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Cover Page Footnote

The Author wishes to thank his father for introducing him to the topic; Kevin Grady for his editorial assistance; his parents, brother, and sister for their love and support; and his bride-to-be, Jaclynn Hausfeld, for her patience and support over the last three years. Finally, the Author would especially like to thank his grandmothers, Mrs. Anna Krella and Mrs. Marguerite Graham, whose brilliance and good genes cannot go unrecognized.

LEGISLATIVE MALPRACTICE: AN ANALYSIS OF OHIO'S PROPOSED MANDATORY MEDICAL MALPRACTICE ARBITRATION PROGRAM*

*Joseph C. Krella***

I. INTRODUCTION

For the last thirty years, healthcare professionals have faced more and more litigation regarding medical malpractice claims and higher damage awards for successful plaintiffs.[1] As a result, these professionals encounter limited malpractice insurance coverage and higher insurance costs. This increase in cost has forced some physicians out of medical practice and has made many doctors anxious over threats of expansive damages awards that can result from malpractice trials. This Comment explores actions taken by some state legislatures in an attempt to curb rising damage awards and increasing medical malpractice insurance costs. It also examines how legislatures use alternative dispute resolution ("ADR") in the form of arbitration as a way to solve the "medical malpractice crisis." Central to this analysis is Ohio Senate Bill 59 ("SB 59") and its potential for success.[2] SB 59 comprises Ohio's recently proposed pilot program that mandates arbitration for medical malpractice claims.

The increasing cost of medical malpractice claims has forced almost every state legislature to undertake some form of action to deal with the problem.[3] States have several options available to them, to aid in dealing

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* At the time of publication, Senate Bill 59 had been referred to the Insurance, Commerce and Labor Committee and was awaiting additional hearings.

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[1] Studies show in a five-year period from 1995-2000 the median jury award in medical malpractice cases rose from $500,000 to $1,000,000 and jumped 43% in one year—from $700,000 in 1999 to $1,000,000 in 2000. Jury Verdict Research, *Medical Malpractice: Verdicts, Settlements, and Statistical Analysis*, www.juryverdictresearch.com/Press_Room/Press_releases/medmal_01/medmal_01.html (accessed Nov. 4, 2006).

[2] Originally, this bill was introduced as Senate Bill 88 in the 126th Ohio General Assembly. However, due to that session's adjournment, the Bill was reintroduced in the Senate on February 2, 2007, as Senate Bill 59 for Ohio's 127th General Assembly. Accordingly, the bill will be referred to as Senate Bill 59 throughout this article.

[3] For example, in 2005 alone, every state except Idaho introduced some form of legislation attempting to reform the way in which it dealt with medical malpractice claims. Natl. Conf. of State Legislatures, *Medical Malpractice Tort Reform*, www.ncsl.org/standcomm/sclaw/medmalreform05.html (accessed Nov. 4, 2006).

with the medical malpractice issue. These options include insurance market interventions, tort reforms such as caps on noneconomic damages and elimination of joint and several liability, alternative dispute resolution, and patient safety efforts.[4] As noted above, Ohio's answer to the medical malpractice crisis is to introduce legislation that implements rules and procedures for a pilot program mandating arbitration for claims of medical negligence prior to filing a complaint against an individual medical professional or facility.[5]

SB 59, as drafted by the Ohio Senate, will effectively get cases to arbitration; however, it will be unsuccessful at limiting the cost of medical malpractice claims and accomplishing the true goals of arbitration. Section II of this Comment discusses the history and evolution of medical malpractice and the need for reform. Because Ohio chose arbitration as its method for dealing with medical malpractice, Section II briefly explains what arbitration is and what a typical arbitration hearing entails. Also, Section II discusses Ohio's history of dealing with medical malpractice arbitration and some issues that the Ohio courts faced. Finally, Section II introduces the provisions of SB 59 and explores the differences between the current legislation and the new program.

Section III examines the current debate over SB 59. The Section looks at potential challenges that the pilot program faces by looking at similar statutes from other states and caselaw pertaining to those statutes. Furthermore, Section III examines the policy behind adopting the new program and the arguments for and against its enactment. Section IV analyzes the viability of the pilot program and examines the validity of the arguments surrounding it. Section IV also offers suggestions to the General Assembly on how to improve its medical malpractice policy. Finally, Section V concludes that SB 59 may face little challenge as to its validity, but it will not accomplish its goal of lowering medical malpractice costs and providing quicker resolution to disputes.

II. BACKGROUND

This Section explores several aspects of medical malpractice and its relationship to arbitration. Part A looks at the history of the medical malpractice crisis in America and the corresponding reform efforts. Because it is relevant to Ohio's current situation, Part B of this Section examines the purpose of arbitration and what a typical arbitration hearing entails. Part B concludes with an examination of Ohio's previous forays into medical malpractice arbitration and some issues Ohio courts have faced.

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[4] Emily V. Cornell, *Addressing the Medical Malpractice Insurance Crisis*, www.nga.org/Files/pdf/1102MEDMALPRACTICE.pdf (Dec. 5, 2002).

[5] Natl. Conf. of State Legislatures, *Medical Malpractice Tort Reform: 2005 State Introduced Legislation*, www.ncsl.org/standcomm/sclaw/medmalreform05.htm (last updated Dec. 2005).

Finally, Part C of this Section introduces the provisions of SB 59.

A. A Brief History of the Medical Malpractice Crisis in America

Beginning roughly thirty years ago with the first "medical malpractice crisis," heavy periods of medical malpractice litigation created the need to explore alternatives to traditional jury trials.[6] By the middle of the 1970s "[t]he synergistic effect of changes in legal doctrine, advances in medical science, and the development of more coherent and visible standards of care" led to surges in litigation.[7] These initial surges in litigation caused insurance premiums to soar, forced medical malpractice insurers to leave the market, and left medical practitioners without coverage.[8] State legislatures answered this initial wave of litigation with legislation in the form of tort reform.[9] By the end of the decade, the legislatures' answers to the increased litigation appeared to work as the malpractice crisis subsided.[10]

After subsiding in the late 1970s, the medical malpractice crisis reemerged in the mid-1980s.[11] The return of the medical malpractice crisis developed due to the wrongful relaxation of malpractice legislation in some states at end of the first wave,[12] the climb of malpractice claim rates, and the development of other types of personal-injury litigation.[13] In response to this new wave of increased costs, legislatures looked to new methods of reform, including caps on noneconomic and punitive damage awards.[14]

While the reforms of the mid-1980s did help quell the crisis, the cost of medical malpractice insurance and claims remains high today. One reason for the high cost is that during the strong economy and stock market of the 1990s, insurers kept premiums artificially low to gain market share.[15] Also, jury awards for medical malpractice claims have risen over recent

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[6] David M. Studdert, Michelle M. Mello & Troyen A. Brennan, *Medical Malpractice*, 350 New Eng. J. Med. 283, 284 (2004).

[7] *Id.*

[8] *See id.*

[9] *Id.*

[10] The tort reform that led to the decrease included the formation of joint underwriting associations "to serve as insurers of last resort . . . ." *Id.* Also, "special state patient-compensation funds were introduced to absolve commercial insurers of responsibility for specified dollar portions of malpractice payments . . . ." *Id.*

[11] *Id.*; *see also* Albert Yoon, *Mandatory Arbitration and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the West*, 6 Am. L. & Econ. Rev. 95, 101 (2004).

[12] For example, the Nevada legislature abolished the screening panels that it had implemented in the 1970s as a way to screen malpractice claims. Yoon, *supra* n. 11, at 101. The panels were abolished because the legislature concluded that they were ineffective. *Id.* However, despite the legislature's efforts, increasing malpractice costs persisted, causing the legislature to look at new types of reform. *Id.*

[13] Studdert et al., *supra* n. 6, at 284.

