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ONE THOUSAND SEVEN HUNDRED DAYS: A HISTORY OF MEDICAL MALPRACTICE MEDIATION PANELS IN FLORIDA

CHARLES W. EHRHARDT*

I. INTRODUCTION

In response to the perceived danger of a drastic curtailment in the availability of health care services in Florida as the result of a medical practice insurance crisis, the Medical Malpractice Reform Act of 1975 (the Act)1 was enacted. The legislature believed that the rapidly increasing cost and decreasing availability of professional liability insurance for health care providers could result in older physicians retiring sooner, in younger physicians not coming to Florida, in substantially higher bills to patients due to increased costs of insurance premiums, and in increased practice of defensive medicine.2

The legislative response included procedural and substantive modifications to the tort system, as well as provisions designed to insure the continued availability of medical liability coverage and to increase the discipline of negligent and incompetent physicians.3

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1. Ch. 75-9, § 5, 1975 Fla. Laws 13 (current version at Fla. Stat. § 768.44, .47 (1979)). There is now dispute as to whether this medical malpractice insurance crisis ever actually existed. See Cunningham & Lane, Malpractice—The Illusory Crisis, 54 Fla. Bar J. 114 (1980); The Crisis in Medical Professional Negligence: Fact or Fancy?, Monograph Series, 2 ABA Litigation Section 1 (1977).

The Secretary of Health, Education & Welfare has conducted a broad study of the medical malpractice problem. See Medical Malpractice, Report of the Secretary’s Commission on Medical Malpractice, Dept. of H.E.W. (Jan. 16, 1973).


The most significant provision of the Act was the creation of a statutory system which required that a malpractice claim be submitted to a medical liability mediation panel as a condition precedent to filing a civil tort suit. If a defendant did not answer within twenty days from the date a mediation claim was filed, a claimant could proceed in court. If an answer was timely filed, the claim was heard by a mediation panel consisting of a judicial referee, an attorney and a licensed physician. The panel's jurisdiction terminated either ten months after the claim was filed or, if prior to the expiration of the ten-month period, when its written decision was filed. The decision as to whether a defendant was actionably negligent was not binding on the parties but was admissible in the subsequent trial. It was felt that mediation panels would encourage settlement of meritorious claims since a defendant would be hesitant to proceed to a trial in which the panel's finding of actionable negligence would be introduced against him. On the other hand, nonmeritorious malpractice suits would be reduced after a finding by the panel that there was no actionable negligence by any defendant.

The Act, which became effective July 1, 1975, contained a number of ambiguities which caused many uncertainties for those involved in the mediation procedure. The Supreme Court attempted to clarify some of these uncertainties when it adopted the Rules of Medical Mediation Procedure which superseded the procedural portions of the Act.


4. See French, Florida Departs From Tradition: The Legislative Response to the Medical Malpractice Crisis, 6 Fla. St. U.L. Rev. 423 (1978); Thornton, The Value of Medical Mediation, 53 Fla. Bar J. 592 (1979). See also, 49 Fla. Bar J. 498 (1975) (the issue is devoted to five articles which discuss some of the problems raised by the Medical Mediation Panel).


7. See French, Florida Departs from Tradition: The Legislative Response to the Medical Malpractice Crisis, 6 Fla. St. U.L. Rev. 423 (1978).

8. Fla. Stat. § 768.44(10), .47(3) (1979). For instance, it was unclear whether the Act was to be strictly construed regarding the three member panel and the jurisdictional time limits. These and other ambiguities are discussed later in this article.

9. In re The Florida Bar, 348 So. 2d 547 (Fla. 1977). The order adopting the Medical Mediation Rules provided: "All conflicting rules and statutes are hereby superseded as of the effective date of these Rules, and any statute not superseded shall remain in effect as a rule promulgated by the Supreme Court." Id. at 547. The power to regulate matters of pro-
The constitutional arguments against the Act were quickly asserted. A multi-faceted attack was made on the validity of the Act in *Carter v. Sparkman*. After dismissing many of the arguments as being unimportant and "without merit," the Florida Supreme Court upheld the constitutionality of the Act. In so doing, the court rejected the argument that equal protection was violated because a plaintiff was required to proceed through the mediation procedure while a defendant could avoid the process by not filing an answer. The Act was construed to mean that if the physician failed to participate in the hearing, his failure to participate would be admissible into evidence at the subsequent civil trial. The court also determined that the mediation procedure did not place an unreasonable burden on an aggrieved person's right to access to the courts that is guaranteed by the Florida Constitution. The court found that the "imminent danger [of] a drastic curtailment in the availability of health care services" validated the legislature's exercise of its police power for the health and welfare of its citizens. At the same time, the court stressed that "the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance." In another case, the United States Court of Appeals for the Fifth Circuit rejected arguments that the Act had abridged the plaintiff's equal protection, substantive and procedural due process and right to jury trial standards of the United States Constitution. Nevertheless, only forty-five months after its

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10. 335 So. 2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977). On July 31, 1975, the defendant moved to have the circuit court dismiss a malpractice suit which had bypassed the statutorily required mediation hearing and been filed directly in court. The trial court denied the motion to dismiss on the basis that the Act was unconstitutional. Id. at 804.

11. Id. at 806. Justice England, in his concurring opinion, analyzed the additional arguments which had been made, but which were rejected without comment by the majority. The defendants argued that the Act was constitutionally invalid because it abrogated a person's "privilege to select a judicial forum" in violation of the privileges and immunities clause and the due process clause of the 14th amendment of the United States Constitution; it provided that judges serve on mediation panels rather than devote their full time to judicial duties as required by art. V, § 13 of the Florida Constitution; and it violated the court's rulemaking authority under art. V, § 2 of the Florida Constitution. Id. at 807-08.

12. Id. at 805.

13. Id.

14. Id.

15. Id.

16. Id. at 806.

17. *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979). The United States Court of Appeals rejected arguments that the Act had abridged the plaintiff's constitutional rights of equal protection and due process, and the right to a jury trial. The Court of Appeals found that the Florida Legislature had a rational basis for the classifications established by
decision in *Carter v. Sparkman*, the Florida Supreme Court readdressed the constitutional issues and found that the medical mediation procedures were constitutionally invalid because the Act was being applied to the litigants in an arbitrary and capricious manner.\textsuperscript{18}

The purpose of this article is to examine the operation of medical mediation panels during their 1,704 day existence in Florida. Appellate decisions which interpret various problems in the medical mediation process are analyzed. In addition, the results of a statistical study of the malpractice claims filed in Florida's fifteen largest counties during the three-year period from July 1, 1975 to June 30, 1978 are analyzed to determine what actually occurred during the medical mediation proceedings held during that period.

II. THE MEDICAL MEDIATION CLAIM

A. Claims Subject to Mediation

All claims for damages arising from the alleged malpractice of any medical or osteopathic physician, podiatrist, hospital or health maintenance organization were required to be submitted to a medical mediation panel and the panel's jurisdiction terminated before a complaint based on the claim could be filed in circuit court.\textsuperscript{19} If the claim was filed directly with the circuit court without the submission of the claim to the mediation panel, the complaint in circuit court was subject to a motion to dismiss.\textsuperscript{20} Even in cases in the Act, that the provisions did not significantly restrict access to court since a claimant could file a court action after the conclusion of the mediation process, and that neither substantive nor procedural due process was violated. *Id.* at 1175-79. The court specifically rejected the following alleged violations of procedural due process:

1. The denial of access to the courts;
2. The delay in the filing of a court action incident to the mediation process;
3. Mandatory arbitration [the court carefully distinguished the mediation required under the Florida Act from arbitration which may be unconstitutional];
4. The admission of panel findings in evidence at a subsequent trial; and
5. A malpractice claimant's inability to voir dire prospective panel members.

*Id.* at 1175 n.19, 1176-77.

The Fifth Circuit held that Florida's mediation statutes must be applied by a federal court in a diversity case. *Id.* at 1168-69.

20. *Fla. Stat.* § 768.44(1)(a) (1979); *see Mount Sinai Hosp. v. Wolfson*, 327 So. 2d 883 (Fla. 3d Dist. Ct. App. 1976). In *Jackson v. Biscayne Medical Center, Inc.*, 347 So. 2d 721 (Fla. 3d Dist. Ct. App. 1977), the court dismissed two counts of the complaint which dealt with medical negligence because it had not been submitted to a mediation proceeding. However, other counts alleging intentional torts by the defendant hospital were allowed to proceed without mediation, even though it was alleged that all of the counts arose from one
which the allegations of malpractice arose only in a third party
complaint, the mediation proceedings had to be concluded before
the third party complaint could be filed. As an example, if A sued
B for damages arising out of an automobile accident, B could not
file a third party complaint for contribution alleging that Dr. C's
malpractice had aggravated A's injury until a claim had been filed
before a medical mediation panel. The third party complaint
would be dismissed without affecting A's original action against B.

Malpractice claims which are litigated in federal court generally
are based on diversity jurisdiction and look to state law to supply
the substantive law relating to the alleged malpractice. The fifth
circuit found that in a diversity case in which the Florida substan-
tive malpractice law was applicable, a federal court would enforce
the requirement that a medical malpractice plaintiff first partici-
pate in a medical mediation proceeding in a Florida state court.
The court found the mediation proceeding to be so intertwined
with Florida's substantive malpractice law that it should be recog-
nized in federal court in order to fully effectuate Florida's substan-
tive policy. The court also felt that not requiring participation in
the mediation proceeding would encourage forum-shopping by al-
lowing a nonresident plaintiff to choose whether to submit his mal-
practice claim to mediation through the selection of a federal or
state forum.

B. Proper Parties to the Mediation Claim

Mediation Rule 20.120(a) provided that "only those persons who
would be entitled to damages as the result of the alleged malprac-

transaction. Id. at 722. See also St. Vincent's Medical Center v. Oakley, 371 So. 2d 590 (Fla.
In Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979), the court observed that in
federal court a stay of the proceeding would have been proper if the Florida mediation
proceeding had not been instituted. One Florida decision, Richards v. Foulk, 345 So. 2d 402
(Fla. 3d Dist. Ct. App. 1977), distinguished between the use of a judgment of dismissal and
a stay by the trial judge. The Richards court found it proper to dismiss the complaint if the
plaintiff intentionally evaded the jurisdiction of the mediation panel; however, when the
plaintiff's failure to follow the mediation procedure was due to mistake or inadvertence, the
court considered a stay of the malpractice action appropriate pending the mediation pro-
cceeding. Id. at 403. The trial judge was required to exercise his discretion to determine the
appropriate remedy. Id.
21. See Davis v. Acton, 373 So. 2d 952 (Fla. 3d Dist. Ct. App. 1979); Walt Disney World
23. Id.
24. Id. at 1170.
"practice" could be joined as claimants. On the other hand, under section 768.44(1)(a) of the Florida Statutes, "any person . . . claiming damages" because of the alleged malpractice of an enumerated defendant was required to submit his claim to mediation. It might have been argued that if the mediation claim on its face disclosed that, as a matter of law, a person was not entitled to damages, he would be properly included as a claimant under the statute but not under the terms of the rule; that is, he would be a person "claiming" damages, but not a person "entitled" to them. Other parts of the statute, however, ensured that this distinction was not material. For example, because a motion attacking the legal sufficiency of the mediation claim was not a proper motion during a mediation proceeding, if a person alleged in her claim that the malpractice of a named defendant had damaged her, a mediation hearing was required. However, if a claim did not seek money damages for malpractice, it was not necessary to proceed through the mediation process. For instance, a suit seeking only injunctive relief could be filed directly in circuit court.

