Correspondence

Malpractice Arbitration: A Response

Dear Editors:

In his article, *Legislative Efforts to Reform Medical Malpractice: Unconstitutional in Practice?*, MEDICOLEGAL NEWS 8(4): 8 (September 1980), Lee J. Dunn discusses appellate court decisions that have reviewed programs in three states, including the Pennsylvania system. In *Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979), the conclusions of Judges Aldisert and Rosenn, that the system is a dismal failure, could have resulted only from incomplete statistics presented to the Court of Appeals. We can understand why counsel avoided presenting the accomplishments of the arbitration system in Pennsylvania. The true story would outrage their clients, both plaintiffs and defendants, and would show that the delay in holding hearings is caused by lawyers running cases at their own pace.

The Pennsylvania system provides plaintiffs with a full hearing before an arbitration panel that is empowered to render a decision and award damages. Absent a request for a trial de novo in the courts, a panel's decision is final and fully enforceable. A panel's findings of fact and its decision on liability are admissible as evidence at the trial de novo; the amount of damages awarded is not.

Since medical malpractice cases are usually complex, requiring extensive preparation on both sides, an immediate hearing is impossible. However, we find that trial attorneys often consume several years in pre-trial motions and preparation. Under our system, counsel for plaintiff or defendant may file a Certificate of Readiness to proceed to an arbitration hearing. In the 3,717 claims filed with the Arbitration Panels for Health Care between April of 1976 and July of 1980, requests for arbitration hearings were filed in only 249 cases. Since we can provide arbitration panels for all claims ready, we are concerned about counsels' delays in requesting hearings.

The Pennsylvania Supreme Court has recognized the delay in civil litigation and has attempted to prod trial counsel to action by adopting rules providing for special damages for delay against the defendants[1] and an eight month limit for preparing cases before the courts.[2] Damages for delay may also be awarded in claims before the arbitration panel. However, at the suggestion of the Supreme Court's administrative office, we have adopted a twelve month limit,[3] recognizing that medical malpractice claims are complex and require more time to prepare. Failure to prepare a claim for arbitration within twelve months may result in its dismissal. We hope these innovations will promote prompter action by counsel.

In December of 1979, our state legislature unanimously passed and Governor Thornburgh signed amendments to the Health Care Services Malpractice Act which streamlined arbitration panel selection and reduced the number of arbitrators from seven to three.[4] The medical malpractice panels are now the same size as arbitration panels in the local courts which hear other claims.

As of July 31, 1980, 89 percent of the claims filed in 1976 and 68 percent of the claims filed in 1977 have been ended; this decreases to 39 percent of claims filed in 1978, 18 percent of the claims filed in 1979, and 5 percent of claims filed in 1980. While a few diligent counsel complete discovery and request arbitration panels within a few months after commencing the action, these counsel are clearly the exception. Most attorneys seem to follow the practice described to us by a prominent Pennsylvania plaintiffs' attorney: "I needn't tell you that too many of us in trial practice are specialists in delay and procrastination — and more delay, and then some more delay."

The changes described above are beginning to take effect and we anticipate a marked increase in the number of requests for arbitration hearings for claims commenced on or before February 12, 1980.

We must also emphasize that the number of arbitration hearings is not, alone, an accurate measure of the operation of this office. In addition to providing arbitration hearings, we handle all preliminary motions. Our program also requires at least one conciliation conference in every claim. Over one thousand such conferences have been held, resulting in hundreds of offers of settlement by defendants or discontinuances by plaintiffs. Through July 31, 1980, 1,025 claims have been closed by agreement of the parties or on procedural grounds before an arbitration hearing was even held. This leaves 2,501 claims where counsel have not yet finished preparing their cases.

In the short time that we have been in existence, we have assembled a staff with expertise in motion work, in conciliation conferences, and in arranging arbitration hearings. We have a system ready and able to provide prompt and efficient hearings for all medical malpractice claims. It is now the responsibility of counsel to complete their preparation and to request a hearing. It is the responsibility of the clients, both plaintiffs and defendants, to utilize counsel who will diligently and promptly prepare their cases for arbitration.

Arthur S. Frankston, Esq.
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References

1. PA. R. CIV. PROC 238.
2. An order of the Pennsylvania Supreme Court entitled, *Prompt Certification for Trial of Civil Cases*, PENNSYLVANIA BULLETIN Vol. 9, p. 3936 (December 1, 1979).
3. 37 Pa. Code §171.123.
4. Health Care Services Malpractice Act of October 15, 1975, P.L. 390, *as amended*, 40. PA. STAT. ANN. §1301.101, *et seq., as amended* P.L. 562, No. 128, December 14, 1979.

Editor's Note: *On June 24, 1980, the Pennsylvania Supreme Court heard oral argument in* Mattos v. Thompson, *a case that challenges the constitutionality of the arbitration provisions of the Health Care Services Malpractice Act. According to the* PENNSYLVANIA LAW JOURNAL[1], *the questions asked by the justices were "tinged with skepticism." One justice is quoted as asking the state's attorney, "Are you arguing that we should preserve a system with the poorest record in the Commonwealth?" As* MEDICOLEGAL NEWS *went to press, the court had not released its opinion.*

References

1. PA. LAW J. (Monday, June 30, 1980).

Rattigan Contest Winner

Dear Mr. Doudera:

I wish to thank you and all the members of the American Society of Law and Medicine for selecting my manuscript, entitled *Transfer Trauma:*

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