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# Positive Prognosis for Judges: A Look into Judge-Directed Negotiations in Medical Malpractice Cases

Kristine Gamboa\*

## I. INTRODUCTION

A mother rushes her six-year-old daughter to North Central Bronx Hospital.<sup>1</sup> The little girl has a fever and a rash all over her body.<sup>2</sup> At the hospital, an emergency room nurse examines the little girl.<sup>3</sup> The nurse assures the mother that the little girl probably just has a virus and sends the mother and daughter home.<sup>4</sup> The following day, the little girl displays the same symptoms.<sup>5</sup> The mother rushes her to the hospital, but this time her mother brings her to a private hospital.<sup>6</sup> The doctors at the private hospital examine the little girl and diagnose her with more than just a virus—a bacterial blood infection.<sup>7</sup> In order to save her life, the doctors have to amputate her leg, the toes on the other leg's foot, and the fingers on one of her hands.<sup>8</sup> Several months later, the little girl's family notifies North Central Bronx Hospital that it will be suing for medical malpractice for the

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1. Gale Scott, *Med Mal Cases Get Expert Hearings*, CRAIN'S NEW YORK BUSINESS, Aug. 22, 2010, <http://www.crainsnewyork.com/article/20100822/SUB/308229981>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

hospital's misdiagnosis.<sup>9</sup> Even though the misdiagnosis was clearly North Central Bronx Hospital's fault<sup>10</sup> and the family most likely would get a verdict in its favor, the family would be in for a long journey of medical malpractice litigation.<sup>11</sup>

Medical malpractice litigation has been characterized as burdensome, expensive, and slow.<sup>12</sup> A patient must be willing to be interrogated by attorneys, submit to a deposition, go to trial if the case does not settle, pay attorney's fees, and wait years for compensation.<sup>13</sup> However, the primary issue concerning medical malpractice litigation has been its exorbitant cost.<sup>14</sup> Reports show that health care providers incur costs amounting to tens of billions of dollars each year due to medical malpractice liability.<sup>15</sup>

Because of these overwhelming statistics, studies have been conducted in an effort to reduce medical malpractice liability.<sup>16</sup> These studies looked at the needs of injured patients and the reasons why they file medical malpractice claims against their health care providers.<sup>17</sup> In the 1990s, all levels of the health care system made concerted efforts to address patient and health care provider concerns.<sup>18</sup> Moreover, the health care system looked into alternative forms of dispute resolution as a way to reduce

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9. *Id.*

10. *Id.* (quoting the then-Bronx Superior Court Judge Douglas McKeon who became involved in the mishap when the family notified the city several months later that it was suing for medical malpractice: "The misdiagnosis was clearly the city-run hospital's fault.")

11. *Id.*

12. David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1114 (2006).

13. *Id.* at 1114–15. Other problems a plaintiff may face include being "blacklisted" by other physicians or providers who refuse to treat patients who are known to sue and have terminated their existing relationships with a health care provider in order to bring suit. *Id.* at 1114; *see, e.g.*, Christine Wiebe, *Physicians Take the Offensive Against Malpractice Suits*, MEDSCAPE MONEY & MED., Apr. 30, 2004, available at <http://www.medscape.com/viewarticle/474639> (reporting that doctors in Texas are blacklisting malpractice claimants and that doctors are requiring patients to pledge that they will not assert claims).

14. Mark A. Rothstein, *Health Care Reform and Medical Malpractice Claims*, 38 J.L. MED. & ETHICS 871, 871 (2010) (citing Edward P. Richards & Thomas R. McLean, *Administrative Compensation for Medical Malpractice Injuries: Reconciling the Brave New World of Patient Safety and the Torts System*, 49 ST. LOUIS U. L.J. 73, 74 (2004)).

15. Thomas L. Hafemeister & Joshua Hinckley Porter, *The Health Care Reform Act of 2010 and Medical Malpractice Liability: Worlds in Collision or Ships Passing in the Night?*, 64 SMU L. REV. 735, 739 (2011).

16. *Id.* at 740 (citing Rothstein, *supra* note 14, at 872).

17. *Id.* at 740 (citing Rothstein, *supra* note 14, at 872).

18. *Id.* at 740 (citing Paul J. Barringer et al., *Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again*, 33 J. HEALTH POL. POL'Y & L. 725, 740–42 (2008)).

medical malpractice claims.<sup>19</sup> Nonetheless, in the early 2000s, the cost of physicians' malpractice insurance premiums still increased significantly.<sup>20</sup>

This increase started a debate regarding who was at fault for the significant costs of medical malpractice liability.<sup>21</sup> One side blamed the costs on the "litigiousness of patients" and the amount of jury awards.<sup>22</sup> Because of these arguments, some providers advocated for tort reform to limit medical malpractice lawsuits.<sup>23</sup> This reform was seen as a way to ultimately reduce malpractice premiums for health care providers.<sup>24</sup> However, it would require changing existing laws.<sup>25</sup> The other side blamed health care providers for utilizing "defensive medicine" out of fear of potential liability.<sup>26</sup> This side argued that "defensive medicine" ultimately led to increased costs.<sup>27</sup>

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19. *Id.* at 740 (citing Barringer et al., *supra* note 18, at 740–42).

20. *Id.* at 740 (citing J. Robert Hunter, Gillian Cassell-Stiga & Joanne Doroshov, *True Risk: Medical Liability, Malpractice Insurance and Health Care* 14 (2009), available at <http://www.centerjd.org/air/TrueRiskF.pdf> (graph)).

21. *Id.* at 740–41.

22. *Id.*

23. *Id.* at 741.

24. *Id.*

25. See AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., MEDICAL LIABILITY REFORM AND PATIENT SAFETY INITIATIVE PROGRESS REPORT, available at <http://www.ahrq.gov/qual/liability/mediabrep.htm> (last updated Feb. 2012) [hereinafter MEDICAL LIABILITY REFORM AND PATIENT SAFETY INITIATIVE PROGRESS REPORT]. Some states have initiated malpractice reform to cap non-economic damages. See MICHELLE M. MELLO & ALLEN KACHALIA, EVALUATION OF OPTIONS FOR MEDICAL MALPRACTICE SYSTEM REFORM (2010), available at [http://www.medpac.gov/documents/Apr10\\_MedicalMalpractice\\_CONTRACTOR.pdf](http://www.medpac.gov/documents/Apr10_MedicalMalpractice_CONTRACTOR.pdf). For example, in 1975, California became the first state to cap non-economic damages to \$250,000. Medical Injury Compensation Reform Act of 1975 (MICRA) (codified at CAL. BUS. & PROF. CODE § 6146 (West 2006)).