Medical or osteopathic physicians, podiatrists, hospitals and health maintenance organizations were appropriate defendants in a mediation claim, and a malpractice claim against any of them had to be submitted to mediation. Nurses, dentists, chiropractors and nursing homes were not included within the terms of the statute as defendants against whom a malpractice mediation claim could or had to be brought. The mediation requirement was not imposed in malpractice actions against lawyers, accountants or other non-medical professionals. If a plaintiff desired to name as a defendant a person not enumerated in the statute, such as a nurse, a com-

25. Fla. R. Med. P. 20.120(a), 348 So. 2d 547, 549 (Fla. 1977)(emphasis added).
27. A defendant could not attack the substantive merits of a malpractice claim by a motion. See footnotes 60-65 and accompanying text infra. Therefore, the prehearing defense that the claim was insufficient was not available to the defendant. Also, under the supreme court's order, the Rules of Medical Mediation Procedure superseded any conflicting statutory provisions. In re The Florida Bar, 348 So. 2d 547, 547 (Fla. 1977).
28. Fla. R. Med. P. 20.090(e), 348 So. 2d 547, 548 (Fla. 1977). Neither was a motion for summary judgment nor a motion for judgment on the pleadings a proper motion. Id. at 20.090(f); see note 66 infra.
32. Young v. Bramlett, 369 So. 2d 652 (Fla. 1st Dist. Ct. App. 1979). If a medical mediation claim was filed against a professional not included within the Act, the statute of limitations was not tolled. Id. at 653. See notes 43, 44 infra.
plaint could be filed directly in circuit court without going through a mediation proceeding. But, if a plaintiff desired to name a nurse as one of a number of the co-defendants, the mediation proceeding would first have to be held for all defendants other than the nurse. She could not be included in the mediation proceeding, even if she or the plaintiff desired to do so. A complaint could subsequently be filed in a civil malpractice action naming both the nurse and the other co-defendants, but the statute of limitations would have required the malpractice action against the nurse to be filed at the same time as the mediation claim was filed against the other defendants.

Frequently, multiple defendants are named in a malpractice action to ensure that the party who committed the allegedly negligent act is included in the suit and to make it impossible for the parties to cast the blame on one who is not present. Rule 20.120 recognized that multiple defendants could be named in a mediation proceeding and gave the plaintiff/claimant the option of filing a single claim in which all of the defendants were included or of filing separate claims against each of the defendants.

C. The Mediation “Claim”

The pleading initiating a medical mediation proceeding was called a “claim” rather than a complaint, and was required to be filed with the clerk of the circuit court in the county in which there was proper venue. The claim was served on the defendant in the same manner as service of process is generally effected in a civil suit, that is, by personal service. In addition, a copy of the claim was required to be mailed to the defendant and to the administrative board licensing the professional.

In evaluating the facts which had to be included in the “claim,” it seems clear that only notice pleading was necessary. A “short
and plain statement of the ultimate facts" describing the alleged malpractice was required. In addition, the claim included the designation of the medical specialty involved in the malpractice.

A claimant could include more than one instance of malpractice in his claim. If there were multiple instances by the same defendant, they could be stated cumulatively or in the alternative. When separate claims were filed by the same plaintiff against the same defendant, the judicial referee had the discretion under rule 20.120(b) to consolidate them in one mediation proceeding.

When a medical mediation claim was filed in circuit court, the action was commenced and the applicable statute of limitations was tolled until the mediation panel issued a written decision or its jurisdiction otherwise terminated. Section 768.44(4) provided that after the jurisdiction of the panel had terminated, the plaintiff/claimant had sixty days in which to file a complaint in the circuit court. The section operated as a savings clause to extend the time limit for filing a complaint in the circuit court, even though the statute of limitations would have run during the time the mediation panel considered the claim.

If the time limit for filing the cause of action extended more than sixty days from the date the jurisdiction of the panel terminated, section 768.44(4) did not shorten the time limit. The sixty-day provision operated to lengthen the time period to insure that a plaintiff could adequately prepare and file his complaint in circuit court upon learning of the mediation panel's decision.

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41. Fla. R. Med. P. 20.120(b), 348 So. 2d 547, 549 (Fla. 1977).


43. Fla. Stat. § 95.11(4)(a)-(b) (1979). The two-year statute of limitations runs from the time of the incident giving rise to the action or from the time the incident was discovered or should have been discovered by the exercise of due diligence, whichever is later. In no event, however, could the action be brought more than four years from the date of the incident. Id.

44. Fla. Stat. § 768.44(4) (1979). The panel's jurisdiction terminated ten months after the claim was filed, even if a written decision had not been filed. The tolling effect ceased when the jurisdiction terminated. See Valenstein v. Doctor's Hosp., 372 So. 2d 1169 (Fla. 3d Dist. Ct. App. 1979) (Schwartz, J., specially concurring).


Unlike the practice under both the Federal and Florida Rules of Civil Procedure, a participant in a mediation proceeding was not allowed to amend his pleading one time as a matter of right nor was he given liberal leave to amend granted by the court. Rule 20.100(a) provided that a party could amend only upon order of the judicial referee. If a party amended, the amendment related back to the date of filing the original pleading and did not operate to extend or increase the jurisdictional time limits of the mediation panel. Thus, the process of delaying a proceeding by numerous amendments was strictly limited to ensure that the plaintiff was not denied his right to a trial by jury for a time greater than that specified in the rules and statute.

D. The Answer and Other Pleadings

Each named defendant in a mediation proceeding could file an answer to the claim within twenty days of service of process. If an answer was filed, the defendant was not allowed to claim in the subsequent civil proceeding that the mediation panel lacked personal jurisdiction over him. The defendant could specify in the answer the medical specialty he desired the physician member of the mediation panel to possess. If this designation was not included in the answer, he filed a separate pleading designating a medical specialist within thirty days after the service of process.

If an answer was not filed within twenty days, the jurisdiction of the mediation panel automatically terminated and the parties could proceed "in accordance with law," i.e., the plaintiff could file suit in circuit court. While the plaintiff was required to file a mediation claim even though he did not desire to proceed to mediation, the defendant clearly had a choice. If the defendant wished to proceed with mediation, he filed his answer; if he did not wish

47. See Fed. R. Civ. P. 15(a); Fla. R. Civ. P. 1.190(a).
50. Fla. R. Med. P. 20.090(g), 348 So. 2d 547, 548 (Fla. 1977).
53. Id. at § 768.44(1)(c). Fla. R. Med. P. 20.190(a), 348 So. 2d 547, 550 (Fla. 1977), required the clerk to send a notice of termination of the proceeding to the parties if no timely answer was filed.
54. Fla. Stat. § 768.44(1)(c) (1979). The fact that a defendant had elected not to participate was admissible as evidence in a subsequent malpractice trial. Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976). See text accompanying note 165 infra.
to mediate, no answer was filed.\textsuperscript{55}

The twenty-day time limit for filing an answer was strictly jurisdictional and the appellate courts rejected equitable arguments to extend it.\textsuperscript{56} Even when both parties agreed that the defendant doctor could have more than twenty days to answer, the court would not recognize the agreement because the jurisdictional time period could not be waived by stipulation of counsel.\textsuperscript{57}

When there were multiple defendants, some defendants might file a timely answer and others might not. There was a split of authority as to whether the mediation panel had jurisdiction in this situation over a defendant who elected not to file an answer. In \textit{Latorra v. Patrick},\textsuperscript{58} one defendant inadvertently filed his answer in the wrong court while the remaining defendants filed their answers correctly. The judicial referee entered an order terminating the panel's jurisdiction over the defendant who did not file an answer. The fourth district affirmed on the grounds that the twenty-day period was jurisdictional and that the judicial referee had no discretion if an answer was not properly filed.\textsuperscript{59} Under the rationale of this decision, the claimant could initiate suit against a single nonanswering defendant in circuit court while the mediation process continued as to the other defendants. In \textit{Baptist Memorial Hospital v. Beaty},\textsuperscript{60} however, only one of four defendants filed his answer within twenty days. No hearing was held on the claim against any of the defendants. The first district found that where a claim was filed against several defendants, the filing of an answer by one defendant provided jurisdiction for the panel as to all other defendants included in the claim, regardless of whether the others had filed an answer.\textsuperscript{61} In reaching this conclusion, the \textit{Beaty} court focused on the second sentence of section 768.44(1)(c) which stated that if no answer was filed within twenty days the jurisdiction of the panel terminated. The court interpreted this language to mean that the jurisdiction of the panel terminated only if no answer was

\textsuperscript{55} The constitutionality of this provision was upheld in Carter v. Sparkman, 335 So. 2d at 805.

\textsuperscript{56} FLA. STAT. § 768.44(1)(c) (1979). \textit{See} Latorra v. Patrick, 359 So. 2d 463 (Fla. 4th Dist. Ct. App. 1978) (timely answer filed in wrong court); Scherer v. Liberto, 353 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1977) (answer mailed on twentieth day).


\textsuperscript{58} 359 So. 2d 463 (Fla. 4th Dist. Ct. App. 1978).

\textsuperscript{59} \textit{Id.} at 464.

\textsuperscript{60} 364 So. 2d 546 (Fla. 1st Dist. Ct. App. 1978).

\textsuperscript{61} \textit{Id.} at 547.
filed by any of the named defendants. The Beaty court reasoned that any other reading of the statute would change its meaning, and that this interpretation was logical because the plaintiff, by filing a claim against several defendants, indicated a desire to bring an action against them in one lawsuit. The court further reasoned that to find otherwise would result in a multiplicity of lawsuits. A contrary holding would require the claimant to file suit against the nonparticipating defendant and to litigate that cause of action at the same time that the mediation proceeding continued against the defendant who filed an answer.

Proper venue before the mediation panel was in the circuit where the subsequent lawsuit would be ultimately filed, i.e., where the defendant resided or where the cause of action occurred. Apparently a motion for change of venue was recognized as long as it was made upon or before filing the answer. If the issue was not timely raised, a defendant waived his venue privilege. The mediation rules did not clearly define which motions were permissible in a mediation proceeding. However, they specifically prohibited motions for summary judgment, for judgment on the pleadings, for a directed verdict, for a more definite statement, for failure to at-

62. Id. at 547-48.
63. Id. at 548. This decision involved the issue of whether the statute of limitations had run, which would bar a subsequent civil malpractice suit. The Beaty court misconstrued the effect of the rules and statute when it said that "[u]pon filing their claim with the mediation panel, jurisdiction of the panel (in the absence of a hearing being held on the claim) extended for 10 months from the date the claim was filed . . . unless no answer was filed within 20 days of the date of service." Id. at 547 (citation omitted). Because one of the defendants filed a timely answer, the court found the statute of limitations was tolled for 10 months. The Beaty court overlooked the requirement that unless a hearing was held within 120 days from the date the claim was filed or an order entered extending that time period, jurisdiction automatically terminated. Fla. Stat. § 768.44(3) (1979). See Thames v. Melvin, 365 So. 2d 813 (Fla. 1st Dist. Ct. App. 1979); see generally notes 101-09 and accompanying text infra. If the Beaty court had correctly interpreted the length of the panel's jurisdiction, it would have found that the statute had run.
65. Largen v. Greenfield, 363 So. 2d 573, 574 (Fla. 2d Dist. Ct. App. 1978). See State Bd. of Regents v. Forsythe, 370 So. 2d 1240 (Fla. 1st Dist. Ct. App. 1979); Conard v. Mora, 362 So. 2d 728 (Fla. 2d Dist. Ct. App. 1978). The 120-day jurisdictional time period began to run when the claim was filed with the clerk of the circuit court having proper venue. Conard, 362 So. 2d at 729.
66. Fla. R. Med. P. 20.090(f), 348 So. 2d 547, 548 (Fla. 1977) prohibited motions for summary judgments, judgment on the pleadings, and directed verdicts. See Finnk v. Tanner, 366 So. 2d 524, 525 (Fla. 3d Dist. Ct. App. 1979) (judicial referee had no authority to dismiss a claim based on his finding that the claimant's testimony was not credible); Howarth & Scott, P.A. v. Edwards, 353 So. 2d 175, 176 (Fla. 4th Dist. Ct. App. 1977) (judicial referee had no authority to grant a motion for summary judgment even when the statute of
tach documents or exhibits, to attack the sufficiency of the claim or in answer to the claim. In permitting a motion for change of venue, the second district reasoned that the bar to motions "filed in answer to the claim" referred only to motions attacking the substantive merits of the claim. Other types of motions not specifically prohibited were allowed, such as motions to terminate the panel's jurisdiction because of a jurisdictional time limit.

The only pleadings permitted were the claim and the answer. Other types of pleadings commonly used in civil actions, such as replies, third party complaints, or cross-claims, were not available in mediation proceedings.

III. THE MEDIATION PANEL

A. Selection

The mediation panel consisted of a judicial referee, a licensed physician, and an attorney. The judicial referee was a circuit judge who presided over the panel and was selected by the chief circuit judge through a "blind" system of selection. The parties to the mediation proceeding had no input into the judicial referee's selection.

The first step in selecting the physician panelist was to establish the panelist's specialty. The "claim" included a designation of limitations had run before the mediation claim was filed); Floyd v. Goss, 352 So. 2d 1189, 1189 (Fla. 4th Dist. Ct. App. 1977) (judicial referee had no authority to enter a judgment on the pleadings even when the defense that the statute of limitations had run was not disputed).

