# Task Force Meeting Attendance Sheet

# Medical Malpractice Task Force

**Date:** 6 Oct 05 **Meeting Type:** Working Group

**Location:** 328 NW

| Committee Member | Present | Absent | Excused |
|---|---|---|---|
| Representative Curtis Gielow, Chair | ☒ | ☐ | ☐ |
| Representative Mike Huebsch | ☒ | ☐ | ☐ |
| Representative Ann Nischke | ☒ | ☐ | ☐ |
| Representative Jason Fields | ☒ | ☐ | ☐ |
| Representative Bob Ziegelbauer | ☒ | ☐ | ☐ |
| Mr. David Strifling | ☒ | ☐ | ☐ |
| Ms. Mary Wolverton | ☒ | ☐ | ☐ |
| Dr. Clyde "Bud" Chumbley | ☒ | ☐ | ☐ |
| Mr. David Olson | ☒ | ☐ | ☐ |
| Mr. Ralph Topinka | ☒ | ☐ | ☐ |
| **Totals:** | 10 | 0 | 0 |

John Reinemann

John Reinemann
Task Force Clerk

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cont.

# "TAKING THE BEST"
# Contributory Legislative Elements for Developing the Proposed Model Act on Medical Liability Reform

*Prepared for the Civil Justice Task Force and Health and Human Services Task Force*

**OUTLINE OF LEGISLATIVE ELEMENTS**

1) **Limitation of damage awards**
   - **Texas**
2) **Various California Statutes**

3) **Pre-litigation medical screening and mediation panel**
   - **Maine**
4) **Unconstitutional language of cap on non-economic damages**
   - **Washington**
5) **Expert witness standards**
   - **Alabama**
   - **Texas**
6) **Statute of limitations**
   - **Kansas**
7) **Joint and several liability provisions**
   - **Arizona**
8) **Immunities, including state sovereign and emergency care provisions**
   - **Nevada**
   - **Alaska**
   - **Virginia**
   - **Florida**
   - **Oklahoma**
9) **Pre-judgment interest calculations**
   - **Washington**
   - **Massachusetts**
10) **Limit on punitive damage awards**
    - **Texas**
    - **North Carolina**
11) **Comparative v. contributory negligence**
    - **Connecticut**
    - **Delaware**
    - **Arizona**
12) **Ostensible agency**
    - **Indiana**
13) **"I'm sorry" provision enacted**
    - **Oklahoma**
14) **Other Texas statutes**
    - **Comparative negligence**
    - **Several liability, no joint liability**
    - **Right of contribution**
15) **Medical Review Panels**
    - **Louisiana**
16) **Limitations on Contingency Fees**
    - **Florida**

**17) Certificate of Merit**
**-U.S. HEALTH Act**

# Section 1

# Limitation of Damage Awards

**1) Limitation of damage awards, which was approved by Texas in a statewide referendum..**

SUMMARY:

Texas law limits damages in a medical malpractice action for wrongful death to $500,000 (in 1977 dollars). Tex. Rev. Civ. Stat. Ann. art. 4590i, § 11.02 (West Supp. 1998). This amount is adjusted annually for inflation, Tex. Rev. Civ. Stat. Ann. art. 4590i, § 11.04 (West Supp. 1998), and is now approximately $1,300,000. The statute was intended to apply to all medical malpractice cases, but has been held to be unconstitutional except with respect to wrongful death. *Rose v. Doctors Hospital*, 801 S.W.2d 841 (Tex. 1990).

Texas also limits punitive damages in cases arising after September 1, 1995, to (a) two times the amount of economic damages, plus (b) an amount equal to non-economic damages (not to exceed $750,000) or $200,000, whichever is greater. Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 1997). This was formerly four times actual damages or $200,000, whichever is greater. Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (West 1991) (repealed 1995). The cap on punitive damages does not apply in cases of certain felonies, including fraudulent destruction or concealment of written records. Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 1997).

V.T.C.A., Civil Practice & Remedies Code § 41.008

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)
Title 2. Trial, Judgment, and Appeal
Subtitle C. Judgments
Chapter 41. Damages (Refs & Annos)

**➡§ 41.008. Limitation on Amount of Recovery**

(a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
(2) $200,000.

