SHIELDING HIPPOCRATES: NEVADA'S EXPANDED PLEADING STANDARD FOR MEDICAL MALPRACTICE ACTIONS AND THE NEED FOR LEGISLATIVE REFORM

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"I swear by Apollo the physician, and Aesculapius . . . that, according to my ability and judgment, I will keep this Oath . . . . I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. . . . With purity and with holiness I will pass my life and practise my Art."[1]

—The Genuine Works of Hippocrates

INTRODUCTION

One of the core tenets of Western medicine, dating back to the Hippocratic Corpus,[2] is the principle of *primum est ut non nocere*,[3] or "first, do no harm."[4] To this day, the Hippocratic Oath is delivered at medical school graduations around the country and new doctors swear to uphold this ancient idea.[5] The practice of modern medicine, though technologically far removed from Ancient Greece, is still an art as well as a science.[6] The scientific elements of medicine may be based on clinical trials and may reach reasonably certain conclusions, but the artistic side of medicine leaves room for a clinician's judgment.[7] The unfortunate reality is that doctors will, in the normal course of practicing medicine, inevitably make mistakes.

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[1] HIPPOCRATES, THE GENUINE WORKS OF HIPPOCRATES 779–80 (Francis Adams trans., Leslie Adams, Spec. Ed. 1985) (1849) (emphasis omitted).

[2] *See generally The Hippocratic Corpus*, U. VA. HEATH SYS. CLAUDE MOORE HEALTH SCI. LIBR., http://www.hsl.virginia.edu/historical/artifacts/antiqua/humoral.cfm (last visited Nov. 20, 2011).

[3] THOMAS INMAN, ON THE RESTORATION OF HEALTH 165 (London, H.K. Lewis, 2nd ed. 1872).

[4] *Id.*

[5] Peter Tyson, *The Hippocratic Oath Today*, PBS NOVA (Mar. 27, 2001), http://www.pbs.org/wgbh/nova/body/hippocratice-oath-today.html.

[6] N.H. Tucker, III, *President's Message—Medicine: Art Versus Science*, JACKSONVILLE MED., Dec. 1999, http://www.dcmsonline.org/jax-medicine/1999journals/december99/presmess.htm.

[7] *Id.*

Preventable medical errors still happen and cost close to 100,000 U.S. lives every year,[8] despite the medical community's commitment to the ideals espoused in the Hippocratic Oath. Medical malpractice litigation is the logical result of these errors, with patient-plaintiffs seeking compensation for their injuries.[9] State legislatures enacted a wide variety of reforms to combat frivolous medical malpractice litigation.[10] Nevada's chosen statutory reforms are a cap on noneconomic damages[11] and an expanded pleading statute.[12] A large part of Nevada's medical malpractice reform scheme rests on shaky ground, due to possible inconsistencies between the statutory language of NRS 41A.071 and Nevada's common law.[13] The critical importance of medical malpractice reform and its susceptibility to legal challenge require legislatures to give reform the attention it demands.

This Note proposes that the Nevada legislature must amend NRS 41A.071 so that the plain language of the statute directly mirrors the underlying statutory intent and public policy. Part I briefly discusses three of the most common legislative responses to the perceived need for tort reform: noneconomic damages caps, screening panels, and expanded pleading standards. Part II discusses Nevada's legislative response to the medical malpractice crisis of 2002 and the subsequent adoption and interpretation of NRS 41A.071. Part III evaluates the current interpretation of NRS 41A.071 and the apparent conflict with Nevada's common law rules of statutory interpretation. Part IV(A) proposes an amended and restructured version of NRS 41A.071, constructed expressly to alleviate the concerns brought to light in Part III. Part IV(B) critically examines each section of the proposed amended statute. This Note concludes by examining the potential impact of the proposed amended statute and its effect on tort reform in Nevada.

I. The Common Legislative Responses to Tort Reform

Legislative responses to medical malpractice crises have varied, and an examination of these responses serves as a useful background for the discussion of tort reform in Nevada. Throughout the twentieth century, federal and state legislatures enacted specific policies to limit tort claims, guide juries in finding liability, and force the common law to listen to public policy concerns.[14] More recent developments in common law and statutory tort reform include states adopting comparative negligence laws, frequently at the expense of contributory negligence, and reducing the plaintiff's burden of proof in civil cases.[15]

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[8] Claudia Kalb, *Do No Harm*, Newsweek, Oct. 4, 2010, at 48.
[9] F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 Hofstra L. Rev. 437, 441–42 (2006).
[10] *See generally id.* at 469–79.
[11] Nev. Rev. Stat. §41A.035 (2009).
[12] *Id.* at §41A.071.
[13] Micah S. Echols, *Can Savings Statutes Cure the Failure to Attach a Medical Malpractice Affidavit to a Complaint?*, Communique, Nov. 2010, at 16, 18, *available at* http://www.clarkcountybar.org (follow "Communique" pull down menu; then follow "Past Articles" hyperlink; then follow "November 2010" hyperlink).
[14] Hubbard, *supra* note 9, at 468.
[15] *Id.*

Following an unprecedented boom in the number of medical malpractice cases filed in the 1970s,[16] legislatures across the nation undertook broad efforts to reform insurance law and tort law as a whole.[17] Actual legislative remedies varied, creating little uniformity among the states. These remedies included imposing caps on noneconomic damages,[18] altering or expanding the pleading standard for medical malpractice litigation, and forming screening panels[19] to hear cases before those claims made it to the district courts.[20]

The public policy rationale for limiting noneconomic damages stems almost entirely from a desire to curtail medical malpractice insurance premiums.[21] Critics argue that large pain-and-suffering damage awards fail to truly compensate a plaintiff for a real injury, even if that injury is difficult to quantify.[22] For example, one critic pointed out that "even though pain and mental trauma are 'real' injury costs, these noneconomic injuries have no equivalent dollar value that will 'fix' or 'replace' these psychic injuries."[23]

Those who oppose a legislative limitation on noneconomic damages frequently do so by arguing in favor of the deterrent effect that large damage awards can have on future potential offenders.[24] Opponents also argue that rising insurance premiums are easily attributable to insurance company investment patterns.[25] Opponents further argue that cyclical downturns in the financial markets—not expansive jury awards—dictate the rise and fall of insurance costs.[26] Despite the arguments against noneconomic damages caps and the evidence refuting their efficacy as a remedy for rising malpractice insurance rates, 21 states currently have some form of statutory cap in place.[27]

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[16] Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 181 (1990).