68. Fla. R. Med. P. 20.090(c), 348 So. 2d 547, 548 (Fla. 1977).
69. Largen v. Greenfield, 363 So. 2d 573, 574 (Fla. 2d Dist. Ct. App. 1978). In Finnk v. Tanner, 366 So. 2d 524 (Fla. 3d Dist. Ct. App. 1979), the court suggested that the judicial referee may have the power to enter a dismissal or default when the claimant disobeyed orders entered by the judicial referee and when the claim was "based on fraud, pretense, collusion or other similar wrongdoing." Id. at 525.
71. See Fla. R. Med. P. 20.090(c)-(d), 348 So. 2d 547, 548 (Fla. 1977).
72. FLA. STAT. § 768.44(2) (1979). In Diggett v. Conkling, 368 So. 2d 74 (Fla. 4th Dist. Ct. App. 1979), the parties stipulated that the judicial referee could hold a hearing without the other panel members participating. The court found that the panel could not act unless all three members participated. Id. at 75. See also Grossman v. Duncan, 371 So. 2d 142 (Fla. 1st Dist. Ct. App. 1979) (hearing was conducted before the judicial referee alone and therefore it was not the hearing contemplated by the applicable statute).
73. FLA. STAT. § 768.44(2) (1979).
74. Id. at § 768.44(2)(f). A podiatrist could not serve as a member of the panel because the statutory provision only included "physicians" as possible panel members. When a malpractice claim was filed naming a podiatrist as a defendant, a medical doctor rather than a...
the specialty of the defendant committing the malpractice. In the case of multiple defendants, the claimant elected the type of specialist he wanted on the panel. The defendant could designate the specialty in his answer. If there were multiple defendants, then each could file a designation of a different specialty. If the parties did not designate the same specialty, the judicial referee determined the proper specialty of the panelist. There was no requirement that the physician panelist be of the same specialty as that specified by any of the defendants.

A standing list of licensed physicians and attorneys from whom mediation panels were chosen was prepared by the chief judge. The physician’s list, if possible, was divided into areas of medical

podiatrist served on the panel. See Bryant v. Tedder, 356 So. 2d 379 (Fla. 4th Dist. Ct. App. 1978); Morales v. Moore, 356 So. 2d 829 (Fla. 4th Dist. Ct. App. 1978). In 1976, the statute was amended to specifically include claims against podiatrists within the mediation process. Ch. 76-260, § 7, 1976 Fla. Laws 660 (current version at FLA. STAT. § 768.44(1)(a) (1979)). The amendment did not add podiatrists to the persons who were qualified to serve on the mediation panel.

75. Fla. R. Med. P. 20.060(b), 348 So. 2d 547, 548 (Fla. 1977). Although Florida Statutes provided that the parties must file a document designating the panelist’s specialty within 30 days of service of process, the mediation rules required the designation in the “claim” filed by the patient to initiate the mediation process. FLA. STAT. § 768.44(2)(f) (1979); Fla. R. Med. P. 20.070, 348 So. 2d 547, 548 (Fla. 1977).

76. Fla. R. Med. P. 20.090(b); 348 So. 2d 547, 548 (Fla. 1977).

77. Fla. R. Med. P. 20.210, 348 So. 2d 547, 551 (Fla. 1977), required the clerk to immediately set a hearing before the referee to determine the proper specialty when different specialties were designated.

The following statistics concerning the frequency of stipulation were compiled from the survey discussed later in the article.

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<th>TABLE 1</th>
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<td>Date Mediation Claim Filed Through June 30, Total</td>
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<tr>
<td>Number of claims in which specialty of physician/panelist stipulated by parties</td>
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<tr>
<td>Percentage of claims in which specialty of physician/panelist stipulated by parties</td>
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78. FLA. STAT. § 768.44(2)(a)-(b) (1979). The standing lists were made by the chief judge who could accept the recommendations of recognized professional medical and legal societies. Id. There was no suggestion as to the specific number of names to be included on each list.
specialty.\textsuperscript{79} If the parties could agree upon a doctor, an attorney, or both, to serve upon the panel, their stipulation as to the panelist was followed.\textsuperscript{80} The statute was not clear as to whether a stipulated panelist must have been on the approved list. It would seem that if the parties agreed to a panelist who was not included on the chief judge's list, and if that person had no objection, the court would have little reason to exclude the person from the panel.

A stipulation between the parties as to the names of the panel members needed to be reached within ten days after the determination of the medical specialty to be represented on the hearing panel. If the parties could not agree, then the clerk mailed to each party the names of five attorneys and five doctors whom he selected at random from the list of panel members previously compiled by the chief judge.\textsuperscript{81} At the same time, the clerk also sent a notice and an information questionnaire to each of the five attorneys and five doctors that had been chosen as prospective panel members. The questionnaire elicited information regarding the education, professional background and experience of each prospective panel member, as well as any association the prospective

\begin{table}[h!]
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
\textbf{Date Mediation Claim Filed} & \\
\hline
\textbf{Through} & \\
\textbf{June 30,} & \\
\textbf{1975} & \\
\textbf{1976} & \\
\textbf{1977} & \\
\textbf{1978} & \\
\hline
\textbf{Total} & \\
\hline
\end{tabular}
\end{table}

\begin{tabular}{|l|c|c|c|c|c|}
\hline
\textbf{Number of claims in which} & \\
\textbf{identity of physician/} & \\
\textbf{panelist stipulated by parties} & \\
\hline
\textbf{1975} & \\
\textbf{1976} & \\
\textbf{1977} & \\
\textbf{1978} & \\
\textbf{Total} & \\
\hline
\textbf{59} & \\
\textbf{231} & \\
\textbf{202} & \\
\textbf{92} & \\
\hline
\textbf{584} & \\
\hline
\end{tabular}

\begin{tabular}{|l|l|}
\hline
\textbf{Percentage of claims in which} & \\
\textbf{identity of physician/} & \\
\textbf{panelist stipulated by parties} & \\
\hline
\textbf{23.3} & \\
\textbf{27.4} & \\
\textbf{27.3} & \\
\textbf{28.3} & \\
\hline
\textbf{27.0} & \\
\hline
\end{tabular}

\begin{tabular}{|l|c|c|c|c|c|}
\hline
\textbf{Number of claims in which} & \\
\textbf{identity of attorney/} & \\
\textbf{panelist stipulated by parties} & \\
\hline
\textbf{1975} & \\
\textbf{1976} & \\
\textbf{1977} & \\
\textbf{1978} & \\
\hline
\textbf{59} & \\
\textbf{231} & \\
\textbf{200} & \\
\textbf{88} & \\
\hline
\textbf{578} & \\
\hline
\end{tabular}

\begin{tabular}{|l|l|}
\hline
\textbf{Percentage of claims in which} & \\
\textbf{identity of attorney/} & \\
\textbf{panelist stipulated by parties} & \\
\hline
\textbf{23.3} & \\
\textbf{27.4} & \\
\textbf{27.0} & \\
\textbf{27.1} & \\
\hline
\textbf{26.7} & \\
\hline
\end{tabular}

\textsuperscript{79} Id. at § 768.44(2)(a).
\textsuperscript{80} Id. at § 768.44(2)(g). The following statistics concerning the frequency of stipulation were compiled from the survey discussed later in the article.

\textsuperscript{81} Fla. Stat. § 768.44(2)(g) (1979).
member may have had with the parties to the claim.\textsuperscript{82}

The statute was not clear regarding who had access to the questionnaires after they were returned to the clerk. Since challenges for cause to a prospective panel member were allowed,\textsuperscript{83} it would seem that the chief purpose for these questionnaires was to give the parties information to help them determine if any prospective panel member should be disqualified. However, since a provision in a draft of rule 20.130(a) reading "[t]he clerk shall make available to the parties the answers to the questionnaires" was unanimously stricken by the rules committee,\textsuperscript{84} and not included in the rule as adopted by the supreme court,\textsuperscript{85} it appears that the intent was to make these questionnaires unavailable to the parties. In practice, the questionnaires were available to the attorney before the selection of the panelists just as jury questionnaires are in a criminal or civil trial.

If the questionnaire did not completely disclose a prospective panel member’s background, the judicial referee could authorize the submission of additional questions to the panel member upon application of any party.\textsuperscript{86} The application was required to be made within ten days of the mailing to the parties of the names of the prospective panel members, and the answers to the additional questions had to be returned to the clerk within ten days of the mailing.\textsuperscript{87}

When a prospective panel member received a notice that he had been chosen to serve on a mediation panel, he had ten days to disqualify himself.\textsuperscript{88} No reason need have been given for this disqualification. The parties also had ten days within which to challenge a prospective panel member for cause, which challenge was made and filed with the clerk.\textsuperscript{89} The clerk automatically set a hearing

\textsuperscript{82} Id., Fla. R. Med. P. 20.130(a), 348 So. 2d 547, 549 (Fla. 1977). The form of the physician's questionnaire is set forth in Fla. R. Med. P. Form 20.902, 348 So. 2d 547, 552-53 (Fla. 1977); and the attorney's questionnaire is set forth in Fla. R. Med. P. Form 20.903, 348 So. 2d 547, 554 (Fla. 1977).

\textsuperscript{83} Fl. Stat. § 768.44(2)(d) (1979).

\textsuperscript{84} Minutes of the Civil Procedure Rules Committee of The Florida Bar, p. 2 (January 21, 1977)(on file with Professor Ehrhardt, Florida State University College of Law, Tallahassee, Fla.).

\textsuperscript{85} Fla. R. Med. P. 20.130(a), 348 So. 2d 547, 549 (Fla. 1977).

\textsuperscript{86} Fla. R. Med. P. 20.130(b), 348 So. 2d 547, 549 (Fla. 1977).

\textsuperscript{87} Fla. R. Med. P. 20.130(b)-(c), 348 So. 2d 547, 549 (Fla. 1977).

\textsuperscript{88} Fl. Stat. § 768.44(2)(g) (1979).

\textsuperscript{89} Id., Fla. R. Med. P. 210(d), 348 So. 2d 547, 551 (Fla. 1977). Although the Act was not clear as to when the 10-day period began to run, Form 20.905, approved by the supreme court, provided that it ran from the date of mailing. 348 So. 2d at 556.
before the judicial referee whenever a challenge for cause was filed. However, if the parties informally agreed on the disposition of the challenge, it was not heard by the judicial referee.

When a prospective panel member disqualified himself or was successfully challenged for cause, the clerk appointed an additional prospective panel member. Notices were mailed to the attorneys for the parties and questionnaires were mailed to the prospective panel members. The process of disqualification and challenge was repeated until a panel of five attorneys and five physicians was selected.

From the final list of five physicians and five attorneys, the parties chose one attorney and one doctor to serve on the panel. This selection was made during a conference scheduled by the clerk in which the parties could informally agree on the panel members. If informal agreement was not reached, a process of striking names was used until a panel member was selected. The claimant first struck a name. The strikes alternated until only one name remained. The same process was repeated in selecting a physician. The rules did not set forth the procedure to be followed if multiple defendants could not agree on the name to be stricken. Apparently, the judicial referee, through the exercise of his discretion, ordered a fair and equitable process in determining the name to be stricken. For instance, the defendants could decide each strike by majority vote or, if there were only two defendants, each could be allowed to exercise one strike.

After the parties had selected the attorney and the physician members of the panel, either the judicial referee or a party could question the physician and attorney to determine whether either had a state of mind regarding the claim of the parties that would prevent him from acting impartially. If the judicial referee determined that a panelist could not act impartially, he removed the panelist. Neither the statute nor the rule provided a procedure for the replacement of a panelist who was removed at this point. Presumably the initial selection process began again with the clerk.

90. Fla. R. Med. P. 20.210(d), 348 So. 2d 547, 551 (Fla. 1977). If a challenge for cause was not timely made, it was waived. See Pyle v. Taylor, 361 So. 2d 790 (Fla. 1st Dist. Ct. App. 1978).
92. Id.; Fla. R. Med. P. 20.210(e), 348 So. 2d 547, 551 (Fla. 1977).
94. Id.
making a random selection and mailing questionnaires.

B. Statutory Time Limits - The Traps for the Unwary

The medical mediation rules and statutes established several important time limit provisions. Because the Act was in derogation of the common law and was an impediment to the constitutional guarantee of access to the courts, these time limit provisions were generally interpreted as being jurisdictional and therefore were strictly construed. In adopting Mediation Rule 20.190, the supreme court made it clear that it interpreted these provisions as being jurisdictional. If the time limit expired without certain actions having occurred, the mediation panel automatically lost its subject-matter jurisdiction, and the equities involved in the expiration of the time limit were not considered. Even if the opposing counsel agreed to an action that led to noncompliance with a certain time provision, that agreement generally did not operate as a waiver.