(c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);
(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);
(4) Section 22.02 (aggravated assault);
(5) Section 22.011 (sexual assault);
(6) Section 22.021 (aggravated sexual assault);
(7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);
(8) Section 32.21 (forgery);
(9) Section 32.43 (commercial bribery);
(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
(11) Section 32.46 (securing execution of document by deception);
(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
(14) Section 49.07 (intoxication assault); or
(15) Section 49.08 (intoxication manslaughter).

(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.
(e) The provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.
(f) This section does not apply to a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter

# Section 2

# Various California Statutes

**2) Various California statutes:**

**A) Limitation w/ out exception for payment of non-economic damage awards.**

**B) Periodic payments of future economic damage awards**

**C) Establishment of a collateral source offset to prevent "double dipping"**

**D) Creation of an attorney contingency fee schedule**

**E) Provision for an alternative dispute resolution.**

SUMMARY:

a) California places a cap on non-economic damages for medical malpractice cases. Cal. Civ. Code § 3333.2 (West 1997). Non-economic damages, defined as compensation for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary injury, are limited to $250,000. *Id.* The cap applies whether the case is for injury or death, and it allows only one $250,000 recovery in a wrongful death case. *Yates v. Pollock*, 194 Cal. App. 3d 195, 239 Cal. Rptr. 383 (1987). There is authority, however, for allowing separate caps for the patient and a spouse claiming loss of consortium. *Atkins v. Strayhorn*, 223 Cal. App. 3d 1380, 273 Cal. Rptr. 231 (1990). The cap on non-economic damages has been held to be constitutional. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (also upholding the modification of the collateral source rule).

b) For medical malpractice cases that result in judgments of future damages in excess of $50,000, either party may request the court to order periodic payments. Cal. Civ. Proc. Code § 667.7 (West 1987). Upon the death of the claimant, the court will modify any future damage award. *Id.* However, damage awards for the loss of future earnings will not be reduced by reason of the claimant's death. *Id.*

c) California allows defendants in medical malpractice actions to offer evidence of the claimant's receipt of payments in connection with the injury in the form of social security benefits, workers' compensation benefits, health insurance, accident insurance, or any other contract providing for health care. Cal. Civ. Code § 3333.1 (West 1997). The claimant may then offer evidence of any amounts paid or contributed to secure the right to the collateral benefits. *Id.* No provider of benefits can recover them from the plaintiff or by subrogation from a defendant. *Id.*

d) California limits the amount attorneys in a medical malpractice case can collect pursuant to a contingent fee arrangement to 40 percent of the first $50,000, 33 1/3 percent of the next $50,000, 25 percent of the next $500,000, and 15 percent of any amount that exceeds $600,000. Cal. Bus. & Prof. Code § 6146 (West 1990). This limit applies regardless of whether the recovery is by settlement, arbitration, or judgment. *Id.* If the contingent fee arrangement is based, in part, on an award of periodic payments, the court is to place a total value on the payments based upon the projected life expectancy of the claimant, and then calculate the contingent fee percentages. *Id.*

e) California allows health care providers and their patients to contract for the arbitration of disputes. Cal. Civ. Proc. Code § 1295 (West 1982). However, absent the parties' agreement, California does not require that claims of medical malpractice be arbitrated prior to litigation.

f)

West's Ann.Cal.Civ.Code § 3333.2

West's Annotated California Codes Currentness

Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 1. Relief
Title 2. Compensatory Relief
Chapter 2. Measure of Damages
Article 2. Damages for Wrongs (Refs & Annos)
**§ 3333.2. Negligence of health care provider; noneconomic losses; limitation**

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

(c) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

West's Ann.Cal.C.C.P. § 667.7

West's Annotated California Codes Currentness

Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 8. Of the Trial and Judgment in Civil Actions (Refs & Annos)
Chapter 8. The Manner of Giving and Entering Judgment
**§ 667.7. Action against health care provider; periodic payments of future damages; contempt; legislative intent**

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars ($50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b)(1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(4) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment.

