Adopted effective February 1, 2009

RULE 80M. MEDICAL MALPRACTICE SCREENING PANEL PROCEDURES

(a) Applicability and Confidentiality. This rule applies to medical malpractice screening panel proceedings under the Maine Health Security Act, 24 M.R.S. § 2851, et seq. This rule supersedes the general provisions of the Maine Rules of Civil Procedure only to the extent that this rule provides otherwise. Medical malpractice screening panel proceedings shall be confidential.

(b) Commencement of Screening Panel Proceedings.

(1) *Notice of Claim.* A medical malpractice screening panel proceeding shall be commenced by a notice of claim in the same manner as a civil complaint. In addition to the form and content of the notice required by statute, an attorney representing a claimant shall sign the notice of claim as attorney. The notice of claim shall state the name, address and telephone number of the claimant's attorney or of the self-represented claimant.

(2) *Appointment of the Panel Chair.* Upon the filing of a notice of claim, the clerk shall notify the Chief Justice of the Superior Court, who shall appoint a Panel Chair. The Panel Chair shall be responsible for the further conduct of the proceedings.

(3) *Objections to the Panel Chair.* Objections to the Panel Chair appointed shall be made by motion to the Chief Justice within 7 days of the appearance of all respondents.

(4) *Objections to Conduct of the Panel Chair.* A party seeking relief for cause arising from the conduct or inaction of the Panel Chair shall promptly state the objection by letter to the Chief Justice of the Superior Court.

(5) *Notice of Appearance of Respondent.* Each respondent shall file a notice of appearance that shall state the name, address and telephone number of the respondent's attorney or of the self-represented respondent.

(6) *Fees and Filing of Papers.* All fees required by statute or by court rule or order shall be paid and all papers shall be signed as required by Rule 5 (f). A fee is not required to be paid when required if the party files a motion for waiver of

the fee pursuant to Rule 91. The Panel Chair may order that a fee be waived if permitted by statute or rule. If a motion for waiver of a fee is denied, the Panel Chair shall order a time for the prompt payment of the fee.

(c) Screening Panel Scheduling Order. The parties shall promptly confer on a schedule for exchanging medical records and for the future conduct of the proceedings, and they shall promptly advise the Panel Chair of any agreements on a proposed scheduling order. Within 7 days of the appearance of all respondents, a party may request a scheduling conference with the Panel Chair. If a scheduling conference has been requested, the conference shall be held within 14 days and a scheduling order shall be entered within 7 days of the conference. If no scheduling conference has been requested, the Panel Chair shall, within 14 days of the appearance of all respondents, enter a scheduling order. The scheduling order shall set deadlines for discovery, motions, the designation and depositions of experts, the date by which the parties shall be ready for hearing, and such other matters as the Panel Chair may require. The scheduling order shall comply with the applicable statutory deadlines and shall not be modified except on motion to the Panel Chair for good cause. Extensions of time may be granted by the Panel Chair only on motion for good cause made before the expiration of the deadline to be extended.

(d) Discovery. Discovery shall be conducted and disputes resolved by the Panel Chair in the same manner and with the same effect as in civil actions in the Superior Court.

(e) Motions. Motions shall be filed with the court and served on the Panel Chair. The Panel Chair shall determine those motions that are within the jurisdiction of the screening panel or that the parties have agreed by filed stipulation that the Panel Chair may decide. The Panel Chair may, before the panel hearing, order the parties to resolve by motion in the Superior Court legal defenses or issues outside the jurisdiction of the screening panel. If the Panel Chair decides that a motion is outside the jurisdiction of the screening panel, the Panel Chair shall refer the motion to the Chief Justice of the Superior Court for assignment to a justice of the Superior Court.

(f) Waiver of the Panel Hearing. The panel hearing may be waived at any time by stipulation signed by all parties and filed with the court. If a Panel Chair fails or is unable to appoint qualified panelists for a panel hearing to be held within the time required by statute, the Panel Chair or any party may apply to the Chief Justice for relief, which may include a waiver of the panel hearing by order

finding that a qualified panel cannot be appointed to hold a panel hearing within the time required by statute. A waiver of the panel hearing terminates the screening panel proceedings in the Superior Court.

(g) Panel Hearing.