26. Hafemeister & Porter, *supra* note 15. "Defensive medicine" occurs "when doctors order tests, procedures, or visits, or avoid certain high-risk patients or procedures, primarily because of concern about malpractice liability." U.S. CONGRESS, OTA-H-602, OFFICE OF TECH. ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 1 (1994), available at <http://biotech.law.lsu.edu/policy/9405.pdf>.

27. Hafemeister & Porter, *supra* note 15, at 741. The debate also surrounded the insurance industry. Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 394–95 (2005). Trial lawyers and others argued that the high-priced phase of the liability insurance underwriting cycle fueled the medical malpractice insurance crisis in the early 2000s. *Id.* In contrast, medical associations argued that the crisis represented the long overdue consequences of escalating tort costs that were allowed by the competitive phase of the insurance underwriting cycle. *Id.*

Because of the debate, and perhaps because both sides of the debate have merits, President Obama addressed medical malpractice reform in his September 2009 address to Congress.<sup>28</sup> In his address, President Obama directed the Secretary of Health and Human Services, Kathleen Sebelius, to allocate grants for various projects aimed at reforming medical malpractice liability.<sup>29</sup>

One grant was made to the New York State Unified Court System to fund the implementation of a judge-directed negotiation program for early settlement in five academic medical centers in New York City and to expand the existing judge-directed negotiation program.<sup>30</sup> A judge-directed negotiation is a process in which judges who have medical knowledge conduct and direct negotiations in a medical malpractice lawsuit rather than have the lawsuit go to trial.<sup>31</sup> It focuses on early court intervention and facilitates discussion among attorneys about claims and potential settlements.<sup>32</sup> Early court intervention takes the form of negotiations, which are like settlement conferences, but instead of being held years after a case is filed, they occur early on in the lawsuit, only months after a case is filed.<sup>33</sup>

The case of the little girl who was misdiagnosed at North Central Bronx Hospital<sup>34</sup> was part of the judge-directed negotiation experimental system in the Bronx.<sup>35</sup> After five intense sessions with a judge, both sides agreed to settle the case for \$6.8 million.<sup>36</sup> Although this amount is significantly less

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28. See Barack Obama, President of the U.S., Overhauling Health Care: Address to a Joint Session of Congress (Sept. 9, 2009), available at <http://www.presidentialrhetoric.com/speeches/09.09.09.html> [hereinafter the President's Address to a Joint Sessions of Congress].

29. *Id.* (recognizing the need to address medical malpractice liability reform: "I don't believe malpractice reform is a silver bullet, but I've talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs. . . . So I'm proposing that we move forward on a range of ideas about how to put patient safety first and let doctors focus on practicing medicine. . . . I'm directing my Secretary of Health and Human Services to move forward on . . . [a demonstration projects] initiative today.").

30. Hafemeister & Porter, *supra* note 15, at 741 (citing AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, GRANT SUMMARY FOR GRANT NUMBER HS19505-01, [http://gold.ahrq.gov/projectsearch/grant\\_summary.jsp?grant=R18+HS19505-01](http://gold.ahrq.gov/projectsearch/grant_summary.jsp?grant=R18+HS19505-01) (last visited Nov. 7, 2013)).

31. *Just What the Doctor Ordered? Bringing Judges into Medical-Malpractice Negotiations*, NEGOTIATION (Sept. 2011), available at [http://www.pon.harvard.edu/wp-content/uploads/images/posts/NEG0911\\_5.pdf](http://www.pon.harvard.edu/wp-content/uploads/images/posts/NEG0911_5.pdf) [hereinafter *Just What the Doctor Ordered?*].

32. Alice Gallegos, *Medical Liability: Cutting Costs From the Bench*, AM. MED. NEWS, Oct. 31, 2011, available at <http://www.ama-assn.org/amednews/2011/10/31/prsa1031.htm>.

33. *Health Care Appropriation Provides A Court-Based ADR Pilot Program*, 29 ALTERNATIVES TO HIGH COST LITIG. 108, 108 (2011).

34. See Scott, *supra* note 1.

35. *Id.*

36. *Id.*

than the little girl might have received from a jury trial, her lawyer was able to devise a settlement that guaranteed lifelong payments and included money for college.<sup>37</sup> According to the little girl's lawyer, this structured settlement could not have happened with a jury verdict.<sup>38</sup> The little girl's family and the hospital staff both left the judge-directed negotiation content with the settlement.<sup>39</sup>

This article will look at judge-directed negotiations, and more specifically, whether this program can help improve medical malpractice litigation. Part II will look at the existing judge-directed negotiation program in New York. Part III will explore the program's success. Part IV will discuss praises for the program, whereas Part V will discuss the criticisms. Finally, Part VI will conclude that judge-directed negotiations can improve medical malpractice litigation, and that other states should consider adopting a similar program.

## II. THE NEW YORK JUDGE-DIRECTED NEGOTIATION PROGRAM

In 2002, the Honorable Douglas McKeon of the Bronx County Supreme Court developed the concept of judge-directed negotiations.<sup>40</sup> Justice McKeon, who has been presiding for many years over thousands of civil claims in one of the busiest courts in the country,<sup>41</sup> was trying to find a way to deal with a backlog of medical malpractice cases coming from the city's Health and Hospitals Corporation ("HHC").<sup>42</sup> One thing that bothered Justice McKeon about these cases was how they were treated in the system: they were classified as every other lawsuit, despite their complexity and the increased amount of time it took to review them.<sup>43</sup> Therefore, Justice

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37. *Id.*

38. *Id.*

39. *Id.*

40. Gallegos, *supra* note 32. Justice McKeon is also Chief Judge of Appellate Term, First Department. New York Department of Health, New York State to Conduct Medical Liability Reform Demonstration with \$3 Million Federal Grant, available at [http://www.health.ny.gov/press/releases/2010/2010-06-16\\_medical\\_liability\\_reform\\_demo\\_3\\_mill\\_fed\\_grant.htm](http://www.health.ny.gov/press/releases/2010/2010-06-16_medical_liability_reform_demo_3_mill_fed_grant.htm) (last updated June 2010) [hereinafter New York State to Conduct Medical Liability Reform Demonstration]. Justice McKeon presides over all medical malpractice cases involving Health and Hospitals Corporation hospitals in the Bronx and Manhattan. *Id.*

41. Gallegos, *supra* note 32.

42. *Just What the Doctor Ordered?*, *supra* note 31.