[14] *Id.* Also, the Nevada state legislature, in response to the adverse effects of its decisions mentioned *supra* note 12, instituted a new screening panel system that proved to be effective. Yoon, *supra* n. 11, at 101-03.

[15] Cornell, *supra* n. 4, at 2.

years.[16] Finally, the St. Paul Companies, one of the largest medical malpractice insurers, stopped writing medical liability policies in 2002.[17] St. Paul[18] departed from the industry because it could no longer afford to offer medical malpractice insurance. Its departure decreased the incentive for others to keep rates competitive.[19] Accordingly, state legislatures, including Ohio, are still exploring options to help solve the crisis.

B. Ohio's Past Use of Arbitration as a Solution to Solve the Medical Malpractice Crisis

As noted above, there are many ways in which a state can attempt to contain the costs of medical malpractice insurance premiums.[20] However, because Ohio's past focus and current action when dealing with malpractice has been on arbitration, this Comment will only explore the use of arbitration as a means to cure the medical malpractice crisis. Subpart One briefly addresses the goal of arbitration and then explains what a typical arbitration hearing entails. Subpart Two reviews Ohio's current legislation on medical malpractice arbitration and the Ohio courts' view of the State's medical malpractice arbitration legislation.

1. The Arbitration Process[21]

Arbitration and its usefulness in settling disputes is not a new concept.[22] Arbitration has been widely recognized as an effective device for resolving various disputes in the United States since the 1920s.[23] Since that time, arbitration has been a valid "method of dispute resolution involving

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[16] Jury Verdict Research, *supra* n. 1.

[17] Cornell, *supra* n. 4, at 2.

[18] St. Paul's announcement to leave ended coverage for 750 hospitals, 42,000 physicians, and 73,000 other healthcare works nationwide. Milt Freudenheim, *St. Paul Cos. Exits Medical Malpractice Insurance*, http://www.nytimes.com (December 13, 2001). "St. Paul, the nation's fourth-largest business insurer, said it was facing losses on its malpractice business of $940 million [in 2001]." *Id.* "Dr. Donald J. Palmisano, secretary-treasurer of the American Medical Association, said the St. Paul announcement bolstered the association's arguments for laws to limit jury awards in malpractice cases. 'Because of the sky-high cost of professional liability insurance, physicians are closing or limiting their practices' or going without insurance, he said." *Id.*

[19] Cornell, *supra* n. 4, at 2.

[20] *Id.*

[21] Parties can find their dispute in the arena of arbitration for several reasons. For example, the parties can use arbitration clauses in their contracts. *See* Frances Kellor, *American Arbitration: Its History, Functions and Achievements* 64 (Kennikat Press 1972). Also, courts can order the arbitration of a dispute. *See generally* N.C. Gen. Stat. § 7A-37.1 (Lexis 2006) (ordering arbitration for disputes in North Carolina involving claims of money damages of $15,000 or less). Additionally, legislation, such as Ohio's pilot program discussed in this Comment, can mandate the arbitration of claims involving a certain subject matter.

[22] *See* Kellor, *supra* n. 21, at 3-8 (describing the historical pattern of arbitration and noting that its use goes as far back as ancient Greece).

[23] In 1920, New York was the first state to enact a modern arbitration law. *Id.* Shortly after, in 1922, the first arbitration association, the Arbitration Society of America, was formed to help administer arbitration trials. *Id.* at 11. Eventually, American acceptance of arbitration was solidified with the enactment of the U.S. Arbitration Act in 1925 and the formation of the American Arbitration Association in 1926. *Id.*

one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding."[24]

Generally, arbitration is less formal but very similar to a trial in that it typically involves several procedural stages and "offers parties a decisive legal outcome to their dispute . . . ."[25] The attorney's role during arbitration is very similar to presenting a case in litigation.[26] The arbitration process usually begins with "initial and responsive findings and the appointment of arbitrators.[27] Some form of preliminary planning, including a prehearing conference, is likely to occur, perhaps followed by informal exchange or discovery."[28] After this initial stage, the hearing begins with each side typically presenting opening statements, introducing evidence, examining witnesses, and concluding with closing statements.[29] Finally, the arbitration process concludes with "arbitrator deliberations leading to the rendition of an award."[30]

2. Ohio's Previous Experience with Medical Malpractice Arbitration

Prior to the introduction of SB 59, the Ohio General Assembly endorsed a system of medical malpractice arbitration codified in §§ 2711.21–2711.24 of the Ohio Revised Code ("O.R.C."). This Subpart introduces the existing provisions that SB 59 will repeal during the period of its pilot program. This Subpart also discusses various court cases in which Ohio's medical malpractice arbitration provisions have been challenged.

Section 2711.21 of the O.R.C. addresses medical malpractice arbitration by providing that "[u]pon the filing of any medical . . . claim . . . , if all of the parties to the medical . . . claim agree to submit it to nonbinding arbitration, the controversy shall be submitted to an arbitration board consisting of three arbitrators to be named by the court."[31] Under the statute, each party to the dispute chooses one arbitrator and the court chooses the third arbitrator who also serves as the chairperson of the board.[32] If any party objects to the final decision of the arbitration board, the claim then proceeds to trial as if it had not been arbitrated; the decisions

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[24] *Black's Law Dictionary* 41 (Bryan A. Garner ed., 2d pocket ed., West 2001).

[25] Natl. Arb. Forum, *Arbitration Overview*, http://www.arbitration-forum.com/main.aspx?itemID=324&hideBar=False&navID=178&news=3 (accessed Nov. 5, 2006).

[26] *See* Jay Folberg, Dwight Golann, Lisa Kloppenberg & Thomas Stipanowich, *Resolving Disputes: Theory, Practice, and Law* 487 (Aspen Publishers 2005) (explaining that during arbitration an attorney typically makes opening and closing statements and may have to file briefs and motions and examine witnesses).

[27] A typical medical malpractice arbitration involves a panel of three arbitrators: one chosen by the plaintiff, one chosen by the defendant, and one chosen either by a court or by agreement of both parties. *See* Ohio Rev. Code Ann. § 2711.21 (Lexis 2006).

[28] Folberg et al., *supra* n. 26, at 487.

[29] *See id.*

[30] *Id.*

[31] Ohio Rev. Code Ann. § 2711.21(A).

[32] *Id.*

of the board are inadmissible at the subsequent trial.[33]

In addition to allowing nonbinding arbitration, the O.R.C. allows parties to contract to arbitrate future malpractice claims.[34] Section 2711.22 provides:

> [A] written contract . . . to settle by binding arbitration any dispute or controversy arising out of . . . care of the patient rendered by a hospital or healthcare provider, that is entered into prior to the . . . care is valid, irrevocable, and enforceable . . . until or unless the patient or the patient's legal representative rescinds the contract by written notice within thirty days of the signing of the contract.[35]

While allowing for future claims to be arbitrated by agreement, the O.R.C. establishes extensive procedural guidelines with which the agreements must comply.[36] Section 2711.23 requires the contract to "clearly inform[] the patient of the patient's rights" and that it be separate from "any other agreement, consent, or document."[37] Additionally, the agreement must contain the type of treatment to be provided, a provision declaring that all arbitration expenses will be divided equally, and a declaration that the arbitration will consist of a three-person board.[38] To further clarify, the Ohio General Assembly provides an example of an arbitration agreement form and cancellation form that, if used, will be "presumed valid and enforceable."[39]

Although Ohio courts have not faced many challenges to the medical malpractice sections of the O.R.C., the Supreme Court of Ohio declared the legislation constitutional in *Beatty v. Akron City Hospital*.[40] In *Beatty*, the defendants allegedly performed a tubal ligation on the plaintiff without her consent.[41] Pursuant to O.R.C § 2711.21, the case went to arbitration and the board found for the defendants.[42] On appeal, the plaintiffs claimed § 2711.21 violated "the constitutional guarantee of equal protection by treating medical malpractice claims in a judicially different manner than other tort claims; and that there is no state interest sufficiently compelling to justify such different treatment."[43]

As a guideline for its constitutional determination, the Court noted:

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[33] *Id.* at § 2711.21(C).
[34] *Id.* at § 2711.22.
[35] *Id.* at § 2711.22(A).
[36] *See id.* at § 2711.23(A)-(J).
[37] *Id.* at § 2711.23 (G), (J).
[38] *Id.* at § 2711.23(A)-(J).
[39] *Id.* at § 2711.24.
[40] 67 Ohio St. 2d 483 (1981).
[41] *Id.* at 483.
[42] *Id.*
[43] *Id.* at 491.