(1) *Appointment of Panelists*. The Panel Chair shall appoint at least one legal and one medical panelist. The Panel Chair may consult with the parties and others to locate potential panelists. Prior to appointment of a panelist, the Panel Chair shall inquire of a potential panelist whether the panelist has any personal or professional relationship to the parties, attorneys, witnesses or issues that could reasonably be expected affect the panelist's fairness and independent judgment, and shall inform the panelist of the confidential and serious nature of the proceedings. The Panel Chair shall notify the parties of the appointment of the panelists and shall disclose any relationship to the parties and expert witnesses or any other source of potential conflict or bias identified during the Panel Chair's inquiry of the panelist.

(2) *Objections to Panelists.* Objections for cause to proposed or appointed panelists shall promptly be directed to the Panel Chair. No ex parte communication with the Panel Chair or any panelist may be had on any substantive matter relevant to the proceedings.

(3) *Time, Place and Schedule for Panel Hearing.* After soliciting comment from the parties, the Panel Chair shall set a hearing date at least 60 days in advance and shall notify the parties of the date and location for the panel hearing. The Panel Chair shall make a reasonable effort to schedule the hearing to permit the parties and witnesses to attend in person. The panel hearing shall not be scheduled for more than one day or continued except on motion for good cause. The panel hearing shall be conducted in a courthouse or such other neutral location as the Panel Chair may select.

(4) *Prehearing Conference.* The Panel Chair may order a prehearing conference, which may be conducted by telephone or electronic communication. The parties shall be prepared to disclose and discuss the identity of witnesses and manner of presentation of testimony, the exhibits, medical literature, and deposition testimony to be offered, the time required for the presentations of the parties, the nature of any unusual legal or factual issues the Panel Chair may address or prepare in advance of the hearing, and the likelihood of scheduling or other problems that could affect the efficient conduct of the hearing. Motions in

limine shall be filed with the court and served on the Panel Chair 14 days before the hearing.

(5) *Submissions to the Panel.* The Panel Chair may order the parties to submit to the panel in advance of the hearing briefs, medical records, depositions, exhibits, and such other material as the Panel Chair may direct.

(6) *Recording of Panel Hearing.* With notice to the other parties and to the panel chair, a party may, at that party's expense, arrange for the panel hearing to be recorded for transcription in the same manner as for depositions under Rule 30 (b)(4). Only one recorder or reporter shall be permitted. If more than one party has arranged for the hearing to be recorded, the Panel Chair shall select a person to record the hearing and the parties requesting the recording shall equally share the cost. At the hearing, the Panel Chair shall instruct the person recording or reporting the hearing that the proceedings are confidential, that recording or reporter's notes shall be preserved by the reporter, and that no transcript of the hearing may be prepared without an order of the court.

(7) *Conduct of the Panel Hearing.* The Panel Chair shall conduct the hearing and make such rulings and orders as will promote the fair, efficient and inexpensive determination of the issues, including a reasonable allocation of the hearing time allowed the parties for their presentations.

(A) The Hearing. The panel hearing shall be closed to the public, unless otherwise stipulated by all parties, and shall be conducted so as to respect the serious nature of proceedings in a formal legal forum. The Maine Rules of Evidence shall not apply, but admitted evidence shall only be of a kind on which reasonable persons are accustomed to rely in the conduct of serious affairs. The Panel Chair may exclude evidence that is irrelevant, unreliable, cumulative or unfairly prejudicial to a party. Witnesses shall swear or affirm to tell the truth.

(B) Presentation of Testimony. The parties shall have the right to examine and cross-examine witnesses. The Panel Chair shall not permit long narrative answers that prejudice another party's right to object to inadmissible testimony. With notice prior to hearing, in the absence of unfair prejudice to any opposing party and on such conditions as the Panel Chair may order, witnesses may be called by deposition or by telephone or video conference, and parties may submit an affidavit, summary of evidence or written report in lieu of testimony, regardless of a witness's availability for appearance at the hearing. Such prior notice shall be

given at a time and in a manner sufficient to permit the opposing party a meaningful opportunity to respond.

(C) Questions by the Panel. Except to for the limited purpose of clarifying testimony, questions by the panelists shall be deferred until after the parties have completed their examinations.

(D) Opening and Closing Statements. The parties may make opening or closing statements as permitted by the Panel Chair.