West's Ann.Cal.Civ.Code § 3333.1

West's Annotated California Codes Currentness

Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 1. Relief
Title 2. Compensatory Relief
Chapter 2. Measure of Damages
Article 2. Damages for Wrongs (Refs & Annos)

**§ 3333.1. Negligence of health care provider; evidence of benefits and premiums paid; subrogation**

(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, [FN1] any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

(c) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

West's Ann.Cal.Bus. & Prof.Code § 6146

West's Annotated California Codes Currentness

Business and Professions Code (Refs & Annos)
Division 3. Professions and Vocations Generally (Refs & Annos)
Chapter 4. Attorneys (Refs & Annos)
Article 8.5. Fee Agreements (Refs & Annos)
**§ 6146. Limitations; periodic payments**

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.

(4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2

(commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

West's Ann.Cal.C.C.P. § 1295

West's Annotated California Codes Currentness

Code of Civil Procedure (Refs & Annos)
Part 3. Of Special Proceedings of a Civil Nature
Title 9.1. Arbitration of Medical Malpractice (Refs & Annos)
**§ 1295. Contract for medical services; mandatory provision; waiver of right to sue; form of notice; nature of contract**

(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10- point bold red type:

"NOTICE: 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. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

(d) Where the contract is one for medical services to a minor, it shall not be subject to disaffirmance if signed by the minor's parent or legal guardian.

(e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section.

(f) Subdivisions (a), (b), and (c) shall not apply to any health care service plan contract offered by an organization registered pursuant to Article 2.5 (commencing with Section 12530) of Division 3 of Title 2 of the Government Code, or licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code, which contains an arbitration agreement if the plan complies with paragraph (10) of subdivision (a) of Section 1363 of the Health and Safety Code, or otherwise has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision, and the plan contracts conform to subdivision (h) of Section 1373 of the Health and Safety Code.

(g) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital

# Section 3

# Pre-litigation Medical Screening and Mediation Panel

## 3) Pre-litigation medical screening and mediation panel from Maine

SUMMARY:

Before a medical malpractice claim may be filed in Maine, a complaint must be filed with a pre-litigation screening panel. Me. Rev. Stat. Ann. tit. 24, §§ 2851 and 2853 (West 1990 & Supp. 1997). The screening panels serve a two-fold function of encouraging both the early resolution of claims and the withdrawal of unsubstantiated claims. *Id.* However, the pre-trial screening process can be waived if all parties agree. Me. Rev. Stat. Ann. tit. 24, § 2853(s) (West 1980 & Supp. 1997). Alternatively, all parties may agree in writing to submit the claim to a binding decision of the panel. *Id.* The parties can also use a combined method where certain issues are heard by the panel and others by the court. *Id.* The panel does not have the power to decide dispositive legal issues. The chairman may request that these dispositive legal issues be tried in the Superior Court prior to the panel's hearing. *Id.*

The findings of the panel and any disclosures made at the hearing are confidential and cannot be used later in subsequent litigation, unless the panel's decision is unanimously in favor of either the plaintiff or the defendant. Me. Rev. Stat. Ann. tit. 24, § 2857 (West 1990 & Supp

24 M.R.S.A. § 2851

Maine Revised Statutes Annotated Currentness

Title 24. Insurance (Refs & Annos)
Chapter 21. Maine Health Security Act (Refs & Annos)
Subchapter IV-A. Mandatory Prelitigation Screening and Mediation Panels (Refs & Annos)
**§ 2851. Purpose and definitions**

**1. Purpose.** The purpose of mandatory prelitigation screening and mediation panels is:

**A.** To identify claims of professional negligence which merit compensation and to encourage early resolution of those claims prior to commencement of a lawsuit; and

**B.** To identify claims of professional negligence and to encourage early withdrawal or dismissal of nonmeritorious claims.

**2. Definitions.** As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings. The definition of a "claim of professional negligence" is limited to any written notice of claim served pursuant to section 2903 against health care practitioners and health care providers or any employee or agent acting within the scope of their authority.

CREDIT(S)

1985, c. 804, § 12, eff. Jan. 1, 1987.

<<TITLE 24. **INSURANCE**>>

<Laws 1969, c. 132, § 11, eff. Jan. 1, 1970, repealed Chapters 1, 3, 5, 7, 9, 11, 13, 15, 17, 21, 23, 25, 26, 27, and 28 of Title 24.>

<Laws 1977, c. 492, § 3, enacted a new Chapter 21, Maine Health Security Act, consisting of §§ 2501 to 2905.>

<Laws 1995, c. 311, § 1, eff. Dec. 31, 1995, repealed Chapter 20 of Title 24, consisting of §§ 2401 to 2414.>

HISTORICAL AND STATUTORY NOTES

Laws 1985, c. 804, § 22, provides in part:

" * * * Sections 11, 12 and 14 shall be effective on January 1, 1987, and shall apply to any notices of claim filed after that date."