[17] *Id.* at 182; *see also* Hubbard, *supra* note 9, at 468–69.

[18] Harry Zavos, *Monetary Damages for Nonmonetary Losses: An Integrated Answer to the Problem of the Meaning, Function, and Calculation of Noneconomic Damages*, 43 LOY. L.A. L. REV. 193, 265–66 (2009). Zavos defines noneconomic damages as "a symbolic sum that the jury determines will offset a loss that cannot be eliminated by that sum." *Id.* at 248.

[19] Macchiaroli, *supra* note 16, at 186. This Note will use the term "screening panel" to refer to a legal entity created for the purpose of pretrial evaluation of medical malpractice claims.

[20] *See id.* at 182 nn.4–5; Hubbard, *supra* note 9, at 483–84.

[21] Hubbard, *supra* note 9, at 493–94.

[22] *See id.* at 493.

[23] *Id.*

[24] *Id.* at 494.

[25] Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform"*, 5 YALE J. HEALTH POL'Y L. & ETHICS 357, 364 n.32 (2005).

[26] *Id.*

[27] ALASKA STAT. § 09.17.010 (2007); CAL. CIV. CODE § 3333.2 (West 1997); COLO. REV. STAT. § 13-21-102.5 (2005 & Supp. 2011–12); CONN. GEN. STAT. § 52-228c (2005 & Supp. 2011); FLA. STAT. § 766.118 (2011); HAW. REV. STAT. § 663-8.7 (2008); IDAHO CODE ANN. § 6-1603 (2006); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West 2011); MICH. COMP. LAWS § 600.1483 (1996); MISS. CODE ANN. § 11-1-60 (2008); MO. STAT. § 538.210 (2008); MONT. CODE ANN. § 25-9-411 (2009); NEV. REV. STAT. § 41A.035 (2009); N.J. STAT. ANN. § 2A:15-5.14 (West 2000 & Supp. 2011); N.M. STAT. ANN. § 41-5-6 (2003); N.D. CENT. CODE § 32-42-02 (2008); OHIO REV. CODE ANN. § 2323.43 (West 2004); OKLA. STAT. ANN. tit. 63, § 1-1708.1F-1 (West 2004 & Supp. 2010–11) (expired Nov. 1, 2010); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2011); W. VA. CODE ANN. § 55-7B-8 (West 2002 & Supp. 2011); Wis. Stat. § 893.55 (2006). This list does not count several states where

As an alternative or supplement to damage caps, some states implemented statutory schemes creating screening panels tasked with evaluating medical malpractice claims.[28] The screening panels varied in form from state to state, though there are some common characteristics.[29] The screening panels were typically staffed by a mix of doctors, lawyers, and judges, and the panels issued opinions regarding the negligence of health care providers in medical malpractice actions.[30] Law makers in some states granted screening panels express authority to offer opinions on damages, though those opinions did not carry the weight of a binding arbitration award.[31] Supporters of the screening panels saw them as a way to expedite medical malpractice litigation, ushering meritorious cases towards settlement and exposing frivolous cases as early in the process as possible.[32]

However, screening panels are harshly criticized for the delays they force onto the litigants, the potential evidentiary consequences to the "losing" party, and the added costs if the ultimate claim ends up going to court anyway.[33] Despite the procedural challenges present in a screening panel system, four of the nine states in the Ninth Circuit have implemented some form of a screening panel.[34]

The third major form of action legislatures have taken to deter frivolous medical malpractice litigation is to expand pleading standards. On their face, the expanded pleading standards are the simplest manifestation of tort reform. These standards add the requirement that the claimant attach some form of evidentiary verification, most commonly an expert affidavit, to the complaint.[35] Proponents of the expanded pleading standard tout it as a way to "streamline and expedite medical malpractice cases and lower overall costs."[36] They further argue that the expanded pleading standard is a more efficient method than a screening panel system to quickly eliminate frivolous lawsuits because it requires an expert's good faith assessment that the claim is meritorious.[37]

Despite the superficial simplicity of the expanded pleading standard, prelitigation limitations were met with strong opposition.[38] Depending on the specific textual nature of the statute, complaints that failed to satisfy the expanded

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similar statutory measures were found to be unconstitutional limitations on the right to a jury trial.

[28] Macchiaroli, *supra* note 16, at 186.

[29] *See id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Hubbard, *supra* note 9, at 522–23.

[34] ALASKA STAT. § 09.55.536 (2007); HAW. REV. STAT. § 671-11 (West 2008 & Supp. 2010); IDAHO CODE ANN. § 6-1001 (2006); MONT. CODE ANN. § 27-6-104 (2009).

[35] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-190A (West 2005 & Supp. 2011); NEV. REV. STAT. § 41A.071 (2009); N.J. STAT. ANN. § 2A:53A-27 (West 2000 & Supp. 2011).

[36] Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 794 (Nev. 2006).

