Tired of Tribunals: A Proposal To Combine Section 60L's "Notice of Claim" Requirement with Certificates of Merit in Massachusetts Medical Malpractice Litigation

"[Abolishing the tribunals] would . . . put an end to a tremendous waste of resources, . . . [a]nd I'm referring to both the lawyers' time and the courts' time."[1]

I. INTRODUCTION

Medical malpractice litigation is complex, lengthy, and thus costly.[2] The cost of this type of litigation contributes, in various ways, to the soaring cost of health care in the United States, although the degree to which this occurs is hotly debated.[3] Tort reform efforts aimed at reducing medical malpractice lawsuits began in the 1970s; the reform of choice for some states, including Massachusetts, was the adoption of screening panels.[4] Although these panels differ in composition from state to state, all involve a panel of individuals that review a plaintiff's evidence at an early stage in the litigation process and "screen out" the frivolous lawsuits, namely those that do not produce adequate expert witness support.[5] The underlying policy is that not having to defend against frivolous lawsuits will translate into suppressing the cost of medical malpractice litigation, which would in turn lower the cost of the medical

1. Mark A. Cohen, *Movement To Abolish Med-Mal Tribunals: Unnecessary Hurdle or Important Filter?*, MASS. LAW. WKLY., June 2, 1997, at 1 (citing key opinion that tribunals should be eliminated).

2. *See infra* Part II.A (describing reasons for complexity of medical malpractice litigation).

3. *See* Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis,"* 23 STAN. L. & POL'Y REV. 477, 478-79 (2012) (noting plaintiffs, defendants, and insurers have varying opinions on costs); Kelly Bogue, Note, *Innovative Cost Control: An Analysis of Medical Malpractice Reform in Massachusetts*, 9 J. HEALTH & BIOMEDICAL L. 87, 89-95 (2013) (explaining direct and indirect causes of medical malpractice's impact on healthcare costs). Although it is estimated that the costs of the medical malpractice system compose only 2.4% of overall healthcare costs, this percentage equals approximately $55.6 billion. *See* Bogue, *supra*, at 89.

4. *See* Jean Macchiaroli Eggen, *Medical Malpractice Screening Panels: An Update and Assessment*, 6 J. HEALTH & LIFE SCI. L. 1, 6-7 (June 2013) (providing historical overview of screening panels); *infra* notes 41-44 and accompanying text (explaining historical development of Massachusetts's screening panels). Some states describe the panels as arbitration or mediation, but no arbitration or mediation actually occurs. *See* Sheila M. Johnson, *A Medical Malpractice Litigator Proposes Mediation*, 52 DISP. RESOL. J. 42, 45-47 (1997) (explaining how screening panels do not amount to actual mediation); *see also* Eggen, *supra*, at 9-10 (noting other portions of screening panel statutes may require mandatory mediation).

5. *See* Eggen, *supra* note 4, at 8-10 (describing characteristics of various screening panels).

malpractice insurance premiums charged to healthcare providers and so on up the chain.[6] Despite this well-intentioned goal, the bottom line is that these screening panels do not work.[7]

In Massachusetts, screening panels are called tribunals.[8] In its current form, the tribunal is an unpopular procedural hurdle that exacerbates the issues it was designed to address: the cost and time inherent in medical malpractice litigation.[9] Simply scheduling the tribunal, which the statute requires be held within fifteen days after one is requested, can take months or even over a year, thereby stretching out an already lengthy process.[10] Case law has boiled down the tribunal's panel function to little more than a cursory review to ensure the plaintiff has produced an adequate expert witness statement containing the appropriate legal language that a tort has occurred.[11] It is not altogether the tribunal system's design, or the case law that has gutted it, which renders the tribunal ineffective.[12] Rather, the problem is that the tribunal was designed to address an issue misperceived from the beginning: there are few frivolous medical malpractice lawsuits, and lengthy discovery is needed to allow for adequate analysis of these complex claims.[13]

Moreover, the 2012 healthcare reform law's pre-suit notification requirements now render the tribunal redundant.[14] The part of the healthcare

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6. *See id.* at 7; *infra* text accompanying note 46 (regarding purpose of Massachusetts's panel).

7. *See* Eggen, *supra* note 4, at 24 (indicating tribunals "not as effective as hoped"); Nicole L. Kaufman, Commentary, *The Demise of Medical Malpractice Screening Panels and Alternative Solutions Based on Trust and Honesty*, 28 J. LEGAL MED. 247, 249 (2007) (opining panels "not serving the public interest"); Kyle Miller, Note, *Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law,* 59 VAND. L. REV. 1457, 1484 (2006) (noting panels "at best, make limited headway" in achieving tort law objectives); Mitchell J. Nathanson, *It's the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN ST. L. REV. 1077, 1099 (2004) (deeming screening panels "worthless at best"); Linda S. Crawford, *Reducing Med-Mal Litigation: Is Anything Helping?*, MED. MALPRACTICE L. & STRATEGY, Sept. 2012, at 3, 4 (asserting panels do not reduce lawsuits and rather increase defense costs).

8. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015).

9. *See* Editorial, *Time To Revise Med-Mal Tribunal Statute*, MASS. LAW. WKLY., Oct. 15, 2012, at 38 (describing tribunal as inefficient and unpopular); Sylvia Hsieh, *Bar: Med-Mal Tribunal Far from Perfect System*, MASS. LAW. WKLY., Oct. 1, 2012, at 1 (noting inefficiencies of tribunal system).

10. *See* Raymond J. Brassard, Opinion, *Medical-Malpractice Tribunals: Can They Be Improved?*, MASS. LAW. WKLY., Mar. 31, 2008, at 63 (highlighting significant delay between filing of case and tribunal); Hsieh, *supra* note 9 (explaining fifteen-month wait for tribunal as more accurate estimate); *infra* Part II.C.1 (describing lengthy wait time for tribunals and explaining reasons why).

11. *See* Hsieh, *supra* note 9 (recognizing cases with appropriately worded statement often survive tribunal); *infra* notes 67-69 and accompanying text (discussing limits on what panel may consider).

12. *See infra* text accompanying note 13 (providing reasons why tribunal not effective).

13. *See* Dwight Golann, *Dropped Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 HEALTH AFF. 1343, 1346 (2011) (recognizing necessity of discovery period in evaluating medical malpractice lawsuits); David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2029-31 (2006) (debunking myth of numerous frivolous medical malpractice lawsuits).

14. *See infra* notes 72, 92 and accompanying text (illustrating duplicative disclosures).

reform law codified as chapter 231, section 60L of the Massachusetts General Laws (Section 60L) requires potential plaintiffs, before filing suit, to notify potential defendants of their claims and the medical bases for their allegations.[15] The information that Section 60L requires disclosure of closely echoes the information within the expert witness statement submitted to the tribunal.[16] Similarly, the motivation for enacting Section 60L was to ease the cost and time inherent in medical malpractice litigation and its resulting upward pressure on healthcare costs.[17]

This Note explains the reasons for the adoption of Massachusetts's medical malpractice tribunal system, the goals it sought to achieve, how it has been implemented, and how its goals have not been met.[18] It further explains Section 60L's pre-suit notification procedures instituted in 2012 and then explores the use of certificates of merit, which is an alternative used in liquor liability litigation that offers a framework for reworking the tribunal system.[19] This Note concludes with a specific proposal to replace the tribunal system with a process combining the positive aspects of the pre-suit notification procedure with the use of certificates of merit.[20]

II. HISTORY

A. Context

Medical malpractice is a negligence tort that has been the focus of much media and political attention due to the complexities involved in bringing this type of lawsuit and the often severe nature of the plaintiffs' injuries.[21] Medical malpractice lawsuits are an especially popular topic in Massachusetts; within the past three years of available data, Massachusetts has been in the top eleven states for number of medical malpractice payments made.[22] In addition, the

15. *See infra* note 92 and accompanying text (quoting requirements of plaintiff disclosure).

16. *See infra* text accompanying note 72 (describing contents of expert disclosure to tribunal).

17. *See infra* notes 86, 89 and accompanying text (describing cost motivations underlying newly enacted statute).

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See* Allen Kachalia & Michelle M. Mello, *New Directions in Medical Liability Reform*, 364 NEW ENG. J. MED. 1564, 1564 (2011) (describing medical malpractice litigation's "tenacious hold on the national policy agenda"); Raja Mishra, *A Malpractice Verdict's Human Dimension*, BOS. GLOBE, May 14, 2003, at A1 (explaining controversy surrounding medical malpractice reform due to tragic injuries); *infra* Part II.A (discussing complexities in bringing medical malpractice lawsuits).

22. *See Data Analysis Tool*, NAT'L PRAC. DATA BANK, http://www.npdb-hipdb.hrsa.gov/analysistool (select "Medical Malpractice" tab; select "All" for "Location"; select the three most recent years for "Payment Years"; select "All" for both "Practitioner Type" and "Malpractice Payment Range"; then follow "Show Results" hyperlink) (last visited Jan. 2, 2014), *archived at* http://perma.cc/67Z9-985S (providing statistics for number of medical malpractice payments from 2010-2012). Medical malpractice payments include both

healthcare industry is one the largest employers in Massachusetts, and it is politically influential.[23] At the same time, the costs of medical malpractice lawsuits amount to such a small percentage of overall healthcare costs that some people debate whether the attention to such lawsuits is well spent.[24]

Medical malpractice lawsuits differ in various ways from typical negligence torts.[25] From a legal standpoint, the plaintiff normally must have expert witness support for both the duty and causation prongs of the medical malpractice tort.[26] From a functional standpoint, medical malpractice lawsuits

judgments and settlements. *Glossary*, NAT'L PRAC. DATA BANK, http://www.npdb-hipdb.hrsa.gov/resources /glossary.jsp (last visited Aug. 9, 2015), *archived at* http://perma.cc/JZ5Y-VVVG. The Massachusetts court system does not provide statistics breaking down the types of civil lawsuits that are filed. *See, e.g.*, *Appeals Court Case Statistics*, MASS. CT. SYS., http://www.mass.gov/courts/court-info/appeals court/about-the-appeals-court/appeals-court-case-statistics.html (last visited Aug. 9, 2015), *archived at* http://perma.cc/4YQX-MGEL (containing no breakdown of types of appellate lawsuits); *The Superior Court Fiscal Year 2014 Civil Statistics*, MASS. CT. SYS., http://www.mass.gov/courts/docs/courts-and-judges/courts/superior-court/sc-2014statscivillo ad.pdf (last visited Aug. 9, 2015), *archived at* http://perma.cc/XCN3-FS7E (containing no breakdown of types of trial court civil lawsuits); *SJC Case Statistics*, MASS. CT. SYS., http://www.mass.gov/courts/court-info/sjc/about/court-mgt-admin/supreme-judicial-court-case-statistics.html (last visited Aug. 9, 2015), *archived at* http://perma.cc/3SER-645H (containing no breakdown of types of lawsuits).

23. *See* Edward Mason, *Businesses on Track To Break Lobbying Record*, BOS. BUS. J. (Feb. 10, 2012), http://www.bizjournals.com/boston/print-edition/2012/02/10/businesses-on-track-to-break-lobbying.html, *archived at* http://perma.cc/F3UM-XXSP (noting healthcare groups top employers and lobbyists).

24. *See* Bogue, *supra* note 3, at 89 (estimating medical malpractice system amounts to 2.4% of current healthcare spending). Notably, the Massachusetts Attorney General's Office has not even mentioned the impact of medical malpractice litigation in its recent reports on healthcare cost drivers. *See, e.g.*, OFF. OF MASS. ATT'Y GEN. MARTHA COAKLEY, EXAMINATION OF HEALTH CARE COST TRENDS AND COST DRIVERS PURSUANT TO G.L. C. 6D, §8 46-57 (Apr. 24, 2013), *available at* http://www.mass.gov/ago/docs/healthcare/ 2013-hcctd.pdf, *archived at* http://perma.cc/J6T8-9URZ (analyzing healthcare providers' costs without mentioning litigation); OFF. OF MASS. ATT'Y GEN. MARTHA COAKLEY, EXAMINATION OF HEALTH CARE COST TRENDS AND COST DRIVERS PURSUANT TO G.L. C. 118G, §6½(b) 52 (June 22, 2011), *available at* http://www .mass.gov/ago/docs/healthcare/2011-hcctd-full.pdf, *archived at* http://perma.cc/32X8-C6UR (focusing on changing payments to healthcare providers and increasing market competition); OFF. OF MASS. ATT'Y GEN. MARTHA COAKLEY, EXAMINATION OF HEALTH CARE COST TRENDS AND COST DRIVERS PURSUANT TO G.L. C. 118G, §6½(b) 43 (Mar. 16, 2010), *available at* http://www.mass.gov/ago/docs /healthcare/2010-hcctd-full.pdf, *archived at* http://perma.cc/B5VT-MZEN (concluding market leverage of costly healthcare providers increase healthcare costs).