1. The Twenty-Day Period

An answer was required to be filed within twenty days of the date of service of process. If an answer was not timely filed, subject-matter jurisdiction of the hearing panel automatically terminated and could not be extended, even by the actions of the parties.

96. The mechanism for computing time was similar to that set forth in the FLA. R. CIV. P. 1.090. The day of the act from which the designated period of time began to run was not included. The last day of the time period was included unless it was a Saturday or Sunday or legal holiday. In that case, the period ran until the end of the next day which was not a Saturday, Sunday or legal holiday. If the period of time prescribed was less than seven days, intermediate Saturdays, Sundays and legal holidays were not included. If a rule or statute required an act to be done and no specific time period was stated the act had to be done within 10 days. Fla. R. Med. P. 20.160(a)-(b), 348 So. 2d 547, 550 (Fla. 1977).


2. The 120-Day Period

A hearing on the mediation claim was required to be held within 120 days of the date that the claim was filed, unless the judicial referee extended the time for good cause shown. The party requesting the extension had to move for an extension and make a showing of good cause prior to the expiration of the 120-day period. The motion to extend had to be granted within the 120 days. If it was only set for hearing within this period, then the jurisdiction terminated. Apparently, if the motion to extend was orally granted in a timely manner, jurisdiction was not lost simply because the written order was not entered within 120 days. The 120-day period was jurisdictional and could not be extended by the actions of the parties.

It was uncertain whether jurisdiction terminated if a hearing was begun, but not completed within the 120-day period. The most logical interpretation is that the hearing must have been completed within the time period. Rule 20.190(b) required that the hearing be “held” within the 120-day period. When the referee extended the 120-day period, rule 20.190(c) required that the hearing be


102. Fla. R. Med. P. 20.160(e), 190(b), 348 So. 2d 547, 550 (Fla. 1977). A motion to extend the time for hearing could not be made after the termination of the 120-day period. See Ballard v. Curatolo, 363 So. 2d 864 (Fla. 4th Dist. Ct. App. 1978). But see Thames v. Melvin, 365 So. 2d 813 (Fla. 1st Dist. Ct. App. 1979) where the court found a referee's order, made within the 120-day period, which set the final hearing outside the 120-day period, to be an order extending the time for hearing, with good cause shown. However, shortly after this decision was filed, the same three-judge panel of the first district found that the holding in Thames was strictly limited to its facts. Grossman v. Duncan, 371 So. 2d 142, 143 (Fla. 1st Dist. Ct. App. 1979).

103. Fla. R. Med. P. 20.190(b), 348 So. 2d 547, 550 (Fla. 1977). This rule required the clerk to send a notice of termination of the proceedings to the parties if the 120-day period had expired and no extension order was entered. Therefore, even if a motion to extend was pending, the clerk was required to terminate the proceedings.


105. See Thames v. Melvin, 365 So. 2d 813 (Fla. 1st Dist. Ct. App. 1979); Mercy Hosp., Inc. v. Badia, 348 So. 2d 631 (Fla. 3d Dist. Ct. App. 1977). However, in Limond v. Llanio, 349 So. 2d 214 (Fla. 3d Dist. Ct. App. 1977), a motion to extend the time for hearing was pending at the expiration of the 120-day period. The opinion incorrectly held that the panel's jurisdiction always lasted 10 months and therefore an order terminating jurisdiction after the expiration of the 120 days was erroneous. See also Richards v. Foulk, 345 So. 2d 402 (Fla. 3d Dist. Ct. App. 1977).

“commenced” within six months of the date the claim was filed.\textsuperscript{107} It seems that if the rule meant only that the hearing must have begun within the 120-day period, the court would have used the word “commence” as it did in rule 20.190(c).\textsuperscript{108}

It was unclear whether an order extending the time for a hearing or only the motion showing good cause had to be entered within the 120-day period. If jurisdiction automatically terminated at the expiration of 120 days, it would seem that the court would lack jurisdiction to do any act, including the entry of an order extending jurisdiction, once the deadline for filing was past.\textsuperscript{109}

3. The Six-Month Period

When the judicial referee entered an order extending the 120-day period within which a hearing was to be held, the hearing was required to begin within six months from the date the claim was filed.\textsuperscript{110} If a hearing did not commence within six months, the subject-matter jurisdiction of the mediation panel automatically terminated and could not be modified by the parties or by the judicial referee. If the 120-day period was not extended in a timely manner, the six-month period did not become effective.\textsuperscript{111}

Occasionally a party attempted to evade this requirement by holding a “commencement hearing” within the six-month period. Limited evidence would be introduced and a hearing date would again be set, but beyond the six-month period. This dilatory tactic was disapproved and the court generally required a full hearing to begin.\textsuperscript{112} For example, in Hewitt v. Coffee,\textsuperscript{113} the judicial referee granted defendant’s motion to limit a previously set hearing to permit only the introduction of medical records. A five-minute hearing was held for this purpose. The claimant objected on the ground that it was not a final hearing or one on the merits. The Hewitt court held that the limited hearing was not a commence-

\begin{itemize}
  \item \textsuperscript{107} Fla. R. Med. P. 20.190(c), 348 So. 2d 547, 550 (Fla. 1977).
  \item \textsuperscript{108} Fla. R. Med. P. 20.160(e), 348 So. 2d 547, 550 (Fla. 1977), also said that the hearing “shall be begun no later than six months” from the day of filing.
  \item \textsuperscript{109} Fla. R. Med. P. 20.190, 348 So. 2d 547, 550 (Fla. 1977).
  \item \textsuperscript{110} Fla. R. Med. P. 20.160(e), 20.190(c), 348 So. 2d 547, 550 (Fla. 1977). The hearing had to be held before all three panel members. See Diggett v. Conkling, 368 So. 2d 74 (Fla. 4th Dist. Ct. App. 1979).
  \item \textsuperscript{111} See Shore v. Abbazia, 375 So. 2d 354 (Fla. 3d Dist. Ct. App. 1979) (a hearing at which only one medical record was introduced); Wright v. Ratnesar, 373 So. 2d 431 (Fla. 2d Dist. Ct. App. 1979) (the only evidence offered was inadmissible hospital records).
  \item \textsuperscript{112} 368 So. 2d 1342 (Fla. 3d Dist. Ct. App. 1979).
\end{itemize}
ment of a final hearing and dismissed the action because six months had run from the date the claim was filed. The opinion focused on the fact that the claimant had not been permitted to make an opening statement or call any witnesses. The court looked to substance rather than form and found the hearing to be a device to extend the six-month period.

Prior to the enactment of the Rules of Medical Mediation Procedure, the Third District Court of Appeal considered whether it was possible to waive this six-month time limitation. In Love v. Jacobson, an order had been entered extending the time for hearing to six months. After the expiration of that period, the claimant tried to terminate the jurisdiction of the panel. The Jacobson court reasoned that the statute, by providing for termination of jurisdiction when no hearing was held within the ten-month period, also provided that subject-matter jurisdiction existed in the mediation panel until the expiration of the ten-month period. Therefore, the jurisdiction did not terminate after only six months. However, subsequent to this decision the supreme court adopted Mediation Rule 20.190(c), which provided that the six-month period was jurisdictional, and the actions of the parties could not extend it if the hearing had not begun within that time period. For instance, in Raedel v. Watson Clinic Foundation, Inc., the judicial referee entered an order within the 120-day period pursuant to a stipulation by the parties which extended the date for the final hearing beyond the six-month period. The second district held that the panel's jurisdiction had terminated and the final hearing could not be held because no extension of the six-month period was permissible under the rule. The lack of subject-matter jurisdiction precluded the panel from considering the merits of the claim.

114. Id. at 1345.
115. Id.
116. 343 So. 2d 1328 (Fla. 3d Dist. Ct. App. 1977).
117. Id.
118. The opinion in Jacobson was filed March 29, 1977, 343 So. 2d at 1328, while the Rules of Mediation Procedure were filed on July 14, 1977. In re The Florida Bar, 348 So. 2d 547 (Fla. 1977).
120. 360 So. 2d 12 (Fla. 2d Dist. Ct. App. 1978). The court noted that the only situation where a mediation time limit could be extended was an extension of the 120-day limitation to six months. Id. at 14.
4. The Ten-Month Period

Mediation Rule 20.190 provided that if the judicial referee granted an extension of the 120-day time period, the hearing had to commence within six months from the date the claim was filed, but that subject-matter jurisdiction did not terminate until ten months from the date of filing. This rule recognized that although a hearing was commenced in many mediation proceedings, a valid reason could render it impossible to conclude the hearing within the six-month period. To illustrate, if the hearing unexpectedly lasted more than a day, at least one of the panel members was likely to have a conflict and be unable to meet the following day. The hearing would then be continued to a date on which counsel and each of the panel members had no conflict. Because of busy schedules, this date may not have been in the near future. The ten-month rule provided the ultimate limit beyond which an injured claimant could not be denied the right to file a malpractice action in the circuit court.

Four of the district courts of appeal considered whether the ten-month limit was jurisdictional or whether there were some circumstances under which the mediation panel could hear the claim beyond the ten-month period. The first decisions were filed shortly after the constitutionality of the malpractice act was unsuccessfully challenged. Several judicial referees had decided to stay mediation proceedings pending a final determination of the constitutionality of the underlying medical malpractice statute. The ten-month period elapsed before the supreme court's decision in Carter v. Sparkman was rendered.

Both the Second and Third District Courts of Appeal were subsequently faced with the issue of whether the ten-month period was jurisdictional or whether a mediation panel could retain jurisdiction. Both courts recognized a very narrow exception and provided that in this particular circumstance, the expiration of the ten-month period did not result in the termination of the jurisdic-

122. Fla. R. Med. P. 20.190, 348 So. 2d 547, 550 (Fla. 1977). The panel was required to file a written decision within thirty days after the completion of the hearing. FLA. STAT. § 768.44(7) (1979). Apparently, this decision had to be filed within the 10-month period or the panel lost its jurisdiction to do so. See Aldana v. Holub, 381 So. 2d 231 (Fla. 1980).
123. Fla. R. Med. P. 20.190(d), 348 So. 2d 547, 550 (Fla. 1977); FLA. STAT. § 768.44(3) (1979).
124. See, e.g., Perkins v. Pare, 352 So. 2d 65 (Fla. 4th Dist. Ct. App. 1977), holding that the 10-month limitation could not be "extended, modified or reinstated by the panel, the judicial referee or by agreement of the parties." Id. at 67.
tion of a mediation panel. In considering the same issue, the Fourth District Court of Appeal came to an opposite conclusion and held that the panel's subject-matter jurisdiction terminated after ten months even though the mediation proceeding had been stayed pending the decision on the Act's constitutionality.

Subsequently, Mediation Rule 20.190 was adopted. It clearly provided that jurisdiction automatically terminated with the expiration of ten months. After the adoption of the Mediation Rules, the Second and Third District Courts of Appeal reviewed the issue of whether the ten-month time period could be extended. In Love v. Jacobson, the third district clearly held that if a hearing had not been concluded within ten months from the date the claim was filed because of the alleged delaying tactics of the claimants, the panel's jurisdiction terminated. The court noted that its prior decisions were strictly limited to the facts of those cases. In Febles v. Abercrombie, the second district considered a case in which the judicial referee had become unavailable and the hearing could not be rescheduled within the ten-month period. The court declined to extend its earlier decision and ruled that jurisdiction automatically terminated after ten months. Similarly the First District Court


126. Cole v. Wallace, 354 So. 2d 885 (Fla. 4th Dist. Ct. App. 1977). The court reasoned: "The jurisdiction of a medical mediation panel terminates as a matter of law if a hearing has not been held at the expiration of the ten-month jurisdictional period." Id. at 887 (emphasis in the original).

127. Fla. R. Med. P. 20.190, 348 So. 2d 547, 550 (Fla. 1977), stated in part:

The clerk shall send to all parties a notice of termination of the proceedings when any of the following events has occurred:

(d) The final hearing has not been concluded within 10 months from the date the claim is filed.

Termination for any of the foregoing reasons terminates the jurisdiction of the panel.

If rule 20.190 had been applicable when the judicial referees stayed the mediation proceedings beyond the 10-month period pending the outcome of the Florida Supreme Court's decision on the constitutionality of the Act, the jurisdiction of the panels would have terminated. In Cole v. Burrows, 364 So. 2d 502 (Fla. 4th Dist. Ct. App. 1978), the panel's jurisdiction terminated even though the death of a panel member prevented the hearing from being held in a timely manner.