"Under the traditional test of equal protection, unequal treatment of classes of persons by a state is valid if the state can show that a rational basis exists for the inequity."[44] The Court further clarified that "any classification based 'upon a state of facts that reasonably can be conceived to constitute a distinction, or differences, in state policy ***' will be upheld."[45] In upholding the constitutionality of the section the Court explained:

> The Ohio General Assembly, after appropriate study and debate on the subject, recognized the urgency of implementing a reasonable and effective means of helping alleviate the adverse economic and social impacts of this medical provider crisis. It is beyond reasonable question that the General Assembly had a legitimate interest in protecting the health of its citizens as well as the economic and social stability of the state in this area of concern. Concluding as they must have that the increased number of medical claims was the cause of the dramatic rise in the cost of medical malpractice insurance, and thus the cause of the rise in the cost of providing medical services to the public, it was only rational for the General Assembly to deal with such claims in the manner provided in the Act.[46]

The decision in *Beatty* demonstrates how courts will work to uphold an act of the General Assembly and how anyone challenging an act "must overcome a strong presumption of constitutionality."[47] This policy of deference to the General Assembly is important in the face of SB 59. As discussed in detail *infra*, SB 59 is a significant departure from the current legislation and will likely face challenges from parties who feel they have been adversely affected by its requirements. However, as *Beatty* demonstrates, it appears that as long as the General Assembly can rationalize its decisions as a reasonable way to deal with increasing medical malpractice costs, it appears that parties challenging the new legislation face tough barriers to victory.

C. SB 59: Ohio's New Pilot Program Mandating Arbitration for Claims of Medical Negligence

SB 59 suspends O.R.C. §§ 2711.21-2711.24 and enacts O.R.C. §§ 2339.01-2339.16[48] to establish a nine-year pilot program mandating arbitration for claims of medical negligence prior to the filing of a

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[44] *Id.* at 493 (quoting *Allied Stores of Ohio v. Bowers*, 353 U.S. 522, 530 (1959)).
[45] *Id.*
[46] *Id.* at 495.
[47] *Id.* at 493 (citing *Am. Cancer Socy., Inc. v. City of Dayton*, 160 Ohio St. 114, 121 (1953)).
[48] Hereinafter, any section of SB 59 cited in this Comment will refer to its proposed Ohio Revised Code section.

complaint. Under SB 59, the Superintendent of Insurance ("Superintendent"), in collaboration with the Supreme Court of Ohio, administers and monitors the program.[49] The goal of the pilot program is to "determine the benefits of using arbitration in disputes as to the medical negligence of a health care professional, hospital, or health care facility."[50] SB 59's provisions pertain only to medical negligence claimants in Lorain, Erie, Huron, Cuyahoga, Summit, Lake, and Geauga counties; all located in northeastern Ohio.[51] Within one year of the conclusion of the pilot program, the Superintendent and the Court are to submit written reports detailing the arbitration proceedings undertaken during the program's period.[52]

Procedurally, SB 59 is much more extensive than the guidelines previously laid out in the voluntary arbitration scheme of O.R.C. §§ 2711.21-2711.24. Under SB 59, parties alleging medical negligence in the above-mentioned counties must provide written notice[53] to the defendant of the claimant's intent to file a complaint not less than 180 days before commencing the action.[54] Also, the written notice must include the following: the factual basis for the claim; the standard of practice alleged by the claimant to be applicable; the manner in which the applicable standard was breached; the action that allegedly should have been taken to achieve compliance with the stated standard of care; the manner in which the breach was the proximate cause of the injury claimed; and the names of all healthcare professionals, hospitals, and health care facilities the claimant is

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[49] Ohio Sen. 59, 127th Gen. Assembly, § 2339.02(A) (2006).

[50] *Id.*

[51] *Id.* at § 2339.03(A).

[52] In addition to the final report, the superintendent and court each must submit a preliminary report on the program five years after its effective date. *Id.* at § 2339.02(B). Specifically, both the interim and final reports must include statements on the use of arbitration panels by the pilot program and other alternative dispute resolution mechanisms agreed upon by all parties. *Id.* Also, the reports must include:

> [I]nformation detailing the number of complaints alleging medical negligence that were filed after arbitration proceedings were held under the pilot program and any increases or decreases in the number of complaints filed alleging medical negligence after the effective date of the pilot program as compared to the number of such complaints filed before the effective date of the pilot program.

Id.

[53] The written notice must be accompanied by an affidavit of merit as described in Ohio Rule of Civil Procedure 10. *Id.* at § 2339.03(A). Civil Rule 10 requires an affidavit of merit relative to each defendant named in the complaint for which expert testimony is necessary to establish liability. Ohio R. Civ. P. 10(2)(a).

> Affidavits of merit shall include: (i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint; (ii) A statement that the affiant is familiar with the applicable standard of care; (iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

Id. at (i)-(iii).

[54] Ohio Sen. 59, 127th Gen. Assembly at § 2339.03(A).

notifying.[55]

SB 59 also provides procedures and guidelines for the selection and composition of the arbitrators.[56] It provides that the arbitration panel shall consist of three members, "one member selected by the claimant[s], one member selected by the respondent[s], and a third member, who shall serve as chairperson of the panel, agreed to by the [parties]."[57] This process is similar to the current law in that it maintains a three-person panel. However, it does differ in that, under SB 59, the parties agree on a chairperson, whereas currently the court designates the chairperson of the board.[58] Furthermore, SB 59 requires the chairperson to have practiced law for at least eight years and be affiliated with an ADR service.[59] Additionally, each panel member selected by the parties must be a medical expert in the same "area of [specialty] medicine that is the subject of the claim."[60]

In addition, SB 59 contains various provisions and a procedure that maps out time guidelines for the arbitration process after the defendant receives the written notice. The Bill requires the parties to select a chairperson within thirty days of the defendant receiving the notice. Moreover, within thirty days of choosing the chairperson, each party must choose its panel member.[61] Additionally, within thirty days of the selection of the panel members the chairperson must:

> set a time for the arbitration hearing,
>
> set a place for the arbitration hearing,
>
> set a case management schedule allowing time periods for written discovery, depositions, and the exchanging of expert reports, and
>
> send notice to the arbitrators and parties informing them that the panel has been selected and the other information described above.[62]

Within fifteen days after receiving notice from the chairperson, if the defendant denies the claim, then it must furnish a written response to the claimant and arbitration panel that contains the following:

> [1] The factual basis for any defense . . .;

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[55] *Id.* at § 2339.03(D)(1)-(6).
[56] *Id.* at § 2339.04.
[57] *Id.*
[58] *See* Ohio Rev. Code Ann. § 2711.21(A).
[59] Ohio Sen. 59, 127th Gen. Assembly at § 2339.04(A).
[60] *Id.*
[61] *Id*
[62] David M. Gold, *Sub. S.B. 88 Bill Analysis*, http://www.lsc.state.oh.us/analyses126/s0088-ps-126.pdf (accessed Nov. 4, 2006).