25. *See infra* notes 26-33 and accompanying text (discussing differences between medical negligence and typical negligence torts). Medical malpractice lawsuits can also encompass allegations of battery, such as the performance of an unauthorized treatment on a patient, breach of contract, breach of the consumer protection statute, and vicarious liability claims against healthcare institutions. *See* Lubanes v. George, 435 N.E.2d 1031, 1034 (Mass. 1982) (describing limited role of tribunal in evaluating battery claims); GEORGE JACOBS & KENNETH LAURENCE, 51 MASS. PRAC., PROFESSIONAL MALPRACTICE §§ 2.1-2.18 (2013) (discussing legal grounds for medical malpractice lawsuits). By far the most common medical malpractice claim, however, is negligence. *See id.* § 2.2.

26. JACOBS & LAURENCE, *supra* note 25, § 7.1 (describing heavy reliance on expert witness testimony). Like negligence torts, medical malpractice torts involve an allegation that the defendant healthcare provider breached a duty to her patient and that breach caused the plaintiff patient's injuries. *Id.* § 2.2. Regarding the duty prong of the tort, a healthcare provider must exercise the degree of care and skill of the average qualified provider or specialist, taking into account the advances of the profession at the time of the treatment at issue and the medical resources available to the provider. *Id.* Common allegations against healthcare providers

take a long time and cost a lot of money.[27] First, obtaining an expert opinion alone can cost hundreds—if not thousands—of dollars, and attorneys on both sides may have to obtain multiple expert opinions if the defendants practice different specialties.[28] Second, both attorneys and all of the experts must obtain and review all of the plaintiff's medical records, which can be a lengthy process.[29] Obtaining records involves complying with the procedural requirements of strict patient privacy laws and potentially paying significant costs for copies of what may be hundreds of pages of records.[30] The average

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consist of negligent care, failure to warn of risks posed by a patient to third parties, and failure to obtain a patient's informed consent before proceeding with a course of treatment. *See id.* §§ 2.2, 2.6, 3.1. In a lack of informed consent claim, a physician owes to her patient the duty to disclose, in a reasonable manner, all significant medical information that the physician possesses or reasonably should possess that is material to the patient's intelligent decision of whether to undergo a proposed course of treatment. *Id.* § 3.2. The plaintiff must also prove that a reasonable person, in what the defendant physician knows or should reasonably know is the plaintiff's particular position, would not have chosen to pursue the course of treatment had she been adequately informed. *Id.* A relatively new derivative of the medical malpractice tort is the loss of chance tort, which alleges that the defendant healthcare provider's action or failure to act caused the patient to lose a chance of cure. *See generally* Matsuyama v. Birnbaum, 890 N.E.2d 819 (Mass. 2008) (recognizing loss of chance medical malpractice action in Massachusetts for first time).

27. *See* Studdert et al., *supra* note 13, at 2026-27 (estimating average of administrative costs for defending cases as over $50,000); *Litigiousness*, INS. INFO. INST., http://www.iii.org/facts_statistics/litigiousness.html (last visited Aug. 9, 2015), *archived at* http://perma.cc/6KQG-2Z8H (stating in 2013 medical malpractice insurers spent 53.3% of all losses on defense costs); *infra* notes 28-33 and accompanying text (discussing reasons for length and cost of medical malpractice lawsuits). *See generally* Aaron E. Carroll et al., *The Impact of Defense Expenses in Medical Malpractice Claims*, 40 J.L. MED. & ETHICS 135 (2012) (exploring factors contributing to litigation and insurance costs in defending medical malpractice lawsuits).

28. *See* Golann, *supra* note 13, at 1346 (estimating cost for expert opinion for tribunal at $2000); Gabriel H. Teninbaum & Benjamin R. Zimmermann, *A Tale of Two Lawsuits*, 8 J. HEALTH & BIOMEDICAL L. 443, 447 (2013) (offering example of when multiple experts required); Williams, *supra* note 3, at 513 (estimating plaintiff's costs of litigating medical malpractice lawsuits at $50,000 to $100,000).

29. *See* JACOBS & LAURENCE, *supra* note 25, § 6.1 (emphasizing importance for plaintiff attorney to obtain medical records); Donald M. Lubin & Andrew C. Meyer, *An Outline for the Plaintiff's Offer of Proof Before a Medical Malpractice Tribunal*, 25 BOS. B. J. 27, 28 (1981) (noting obtainment of patient's medical records begin medical malpractice lawsuit); Teninbaum & Zimmermann, *supra* note 28, at 446-47 (describing necessity for expert to review plaintiff's entire medical record).

30. *See* Karen R. Ristuben & Sherry Yee Mulloy, OBTAINING AND USING MEDICAL RECORDS IN MASSACHUSETTS §§ 6.1-6.9 (MASS. CONTINUING LEGAL EDUC. 2010) (explaining multiple layers of state and federal statutes and regulations restricting access to medical records). These protections may impede a defendant trying to subpoena a plaintiff's medical records for review. *See id.* § 8. The federal Health Insurance Portability and Accountability Act (HIPAA) requires that records must be provided within thirty days, however, it allows for an additional thirty-day extension. *Physician Obligations with Respect to Patient Medical Records*, BD. OF REGISTRATION IN MED. (Apr. 2, 2012), http://www.mass.gov/eohhs/docs/borim/physicians/medical-record-obligations.pdf, *archived at* http://perma.cc/C5VJ-3EZA. The Massachusetts Board of Registration in Medicine states physicians not covered by HIPAA shall produce records within two to three weeks, but neglects to mention whether there are any physicians to which HIPAA does not apply. *See id.*; *see also* 45 C.F.R. § 160.103 (2014) (providing expansive HIPAA definition of healthcare provider). Chapter 111, section 70 of the Massachusetts General Laws governs the costs that may be charged for copying medical records, which is set at a $15 base fee, $.50 per page for the first 100 pages, and $.25 per page thereafter, subject to adjustment according to the consumer price index for medical care services. MASS. GEN. LAWS ANN. ch. 111, § 70 (West 2015). In addition, copies of radiology images and other items that are not

time between the filing and resolution of a medical malpractice lawsuit is four years.[31] One study found that the average cost of litigating medical malpractice lawsuits—including plaintiff attorney's contingency fees, defense attorney costs, and insurance company overhead costs—amounts to 54% of the compensation eventually paid to the plaintiff.[32] Third, the judgments in these cases, particularly in death cases, are quite large.[33]

To address these challenges, the Massachusetts legislature has instituted a number of tort reforms addressing medical malpractice lawsuits.[34] First, there is a three-year statute of limitations for bringing a medical malpractice lawsuit, whether in tort or contract, which runs from the date of discovery of the cause of action.[35] That statute also provides for a seven-year statute of repose, which runs from the date of the occurrence.[36] Second, noneconomic damages, such as those awarded for pain and suffering, are capped at $500,000 per

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reproduced via regular photocopying are charged at the actual cost of the copy. 243 MASS. CODE REGS. 2.07(13)(c) (2015).

31. *See* John O. Cunningham, *The Fall of Torts in Massachusetts: A Look at Verdicts and Settlements from the Last Three Years Reveals a Steady Decline in Recoveries*, MASS. LAW. WKLY., Apr. 16, 2001, at B1 (estimating medical malpractice lawsuits take over four years to reach trial); *cf.* Studdert et al., *supra* note 13, at 2026 (citing average of five years between injury and closure of insurance claim). The courts assign medical malpractice lawsuits to the "average track" designation, which provides for resolution of these lawsuits in three years. *Superior Court Standing Order 1-88: Time Standards (Third Amended)*, MASS. CT. SYS., http://www.mass.gov/courts/case-legal-res/rules-of-court/superior/sup-orders/sup1-88.html (last visited Sept. 3, 2015), *archived at* http://perma.cc/3YJM-7LFA (providing time standards to combat delay and cost of litigation). This is the longest track available. *Id.*

32. *See* Studdert et al., *supra* note 13, at 2031; *see also* Bogue, *supra* note 3, at 90-95 (describing direct and indirect costs of medical malpractice).

33. *See Largest Verdicts & Settlements of 2014*, MASS. LAW. WKLY., Feb. 2, 2015, at 9 (noting medical malpractice cases composed half of fourteen highest verdicts of 2014); Cunningham, *supra* note 31 (noting medical malpractice "still king" in terms of biggest verdicts in Massachusetts). The reasons medical malpractice verdicts tend to be the largest are due to large insurance policies and the nature of the underlying injuries. *See* Cunningham, *supra* note 31. When these lawsuits do settle, it tends to be on the eve of trial, after most of the expense in prosecuting or defending the case and preparing for trial has already been spent. *See* Johnson, *supra* note 4, at 48 (explaining most lawsuits settle "on the courthouse steps"); Marianne C. LeBlanc, Opinion, *Med-Mal Actions Still Have Pulse in Massachusetts*, MASS. LAW. WKLY., May 7, 2012, at 39 (noting settlements reached only days before trial after significant expenditure of time and resources).

34. *See infra* notes 35-40 and accompanying text (summarizing tort reforms aimed at medical malpractice cases).

35. *See* MASS. GEN. LAWS ANN. ch. 260, § 4 (West 2015); Franklin v. Albert, 411 N.E.2d 458, 459-60 (Mass. 1980) (holding cause of action accrues when patient "learns, or reasonably should have learned" of injury). The statute of limitations for other personal injury actions is also three years, but the statute of limitations for other contracts actions is six years. MASS. GEN. LAWS ANN. ch. 260, § 2A (West 2015) (relating to personal injury lawsuits); MASS. GEN. LAWS ANN. ch. 260, § 2 (West 2015) (relating to contract lawsuits). The one exception to the statute of limitations for medical malpractice lawsuits is triggered when the plaintiff suffers a retained foreign object. Ch. 260, § 4. A minor also has a three-year statute of limitations for medical malpractice actions, with the caveat that a minor under six years old has until her ninth birthday to file suit. MASS. GEN. LAWS ANN. ch. 231, § 60D (West 2015).

36. Ch. 260, § 4; *see also* ch. 231, § 60D (regarding statute of repose pertaining to lawsuits brought by minors). The statute of repose is absolute; the time period starts to run when the injury occurs, not when the injury is discovered. *See* Joslyn v. Chang, 837 N.E.2d 1107, 1110 (Mass. 2005).

occurrence.[37] Third, the Legislature enacted limits on the contingency fees that an attorney may contract for in medical malpractice cases.[38] Fourth, as further discussed in Part II.C.1 below, as part of the recently adopted "Disclosure, Apology, & Offer" statute, there is now a 180-day waiting period prior to the filing of a lawsuit during which certain theories of liability must be disclosed.[39] Fifth, there is the tribunal system.[40]

B. Historical Development of Tribunal System

The Massachusetts Legislature established the medical malpractice tribunal system in 1975 in reaction to a crisis of soaring malpractice insurance premiums and increasing numbers of medical malpractice lawsuits.[41] A

37. MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2015). Whether caps on noneconomic damages in medical malpractice actions are useful in discouraging frivolous lawsuits is debated. *Compare* Johnson, *supra* note 4, at 44-45 (contending caps discourage settlement and discourage plaintiff attorneys from taking small-value cases), *and* Crawford, *supra* note 7, at 4 (discounting value of damages caps in reducing number of lawsuits), *with* Williams, *supra* note 3, at 514-20 (advocating for caps on noneconomic damages with limitations). There are two other statutes regulating damages specific to medical malpractice cases. *See* MASS. GEN. LAWS ANN. ch. 231, § 60F (West 2015); MASS. GEN. LAWS ANN. ch. 231, § 60G (West 2015). First, when a jury or a judge in a bench trial awards damages, the damages must be broken down into specific categories and time periods for which they are being awarded. *See* ch. 231, § 60F. Second, if a judge determines that a jury awarded money for medical bills or other expenses that other sources, such as health insurers or the workers compensation system, have already paid for, those amounts will be deducted from the judgment. *See* ch. 231, § 60G.

38. *See* MASS. GEN. LAWS ANN. ch. 231, § 60I (West 2015); *see also* Gerard O'Neill et al., *Lawyers Ask: Will it Pay? Some Cases Fall Between Cracks*, BOS. GLOBE, June 18, 1986, at 1 (discussing fee arrangements prior to statute's enactment).

39. *See* MASS. GEN. LAWS ANN. ch. 231, § 60L (West 2015); *infra* Part II.C.1 (describing timeline for disclosure of information).

40. *See infra* Part I.B (describing history of tribunal system, case law interpreting tribunal statute, and present-day application).