(8) *Settlement and Mediation.* The Panel Chair shall discuss with the parties the opportunity for settlement or mediation of the claim without the necessity of a hearing or findings. The Panel Chair may mediate the claim to the extent agreed by the parties in a filed stipulation.

(9) *Deliberations and Findings.* At the conclusion of the hearing, the panelists shall deliberate in confidential session and make the findings required by statute on a form provided by the Panel Chair. The panel shall make its findings based on the issues and evidence presented at the hearing.

(10) *Evidence and Proceedings Confidential.* Unless otherwise stipulated by the parties with the approval of the Panel Chair, the proceedings, evidence and findings in the panel hearing shall be confidential to the extent required by statute or by order of the court.

(11) *Determination of Claim or Damages in Certain Screening Panel Proceedings.* The parties may stipulate to submit the entire claim for binding determination by the panel. If liability is admitted, the parties may stipulate that the screening panel shall determine damages.

(h) Sanctions. For failure to prosecute or to comply with any scheduling order or other order of the Panel Chair or the court, the Panel Chair may for good cause impose sanctions on a party or an attorney after notice and opportunity for hearing. Sanctions may include conclusion of the panel proceeding with or without findings against the offending party or an order to proceed to Superior Court without findings. An order for sanctions shall be written and shall state the grounds for the sanctions and the specific sanctions imposed. Sanctions may be reviewed by the Chief Justice of the Superior Court pursuant to subdivision (b) (4) of this rule.

(i) Dismissal. A claimant may dismiss the notice of claim with or without prejudice at any time before the appointment of all panelists under this rule or by stipulation of all parties who have appeared in the screening panel proceeding. Otherwise, a screening panel proceeding may be dismissed with or without prejudice only on written order of the Panel Chair.

Advisory Committee's Note – January, 2009

In March, 2008, the Supreme Judicial Court requested the Advisory Committee on the Rules of Civil Procedure to draft a civil rule to provide a procedure for medical malpractice screening panel proceedings under the Maine Health Security Act, 24 M.R.S. § 2851, et seq. Although medical malpractice screening proceedings have been conducted for many years, the procedure before the panels was established to some extent by administrative orders and, to a larger extent, by a course of practice followed by the Panel Chairs and the trial bar. The Court's charge to the Committee was to review the practice before the medical malpractice screening panels and to draft a rule that would unify procedure in a single rule. The Advisory Committee created a subcommittee composed of attorneys and Justices of the Superior Court to study the issues. Rule 80M was drafted with a report which is reproduced following this Advisory Committee Note. The draft rule was reviewed and recommended to the Supreme Judicial Court by the full Advisory Committee.

Rule 80M applies to medical malpractice screening panel proceedings under the Maine Health Security Act, 24 M.R.S. § 2851, et seq. To the extent that the rule does not provide otherwise for a specific procedure, the Maine Rules of Civil Procedure, particularly the discovery rules, govern as in civil actions. When the rule is promulgated, it is anticipated that all administrative orders relating to medical malpractice screening panels will be withdrawn. The rule seeks to implement, not replace, the statutory process required by the Maine Health Security Act. If in a specific application, the rule and the Act appear to conflict, the Act is intended to govern.

Medical malpractice screening panels are confidential by statute. Subdivision (b) makes clear that a medical malpractice screening panel proceeding is commenced by filing or serving a notice of claim in the same manner as a civil complaint. The contents of the notice of claim are prescribed by statute. 24 M.R.S. § 2853(1).

The medical malpractice screening panel process is supervised by the Panel Chair, who is appointed by the Chief Justice of the Superior Court. The rule codifies the current practice that the Chief Justice appoints the Panel Chair soon after the notice of claim is filed. The respondents are required by statute to file a notice of appearance, not to answer. As soon as all notices of appearance have been filed, the parties have seven days to object to the Panel Chair appointed by the Chief Justice. Thereafter, if a party objects to the conduct of the panel chair during the proceedings, a party must do so by letter addressed to the Chief Justice of the Superior Court. It is the Advisory Committee's view that such objections should not serve as an otherwise unauthorized appeal of a Panel Chair's rulings. They should be reserved for that conduct that might warrant replacement of the Panel Chair or for review of rulings, such as imposition of sanctions, that substantially affect the course and outcome of the proceedings.