43. Gallegos, *supra* note 32.

McKeon decided to begin meeting with the attorneys representing the parties in medical malpractice cases.<sup>44</sup> The meetings would take place in his chambers,<sup>45</sup> where they would discuss the claims' strengths and weaknesses.<sup>46</sup>

Justice McKeon relied on his years of experience presiding over medical malpractice trials to guide him during these meetings.<sup>47</sup> Additionally, he has acquired medical knowledge from auditing early morning anatomy classes at the Albert Einstein College of Medicine, and he has kept up to date on new medical techniques and technology by reading medical journals.<sup>48</sup>

Furthermore, a nurse who has legal training assists Justice McKeon.<sup>49</sup> With all of these resources, Justice McKeon can advise each party on what they could reasonably expect from a jury trial and attempt to guide the parties toward an agreement.<sup>50</sup>

Justice McKeon's model expanded into a similar program in which a judge with expertise in medical matters becomes the "point person" once a plaintiff files a medical malpractice lawsuit.<sup>51</sup> The judge directs the entire process by convening the parties to discuss the case and by helping broker a settlement.<sup>52</sup> The judge conducts the negotiations, but does not impose a settlement amount.<sup>53</sup> If the parties do not agree on a settlement, the plaintiff may move ahead with the lawsuit.<sup>54</sup> In addition to using judge-directed negotiations based on Justice McKeon's model, this program is aimed at improving patient safety and reducing malpractice costs.<sup>55</sup>

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44. *Just What the Doctor Ordered?*, *supra* note 31.

45. *Id.*

46. Gallegos, *supra* note 32.

47. *Just What the Doctor Ordered?*, *supra* note 31.

48. Scott, *supra* note 1.

49. *Just What the Doctor Ordered?*, *supra* note 31. Federal funding for the program funds the registered nurse with legal training. *Health Care Appropriation Provides a Court-Based ADR Pilot Program*, *supra* note 33, at 108.

50. *Just What the Doctor Ordered?*, *supra* note 31.

51. MEDICAL LIABILITY REFORM AND PATIENT SAFETY INITIATIVE PROGRESS REPORT, *supra* note 25.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Just What the Doctor Ordered?*, *supra* note 31. More specifically, the program consists of four components: (1) each hospital will develop and promote a culture of patient safety; (2) four hospitals will initiate safety interventions in obstetrics and one hospital will initiate safety interventions in general surgery; (3) each hospital will implement a program whereby it will provide early disclosure to a patient and, if necessary, a patient's family when a medical error occurs and, if appropriate, make an early (pre-litigation) offer of compensation; (4) a courtroom will be established to achieve early settlement through judge-directed negotiations for medical malpractice cases that do

This program is one of seven grants that were distributed by the Secretary of Health and Human Services.<sup>56</sup> The New York judge-directed negotiation program started in Fall 2010 and was funded for three years with \$3 million from the federal government.<sup>57</sup> The grant money has allowed New York to expand its program beyond the Bronx courts, over which Justice McKeon presided, to courts in Brooklyn and Manhattan.<sup>58</sup> Additionally, the New York program now handles cases against both city and private hospitals.<sup>59</sup>

This program is aimed at cutting \$1.4 billion that is spent annually on medical malpractice premiums in New York.<sup>60</sup> In addition to these exorbitant expenses, New York health care providers' malpractice insurance rates are among the highest in the country.<sup>61</sup> Furthermore, obstetrical and surgical premiums in New York have increased.<sup>62</sup> Even with these startling statistics, the New York judge-directed negotiation program looks promising

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not settle early and lead to lawsuits. *New York State to Conduct Medical Liability Reform Demonstration*, *supra* note 39.

56. Michelle Andrews, *Judge Devises Model for Resolving Medical Malpractice Cases More Quickly*, WASH. POST, Nov. 21, 2011, available at [http://www.washingtonpost.com/national/health-science/judge-devises-model-for-resolving-medical-malpractice-cases-more-quickly/2011/11/16/gIQAT0EthN\\_story.html](http://www.washingtonpost.com/national/health-science/judge-devises-model-for-resolving-medical-malpractice-cases-more-quickly/2011/11/16/gIQAT0EthN_story.html); Hafemeister & Porter, *supra* note 15, at 741 (citing MEDICAL LIABILITY REFORM AND PATIENT SAFETY INITIATIVE PROGRESS REPORT, *supra* note 25). Under the direction of the Secretary of Health and Human Services, the U.S. Department of Health and Human Services's Agency for Healthcare Research and Quality administered grants to Texas, Illinois, Michigan, and New York. *Health Care Appropriation Provides a Court-Based ADR Pilot Program*, *supra* note 33, at 108. Under another separate grant, five judges in Buffalo, New York, started a similar program in November 2011. Gallegos, *supra* note 31.

57. Suzanne Sataline, *Mediating Malpractice*, WALL ST. J., July 23, 2010, at A1, available at <http://online.wsj.com/article/SB10001424052748703467304575383501123709186.html>. Harvard University's School of Public Health has received a substantial part of the grant for evaluating and reporting the results after the three-year trial period. *Health Care Appropriation Provides a Court-Based ADR Pilot Program*, *supra* note 33, at 108.

58. William Glaberson, *To Curb Malpractice Costs, Judges Jump in Early*, N.Y. TIMES, June 12, 2011, available at <http://www.nytimes.com/2011/06/13/nyregion/to-curb-malpractice-costs-judges-jump-in-early.html?pagewanted=all>.

59. *Id.*

60. Sataline, *supra* note 57.

61. *Just What the Doctor Ordered?*, *supra* note 31.

62. See Sataline, *supra* note 57. For example, in Brooklyn's Maimonides Medical Center, obstetrical premiums increased from \$13.5 million in 2007 to \$17 million in 2008. *Id.* Pam Brief, the CEO and president of Maimonides Medical Center in Brooklyn, said that her staff has been searching for a long time for a way to cut insurance premiums, especially those for childbirth. *Id.* One technique they have tried is to require that any member who has contact with an OB patient knows how to read a fetal monitor. *Id.*

in improving New York's malpractice liability because of its 95% settlement rate.<sup>63</sup> With this success rate, HHC's malpractice costs decreased from \$196 million in 2003 to \$130 million in 2010,<sup>64</sup> and the hospital's average payment in medical malpractice cases declined from \$567,000 in 2003 to \$428,000 in 2010 as a result of measures to reduce liability costs, including settling cases before they reach trial.<sup>65</sup> The Federal Agency for Healthcare Research and Quality, which funds the New York judge-directed negotiation program, estimates that the program could save more than \$1 billion annually throughout the nation.<sup>66</sup>

### III. THE SUCCESS OF JUDGE-DIRECTED NEGOTIATIONS

The decreased malpractice costs and the increased settlement rates resulting from the judge-directed negotiation program give rise to the question of why is the program so successful. To adequately answer this question, we will look at the program's two components: judges and negotiations.