41. *See* An Act Relative to Medical Malpractice, ch. 362, § 5, 1975 Mass. Acts 341 (West) (codified as amended at MASS. GEN. LAWS ANN. ch. 231, § 60B (2015)); DANIEL J. FOLEY ET AL., ANNUAL REPORT OF THE SPECIAL COMMISSION ESTABLISHED TO MAKE AN INVESTIGATION AND STUDY OF MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE (UNDER SECTION 12 OF CHAPTER 362 OF THE ACTS OF 1975), H.R. 169-5345, 2d Sess., at 5 (Mass. 1976) (noting fear of "prohibitively high" medical malpractice insurance premiums); Edward J. Barshak, *The President's Page*, BOS. B. J., Feb. 1975, at 3, 4 (attributing crisis to "tremendous recent increase" in number of medical malpractice lawsuits); Diane C. Tillotson, Note, *The Massachusetts Medical Malpractice Statute: A Constitutional Perspective*, 11 SUFFOLK U. L. REV. 1289, 1289-90 (1977) (describing crisis as nationwide). The true nature and extent of the crisis was debated at the time. *See* DANIEL J. FOLEY ET AL., ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE (UNDER SECTION 12 OF CHAPTER 362 OF THE ACTS OF 1975), H.R. 173-5980, 1st Sess., at 4 (Mass. 1983) (acknowledging, even in 1983, reasons for mid-1970s' crisis "still uncertain"); Tillotson, *supra*, at 1291 (arguing claim of crisis had "no reasonable statistical foundation"). The focus on medical malpractice insurance premiums was sparked, at least in part, by a report issued in 1973 by the U.S. Department of Health, Education, and Welfare (now Department of Health and Human Services) that highlighted a nationwide average of 10% more medical malpractice lawsuits filed than settled in 1970. *See* Tillotson, *supra*, at 1289 n.2; Kevin W. Clancy, Note, *The Constitutionality of the Massachusetts Medical Malpractice Pain and Suffering Cap*, 29 B.C. L. REV. 659, 662 (1988) (describing report precipitated many

number of insurance companies had recently withdrawn from offering medical malpractice insurance in the Commonwealth, causing premiums to soar.[42] The Legislature became alarmed that the cost of obtaining medical malpractice insurance would soon price many physicians out of the market.[43] Thus, the tribunal system was enacted as one part of a package of reforms aimed at stabilizing medical malpractice insurance premiums to ensure that all physicians could obtain coverage.[44]

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medical malpractice reforms nationwide). That report indicated Massachusetts had experienced a 7.8% increase in these lawsuits in 1970. Tillotson, *supra*, at 1289 n.2. In the wake of that report in 1975, forty-one states enacted legislation directed at curbing medical malpractice litigation. *Id.* at 1290. Since the frequency of medical malpractice lawsuits exploded in the 1840s, medical malpractice crises have been cyclical: the 1920s and 1930s experienced an increase in the number of lawsuits, the 1960s witnessed an increase in the value of judgments, and the 1970s, 1980s, and early 2000s saw an inflation of insurance premiums. *See* George J. Annas, *Doctors, Patients, and Lawyers–Two Centuries of Health Law*, 367 NEW ENG. J. MED. 445, 448 (2012) (describing concerns in 1850 lawsuits causing surgeons to close practices); Michelle M. Mello et al., *The Medical Liability Climate and Prospects for Reform*, 312 J. AM. MED. ASS'N 2146, 2153 (2014) (discussing "regular cycles" of litigation "since the expansion of malpractice litigation in the 1960s"); James C. Mohr, *American Medical Malpractice Litigation in Historical Perspective*, 283 J. AM. MED. ASS'N 1731, 1732, 1736 (2000) (exploring periods of medical malpractice tort practice); Kevin Beagan et al., *Medical Malpractice Insurance in the Massachusetts Market Report*, MASS. DIV. OF INS., Dec. 31, 2008, *available at* http://www.mass.gov/ocabr/insurance/health-insurance/health-care-access-bureau/medical-malpractice-insurance-in-the.html, *archived at* http://perma.cc/2ERR-NVFZ (discussing causes of rate increases in Massachusetts in early 2000s); Editorial, *The Med-Mal Premium Crisis*, MASS. LAW. WKLY., Apr. 14, 2003, at 10 (describing Massachusetts physicians' protest outside State House regarding high insurance premiums in 2003). *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE (2003) (commenting on varying, local nature of impact of rising nationwide premiums). While some blame the current nationwide crisis of soaring healthcare costs partly on medical malpractice lawsuits, these lawsuits appear not to be affecting insurance premiums. *See* Mello et al., *supra*, at 2147 (finding "flat or declining premiums" nationwide over last decade); Alicia Gallegos, *Malpractice Premiums Steady in 2013, Vary Widely by Region*, OB. GYN. NEWS (Oct. 14, 2013), http://www.obgynnews.com/index.php?id=11146&cHash=071010&tx_ttnews[tt_news]=218953, *archived at* http://perma.cc/47L7-URFG (illustrating no change in Massachusetts's medical liability insurance rates and small-to-moderate change nationwide). *Compare Medical Liability Reform*, AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/advocacy/topics/medical-liability-reform.page (last visited May 9, 2015), *archived at* http://perma.cc/7VV5-QPXK (blaming "broken medical liability system" for healthcare costs), *with* Taylor Lincoln, *No Correlation: Continued Decrease in Medical Malpractice Payments Debunks Theory that Litigation is To Blame for Soaring Medical Costs*, PUB. CITIZEN 5 (Aug. 2013), http://www.citizen.org/documents/medical-malpractice-payments-do-not-increase-health-care-costs-report-2013.pdf, *archived at* http://perma.cc/RHE2-A7CD (comparing decreased medical malpractice payments to soaring healthcare costs).

42. *See* H.R. 169-5345 at 5; *cf.* Clancy, *supra* note 41, at 662 (noting in 1970s number of medical malpractice insurers nationwide dropped from approximately eighty-five to five).

43. *See* H.R. 169-5345 at 5 (emphasizing inevitable "serious threat" to healthcare without strong legislative action); Clancy, *supra* note 41, at 662 (characterizing crisis as including problems in "both the affordability and availability of medical malpractice insurance").

44. *See* 1975 Mass. Acts 341. Along with the tribunal system, this Act instituted a new Board of Registration and Discipline in Medicine. *Id.* at 341-48. The Board (now known as the Board of Registration in Medicine) is tasked with, among other things, investigating consumer complaints regarding the competency of physicians, quality of care, and the "proper practice of medicine." *See* MASS. GEN. LAWS ANN. ch. 112, § 5 (West 2015) (conferring investigatory powers upon Board); MASS. BOARD OF REGISTRATION IN MED., A CONSUMER'S GUIDE TO THE COMPLAINT PROCESS, *available at* http://www.mass.gov/eohhs/docs/borim

At the time of the tribunal system's enactment, a common perception was that frivolous lawsuits were fueling the crisis of high insurance premiums, at least in part.[45] The tribunal system's aim was to act as a screening mechanism, catching these frivolous lawsuits in the early stages of litigation, and remove them from the court system.[46] The Legislature hoped the cost savings to defendants from not having to defend frivolous lawsuits, and from potentially recouping money from a plaintiff who persisted in prosecuting a frivolous lawsuit, would suppress both insurance premiums and the overall cost of healthcare.[47]

Over the past thirty-five years, the tribunal system has survived constitutional challenges on the grounds of equal protection, due process, and separation of powers.[48] The tribunal system has also survived various

/physicians/complaint-brochure.pdf (last visited Aug. 9, 2015), *archived at* http://perma.cc/FCW7-4NU9 (discussing what issues Board reviews and investigates). Partly due to lack of funding, the Board has faced harsh criticism over the years regarding its effectiveness in policing the practice of medicine. *See* LINDA J. MELCONIAN ET AL., INTERIM REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE (UNDER SECTION 12 OF CHAPTER 362 OF THE ACTS OF 1975 AND SECTION 39 OF CHAPTER 351 OF THE ACTS OF 1986), H.R. 175-6186, 1st Sess., at 16 (Mass. 1987) (discussing media criticism of Board); H.R. 173-5980 at 9-10 (discussing "lengthy tenure" of Board's funding problems); Callum Borchers & Stephen Kurkjian, *Once a Model, State Medical Board Lags Badly*, BOS. GLOBE, Mar. 18, 2012, at A1 (criticizing Board for lack of transparency and technological primitivism). The Act Relative to Medical Malpractice also created the Joint Underwriting Association (JUA). *See* §§ 6-7, 1975 Mass. Acts 350-56. As a condition of doing business in Massachusetts, the Act required all insurers to participate in the JUA; the JUA then issued medical malpractice policies to Massachusetts physicians at rates determined by the Commissioner of Insurance. *See id.* at 351-52; H.R. 173-5980 at 8 (explaining how Massachusetts JUA functioned); *see also* Clancy, *supra* note 41, at 664-65 (explaining how JUAs functioned generally nationwide). The JUA was initially created as a temporary solution to the malpractice premium crisis, but it in essence it became virtually the exclusive provider of medical malpractice insurance for Massachusetts physicians until 1992, when it was privatized. *See* H.R. 173-5980 at 5 (noting JUA virtually sole provider of medical malpractice insurance in 1983); Beagan et al., *supra* note 41 (providing short history of JUA and its conversion to private insurance company).

45. *See* H.R. 169-5345 at 13 (stating purpose of tribunal to screen out nonmeritorious cases). Even the then-president of the Boston Bar Association opined that there were many unjustified malpractice cases brought by a few "bad seeds" amongst the plaintiff bar. *See* Barshak, *supra* note 41, at 4. Studies have since revealed that there are not as many frivolous lawsuits as once thought. *See supra* note 13 and accompanying text (offering studies showing few frivolous lawsuits).

46. *See* H.R. 169-5345 at 13 (stating purpose of tribunal to screen out nonmeritorious cases).

47. *See* Hanley v. Polanzak, 393 N.E.2d 419, 421-22 (Mass. App. Ct. 1979) (discussing purposes of tribunal statute); *infra* Part II.C.7 (discussing money plaintiff must wager to continue to prosecute lawsuit deemed meritless).

48. *See* Beeler v. Downey, 442 N.E.2d 19, 19-20 (Mass. 1982) (discussing constitutional challenge to portion of tribunal statute); Paro v. Longwood Hosp., 369 N.E.2d 985, 993 (Mass. 1977) (upholding constitutionality of tribunal statute). First, the plaintiffs in *Paro* alleged that the tribunal statute violated the equal protection provisions of the United States and Massachusetts constitutions by treating medical malpractice victims differently than victims of other torts, and plaintiffs differently than defendants. 369 N.E.2d at 987-88. The Massachusetts Supreme Judicial Court (SJC) held that the goal of the tribunal statute was legitimate and rationally related to the creation of these classifications; thus, the tribunal statute did not violate equal protection guarantees. *Id.* at 987-89. Second, the plaintiffs alleged that the bond requirement violated their procedural due process rights by denying them access to the courts. *Id.* at 989. The court held

attempts, by various groups, to significantly reform or abolish it.[49]

C. The Tribunal System

1. Time Period

The statute states that a tribunal shall be convened within fifteen days of the filing of the defendant's answer to the complaint.[50] The most recently available statistics reveal it takes over 250 days between the request for and the convening of a tribunal.[51] Administrative factors that contribute to this delay

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that the tribunal statute did not place an insurmountable financial obstacle between plaintiffs and the courts because the bond may be reduced, but not eliminated, upon a finding of indigency. *Id.* at 989-91. Third, the plaintiffs alleged that the tribunal statute "abrogates their common law rights without providing a reasonable alternative," which the court interpreted as a substantive due process argument. *Id.* at 991. The court clarified that the tribunal was merely a new procedure for enforcing existing common law rights, and thus the tribunal statute did not violate the plaintiffs' substantive due process rights. *Id.* Fourth, the plaintiffs argued that the Legislature's creation of the tribunal interfered with the judicial branch in violation of the separation of powers provision of the Massachusetts Constitution. *Id.* at 991-92. In rejecting this argument, the court emphasized the tribunal's role as a judicial proceeding that receives and evaluates evidence and the judge's role in assembling and directing the tribunal hearing. *Id.* at 992-93. In *Beeler*, the defendants raised a constitutional challenge to the portion of the statute that admits the tribunal's determination at trial, however, the SJC avoided deciding this case on constitutional grounds. *See* 442 N.E.2d at 24 (deciding case on statutory construction grounds). Plaintiffs have challenged medical malpractice screening panels in other states on similar constitutional grounds; whether the panels have survived such scrutiny varies due to the differences in construction of the panels and in state law. *See* Eggen, *supra* note 4, at 10-13 (summarizing various constitutional challenges to screening panels); Nathanson, *supra* note 7, at 1092-93 (exploring four categories of constitutional challenges to screening panels).