128. 358 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 1978).

129. Id. at 1181. See Valenstein v. Doctors Hosp., 372 So. 2d 1169 (Fla. 3d Dist. Ct. App. 1979) (Schwartz, J., specially concurring).

130. 358 So. 2d 568 (Fla. 2d Dist. Ct. App. 1978).

131. Id. at 569.
of Appeal in *Aldana v. Holub*\(^\text{132}\) held that regardless of the reason that a hearing was not concluded within the ten-month period, the panel's subject-matter jurisdiction automatically terminated. In that decision, the court found that because of the expiration of the ten-month period it was not necessary to reach the question of whether the judicial referee had erred in granting a mistrial which resulted in an inability to reschedule the hearing within the ten-month time period.\(^\text{133}\) In its decision holding the Act to be constitutionally invalid, the supreme court agreed that the ten-month limit was jurisdictional and could not be extended.\(^\text{134}\)

5. **Tolling Effect of Appeals**

If a party appealed an order of the judicial referee, the appellate process could result in the mediation panel losing jurisdiction. The decisions seem clear that if, for any reason, a proceeding before a mediation panel was not completed within ten months from the date that a claim was filed, subject-matter jurisdiction automatically terminated.\(^\text{135}\) Whenever a party appealed an order, the appeal process consumed a substantial amount of time; the ten-month time period could expire during the pendency of the appeal and jurisdiction of the mediation panel would then terminate. In this event, a party could receive a favorable ruling, but be unable

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132. 354 So. 2d 1272, 1273 (Fla. 1st Dist. Ct. App. 1978), rev'd on other grounds, 381 So. 2d 231 (Fla. 1980). See *Thames v. Melvin*, 370 So. 2d 439 (Fla. 1st Dist. Ct. App. 1979); *Pyle v. Taylor*, 361 So. 2d 790 (Fla. 1st Dist. Ct. App. 1978). The *Thames* court found upon expiration of the 10-month period, the panel's jurisdiction terminated. 370 So. 2d at 440. The 10-month period had run during the time appellant successfully appealed an earlier order of the judicial referee which had erroneously terminated the mediation proceeding. Although the defendant obtained a determination by the appellate court that the proceeding should not have been dismissed, the passage of the time involved in the appellate process resulted in the panel losing jurisdiction under the 10-month rule. *Id.*

133. 354 So. 2d at 1273.


135. An analogous situation involves a motion to vacate and set aside a judgment on the basis of mistake, inadvertence, surprise, excusable neglect, and newly discovered evidence under Fla. R. Civ. P. 1.540(b). The motion must be made not later than one year after the judgment. *Id.* If an appeal is taken from a final order, the one-year period is not tolled. When the appellate process extends over one year and a rule 1.540 motion is filed, it will not be considered because it is not timely. *See Seven-Up Bottling Co. v. George Constr. Co.*, 153 So. 2d 11 (Fla. 3d Dist. Ct. App. 1963); *H. Trawick, Florida Practice & Procedure § 26-8* (1976).
to proceed in mediation because of the expiration of the ten-month period.\textsuperscript{136} The reason for this seemingly harsh result was to insure that a malpractice claimant was not deprived of his right to file a complaint in circuit court for any longer than ten months.\textsuperscript{137} If the rule was not interpreted strictly, either party could indefinitely extend the jurisdiction of the panel by filing appeals.

The only possible relief available to a party who desired to appeal was to obtain a stay. Although the decisions seem clear that there was no method of extending the ten-month period,\textsuperscript{138} a few cases suggested that a stay was available to toll the running of the ten-month period.\textsuperscript{139} Application for a stay had to be made to the judicial referee.\textsuperscript{140} If the stay was denied, an appellate court, upon motion, could review the denial of the stay.\textsuperscript{141}

\section*{C. The Conduct of the Hearing}

The hearing before the medical mediation panel was conducted in a manner similar to that used in some arbitration proceedings and before some administrative panels. The judicial referee presided and ruled on matters of law and the admissibility of evidence. The other panel members functioned as fact finders although they were permitted to question the witnesses.\textsuperscript{142} During the hearing, the parties were permitted to call witnesses who testified under oath subject to cross-examination.\textsuperscript{143} Testimony could

\begin{itemize}
\setlength:\itemsep{0em}
\item \textsuperscript{136} See, e.g., Thames v. Melvin, 370 So. 2d 439 (Fla. 1st Dist. Ct. App. 1979). In Thames, the defendant successfully appealed the referee's order dismissing the mediation proceeding because the 120-day period had run without a timely order extending it. Although the court found that the jurisdiction had continued, the mediation claim was dismissed since the 10-month period had run during the appellate process.
\item \textsuperscript{137} \textit{Aldana}, 381 So. 2d at 235.
\item \textsuperscript{138} See, e.g., \textit{Aldana}, 354 So. 2d at 1273.
\item \textsuperscript{139} See Thames v. Melvin, 370 So. 2d 439 (Fla. 1st Dist. Ct. App. 1979); Morales v. Moore, 356 So. 2d 829 (Fla. 4th Dist. Ct. App. 1978).
\item \textsuperscript{141} Fla. R. App. P. 9.310(f).
\item \textsuperscript{142} Fla. R. Med. P. 20.170, 348 So. 2d 547, 550 (Fla. 1977). The judicial referee had the discretion to permit the other panelists to question witnesses. It is clear that the mediation rules did not permit the other panel members to overrule the judicial referee on questions as to the admissibility of evidence. See Minutes of the Civil Procedure Rules Committee of The Florida Bar, p. 8 (November 19, 1976)(on file with Professor Ehrhardt, Florida State University College of Law, Tallahassee, Fla.).
\item \textsuperscript{143} Fla. Stat. § 768.44(6) (1979).}
\end{itemize}
also be offered through depositions and documentary evidence could be considered by the panel. The subpoena power of the court was available. Nevertheless, the statute and rules provided that strict adherence to the rules of civil procedure and to the rules of evidence applicable in civil cases was not required. Thus, the judicial referee could admit hearsay and other evidence for which a technical foundation had not been laid if he found it to be relevant and reliable.

The major issue that arose in connection with the conduct of the hearing was whether the claimant was required to present evidence to the panel. In Herrera v. Doctors Hospital, the claimant presented no evidence before the panel and the panel found that the defendants were not actionably negligent. When the claimant subsequently filed his suit in circuit court, the defendants moved to dismiss on the basis that the court lacked jurisdiction because the claimant had presented no evidence to the mediation panel.

The supreme court ruled that the complaint should not be dismissed because under the Act a plaintiff was not required to submit any evidence to the panel. The supreme court found that the statute only required that the claim be "submitted" to mediation, which occurred automatically when the claim form containing a statement of the facts describing the alleged malpractice was filed in the circuit court.

The court found it unnecessary to require the presentation of evidence before the panel due to what it found to be "substantial obstacles" in sections 768.44(7) and 768.47 of the Florida Statutes, to the plaintiff who presented no evidence. Section 768.47(2) al-

144. Id. The parties could use any of the discovery procedures provided by the Rules of Civil Procedure, subject to certain time modifications. Id. at § 768.44(5); Fla. R. Med. P. 20.140(a), 348 So. 2d 547, 549 (Fla. 1977). The judicial referee had the power to limit discovery, Fla. Stat. § 768.44(5) (1979), and to impose certain sanctions for noncompliance with discovery orders, Fla. R. Med. P. 20.140(b), 348 So. 2d 547, 549 (Fla. 1977). In Taylor v. Munroe Memorial Hosp., 362 So. 2d 142, 143-44 (Fla. 1st Dist. Ct. App. 1978), the court found the entry of a default judgment was proper when a party repeatedly failed to answer certain interrogatories. Subsequently, Mediation Rule 20.140(b) was promulgated, which provided that Fla. R. Civ. P. 1.380, authorizing the entry of a default for the failure to furnish discovery, was not applicable in mediation proceedings.


146. Id. at § 768.44(6) (1979); Fla. R. Med. P. 20.170, 348 So. 2d 547, 550 (Fla. 1977).


148. 360 So. 2d at 1093.

149. 367 So. 2d at 206.

150. Id.

151. Id. at 206-07. Judge Pearson dissented from the opinion of the third district. He
lowed only the panel’s conclusion as to liability to be admitted into evidence at trial, and section 768.44(7) limited the panel’s conclusion to a finding that the defendant “was actionably negligent” or “was not actionably negligent.” Presumably, if the claimant presented no evidence the defendant could be found not actionably negligent. Then the claimant would be forced to overcome this finding at trial.

Within thirty days after the completion of the hearing, the panel was required to file a written decision with the clerk, who then mailed copies to the parties. The decision simply stated whether or not there was actionable negligence on the part of each of the defendants. If the parties desired they could continue mediation for the purpose of having the panel make a recommendation regarding the damages suffered by the claimant, although any determination of punitive damages was specifically prohibited. The recommendation was required to contain findings as to the damage caused by each act involved. Any finding regarding damages was inadmissible during a subsequent trial. Its only purpose was to facilitate a settlement between the parties.

IV. APPELLATE REVIEW

Decisions of the mediation panel relating to its jurisdiction to hear the plaintiff’s claim under section 768.44 were reviewed by appellate courts. Although both the statute and the mediation

argued that the Act required good faith compliance with the statute and that to allow a claimant to proceed without presenting evidence would make a sham of the mediation procedure. 360 So. 2d at 1097-98.

154. Fla. Stat. § 768.44(7) (1979). Any panel member could file a written concurring or dissenting opinion. Id. However, in Kirkley v. Behe, 381 So. 2d 242 (Fla. 4th Dist. Ct. App. 1979), the 30-day requirement was held not to be jurisdictional and a written decision was permitted after 30 days if it was made orally in a timely manner.

For a discussion of whether the claimant can inform the jury that he presented no evidence to the mediation panel, see notes 177-81 and accompanying text infra.

155. Fla. Stat. § 768.44(8) (1979). It appears that the panel was seldom asked to make a damage recommendation. In a study conducted during the summer of 1979, discussed in part VII of this article, infra, one of the items included in the questionnaire was whether the mediation panel had been asked to render an advisory opinion as to the amount of damages suffered by the claimant. Of the 789 hearings studied, none addressed itself to the question of damages.

157. Generally review was by a common law writ of certiorari. See Cole v. Wallace, 354 So. 2d 885 (Fla. 4th Dist. Ct. App. 1977); Perkins v. Pare, 352 So. 2d 64 (Fla. 4th Dist. Ct.
rules were silent on the method of appellate review of a panel determination, the courts permitted appeals involving subject-matter jurisdiction but denied appeals for other issues not involving fundamental jurisdictional questions. For instance, decisions of the judicial referee on the sufficiency of the evidence to support the panel’s factual finding were not reviewable by an appellate court. The courts declined review of these issues on the ground that they did not go to the integrity of the Act and that the party had an adequate legal remedy at trial. On the other hand, the purpose of the Act would have been frustrated if the jurisdiction of the panel could have been erroneously defeated or maintained.

Courts also reviewed issues involving compliance with the Act’s strict time limits, the selection of unqualified members of the mediation panel and the termination of the panel’s jurisdiction by unauthorized means, i.e., entry of a judgment on the pleadings.


Although appellate review may have been available, the process could consume so much time that the mediation panel’s jurisdiction was terminated by the expiration of the time limit. One district court of appeal suggested that only the entry of a stay would toll the running of the jurisdictional period. See Thames v. Melvin, 370 So. 2d 439 (Fla. 1st Dist. Ct. App. 1979).

158. The Florida Supreme Court held in Simmons v. Faust, 358 So. 2d 1358 (Fla. 1978), that an order of a judicial referee on the constitutionality of a statute was not an order of a trial court. Id. If it had been an order of the trial court, it would have been appealable to the supreme court. Fla. Const. art. V, § 3 (b)(1). The Simmons court also held that a judicial referee did not perform the essential functions of a court and therefore, the referee’s orders were not appealable. 358 So. 2d at 1359. Also, a referee does not have the authority to certify questions of law to the district court of appeal. Koota v. Parkway Gen. Hosp. Inc., 347 So. 2d 124 (Fla. 3d Dist. Ct. App. 1977).

159. See Hospital Corp. of America v. Lawyer, 363 So. 2d 848 (Fla. 4th Dist. Ct. App. 1978); Ans v. Pagnotti, 362 So. 2d 459 (Fla. 4th Dist. Ct. App. 1978).