#### *A. Putting the "Judge" in Judge-Directed Negotiations*

Judges are essential to the success of the New York judge-directed negotiation program.<sup>67</sup> In comparison to programs in other states that were given grants,<sup>68</sup> New York is the only state with a court component.<sup>69</sup> Under the New York program, medical malpractice cases against any of the five participating hospitals are automatically given to judges in the judge-directed negotiation program.<sup>70</sup> These judges attempt to bring the parties together to discuss and address the situation.<sup>71</sup> Then, the judges can advise the parties accordingly such that they come to a settlement.<sup>72</sup>

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63. *Just What the Doctor Ordered?*, *supra* note 31. According to New York State Court officials, statistics indicate Justice McKeon settles about 20% more cases than other judges. Glaberson, *supra* note 58.

64. *Health Care Appropriation Provides a Court-Based ADR Pilot Program*, *supra* note 33, at 108 (quoting Sataline, *supra* note 56: "The [judge-directed negotiations] effort has cut payouts to \$130 million this year, from a high of \$196 million in 2003.").

65. Glaberson, *supra* note 58.

66. *Just What the Doctor Ordered?*, *supra* note 31.

67. *See Health Care Appropriation Provides A Court-Based ADR Pilot Program*, *supra* note 33, at 108.

68. These states include Texas, Illinois, and Michigan. *Id.*

69. *Id.*

70. *Id.*

71. *See Hafemeister & Porter*, *supra* note 15, at 747 (citing Scott, *supra* note 1).

72. *See id.*

Medical malpractice litigation can go on for many years with minimal judge involvement, and this lack of involvement increases legal expenses and solidifies the parties' positions.<sup>73</sup> These factors make it difficult for a judge in a non-judge-directed negotiation to control medical malpractice lawsuits.<sup>74</sup> Without this control, lawsuits can come back several times to be heard before different judges.<sup>75</sup> Settlement also becomes more difficult the longer a case lingers.<sup>76</sup> However, in a judge-directed negotiation, a judge intervenes early on in the case and this can increase the chance of settlement.<sup>77</sup>

Coming to a settlement agreement, of course, depends in part on the judge who conducts the negotiations.<sup>78</sup> Justice McKeon acknowledges that certain judges would not be right for the role because of their lack of communication skills.<sup>79</sup> Accordingly, judges in the program should be knowledgeable in medicine<sup>80</sup> and communication<sup>81</sup> because of the number of complexities in the health care field.

The most obvious complexity is the amount of medical knowledge necessary to understand the health care field.<sup>82</sup> Additionally, as part of the grant, each court will have the aid of a registered nurse with legal training who can confer with judges on claims and provide any necessary medical

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73. Glaberson, *supra* note 58.

74. *Id.*

75. Michael Virtanen, *More NY Courts to Focus on Medical Malpractice*, WALL ST. J., Nov. 11, 2011, available at <http://www.washingtontimes.com/news/2011/nov/11/more-ny-courts-focus-medical-malpractice/?page=all> (quoting Justice McKeon: "Without close scrutiny by one judge, cases can come back several times before various judges with settlements discussed but doctors refusing to agree.").

76. Glaberson, *supra* note 58.

77. *See Just What the Doctor Ordered?*, *supra* note 31.

78. Gallegos, *supra* note 32 (quoting Ronald Landau, a New York plaintiffs' lawyer who had four medical liability cases go through the program: "If you can find a judge who can understand the perspective of the plaintiff and understand the constraints and the perspective of the defendant, it's a terrific plan . . . . I have had multiple mediation experiences over the years, and I would say 85% don't work because the mediator just doesn't have the right temperament.").

79. *See* Telephone Interview with Judge Douglas McKeon, Bronx County Supreme Court (Feb. 23, 2012) [hereinafter Telephone Interview with Judge Douglas McKeon].

80. *See* Scott, *supra* note 1 (noting that "having medically sophisticated justices is crucial.").

81. *Id.* For example, a "Medicine for Judges" course was designed to teach 100 justices about medicine and "humanness," Justice McKeon's term for "becoming a compassionate, sympathetic listener." *Id.*

82. *See id.* (quoting Justice McKeon who "always felt [he] needed basic knowledge of the medical lingo to effectively preside over a trial.").

background.<sup>83</sup> Moreover, Justice McKeon is using part of the grant to design medical curriculum for judges so that they can gain knowledge in medicine.<sup>84</sup>

Another complexity is the number of different parties involved in the health care field's decision-making system.<sup>85</sup> For example, the party who purchases the service might not necessarily be the party who receives the service.<sup>86</sup> Other complexities include the emotion and passion in the health care field due to the fact that people's lives are at stake.<sup>87</sup> Because of these complexities, judges under the judge-directed negotiation program need to have special training in medical-related lawsuits so that they are better able to evaluate the merits of a medical malpractice case.<sup>88</sup>

### *B. Negotiating in Judge-Directed Negotiations*

Like judges, negotiations are another important aspect of the judge-directed negotiation program.<sup>89</sup> Negotiations can be defined as a process in which parties exchange information, generate decisions, and then implement what was decided.<sup>90</sup> Justice McKeon has found that parties are willing to come in and talk if there is the potential to settle a case sooner rather than later for a significant amount of money.<sup>91</sup> These negotiations are more than just the typical discussions of how much the parties want and are willing to spend; rather, the parties also discuss the strengths and weaknesses of their

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83. Gallegos, *supra* note 32.

84. Scott, *supra* note 1.

85. Leonard J. Marcus, *A Culture of Conflict: Lesson from Renegotiating Health Care*, 5 J. HEALTH CARE LAW & POL'Y 447, 457 (2002).

86. *Id.* Similarly, a physician who orders a health care service does not necessarily pay the financial consequences of that order. *Id.*

87. *Id.*

88. Hafemeister & Porter, *supra* note 15, at 747. See Gallegos, *supra* note 31 (discussing a plaintiffs' lawyer who believed that through a judge-directed negotiation, he would be able to get at the complexities of the case with a judge who understood medical issues).

89. See Andrews, *supra* note 56.

90. Marcus, *supra* note 85, at 458. In an interest-based negotiation, parties address their mutual and different interests. *Id.* at 464. Interests include goals, objectives, ideas, concerns, and hopes that the parties want to be satisfied through the negotiation. *Id.* In positional negotiations, one party's objectives are best satisfied through victory, control, or dominance. *Id.* Therefore, positional negotiations usually establish winners and losers. *Id.* However, it is natural to negotiate based on self-interests because these interests define what the parties want to accomplish. *Id.* (citing Leonard J. Marcus & Barry C. Dorn, *Negotiating Organizational Alliances: The Walk in the Woods*, AM. MED. NEWS, Sept. 21, 1998, at 19, available at <http://business.highbeam.com/137033/article-1G1-21168914/negotiating-organizational-alliances-walk-woods>).