49. *See* Editorial, *A New Med-Mal Battle?*, MASS. LAW. WKLY., Feb. 9, 2004, at 10 (criticizing proposed legislation in 2004 to strengthen tribunal system); Cohen, *supra* note 1 (discussing proposed legislation in 1997 to strike entire tribunal statute); Jeanne Greeley, *The Problem with Medical-Malpractice Tribunals,* MASS. LAW. WKLY., July 29, 2002, at B1 (mentioning bill filed in 2001 proposing repeal of tribunal statute). Notably, the chief justices of Massachusetts's trial courts supported the legislation proposed in 1997 to completely repeal the tribunal statute. *See* Cohen, *supra* note 1. *Massachusetts Lawyers Weekly* has published editorials in 2003 and 2012 calling for tribunal reform or abolishment. *See* Editorial, *Re-Thinking Med-Mal Tribunals*, MASS. LAW. WKLY., July 21, 2003, at 10 (advocating system be "reformed or scrapped entirely"); *Time To Revise Med-Mal Tribunal Statute*, *supra* note 9 (calling for fix to system). Retired superior court Judge Hiller B. Zobel has been a longtime critic of the tribunal system. *See* Greeley, *supra* (quoting Judge Zobel calling tribunals "just a waste of time and money" in 2002). In 1982, Judge Zobel ruled that a case could proceed without undergoing a tribunal screening because the offer of proof clearly passed the directed verdict standard. *See* Broadard v. Hubbard Reg'l Hosp., 446 N.E.2d 405, 406 (Mass. 1983). In that decision, Judge Zobel described holding a tribunal as a "needless exercise and a waste of the Commonwealth's money, to say nothing of the valuable time of a health professor and a lawyer." *Id.* The SJC later overturned his decision. *Id.*

50. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015).

51. *See* Brassard, *supra* note 10, at 1671 (noting statewide average of 256 days in 2006). This timeframe has grown since the tribunal system was first instituted. *See* FOLEY ET AL., *supra* note 41, at 15 (questioning whether to extend timeframe from fifteen to sixty days); Walter H. McLaughlin, *A Look at the Massachusetts Malpractice Tribunal System*, 3 AM. J. L. & MED. 197, 203-04 (1977) (discussing insufficiency of fifteen-day period); Cohen, *supra* note 1 (explaining delay of "several months" in 1997); Greeley, *supra* note 49 (estimating seven-month delay in 2002). The only sources of statistics regarding medical malpractice tribunals are articles authored by people with specialized access. *See* Brassard, *supra* note 10 (explaining how judge has access to court information); Cohen, *supra* note 1 (documenting what court officials disclosed to news

include difficulties finding medical members who practice the appropriate medical specialty, coordinating the schedules of the tribunal's participants, and waiting until there are enough cases within a particular specialty to make it economically worthwhile to schedule a tribunal.[52] Delays in scheduling the tribunal exacerbate the already lengthy process of litigating a medical malpractice claim when the attorneys disagree whether discovery should proceed before a tribunal is convened.[53]

2. *Composition*

The tribunal is composed of a judge, an attorney, and a physician, who must be licensed in Massachusetts and "represent[] the field of medicine in which the alleged injury occurred."[54] If the defendant is not a physician, then the profession of the tribunal's medical member may encompass any healthcare provider, including a nurse, social worker, or healthcare administrator, representing the appropriate field of medicine at issue.[55] The medical member

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reporter); Greeley, *supra* note 49 (stating what news reporter gathered during interviews and relaying statistics provided by insurance company). The Massachusetts court system does not release statistics specifically regarding medical malpractice tribunals or the number of medical malpractice lawsuits. *See supra* note 22 (discussing lack of publicly available statistics); *see also* Julia Reischel, *Medical-Malpractice Filings Fall in Massachusetts*, MASS. LAW. WKLY., May 4, 2009, at 1 (noting court, in 2008, released statistics regarding medical malpractice lawsuit filings). The Board of Registration in Medicine receives reports of every tribunal determination and every final disposition of a medical malpractice lawsuit. MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015). It appears that all of these reports are lumped together in the category of "Court Reports—malpractice" when the Board provides statistical data in its annual reports. *See* 243 MASS. CODE REGS. 2.14(5)(i), 2.14(5)(j) (2015) (listing mandated court reports to Board); MASS. BD. OF REGISTRATION IN MED. 2013 ANN. REP. 20, *available at* http://www.mass.gov/eohhs/docs/borim/physicians/publications/annual-report-2013.pdf (last visited Aug. 9, 2015), *archived at* http://perma.cc/9U4Y-NPQF.

52. *See* Brassard, *supra* note 10; Cohen, *supra* note 1 (noting court officials described scheduling tribunal as "administrative nightmare"). If there are multiple defendants in multiple practice areas, then multiple tribunals may need to be convened, which contributes to the delay in scheduling the tribunals. *See* St. Germain v. Pfeifer, 637 N.E.2d 848, 849-50 (Mass. 1994) (describing tribunal convened for nurse defendant and second tribunal convened for physician defendants); *infra* note 55 and accompanying text (discussing significance of defendants' practice areas).

53. *See* Greeley, *supra* note 49 (noting impasse between attorneys regarding whether to proceed with discovery); Frank J. Riccio, Letter to the Editor, *Tribunals No Longer Useful*, MASS. LAW. WKLY., Aug. 11, 2003, at 31 (noting "discovery is often held up" prior to tribunal). Judges rule inconsistently when pressed to compel discovery during this time period. *See* Greeley, *supra* note 49. According to the court's scheduling standards, discovery should be completed in twenty-four months. *Superior Court Standing Order 1-88: Time Standards (Third Amended)*, MASS. CT. SYS., http://www.mass.gov/courts/case-legal-res/rules-of-court/superior/sup-orders/sup1-88.html (last visited Sept. 3, 2015), *archived at* http://perma.cc/3YJM-7LFA (providing time standards to combat delay and cost of litigation).

54. *See* ch. 231, § 60B.

55. *See id*. The scope of medical professions that the tribunal statute covers has broadened over the years. *Compare* An Act Relative to Medical Malpractice, Act of June 19, 1975, ch. 362, § 5, 1975 Mass. Acts 341 (limiting application to ten professions or healthcare institutions), *with* ch. 231, § 60B (mentioning twelve professions or healthcare institutions). The Legislature added social workers to the statute after the SJC had determined that that profession was not entitled to a tribunal hearing. *See* An Act Applying the Malpractice Tribunal to Social Workers, ch. 217, 2006 Mass. Acts 1051 (codified as MASS. GEN. LAWS ANN. ch. 231, §

must also conduct her practice "outside the county where the defendant practices or resides."[56] While not striking down this requirement, the SJC has discounted its value, explaining that it neither affects the tribunal member's expertise nor the tribunal's functionality.[57] The Massachusetts Bar Association and the Massachusetts Medical Society provide the court with lists of volunteers to be the attorney and medical members of the tribunal.[58] Generating the medical volunteers remains difficult because of the nominal compensation offered to them, fifty dollars per case, and the need to travel from their practice location in one county to a courthouse in another.[59]

3. *Jurisdiction*

The statute directs that a medical malpractice tribunal shall be convened to screen "[e]very action for malpractice, error or mistake."[60] Case law has further refined the extent of the tribunal's mandate to encompass all lawsuits

60B (2015)) (adding social workers to list of "provider[s] of health care"); Carter v. Bowie, 736 N.E.2d 385, 386 (Mass. 2000) (holding social workers not subject to tribunal statute).

56. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015). If the defendant is a healthcare institution and not an individual, the medical member must practice "outside the county where said institution or facility is located." *Id.* The purpose of the practice location requirement is to ensure the neutrality of the medical member. *See* McLaughlin, *supra* note 51, at 203 (opining such requirement "impugns the integrity of the medical profession").

57. *See* Blood v. Lea, 530 N.E.2d 344, 348 (Mass. 1988) (noting practice location requirement akin to waivable requirement of venue).

58. *See* ch. 231, § 60B. The Massachusetts Medical Society solicits tribunal volunteers online. *Medical Malpractice Tribunal*, MASS. MED. SOC'Y, http://www.massmed.org/Physicians/Legal-and-Regulatory/Medical-Malpractice-Tribunal/#.UyXj3Nw5Mds (last visited Aug. 9, 2015), *archived at* http://perma.cc/R4X6-VK85 [hereinafter *Medical Malpractice Tribunal*] (offering video explaining tribunal process); *How You Can Help Prevent Wrongful Malpractice Suits*, MASS. MED. SOC'Y (Apr. 2011), http://www.massmed.org/News-and-Publications/Vital-Signs/How-You-Can-Help-Prevent-Wrongful-Malpractice-Suits/#.Ul8h8X_XvgV, *archived at* http://perma.cc/HVA7-4L45 [hereinafter *Help Prevent Wrongful Malpractice Suits*] (offering emotional appeal for volunteers).

59. *See* Brassard, *supra* note 10 (noting economic reasons for holding several tribunals at once with resulting delays in scheduling); Greeley, *supra* note 49 (commenting on inadequacy of compensation in light of physician salaries); Hsieh, *supra* note 9 (commenting on difficulty convincing busy physicians to volunteer for tribunal at fifty dollars per case). The Massachusetts Medical Society offers videoconferencing capability from three of its offices—Waltham, Holyoke, and Lakeville—as an alternative to traveling to the courthouse. *See* Dean P. Nicastro, Letter to the Editor, *Tribunal Adds 'Value' to System*, MASS. LAW. WKLY., Sept. 8, 2003, at 10 (discussing videoconferencing offerings); *Help Prevent Wrongful Malpractice Suits*, *supra* note 58 (explaining videoconferencing capabilities).

60. Ch. 231, § 60B. All lawsuits that meet these criteria are subject to tribunal review regardless of the court in which the lawsuit is filed. *See* Austin v. Bos. Univ. Hosp., 363 N.E.2d 515, 518-19 (Mass. 1977) (noting no exceptions in tribunal statute). The tribunal statute does not only apply to those lawsuits brought in superior court, which is the court where medical malpractice lawsuits are typically brought. *See id.* The United States District Court for the District of Massachusetts refers medical malpractice lawsuits filed there to the Massachusetts superior courts to be heard by tribunals in accordance with the Rules of Decision Act, which requires federal courts to apply state laws in civil cases where applicable. *See* Feinstein v. Mass. Gen. Hosp., 643 F.2d 880, 886-87 (1st Cir. 1981) (exploring Massachusetts's tribunal statute in light of Rules of Decision Act and Erie Doctrine).

alleging medical malpractice, medical negligence, lack of informed consent, and treatment-related claims of breach of contract or warranties, and unfair trade practices, such as claims asserted under the Massachusetts Consumer Protection Statute.[61] Even if the underlying lawsuit relates to a claim concerning medical treatment, a tribunal may not address nonmedical issues relating to the statute of limitations or the vicarious liability of a healthcare facility.[62]

4. Function and Standard of Review

The tribunal has three tasks.[63] First, it determines whether the defendant healthcare provider has a duty of care to the plaintiff.[64] Second, it determines whether the plaintiff's evidence "if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result."[65] Finally, it determines whether the plaintiff suffered damages as a result of the medical treatment.[66] The tribunal's standard of review is akin to the standard a judge employs when deciding a motion for directed verdict.[67] The tribunal may not

61. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015) (mentioning tort and breach of contract causes of action); Harnish v. Children's Hosp. Med. Ctr., 439 N.E.2d 240, 241 (Mass. 1982) (illustrating lack of informed consent case properly before tribunal); Little v. Rosenthal, 382 N.E.2d 1037, 1040 (Mass. 1978) (noting procedural requirements of Consumer Protection Act do not preempt tribunal); Anderson v. Attar, 841 N.E.2d 1286, 1289 (Mass. App. Ct. 2006) (reiterating all treatment-related tort, contract, or Consumer Protection Act claims subject to tribunal). *But see* Koltin v. Beth Israel Deaconess Med. Ctr., 817 N.E.2d 809, 811 (Mass. App. Ct. 2004) (excluding nontreatment-related contract claim from tribunal scrutiny).

62. *See* Kilmartin v. Lowell Gen. Hosp., 498 N.E.2d 1076, 1076 (Mass. App. Ct. 1986) (holding tribunal not "jurisdictionally competent" to decide vicarious liability issue); McMahon v. Glixman, 393 N.E.2d 875, 880 (Mass. 1979) (holding statute of limitations issue improperly before tribunal). Regarding the lack of informed consent tort, the tribunal may not consider whether the patient or a reasonable person in the patient's position would have consented to a course of treatment had the patient been fully informed. *See Harnish*, 439 N.E.2d at 244 (stating such nonmedical questions inappropriate for tribunal's inquiry).

63. *See infra* text accompanying notes 64-66 (describing tribunal's tasks).