160. See Hubacher v. Landry, 360 So. 2d 42, 44 (Fla. 3d Dist. Ct. App. 1978). The party has an adequate remedy at trial because he can make a timely objection to the proffered evidence.

161. Id. This decision also argued that if a medical defendant could obtain review of nonjurisdictional matters, he could postpone the mediation proceedings and increase the plaintiff’s prelitigation burden beyond constitutional tolerance. Id. at 44-45.


or a summary judgment.\textsuperscript{164}

V. ADMISSIBILITY OF EVIDENCE REGARDING MEDIATION PROCEEDING AT SUBSEQUENT TRIAL

During the trial of the civil malpractice action in circuit court, either the plaintiff or the defendant may have wished to introduce evidence of certain aspects of the mediation proceeding. In addition to being governed by the usual rules of evidence, the admissibility of evidence in mediation proceedings was also restricted by certain specific provisions established in the Act.\textsuperscript{165}

One provision stated that a panel member was prohibited from being called as a witness during any subsequent trial.\textsuperscript{166} In fashioning this general rule of incompetency, the Act was in accord with general evidence rules which, during the retrial of an action, bar the testimony of a person who has served as a juror or who has sat as the trial judge during the first trial.\textsuperscript{167}

Although the Act provided that counsel could not make references to insurance during the trial of the malpractice action,\textsuperscript{168} in \textit{Carter v. Sparkman} the court found that this provision was invalid because it violated the supreme court's constitutional rule-making power.\textsuperscript{169} In that opinion, however, the court accepted a new rule of court which adopted the philosophy of the Act and prohibited references to insurance during the malpractice trial.\textsuperscript{170}

The Act provided that a defendant could elect not to mediate by simply not filing an answer.\textsuperscript{171} In \textit{Carter}, the supreme court construed the Act to mean that when a defendant failed to participate in a mediation proceeding, that fact was admissible into evidence in a subsequent civil medical malpractice trial.\textsuperscript{172} Satisfactory ways


\textsuperscript{165} FLA. STAT. § 768.47(2) (1979). A transcript of the evidence admitted during the mediation proceeding was usually hearsay evidence if it was offered during the civil trial. Only if a witness was unavailable could a transcript be offered rather than calling the witness to testify. See FLA. STAT. § 90.804(2)(a) (1979). See generally C. EHRHARDT, FLORIDA EVIDENCE (1977).

\textsuperscript{166} FLA. STAT. § 768.44(6) (1979).


\textsuperscript{168} FLA. STAT. § 768.47(1) (1979).

\textsuperscript{169} 335 So. 2d at 806. \textsuperscript{170} Id. at 806.

\textsuperscript{171} FLA. STAT. § 768.44(1)(c) (1979). Fla. R. Med. P. 20.190(a), 348 So. 2d 547, 550 (Fla. 1977). The constitutionality of this was upheld in \textit{Carter}, 335 So. 2d at 805.

\textsuperscript{172} 335 So. 2d at 805.
to prove a defendant’s failure to mediate included calling the defendant as an adverse-party witness and asking him whether he had elected to participate in the mediation proceeding or calling the plaintiff to testify to the defendant’s nonparticipation.

A more difficult question arose regarding the admissibility of evidence relating to the findings of the mediation panel. Factual findings could occur in two areas: (1) whether the defendant was actionably negligent; and (2) if the defendant was liable, the amount of damages suffered by the claimant. While recognizing that the purpose of the finding as to damages was to aid an out-of-court settlement, the statute provided that this finding was not admissible in a subsequent civil action.173 However, the finding by the panel as to the actionable negligence of the defendant posed a more difficult question. Florida Statutes provided that:

The conclusion of the hearing panel on the issue of liability may be admitted into evidence in any subsequent trial. . . . Parties may, in the opening statement or argument to the court or jury, comment on the panel’s conclusion in the same manner as any other evidence introduced at trial. If there is a dissenting opinion, the numerical vote of the panel shall also be admissible. Panel members may not be called to testify as to the merits of the case. The jury shall be instructed that the conclusion of the hearing panel shall not be binding but shall be accorded such weight as they choose to ascribe to it.174

This section provided for the admissibility of the written finding of the mediation panel together with the vote of the panel, if the vote was not unanimous.175 Although this evidence is otherwise hearsay, a limited exception to the hearsay rule was created. However, if the panel stated any reason for its finding, that part of the written finding was inadmissible and was stricken if offered during a subsequent trial.176

A claimant could effectively avoid the mediation process by not presenting evidence to the mediation panel, if he accepted a finding that “no actionable negligence” had been proven, and thereby argued to the jury during a civil malpractice trial that the panel’s finding was meaningless since no evidence had been presented to

175. Id. But the ruling of a panel which lacked jurisdiction was not admissible as evidence at trial. Cohen v. Johnson, 373 So. 2d 389 (Fla. 4th Dist. Ct. App. 1979).
it. The supreme court in *Fisher v. Herrera*177 decided that a claimant was not required to present evidence to the mediation panel after he filed his claim. Apparently, the court negated the effectiveness of this technique by limiting the admissibility of evidence regarding the panel's finding during the civil trial to whether the panel found the defendant to be "actionably negligent" or "not actionably negligent."178 In its decision, the supreme court apparently upheld the reasoning of the Third District Court of Appeal and ruled that by standing silent before the mediation panel, a claimant elected to assume the burden of overcoming an adverse finding by the panel during the civil trial.179 In limiting admissibility to the panel's finding of no actionable negligence, the district court stated that: "A plaintiff against whom an adverse conclusion has been entered by a mediation board can show no reasons for the board's finding when he litigates the matter in court."180 Therefore, if the plaintiff elected not to present any evidence to the mediation panel, he faced a major obstacle in the civil trial since he was not allowed to inform the jury that the defendant was found not negligent as a result of the plaintiff's failure to submit any evidence. A jury would probably place great weight on the panel's finding. Thus, a claimant/plaintiff who elected not to present evidence before the mediation panel had to be prepared during a civil trial to face an adverse finding by the mediation panel which he was not allowed to explain or attack.181

However, the practical application of *Herrera* is uncertain. In order for a jury to comprehend the importance of the mediation panel's finding, it would seem that defense counsel would have had to explain to them the foundation and role of the panel. The sterile introduction of a finding of actionable negligence by a mediation panel would not seem to be able to significantly influence a jury because the jury would have no idea what it indicated. If *Herrera* meant that neither counsel for the plaintiff nor counsel for the defendant could comment upon the panel's finding, the significance

177. 367 So. 2d 204, 205-06 (Fla. 1979), aff'g Herrera v. Doctors Hosp., 360 So. 2d 1092 (Fla. 3d Dist. Ct. App. 1978).
178. *Id.* at 207.
180. 360 So. 2d at 1096. The supreme court did not comment upon this issue in its opinion.
181. See Medel v. Valentine, 376 So. 2d 1154 (Fla. 1979). The supreme court commented that "the trial court committed error in permitting the jury to hear that [plaintiff] presented no evidence before the mediation panel." *Id.* at 1156 n.2.
of the finding in the jury's deliberations would be greatly diminished. On the other hand, if the decision did not bar defense counsel from commenting upon the import of the panel's finding, it would seem that the traditional rules pertaining to trial practice and evidence would require that the plaintiff be able to rebut the defendant's argument that "a panel of experts had already found that the defendant was not actionably negligent." The plaintiff could rebut with the argument or the evidence that the panel had decided in the defendant's favor because the plaintiff failed to introduce any evidence before the panel in an attempt to avoid the time and expense of two trials. This latter interpretation applies the traditional "rule" that once a party opens the door to otherwise inadmissible evidence, the adverse party is permitted to walk through it. Allowing rebuttal argument and comment by defense counsel would have been consistent with that part of the Act which provided that: "Parties may, in the opening statement or argument to the court or jury, comment on the panel's conclusion in the same manner as any other evidence introduced at trial."

182. During final arguments to the jury, otherwise improper arguments are justified when they are in response to similar remarks by adverse counsel. See Leisure Group, Inc. v. Williams, 351 So. 2d 374 (Fla. 2d Dist. Ct. App. 1977); Jones v. State, 355 So. 2d 198 (Fla. 3d Dist. Ct. App. 1978).

183. Many courts have held that when a party offers otherwise inadmissible evidence which is admitted, the door has been opened, and "he should not [be] allowed to shut it in the face of" the adverse party who offers similarly inadmissible evidence. Sprenger v. Sprenger, 146 N.W.2d 36, 44 (N.D. 1966). See Cities Serv. Oil Co. v. Griffin, 357 So. 2d 333, 343 (Ala. 1978) ("[i]relevant evidence may be admitted to rebut evidence of like character"). See generally McCORMICK ON EVIDENCE § 57 (2d ed. 1972).

This interpretation of the Act forbidding comment upon the reasons for the panel reaching its conclusion was inconsistent with the general rules of evidence. The panel's finding as to actionable negligence was hearsay. When offered during a subsequent trial to prove the defendant was negligent, the Act created an exception to the hearsay rule when it provided for the decision's admissibility. The general rules of evidence permit attacks upon the credibility of all evidence admitted as an exception to the hearsay rule. See C. EHRHARDT, FLORIDA EVIDENCE § 806.1 (1977); J. WEINSTEIN, EVIDENCE § 806.1 (1978); Fed. R. Evid. 806. Thus, a party would be able to demonstrate to the trier-of-fact any reason that the finding of the mediation panel was not credible. The lack of any evidence from the claimant would seem to detract from the weight the jury would give the panel's finding.

The Uniform Official Reports as Evidence Act, 9A U.L.A. 573 (1965), also provides an exception to the hearsay rule for "[w]ritten reports or findings of fact made by officers" of a state. Id. A decision of a medical mediation panel would have been such a report or finding of fact. Section 3 of that Act provided for the cross-examination of the person making the report. This cross-examination would permit inquiry into matters affecting the weight to be given to the report. Id. at 578.

185. FLA. STAT. § 768.47(2) (1979).
VI. The Death

After the decision of the Florida Supreme Court upholding the constitutionality of the Act, Florida trial courts continued to find portions of the Act to be constitutionally infirm. Finally, Dr. Luis Aldana petitioned the supreme court for a writ of certiorari from the order of a judicial referee who had refused to extend the ten-month jurisdictional time limit after a mediation hearing resulted in a mistrial because of statements made by the physician/panelist indicating his prejudgment of the claim. Although there was no assertion on appeal that the Act was unconstitutional, the supreme court, upon its own motion, called for briefs from all parties on the constitutional issues involved in the practical application of the medical mediation procedure. On February 28, 1980, 1,704 days after medical mediation became effective in Florida and 1,393 days after the supreme court had found that the Act passed constitutional muster, medical mediation in Florida ceased to exist. In Aldana, the supreme court found that the time limitations, especially the ten-month maximum, were jurisdictional and could not be interpreted to permit extensions of time, because to do so would unduly delay the filing of a civil malpractice action and unreasonably deny an aggrieved person access to the courts. The court found that the inflexibility of these time limits deprived the litigants of due process because they operated in a manner which was "intrinsically unfair and arbitrary and capricious in their application." Both the claimant and the defendant could be deprived of their right to mediation through no fault of their own. The court carefully explained that in its previous decision in Carter v. Sparkman, it had upheld the facial validity of the Act, while in Aldana the practical operation and effect of the Act in a mediation proceeding was inequitable and unworkable. The court did not declare unconstitutional all types of pretrial screening panels in medical malpractice hearings; the decision only held

187. See Aldana, 354 So. 2d at 1273.
188. Aldana, 381 So. 2d at 234. Aldana was consolidated with Abel v. Kirschgessner where the judicial referee continued the mediation hearing on his own motion to a date beyond the 10-month time period. Id. at 234.
189. Id. at 235.
190. Id. at 236.
191. Id. at 237.
invalid the procedure set forth in the Act.\textsuperscript{192}

VII. THE STUDY

This portion of the article contains some of the results of a statistical study of a sample of medical malpractice mediation claims filed in Florida between July 1, 1975, and June 30, 1978.\textsuperscript{193} Florida's fifteen most populous counties were chosen for this study.\textsuperscript{194} During the summer of 1979, the medical mediation files in the clerk of court's office in each of these counties were personally examined by a researcher, usually a law student, who completed a questionnaire based on the information contained in the mediation file and the file for the subsequent civil action, if there was one. Claims filed subsequent to June 20, 1978, were not included because of the time lag involved in completing the mediation process. If these later files had been used, the mediation process would not have been completed in many of the claims and misleading statistical information possibly would have been obtained. The reported information was current at the time the research was completed (most counties were completed prior to September 15, 1979).