91. Andrews, *supra* note 56.

respective claims.<sup>92</sup> The discussions lead to more discussions, with each case having about three to four negotiation meetings.<sup>93</sup> The negotiation may reach a point where the attorneys leave the meeting but continue their discussions over the phone.<sup>94</sup> It is thus this “[negotiation] environment that fosters discussion, and discussion fosters resolution.”<sup>95</sup>

The negotiation and judge component of the judge-directed negotiation program help contribute to the success of the program.

#### IV. PRAISES FOR THE JUDGE-DIRECTED NEGOTIATION PROGRAM

Due to the success of judge-directed negotiations, there are many praises for the program. The praises regard the amount of time and money saved to settle a case, and the forum the program provides for both parties to be heard.

##### A. *Giving the Gift of Efficiency*

One of the benefits of the judge-directed negotiation program is that it saves time and money because it bypasses years of court battles.<sup>96</sup> Judge-directed negotiations have cut the HHC’s case backlog by 33%, and the average time it takes to resolve a case has fallen by 17% in the past three years.<sup>97</sup> This success may be seen as a result of the judge’s involvement in a judge-directed negotiation.<sup>98</sup> From the very beginning of a judge-directed negotiation, the judge “can delve into a case with an eye towards settlement.”<sup>99</sup> The judge then holds frequent negotiation meetings in the beginning stages of a case, which can lead to an early settlement.<sup>100</sup>

This timeline is very different from what typically happens now, given that the pre-trial phase—in which depositions are taken and other evidence is

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92. Gallegos, *supra* note 32.

93. *Id.*

94. *Id.*

95. See Telephone Interview with Justice Douglas McKeon, *supra* note 79.

96. Glaberson, *supra* note 58.

97. Scott, *supra* note 1.

98. See Andrews, *supra* note 56.

99. *Id.* (quoting Justice McKeon: “From the beginning, that designated jurist can delve into the case with an eye toward settlement.”).

100. See Glaberson, *supra* note 58.

gathered—can drag on for months or even years.<sup>101</sup> During this pre-trial phase, a number of judges may be involved, and no one judge may push the parties toward resolution.<sup>102</sup> Usually settlement conferences are held years after a case is filed, and it might be seen as merely a “pro forma exercise”<sup>103</sup> that is held simply as a formality because it might be too late in the lawsuit for the parties to settle complicated issues.<sup>104</sup>

However, negotiation meetings in a judge-directed negotiation occur after only several months.<sup>105</sup> These settlement conferences can better help parties settle their case,<sup>106</sup> which is particularly important because medical malpractice cases take longer than other kinds of tort cases.<sup>107</sup> If the parties do settle, compensation to injured parties can be paid out years earlier than a jury award and without lengthy appeals.<sup>108</sup>

Judge-directed negotiations are also helpful in finding and excluding doctors who have no responsibility early on in a case.<sup>109</sup> Plaintiff attorneys initially often include a long list of alleged defendants in the claim such that they do not lose the chance of adding defendants later.<sup>110</sup> This strategy can cause doctors who are not at fault to spend years defending a claim before

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101. Andrews, *supra* note 56. According to Michelle M. Mello, a Harvard professor of law and public health who is evaluating the New York experiment, a typical medical malpractice case can take three years from the date the claim is filed to the date the case is closed. *Id.* A typical time frame for settling one of Justice McKeon’s cases is six to nine months. *Id.*

102. *Id.* In a traditional medical malpractice claim, up to four different judges may oversee one medical liability case at different intervals. Gallegos, *supra* note 31.

103. Glaberson, *supra* note 58.

104. *Id.* (quoting Michelle M. Mello: “Ordinarily when the parties come to a settlement conference, it’s late in the game . . . . It’s often a pro forma exercise rather than an attempt to grapple with the tricky issues in the case.”). Under New York’s Civil Practice Law Rule 3409, a court involved in a medical malpractice action shall hold a mandatory settlement conference 45 days after the filing of the note of issue and certificate of readiness or within 45 days after the denial of such motion. NY CPLR Rule 3409.

105. *Health Care Appropriation Provides a Court-Based ADR Pilot Program*, *supra* note 33, at 108. There is a strong policy in favor of allowing a judge’s inherent authority to preserve efficiency and the judicial process through settlement conferences. See 6A Fed. Prac. & Proc. Civ. § 1525.1 (3d ed.).

106. Glaberson, *supra* note 58.

107. David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1106 (2006). Michael Heise, a professor who studied a nationwide sample of tried cases, found that the average length for civil cases that reached juries was 30.2 months whereas the average length of tried malpractice cases lasted 38.4 months or more than half a year longer. *Id.* (citing Michael Heise, *Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 834 (2000)).

108. Glaberson, *supra* note 58.

109. Gallegos, *supra* note 32.

110. *Id.*

being dismissed from the case.<sup>111</sup> Doctors initially named in a traditional medical malpractice claim generally are not dismissed from the lawsuit until after the discovery process, which can be up to fifteen months after a claim has been filed.<sup>112</sup> However, in judge-directed negotiations, doctors who are not at fault typically are dismissed within the first six months.<sup>113</sup>

Not only can doctors be dismissed from the claim, but also the entire claim can be dismissed.<sup>114</sup> During the judge's meeting with the parties in a judge-directed negotiation, the judge can advise each party as to what it can reasonably expect from a jury trial.<sup>115</sup> In one case, Justice McKeon warned lawyers representing a hospital that jurors most likely would not be influenced by their claim that a patient who died was somewhat responsible for his death because he ignored his doctors.<sup>116</sup> A judge's intervention will help a party evaluate the strengths and weaknesses of its case, which might help a party to recognize its "unrealistic expectations about winning big in court"<sup>117</sup> or deter a party from pursuing a weak case.<sup>118</sup>

Thus, quick resolution of medical malpractice cases benefits all parties: the court system gets to put its limited resources elsewhere, health care providers can put the situation behind them, and hospitals can gain information to help improve patient safety efforts.<sup>119</sup>

### *B. Giving Parties a Voice*

Another praise for judge-directed negotiations is that both parties to be heard during the negotiation meetings.<sup>120</sup> Being given a voice may be as important to a party as its financial concerns.<sup>121</sup> Communicating with the other party also allows parties to learn more about the situation and better understand it.<sup>122</sup> A Harvard School of Public Health's Care Negotiation

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Glaberson, *supra* note 58.

117. *Just What the Doctor Ordered?*, *supra* note 31.

118. Glaberson, *supra* note 58.

119. Andrews, *supra* note 56.

120. *Just What the Doctor Ordered?*, *supra* note 31.