64. *See* Santos v. Kim, 706 N.E.2d 658, 661 (Mass. 1999). In *Kapp v. Ballantine*, the SJC described this task as requiring the tribunal to determine if there was a doctor-patient relationship. *See* 402 N.E.2d 463, 468 (Mass. 1980). In *Santos*, the SJC clarified that that phrasing was a misstatement, and the tribunal must determine whether the defendant owes a duty of care to the plaintiff. *See Santos*, 706 N.E.2d at 660-61. The *Santos* lawsuit involved an alleged delay in reporting a concerning lab value, which resulted in a delay in the plaintiff's treatment. *Id.* at 659. The defendant was not the plaintiff's physician per se, but the SJC nevertheless held that he owed a duty of care to the plaintiff because he was responsible for designing the system used to report the lab results. *Id.* at 661.

65. Ch. 231, § 60B. The only other guidance the statute provides is that "[s]ubstantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion." *Id.* At the time the tribunal statute was first implemented, commentators opined that the standard of review should be everything from probable cause to the directed verdict standard. *See* Barshak, *supra* note 41, at 5 (proposing "probable cause" standard of review); McLaughlin, *supra* note 51, at 205 (contending evidence at tribunal must survive directed verdict analysis); *see also infra* note 67 (providing current standard of review).

66. *See Kapp*, 402 N.E.2d at 468.

67. *See* Little v. Rosenthal, 382 N.E.2d 1037, 1041 (Mass. 1978) (comparing tribunal's task to trial

address the strength or credibility of the plaintiff's evidence.[68] Partly as a result of this indulgent standard, tribunals find for the plaintiff in approximately 85% of all cases.[69]

5. The Evidence

Five days before the tribunal is scheduled to convene, the plaintiff must provide copies of her offer of proof to defense counsel and the court.[70] The offer of proof generally consists of a selection of the plaintiff's medical records and, most importantly, a letter signed by an expert witness.[71] A typical expert witness letter contains the expert's qualifications, a statement of what materials the expert has reviewed, an opinion that the defendant failed to meet the expected standard of care, what facts form the basis of that opinion, and an explanation of how the defendant's breach of the standard of care caused the plaintiff's current injuries.[72] The expert witness does not need to practice in the same specialty area as the defendant physician.[73] The statute also gives the tribunal subpoena power, along with the power to require independent medical

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judge's ruling on motion for directed verdict). The directed verdict standard considers the evidence in the light most favorable to the plaintiff. *See* St. Germain v. Pfeifer, 637 N.E.2d 848, 851 (Mass. 1994) (quoting directed verdict standard). The plaintiff succeeds if the tribunal determines a reasonable inference in favor of the plaintiff may be drawn from the evidence. *Id.*

68. *See* Blood v. Lea, 530 N.E.2d 344, 348 (Mass. 1988) (explaining tribunal may assess, not weigh, sufficiency of evidence).

69. *See* Greeley, *supra* note 49 (estimating tribunals screen out 10-15% of lawsuits); *Medical Malpractice Tribunal List*, *supra* note 58 (estimating tribunals screen out 16% of lawsuits); *see also* Kilmartin v. Lowell Gen. Hosp., 498 N.E.2d 1076, 1077 (Mass. App. Ct. 1986) (describing motion for directed verdict standard as indulgent). Another reason for the low number of screened-out lawsuits may be a lack of frivolous cases. *See supra* note 13 and accompanying text (regarding few frivolous lawsuits).

70. *Superior Court Standing Order 1-88: Time Standards (Third Amended)*, MASS. CT. SYS., http://www.mass.gov/courts/case-legal-res/rules-of-court/superior/sup-orders/sup1-88.html (last visited Sept. 3, 2015), *archived at* http://perma.cc/3YJM-7LFA.

71. *See* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015) (stating admissible evidence includes medical records and expert statements); Donna M. Norris, Editorial, *A Medical Malpractice Tribunal Experience*, 35 J. AM. ACAD. PSYCHIATRY & L. 286, 287 (2007) (describing length of offers of proof ranging from 13-400 pages); Greeley, *supra* note 49 (noting importance of expert letter); *Re-Thinking Med-Mal Tribunals*, *supra* note 49 (noting importance of expert letter). Critics of the offer of proof contend that a well-worded expert letter, containing the "'magic words' on standard of care and causation," will automatically survive the tribunal. *See* Hsieh, *supra* note 9.

72. *See* Lubin & Meyer, *supra* note 29, at 30-31 (listing recommended contents of expert letter).

73. *See* Kapp v. Ballantine, 402 N.E.2d 463, 467 (Mass. 1980) (describing leniency afforded to expert qualifications); Simonelli v. Johnson, No. 00-P-1793, 2002 WL 1961265, at *2 (Mass. App. Ct. Aug. 23, 2002) (holding gynecologist expert qualified to testify regarding defendant neurologist); Greeley, *supra* note 49 (describing tribunal acceptance of expert witness letter from podiatrist in case involving infectious disease). If a trial judge may possibly determine that a proffered expert witness is qualified to testify, then the tribunal may not question that expert's qualifications. *Kapp*, 402 N.E.2d at 467. To be qualified to testify at trial, plaintiffs must prove their expert witnesses have "sufficient education, training, experience and familiarity with the subject matter of the testimony." Letch v. Daniels, 514 N.E.2d 675, 677 (Mass. 1987) (internal quotation marks omitted).

examinations, but that prerogative is rarely exercised.[74]

6. *The Determination*

The court's clerk sends the tribunal's determination to the Board of Registration in Medicine.[75] This determination is not admissible at trial, but the tribunal's decision to appoint a physician to conduct an independent medical examination is admissible.[76] Although tribunals determine that a vast majority of cases are appropriate for judicial inquiry, of those lawsuits that reach the trial stage, over 90% of jury verdicts favor the defendants.[77]

7. *Bond*

After a tribunal's determination that the offer of proof is insufficient, the plaintiff may still proceed with her lawsuit by posting a $6000 bond with the court within thirty days of the finding.[78] If the defendant later wins at trial, that bond is payable to the defendant.[79] The purposes of the bond requirement are to discourage the pursuit of frivolous lawsuits and to help defray the costs of defending them by providing some financial assurance to the defendant.[80] The

74. *See* ch. 231, § 60B; KEVIN E. MCCARTHY, CONN. GEN. ASSEMB. OFFICE OF LEGIS. RESEARCH, 2003-R-0880, MASSACHUSETTS MEDICAL MALPRACTICE SCREENING (Dec. 2003), *available at* http://www.cga.ct.gov/2003/rpt/2003-R-0880.htm, *archived at* http://perma.cc/JVG5-P7NF (noting uncommon for tribunal to subpoena witnesses); Norris, *supra* note 71, at 288 (describing attorney presentation and question-and-answer process of tribunals); JACOBS & LAURENCE, *supra* note 25, § 5.7 (advising plaintiffs to present adequate offer of proof because live testimony only "theoretically . . . permissible"). *But see* McMahon v. Glixman, 393 N.E.2d 875, 878 (Mass. 1979) (describing testimony offered to tribunal in case from 1970s).

75. Ch. 231, § 60B.

76. *See* Beeler v. Downey, 442 N.E.2d 19, 24 (Mass. 1982).

77. *See* David E. Frank, *Odds Against Tort Plaintiffs in Massachusetts*, MASS. LAW. WKLY., June 14, 2010, at 1 (commenting nearly impossible for medical malpractice plaintiffs to prevail at trial); Greeley, *supra* note 49 (estimating 95% of medical malpractice trial verdicts favor defendants); *supra* note 69 and accompanying text (estimating number of lawsuits tribunal screens out). Anecdotally, plaintiff attorneys note instances of plaintiff verdicts in cases that tribunals had previously screened out, but where the plaintiffs posted the bond in order to continue to trial. *See* Cohen, *supra* note 1 (quoting plaintiff counsel on how tribunals screen out valid cases); Hsieh, *supra* note 9 (providing examples of jury verdicts in cases with negative tribunal findings).

78. MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015). In 1986, the bond increased from $2000 to $6000. An Act Relative to Medical Malpractice, Act of June 19, 1975, ch. 362, § 5, 1975 Mass. Acts 341 (codified as amended at MASS. GEN. LAWS ANN. ch. 231, § 60B (2015)) (clarifying $6000 constitutes aggregate amount, not per incident or per occurrence). The thirty-day period to file the bond starts to run when the clerk enters the tribunal finding on the docket, not on the date of the actual tribunal decision. Goldstein v. Barron, 414 N.E.2d 998, 999-1000 (Mass. 1980) (rejecting appeals court's addition of three-day allowance for mail to timeframe). The judge, in her discretion, may extend the thirty-day filing period. *Id.* at 1001.

79. *See* ch. 231, § 60B.

80. *See* Hanley v. Polanzak, 393 N.E.2d 419, 422 (Mass. App. Ct. 1979). The tribunal judge has the discretion to increase the tribunal bond to cover the defendant's costs. *See* ch. 231, § 60B; Denton v. Beth Israel Hosp., 465 N.E.2d 779, 782 (Mass. 1984) (allowing judge to increase bond in order to cover all of defendant's costs).

bond may be decreased, but not waived, based on a finding that the plaintiff is indigent.[81] In reducing the bond, a judge may consider whether the indigent plaintiff presented a good-faith argument in her offer of proof and whether a reasonable person would choose to proceed with the lawsuit; the judge, however, may not consider whether the plaintiff attorney is fronting the plaintiff's costs.[82]

8. Judgment and Appeal

If the plaintiff fails to post a bond within thirty days, a court must dismiss the complaint and enter judgment for the defendant.[83] At that point, the plaintiff may appeal the tribunal's decision.[84] If the tribunal determines that the plaintiff's offer of proof is sufficient, the defendant healthcare provider is not entitled to an interlocutory appeal and must similarly wait for a judgment before she may appeal.[85]

C. Alternatives

1. Notice Pursuant to chapter 231, section 60L of the Massachusetts General Laws

In 2012, the Massachusetts Legislature passed the second phase of a comprehensive healthcare reform bill aimed at controlling healthcare costs.[86] The tort reform aspect of this legislation, known colloquially as "disclosure, apology, and offer," encourages healthcare providers to disclose medical errors to their patients, apologize, and then, if appropriate, make an offer of compensation in hopes of averting a lawsuit.[87] This new type of tort reform

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81. *See* Faircloth v. DiLillo, 993 N.E.2d 338, 342 (Mass. 2013) (clarifying finding of indigency does not *require* reduction of bond).

82. *Id.*

83. Ch. 231, § 60B.

84. *See* McMahon v. Glixman, 393 N.E.2d 875, 877-78 (Mass. 1979) (recognizing plaintiff's right to appeal only after complaint dismissed). The SJC determined that it is the plaintiff's right to risk not posting the bond and seek appellate review of the tribunal's determination instead of proceeding through to trial. *See id.* at 878. After a plaintiff files a notice of appeal in the superior court, it may take several months for the case to be assembled and sent to the appeals court, and then up to a year after that for the appeal to be decided. *See* MASS. R. APP. P. 9 (regarding lower court's assembly of record and submission to appeals court); Jeanne M. Kempthorne et al., Opinion, *Justice Denied: Appeals Mired in Delay*, MASS. LAW. WKLY., Oct. 8, 2012, at 39 (discussing average 378-day delay before appeals decision in civil cases).

85. *See* Ruggiero v. Giamarco, 901 N.E.2d 1233, 1237 (Mass. App. Ct. 2009) (commenting on unnecessary delay if defendant allowed chance at interlocutory appeal).

86. *See* Bogue, *supra* note 3 (analyzing Massachusetts legislation in context of 2010 Patient Protection and Affordable Care Act's cost-containment provisions); Lois Dehls Cornell & Natalie MacLean Leino, *"Phase 2" of Healthcare Reform: The Massachusetts Experience*, 6 J. HEALTH & LIFE SCI. L. 151 *passim* (2013) (discussing non-litigation aspects of Massachusetts legislation).

