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.”

I. INTRODUCTION

Medical malpractice litigation is complex, lengthy, and thus costly. 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. 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. 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. 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 Care 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).
8. See MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2015).
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).
14. See infra notes 72, 92 and accompanying text (illustrating duplicative disclosures).
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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.
22. See Data Analysis Tool, NAT’L PRAC. DATA BANK, http://www.npdb-hipdb.hrsa.gov/analysisstool (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/67Z9-9855 (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. 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.


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. 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. 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. 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. The average
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 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. Third, the Legislature enacted limits on the contingency fees that an attorney may contract for in medical malpractice cases. 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. Fifth, there is the tribunal system.

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. 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).

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.\(^{44}\)


42. See H.R. 169-5345 at 5; cf. Clancy, \textit{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, \textit{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. \textit{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 \textit{CONSUMER’S GUIDE TO THE COMPLAINT PROCESS}, available at \url{http://www.mass.gov/ehhs/does/borin}
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. 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. 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.

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. The tribunal system has also survived various
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. The most recently available statistics reveal it takes over 250 days between the request for and the convening of a tribunal. Administrative factors that contribute to this delay 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 abolition. 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 overruled 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{55} The medical member

\textsuperscript{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).


\textsuperscript{54} See ch. 231, § 60B.

\textsuperscript{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

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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”).


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. W.KLY., 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 344, 348 (Mass. 1988) (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).

4. \textit{Function and Standard of Review}

The tribunal has three tasks.\footnote{See infra text accompanying notes 64-66 (describing tribunal’s tasks).} First, it determines whether the defendant healthcare provider has a duty of care to the plaintiff.\footnote{See \textit{Santos v. Kim}, 706 N.E.2d 658, 661 (Mass. 1999). In \textit{Kapp v. Ballantine}, the SJC described this task as requiring the tribunal to determine if there was a doctor-patient relationship. \textit{See 402 N.E.2d 463, 468 (Mass. 1980). In \textit{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. \textit{See \textit{Santos}}, 706 N.E.2d at 660-61. The \textit{Santos} lawsuit involved an alleged delay in reporting a concerning lab value, which resulted in a delay in the plaintiff’s treatment. \textit{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. \textit{Id.} at 661.} 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.”\footnote{Ch. 231, \S~60B. The only other guidance the statute provides is that “[a]substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion.” \textit{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. \textit{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).}} Finally, it determines whether the plaintiff suffered damages as a result of the medical treatment.\footnote{Ch. 231, \S~60B.} The tribunal’s standard of review is akin to the standard a judge employs when deciding a motion for directed verdict.\footnote{See \textit{Kapp}, 402 N.E.2d at 468.} The tribunal may not
address the strength or credibility of the plaintiff’s evidence. Partly as a result of this indulgent standard, tribunals find for the plaintiff in approximately 85% of all cases.

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. 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. 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. The expert witness does not need to practice in the same specialty area as the defendant physician. The statute also gives the tribunal subpoena power, along with the power to require independent medical

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.


69. 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.


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

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

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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).


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

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).
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://medical-economics.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.\footnote{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.\footnote{89}

The “offer” prong of this legislation stipulates a timeline set forth in
chapter 231, section 60L of the Massachusetts General Laws.\footnote{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.\footnote{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

\footnote{88} See Beaulieu-Volk, supra note 87, passim (describing complexities in encouraging physician
apologies); 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”).

\footnote{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.
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.

\footnote{90} See infra notes 91-96 and accompanying text (containing details of timeline).

\footnote{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
denies 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

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. The purpose of this requirement is to discourage the filing of frivolous lawsuits. 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. 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. Approximately fifteen states have certificate of merit statutes, sometimes in addition to screening panel statutes.

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

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 Jeffrey 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.\textsuperscript{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.\textsuperscript{105} The affidavit must set “forth sufficient facts to raise a legitimate question of liability appropriate for judicial inquiry.”\textsuperscript{106} Without this affidavit, the plaintiff’s complaint is “insufficient as a matter of law.”\textsuperscript{107}

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

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\textsuperscript{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)).

\textsuperscript{106} Ch. 321, § 60J.

\textsuperscript{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.

\textsuperscript{108} Ch. 321, § 60J.

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

III. ANALYSIS

The causes of the cyclical fluctuations in medical malpractice insurance premiums are often debated.\textsuperscript{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.\textsuperscript{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.\textsuperscript{116} Although well-intentioned, the tribunal system has proved worthless.\textsuperscript{117} The goal of medical malpractice tort reform should be to reduce the time and cost of this type of litigation.\textsuperscript{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.\textsuperscript{119}

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{116} See infra Part III.B.1 (providing specific proposal for new screening system).
\textsuperscript{117} See infra Part III.A.
\textsuperscript{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”).
\textsuperscript{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.\textsuperscript{120}

\textbf{A. Problems with the Tribunal System}

From attorneys to judges to physicians, the tribunal system is universally disliked.\textsuperscript{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.\textsuperscript{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.\textsuperscript{123}

\textbf{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{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).

\textsuperscript{124} Cohen, supra note 1 (calling scheduling tribunals “administrative nightmare”); supra notes 51, 53 and accompanying text (discussing delays in scheduling tribunals).

\textsuperscript{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. 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.

2. Financial Cost

To defendants, the costs of waiting, preparing for, and attending tribunals may outweigh the financial benefit of defending 15% fewer lawsuits. 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. Moreover, administering the tribunal system costs the already burdened court system tens of thousands of dollars per year.

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. Massachusetts’s experience is not unique: studies have found that screening panels in other states are similarly ineffective. Furthermore, plaintiff attorneys have long claimed, and two independent, Massachusetts-based studies have concluded, there are

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).
132. See supra note 7 and accompanying text (explaining failures of screening panels nationwide).
few truly frivolous medical malpractice lawsuits. 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. Thus, the very target of the tribunal system—frivolous lawsuits—are not a significant problem.

4. Redundancy

The recently enacted pre-suit notification procedure now renders these tribunals redundant. 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. 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. 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.

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. 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. 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. 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. 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.

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

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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. 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.” If the judge grants summary judgment in favor of the defendant, the court shall dismiss the lawsuit without prejudice.

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. The SJC has made clear that an expert witness’s qualifications go to the weight of that expert’s testimony, not to its admissibility. 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. 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. Moreover, requiring this

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”).


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. 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.

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. 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. Instead, a lawsuit that does not meet the certificate of merit requirement should be dismissed without prejudice. Plaintiffs will then have the option of either appealing that dismissal or filing a second lawsuit with an adequate certificate of merit. 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.

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). “[The 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.


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. Glitzman, 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 Hume 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. On the defense side, counsel will be assured in receiving the plaintiff’s expert witness statement prior to conducting discovery. 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. 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. 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. Having a judge be the sole reviewer of the certificate of merit will reduce the chance that valid cases are wrongfully screened out. 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. The shorter time period between filing and resolution of lawsuits will further deter medical errors, thereby positively impacting patient safety. Finally, requesting the court’s intervention only after the exchange of the certificate of merit and involving the review of only a judge, 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.\textsuperscript{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.\textsuperscript{169}

\section*{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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\textsuperscript{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).

\textsuperscript{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).