN ACT to Lower the Costs of Medical Malpractice Arbitration.**

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**Emergency preamble.** Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the first regular session of the 108th Legislature enacted by PL 1977, chapter 492, "AN ACT to Implement the Recommendations of the Pomeroy Commission on Medical and Hospital Malpractice Insurance;" and

Whereas, one of the intentions of this Act was to decrease the costs of processing damage claims for medical malpractice; and

Whereas, it has come to the attention of the Legislature that provisions of the Act may still require a substantial and unnecessary financial outlay by a claimant before and during the medical malpractice arbitration conducted under the Act; and

Whereas, it is possible, by providing for the choice of a neutral arbitrator or a panel instead of a panel of 3 arbitrators only and by providing free use of state facilities for arbitration, to substantially cut this financial outlay while still providing for an equitable system for arbitrating malpractice claims; and

Whereas, it is necessary that these changes be enacted as soon as possible to eliminate unnecessary financial barriers to the arbitration of malpractice claims; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

**Sec. 1. 24 MRSA § 2702, sub-§ 1, NOTICE TO PATIENT, 1st ¶,** as enacted by PL 1977, c. 492, § 3, is amended to read:

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~~ AN ARBITRATOR RATHER THAN A COURT FOR DETERMINATION BY A JURY OR A JUDGE.

**Sec. 2. 24 MRSA § 2702, sub-§ 2, ¶ A, NOTICE TO PATIENT, last ¶,** as enacted by PL 1977, c. 492, § 3, is amended to read:

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. THIS AGREEMENT PROVIDES THAT ANY CLAIM YOU MAY ASSERT RELATIVE TO TREATMENT BY (name of provider) WILL BE SUBMITTED TO ~~A PANEL OF ARBITRATORS~~ AN ARBITRATOR RATHER THAN A COURT FOR DETERMINATION BY A JURY OR A JUDGE AS WOULD BE YOUR CONSTITUTIONAL RIGHT IN THE ABSENCE OF THIS AGREEMENT.

**Sec. 3. 24 MRSA § 2704, sub-§ 7** is enacted to read:

**7. Location of proceedings.** The arbitration proceeding may be held in a District Court building at a location agreed to by the parties in writing, or in any other location agreed to by the parties in writing. The District Court shall establish procedures by which parties may request and receive use of a room, facilities and equipment for an arbitration. This room shall be provided by the district court system to the parties and arbitrators at no cost to the parties or arbitrators.

**Sec. 4. 24 MRSA § 2705,** as enacted by PL 1977, c. 492, § 3, is repealed and the following enacted in its place:

**§ 2705. Arbitrators**

**1. Neutral arbitrator.** An arbitration under this chapter shall be heard by a neutral arbitrator. Within 5 days of the commencement of arbitration proceedings, the patient shall agree in writing with the health care provider or physician, or both, upon the selection of a neutral arbitrator, and the agreement shall state the name and address of the person so selected. If, within 10 days from the commencement of arbitration proceedings, the parties do not agree upon the selection of a neutral arbitrator, either party may request the American Arbitration Association to use its procedures for the selection of the neutral arbitrator. As soon as possible after the receipt of this request, the neutral arbitrator shall be selected in accordance with the rules and procedures prescribed by the American Arbitration Association for making such a selection.

**2. Agreements of parties concerning arbitrator.** Notwithstanding subsection 1, the parties may agree upon a neutral arbitrator or any method of selecting a neutral arbitrator, provided the agreement is made after the commencement of arbitration proceedings.

**3. Optional panel of arbitrators.** Notwithstanding subsection 1, the parties may agree in writing upon a panel of any number of arbitrators and upon any method of selecting those

arbitrators, provided the agreement is made after the commencement of arbitration proceedings.

For the purposes of this chapter, a panel selected under this subsection shall perform all the duties of a neutral arbitrator. The chairman may act for the panel except in the case of a disagreement among the panel, when a majority of the panel shall act for the panel. A panel member who disagrees with the majority on an opinion may write a dissenting opinion. The cost of the arbitrator's fee, under section 2708, subsection 2, shall be the sum of the fees for all arbitrators on the panel.