Although mediation files were not chosen on a random-sample basis, the inclusion of all major counties should reflect filings in the counties where the greatest number of mediation claims have been filed. The study attempted to consider every mediation claim filed in the counties during the applicable time period; however, files were occasionally missing in a clerk of court's office. In addition, some mediation files contained insufficient information to complete the questionnaires. And frequently, multiple defendants were named in a mediation claim. For the purposes of the study, if one pleading was filed asserting a claim for damages arising out of medical malpractice, it was treated as a single claim even if multiple defendants were involved. If individual proceedings were filed against each of the defendants, then they were treated as separate

\textsuperscript{192} The court was careful to note that its holding was "that section 768.44, Florida Statutes (1979), the medical mediation act, is unconstitutional." Id. at 238. The decision did not address the question of whether other types of medical malpractice panels were also invalid.

\textsuperscript{193} Portions of this study were previously published in a monograph, C. EHRHARDT, A PRELIMINARY ANALYSIS OF MEDICAL LIABILITY MEDIATION PANELS IN FLORIDA (Center for Employment Rel. & Law 1980) (on file with Professor Ehrhardt, Florida State University College of Law, Tallahassee, Fla.).

\textsuperscript{194} The counties involved in the study were Alachua, Brevard, Broward, Dade, Duval, Escambia, Hillsborough, Lee, Leon, Orange, Palm Beach, Pinellas, Polk, Sarasota, and Volusia.
An attempt was made to determine whether plaintiffs were electing not to introduce evidence before the mediation panel, in light of the decision in Fisher v. Herrera. However, the mediation files frequently did not disclose what evidence, if any, was presented. Thus, it was not possible to draw any meaningful conclusion from the available data.

One of the items included on the questionnaire was whether the mediation panel had been asked to render an advisory opinion as to the amount of damage suffered by the claimant. In none of the 789 hearings studied did the panel address itself to the question of damages and, therefore, there are no tables included which address this issue. Between July 1, 1975, and June 30, 1978, 2,162 separate malpractice mediation claims were filed in the fifteen counties studied. Table A shows that the largest number of claims filed in a single year was 843 in 1976. From this high mark, the number of claims decreased by 12.1% in 1977 and by 22.9% in 1978 (assuming that the claims filed during the first six months of 1978 were 50% of the total claims filed during that year).

During the first six months of medical mediation in 1975, 51.4% of the mediation claims filed were subsequently refiled as civil malpractice actions. The frequency dropped in the following years with the percentage of claims in which civil actions were filed being a constant 42% (within .8 percent). But only 3.1% of the 2,162 mediation claims progressed to a trial and verdict from a jury. This figure will rise with the passage of time, since suits involving 325 defendants were pending during the period of data collection (see Table B).

Jury verdicts in which a defendant was found to have committed malpractice were returned in only 1.9% of the mediation claims that were studied. However, this low percentage does not indicate that only 1.9% of the defendants sued were negligent since many cases would not progress to trial for other unrelated reasons; for instance, the parties would often reach a pretrial settlement in the case or the parties would not proceed with the suit because of the expense involved.

In the 67 civil actions that resulted in a jury verdict, 77 defendants were alleged to have committed malpractice. The jury re-

195. See text at note 155 supra.
196. Even if the number of defendants still having suits pending is subtracted from the total number of claims (2,162 less 325), only 3.7% of the mediation claims studied could ultimately result in a jury verdict.
turned a verdict in favor of the plaintiff against 41 (53.2%) of the defendants; while jury verdicts were entered in favor of 36 (46.8%) of the defendants.

### Table A

<table>
<thead>
<tr>
<th>Date Mediation Claim Filed</th>
<th>Through June 30,</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of mediation claims filed</td>
<td>253</td>
</tr>
<tr>
<td>Number of claims in which civil suit was subsequently filed</td>
<td>130</td>
</tr>
<tr>
<td>Percentage of claims in which civil suits filed</td>
<td>51.4</td>
</tr>
<tr>
<td>Number of claims that subsequently resulted in a jury verdict</td>
<td>19</td>
</tr>
<tr>
<td>Percentage of claims that subsequently resulted in a jury verdict</td>
<td>7.5</td>
</tr>
<tr>
<td>Number of jury verdicts in subsequent civil action (by defendant)</td>
<td>12</td>
</tr>
<tr>
<td>For defendant</td>
<td>11</td>
</tr>
</tbody>
</table>

A majority of the 935 civil malpractice actions that were filed following the completion of the medical mediation proceeding did not progress to a trial and finding of fact by the jury. The complaint in many of the civil actions alleged that more than one defendant had committed malpractice. Table B tabulates the reasons indicated in the civil case file that a jury trial had not been held for each defendant named. Civil actions were pending against 26.9% of the 1,208 defendants at the time this research was completed. Some of these actions will subsequently be tried before a jury. The case files reflected that 231 (19.1%) of the defendants had a voluntary dismissal entered.
TABLE B

Reasons No Trial Held After Civil Malpractice Suit Filed
(by individual defendant sued)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial pending</td>
<td>23</td>
<td>62</td>
<td>140</td>
<td>100</td>
<td>325</td>
</tr>
<tr>
<td>Settlement</td>
<td>31</td>
<td>112</td>
<td>73</td>
<td>15</td>
<td>231</td>
</tr>
<tr>
<td>Voluntary dismissal</td>
<td>11</td>
<td>46</td>
<td>53</td>
<td>9</td>
<td>119</td>
</tr>
<tr>
<td>Dismissal-summary judgment</td>
<td>8</td>
<td>13</td>
<td>4</td>
<td>2</td>
<td>30</td>
</tr>
<tr>
<td>Dismissal-failure to prosecute</td>
<td>11</td>
<td>23</td>
<td>13</td>
<td>3</td>
<td>47</td>
</tr>
<tr>
<td>Case transferred</td>
<td>0</td>
<td>7</td>
<td>5</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>File missing</td>
<td>2</td>
<td>36</td>
<td>52</td>
<td>24</td>
<td>114</td>
</tr>
<tr>
<td>Other</td>
<td>54</td>
<td>118</td>
<td>50</td>
<td>30</td>
<td>252</td>
</tr>
</tbody>
</table>

The specialty or type of each defendant named in each malpractice claim is recorded in Table C. Hospitals were the most frequently named defendants; they were named 766 times. Obstetrics and gynecology was the medical specialty named the most frequently—348 times. General surgery was the specialty of 298 defendants, while orthopedic surgery was named 247 times. The number in the category of “other” specialties in Table C is unfortunately large. Researchers orally reported that emergency medicine specialists and surgeons possessing different subspecialties were the most frequent defendants within this category.
TABLE C
Type of Defendant Named in Medical Mediation Claims

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Hospital</td>
<td>79</td>
<td>292</td>
<td>259</td>
<td>136</td>
<td>766</td>
</tr>
<tr>
<td>Obstetrics/gynecology</td>
<td>49</td>
<td>126</td>
<td>112</td>
<td>61</td>
<td>348</td>
</tr>
<tr>
<td>General surgeon</td>
<td>30</td>
<td>124</td>
<td>110</td>
<td>34</td>
<td>298</td>
</tr>
<tr>
<td>Orthopedic surgeon</td>
<td>29</td>
<td>108</td>
<td>74</td>
<td>36</td>
<td>247</td>
</tr>
<tr>
<td>Internal medicine</td>
<td>17</td>
<td>86</td>
<td>55</td>
<td>21</td>
<td>189</td>
</tr>
<tr>
<td>General practitioner</td>
<td>23</td>
<td>79</td>
<td>55</td>
<td>23</td>
<td>180</td>
</tr>
<tr>
<td>Pediatrics</td>
<td>10</td>
<td>13</td>
<td>24</td>
<td>6</td>
<td>53</td>
</tr>
<tr>
<td>Anesthesiologist</td>
<td>8</td>
<td>19</td>
<td>15</td>
<td>10</td>
<td>52</td>
</tr>
<tr>
<td>Eye, ear, nose and throat</td>
<td>2</td>
<td>16</td>
<td>9</td>
<td>2</td>
<td>29</td>
</tr>
<tr>
<td>Other</td>
<td>140</td>
<td>379</td>
<td>331</td>
<td>142</td>
<td>992</td>
</tr>
<tr>
<td>Unknown</td>
<td>25</td>
<td>77</td>
<td>79</td>
<td>36</td>
<td>217</td>
</tr>
</tbody>
</table>

More than one defendant may be named in a mediation claim. Table D discloses that in the claims filed during the study period, 3,360 defendants were alleged to have been negligent. Table D indicates that 18.3% of the defendants named in mediation claims filed during 1975 elected to avoid the mediation process by not filing an answer. The percentage of nonanswering defendants dropped from 18.3% in 1975 to 12.3% in 1976. This rate remained relatively stable in 1977 and 1978. In 1977, 11.7% of the defendants failed to answer, and in 1978, 10% of them elected not to do so.
TABLE D

Defendants Who Did Not File
Answer to Mediation Claim

<table>
<thead>
<tr>
<th>Date Mediation Claim Filed</th>
<th>Through June 30,</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of defendants named in mediation claims</td>
<td>409</td>
</tr>
<tr>
<td>Number of the defendants who filed answer</td>
<td>334</td>
</tr>
<tr>
<td>Number of defendants who did not file answer</td>
<td>75</td>
</tr>
<tr>
<td>Percent of defendants who did not file answer</td>
<td>18.3</td>
</tr>
</tbody>
</table>

Sixty-three percent of the 3,360 defendants named in the malpractice claims studied were not involved in a hearing before a mediation panel to determine whether they were actionably negligent. Table E indicates the reason that a mediation hearing for each defendant was not held. Voluntary dismissals of the mediation claims were filed against 16.8% of the defendants, while 12.1% of the defendants elected to avoid a hearing by not filing an answer to the mediation claim. A dismissal was "stipulated" against 10.3% of the defendants.

In its opinion finding the Act to be unconstitutional, the Florida Supreme Court placed great weight on the "over seventy" cases that were dismissed because a jurisdictional time period had expired. 197 Despite the court's research involving appellate decisions, it is interesting to note that such cases occurred relatively infrequently. Of the 3,360 defendants who had mediation claims filed against them, only 6.5% of the defendants had the claim dismissed because the 120-day period had expired and 4.4% of the defendants had the claim dismissed because the ten-month time period expired. Since the running of the jurisdictional periods often deprived the parties of their right to mediate when the equities indicated that the loss of mediation should not have occurred, it is probable that a party's feeling that he had been treated unfairly resulted in a high proportion of these cases being appealed.

197. Aldana, 381 So. 2d at 236.
TABLE E
Reasons Mediation Hearing Was Not Held
For Individual Defendants

<table>
<thead>
<tr>
<th>Date Mediation Claim Filed</th>
<th>1975</th>
<th>1976</th>
<th>1977</th>
<th>1978</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary dismissal</td>
<td>54</td>
<td>262</td>
<td>180</td>
<td>67</td>
<td>563</td>
</tr>
<tr>
<td>No answer filed</td>
<td>75</td>
<td>164</td>
<td>117</td>
<td>50</td>
<td>406</td>
</tr>
<tr>
<td>Dismissal stipulated</td>
<td>36</td>
<td>141</td>
<td>112</td>
<td>56</td>
<td>345</td>
</tr>
<tr>
<td>Dismissal-expiration of 120 days from filing</td>
<td>30</td>
<td>60</td>
<td>87</td>
<td>40</td>
<td>217</td>
</tr>
<tr>
<td>Dismissal-expiration of 10 months from filing</td>
<td>49</td>
<td>65</td>
<td>24</td>
<td>10</td>
<td>148</td>
</tr>
<tr>
<td>Dismissal-specialty outside statute</td>
<td>3</td>
<td>9</td>
<td>6</td>
<td>3</td>
<td>21</td>
</tr>
<tr>
<td>Transferred to another county</td>
<td>5</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td>18</td>
</tr>
<tr>
<td>Dismissal-statute of limitation</td>
<td>10</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Settlement</td>
<td>2</td>
<td>12</td>
<td>8</td>
<td>5</td>
<td>27</td>
</tr>
<tr>
<td>Other</td>
<td>68</td>
<td>163</td>
<td>79</td>
<td>50</td>
<td>360</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>257</td>
<td></td>
</tr>
<tr>
<td>717</td>
<td></td>
</tr>
<tr>
<td>501</td>
<td></td>
</tr>
<tr>
<td>236</td>
<td></td>
</tr>
<tr>
<td>1,711</td>
<td></td>
</tr>
</tbody>
</table>

A mediation hearing was held in only 36.4% of the total mediation claims studied. The data in Table F discloses little correlation between population or geographic location of the county and the frequency with which a hearing was actually held. Hearings occurred in only 17.1% of the claims filed in Alachua County and 21.2% of the claims filed in Duval County. On the other hand, a hearing resulted in 61.1% of the claims filed in Lee County and in 57.6% of the claims filed in Polk County.