> [2] The standard of practice or care that the [health care professional] . . . alleges to be applicable to the health care services rendered;
>
> [3] A statement . . . that the applicable standard or practice or care was complied with and the manner in which the compliance was achieved;
>
> [4] The reason . . . that the claimant's alleged injury is unrelated to the healthcare services rendered.[63]

Within ten days after the claimant receives the necessary written response from the defendant, the claimant must give the defendant access to "all of the medical records related the claim that are in the claimant's control."[64] The defendant may file for a dismissal of the claim within fifteen days of receiving the complaint.[65]

As far as other general procedural requirements, the parties may communicate with one another to obtain information relevant to the claim and obtain discovery, including interrogatories, document productions, and depositions.[66] Also, a party to the claim shall attend the arbitration hearing.[67] Furthermore, the Ohio Rules of Evidence shall apply to arbitration hearings.[68] In a departure from the current medical arbitration law, the panel's written evaluation is admissible in subsequent court proceedings; however, panel members are not allowed to testify or provide depositions.[69] In addition, admissions made at the hearing, witness testimony, and documentary evidence are admissible in any subsequent court proceedings.[70] Finally, the arbitration panel must evaluate the claim within ten days of the hearing and serve each party with a copy of its evaluation.[71] The evaluation must include the panel's findings as to the applicable standard of care, a determination as to whether the defendant deviated from the standard of care, and a determination as to whether that deviation was the proximate cause of claimant's injury. The panel's findings do not include awards for damages.[72]

After receiving the panel's determination, each party files a written

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[63] Ohio Sen. 59, 127th Gen. Assembly at § 2339.06(A)(1)-(4).

[64] *Id.* at § 2339.06(C).

[65] The motion for dismissal must be accompanied by an affidavit of noninvolvement that complies with the guidelines set forth in § 2323.45 of the O.R.C. *Id.* at § 2339.06(D).

[66] *Id.* at § 2339.06(E).

[67] *Id.* at § 2339.11.

[68] *Id.* at § 2339.11(B).

[69] *Id.* at § 2339.11(C) (Section 2711.21(C) states that "[i]f the decision of the arbitration board is not accepted by all parties . . . , the claim shall proceed [to trial] as if it had not been submitted to nonbinding arbitration. . . . The decision of the arbitration board . . . [is] not admissible into evidence at the trial.").

[70] *Id.* at § 2339.11(D).

[71] *Id.* at § 2339.12(A).

[72] *Id.*

acceptance or rejection of the evaluation within twenty-eight days.[73] A party's acceptance or rejection of the panel's evaluation will not be disclosed until the expiration of the twenty-eight-day period.[74] The chairperson then notifies the parties of any acceptance or rejection as well as the fees, costs, and interest of the arbitration, which are to be split equally among the parties.[75] If opposing parties accept the arbitration panel's evaluation, the evaluation is binding on all accepting parties.[76] However, if all or part of the evaluation is rejected by opposing parties and a party files a complaint within sixty days of being served with the evaluation,[77] the action then proceeds to trial to "determine the standard of practice or care applicable . . .; if the . . . [defendant] deviated from the standard of care; if that deviation was the proximate cause of the claimant's injuries; and damages to be awarded under the claim . . . ."[78]

SB 59 has several provisions that are not included in the current medical arbitration law. These provisions act as penalties and increase the risk for a party who chooses to appeal the arbitration panel's binding decision. The arbitration panel's evaluation "shall state if the arbitration panel determines that a claim or defense is frivolous."[79] If the party whose claim is deemed frivolous proceeds to trial, then that party

> shall post a cash or surety bond, approved by the court, in the amount of fifty thousand dollars. If judgment is entered against the party who posted the bond, the bond shall be used to pay all reasonable costs incurred by the opposing parties as allowed by the Revised Code and rules of court, including reasonable attorney fees.[80]

Additionally, if a party whose claim has not been deemed frivolous by the arbitration panel rejects the arbitration panel's finding, then the claim proceeds to trial as described *supra*.[81] If the court's verdict is not favorable to the rejecting party, then the "rejecting party shall pay an opposing party's actual costs in addition to any damages the court orders the rejecting party to pay."[82]

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[73] *Id.* at § 2339.13(A).
[74] *Id.* at § 2339.14(A).
[75] *Id.*
[76] *Id.* at § 2339.14(F).
[77] *Id.* at § 2339.14(C).
[78] *Id.*
[79] *Id.* at § 2339.12(B).
[80] *Id.*
[81] *Id.* at § 2339.15(A).
[82] *Id.* Actual costs include, but are not limited to, those costs taxable in any civil action and reasonable attorney fees. *Id.* at § 2339.15(C).

III. THE DEBATE OVER SB 59

This Section examines the challenges and debates facing SB 59. Part A explores the potential challenges SB 59 faces by looking at similar statutes from other states and the caselaw pertaining to those statutes. Part B looks at the policy debate behind mandatory arbitration for medical negligence claims. Part B also examines the reasons offered in support of arbitration, as well as the arguments against implementing such a program.

A. Ohio Courts Should Uphold the Validity of the New Pilot Program if they are Faced with a Challenge to its Requirements

With SB 59 forcing claimants into arbitration before getting to the courtroom, it is likely the new program and its procedural requirements could face challenges. This Part examines the legal challenges other jurisdictions have faced with similar legislation. Specifically, this Part demonstrates how various jurisdictions, including Ohio,[83] have continually upheld challenges to state-mandated procedures that require pre-trial examination of medical negligence claims.

Courts most often face constitutional challenges to the enacted procedures in situations where screening panels or arbitration panels are implemented.[84] However, if Ohio courts find themselves faced with questions as to the validity of SB 59, several decisions demonstrate that those challenges will do little to prevent the enforcement of the legislation.

As noted *supra*, *Beatty v. Akron City Hospital* provides helpful insight into how Ohio courts handle challenges to legislation enacted by the General Assembly.[85] In the first part of its opinion, the court addressed the issue of whether O.R.C. § 2711.21 violated the right to jury trial and "delegate[ed] the jury's fact-finding role to a panel of arbitrators."[86] The controversy centered on the fact that the O.R.C.[87] allowed for the

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[83] *See supra* Sec. II pt. B sub. 2.

[84] *See Landry v. Alton Ochsner Found. Med. Ctr.*, 671 So. 2d 24 (La. App. 5th Cir. 1996) (finding that a failure to follow the procedures required by a statute mandating review of all claims by a screening panel constitutes appropriate grounds for dismissal of a suit); *Attorney Gen. v. Johnson*, 282 Md. 274 (1978) (finding that the state's mandatory arbitration system for all medical malpractice claims does not deprive a right to a jury trial).

[85] 67 Ohio St. 2d 483.

[86] *Id.* at 486.

[87] Particularly, at the time of the dispute, § 2711.21(C) declared that "[i]f the decision of the arbitration board is not accepted, the decision of the arbitration board, and any dissenting opinion written by any board member, shall *be admitted into evidence at trial* upon the offer of any party. . . ." *Id.* at 485 (emphasis added). In a similar decision, an Ohio appellate court upheld the legislature's allowance of arbitration decisions as evidence at trial. *Stratso v. Song*, 17 Ohio App. 3d 39 (Ohio App. 10th Dist. 1984). This is different from the current version of § 2711.21(C), which provides that "[t]he decision of the arbitration board and any dissenting opinion written by any board member are *not* admissible into evidence at the trial." Ohio Rev. Code Ann. § 2711.21(C) (emphasis added). Despite the change, I feel this part of the case will be helpful to the new program because it has reintroduced the admissibility of arbitration proceedings as evidence in subsequent trials. *See id.* at § 2339.11(D).

submission of the arbitrators' report as evidence in a jury trial.[88] In finding that the provision was constitutional, the Court first noted that allowing the arbitrators' decision as evidence was reasonable under the statutory scheme.[89] The Court added that the jury's role is not diminished because "the arbitrators' decision . . . is just one facet of an adversarial proceeding where each party may, as in any other proceeding, introduce any admissible evidence by way of witnesses' testimony and exhibits."[90] The Court concluded by agreeing with other state courts that "the admissibility of the arbitration decision . . . is compatible with the right to a fair and impartial jury."[91]