87. *See* Debra Beaulieu-Volk, *Apology Laws: Talking to Patients About Adverse Events*, MED. ECON. (Jun. 10, 2014), http://medicaleconomics.modernmedicine.com/medical-economics/content/tags/apology-laws/

seeks to create a shift in the medical and legal culture regarding how medical mistakes are dealt with.[88] By forcing disclosure and apology, this reform seeks to obviate the sizeable contingent of medical malpractice lawsuits that patients file seeking apologies or answers.[89]

The "offer" prong of this legislation stipulates a timeline set forth in chapter 231, section 60L of the Massachusetts General Laws.[90] Prior to filing suit, the claimant is required to give notice to the prospective defendant healthcare providers, and must do so 182 days before filing.[91] The notice must contain the following elements:

> (1) the factual basis for the claim;
>
> (2) the applicable standard of care alleged by the claimant;
>
> (3) the manner in which it is claimed that the applicable standard of care was breached by the health care provider;
>
> (4) the alleged action that should have been taken to achieve compliance with

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apology-laws-talking-patients-about-adverse-events, *archived at* http://perma.cc/94RX-N9MA (explaining apology laws designed "in hopes that fewer patients will resort to lawsuits"); Bogue, *supra* note 3, at 107-08 (summarizing litigation aspects of legislation). Massachusetts was the first state to enact legislation protecting apologies from admission at a later trial, but some fear that this legislation may take a step back from those protections. *See* MASS. GEN. LAWS ANN. ch. 233, § 23D (West 2015) (making statements of "sympathy or a general sense of benevolence" inadmissible as evidence of liability); James G. Wagner, Opinion, *For Med-Mal Lawyers, Whole New Landscape*, MASS. LAW. WKLY., Dec. 10, 2012, at 38 (cautioning new law may make protections "more fleeting"); Williams, *supra* note 3, at 511 (crediting Massachusetts as first state to protect some apologies from use at trial). The new statute broadens the scope of the protected statements to those concerning "benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error or a general sense of concern." MASS. GEN. LAWS ANN. ch. 233, § 79L (West 2015). These statements, however, may become "admissible for all purposes" if the maker of that statement, or a defense expert witness, later makes a "contradictory or inconsistent statement" under oath during the course of litigation. *See id.*; Beaulieu-Volk, *supra* (cautioning "lawyers can 'blow a hole in every one'" of states' apology laws); Brandon Gee, *Two Years in, Med-Mal Law Reforms Showing Promise*, MASS. LAW. WKLY., Mar. 2, 2015, at 1 (explaining this part of statute "yet to be tested in the courts"); Mello et al., *supra* note 41, at 2151 (suggesting Massachusetts' apology law "may limit candor"); Wagner, *supra* (calling situation ripe for "creative lawyering at trial").

88. *See* Beaulieu-Volk, *supra* note 87, *passim* (describing complexities in encouraging physician apologies); Bogue, *supra* note 3, at 114 (noting burden on attorneys to accept new "culture of transparency"); Darshak Sanghavi, *Why Is it So Hard for Doctors To Apologize?*, BOS. GLOBE, Jan. 27, 2013 (Magazine) at 16, 18 (explaining shift from old "deny and defend" malpractice system).

89. *See* Johnson, *supra* note 4, at 49 (explaining patients need opportunity to ask questions); Williams, *supra* note 3, at 506-07 (contending patients do not sue for revenge or money); Gee, *supra* note 87 (proffering "betrayal . . . drives clients to lawyers in many [medical malpractice] cases"); Marc G. Perlin & John M. Connors, *A New Wrinkle in Med-Mal Cases: The Pre-Litigation Notice*, MASS. LAW. WKLY., May 6, 2013, at 21 (explaining statute provides opportunity to "avoid the burden and expense of litigation"). Two studies have indicated that once plaintiffs received the answers they were seeking and discovered that the physicians were not negligent, they tended to dismiss their lawsuits. *See* Williams, *supra* note 3, at 507.

90. *See infra* notes 91-96 and accompanying text (containing details of timeline).

91. *See* MASS. GEN. LAWS ANN. ch. 231, § 60L (West 2015). This has been referred to as a "cooling off" period. *See* Wagner, *supra* note 87.

> the alleged standard of care;
>
> (5) the manner in which it is alleged the breach of the standard of care was the proximate cause of the injury claimed in the notice; and
>
> (6) the names of all health care providers that the claimant intends to notify under this section in relation to a claim.[92]

Within the next fifty-six days, the claimant must provide the healthcare provider with all of the medical records in her control, and provide authorizations to obtain those records that she does not control.[93] Within 150 days following the notice, the healthcare provider must respond, elucidating the following elements:

> (1) the factual basis for the defense, if any, to the claim;
>
> (2) the standard of care that the health care provider claims to be applicable to the action;
>
> (3) the manner in which it is claimed by the health care provider that there was or was not compliance with the applicable standard of care; and
>
> (4) the manner in which the health care provider contends that the alleged negligence of the health care provider was or was not a proximate cause of the claimant's alleged injury or alleged damage.[94]

This is presumably the point at which the healthcare provider alternatively may make an offer to settle.[95] If the healthcare provider fails to respond or declines to settle, the claimant may immediately file suit.[96] Notably, there is nothing in the statute that provides a remedy for a party's failure to abide by it.[97]

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92. Ch. 231, § 60L.

93. *Id.*

94. *Id.*

95. *See* Brandon Gee, *Bar Moves To Stem Skepticism as Med-Mal Reforms Take Effect*, MASS. LAW. WKLY., June 7, 2013, at 1 (noting 150-day period before offer to settle must be made).

96. *See* MASS. GEN. LAWS ANN. ch. 231, § 60L (West 2015). It may be inferred that if the healthcare provider does make an offer to settle, then the claimant may not file suit until the 182-day period has expired. *See id.* The statute states a claimant *shall* not file a lawsuit before giving the 182-day notice, but *may* file after 150 days if the healthcare provider does not respond or declines to make an offer. *See id.* This timeline may be shortened to ninety days if the claimant has already sent the notice to a prospective defendant healthcare provider, or if a plaintiff is adding another defendant to an existing lawsuit. *See id.* Furthermore, claimants who are near the end of the statutes of limitation or repose periods are exempt from these requirements. *See id.*

97. *See id.*; Wagner, *supra* note 87 (calling notice requirement "toothless"). The statute does provide that in the instances where a plaintiff files a lawsuit, is thereafter awarded damages, and the healthcare provider had previously failed to respond to the plaintiff's pre-suit "notice of intent," then prejudgment interest on those damages will be calculated from the date of the "notice of intent" rather than from the date that the plaintiff filed the complaint. *See id.*

2. *Certificates of Merit*

A number of states require filing certificates of merit before, with, or after filing a medical malpractice complaint.[98] The purpose of this requirement is to discourage the filing of frivolous lawsuits.[99] These certificates of merit function similarly to both the notice required by chapter 231, section 60L of the Massachusetts General Laws, and the expert letter required in the offer of proof submitted to tribunals, which generally must state the expert's qualifications, opinions on the standard of care and causation elements, and the factual bases of these opinions.[100] Plaintiffs have challenged certificate of merit statutes on constitutional grounds similar to the challenges against screening panel statutes, alleging they violate the doctrines of equal protection, due process, separation of powers, and the right of people to access the courts.[101] Approximately fifteen states have certificate of merit statutes, sometimes in addition to screening panel statutes.[102]

Massachusetts employs a version of the certificate of merit system for litigation involving the negligent serving of alcohol.[103] In 1985, in response to

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98. *See* Thomas J. Hurney, Jr. et al., *Challenges to Affidavit of Merit Requirements*, FOR THE DEFENSE, June 2008, at 12-13. Some of these statutes are not specifically directed at medical malpractice lawsuits; rather, they require filing certificates of merit in lawsuits alleging malpractice against any licensed professional, including architects, accountants, and attorneys. *See* Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 539 (1997) (identifying various types of lawsuits requiring certificates of merit).

99. *See* Crawford, *supra* note 7, at 3 (providing statistics proving these statutes reduce lawsuits); Hurney et al., *supra* note 98, at 12 (stating purpose to avoid lawsuits without expert support).

100. *See* Hurney et al., *supra* note 98, at 12, 13-14 (exploring statutory requirements of certificates of merit in seven states). For example, the West Virginia statute states:

> The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.

W. VA. CODE ANN. § 55-7B-6(b) (West 2015).

101. *See* Hurney et al., *supra* note 98, at 15-17 (describing constitutionality of various certificate of merit statutes); Nathanson, *supra* note 7, at 1115-19 (describing three categories of constitutional challenges to certificate of merit statutes).

102. *See* Nathanson, *supra* note 7, at 1111, 1121-22 (indicating states often have more than one method of tort reform).

103. *See* MASS. GEN. LAWS ANN. ch. 231, § 60J (West 2015) (requiring affidavit filed with complaint in certain liquor liability lawsuits); *infra* notes 104-113 and accompanying text (describing use of certificates of merit in Massachusetts). Negligent serving of alcohol is a straightforward negligence tort in that it does not require expert witness testimony to prove the breach-of-duty prong. *See* Pucci v. Amherst Rest. Enters., Inc., 605 N.E.2d 309, 310 (Mass. App. Ct. 1992) (describing tavern keeper's duty of care to patron as one of reasonableness). Thus, the affidavit does not have to be from an expert witness. *See* Courtemanche v. Beijing Rest., Inc., 490 F. Supp. 2d 107, 110 (D. Mass. 2007) (stating affidavit from friend of decedent who drank with decedent). The United States District Court for the District of Massachusetts has required an affidavit in a

soaring liquor liability insurance premiums and an increase in the size of damage awards in liquor liability lawsuits, the Massachusetts legislature enacted tort reform to ensure the availability of this kind of insurance.[104] Part of this legislation included requiring plaintiffs, who allege the negligent serving of alcohol to a minor or to an intoxicated person, to file an affidavit with their complaints, or within ninety days thereafter.[105] The affidavit must set "forth sufficient facts to raise a legitimate question of liability appropriate for judicial inquiry."[106] Without this affidavit, the plaintiff's complaint is "insufficient as a matter of law."[107]

After the plaintiff files the affidavit, the defendant may move for summary judgment.[108] If the judge grants summary judgment, the plaintiff may seek an interlocutory appeal of that decision.[109] The plaintiff has thirty days following her notice of appeal to file a $2000 bond as to each defendant with the

lawsuit alleging the defendant negligently trained its employees to serve alcohol because the plaintiff still had to prove that the negligent training resulted in negligent serving of alcohol. *See* Chiulli v. Newbury Fine Dining, Inc., 895 F. Supp. 2d 277, 282 (D. Mass. 2012) (concluding plaintiff's allegation falls within purview of affidavit statute). That same court has also required an affidavit from a third-party plaintiff. *See Courtemanche*, 490 F. Supp. 2d at 110. In *Courtemanche*, the defendant restaurant filed a third-party complaint against another restaurant seeking indemnification or contribution for damages. *See id.* at 109.

104. *See* H.R. 6508, 174th Leg., 1st Sess. (Mass. 1985) (describing purpose of proposed statute); James M. Goldberg, *One for the Road Liquor Liability Broadens*, A.B.A. J., June 1, 1987, at 84, 86 (explaining nationwide changes in liquor liability market at that time). The main purpose of the Act was to establish the Liquor Liability Joint Underwriting Association (LLJUA). *See* An Act Relative to Liquor Legal Liability Insurance, ch. 223, §§ 2-13, 1985 Mass. Acts 482, 483-87. The Legislature enacted the LLJUA to ensure the availability of liability insurance to businesses serving alcoholic beverages. MASS. DIV. OF INS., REPORT ON THE STATUTORY EXAMINATION OF THE LIQUOR LIABILITY JOINT UNDERWRITING ASSOCIATION OF MASSACHUSETTS, Dec. 31, 2006, at 2, *available at* http://www.mass.gov/ocabr/docs/doi/companies/fin-reports/liquorliability123106webrpt.pdf, *archived at* https://perma.cc/V2UZ-SE9J [hereinafter REPORT ON LLJUA] (providing history of LLJUA). Initially designed as a temporary solution, the "expiration date" of the LLJUA was extended twice, and then that section of the enabling act was removed altogether in 2002, making the LLJUA a permanent institution. *See* § 13, 1985 Mass. Acts at 487 (providing initial "expiration date" of December 31, 1987); REPORT ON LLJUA, *supra*, at 3 (discussing extension of LLJUA's mandate). In 2008, however, the Legislature privatized the LLJUA, converting it into a mutual insurance company. *See History*, HOSPITALITY INS. GRP., http://www.hospitality-mutual.com/history (last visited Mar. 16, 2014), *archived at* http://perma.cc/8V5C-NJYH.

105. *See* § 17, 1985 Mass. Acts at 488-89 (codified as amended at MASS. GEN. LAWS ANN. ch. 231, § 60J (2015)). A judge, in her discretion, may extend the ninety-day period. *See* Croteau v. Swansea Lounge, Inc., 522 N.E.2d 967, 969 (Mass. 1988) (allowing time extension when appropriate). In *Croteau*, the SJC drew an analogy between granting an extension of time to file the affidavit with granting an extension of time to post the bond in a medical malpractice lawsuit. *See id.* (quoting Goldstein v. Barron, 414 N.E.2d 998 (Mass. 1980)).

106. Ch. 231, § 60J.

107. *Pucci*, 605 N.E.2d at 310. The United States District Court of Massachusetts has called this affidavit requirement "mandatory and unambiguous." *Chiulli*, 895 F. Supp. 2d at 281.