[37] *Id.*

[38] Brett J. Blank, Note, *Medical Malpractice/Civil Procedure—Trap for the Unwary: The 2005 Amendments to Connecticut's Certificate of Merit Statute*, 31 W. NEW ENG. L. REV. 453, 455–56 (2009).

pleading statute could be dismissed with or without prejudice.[39] There was added confusion under the expanded pleading statutes over which actions were actually covered and whether actions such as cross-claims, counterclaims, and impleaders required expert affidavits as well.[40]

The nationwide tort reform movement of the 1970s and 1980s left medical malpractice dotted with noneconomic damages caps, screening panels, and expanded pleading standards, along with other legislative and common law remedies such as comparative liability schemes, insurance reforms, etc.[41]

II. Legislative Response to Medical Malpractice in Nevada—From Panels to Pleadings

A. Screening Panels in Nevada

The Nevada medical malpractice screening panels were originally adopted in 1985 as Nevada's response to the tort reform crisis of the mid-1980s.[42] Before the statute's repeal, Nevada had screening panels comprising lawyers, doctors, or dentists (depending on the type of malpractice alleged), and the chairperson of the screening panel (usually an attorney or judge).[43] All medical malpractice actions were subject to review by the screening panels before they were eligible for hearing before the district court.[44] Any case filed in district court without first going through a screening panel (or otherwise failing to comply with the mechanical requirements of the screening panel) was "subject to dismissal without prejudice."[45] The screening panel's final rulings had evidentiary value at any subsequent proceeding on that issue, though the legislature was careful to limit that value to the final conclusion of the panel.[46] Though the screening panels did have a demonstrable effect in limiting the number of frivolous medical malpractice cases filed in district courts, there was a new crisis on the horizon.[47]

B. The Medical Malpractice Crisis of 2002

The sweeping medical malpractice reforms of 2002 came in response to several factors. The first factor was a rise in the number of medical malpractice

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[39] Melinda L. Stroub, Note, *The Unforeseen Creation of a Procedural Minefield—New Jersey's Affidavit of Merit Statute Spurs Litigation and Expense in its Interpretation and Application*, 34 Rutgers L.J. 279, 293–94 (2002).

[40] Szydel v. Markman, 117 P.3d 200, 201 (Nev. 2005) (ruling that res ipsa loquitor case did not require expert affidavits under Nevada's expanded pleading standard).

[41] *See, e.g.*, Hubbard, *supra* note 9, at 475–76.

[42] *See supra* Part I.

[43] Nev. Rev. Stat. Ann. § 41A.003-069 (2001) (repealed 2002).

[44] *Id.* § 41A.016(1) (repealed 2002).

[45] *Id.*

[46] *Id.* § 41A.016(2) (repealed 2002).

[47] Chris Di Edoardo, *Malpractice Lawsuits Feed Insurance Debate*, Las Vegas Rev.-J. (Mar. 4, 2002), http://www.reviewjournal.com/lvrj_home/2002/Mar-04-Mon-2002/news/18219452.html.

cases filed each year prior to 2002.[48] In Clark County alone, there were 133 medical malpractice lawsuits filed in 1998, 148 in 1999, and 158 in 2000.[49] A series of exorbitantly high verdicts in 2001 helped urge policy makers toward reform.[50] The jury awarded 6 million dollars to the plaintiff in *Watts v. Reliable Medical Care*, 5.4 million dollars in *Banks v. Sunrise Hospital*, and 4.6 million in *Debourg v. Southwest Medical*.[51] Following the adverse trends in medical malpractice, several large insurance companies responded by no longer carrying medical malpractice coverage.[52] The snowball effect continued, as insurers like the St. Paul companies departed Nevada, which left doctors with skyrocketing insurance premiums or an absence of coverage altogether.[53] As a direct consequence of the insurance crisis, physicians began closing their practices if they were unwilling to pay the exorbitant premiums or unable to obtain malpractice coverage altogether.[54] The crisis reached critical mass when University Medical Center (UMC), Southern Nevada's state-designated Level I Trauma Center,[55] closed its doors to patients in response to mass resignations by doctors unable to secure malpractice insurance.[56] UMC's closure led Governor Kenny Guinn's political opponents to call for exercise of his emergency powers.[57]

The confluence of rising case volumes, shockingly high award amounts, and the severely adverse effects that rising malpractice insurance premiums had on the local medical community led Governor Guinn to call a special session of the legislature.[58] California was the early inspiration for tort reform during the special session in Carson City.[59] Doctors in Nevada hoped for reforms as restrictive as those passed in California's Medical Injury Compensation Reform

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[48] Joelle Babula, *Medical Malpractice: Rising Insurance Costs Threaten Care*, LAS VEGAS REV.-J., July 1, 2001, at 1B, *available at* http://www.reviewjournal.com/lvrj_home/2001/Jul-01-Sun-2001/news/16437839.html.

[49] *Id.*

[50] Di Edoardo, *supra* note 47.

[51] *Id.*

[52] *Id.* St. Paul was only one example of an insurance company discontinuing medical malpractice coverage in Nevada during this time period. "[S]ince insurance companies set their premiums on a regional or state basis, and they perceived Nevada juries to be operating with a jackpot mentality, Nevada became a bad place to do business." Katherine A. Keeley, *A Doctor's Gamble in Nevada*, HARV. MED. ALUMNI BULL., Summer 2004, http://harvard medicine.hms.harvard.edu/doctoring/health/gamble.php.

[53] Di Edoardo, *supra* note 47.

[54] Joelle Babula, *The Medical Malpractice Insurance Crisis: Operation Special Session*, LAS VEGAS REV.-J., July 28, 2002, at 23A, *available at* http://www.reviewjournal.com/lvrj_home/2002/Jul-28-Sun-2002/news/19271188.html.