Sec. 5. 24 MRSA § 2706, sub - §§ 1 and 2, as enacted by PL 1977, c. 492, § 3, are amended to read:

1. **Depositions; discovery.** After the selection of the ~~panel of arbitrators~~ **neutral arbitrator**, 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 in the Superior Court.

2. **Expeditious proceedings.** The ~~panel~~ **neutral arbitrator** shall conclude the entire proceeding as expeditiously as possible.

Sec. 6. 24 MRSA § 2707, sub-§ 3, ¶¶ A, B and F, as enacted by PL 1977, c. 492, § 3, are amended to read:

A. A hearing shall be informal and the rules of evidence shall be as provided for administrative proceeding in this State, except that the ~~panel~~ **neutral arbitrator** 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 the party's expense, may have transcriptions of copies of the recording made or may provide for a written transcript of the proceedings. The cost of any transcription ordered by the ~~panel~~ **neutral arbitrator** for ~~its~~ **his** own use shall be deemed part of the cost of the proceedings.

F. The ~~panel~~ **neutral arbitrator** shall accord such weight and probative worth to expert evidence as ~~it~~ **he** determines appropriate. ~~The panel~~ **He** may call a neutral expert on ~~its~~ **his** 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.

Sec. 7. 24 MRSA § 2707, sub-§ 4, 1st 2 sentences, as enacted by PL 1977, c. 492, § 3, are amended to read:

The ~~panel or its chairman in the arbitration proceeding~~ **arbitrator** shall, upon application by a party, and may upon ~~its~~ **his** 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~~ **arbitrator** 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.

**Sec. 8. 24 MRSA § 2708, sub-§ 1, last sentence**, as enacted by PL 1977, c. 492, § 3, is amended to read:

The fee and mileage of a witness subpoenaed solely upon the determination of the arbitrator ~~or the majority of a panel or arbitrators~~ shall be paid in the manner provided for the payment of the arbitrator's expenses.

**Sec. 9. 24 MRSA § 2708, sub-§ 2**, as enacted by PL 1977, c. 492, § 3, is amended to read:

**2. Cost of arbitrator's fees and expenses; assessment against party.** The cost of ~~each~~ the 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.

**Sec. 10. 24 MRSA § 2709**, as enacted by PL 1977, c. 492, § 3, is amended to read:

§ 2709. Awards.

**1. Majority of panel; relief.** ~~A majority of the panel of arbitrators~~ The arbitrator 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~~ arbitrator 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~~ arbitrator shall render ~~its~~ his 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~~ arbitrator. 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.

**Sec. 11. 24 MRSA § 2710, sub - §§ 1 and 2**, as enacted by PL 1977, c. 492, § 3, are amended to read:

**1. Written opinion; dissenting opinion.** In addition to the award, the ~~panel~~ arbitrator shall render a written opinion which states ~~its~~ his 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~~ arbitrator shall determine the degree to which each respondent party was at fault for the total damages accruing to any other party to the arbitration.

**Sec. 12. 24 MRSA § 2711, sub-§ 1**, as enacted by PL 1977, c. 492, § 3, is amended to read:

**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~~ arbitrator 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.

**Emergency clause.** In view of the emergency cited in the preamble, this Act shall take effect when approved.

#### STATEMENT OF FACT

This bill will eliminate unnecessary costs which are now involved in arbitrating a medical malpractice claim. The bill provides the parties to an arbitration with 2 choices:

1. They may have the arbitrator or a panel of arbitrators; and
2. They may hold the arbitration in cost-free space allocated by the District Court or in any other agreed-upon location. Thus, parties may, by choosing free District Court space and one arbitrator, save substantial pre-hearing costs, which can now run \$1,000 to \$2,000. These costs can be substantially reduced.