The statute requires the parties to pay a filing fee for each notice and appearance filed. 24 M.R.S. § 2853 (1-B) and (2). Since the Civil Rules apply generally, filing fees must be paid and papers signed as required by Rule 5(f).

The most important procedural document created in the medical malpractice screening panel process is the scheduling order. As subdivision (c) requires, the parties must confer about a schedule and promptly advise the Panel Chair of any agreements on a proposed scheduling order. Alternatively, a party may request a scheduling conference with the Panel Chair. The request must be made within seven days of the appearance of all respondents, and the conference itself must be held within 14 days after the request. If the conference is held, a scheduling order must be entered within seven days of the conference. The purpose of these short time periods is to ensure that the parties promptly confer and enable the Panel Chair to enter a scheduling order as early in the case as practicable.

The scheduling order governs the deadlines for discovery and motions. In these cases, which routinely involve multiple respondents and expert witnesses, the scheduling order sets deadlines for the designation and depositions of experts.

Rule 80M requires that the scheduling order "shall comply with the applicable statutory deadlines and shall not be modified except on motion to the Panel Chair for good cause." The statute is somewhat ambiguous about the time within which panel hearings must be held. Although one subsection of the statute contemplates hearings within six months of the filing of the notice of claim, 24 M.R.S. § 2853(4), another subsection states that hearings "shall be completed

within one year from the filing of the notice of claim" and permits extensions beyond that for "good cause," 24 M.R.S. § 2853(7). The intent of the rule is for the Panel Chair to set deadlines in such a way that the hearing can be scheduled within the six months contemplated by the statute, but also recognizes the flexibility that individual cases may need more time. Thus, the rule permits extensions of time but "only on motion for good cause made before the expiration of the deadline to be extended." The purpose of the rule is to establish deadlines early and to require adherence to deadlines unless there is good cause to extend time.

As the rule recognizes, the Maine Rules of Civil Procedure govern discovery in medical malpractice screening panel proceedings. Since discovery in the panel proceedings is usable in any later filed civil action, the panel proceedings perform a valuable function in producing the discovery required in a civil action.

Rule 80M requires that motions be filed with the court and also served on the Panel Chair. Since Panel Chairs frequently use electronic communications, it is important that the motion itself be filed with the court for the record with a copy to the Panel Chair. The Panel Chair may decide any motions within the jurisdiction of the screening panel or those issues that the parties have agreed by a filed stipulation that the Panel Chair may decide. On the other hand, the Panel Chair has no jurisdiction to decide dispositive legal defenses or other matters outside its jurisdiction. This initial determination is made by the Panel Chair and, if it is determined that the matter is outside the jurisdiction of the screening panel, the Panel Chair refers the motion to the Chief Justice of the Superior Court for assignment and disposition.

A panel hearing may be waived by the parties at any time by filed stipulation. In the absence of agreement, however, a panel hearing may be waived only if the Panel Chair fails or is unable to appoint a qualified panel for the hearing. In that case, the Panel Chair or a party may apply to the Chief Justice for relief and if the court finds that the qualified panel cannot be appointed, a waiver of the panel hearing may be entered by the court. The Committee recognizes that there is no explicit statutory authority for this latter procedure, but it seems implied that if, despite a good-faith effort within the time required by the statute as extended, the Chief Justice finds that a qualified panel cannot be appointed, the claim should not be barred, but should be permitted to proceed to court.

An essential function of the Panel Chair is to locate and appoint a medical and a legal panelist to serve on the hearing panel. The rule codifies a prior

administrative order to the effect that the Panel Chair is required to inquire of prospective panelists whether there exist any personal or professional relationships or other reasons why the panelist could not serve fairly and independently. Since the medical and legal panelists are unpaid volunteers and may not be aware of the nature of the screening panel process, the rule requires the Panel Chair to inform the prospective panelists about the confidential nature and the serious purpose of the proceedings. The parties may object to a panelist, but must do so promptly and show good cause for the disqualification of the panelist.

In order to give the parties time to prepare and to arrange for the appearance of their witnesses in person, the Panel Chair should provide at least 60 days advance notice of the hearing and make a "reasonable effort" to schedule the hearing at a time when participants can attend in person. The Panel Chair may also schedule a prehearing conference to narrow the issues and to decide upon the material to be submitted in advance of the hearing. If there are motions in limine, they must be filed with the court and served on the Panel Chair at least 14 days prior to the hearing. The parties may arrange for the recording of the panel hearing at their own expense, but the transcript is confidential and subject to court supervision in its preparation.