As alluded to in *Beatty*, Ohio was one of the last states to address the issue of the constitutionality of enactments providing for the arbitration of malpractice claims.[92] For example, the Nebraska Supreme Court, in *Pendergrast v. Nelson*, held that Nebraska's Hospital-Liability Act's provision for panel review and the admissibility of the panel's report were constitutional.[93] Similarly, in *Davidson v. Sinai Hospital of Baltimore, Inc.*, the District Court for the District of Maryland held that mandatory arbitration of medical malpractice claims as a prerequisite to trial did not violate the Constitution even when the findings of arbitrators were treated as presumptively valid.[94]

These cases show that Ohio, along with the many other states, has refused to find that mandatory pre-trial procedures violate a claimant's right to a jury trial. Courts have continually viewed mandatory requirements such as those set forth in the pilot program as effective and legal ways to screen claims. Therefore, if challenged, SB 59 will likely be viewed as an efficient measure that allows experts to determine fault without a trial. If a party does not agree with the arbitrators' decision, its right to trial will not be affected when that decision is allowed as evidence at the subsequent trial. Accordingly, any challenge to the constitutionality of SB 59 on those grounds will fail, and claimants in the designated counties will have no choice but to follow the mandatory procedures.

SB 59 also faces potential challenges to its provisions that require a cash or surety bond for an appeal of frivolous claims and payment of the prevailing party's costs if a party loses at arbitration, decides to go to trial, and loses again at trial. As discussed *supra*, SB 59 provides that if the panel finds a claim to be frivolous and the party with the frivolous claim proceeds

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[88] *Beatty*, 67 Ohio St. 2d at 485.
[89] *Id.* at 487.
[90] *Id.*
[91] *Id.* at 490. *See also Stratso*, 17 Ohio App. 3d at 39 (where the court upheld the provision's allowance of arbitration decisions as evidence at trial).
[92] *Beatty*, 67 Ohio St. 2d at 486.
[93] 199 Neb. 97 (1977) (cited in *Beatty*, 67 Ohio St. 2d at 488).
[94] 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

to trial, then that party must "post a cash or surety bond, approved by the court, in the amount of fifty thousand dollars. If judgment is entered against [that] party . . . the bond shall be used to pay all reasonable costs incurred by the opposing parties . . . ."[95] Additionally, regardless of the claim's validity, any party who challenges a decision and loses must pay the prevailing party's "actual costs in addition to any damages the court orders the rejecting party to pay."[96]

Potential claimants and defendants can argue that these provisions create improper disincentives for a party who loses at arbitration from exercising its right to trial. However, precedent shows that this argument will also fail. In *Vance v. Roedersheimer*, the plaintiffs appealed an arbitration award in their favor and received a lesser amount at the jury trial.[97] Pursuant to Local Rule 2.53(Z) of the Court of Common Pleas of Montgomery County, General Division, the defendants moved for attorney's fees and costs.[98] The rule permitted the trial court to award costs to a defendant if the judgment for the plaintiff did not exceed the arbitration award by more than twenty-five percent.[99] On appeal, the court found that Local Rule 2.53(Z) contravened Rule 54(D) of the Ohio Rules of Civil Procedure[100] and, as it was applied, was unconstitutional.[101]

What is important to SB 59 is that the court did not find the general rule, or the reason for the provision, unconstitutional.[102] Rather, it found its application unenforceable.[103] In fact, Judges Wolff and Grady[104] specifically found the disincentive to appeal an arbitration award appropriate.[105] The judges noted: "While the right to a trial by jury may not be abridged, the arbitration plan may legitimately contain some disincentive to appeal from

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[95] Ohio Rev. Code Ann. § 2339.12(B).

[96] *Id.* at § 2339.15(A).

[97] 1991 Ohio App. LEXIS 2883 at *2 (Ohio App. 2d Dist. Ct. June 19, 1991).

[98] *Id.*

[99] *Id.*

[100] Rule 54(D) states: "Except when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." Ohio R. Civ. P. 54(D).

[101] *Roedersheimer*, 1991 Ohio App. LEXIS 2883 at **5-6.

[102] *See id.* at **3-11.

[103] *Id.*

[104] In the case, the judges made a unanimous decision as to the unconstitutionality of Loc. R. 2.53(Z), however their analysis was divided. *Id.* at *6. Judge Brogan found that "Loc. R. 2.53(Z) does indeed contravene the civil rules in as much as it permits an award of costs to a non-prevailing party." *Id.* at **7-8. Judges Wolff and Grady found the rule to be unconstitutional, but only to the extent the award did not conform to *Centennial Ins. Co. v. Liberty Mutual Ins. Co.*, 69 Ohio St. 2d 50 (1982). *Id.* at **8-11. *Centennial* held that the subject of costs is entirely of statutory allowance. 69 Ohio St. 2d at 50. Judges Wolff and Grady concluded that "if costs under Loc. R. 2.53(Z)(4) were limited in accordance with *Centennial*, and attorney fees were not awardable under Loc. R. 2.53(Z)(1)-(3), . . . the local rule could be squared away with Civ. R. 54(D)." *Id.* It may be important to note that on appeal to the Ohio Supreme Court, the majority affirmed the decision following the reasoning of Judges Wolf and Grady, and the dissent agreed with the analysis set forth by Judge Brogan. *See Vance v. Roedersheimer*, 64 Ohio St. 3d 552 (1992).

[105] *Roedersheimer*, 1991 Ohio App. LEXIS 2883 at *4.

the arbitration order."[106]

Another example of a court-supported bond scheme appeared in the Massachusetts Supreme Court case of *Paro v. Longwood Hospital*.[107] The plaintiffs appealed an order dismissing their medical malpractice action against the defendant upon recommendation by a medical malpractice tribunal under Massachusetts General Laws chapter 231, § 60B.[108] Section 60B requires a medical malpractice tribunal to determine whether "'a legitimate question of liability appropriate for judicial inquiry' is presented."[109] According to § 60B, if such a question does not exist, a bond shall be imposed on a plaintiff whose medical malpractice claim is found to have no legal merit as a condition for further prosecution.[110] After the plaintiffs' complaint was found to be subject to § 60B, they appealed the constitutionality of the provision.[111]

One specific contention made by the plaintiffs was that the "bond requirement cuts off their access to the courts, thus denying them their constitutional right to be heard."[112] In response to this argument the Massachusetts court found that "[t]he limited obstruction presented by the medical malpractice tribunal procedure does not impair the substance of the jury trial right. Since the judge is required to set the bond so as not unreasonably to burden meritorious suits, no . . . violation exists."[113]

Accordingly, it appears that bond requirements and payment of costs, which some parties may view as objectionable disincentives, have support in Ohio and in other jurisdictions. As Judges Wolff and Grady noted, bond provisions are seen as an effective way to further the goals of a mandatory arbitration.[114] This precedent, paired with the strong presumption of constitutionality afforded to enactments made by the legislature, make a successful challenge to the bond requirement unlikely.

Perhaps the only valid attack to make on the requirement is its reasonableness. While the *Paro* court echoed the sentiment that a bond requirement is not an obstruction to the jury right, it added a caveat that no violation occurs when the bond is set at a reasonable level.[115] Accordingly, plaintiffs who cannot afford the $50,000 bond may argue that it unreasonably prohibits them from appealing a finding of a frivolous claim. Therefore, it may be wise for the General Assembly to remove the flat

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[106] *Id.*
[107] 373 Mass. 645 (1977).
[108] *Id.*
[109] *Id.* at 645.
[110] *Id.* at 645.
[111] *Id.* at 646.
[112] *Id.* at 651-52.
[113] *Id.* at 655.
[114] *See Roedersheimer*, 1991 Ohio App. LEXIS 2883 at **7-11.
[115] *Paro*, 373 Mass. at 654-55.