Actionable negligence was found by the mediation panel in only 7.1% of the total claims studied. A finding that there was no negligence by the defendant was entered in 29.4% of the claims. There was no finding regarding actionable negligence in the remaining 63.5% of the claims because no mediation hearing ever occurred for those claims. Duval County had the lowest frequency of actionable negligence findings: only 1.2% of the total claims filed resulted in such a finding (Duval was also second lowest in the percentage of claims resulting in a hearing). The highest frequency of actionable negligence occurred in Leon County where 19.4% of the claims resulted in that finding (Leon County was second highest in percentage of claims which resulted in a hearing). On the other hand, Table F discloses several counties in which this correlation between the number of hearings held and findings of actionable negligence is absent. For instance, Dade County had a low (6.3%)
frequency of actionably negligent findings by the panel but a relatively high percentage (41.5%) of its claims progressed to a mediation hearing. The statistics in Table F are probably more meaningful in reflecting the differences between counties in the frequency of actionable negligence findings when a mediation hearing is held.

<table>
<thead>
<tr>
<th></th>
<th>Total number of claims studied</th>
<th>Claims that progressed to hearing</th>
<th>Claims resulting in finding of actionable negligence*</th>
<th>Claims resulting in finding no defendant actionably negligent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alachua</td>
<td>35</td>
<td>17.1</td>
<td>5.7</td>
<td>11.4</td>
</tr>
<tr>
<td>Brevard</td>
<td>42</td>
<td>31.0</td>
<td>4.8</td>
<td>26.2</td>
</tr>
<tr>
<td>Brevard</td>
<td>369</td>
<td>34.9</td>
<td>10.0</td>
<td>24.9</td>
</tr>
<tr>
<td>Dade</td>
<td>682</td>
<td>41.5</td>
<td>6.3</td>
<td>35.2</td>
</tr>
<tr>
<td>Duval</td>
<td>170</td>
<td>21.2</td>
<td>1.2</td>
<td>20.0</td>
</tr>
<tr>
<td>Escambia</td>
<td>50</td>
<td>38.3</td>
<td>8.6</td>
<td>29.7</td>
</tr>
<tr>
<td>Hillsborough</td>
<td>163</td>
<td>30.1</td>
<td>8.0</td>
<td>22.1</td>
</tr>
<tr>
<td>Lee</td>
<td>18</td>
<td>61.1</td>
<td>16.7</td>
<td>44.4</td>
</tr>
<tr>
<td>Leon</td>
<td>31</td>
<td>41.9</td>
<td>19.4</td>
<td>22.5</td>
</tr>
<tr>
<td>Orange</td>
<td>128</td>
<td>41.4</td>
<td>7.8</td>
<td>33.6</td>
</tr>
<tr>
<td>Palm Beach</td>
<td>128</td>
<td>38.3</td>
<td>8.6</td>
<td>29.7</td>
</tr>
<tr>
<td>Pinellas</td>
<td>139</td>
<td>29.5</td>
<td>3.6</td>
<td>25.9</td>
</tr>
<tr>
<td>Polk</td>
<td>66</td>
<td>57.6</td>
<td>9.1</td>
<td>48.5</td>
</tr>
<tr>
<td>Sarasota</td>
<td>83</td>
<td>26.5</td>
<td>2.4</td>
<td>24.1</td>
</tr>
<tr>
<td>Volusia</td>
<td>58</td>
<td>37.9</td>
<td>10.3</td>
<td>27.6</td>
</tr>
<tr>
<td>Statewide</td>
<td>2,162</td>
<td>36.5</td>
<td>7.1</td>
<td>29.4</td>
</tr>
</tbody>
</table>

*If mediation claim involved multiple defendants and a finding of actionable negligence was made as to at least one of the defendants, the claim is recorded in this column.

The mediation panel determined in a written finding whether each defendant was or was not "actionably negligent." If only one defendant was named in the claim, it was obvious at the conclusion of a mediation hearing whether the panel's findings favored the claimant. If there were multiple defendants and the panel's findings were identical, it was also obvious whether the panel's finding was in favor of the claimant. However, when multiple defendants were not all found either "actionably negligent" or "not actionably negligent" by the mediation panel, it was difficult to

categorize the decisions as being entirely in favor of either the claimant or the defendant. The number and percentage of mediation hearings in which at least one defendant was found to be actionably negligent and the hearings in which no defendants were found to be actionably negligent are reflected in Table G. At least one defendant was found actionably negligent in 19.4% of the 789 hearings. In 80.6% of the hearings, no defendants were found to have been negligent. The range between the counties in the frequency of findings of negligence was wide. Only 5.5% of the hearings resulted in negligence findings in Duval County, and 15.2% of the hearings had a similar result in Dade County. However, 28.7% of the hearings in Broward County and 33.3% of the hearings in Alachua County resulted in a negligence finding for at least one defendant. The highest frequency of negligence findings was 46.2% in Leon County. (The small number of hearings held in both Leon and Alachua counties may make these figures misleading.)

<table>
<thead>
<tr>
<th>County</th>
<th>Number and percentage of hearings in which at least one defendant found negligent</th>
<th>Number and percentage of hearings in which no defendants were found negligent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alachua</td>
<td>2 33.3</td>
<td>4 66.7</td>
</tr>
<tr>
<td>Brevard</td>
<td>2 15.4</td>
<td>11 84.6</td>
</tr>
<tr>
<td>Broward</td>
<td>37 28.7</td>
<td>92 71.3</td>
</tr>
<tr>
<td>Dade</td>
<td>43 15.2</td>
<td>240 84.2</td>
</tr>
<tr>
<td>Duval</td>
<td>2 5.5</td>
<td>34 94.5</td>
</tr>
<tr>
<td>Escambia</td>
<td>5 20.8</td>
<td>19 79.2</td>
</tr>
<tr>
<td>Hillsborough</td>
<td>13 26.5</td>
<td>36 73.5</td>
</tr>
<tr>
<td>Lee</td>
<td>3 27.3</td>
<td>8 72.7</td>
</tr>
<tr>
<td>Leon</td>
<td>6 46.2</td>
<td>7 53.8</td>
</tr>
<tr>
<td>Orange</td>
<td>10 18.9</td>
<td>43 81.1</td>
</tr>
<tr>
<td>Palm Beach</td>
<td>11 22.4</td>
<td>38 77.6</td>
</tr>
<tr>
<td>Pinellas</td>
<td>5 12.2</td>
<td>36 87.8</td>
</tr>
<tr>
<td>Polk</td>
<td>6 15.8</td>
<td>32 84.2</td>
</tr>
<tr>
<td>Sarasota</td>
<td>2 9.1</td>
<td>20 90.9</td>
</tr>
<tr>
<td>Volusia</td>
<td>6 27.2</td>
<td>16 72.8</td>
</tr>
<tr>
<td></td>
<td>153 19.4</td>
<td>636 80.6</td>
</tr>
</tbody>
</table>

Regardless of whether a defendant was found to be "actionably negligent" or "not actionably negligent," the findings of the mediation panel were almost always unanimous. The finding of actionable negligence on the part of an individual defendant was by a "split" 2-1 vote of the panel only 71 times in the 789 claims in which a mediation hearing was held (see Table H). The panel's
decision was unanimous in 93.2% of the hearings. Since the three panelists were almost always in agreement as to whether a particular defendant was actionably negligent, there is a possibility of either a conscious or unconscious agreement among the panelists to act unanimously.

**TABLE H**

<table>
<thead>
<tr>
<th>Vote of Mediation Panel</th>
<th>Unanimous vote of panel</th>
<th>2-1 vote of panel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of claims in which hearing held</td>
<td>718</td>
<td>71</td>
</tr>
<tr>
<td>Number of hearings in which all defendants were found negligent</td>
<td>82</td>
<td>22</td>
</tr>
<tr>
<td>Number of hearings in which no defendant was found negligent</td>
<td>601</td>
<td>35</td>
</tr>
<tr>
<td>Number of hearings in which some defendant(s) were found negligent</td>
<td>35</td>
<td>14</td>
</tr>
</tbody>
</table>

The physician/panelist was less likely to vote that his fellow physician/defendant was actionably negligent than were either the judicial referee or the attorney/panelist. The frequency with which each type of panelist voted either "actionably negligent" or "not actionably negligent" in the 789 hearings is tabulated in Table I.

**TABLE I**

<table>
<thead>
<tr>
<th>Percentage of &quot;Actionable Negligence&quot; Votes Cast by Each Panelist</th>
<th>Total Number of Votes Cast</th>
<th>Through June 30, 1975</th>
<th>1976</th>
<th>1977</th>
<th>1978</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial referee</td>
<td>1,243</td>
<td>11.1</td>
<td>19.3</td>
<td>18.8</td>
<td>15.0</td>
<td>17.7</td>
</tr>
<tr>
<td>Attorney</td>
<td>1,243</td>
<td>10.1</td>
<td>19.3</td>
<td>18.8</td>
<td>14.5</td>
<td>17.5</td>
</tr>
<tr>
<td>Physician</td>
<td>1,243</td>
<td>10.1</td>
<td>14.1</td>
<td>13.7</td>
<td>14.5</td>
<td>13.7</td>
</tr>
</tbody>
</table>

The lawyer and the judicial referee each found actionable negligence by approximately the same number of defendants. The judicial referee found that 17.7% of the defendants for whom a mediation hearing was held had been actionably negligent. The attorney/
panelist found that 17.5% of the defendants were negligent. According to the data in Table I, the physician/panelist was less likely to find a defendant actionably negligent than was either other panelist. Only 13.7% of the votes cast by the physician/panelists were for actionable negligence.¹⁹⁸

The finding that the physician was the least likely of the three panelists to vote a defendant actionably negligent is confirmed by the data reflected in Table J. The few hearings in which a panelist dissented were analyzed and the vote of the dissenting panelist was recorded. Not only did the physician/panelist dissent most frequently, in almost all of his dissents he found the defendant to be free of negligence despite agreement by the other two panelists that negligence had occurred. When either the judicial referee or the attorney dissented, he usually believed a defendant to be negligent, despite a contrary finding by the other panel members.

**TABLE J**

<table>
<thead>
<tr>
<th>Dissented and Found Negligence</th>
<th>Dissented and Found No Negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Referee</td>
<td>19</td>
</tr>
<tr>
<td>Attorney</td>
<td>11</td>
</tr>
<tr>
<td>Physician</td>
<td>8</td>
</tr>
</tbody>
</table>

**VIII. CONCLUSION**

During Florida's brief experiment with medical malpractice mediation panels, it became clear that the Florida Legislature, in its rush to respond to the medical malpractice insurance "crisis," had enacted a statutory scheme that deprived the persons involved in an alleged act of malpractice of a fair and easily understood pretrial screening procedure. Although lawyers representing patients complained the loudest about medical mediation, the Act did not discriminate against either the patient or the physician; its application to both groups was equally arbitrary and capricious. In fact, it was during an appeal by a physician from his denial of a mediation hearing that the supreme court found the Act to be unconstitutional as it was applied.

¹⁹⁸ It should be noted that the frequency of "actionably negligent" votes cast by the physician/panelist was similar to that of the judicial referee and attorney/panelist in the hearings held on claims filed during the first six months of 1978.
While medical mediation existed, the majority of mediation claims that were filed did not proceed to a mediation hearing; when a hearing was held, the mediation panel's finding usually favored the defendant. The data compiled during the study did not establish whether the legislative intent to encourage settlement of both meritorious and nonmeritorious malpractice claims was fulfilled by the Florida mediation process. Before any pretrial screening procedure is enacted (or reenacted in Florida), the legislative body considering the issue should determine whether the expensive and time-consuming pretrial screening process will encourage settlement of both meritorious and nonmeritorious claims. If it is determined that the pretrial mediation process will have the desired effect, any legislative action in Florida, or elsewhere, will hopefully profit from Florida's 1,700-day lesson—to be successful, a pretrial medical malpractice screening procedure cannot operate as a trap for the unwary.