The rule invests the Panel Chair with considerable discretion in the conduct of the panel hearing. Since the adjudicatory body is composed of volunteer medical and legal professionals who are not compensated, the Panel Chairs have discretion to ensure that the panel hearings proceed efficiently consistent with fairness. At the same time, practice has developed that panel hearings are testimonial hearings. Consequently, the Panel Chairs are required by the rule to permit examination and cross-examination of witnesses and to defer panel questions, although there is considerable flexibility to use depositions, telephone appearances or video conferences. Parties may also submit summaries of evidence, but must do so with prior notice to provide the opposing party a "meaningful opportunity to respond," which may require the Panel Chair to permit an interview or focused deposition of a witness.

The statute contemplates that the Panel Chair may have a role promoting settlement of the case. Obviously, this rule could place the Panel Chair in a difficult position if the Panel Chair participates in settlement discussions and later must decide the case on the merits. Consequently, the rule fulfills the statutory function by providing that the Panel Chair may mediate a claim to the extent agreed by the parties in a filed stipulation, which could occur after the panel decision on the merits has issued. Similarly, although damages are rarely litigated

in medical malpractice screening panels, the statute does contemplate this function. Consequently, the rule provides that the parties may stipulate that the screening panel may determine damages.

Panel proceedings and the deliberations of the panel are confidential. The rule emphasizes that "the panel shall make its findings based on the issues and evidence presented at the hearing" to safeguard against appointed panelists performing their own independent investigation or deciding the case based on issues not addressed by the parties.

Rule 80M, in subdivision (h), authorizes the Panel Chair to impose sanctions on parties or attorneys after notice and opportunity for hearing. The Panel Chair's capacity to impose sanctions is contemplated in 24 M.R.S. § 2853(8)(B). The range of sanctions is broad and includes the capacity to conclude the panel proceeding with or without findings against the offending party or an order to proceed to Superior Court without findings. Any party or attorney against whom sanctions have been imposed may seek review pursuant to the procedure established in subdivision (b) (4).

A claimant may dismiss the notice of claim with or without prejudice only before the appointment of all panelists. Otherwise, a dismissal may occur only by stipulation of all parties who have appeared in the proceeding. As noted in the preceding paragraph, the Panel Chair may conclude a panel proceeding on written order as a sanction.

It is intended that Rule 80M will codify and clarify procedure before the medical malpractice screening panels without compromising the innovation and flexibility that these proceedings have historically exhibited. The intent of the rule is to provide for an efficient, inexpensive, and fair procedure that reflects the serious purpose of the screening panel process.

MAINE CIVIL RULES ADVISORY COMMITTEE

REPORT OF THE MEDICAL MALPRACTICE SUBCOMMITTEE

September 12, 2008

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MAINE CIVIL RULES ADVISORY COMMITTEE
REPORT OF THE MEDICAL MALPRACTICE SUBCOMMITTEE
September 12, 2008

The Maine Civil Rules Advisory Committee created a subcommittee to examine a rule for the Maine Medical Malpractice Screening Panel process, 24 M.R.S. § 2851, et seq. Members of the committee included members of the Civil Rules Advisory Committee and others selected because of their ability to contribute to the work of the subcommittee. The subcommittee was composed of Elizabeth Germani, Chair; Chief Justice Thomas Humphrey, Justice Thomas Warren, Donald Briggs, Peter Clifford, Robert Furbish, Mark Lavoie, Steven Silin, and Charles Harvey, as Reporter.