Derivation:
Laws 1977, c. 492, § 3.
Former 24 M.R.S.A. § 2801.

LIBRARY REFERENCES

Physicians and Surgeons ⚷17.5.
WESTLAW Topic No. 299.
C.J.S. Physicians and Surgeons §§ 97-100, 110-113, 119.

RESEARCH REFERENCES

ALR Library

89 ALR 4th 887, What Patient Claims Against Doctor, Hospital, or Similar Health Care Provider Are Not Subject to Statutes Specifically Governing Actions and Damages for Medical Malpractice.

NOTES OF DECISIONS

Compliance 2
Validity 1

1. Validity

Mandatory panel screening procedures for medical malpractice actions pursuant to statute are rationally related to legitimate purpose of expediting resolution of medical liability claims in order to decrease high costs of medical liability insurance, and thus, screening statutes do not violate equal protection clause. Irish v. Gimbel (1997) Me., 691 A.2d 664. Constitutional Law ⚷245(1); Health ⚷604

2. Compliance

Unless waived by defendant, Maine Health Security Act requires that plaintiff's claim for professional negligence against a health care provider or practitioner be evaluated by screening panel before it is allowed to proceed to litigation. Ferris v. County of Kennebec, D.Me.1999, 44 F.Supp.2d 62. Health ⚷806

Plaintiff's failure to comply with applicable procedural requirements of Maine Health Security Act did not deprive federal court of jurisdiction to adjudicate medical negligence claim which was supplemental to §§ 1983 claim. Ferris v. County of Kennebec, D.Me.1999, 44 F.Supp.2d 62. Federal Courts ⚷15

District court would exercise its discretion to dismiss medical negligence claim pendent to §§ 1983 claim, where plaintiff failed to comply with procedural requirements of Maine Health Security Act applicable to negligence claim and retention of jurisdiction through conclusion of pre-litigation screening process would unnecessarily delay resolution of plaintiff's other federal and state claims. Ferris v. County of Kennebec, D.Me.1999, 44 F.Supp.2d 62. Federal Courts ⚷15

24 M. R. S. A. § 2851, ME ST T. 24 § 2851

Current with emergency legislation through Chapter 40 of the 2005 First Regular Session of the 122nd Legislature and with emergency legislation through Chapter 135 of the 2005 First Special Session of the 122nd Legislature

END OF DOCUMENT

# Section 4

# Unconstitutional Language of Cap on Non-economic Damages

**4) Washington's statute language that was ruled unconstitutional by the Supreme Court of Washington**

SUMMARY:

The Supreme Court of Washington has held that the statutory cap on non-economic damages established by Wash. Rev. Code Ann. § 4.56.250 (West 1988) is an unconstitutional infringement of the right to trial by jury. *Sofie v. Fireboard Corp.*, 112 Wash. 2d 636, 771 P.2d

# Section 5

# Expert Witnesses Standards

**5) Expert witness standards for Alabama and Texas.**

SUMMARY:

*Alabama*

In medical malpractice cases, the plaintiff must prove negligence through the use of expert testimony, unless an understanding of the doctor's alleged lack of due care or skill requires only common knowledge or experience." *Monk v. Vesely*, 525 So. 2d 1364, 1365 (Ala. 1988). The exception applies only to such situations as a foreign object left after surgery or an injury remote from the part of the body being treated. *Dews v. Mobile Infirmary Ass'n*, 659 So. 2d 61 (Ala. 1995). A health care provider may testify as an expert witness in any action against another health care provider based on a breach of the standard of care only if he or she is "similarly situated," as defined by statute. Ala. Code § 6-5-548 (Supp. 1997). This means, in part, that expert witnesses against a physician accused of negligence must be certified in the same specialty and must have practiced within the previous year. *Id.*; *Malcolm v. King*, 686 So. 2d 231 (Ala.1996).