$50,000 rate and allow the panel to establish a bond amount on a case-by-case basis.

B. The Policy Arguments behind SB 59

As history and caselaw seem to show, the new pilot program proposed by the Ohio Senate faces few, if any, valid questions as to its legality. However, that does not end the debate as to whether or not it will be an effective means of accomplishing its goal of lower health care costs. Essentially, the debate becomes one of policy. Is the arbitration program the best method to screen out frivolous claims and provide lower costs to participants involved in complaints? Do the time restraints in the program provide for a quicker resolution to medical malpractice claims? Or will SB 59 cause hurried, incorrect results? Finally, are Ohioans really facing a medical malpractice crisis that requires the State to develop a system that removes claims from the traditional trial system? This Part looks for answers to these questions by examining evidence offered from both sides of the debate. Subpart One looks at the arguments offered in support of SB 59. Subpart Two looks at the arguments offered for maintaining the current system that allows medical malpractice parties to bring their complaints in the traditional court setting.

1. Argument: SB 59 is an Effective Means to Cure Ohio's Medical Malpractice Crisis

When Senator Kevin Coughlin (R-Cuyahoga Falls) first introduced SB 59 in the Ohio State Senate, it was touted as a program that would address the continuing problem of high costs for medical liability insurance coverage through minimization of medical malpractice litigation costs while preserving Ohioans' ability to seek redress in the court system.[116] Since its introduction in the Senate in early March 2005, SB 59 has gained support from legislators and various medical groups as a viable option for curing the problem of rising medical costs.

Senator Coughlin said the need to introduce the Bill was clear based on evidence from a Department of Insurance survey of physicians that "showed 96 [percent] of respondents had insurance premium increases [in 2004], and the average boost from 2003 was 39 percent."[117] Senator Coughlin declared that it is "imperative for the [S]tate to work to combat

[116] Gongwer News Service, Inc., *New Bill Proposes Mandatory Medical Liability Arbitration; Plan Draws Criticism from Trial Lawyers*, Vol. 74, Rpt. 41, http://www.gongwer-oh.com/programming/legislation_articledisplay.cfm?billid=2005SB8802&date=3/... (Mar. 2, 2005).

[117] Gongwer News Service, Inc., *Mandatory Arbitration Offered as Way to Curb Medical Malpractice Premiums; Panel Hears Proposal for Universal Health Care System*, Vol. 74, Rpt. 50, Art. 5, http://www.gongwer-oh.com/programming/legislation_articledisplay.cfm?billid=2005SB8802&date=3/15/2005&locid=2 (Mar. 15, 2005).

these trends."[118] The Senator added, "Senate Bill 88 [now SB 59] is a sensible solution that, using properly structured arbitration, will help reduce the filing of non-meritorious claims and move cases with merit through the system more effectively and efficiently."[119]

Throughout hearings on SB 59, the Senate heard testimony from proponents of the program. This testimony consisted mostly of the opinions of medical groups and doctors who viewed the program as a way to curb their rising insurance costs.[120] For example, Dr. John Clough, a physician practicing at the Cleveland Clinic Foundation, said that "enactment would help control the 'runaway cost' of medical liability insurance."[121] He further added that "the arbitration setting would provide a less-expensive forum where complaints could be reviewed."[122]

Dr. John Myles, president of the Ohio Society of Pathologists, noted how the malpractice problem affects all types of institutions and raises the cost of health care.[123] Dr. Myles stated that the malpractice insurance problem affects self-insured institutions, such as the Cleveland Clinic, that must maintain a capital fund adequate to cover its potential liabilities, with bond rating agencies setting the required level of capitalization.[124] Dr. Myles described how increased rates trickle down to consumers by explaining, "If our malpractice litigation fund is judged inadequate by the bond rating agencies, based on statewide experience, . . . our rating drops, and our interest rates on borrowed money increase. . . . This adds to the cost of health care because that is where the revenue that supports this whole system comes from."[125] Dr. Myles lent his support to the Bill by concluding, "[SB 59] is an innovative approach that hurts no one while removing costs from the system and helping to keep health costs down."[126]

Proponents of the new program also see the positive effects that will result in keeping practitioners in the market as a corollary to keeping costs down. On behalf of the Academy of Medicine of Cleveland/Northern Ohio Medical Association ("AMC/NOMA") and the Summit County Medical Society, Dr. Michael Delahanty "indicated that the continuing insurance problem has forced many experienced physicians to retire or leave the

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[118] Charlie Solley, *Senate Approves Medical Malpractice Arbitration Bill*, http://www.kevincoughlin.com/news/release.aspx?id=57 (May 24, 2006).

[119] *Id.*

[120] *See* Gongwer News Service, Inc., *Senate Hearings, Insurance, Commerce, & Labor*, Vol. 74, Rpt. 64, Art. 16, http://www.gongwer-oh.com/programming/legislation_articledisplay.cfm?billid=2005SB8802&date=4/5/2005&locid=2 (Apr. 5, 2005).

[121] Gongwer News Service, Inc., *supra* n. 116.

[122] *Id.*

[123] Gongwer News Service, Inc., *supra* n. 120.

[124] *Id.*

[125] *Id*

[126] *Id.*

region entirely."[127] Furthermore, Dr. Delahanty stated: "[T]he liability crisis has also affected doctors wishing to add a new partner to their group because of the additional insurance expense for the practice. . . ."[128]

Overall, it seems that most practitioners who offered support for the Bill believe the arbitration system provides faster resolution of disputes.[129] The contention is that the faster resolution of disputes and elimination of frivolous claims by a panel of arbitrators decreases the occurrence of useless, expensive lawsuits and awards that are ultimately paid by the health care entity's insurance company. Accordingly, fewer and less costly lawsuits enable physicians to obtain lower insurance premiums. These lower premiums allow health care providers to stay in the market and provide lower cost health care to consumers.

2. Argument: SB 59 Limits Victims' Rights and Targets the Wrong Groups

From the moment it was introduced, SB 59 faced criticism from groups advocating victims' rights and their access to the court system. Opponents of SB 59 generally argue that the program forces claimants and defendants into disadvantaged positions when they would otherwise be situated to go straight to trial.[130] Furthermore, many opponents believe that the program targets the wrong parties and that arbitration is not the best method of ADR for resolving claims.[131] Finally, some opponents dispute the fact that Ohio is even facing a medical malpractice crisis that requires deviation from the tradition of jury trials.[132]

The Ohio Academy of Trial Lawyers demonstrated its opposition for the new program during testimony before the Ohio House Judiciary Committee.[133] Its main complaint is that the quick procedural system of the program is ill advised because it is "irresponsible for either side in a legal dispute to go before an arbitration panel of [the kind in SB 59] without the benefit of discovery and obtaining facts."[134] In essence, they argue, SB 59 forces parties into a weaker position by compelling them to evaluate cases

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[127] *AMC/NOMA Physicians Provide Proponent Testimony on SB 59—Mandatory Arbitration Legislation*, http://www.amcnoma.org/webpages/main/amc_noma_physicians_provide_prop_040605.html (Nov. 5, 2006).

[128] *Id.*

[129] *See id.*

[130] *See generally* Ohio Acad. of Tr. Lawyers, *Bill That Limits Victims' Rights Discussed in House Committee*, http://www.oatlaw.org (Sept. 12, 2006); Ohio St. Med. Assn., *OSMA Input Pushes Medical Liability Reform Bill Forward*, http://www.osma.org/i4a/pages/headlinedetails.cfm?id=279&archive=1 (May 26, 2006).

[131] *See generally* Ohio Acad. of Tr. Lawyers, *Legislative Update*, http://www.oatlaw.org/OH/index.cfm?event=showPage&pg=legupdate06-05-06 (June 5, 2006).