108. Ch. 231, § 60J.

109. *See id.*; *see also Croteau*, 522 N.E.2d at 969 (explaining defendants alternatively filed motion to dismiss for failure to comply with statute).

appellate court.[110] If the defendant prevails on appeal, the bond is paid to the defendant.[111] The bond may be reduced or eliminated upon a judge's finding that the plaintiff is indigent.[112] Like certificates of merit, this affidavit requirement is intended to prevent defendants from expending money defending frivolous lawsuits.[113]

III. ANALYSIS

The causes of the cyclical fluctuations in medical malpractice insurance premiums are often debated.[114] Whether the number of medical malpractice lawsuits is to blame and whether significant numbers of frivolous medical malpractice lawsuits exist are also hotly debated topics.[115] This Note does not attempt to weigh in on any of these debates; this Note advocates for more efficient litigation of the medical malpractice lawsuits that are filed.[116] Although well-intentioned, the tribunal system has proved worthless.[117] The goal of medical malpractice tort reform should be to reduce the time and cost of this type of litigation.[118] The enactment of the pre-suit notification procedures is a step in the right direction in encouraging early resolution of these lawsuits, but the statute provides no methods for oversight or enforcement.[119]

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110. MASS. GEN. LAWS ANN. ch. 231, § 60J (West 2015).

111. *Id.*

112. *Id.*

113. *See* Croteau v. Swansea Lounge, Inc., 522 N.E.2d 967, 969 (Mass. 1988) (explaining affidavit mechanism designed to reduce frivolous lawsuits).

114. *See* Williams, *supra* note 3, at 479 (noting "countless academicians and policymakers have weighed in on the issue"); Miller, *supra* note 7, at 1463-70 (summarizing multiple viewpoints on "who's to blame" for medical malpractice insurance crises).

115. *Compare The Med-Mal Premium Crisis*, *supra* note 41 (describing contention between Massachusetts Academy of Trial Attorneys and Massachusetts Medical Society), *with supra* note 41 (noting differing viewpoints).

116. *See infra* Part III.B.1 (providing specific proposal for new screening system).

> Medical negligence is a fact of life just like other forms of negligence. Physicians will continue to make mistakes in the care and treatment of patients. In reality, physicians do high-risk work. It can and does injure patients. Some mistakes will meet the legal definition of medical negligence. Some physicians will be negligent often. Litigation is also a fact of modern life. Some patients will want to sue when they are disappointed, hurt or grief-stricken at an unexpected result, whether or not it was caused by negligence.

Johnson, *supra* note 4, at 44.

117. *See infra* Part III.A.

118. *See Re-Thinking Med-Mal Tribunals*, *supra* note 49, at 2230 (calling for tribunal reform to fix "outdated, expensive and . . . burdensome" system); *Time To Revise Med-Mal Tribunal Statute*, *supra* note 9, at 366 (calling for tribunal reform in order to increase efficiency); *see also* Mello et al., *supra* note 41, at 2148 (explaining objectives of tort reform are reduction of "volume and cost of malpractice litigation").

119. *See* Gee, *supra* note 87 (opining pre-suit letters largely ignored); *supra* text accompanying note 97 (concerning lack of remedies for failing to adhere to pre-suit notification requirements).

Massachusetts should adapt the certificate of merit requirement for liquor liability lawsuits to medical malpractice liability lawsuits and bring the pre-suit notification procedures' established timeline within the purview of the court system in order to provide for enforcement.[120]

A. Problems with the Tribunal System

From attorneys to judges to physicians, the tribunal system is universally disliked.[121] Different people have different perspectives: plaintiff attorneys want the system abolished or at least simplified; defense attorneys also agree the system could be simplified; and healthcare providers and their insurers want the system strengthened.[122] Regardless of one's perspective, it is clear that the existing system only exacerbates the time and cost challenges already inherent in medical malpractice litigation.[123]

1. Time Delay

Scheduling tribunals is "an administrative nightmare," and by the time one is scheduled, months have passed since the lawsuit's initiation, at times without the parties having conducted any discovery.[124] If the defendant healthcare provider practices in a particularly specialized area of medicine, the scheduling process is drawn out due to the difficulty in finding a medical member to participate in the tribunal who practices the same specialty.[125] When the tribunal does occur, it takes minutes for the panel to establish that the plaintiff has produced an appropriate expert witness letter and determine that the lawsuit

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120. *See* Riccio, *supra* note 53 (proposing certificate of merit procedure in liquor liability cases as example for medical malpractice tort reform); *infra* text accompanying notes 140-148 (providing specific proposal for new screening system); *cf.* Johnson, *supra* note 4, at 52 (advocating court oversight as only way to enforce mediation of medical malpractice claims).

121. *See* Cohen, *supra* note 1 (noting chief justices of state's trial courts supporting legislation to abolish tribunals); *Time To Revise Med-Mal Tribunal Statute*, *supra* note 9 (noting "tribunals aren't especially popular with either the plaintiffs' or the defense bar"); Hsieh, *supra* note 9 (noting defense attorneys find tribunal hearing unnecessary and only want plaintiff's expert witness letter); Nicastro, *supra* note 59 (acknowledging Massachusetts Medical Society considers tribunal "imperfect"); *supra* note 49 and accompanying text (explaining attempts to repeal tribunal statute).

122. *See* Cohen, *supra* note 1 (exploring plaintiff and defense perspectives on tribunal system); Hsieh, *supra* note 9 (quoting plaintiff and defense attorneys both wanting to abolish or tweak tribunal system); Nicastro, *supra* note 59 (representing Massachusetts Medical Society desire for "tightening the screening mechanism").

123. *See Re-Thinking Med-Mal Tribunals*, *supra* note 49 (noting delay may also increase defense costs); Greeley, *supra* note 49 (calling tribunal delays "a disgrace"); *supra* notes 27-33 and accompanying text (discussing length and costs of medical malpractice lawsuits).

124. Cohen, *supra* note 1 (calling scheduling tribunals "administrative nightmare"); *supra* notes 51, 53 and accompanying text (discussing delays in scheduling tribunals).

125. *See* Brassard, *supra* note 10 (noting difficulties in finding medical member with appropriate specialty); Greeley, *supra* note 49 (noting attorneys may agree on medical member of different specialty in order to convene tribunal).

may continue.[126] If a tribunal's determination for the defendant is eventually overturned on appeal, the case is reopened in the trial court up to one year later without the parties having conducted discovery, which further delays the resolution of these lawsuits.[127]

2. *Financial Cost*

To defendants, the costs of waiting, preparing for, and attending tribunals may outweigh the financial benefit of defending 15% fewer lawsuits.[128] Plaintiffs experience those same costs, along with the additional costs of attempting to conduct discovery prior to the tribunal and potentially having to post a $6000 bond to proceed if the tribunal screens out their lawsuit.[129] Moreover, administering the tribunal system costs the already burdened court system tens of thousands of dollars per year.[130]

3. *Ineffectiveness*

In addition to the low number of lawsuits that are actually screened out, the fact that Massachusetts has experienced at least one subsequent cycle of soaring medical malpractice insurance premiums is further evidence that the tribunal system has not achieved its purpose.[131] Massachusetts's experience is not unique: studies have found that screening panels in other states are similarly ineffective.[132] Furthermore, plaintiff attorneys have long claimed, and two independent, Massachusetts-based studies have concluded, there are

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126. *See* Norris, *supra* note 71, at 288 (noting tribunal hearings move quickly).

127. *See supra* note 84 (explaining length of appeals process).

128. *See Re-Thinking Med-Mal Tribunals*, *supra* note 49 (noting these defense costs may add to medical malpractice insurance costs); *supra* note 69 and accompanying text (providing statistics of number of lawsuits tribunals screen out).

129. *See* Greeley, *supra* note 49 (explaining costs to plaintiff counsel); *supra* notes 78-82 and accompanying text (explaining bond requirement and associated costs). From the defense perspective, it is more cost-effective to not conduct discovery prior to the convening of a tribunal because, should the tribunal determine that the lawsuit is meritless, any time and money spent on discovery would have been wasted. *See* Greeley, *supra* note 49 (noting choice not to conduct discovery "not a delay tactic by the defense").

130. *See* Brassard, *supra* note 10 (estimating tribunal's costs to court system at $50,000 per year); Cohen, *supra* note 1 (estimating tribunal's costs to court system at $75,000 per year); Hsieh, *supra* note 9 (noting tribunal costs burden court system already facing budget cuts).

131. *See* LINDA J. MELCONIAN ET AL., INTERIM REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE (UNDER SECTION 12 OF CHAPTER 362 OF THE ACTS OF 1975 AND SECTION 39 OF CHAPTER 351 OF THE ACTS OF 1986), H.R. 175-6186, 1st Sess., at 15 (Mass. 1987) (expressing some concern over medical malpractice insurance premium increases in 1987); Mello et al., *supra* note 41, at 2153 (predicting insurance crises in future); *The Med-Mal Premium Crisis*, *supra* note 41 (discussing rise in insurance premiums in 2003); *supra* text accompanying notes 46-47 (describing goals of tribunal system).

132. *See supra* note 7 and accompanying text (explaining failures of screening panels nationwide).

few truly frivolous medical malpractice lawsuits.[133] Of the lawsuits that plaintiffs fail to pursue, the discovery process is necessary in order for plaintiff attorneys to adequately evaluate whether the lawsuit has merit.[134] Thus, the very target of the tribunal system—frivolous lawsuits—are not a significant problem.[135]

4. Redundancy

The recently enacted pre-suit notification procedure now renders these tribunals redundant.[136] In fact, some plaintiff attorneys are providing the expert witness statement, which is normally not disclosed until the tribunal, to defense counsel along with the pre-suit notification letter.[137] The information provided in the expert witness statement that is presented to the tribunal is almost identical to the information that must be provided to defense counsel in a "notice of intent" prior to filing the complaint.[138] The major differences between the two are that the notice of intent does not identify the plaintiff's expert witness or the records that the expert evaluated.[139]

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133. *See supra* note 13 and accompanying text (discussing studies concluding few frivolous medical malpractice lawsuits). Plaintiff attorneys contend that it is "professional suicide for an attorney to take on a malpractice case without an expert opinion in his pocket." Greeley, *supra* note 49 (quoting plaintiff attorney) (internal quotations omitted); *see also* Golann, *supra* note 13, at 1346 (citing contingency fee system as strong incentive for plaintiff attorneys to not bring frivolous cases); Hsieh, *supra* note 9 (suggesting plaintiff attorney "who knows what he is doing is already screening cases"). Medical malpractice lawsuits are most often dropped because information gained during discovery reveals that the strength of the plaintiff's claim is weaker or the amount of expected damages is lower than previously thought. *See* Golann, *supra* note 13, at 1346-47 (exploring reasons why plaintiffs drop lawsuits). One study reviewed insurance claims regarding medical error from the perspective of the healthcare provider, and physicians analyzed the medical records of the patients who brought these claims and determined whether the claims were truly meritless. *See* Studdert et al., *supra* note 13, at 2025-26 (describing method of study). This study concluded that even if the plaintiffs had never brought the truly meritless claims, the savings to the insurance company would have been less than 20%. *Id.* at 2031. In addition, "three quarters of the litigation outcomes were concordant with the merits of the claim." *Id.*

134. *See* Golann, *supra* note 13, at 1346-47 (exploring reasons why plaintiffs drop lawsuits).

135. *See supra* text accompanying notes 46-47 (describing goal of tribunal system); *supra* note 13 and accompanying text (contending few frivolous medical malpractice lawsuits exist).

136. *See* Hsieh, *supra* note 9, at 273 (positing new healthcare law could "obviate the need for med-mal tribunals").

137. *See* Gee, *supra* note 87, at 1149.

138. *Compare supra* text accompanying note 72 (listing common elements contained in expert-witness statement), *with* MASS. GEN. LAWS ANN. ch. 231, § 60L (West 2015) (listing required elements of "notice of intent").

139. *See* Gee, *supra* note 95 (mentioning difficulty of not having plaintiff's expert-witness letter before responding to "notice of intent"); Hsieh, *supra* note 9 (explaining defense counsel unable to adequately defend lawsuit without plaintiff's expert-witness letter).

B. Proposal

1. Specific Proposals

The Massachusetts legislature should repeal chapter 233, section 60B, and chapter 231, section 60L of the Massachusetts General Laws and replace them with a statute that integrates the provisions of both section 60L and the certificate of merit requirements in certain liquor liability lawsuits.[140] Specifically, in lawsuits alleging medical malpractice, plaintiffs should be required to file their expert witness's signed certificate of merit as an attachment to the complaint.[141] In situations where the plaintiff is approaching the statutes of limitations or repose, the certificate of merit may be filed within ninety days following the complaint, provided plaintiff's counsel attaches a signed affidavit to the complaint asserting that she in good faith could not obtain an expert witness review in time.[142] The certificate of merit shall include the same elements that section 60L currently requires in the plaintiff's "notice of claim" to the defendant, along with the qualifications of the expert witness and the materials the expert witness reviewed.[143] Further, within fourteen days of service of the defendant's answer to the complaint, the plaintiff attorney shall provide the defense attorney with complete copies of all medical records in the plaintiff's possession and signed authorizations granting the defendant permission to receive those records that the plaintiff does not possess.[144]

Within 182 days of the filing of the complaint, the defendant must provide a response to the plaintiff.[145] The response shall either constitute an offer of

140. *See infra* Part III.B.1 (providing specific proposals).