*Texas (refer to Texas legislation under #1))*

Generally, expert testimony is necessary to establish a *prima facie* case of medical malpractice. *Duff v. Yelin*, 721 S.W.2d 365 (Tex. App. 1986), *aff'd*, 751 S.W.2d 175 (Tex. 1988). To qualify as an expert witness against a physician in a malpractice claim, the witness must be a physician with board certification or other substantial experience relevant to the claim who is practicing or teaching in an area of medicine that is relevant to the claim (or was at the time the claim arose). Tex. Rev. Civ. Stat. Ann. art. 4590i, § 14.01 (West Supp. 1998).

Within 90 days after filing a notice of claim, a plaintiff must post a bond or file an expert report for each defendant. Within 180 days after filing a notice of claim, a plaintiff must provide to counsel for each defendant physician or health care provider an expert witness report or reports along with a curriculum vitae for each expert. Tex. Rev. Civ. Stat. Ann. art. 4590i, § 13.01 (West Supp. 1998

Ala.Code 1975 § 6-5-548

Code of Alabama Currentness (Refs & Annos)

Title 6. Civil Practice.
Chapter 5. Actions. (Refs & Annos)
Article 29. Medical Liability Act of 1987. (Refs & Annos)
**§ 6-5-548. Burden of proof; reasonable care as similarly situated health care provider; no evidence admitted of medical liability insurance.**

(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

(b) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following qualifications:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.
(2) Is trained and experienced in the same discipline or school of practice.
(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

(c) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a "similarly situated health care provider" is one who meets all of the following requirements:

(1) Is licensed by the appropriate regulatory board or agency of this or some other state.
(2) Is trained and experienced in the same specialty.
(3) Is certified by an appropriate American board in the same specialty.
(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

(d) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, no evidence shall be admitted or received, whether of a substantive nature or for impeachment purposes, concerning the medical liability insurance, or medical insurance carrier, or any interest in an insurer that insures medical or other professional liability, of any witness presenting testimony as a "similarly situated health care provider" under the provisions of this section or of any defendant. The limits of liability insurance coverage available to a health care provider shall not be discoverable in any action for injury or damages or wrongful death, whether in contract or tort, against a health care provider for an alleged breach of the standard of care.

(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is a "similarly situated health care provider" as defined above. It is the intent of the Legislature that in the event the defendant health care provider is certified by an appropriate American board or in a particular specialty and is practicing that specialty at the time of the alleged breach of the standard of care, a health care provider may testify as an expert witness with respect to an alleged breach of the standard of care in any action for injury, damages, or wrongful death against another health care provider only if he or she is certified by the same American board in the same specialty.

(Acts 1987, No. 87-189, p. 261, § 9; Acts 1996, No. 96-511, p. 650, § 3.)

# Section 6

# Statutes of Limitations

## 6) Statute of Limitations passed by Kansas

SUMMARY:

In Kansas, a medical malpractice action must be brought within two years after the fact of injury becomes reasonably ascertainable to the injured person, but in no event more than four years after the act giving rise to the cause of action. Kan. Stat. Ann. § 60-513(a)(7) and (c) (Supp. 2001). If a claimant is incompetent (due to minority, incapacity, or imprisonment) he may bring an action within one year from the date the disability is removed, but no action may be brought more than eight years after the act giving rise to the cause of action. Kan. Stat. Ann. § 60-515 (1994).

The statute of limitations for wrongful death is also two years. Kan. Stat. Ann. § 60-513(5) (Supp. 2001). If the cause of death is medical malpractice, however, the two years still begins to run at the date of injury or discovery, which in some cases may be prior to the date of death. *Crockett v. Medicalodges, Inc.*, 247 Kan. 433, 799 P.2d 1022 (1990); *Kelley v. Barnett*, 23 Kan. App. 2d 564, 932 P.2d 471 (1997).

K.S.A. § 60-513

KANSAS STATUTES ANNOTATED
CHAPTER 60.--PROCEDURE, CIVIL
ARTICLE 5.--LIMITATIONS OF ACTIONS
PERSONAL ACTIONS AND GENERAL PROVISIONS

**60-513. Actions limited to two years.**

(a) The following actions shall be brought within two years:

(1) An action for trespass upon real property.

(2) An action for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

(3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

(5) An action for wrongful death.

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in subsections (c) and (d), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action.