[55] *About Us*, U. MED. CENTER, https://www.umcsn.com/Footer/About-UMC-of-Southern-Nevada-Index.aspx?intMenuID=6600&intPageID=305 (last visited Nov. 20, 2011).

[56] Joelle Babula, *Liability Concerns: Trauma Center Closes; ERs Gear Up*, LAS VEGAS REV.-J., July 4, 2002, at 1A, *available at* http://www.reviewjournal.com/lvrj_home/2002/Jul-04-Thu-2002/news/19117587.html.

[57] Sean Whaley, *Neal Urges Guinn to Declare Emergency*, LAS VEGAS REV.-J., July 4, 2002, at 4A, *available at* http://www.reviewjournal.com/lvrj_home/2002/Jul-04-Thu-2002/news/19118762.html.

[58] Babula, *supra* note 56.

[59] Joelle Babula, *The Medical Malpractice Insurance Crisis: California Cited as Reform Model*, LAS VEGAS REV.-J., July 28, 2002, at 27A, *available at* http://www.reviewjournal.com/lvrj_home/2002/Jul-28-Sun-2002/news/19261838.html.

Act (MICRA).[60] The principle provision of MICRA that Nevada doctors hoped to adopt was its strict cap on noneconomic damages.[61] Lawmakers moved quickly and passed the comprehensive tort reform package just over four days after the special session came to order.[62]

Nevada's current medical malpractice landscape began taking shape with the passage of Assembly Bill 1 of the Eighteenth Special Session (AB 1) in August 2002.[63] AB 1 included provisions for caps on noneconomic damages (subject to limitations),[64] a state-wide dissolution of the health-screening panels,[65] and an expanded pleading standard for medical malpractice actions.[66] The expanded pleading standard was expressly designed to replace the health screening panels.[67] The new standard's proponents believed that if the screening panels were sacrificed to speed up access to the courts, the stringent affidavits had to be preserved to guard against an increase in frivolous filings.[68] Though some legislators feared that the cost of a substantive, pretrial expert affidavit was nothing more than "the equivalent of a huge filing fee,"[69] the bill's supporters assuaged those fears by pointing out the similarity in cost between the proposed system and the fees paid by those filing under the health screening panels.[70] The only change to the expanded pleading standard between the proposed version and what ultimately passed in the legislature was a slightly expanded definition of acceptable expertise.[71] NRS 41A.071 codified the expanded pleading standard from AB 1.[72]

C. NRS 41A.071 as Interpreted by the Supreme Court of Nevada

The expanded pleading standard in Nevada represented a more efficient alternative to the health screening panels.[73] NRS 41A.071, in its entirety, reads:

> If an action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.[74]

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[60] *Id.*
[61] CAL. CIV. CODE § 3333.2 (West 1997).
[62] *See* Editorial, *Now Let's Wait and See*, LAS VEGAS REV.-J., Aug. 2, 2002, at 10B, *available at* http://www.reviewjournal.com/lvrj_home/2002/Aug-02-Fri-2002/opinion/19323627.html.
[63] *See generally* Assemb. B. 1, 18th Spec. Sess. (Nev. 2002).
[64] *Id.* § 5.
[65] *Id.* § 69.
[66] *Id.* § 8.
[67] S. JOURNAL, 18th Spec. Sess., at 159 (Nev. 2002) [hereinafter SENATE JOURNAL], *available at* http://leg.state.nv.us/Session/18th2002Special/journal/Senate/Final/sjss18002.html.
[68] *See id.* at 162.
[69] *Id.* at 163 (comment by Sen. Coffin).
[70] *Id.* (comment by Mr. Cotton: "It is the equivalent of the screening panel costs that they incurred anyway.").
[71] *See id.* at 164.
[72] NEV. REV. STAT. § 41A.071 (2009).
[73] *See* SENATE JOURNAL, *supra* note 67, at 163.
[74] § 41A.071.

The Supreme Court of Nevada's first opportunity to interpret NRS 41A.071 was in *Borger v. Eighth Judicial District Court*.[75] This case focused more on the nature of the affidavit required by the statute than the nature of the dismissal required. In *Borger*, plaintiff Borger sought treatment for "recurrent lower digestive tract difficulties."[76] Borger's general surgeon (Lovett) and gastroenterologist (Desai) both diagnosed Borger with Crohn's disease.[77] Borger underwent two serious surgical procedures, but his health did not improve.[78] Borger sued both Lovett and Desai for malpractice when subsequent examinations by Dr. Kudisch revealed that the diagnosis of Crohn's disease was incorrect.[79] After the initial procedural difficulties surrounding the cross-over of the health screening panels and the new procedures were resolved,[80] Lovett, the general practitioner, moved for dismissal under the health screening panel standards.[81] He argued that a gastroenterologist was too dissimilar from a general surgeon to provide a sufficient expert affidavit under the statute, and that the statute required the complaint to be dismissed upon such a failure.[82] The district court dismissed the complaint, and on appeal, the Supreme Court of Nevada reversed, holding that the statute only "requires that the affiant practice in an area 'substantially similar' to that in which the defendant engaged, giving rise to the malpractice action."[83]

The Court used *Borger* as an opportunity to expound, in dictum, on some of the particular aspects of NRS 41A.071, even though it decided the case under the old health screening panel rules. The Court stated that dismissal was the appropriate response for a complete failure to attach an affidavit.[84] The Court was silent on the issue of amendments as a remedy to deficient complaints, effectively leaving the matter to future courts to decide.[85]

The next challenge to the expanded pleading statutes came in *Szydel v. Markman*.[86] The *Markman* holding focused on whether or not the affidavit requirements of 41A.071 extended to cases alleging res ipsa loquitor theories of medical malpractice.[87] Following a breast lift, Dr. Markman allegedly left a surgical needle in Ms. Szydel's right breast.[88] The health screening panel dismissed Szydel's complaint without prejudice.[89] Szydel filed a new complaint under Nevada's res ipsa loquitor statute, NRS 41A.100,[90] but declined to attach