[132] *See* Ohio Acad. of Tr. Lawyers, *Harvard Study: Malpractice Legal System Works Well "Tort Reformers Off Target"*, http://www.oatlaw.org/temp/ts_44E68B3F-BDB9-505B-D5698F15CF6D392B44E68B4E-BDB9-505B-D8B9480B9DB6F126/Harvard%5FStudy.pdf (Sept. 12, 2006).

[133] Ohio Acad. of Trial Lawyers, *supra* n. 131.

[134] *Id.*

without knowing all of the facts that would be known if the case were handled as a traditional trial.[135] The Ohio State Medical Association ("OSMA") also believes that some provisions of the Bill, particularly the "loser pays" provision, put claimants in a difficult position.[136] While the OSMA believes that the "loser pays" provision is an integral part of the program, it cautioned "that the loser pays system may result in only the defendant loser paying because plaintiffs will rarely have assets to cover their costs while defendants most always will."[137] Furthermore, Professor Max Mehlman, head of the Law-Medicine Center at Case Western Reserve University, commented on the potential disparity for plaintiffs in arbitration by noting: "You never hear patients demanding arbitration . . . . You always hear doctors. That raises a red flag."[138]

Some of the strongest opponents to SB 59 believe that the Bill will not be effective in lowering costs because it does not go after all relevant parties to a medical malpractice claim, namely insurance companies.[139] Attorney Gerry Leeseberg, a member of the Ohio Academy of Trial Lawyers' legislative committee, explained:

> It is the insurance companies that typically refuse to discuss settlement until just before a case goes to trial, of after years of expensive court battles. A recent study by the Harvard School of Public Health found that 78 percent of administrative cost of medical malpractice claims is due to insurance companies defending and refusing to pay for real cases of injury.[140]

Opponents to arbitration plans typically claim that excessive premiums can be blamed on state regulators rather than the judicial system.[141] It is believed that part of the reason why those who target insurance companies fail is because of the "clout" wielded by the companies.[142]

Finally, some opponents argue there *is* no malpractice crisis and therefore, no need to reform the system.[143] They cite a recently released Harvard School of Public Health study that concluded: "[E]mpirical data does not support the claim of 'tort reformers' that the legal system is

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[135] *See* Ohio Acad. of Trial Lawyers, *supra* n. 130.
[136] *See* Ohio St. Med. Assn., *supra* n. 130.
[137] *Id.*
[138] Grant Segall, *Bill Proposes Arbitration in Medical Disputes,* Cleveland Plain Dealer C3 (Mar. 3, 2005).
[139] *See* Ohio Acad. of Tr. Lawyers, *supra* n. 132.
[140] Ohio Acad. of Tr. Lawyers, *supra* n. 131.
[141] *See* Segall, *supra* n. 138, at C3.
[142] *See id.*
[143] Ohio Acad. of Tr. Lawyers, *supra* n. 132.

overburdened with 'frivolous lawsuits.'"[144] It also found the legal system does an excellent job of weeding out claims without merit.[145] Leeseberg also noted that "[t]his new Harvard study is compelling because it examined concrete data on the types of medical liability cases in our system and shows that suits without merit rarely exist."[146]

As the rates pertain to Ohio, recent reports show that Ohio medical malpractice insurance rates declined in 2006 for the first time in five years.[147] Specifically, there was a 1.7% decline in overall medical malpractice premiums statewide compared to total rate increases of 195% between 2000 and 2005.[148] The reports show that tort reforms enacted in previous years reduced the number of cases that were filed and this led to a decline in premiums.[149] Accordingly, even though the decrease was small and costs are still relatively high, signs point to a stabilization or decrease in rates in the next few years.[150]

Overall, opponents of SB 59 question the necessity for change and the impact the new program will have on claimants' rights. Opponents point to the fact that provisions in the Bill appear to favor defendant parties who have the resources to risk an appeal while plaintiffs often will not have the means to cover the risk of losing on appeal and having to pay costs. Furthermore, opponents rely on recent studies showing that the idea of frivolous suits wreaking havoc on the judicial system is grossly overstated, as well as other reports showing recent rates have either stabilized or declined slightly.

IV. ANALYSIS

This Section analyzes the arguments set forth by both the proponents and opponents of SB 59 as discussed *supra*. Part A determines, based upon the evidence and testimony set forth above, that Ohioans and the Ohio judicial system do not need the protection from frivolous claims as believed by SB 59 proponents. Furthermore, Part A describes how the provisions in SB 59, as drafted, do not accomplish the goals set forth by the General Assembly. Part B of this Section offers suggestions for improving SB 59 as well as alternative approaches to help lower malpractice costs.

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[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] Denise Trowbridge, *First Time in 5 Years; Malpractice Insurance Rates Decline*, Columbus Dispatch 1B (Nov. 11, 2006).
[148] *Id.*
[149] *Id.*
[150] *Id.*

A. SB 59 is Unnecessary and Ineffective

Based upon evidence and recent data, it is clear that SB 59 is unnecessary and its provisions hamper the abilities of parties to obtain efficient judicial relief. Subpart One declares that the recent trends of Ohio's malpractice insurance costs and the recent reports of the realities of the malpractice system show there is no need for SB 59. Subpart Two argues that, even if the Bill was deemed necessary, SB 59's purpose is misguided and its provisions do not properly address the malpractice situation.

1. SB 59 is Unnecessary

As noted earlier, Senator Coughlin introduced the Bill to "help address the problem with physicians maintaining medical liability insurance coverage."[151] To support his claim that physicians needed relief, Senator Coughlin relied in part on surveys that covered a random sample of 8,000 physicians.[152] Of the 8,000 surveys sent out, 17% were returned.[153] Senator Coughlin made note that four out of ten who returned surveys mentioned that "they have retired or plan to retire in the next three years due to rising insurance costs."[154]

While this may seem significant, when compared to the total number of licensed medical doctors in Ohio the survey proves unreliable. By the end of 2005, the State Medical Board of Ohio registered 34,342 medical doctors with active licenses.[155] Of the 34,342, the number of medical doctors with Ohio addresses totaled 25,617.[156] Therefore, the survey relied on by the General Assembly does not seem to be a true representation of Ohio physicians. To discover the true climate Ohio physicians face, the General Assembly must do more extensive research. Only after a majority of doctors in the State are polled will the General Assembly be truly able to gauge the situation physicians face in regards to medical malpractice premiums. Until such research is conducted, it is imprudent for the General Assembly to orchestrate such drastic changes as SB 59.

Also important to Ohio is the clear evidence from the aforementioned reports showing that malpractice costs have recently stopped increasing and have actually decreased.[157] Proponents of SB 59 can

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[151] Gongwer News Service, Inc., *supra* n. 116.
[152] Gongwer News Service, Inc., *supra* n. 117.
[153] *Id.*
[154] *Id.*
[155] St. Med. Bd. of Ohio, *Active Licensee Count*, http://www.med.ohio.gov/pdf/statistics/statistics-licensees.pdf (Feb. 8, 2006).
[156] *Id.*
[157] Trowbridge, *supra* n. 147, at 1B.

point to the fact that the decreases and stabilization are credited to the tort reforms enacted by the General Assembly and can argue that more legislation like SB 59 is necessary.

However, while reforms may have helped, it may be too early to argue that more reforms are necessary. As explained by one report, current "[j]udicial data [is] sketchy, and some critics say Ohio's malpractice awards are stable."[158] It is too early to conclude that because some reforms worked, other more significant reforms will create further relief. Also, because SB 59's reform forces people out of court and into arbitration, more conclusive evidence of positive results should be demonstrated before hastily enacting its provisions.