141. *See supra* text accompanying note 98 (discussing other states' requirement of filing certificate of merit with complaint).

142. *See* Nathanson, *supra* note 7, at 1112 (noting other states' certificate of merit statutes allow extensions in consideration of statute of limitations); *cf.* MASS. GEN. LAWS ANN. ch. 231, § 60L (West 2015) (exempting lawsuits filed near end of statutes of limitations or repose); ch. 231, § 60J (providing for ninety-day period after complaint to file affidavit in certain liquor liability lawsuits).

143. *See* Gee, *supra* note 95 (mentioning difficulty of not having plaintiff's expert-witness letter before responding to "notice of intent"); *infra* Part III.B.2 (discussing benefits of disclosing expert witness qualifications); *cf.* ch. 231, § 60L (providing elements which plaintiff must include in "notice of intent"); *supra* text accompanying note 138 (comparing differences between requirements of "notice of intent" and expert-witness statement to tribunal).

144. *Cf.* MASS. GEN. LAWS ANN. ch. 231, § 60L (West 2015) (providing plaintiffs with fifty-six-day period to provide defendant with medical records or authorizations). Given that plaintiff counsel has already requested her client's medical records in order to investigate the claim and obtained an expert witness opinion before she files the complaint, allowing fifty-six days for plaintiff counsel to provide copies of those records or authorizations to defense counsel is an unnecessarily long time period. *See supra* text accompanying note 29 (explaining obtaining medical records precedes lawsuits).

145. *Cf.* ch. 231, § 60L (providing defendants with 150 days to respond to plaintiff's "notice of intent"); *supra* note 96 (discussing vagueness of statute's 182-day time period). A shorter time period would not afford enough time to properly investigate the plaintiff's claim because defense counsel must obtain the records that

settlement or include a report signed by an expert witness; the report must contain the same elements that are required in the plaintiff's certificate of merit, along with the qualifications of the expert witness and the materials the expert witness reviewed.[146] After the running of the 182-day time period, the defendant may file a motion for summary judgment on the grounds that the plaintiff failed to provide a certificate of merit or that the certificate of merit does not raise a "legitimate question of liability appropriate for judicial inquiry."[147] If the judge grants summary judgment in favor of the defendant, the court shall dismiss the lawsuit without prejudice.[148]

2. *Expert Witness Qualifications*

Currently, the tribunal's extremely deferential view toward expert witness qualifications is incongruous with the more rigorous standards for expert qualifications at trial.[149] The SJC has made clear that an expert witness's qualifications go to the weight of that expert's testimony, not to its admissibility.[150] Thus, in the plaintiff's certificate of merit and the defendant's response, the parties should be required to disclose the bases for their expert witnesses' qualifications to opine on the standard of care and causation elements.[151] Requiring this type of disclosure would discourage plaintiff attorneys from filing suits before adequately vetting their clients' claims and conversely discourage defense attorneys and health insurers from routinely denying claims without thorough investigation.[152] Moreover, requiring this

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the plaintiff did not provide, in addition to retaining and consulting an expert witness, in order to respond to the plaintiff. *See* Gee, *supra* note 95 (characterizing 150-day period as "not enough time to evaluate certain claims").

146. *See* Teninbaum & Zimmermann, *supra* note 28, at 448 (discussing current system's unequal disclosure of expert opinions between plaintiff and defense counsel); *infra* Part III.B.2 (noting benefits of disclosing expert witness qualifications); *cf.* ch. 231, § 60L (providing elements defendant must include in response to plaintiff's "notice of intent"); *supra* text accompanying note 72 (providing elements commonly contained in expert-witness statement to tribunal).

147. MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015) (stating tribunal's realm of inquiry); *cf.* ch. 231, § 60J (allowing party to move for summary judgment in liquor liability lawsuits following filing of affidavit); Brassard, *supra* note 10 (suggesting judge's review "would have the principal advantage of greater speed"); Cohen, *supra* note 1 (suggesting tribunal's "decision could be made much more economically by just a judge"); Greeley, *supra* note 49 (summarizing Judge Zobel's preference for judicial review of offer of proof); Riccio, *supra* note 53 (proposing failure to file affidavit in medical malpractice cases "could be challenged by defendant").

148. *See infra* Part III.B.3 (explaining reasons for proposing dismissal without prejudice); *cf.* ch. 231, § 60B (stating medical malpractice lawsuit dismissed after negative tribunal finding); Nathanson, *supra* note 7, at 1112-14 (discussing various states' remedies, including dismissal, for failure to file certificates of merit).

149. *See supra* note 73 (discussing standards for expert witness qualifications at both tribunal and trial).

150. *See* Letch v. Daniels, 514 N.E.2d 675, 677 (Mass. 1987) (explaining expert's qualification "goes to the weight accorded his testimony but not to its admissibility").

151. *Cf.* Lubin & Meyer, *supra* note 29, at 29-30 (recommending expert writing statement for tribunal should possess qualifications adequate for trial testimony).

152. *See* Nathanson, *supra* note 7, at 1115 (discussing purposes of states' limitations on qualifications of

type of disclosure would not actually preclude the use of any expert.[153] Rather, it would assist a party, and any judge reviewing a motion for summary judgment, in assessing the strength of the opposing party's case, perhaps encouraging early settlement.[154]

3. Dismissal Without Prejudice

The only way to achieve the original purposes behind the bond requirement—discouraging pursuit of frivolous litigation and defraying the cost of defending such claims—would be to significantly increase the amount of that bond because the amount provided for in the tribunal statute is so disproportionate to the overall costs of pursuing a medical malpractice lawsuit.[155] To do so would only exacerbate the already high costs inherent in medical malpractice litigation and may risk the SJC deeming such increased amount unconstitutional.[156] Instead, a lawsuit that does not meet the certificate of merit requirement should be dismissed without prejudice.[157] Plaintiffs will then have the option of either appealing that dismissal or filing a second lawsuit with an adequate certificate of merit.[158] Plaintiffs' understanding that the statutes of limitations and repose will continue to run throughout a lawsuit that is later dismissed as meritless should be adequate deterrence against failing to properly investigate a claim.[159]

experts who can submit certificates of merit); *cf.* Gee, *supra* note 95 (expressing "distrust among the plaintiffs' bar" regarding healthcare providers' commitment to disclosure and apology); Greeley, *supra* note 49 (suggesting benefit of tribunal may lie in forcing plaintiff counsel to "self-screen" their cases).

153. *Cf.* Nathanson, *supra* note 7, at 1115 (discussing Maryland's exclusion of experts based on time spent testifying in personal injury lawsuits).

154. *Cf.* Lubin & Meyer, *supra* note 29, at 30 (discussing qualifications of expert writing statement for tribunal). "[T]he use of an expert medical witness who will have no problem qualifying at trial adds credibility to the plaintiff's claim after a tribunal finding in favor of the plaintiff, thus assisting in any subsequent settlement negotiations." *Id.*

155. *See supra* text accompanying note 80 (discussing purposes of bond requirement). *Compare* MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015) (providing for $6000 bond requirement), *and* Faircloth v. DiLillo, 993 N.E.2d 338, 342 (Mass. 2013) (allowing for reduction of bond to accommodate indigent plaintiff), *with supra* notes 27-30 and accompanying text (discussing high costs of medical malpractice lawsuits in tens of thousands of dollars).

156. *Cf. Faircloth*, 993 N.E.2d at 343 (cautioning judge may not unreasonably burden indigent plaintiff's meritorious suit with full bond amount); Eggen, *supra* note 4, at 12-13 (explaining Arizona Supreme Court struck down bond requirement due to burden imposed on plaintiffs).

157. *Cf.* Nathanson, *supra* note 7, at 1112-14 (explaining some other states provide for dismissal upon failure to file certificate of merit).

158. *Cf. supra* notes 83-84 and accompanying text (describing plaintiff's options following tribunal determination).

159. *See* Franklin v. Albert, 411 N.E.2d 458, 459-60 (Mass. 1980) (stating statutes of limitations encourage timely filing); *cf.* McMahon v. Glixman, 393 N.E.2d 875, 878 (Mass. 1979) (stating plaintiff who fails to post bond runs risk of "being out of court entirely"). Some courts in other jurisdictions have interpreted certificate of merit requirements liberally to avoid dismissal because of the view that dismissal at such an early stage in a lawsuit is too harsh of a sanction. *See* Hurney et al., *supra* note 98, at 17. In Massachusetts, however, often no

C. Benefits of Proposal

This Note's proposed legislation will meet the expectations of all parties involved in medical malpractice litigation.[160] On the defense side, counsel will be assured in receiving the plaintiff's expert witness statement prior to conducting discovery.[161] Healthcare providers and insurers will be assured that the judge, in deciding the motion for summary judgment, will screen out the truly frivolous cases that fail to produce an adequate certificate of merit.[162] Maintaining the 182-day time period and requiring a detailed response from the defendants will encourage early resolution of these lawsuits, particularly those that plaintiffs file simply to seek answers.[163] On the other side, plaintiff's counsel will have access to the same information about the defense's expert witnesses that defense counsel will have about the plaintiff's expert witnesses, which will further assist them in evaluating the strength of their case.[164] Having a judge be the sole reviewer of the certificate of merit will reduce the chance that valid cases are wrongfully screened out.[165] This system will increase patients' access to justice and encourage plaintiff attorneys to take on cases with smaller damages because it will lower the costs of medical malpractice litigation.[166] The shorter time period between filing and resolution of lawsuits will further deter medical errors, thereby positively impacting patient safety.[167] Finally, requesting the court's intervention only after the exchange of the certificate of merit and involving the review of only a judge,

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discovery has occurred prior to the dismissal of a lawsuit following a negative tribunal finding and the plaintiff's failure to post bond. *See supra* note 53 and accompanying text (concerning lack of discovery prior to tribunal).

160. *See infra* Part III.C (describing how proposal meets expectations).

161. *See* Hsieh, *supra* note 9 (explaining defense attorneys only want expert letter); *supra* Part III.B.1 (describing proposed elements for certificate of merit).

162. *See supra* Part III.B.1 (describing proposed judicial review of certificate of merit); *cf.* Nicastro, *supra* note 59 (stating Massachusetts Medical Society's desire for tribunal to screen out or deter filing insubstantial claims).

163. *See* Perlin & Connors, *supra* note 89, at 1552 (explaining notice requirement encourages early resolution of lawsuits); *supra* Part III.B.1 (describing proposed 182-day timeline).

164. *See* Teninbaum & Zimmermann, *supra* note 28, at 448 (noting unfairness of unequal exchange of information); Hsieh, *supra* note 9 (noting knowledge of plaintiff's expert witness opinion provides defense counsel with unfair advantage); *supra* Part III.B.2 (describing benefits of disclosing expert qualifications).

165. *See* Greeley, *supra* note 49 (explaining physicians' inability to understand summary judgment standard); *supra* note 147 (explaining preference for solely judicial review).

166. *See* O'Neill et al., *supra* note 38 (noting attorneys not pursuing medical malpractice lawsuits with low potential damages); *supra* text accompanying note 129 (arguing eliminating tribunals will reduce plaintiffs' costs).

167. *See* Williams, *supra* note 3, at 480 (noting claim litigation responds to "unacceptable level of negligent medical care"); Sanghavi, *supra* note 88 (noting vast majority of injured patients do not file medical malpractice lawsuits); *supra* note 33 (highlighting length of time between filing and settlement). *But see* Gee, *supra* note 87 (explaining existing contingency fee billing practices may inhibit plaintiff's counsel from taking smaller cases).

will decrease the burden on the courts.[168] It is unlikely that the SJC will disprove of adopting certificates of merit in the medical malpractice context because certificates of merit involve less infringement on a plaintiff's access to the courts, and the more intrusive tribunal system has already passed constitutional muster.[169]

IV. CONCLUSION

It is time to finally be rid of the waste of resources that is the Massachusetts medical malpractice tribunal system. The alternative proposed in this Note combines the positive aspects of alternative screening systems that already exist. The alternative also satisfies the goals of all parties involved in medical malpractice litigation.

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168. *See supra* Part II.C.1 (noting burden tribunal poses to court administration); *supra* note 130 and accompanying text (noting tribunal's financial cost to court system).

169. *See supra* note 48 and accompanying text (describing constitutional challenge to tribunal system); *supra* note 101 (describing constitutional challenges to other states' certificate of merit requirements).