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[75] Borger v. Eighth Judicial Dist. Court., 102 P.3d 600, 603–06 (Nev. 2004).
[76] *Id.* at 601.
[77] *Id.*
[78] *Id.* at 601–02.
[79] *Id.* at 602.
[80] *Id.* at 603.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 605.
[84] *Id.* at 606.
[85] *Id.*
[86] Szydel v. Markman, 117 P.3d 200, 201–07 (Nev. 2005).
[87] *Id.* at 205.
[88] *Id.* at 201.
[89] *Id.* at 202. "The panel then informed Szydel by letter that her complaint was procedurally deficient and advised her that . . . any subsequent filing would be considered a new complaint." *Id.*
[90] NEV. REV. STAT. § 41A.100 (2009).

an affidavit,[91] prompting Markman to move for dismissal under NRS 41A.071.[92] The Supreme Court of Nevada ruled that complaints filed under NRS 41A.100 do not require an expert affidavit and were therefore not subject to motions for dismissal under NRS 41A.071.[93]

In this second Supreme Court of Nevada interpretation of NRS 41A.071 in less than two years, the Court reiterated the policy behind the statute without making it binding precedent.[94] As in *Borger,* the Court reinforced mandatory dismissal as the appropriate remedy for complaints that fail to attach an expert affidavit in accordance with NRS 41A.071 (excluding res ipsa loquitor complaints).[95]

The Supreme Court of Nevada finally directly addressed expert affidavits in *Washoe Medical Center v. Second Judicial District Court*.[96] *Washoe* was the Court's most significant step in defining the nature of a complaint's dismissal under 41A.071. Billie Faye Barker sued her doctor and the Washoe Medical Center for negligence, filing her complaint one day before the statute of limitations ran.[97] Barker failed to attach an expert affidavit as required by NRS 41A.071, and Washoe moved to dismiss.[98] Before the district court could rule on Washoe's motion to dismiss, Barker filed an amended complaint that included an expert affidavit as well as the plaintiff's opposition to Washoe's dismissal motion.[99] Arguing that NRS 41A.071 does not allow a plaintiff to attach a missing affidavit as an amendment, Washoe moved to strike the amended complaint.[100] The district court upheld the amended complaint as valid under NRCP Rule 15(a).[101] Washoe filed a petition for a writ of mandamus, challenging the order upholding the amended complaint.[102] The Supreme Court of Nevada concluded that the use of the word "shall" in NRS 41A.071[103] denoted a mandatory dismissal, not a discretionary one.[104] The Court further stated that failure to attach an expert affidavit rendered the case void ab initio[105] and legally nonexistent.[106] The Court finally stated that no amendments are permitted for any complaint dismissed for failure to comply with NRS 41A.071.[107] Consequently, the *Washoe* holding formally codified as precedent

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[91] *Szydel*, 117 P.3d at 202.
[92] *Id.*
[93] *Id.* at 204.
[94] *Id.*
[95] *Id.* at 205.
[96] Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 791 (Nev. 2006).
[97] *Id.*
[98] *Id.*
[99] *Id.* at 791–92.
[100] *Id.* at 792.
[101] *Id.*; *see also* NEV. R. CIV. P. 15(a) (allowing a plaintiff to amend a complaint once as a matter of course before a responsive pleading is served).
[102] *Washoe*, 148 P.3d at 792.
[103] NEV. REV. STAT. § 41A.071 (2009).
[104] *Washoe*, 148 P.3d at 793.
[105] Void ab initio means "[n]ull from the beginning." BLACK'S LAW DICTIONARY, 1604 (8th ed. 2004).
[106] *Washoe*, 148 P.3d at 793–94.
[107] *Id.*

the dicta from *Borger* and *Szydel*.[108] The Court recognized that its interpretation of NRS 41A.071 appeared harsh, but it invoked language from a Minnesota Supreme Court decision to explain that it did so in a fair way.[109]

In finding that NRS 41A.071 requires mandatory dismissal of complaints lacking an expert affidavit, the Supreme Court of Nevada relied on statutory interpretation precedent.[110] That precedent states that where the language of a statute is clear on its face, the Court will rely on the plain meaning.[111] Also, when a statute is ambiguous or subject to multiple interpretations, "legislative intent is controlling."[112] The Court's ultimate guiding principle is to avoid an "interpretation that leads to an absurd result."[113] The Court spent the bulk of its analysis on the phrase "shall dismiss," holding that the legislature's choice of "shall" over "may" indicated a mandatory dismissal.[114] However, the majority opinion overlooked an important phrase in the statute: "without prejudice."[115]

The Supreme Court of Nevada extended its interpretation of NRS 41A.071 in *Fierle v. Perez*.[116] Here, the Court interpreted the expanded pleading standard to also cover complaints filed against professional medical corporations, as well as the medical staff themselves. Plaintiff Patricia Fierle sought treatment from Dr. Perez and members of his staff following her breast cancer diagnosis and subsequent mastectomy.[117] During a chemotherapy session, Fierle suffered "a severe extravasation of chemotherapy" when the catheter used to deliver the medicine was not properly situated.[118] Fierle sued for negligence but did not attach an expert affidavit to her original complaint.[119] She attempted to cure the defect by filing an amended complaint that included her expert's affidavit, but Perez and the other defendants moved to dismiss under NRS 41A.071.[120] The Supreme Court of Nevada ruled that Dr. Perez's professional medical corporation was protected under NRS 41A.071, and dismissed the complaint against the corporation for lack of an expert affidavit on initial filing.[121] The Court also held that, even when certain claims within a complaint did not require an expert affidavit (such as res ipsa loquitor claims), "an amended complaint may not relate back to a complaint that lacked a required medical expert affidavit."[122]

Following the Court's decision in *Fierle*, NRS 41A.071 stands as a bright-line test for admitting medical malpractice complaints into the judicial system.