There is no conclusive evidence that Ohio is currently suffering a medical malpractice crisis that requires legislative intervention. If anything, recent studies and reports on malpractice insurance premiums show that prices have steadied and declined rather than forced practitioners out of the market.[159] In the face of such evidence, it is imprudent for the General Assembly to intervene and unnecessarily require malpractice claimants and defendants to take their issues to arbitrators prior to going to trial.

2. As Drafted, SB 59's Purpose is Misguided and Ineffective

Along with the goal of helping physicians maintain medical malpractice liability insurance coverage, SB 59 was heralded as a program that "would help minimize costs while preserving the ability of Ohioans to seek redress in the court system."[160] However, as the evidence and testimony set forth *supra* demonstrates, the Bill likely does neither. To the contrary, SB 59 actually has the potential to raise costs, extend the waiting time for resolution of disputes, and limit Ohioans' access to the court system.

The arbitration system is credited with being able to resolve disputes faster and cheaper than a trial. However, the system still has the same types of costs that one incurs at trial. Parties to an arbitration hearing still must pay many of the same costs, including attorneys' fees, expert witnesses' fees, and for the panel of arbitrators themselves. Furthermore, under SB 59, damages are decided by the court, which adds more costs and fees for the parties. In addition, if a party does not agree with a decision, the dispute proceeds to trial anyway. Proponents of SB 59 can argue that, because arbitration panel's evaluation is admissible in subsequent court proceedings, this will help offset some traditional evidentiary and testimonial costs of trial. However, this will only slightly affect costs

[158] Segall, *supra* n. 138, at C3.
[159] *See supra* Sec. III pt. B sub. 2.
[160] Gongwer News Service, Inc., *supra* n. 116.

because panel members are not allowed to testify. Accordingly, this could result in additional time, effort, and money being spent developing evidence and testimony to support or refute the panel's finding which can counteract any savings that the evaluation's authority can provide.

Some may argue that SB 59's "loser pays" provisions, which require an appealing party who loses at trial to pay the winner's costs, provide a proper disincentive to prevent unjust appeals and duplicate costs. While that may be true in some cases, the cost provisions wrongly work in defendants' favor and actually limit Ohioans' access to the court. It is natural for any party to have the desire to appeal an adverse arbitration decision. However, that party must weigh the risk of having to pay the winner's costs if they lose again or post a $50,000 bond if they appeal a claim deemed frivolous by the arbitration panel. Typically, that gamble is worth the risk to a party who is willing and able to take a loss at the possibility of a judicial decision in its favor. In medical malpractice cases, the parties with the money are typically the doctors and insurance companies. Conversely, the plaintiff usually does not have the resources to afford the risk of paying the other party's costs. Therefore, the provisions in SB 59 favor defendants who can afford an appeal to the court, but prevent plaintiffs facing an adverse arbitration decision from exercising their full judicial rights because they cannot afford the risk created by SB 59.

Evidence and studies show that Ohio's judicial system is not faced with a medical malpractice crisis. While healthcare costs remain high, it is clear that they are stabilizing and in some instances actually decreasing. Accordingly, a bill that forces claimants away from court is unnecessary. Furthermore, as drafted, SB 59 only creates increased hoops for parties to jump through to obtain a decision while generating additional administrative costs for both parties involved. Finally, while some disincentives in a mandatory arbitration program are appropriate, those in SB 59 are one-sided and wrongly disadvantage claimants.

B. Suggestions for the Ohio Legislature

This Part offers suggestions to the Ohio General Assembly on how to improve its approach to medical malpractice. Subpart One looks at ways to improve SB 59 to make it more equitable for both claimants and defendants. Subpart Two suggests an alternative form of ADR, mediation, as a cheaper and quicker way to attempt to resolve medical malpractice disputes.

1. Improvements to SB 59 the General Assembly Can Undertake

If the General Assembly maintains its stance that Ohio's physicians need help in maintaining coverage, there are several ways to make SB 59

and the arbitration program more feasible and fair for all parties. First, the General Assembly needs to allow the arbitration panel to decide the issue of damages. I believe that a panel of experts as provided for in the program is an appropriate way to conduct the arbitration. The panel's knowledge of the specific medical areas involved and its expertise in arbitration procedures can provide an efficient resolution. Requiring a court, on the other hand, to determine the amount of damages involves the additional cost of getting into the court and forces a judge not intimately involved with the case to award money damages. Thus, it will be cheaper and more efficient for the panel members to award damages. This will lessen the transaction costs that accompany a change in arenas for a determination of damages. Most importantly, this suggestion allows the already thoroughly-involved arbitrators to use their expertise to determine the appropriate amount of damages.

Second, the General Assembly must address the appropriateness of the bond requirement. While the bond requirement is necessary to remove frivolous claims from the system, there must be an element of reasonableness to such a requirement, and a flat rate is not reasonable in all circumstances. Although a $50,000 bond is reasonable for some plaintiffs, it is unlikely to be reasonable for all plaintiffs. Therefore, to avoid the same kind of challenge as in *Paro*[161], the program must allow the court to set a bond on a case-by-case basis for claimants who appeal a claim that was deemed frivolous by the arbitration panel. While some disincentive is necessary in a mandatory arbitration system, the disincentive must be reasonable to protect all interests involved. A case-by-case determination of the bond amount provides the appropriate procedural safeguards for all parties.

Finally, the insurance companies must get involved. As shown *supra*, it is often the insurance companies that prevent a quick settlement and raise the administrative costs involved in malpractice claims. The General Assembly must become proactive in this aspect of malpractice disputes. Whether the General Assembly forces them to participate directly in the proposed arbitration process or through separate regulation of the companies, the General Assembly must find a way to bring insurance companies to quick resolutions of disputes with patients.

2. A More Appropriate Form of ADR: Mediation

If the General Assembly is interested in parties resolving their disputes prior to going to trial, mediation is the best way to accomplish this goal. Mediation is "a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually

[161] *See Paro*, 373 Mass. at 646.

agreeable solution."[162] Mediation is typically more private, consensual, and less formal.[163]

Mediation is useful because it is typically less formal than other forms of ADR and its goal is to promote settlement. Additionally, participants need not reach an agreement and can end the mediation at any time. The system allows parties to talk candidly about their disputes rather than wasting time with lengthy arbitration procedures when no settlement or agreement is possible.

Accordingly, permitting parties to agree to mediate their disputes will allow those parties who truly wish to resolve their disputes out of court to do so. Furthermore, mediation allows those who would rather desire go to court and resolve their disputes to do so. Therefore, a mediation system similar to the current voluntary arbitration law[164] can be an efficient way of removing some cases from the court system.

V. CONCLUSION

Arbitration has been used effectively in the United States and throughout the world for generations and is commonly seen as a cheaper and quicker alternative to trial. However, arbitration has not shown conclusive effects in every area of dispute in which it has been used. One particular area is the field of medical malpractice disputes. Despite this evidence, the Ohio General Assembly, through SB 59, attempts to implement a mandatory arbitration program to resolve medical malpractice clams. SB 59, as passed by the Ohio State Senate, is unnecessary and fails to accomplish its goals of providing more coverage for physicians, cheaper costs for malpractice claims, and preserving Ohioans' access to the courthouse.

There is no conclusive evidence that Ohio is facing a medical malpractice crisis that requires the General Assembly to intervene and implement such a program. However, even if there was such a need, SB 59's provisions add more cost to the overall process through its procedures and appeal process. Furthermore, its provisions unevenly favor defendants and unreasonably prevent disadvantaged plaintiffs from appealing decisions in the traditional trial setting.

If the General Assembly insists on continuing with its reform, it must look at ways to level the playing field for the patient-plaintiffs. It must also examine ways of allowing disputes to voluntarily settle out of court by implementing cheaper, less formal programs such as mediation.

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[162] *Black's Law Dictionary*, *supra* n. 24, at 444.
[163] Folberg et al., *supra* n. 26, at 223.
[164] *Supra* Sec. II pt. B.