The Subcommittee. The subcommittee met three times in Portland and also communicated by email. The discussion draft of proposed Rule 80M as submitted to the Civil Rules Committee was extensively analyzed, and a matrix was prepared by Mr. Furbish comparing the draft to the statute and to the two Administrative Orders promulgated by the Court in 2005. Justice Warren consulted court personnel to assemble data on medical malpractice screening panel proceedings. Chief Justice Humphrey sought perspective from the active panel chairs. Medical Mutual Insurance Company of Maine, the state's largest medical malpractice insurer, was requested to provide data on claims and dispositions. Data were obtained from the court system, Medical Mutual, a 1997 study by the Bureau of Insurance, and a report prepared for the

Legislature, Maine Department of Professional & Financial Regulation, *A Report to the Joint Standing Committee on Insurance and Financial Services of the 122nd Legislature* (March 30, 2005) (attached in relevant part). It should be emphasized that the subcommittee is not equipped to assess the reliability of the data from any source, and it recognized Medical Mutual's obvious interest in the panel process. At the same time, it seemed worthwhile to at least assemble and assess data from whatever sources may be available. The deficiencies and benefits of the present system were extensively discussed. Mr. Harvey was requested to draft a rule and this report, which were carefully reviewed and revised.

Background. The medical malpractice screening panel system originated in the 1980s with the passage of the Maine Health Security Act, 24 M.R.S. § 2851, et seq. Other than setting the foundation for the screening panel process, the statute does not provide much detail on screening panel procedure. As the system has developed, the practice in the screening panels has not consistently followed the original statutory plan. For example, the statute contemplates an active settlement process in the screening panels, but in practice, the panels are viewed by the parties as adjudicatory bodies, not settlement facilitators. The parties rarely involve the panel chairs in settlement or mediation. At the same time, it is not uncommon for parties to resolve claims during the panel process by engaging in formal mediation with a professional mediator, a settlement resource that was not in common use when the MHSA was originally passed. Similarly, the panel hearings have come to resemble formal legal hearings, with discovery and expert witnesses, rather than the more summary proceeding the statute could be read to contemplate.

Observations about the Screening Panel Procedure. It is not the mission of the subcommittee to criticize or to defend the panel system created by the legislature, and this report should not be interpreted as either an endorsement or a condemnation of the statutory system. However, some understanding of the principal criticisms and successes of the system is necessary to understand the subcommittee's effort to improve it with the procedural changes recommended. The subcommittee believes that the rule it recommends will enhance the fairness and efficiency of the system while improving the time to disposition within the panel system.

A principal criticism of the panel process is the perceived length of time to bring the claim to panel hearing. The statute itself is not consistent. In one place, it contemplates hearings being held within six months of the filing of the notice of claim (24 M.R.S. § 2853 (4)), but in another place in the same section, it states that hearings should not be held later than one year "unless good cause is shown." 24 M.R.S. § 2853 (7). Indeed, the statute assumes that the parties will spend up to 60 days of the first six month period agreeing on a timetable for the exchange of medical records and for discovery. *Id.* In practice, the panel chairs routinely enter a scheduling order within a much shorter time, but in those cases that are not dismissed or resolved during the discovery period, the process of completing discovery and holding a panel hearing often extends beyond six months.

In practice, it is difficult to conclude discovery and bring a case with multiple respondents and medical specialties to hearing within six months. The cause of delay in such cases is usually the result of assembling voluminous records and the scheduling issues involving multiple respondents, several attorneys, and the professional schedules of physician respondents, expert witnesses (often traveling from out of state), and volunteer panelists, who have professional schedules of their own. Given the complexity of modern medicine, it is often difficult for claimants to know in advance whether a new respondent needs to be joined to the action or a different theory should be pursued until discovery is underway. In a system that depends on the willingness of panelist attorneys and physicians to volunteer without compensation to read voluminous medical records and to attend a panel hearing, some scheduling flexibility is indispensable to making the system work. Although many cases can and do reach disposition in six months, a goal of one year is not unreasonable. The fact that an individual case may take a year or more to reach a panel hearing does not by itself indicate that the system is not operating as the Legislature intended.

The subcommittee intends that the more clearly defined process recommended will lead to greater access to justice. A criticism of the system is that some claims are closed out of the system. There is the perception that the screening panels require the case to be "tried twice" with an attendant increase in cost, delay, and exclusion of small cases from the system. Data reviewed by the subcommittee suggest that a substantial number of claims are dismissed or resolved without a panel hearing or at least more quickly than without a panel system. To the extent that smaller or difficult liability medical malpractice cases are not accepted and prosecuted by qualified attorneys, this phenomenon may reflect the same barrier indisputably present in other personal injury litigation where the issues are specialized and complex, require experts, and the cases can be expected to be aggressively defended.