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[108] *Id.* at 794.
[109] *Id.* at 795 ("[A]lthough 'the [medical malpractice] statute may have harsh results in some cases, it cuts with a sharp but clean edge.'" (quoting Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 578 (Minn. 1999))).
[110] *Id.* at 792 & 793 nn.6–10.
[111] *Id.* at 792–93.
[112] *Id.* at 793.
[113] *Id.* (internal quotation marks omitted).
[114] *Id.* at 793 & 794 n.17.
[115] *See id.* at 792–95.
[116] Fierle v. Perez, 219 P.3d 906, 908 (Nev. 2009).
[117] *Id.*
[118] *Id.* at 908–09 (internal quotation marks omitted).
[119] *Id.* at 909.
[120] *Id.*
[121] *Id.* at 911.
[122] *Id.* at 914.

The statute's protections extend from the doctors and nurses to their professional medical corporations.[123] However, the Court's continued support of the original *Washoe* interpretation is still at odds with Nevada's well-settled common law doctrines governing statutory interpretation.[124]

III. Questions of Interpretation in NRS 41A.071

Though consistent with the legislative intent and arguments supporting the statute, the Supreme Court of Nevada's position regarding the meaning of NRS 41A.071 is not consistent with a plain language reading of the statute.[125] In *Washoe*, the majority opinion based its statutory interpretation of NRS 41A.071 entirely on the meaning of the "shall dismiss" portion of the statute while neglecting to incorporate the "without prejudice" modifier that immediately follows it.[126] The Court had an opportunity to rectify this error in *Fierle*, but instead opted to preserve the interpretation from *Washoe*.[127] The Court's refusal to interpret the statute in its entirety is in direct opposition to Nevada's common law rules of statutory interpretation.[128] The inconsistency between the plain language of NRS 41A.071 and the Court's strict adherence to the legislative intent behind the statute is a flaw that the legislature should remedy through amending the statute itself.[129]

Nevada's common law scheme for statutory interpretation relies first and foremost on the plain language of the statute, provided that the statute is clear on its face.[130] The courts are only to look beyond the plain meaning when the statute is so ambiguous that it is susceptible to more than one interpretation.[131] NRS 41A.071 expressly provides that a judge "shall dismiss the action, without prejudice" if it is filed without an appropriate expert affidavit attached to it.[132] A plain language reading of this statute would lead the reader to believe that the dismissal itself is mandatory under the "shall dismiss" provision, but that the dismissal itself must necessarily be "without prejudice."[133]

If the Supreme Court of Nevada strictly followed Nevada's principles of statutory interpretation in *Washoe*, the holding would change drastically. The Court's analysis would center on the nature of the compulsory dismissal. Instead of finding that the claim was dismissed as void ab initio, the Court would rule that mandatory dismissals under NRS 41A.071 are made without prejudice, allowing plaintiffs to amend their complaints and file again. This interpretation, while completely consistent with the plain meaning of the statu-

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123 *Id.*
124 *See infra* Part III.
125 *See* Echols, *supra* note 13.
126 *See* Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 792–95 (Nev. 2006).
127 *Fierle*, 219 P.3d at 909.
128 *See supra* Part II (enumerating Nevada's common law principles of statutory interpretation throughout the *Washoe* analysis).
129 *See infra* Part IV(B)(2).
130 Beazer Homes Nev., Inc. v. Eighth Judical Dist. Ct., 97 P.3d 1132, 1135 (Nev. 2004).
131 *Id.*
132 Nev. Rev. Stat. § 41A.071 (2009).
133 *See* Echols, *supra* note 13.

tory language, runs afoul of the legislative intent behind NRS 41A.071. There is no lasting consequence for plaintiffs who file deficient complaints under this hypothetical interpretation. Even the most frivolous complaints are eligible for amendment, rendering the statute toothless as a protection against frivolous lawsuits.

The Court in *Washoe* instead chose to interpret NRS 41A.071 on the meaning of the "shall dismiss" provision of the statute independently of the "without prejudice" portion.[134] The Court's implied justification for this came from the natural progression of Nevada's statutory interpretation scheme—that is, "when a statute is . . . ambiguous, . . . we must look beyond its plain meaning."[135] The interpretation of an ambiguous statute is controlled by legislative intent,[136] and the legislative interpretation of NRS 41A.071 supported a dismissal as void ab initio, rendering the complaint legally nonexistent.[137]

When the Nevada legislature adopted an expanded pleading standard as one of its methods of controlling medical malpractice litigation, it did so as a complement to a noneconomic damages cap and at the expense of the previously implemented health screening panels.[138] The underlying policies holistically remained the same—to reduce the number of frivolous lawsuits filed in district court, lower costs to all litigating parties, and ensure that there is a good faith standard for the litigation.[139] The justification behind making the transition from screening panels to an expanded pleading standard centered on a desire to perpetuate all the positive aspects of the screening panel system while simultaneously "strengthening the requirements for expert witnesses."[140] These policy goals were explicit in the Court's decisions each time it interpreted the dismissal provision of NRS 41A.071.[141]

Given the important legislative intent behind NRS 41A.071, it is extremely unlikely that the Court will abandon stare decisis and reverse its statutory interpretation solely to conform with Nevada's common law doctrines of interpretation. The Court also precluded the possibility of allowing amendments to fix defective complaints under the current statutory scheme.[142] Therefore, the most logical remedy to this conflict is for the Nevada Legislature to amend NRS 41A.071, changing the language to reflect not only the 2002 legislative intent and the subsequent Supreme Court of Nevada decisions that came from it, but to also mold the statute into a more fair, less draconian measure that better suits the needs of plaintiffs and defendants alike.