(d) A negligence cause of action by a corporation or association against an officer or director of the corporation or association shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than five years beyond the time of the act giving rise to the cause of action. All other causes of action by a corporation or association against an officer or director of the corporation or association shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury and there exists a disinterested majority of nonculpable directors of the corporation or association, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable and there exists a disinterested majority of nonculpable directors of the corporation or association, but in no event shall such an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action. For purposes of this subsection, the term "negligence cause of action" shall not include a cause of action seeking monetary damages for any breach of the officer's or director's duty of loyalty to the corporation or association, for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, for liability under K.S.A. 17-5812, 17-6410, 17-6423, 17-6424 or 17-6603 and amendments thereto, or for any transaction from which the officer or director derived an improper personal benefit.

(e) The provisions of this section as it was constituted prior to July 1, 1996, shall continue in force and effect for a period of two years from that date with respect to any act giving rise to a cause of action occurring prior to that date.

K.S.A. § 60-515

KANSAS STATUTES ANNOTATED
CHAPTER 60.--PROCEDURE, CIVIL
ARTICLE 5.--LIMITATIONS OF ACTIONS
PERSONAL ACTIONS AND GENERAL PROVISIONS

**60-515. Persons under legal disability.**

(a) *Effect.* Except as provided in K.S.A. 60-523, if any person entitled to bring an action, other than for the recovery of real property or a penalty or a forfeiture, at the time the cause of action accrued or at any time during the period the statute of limitations is running, is less than 18 years of age, an incapacitated person or imprisoned for a term less than such person's natural life, such person shall be entitled to bring such action within one year after the person's disability is removed, except that no such action shall be commenced by or on behalf of any person under the disability more than eight years after the time of the act giving rise to the cause of action.
Notwithstanding the foregoing provision, if a person imprisoned for any term has access to the court for purposes of bringing an action, such person shall not be deemed to be under legal disability.

(b) *Death of person under disability.* If any person entitled to bring an action dies during the continuance of any disability specified in subsection (a) and no determination is made of the cause of action accrued to the deceased, any person entitled to claim from, by or under the deceased, may commence such action within one year after the deceased's death, but in no event shall any such action be commenced more than eight years beyond the time of the act giving rise to the cause of action.

# Section 7

# Joint and Several Liability Provisions

## 7) Joint and Several Liability Provisions in place in Arizona

SUMMARY:

Arizona has abolished the doctrine of joint and several liability. Tortfeasors are only severally liable for the amount of claimant's damages equal to their percentages of fault, unless they were in a principal-agent relationship, acting in concert, or pursuing a common plan or design to commit a tortious act and actively taking part in it. Ariz. Rev. Stat. Ann. § 12-2506 (West 1994 & Supp. 1997).

A.R.S. § 12-2506

Arizona Revised Statutes Annotated Currentness

Title 12. Courts and Civil Proceedings (Refs & Annos)
Chapter 16. Uniform Contribution Among Tortfeasors Act (Refs & Annos)
Article 1. General Provisions (Refs & Annos)
**§ 12-2506. Joint and several liability abolished; exception; apportionment of degrees of fault; definitions**

**A.** In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

**B.** In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.

**C.** The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.

**D.** The liability of each defendant is several only and is not joint, except that a party is responsible for the fault of another person, or for payment of the proportionate share of another person, if any of the following applies:

1. Both the party and the other person were acting in concert.

2. The other person was acting as an agent or servant of the party.

3. The party's liability for the fault of another person arises out of a duty created by the federal employers' liability act, 45 United States Code § 51.

**E.** If a defendant is found jointly and severally liable pursuant to subsection D, the defendant has the right to contribution pursuant to this chapter. In an action arising out of a duty created by the federal employers' liability act (45 united states code § 51), a person or entity, other than an employee of the defendant, whose negligence or fault caused or contributed to the plaintiff's injury or death shall contribute to the defendant pursuant to this chapter. An action for contribution shall be adjudicated and determined by the same trier of fact that adjudicates and determines the action for the plaintiff's injury or death. The trier of fact shall adjudicate and determine an action for contribution after the court enters a judgment for the plaintiff's injury or death. On motion before the conclusion of the trial, the plaintiff is entitled to an award against the defendant for actual expenses the plaintiff incurred as a direct result of the defendant's claim for contribution. The expenses shall include reasonable attorney fees as determined by the court.

**F.** For the purposes of this section:

1. "Acting in concert" means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person's conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

2. "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.