121. *Id.*

122. *See Just What the Doctor Ordered?*, *supra* note 31.

training seminar demonstrated that once there is an error, problem, or miscommunication while a patient is under the care of the hospital, patients and family members primarily seek to know what happened.<sup>123</sup> However, our standard adversarial system has been seen as discouraging such discussion.<sup>124</sup> Judge-directed negotiations provide parties with a forum to discuss and gain a better understanding of the situation.<sup>125</sup> Moreover, lawyers representing either party also feel that their voices are heard in an appropriate forum given that judges in the judge-directed negotiation program have medical knowledge, and thus, understand the situation better than the average judge.<sup>126</sup> In this way, judge-directed negotiations can be seen as providing a more holistic way of approaching medical malpractice cases.<sup>127</sup>

## V. CRITICISMS OF JUDGE-DIRECTED NEGOTIATIONS

Although there are many praises for judge-directed negotiations, there are still criticisms. These criticisms question a judge's involvement in the negotiations, the fairness of the settlements, and whether the program actually solves medical malpractice problems.

### A. Too Much Judge in Judge-Directed Negotiations?

A major criticism against judge-directed negotiations is the judge's involvement in the negotiation.<sup>128</sup> As previously stated, judges in judge-directed negotiations intervene early in a case and guide the parties toward a settlement.<sup>129</sup> During these negotiations, a judge's neutrality might be

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123. Marcus, *supra* note 85, at 454.

124. *Id.*

125. *See id.* at 454. There are alternatives to the legal system: patients may change providers, complain to their providers, or report their providers' inadequacies to regulators and disciplinary authorities. Hyman & Silver, *supra* note 12, at 1115 (citing Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y. REV. 105, 108 (1990)). These alternatives are cheaper than a lawsuit and may be more efficient. *Id.* However, some of those people who sue also take advantage of these alternatives as well. *See* May & Stengel, *supra* note 76, at 108 (finding that 85% of those who sued switched doctors and 31% complained).

126. Scott, *supra* note 1 (quoting Barry Washor, a Manhattan medical malpractice lawyer: "Under the current system, you can end up with any Supreme Court Justice . . . . Some of them don't have a clue. They don't understand the case, and they don't understand the law.").

127. *Health Care Appropriation Provides A Court-Based ADR Pilot Program*, *supra* note 33, at 108.

128. *See Just What the Doctor Ordered?*, *supra* note 31 (noting that the "process also invites criticism by borrowing some elements of mediation and neglecting others.").

129. MEDICAL LIABILITY REFORM AND PATIENT SAFETY INITIATIVE PROGRESS REPORT, *supra* note 25.

questioned because a judge might unknowingly bring some degree of bias toward a party or lawsuit, particularly if that judge is involved in both the negotiation meetings and subsequent adjudication.<sup>130</sup> In addition, a judge's neutrality might be questioned in a judge-directed negotiation because a judge is allowed to express his or her opinion about a party's offer.<sup>131</sup> Neutrality is an important element of any mediator,<sup>132</sup> who is typically not allowed to express his or her opinion about a party's offer,<sup>133</sup> and some argue that it is compromised in judge-directed negotiations.<sup>134</sup> However, this argument assumes that judge-directed negotiations are considered mediations, which is not how participants in judge-directed negotiations categorize them.<sup>135</sup> Rather, participants distinguish judge-directed negotiations as a mediation technique.<sup>136</sup>

Regardless of whether or not judge-directed negotiations are a mediation technique or type of mediation, some observers are still wary of a judge's involvement in that they characterize it as intimidation.<sup>137</sup> An injured party, who views the judge as an authoritative figure, might be intimidated by the judge's involvement.<sup>138</sup> Because of this intimidation, the injured party might accept an offer that is not fair.<sup>139</sup> However, injured parties might actually

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130. See *Just What the Doctor Ordered?*, *supra* note 31.

131. *Just What the Doctor Ordered?*, *supra* note 31. For example, Justice McKeon warned hospital lawyers that jurors most likely would not be influenced by their claim that a patient who died was somewhat responsible for his death because he ignored his doctors. Glaberson, *supra* note 58.

132. See, e.g., CAL. EVID. CODE § 1115 (West 2006) (defining "mediator" as "a neutral person who conducts a mediation.") "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation, a neutral person who conducts a mediation. *Id.*

133. *Just What the Doctor Ordered?*, *supra* note 31.

134. *Id.*

135. See *Health Care Appropriation Provides A Court-Based ADR Pilot Program*, *supra* note 33, at 108.

136. *Id.* (quoting Judge Judy Harris Kluger, chief of policy and planning for New York State's Unified Court System: "It's not ADR-type mediation . . . it's really a judge sitting down and trying to settle a case early on, earlier than they would other cases. It's a mediation technique."); see also Telephone Interview with Judge Douglas McKeon, *supra* note 79.

137. See *Just What the Doctor Ordered?*, *supra* note 31.

138. *Id.*

139. *Id.*; see also Glaberson, *supra* note 58 (quoting Louis G. Solimano, a plaintiffs' lawyer who seemed disappointed that "[he] didn't get a grand slam" and Nicholas I. Timko, the president of the New York State Trial Lawyers Association, who believes "[t]here's pressure to take less than might be fair compensation."); Virtanen, *supra* note 75 (quoting Arthur Levin, director of the Center

benefit from a judge's involvement, particularly if the judge has many years of malpractice experience and can advise the parties accordingly.<sup>140</sup>

*B. Fair Settlements in Judge-Directed Negotiations?*

In addition to a judge's involvement in a judge-directed negotiation, another criticism is that the process is unfair to the injured parties.<sup>141</sup> Because judge-directed negotiations occur in a judge's chambers, some fear that injured parties will be "shut out" of the courtroom and their day in court.<sup>142</sup> Although generally the lawyers are the only people present during the negotiations,<sup>143</sup> judges might allow the injured parties to attend.<sup>144</sup> Nonetheless, others are still afraid that judge-directed negotiations might allow lawyers to negotiate in private over the price of a party's injury.<sup>145</sup> However, regardless of whether or not a case is part of the judge-directed negotiation program, lawyers still negotiate in private and must participate in mandatory settlement conferences.<sup>146</sup>

Others feel that judge-directed negotiations are unfair to the injured parties because injured parties frequently receive less than they would from a jury award.<sup>147</sup> However, Justice McKeon argues that injured parties probably want fair compensation received in a timelier manner rather than a jury award that takes several years.<sup>148</sup> Even if an injured party receives compensation, others argue that the injured parties are still vulnerable to exploitation because they receive offers early on in a case, while still working through the trauma of the injury or loss of a loved one and before

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for Medical Consumer: "Even though people are not forced into [negotiated settlements], I have no idea how coercive or not the pitch is.").

140. See Glaberson, *supra* note 58 (quoting Ronald J. Landau, a plaintiffs' lawyer, who stated that "[w]hen [Justice McKeon] gives an opinion to me about how he thinks a jury's going to respond to a case, he's generally on target.").