Although the panel system does require the filing of suit after a panel hearing for an unresolved case, the experience of medical malpractice attorneys and Superior Court justices on the subcommittee is that the cases are not fully litigated twice. The data suggest that many cases reach disposition after the panel hearing. For those cases that continue into the court system, most of the discovery has already been completed before the case is filed in the Superior Court. Unlike other complex civil litigation, it is common for medical malpractice cases, which routinely consume 10 trial days or more, to present few or no discovery disputes or legal issues to the court prior to trial. The cases are often ready for trial within the deadline set by the scheduling order. Regardless of whether the panel system does or does not reduce the number of cases that would otherwise reach the Superior Court, it does appear that if the joinder and dismissal of parties, the discovery issues, and other case processing events were largely shunted from the panel system to the Superior Court, the court system would likely be overwhelmed. Active judicial management would be required, and trial in the Superior Court within the time set by the usual scheduling order would be very unlikely in most cases.

Another criticism is the view that the panel system operates without rules or oversight and that it is difficult for those not familiar with the system to negotiate it. It is true that the system has developed its own pattern of practice and that the bar representing clients in medical malpractice cases has become relatively small and specialized. The consolidation of the bar in this area probably reflects the increased specialization of the bar generally, the fewer number of lawyers trying complex civil jury cases with significant stakes in play, the specialized medical knowledge and access to experts required for the practice, the availability of referral fees under the rules of ethics, and the attorney preferences of institutional clients. This trend may make it more difficult for litigants to locate qualified attorneys regardless of the panel system.

Whatever the criticisms of the panel system, it seems important to observe what it accomplishes from a procedural perspective. The Medical Mutual, 1997 Bureau of Insurance and the 2005 Report data suggest that cases are processed and resolved in large numbers without being "tried twice". Aside from processing discovery and joinder issues within a time comparable to the Superior Court, the panel system provides a full hearing — frequently in more than a few cases each month — in which voluminous medical records are reviewed, complex testimony is received from claimants, respondents, nonparty witnesses and experts, and a decision is rendered, all in one day. Indeed, in a state already financially challenged in its support of the judicial system, the process is managed by panel chairs whose compensation is relatively modest for the responsibility and time involved, and who successfully recruit attorneys, physicians, surgeons, and other professionals to contribute expertise and substantial time to this part of the public justice system without any compensation.

The Approach of the Subcommittee to Rule 80M. The subcommittee approached procedural reform of the screening panel process with a few principles in mind. First, the Supreme Judicial Court, in its supervisory capacity, has the right and responsibility to ensure that the procedure in the panel process is fair, efficient, transparent, and consistent with the requirements of the statute and the serious purpose of the system. Second, the subcommittee's task is to recommend changes to the full Civil Rules Committee and in turn to the Court that implement the will of the legislature, not to override the statute by rule. Third, procedural recommendations should address the areas in which the system can be improved and enhance what makes the system work.

In designing any procedural rule, a balance must be found between providing a solid, practical framework and allowing enough flexibility to enable competent professionals to accomplish the legislature's objective. In this process, we have tried not to replicate in the draft rule the provisions the legislature has made in the statute itself. Instead, we have tried to provide a procedural roadmap, based on those areas in which the process now successfully operates. But where the present process could be tightened and improved, we have tried to do so, even though changing present practice may require a period of adaptation. This is especially true in the bias of the draft that time periods be more strictly implemented, that the procedure be more formal, that the panel chairs become involved in facilitating settlement as the statute contemplates, that

the panel chairs have a clear procedural route to refer matters beyond their jurisdiction to the Superior Court for swift determination, and that the Chief Justice of the Superior Court have more explicit supervisory authority.

Finally, the draft tries to avoid stifling the process by over-management, to afford the panel chairs broad latitude to manage their cases in the interest of making the system adapt and work, and to treat the panel chairs as the competent quasi-judicial officers the statute envisions.

The subcommittee worked through several drafts in an effort to make recommendations that will improve and clarify the procedure, decrease the time to disposition, and enhance the perception and reality of the fairness of the process. The subcommittee's recommendation of this draft Rule 80M and its adoption of this report received the unanimous support of all members, which include Superior Justices and attorneys active in both the plaintiffs' and defense bar.

[Note: The reports and information referenced in the subcommittee report is published as a separate pdf document.]