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[134] Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 792–95 (Nev. 2006).

[135] *Id.* at 793.

[136] Potter v. Potter, 119 P.3d 1246, 1248 (Nev. 2005).

[137] *Washoe*, 148 P.3d at 793.

[138] *See generally* Assemb. B. 1, 18th Spec. Sess. (Nev. 2002).

[139] *Washoe*, 148 P.3d at 794.

[140] *Id.*

[141] *See* Fierle v. Perez, 219 P.3d 906, 914 (Nev. 2009); *Washoe*, 148 P.3d at 794; Szydel v. Markman, 117 P.3d 200, 204 (Nev. 2005); Borger v. Eighth Judicial Dist. Court, 102 P.3d 600, 604 (Nev. 2004).

[142] *Washoe*, 148 P.3d at 793.

IV. NRS 41A.071 WITH PROPOSED AMENDMENTS

The following proposed statute is intended as a replacement for NRS 41A.071. The statute is designed to integrate the Supreme Court of Nevada's precedent from *Washoe* and *Fierle* with clearer language. The plain language of the amended statute is consistent with the underlying legislative intent, a feature that prevents inconsistent interpretations by future courts. The amended statute also incorporates a savings clause, where certain defective complaints are expressly given an opportunity to be amended, which is a concession against the current, more draconian approach of immediate dismissal. Finally, the amended statute integrates the Nevada Rules of Professional Conduct, Nevada Rules of Civil Procedure ("NRCP"), and Nevada common law to shift the responsibility for defective complaints from the plaintiff onto the attorney filing the complaint.

A. The Newly Proposed Statute

1. If an action for medical malpractice or dental malpractice is filed in the district court without an affidavit supporting the allegations contained in the action, the district court shall dismiss the action as void ab initio. The affidavit must be submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.

(a) Any attorney filing a complaint in violation of section 1 shall be subject to sanctions under Nevada Rules of Civil Procedure Rule 11.

(b) Any attorney filing a complaint in violation of section 1 shall be presumed in violation of the attorney's professional duties as outlined in the Nevada Rules of Professional Conduct Rule 3.1.

2. If an action for medical malpractice or dental malpractice is filed in the district court with an affidavit attached but the affidavit is found in some way deficient, the judge shall grant thirty (30) days to amend the complaint pursuant to NRCP Rule 15(a). If the plaintiff fails to remedy the deficient affidavit within the time granted, the complaint shall be dismissed as void ab initio.

(a) The judicial grant of leave to amend under Rule 15(a) shall toll the statute of limitations only for such time as is required to hear the motion on the amended complaint.

In addition to incorporating NRS 41A.071, the amended statute incorporates ideas from the Nevada Rules of Civil Procedure, the Nevada Rules of Professional Conduct, and other states' medical malpractice reform laws.[143] The amended statute is designed to combine both the mandatory dismissal provisions in which the Supreme Court of Nevada and Legislature have vested so much interest, as well as new policies protecting the rights of plaintiffs.

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[143] *See generally* NEV. REV. STAT. § 41A.071 (2009), NEV. REV. STAT. § 41A.100 (2009), N.J. STAT. ANN. §§ 2A:53A-27-28 (West 2010 & Supp. 2011), NEV. R. CIV. P. 15(a), NEV. RULES OF PROF'L CONDUCT 1.1.

B. Section by Section Analysis

1. Section 1

Section 1 of the proposed statute begins with language almost identical to the current draft of NRS 41A.071, which requires any complaint filed with no affidavit whatsoever to be summarily dismissed as void ab initio.[144] Unlike the current draft, the language about dismissal "without prejudice" is eliminated for clarity. Section 1 of the amended statute retains as much of the original character of NRS 41A.071 as possible because it is designed to preserve the Supreme Court of Nevada's holdings from *Washoe*[145] and *Fierle*.[146] The new statute also upholds the original legislative intent behind NRS 41A.071 by continuing the Court's tradition of mandatory dismissals for complaints that fail to attach expert affidavits to medical malpractice complaints. Section 1 of the new statute will continue to ensure that medical malpractice cases are "filed in good faith" by mandating the continued presence of the medical expert affidavit.[147] Though a mandatory dismissal as being void ab initio may still yield "harsh results in some cases,"[148] the need "to lower costs, reduce frivolous lawsuits, and ensure that . . . malpractice actions are filed in good faith" far outweighs the opposing viewpoint.[149]

Subsection (a) of the amended statute focuses on the first truly novel addition to the statutory scheme surrounding the expanded pleading standard. The provisions added in subsection (a) make noncompliance a presumptive violation of NRCP Rule 11. NRCP Rule 11(b) states that:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, . . . an attorney . . . is certifying that to the best of the person's knowledge, . . . formed after an inquiry reasonable under the circumstances, . . . the allegations and other factual contentions have evidentiary support . . . .[150]

The goal of Rule 11 is to ensure that all filings before the Court are made in an appropriate fashion and to sanction parties who violate the rule.[151] One important note concerning Nevada's version of Rule 11 and its federal counterpart is that neither rule requires an affidavit to be filed with a complaint unless a rule or statute provides otherwise.[152] This provision adds a definite incentive for the attorney to comply with the statute. Not only will the judge summarily dismiss complaints filed without an affidavit, but the judge must also pursue sanctions under Rule 11.

The arguments against this provision come principally from the argument that a *sua sponte* finding for sanctions removes a portion of the judge's discre-

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144 NEV. REV. STAT. § 41A.071 (2009).