141. See *Just What the Doctor Ordered?*, *supra* note 31.

142. *Id.* In contrast, some lawyers actually like not having the injured parties in the courtroom because they are more relaxed without patients and doctors watching. See Glaberson, *supra* note 58.

143. See Glaberson, *supra* note 58. Lawyers have the authority to settle, and thus, injured parties are not required to attend the judge-directed negotiation. *Id.*

144. See Telephone Interview with Judge Douglas McKeon, *supra* note 79.

145. *Just What the Doctor Ordered?*, *supra* note 31.

146. See Glaberson, *supra* note 58; see also *supra* note 104 and accompanying text (discussing mandatory settlement conferences).

147. Gallegos, *supra* note 32.

148. Gallegos, *supra* note 32; see also Andrews, *supra* note 58 (quoting Leslie Kelmacher, president of the New York State Trial Lawyers Association: "Many families would rather have 5 percent less now than a [larger amount] three years down the road. Prompt resolution allows them to get financial compensation and some degree of closure, so they can move on with their lives.").

they know the extent of their future expenses.<sup>149</sup> Some proposals may even be extremely punitive toward patients who do not accept the settlement offer provided by the hospital.<sup>150</sup> However, a judge's role in a judge-directed negotiation is to guide the parties toward a fair settlement, and thus, the judge can prevent a party from using such bullying tactics.<sup>151</sup>

### *C. Problem Solved with Judge-Directed Negotiations?*

Another criticism is that judge-directed negotiations only address the surface of the medical malpractice system, rather than delving into the root of the problem by improving hospitals and patient safety.<sup>152</sup> In fact, the RAND Institute for Civil Justice's recently studied California malpractice claims and concluded that improved safety performance is an important "focal point" in addressing the medical malpractice debate.<sup>153</sup> However, the expanded judge-directed negotiation program does focus on improving patient safety and reducing malpractice costs.<sup>154</sup> This focus differs from traditional tort reforms, which "were adopted to ensure access to liability insurance for providers and to protect them from the volatility of the medical liability insurance market."<sup>155</sup>

In order to enhance patient safety, an effective system should require providers to "candidly acknowledge their errors and learn from their mistakes."<sup>156</sup> The judge-directed negotiation program does include this

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149. Amy Widman, *Liability and the Health Care Bill: An "Alternative" Perspective*, 1 CAL. L. REV. CIRCUIT 57, 64 (2010).

150. *Id.* For example, some proposals penalize patients who reject an offer with fees or require a higher burden of proof to patients who sue. *Id.* (citing Bernard Black, David A. Hyman & Charles Silver, *The Effects of "Early Offers" in Medical Malpractice Cases: Evidence from Texas*, 6 J. OF EMPIRICAL LEGAL STUDIES 723, 727 (2009)).

151. See *Just What the Doctor Ordered?*, *supra* note 31.

152. *Health Care Appropriation Provides A Court-Based ADR Pilot Program*, *supra* note 33, at 108.

153. Widman, *supra* note 149, at 60 (citing MICHAEL D. GREENBERG ET AL., IS BETTER PATIENT SAFETY ASSOCIATED WITH LESS MALPRACTICE ACTIVITY? EVIDENCE FROM CALIFORNIA (2010), available at [http://www.rand.org/pubs/technical\\_reports/2010/RAND\\_TR824.pdf](http://www.rand.org/pubs/technical_reports/2010/RAND_TR824.pdf)).

154. *Just What the Doctor Ordered?*, *supra* note 31.

155. Leonard J. Nelson, III, David J. Becker & Michael A. Morrisey, *Medical Liability and Health Care Reform*, 21 HEALTH MATRIX 443, 496 (2011).

156. *Id.* (citing JOINT COMM'N ON ACCREDITATION OF HEALTH CARE ORGS., HEALTHCARE AT THE CROSSROADS: STRATEGIES FOR IMPROVING THE MEDICAL LIABILITY SYSTEM AND PATIENT SAFETY (2005), available at [http://www.jointcommission.org/assets/1/18/Medical\\_Liability.pdf](http://www.jointcommission.org/assets/1/18/Medical_Liability.pdf)).

requirement because it is part of a bigger project that consists of four major components, three of which are specifically aimed at improving patient safety.<sup>157</sup> One of these components, the hospital component, entails that each hospital implement a program that will provide early disclosure to a patient and, if the patient desires, to his or her family when a medical error occurs.<sup>158</sup> Furthermore, as part of the New York program's full-disclosure policy, hospitals have agreed to own up to their mistakes and apologize.<sup>159</sup> This early disclosure program will allow providers to candidly acknowledge their errors and learn from their mistakes, which will help enhance patient safety.<sup>160</sup>

Although the judge-directed negotiation component does not specifically state that it will improve patient safety, it does state that the

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[hereinafter HEALTHCARE AT THE CROSSROADS]; Lawrence Gostin, *A Public Health Approach to Reducing Error*, 283 JAMA 1742, 1742 (2000).

157. See *New York State to Conduct Medical Liability Reform Demonstration*, *supra* note 40.

158. *Id.*

159. Scott, *supra* note 1. This full-disclosure policy is known as "Sorry Works". *Id.*; see DOUG WOJCIESZAK, ET AL., SORRY WORKS! DISCLOSURE, APOLOGY, AND RELATIONSHIPS PREVENT MEDICAL MALPRACTICE CLAIMS (Authorhouse 2007); SORRY WORKS!, <http://www.sorryworks.net/> (last updated Dec. 12, 2012).

Apologies and disclosure in the medical context are beyond the scope of this article. However, for more information see Flauren F. Bender, "I'm Sorry" *Laws and Medical Liability*, 9 VIRTUAL MENTOR: AM. MED. ASS'N J. ETHICS 300 (2007); Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000); Ashley A. Davenport, *Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases*, 6 PEPP. DISP. RESOL. L.J. 81 (2006); Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 J. AM. MED. ASS'N 1001 (2003); Rae M. Lamb, *Open Disclosure: The Only Approach to Medical Error*, 13 QUALITY & SAFETY IN HEALTH CARE 3 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1758054/pdf/v013p00003.pdf>; Mazor et al., *Disclosure of Medical Errors: What Factors Influence How Patients Respond?*, 21 J. GEN. INTERNAL MED. 704 (2006); Mazor et al., *Health Plan Members' Views about Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409 (2004); Robbennolt, *Apologies and Medical Error*, 467 CLIN. ORTHOP. RELAT. RES. 376 (2009); Jennifer K. Robbennolt, *What We Know and Don't About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. L. REV. 1009 (2005); Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANN. HEALTH L. 55 (2005); Peter Geier, *Emerging Med-Mal Strategy: "I'm Sorry,"* NAT'L L. J., Jul. 24, 2006, available at <http://www.law.com/jsp/article.jsp?id=1153472732197>; Laura Landro, *The Informed Patient: Doctors Learn to Say "I'm Sorry": Patients' Stories of Hospital Errors Serve to Teach Staff*, WALL ST. J., Jan. 24, 2007, at D5, available at <http://online.wsj.com/article/SB116960074741385710.html>; Kevin Sack, *Doctors Say "I'm Sorry" Before "See You in Court,"* N.Y. TIMES, May 18, 2008, at A1, available at <http://www.nytimes.com/2008/05/18/us/18apology.html?pagewanted=all>; Charlie Schmidt, *"We're Sorry": The Healing Power of Apology—And How Two Little Words Can Make Medicine Safer*, HARV. PUB. HEALTH REV., Fall 2007, at 8; Gail Garfinkel Weiss, *Should You Apologize?*, MEDICAL ECONOMICS, Apr. 21, 2006, at 50, available at <http://medicaleconomics.modernmedicine.com/memag/content/printContentPopup.jsp?id=319420>.

