

From: Ronald J. Lajoie and Joseph Mattson
Re: Medical Malpractice Cases
Date: 10/31/12

**SIGNIFICANT OPINION RENDERED IN NH MEDICAL MALPRACTICE
CASE:
519-B PANEL HEARING REQUIREMENT FOUND CONSTITUTIONAL**

In a decision rendered October 30, 2012, the New Hampshire Supreme Court upheld the overall Constitutionality of the 519-B panel hearing process. The Court also held certain portions of the statute a violation of the constitutional right to a jury trial and, as a consequence, increased the scope of information about the hearing that could be presented to a jury in a subsequent trial.

Since its inception, the constitutionality of the 519-B panel hearing required in all medical malpractice cases had been challenged. Various New Hampshire Superior Court judges have ruled both for and against the legislation's constitutionality creating uncertainty and inconsistency in the management of medical malpractice cases. The area of most contention centered primarily on the 519-B provision which permitted disclosure of the panel's unanimous decision to the jury. Given that the Supreme Court has now held the panel hearing legislation constitutional, the Superior Court will be required to permit the publication of a 519-B's unanimous verdict to a subsequent jury.

Ruling that certain portions of 519-B infringed on a jury's fact-finding role, the Court determined three provisions in the statute unconstitutional: 1) the provision that makes inadmissible at trial, a statement of a party or a party's representative made during the panel hearing; 2) the provision that prohibits an expert who testified (live or via report) at the panel from being compelled to testify at a subsequent trial; and 3) the provision that requires the trial court to instruct the jury that the parties may not call witnesses or produce documents to comment on the panel findings or proceedings except under limited circumstances. The Court reasoned that these provisions allowed admission of the panel's report, but denied the parties the opportunity to explain or challenge the report, or to place it in context. The Court concluded that the effect of these provisions was to materially impair the jury's ability to evaluate the panel's findings. Unfortunately, the Court declined to set out the parameters of evidence that would be admissible to explain or challenge the panel's findings and brushed aside concerns that the panel would redirect the focus of trials away from the conduct of the parties and toward the panel proceedings and spawning a "trial within a trial" regarding the validity of panel findings. Noting that they were not insensitive to these concerns, the Court left in to the trial courts to deal with these kinds of relevancy-versus-competing-interests issues.

The net effect of eliminating the 519-B disclosure limitations is to make the findings and decision of the panel a far more integral part of a subsequent jury trial. We can therefore expect increased discovery commensurate with the increased importance of the panel process.

The opinion may be viewed at:

<http://www.courts.state.nh.us/supreme/opinions/2012/2012109snhmc.pdf>