160. Nelson, III, et al. *supra* note 154, at 496 (citing HEALTHCARE AT THE CROSSROADS, *supra* note 155; Gostin, *supra* note 155, at 1742).

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judge-directed negotiation program will be established to achieve early settlement.<sup>161</sup> Early settlement will be achieved through disclosure, communication, and a judge's involvement earlier on in a case.<sup>162</sup> Through early settlement, health care providers will be able to receive feedback from judges early on in a lawsuit.<sup>163</sup> From this feedback, health care providers can make necessary changes, which can ultimately improve patient safety.<sup>164</sup>

## VI. THE VERDICT IS IN FOR JUDGE-DIRECTED NEGOTIATIONS

Despite the criticisms against judge-directed negotiations, judge-directed negotiations appear to provide a promising method for addressing medical-malpractice litigation and could "serve as a model for other types of tort cases as well."<sup>165</sup> The Obama administration certainly recognizes the positive impact judge-directed negotiations has had on our nation's health care system given that it praises judge-directed negotiations for offering a way for states "to curb liability expenses that have sharply increased health care costs nationally."<sup>166</sup> Although there is no data for the expanded judge-directed negotiation program because at the time this article was written, the three-year Harvard study was still being conducted,<sup>167</sup> the numbers regarding New York's program show promising results.<sup>168</sup> In fact, the federal Agency for Healthcare Research and Quality (AHRQ), which funds the New York judge-directed negotiation program, estimates that the program could save more than \$1 billion annually throughout the nation.<sup>169</sup> Moreover, Dr. James B. Battles, the official overseeing the grant at the AHRQ, "hope[s] that other states across the country [will] look at [the New York program] as a model they might want to replicate."<sup>170</sup> Granted, each state has different medical malpractice insurance systems and tort reform, and New York's success

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161. See *New York State to Conduct Medical Liability Reform Demonstration*, *supra* note 40.

162. Scott, *supra* note 1 (quoting HHC President Al Aviles: "If you are very transparent and skilled in communication, you lower the sense of rage . . . and make settling cases easier.").

163. See *New York State to Conduct Medical Liability Reform Demonstration*, *supra* note 40.

164. *Id.*

165. *Just What the Doctor Ordered?*, *supra* note 31.

166. Glaberson, *supra* note 58.

167. *Health Care Appropriation Provides A Court-Based ADR Pilot Program*, *supra* note 33, at 108.

168. See Sataline, *supra* note 57.

169. *Just What the Doctor Ordered?*, *supra* note 31.

170. Glaberson, *supra* note 58.

might not directly translate to other states. However, if a state like New York, whose health care providers have among the highest malpractice insurance rates in the country,<sup>171</sup> can have such positive results, it seems that judge-directed negotiations can become a national model for other states to follow.<sup>172</sup> Moreover, the judge-directed negotiation program works within our current court systems such that laws do not need to be changed if states adopt a judge-directed negotiation program.<sup>173</sup>

The problem, however, arises with funding.<sup>174</sup> States that adopt a judge-directed negotiation program will have to find the finances to train judges and hire medical assistants to help the judge.<sup>175</sup> However, in the long run, judge-directed negotiations save money by settling a case after only several months rather than after several years.<sup>176</sup> Moreover, not all areas of a state may need to find funding to support a judge-directed negotiation program because certain areas of a state may not have the same problem with malpractice costs.<sup>177</sup> For example, judge-directed negotiations might work better in an urban setting that gives rise to high malpractice rates rather than a rural area in which local hospitals have low malpractice rates.<sup>178</sup> Furthermore, even if every state adopted a judge-directed negotiation program, this will not solve all the problems that arise from medical malpractice litigation.<sup>179</sup> Rather, judge-directed negotiations can be one of

171. *Just What the Doctor Ordered?*, *supra* note 31.

172. *See* Gallegos, *supra* note 32.

173. *Id.* (quoting James Battles, PhD, a senior service fellow for patient safety and medical errors at the Agency for Healthcare Research and Quality: “There are no laws that need to be changed. All the mechanics are in place.”). In contrast, health courts, in which specialized judges review and rule on medical liability cases, require changing existing laws. *Id.*

174. *See* Gallegos, *supra* note 32.

175. *Id.* (quoting Michelle Mello: “Other states would need money to train judges and hire a medical assistant, such as the nurse/attorney being used by New York judges. Another challenge would be to find the right team and funding to evaluate their program.”).

176. *See Health Care Appropriation Provides A Court-Based ADR Pilot Program*, *supra* note 33, at 108.

177. *See* Virtanen, *supra* note 75 (quoting New York Chief Administrative Judge Ann Pfau: “It makes sense for the pilot program to target high-population areas with a large number of cases and high hospital malpractice costs,” and Justice McKeon: “What you’re finding is in poorer communities you’re getting higher incidence of this and in poorer communities you’re finding the huge verdicts.”).

178. *See* Telephone Interview with Judge Douglas McKeon, *supra* note 79.

179. Gallegos, *supra* note 32 (quoting Morris M. Auster, staff counsel for the Medical Society of the State of New York: “We’re very hopeful that if this is very successful in reducing liability costs, it could be expanded further . . . but it’s not the be-all, end-all to address medical malpractice insurance [rates].”). For example, New York physicians will not get significant relief from insurance premiums and claims severity until the state enacts a noneconomic damages cap. *Id.* (quoting Donald J. Fager, vice president of Medical Liability Mutual Insurance Company, the largest writer of medical liability insurance in New York).

many possible solutions.<sup>180</sup> Although a judge-directed negotiation program may not be adopted by all other states, it certainly has opened up the discussion for alternative forms of handling medical malpractice liability cases.

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180. Gallegos, *supra* note 32 (quoting Morris M. Auster: “[Judge-directed negotiations are] one of a series of solutions.”).