145 *Washoe*, 148 P.3d at 794.

146 *Fierle*, 219 P.3d at 911.

147 SENATE JOURNAL, *supra* note 67, at 159 (comment by Mr. Bradley).

148 *Washoe*, 148 P.3d at 795 (quoting Lindberg v. Health Partners, Inc., 599 N.W.2d 572, 578 (Minn. 1999)).

149 Szydel v. Markman, 117 P.3d 200, 204 (Nev. 2005).

150 NEV. R. CIV. P. 11(b).

151 *See* NEV. R. CIV. P. 11.

152 NEV. R. CIV. P. 11(a), *accord* FED. R. CIV. P. 11(a).

tion from the proceeding.[153] This is unfounded due to the statute's construction. If the statute had a new, compulsory sanctions provision built into it that was not grounded in a different rules-based framework, it would almost certainly act as a usurpation of judicial authority. In contrast, this proposed amended statute states that the attorney "shall be subject to sanctions under Nevada Rules of Civil Procedure Rule 11."[154] While the term "shall" denotes that the attorney is automatically subject to Rule 11, the rule itself contains specific mechanisms that give the judge discretionary control as to the conditions of the sanctions themselves.[155] The policy behind the inclusion of this provision is inherently consistent with the policy behind Rule 11. Both the expanded pleading standard and the civil procedure rule governing representations to the court exist to ensure that attorneys file in good faith and to ensure that frivolous cases are eliminated.[156] Subsection (a) of the statute can work in concert with the existing rules to further protect against frivolous medical malpractice litigation by using the existing NRCP to eliminate the possibility that the statute will infringe on judicial providence.

Subsection (b) is another new addition to the expanded pleading standard that exists to both curtail frivolous litigation and to give plaintiffs injured by attorney misconduct a new possible avenue for recovery. The new provision adds a presumption that whenever an attorney files a complaint in violation of Section 1 of the statute, that attorney is legally presumed to have violated Rule 3.1 of the Nevada Rules of Professional Conduct. Rule 3.1 holds that "[a] lawyer shall not bring . . . a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[157] The Nevada legislature adopted this rule verbatim from the corresponding model rule.[158] The policy behind Rule 3.1 is that "[w]hat is required of lawyers is that they inform themselves about the facts of their clients' cases and . . . that they can make good faith arguments in support of their clients' positions."[159] The Supreme Court of Nevada recently upheld the view that "[a]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct."[160] Due to Rule 3.1's presence in the Nevada Rules of Professional Conduct, attorneys in Nevada are already under a duty to exercise due care in ensuring that they file cases in good faith.[161]

The expanded pleading standard present in both the proposed amended statute and NRS 41A.071 elevates the attorney's minimum duty by requiring

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[153] Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 256–57 (2010).
[154] *See supra* Part IV.A.1(a).
[155] NEV. R. CIV. P. 11(c)(2).
[156] Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 794 (Nev. 2006); *see also* Grossberg, *supra* note 153, at 250.
[157] NEV. RULES OF PROF'L CONDUCT 3.1.
[158] MODEL RULES OF PROF'L CONDUCT 3.1 (2006).
[159] *Id.* at cmt. 2.
[160] Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1622 (2010) (quoting Nix v. Whiteside, 475 U.S. 157, 168, (1986)).
[161] NEV. RULES OF PROF'L CONDUCT 3.1.

the attorney to engage in at least minimal discovery to ascertain the nature of the clients' claims.[162] By including the language relating to Rule 3.1 in subsection (b), the amended statute carries additional weight by attaching the possibility of bar sanctions for the intentional filing of facially defective complaints.[163] The policies behind this subsection remain identical to those behind the statute as a whole: to reduce the number of frivolous cases filed and to ensure that medical malpractice actions are undertaken after a good faith effort is made to ascertain the validity of the allegations made in the complaint.[164]

As the amended statute makes filing a complaint without an expert affidavit a presumptive violation of Rule 3.1, attorneys would then be subject to discipline under Rule 8.4, which makes it attorney misconduct for any attorney to "[v]iolate or attempt to violate the Rules of Professional Conduct."[165] The State Bar of Nevada is responsible for determining the level of sanctions meted out for violations of the rules of professional conduct.[166] Punishments range from disbarment to private censure,[167] and the disciplinary committees take into account the attorney's prior conduct and any attempts to mitigate the damage from the infraction when deciding the penalty.[168] This provision might expose attorneys to dramatically increased professional risks, putting the attorney's license at risk for filing a medical malpractice complaint. However, those concerns are mitigated by the disciplinary process.[169] Much like the Rule 11 provision in subsection (a), subsection (b) only subjects attorneys to the same liability for which the attorney is already accountable.[170] The attorney is only at risk of professional sanctions if he or she files a complaint with no expert affidavit attached to it, and as the act of obtaining and attaching such an affidavit is a check on the good faith nature of a medical malpractice claim,[171] the attorney's actions are already facially in violation of Rule 3.1.

One significant collateral outcome of subsection (b) is that the presumptive violation of the attorney's professional responsibility gives a plaintiff injured by that violation a possible evidentiary advantage should the plaintiff choose to pursue a legal malpractice claim against the attorney. A legal malpractice claim requires:

> (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence.[172]

A majority of jurisdictions view a violation of a professional conduct rule as "relevant to the standard of care," but not sufficient to create a cause of

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[162] *See* SENATE JOURNAL, *supra* note 67, at 159.
[163] *See supra* Part IV.A.1(b).
[164] Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 794 (Nev. 2006).
[165] NEV. RULES OF PROF'L CONDUCT 8.4(a).
[166] *See* NEV. SUP. CT. R. 99.
[167] NEV. SUP. CT. R. 102.
[168] NEV. SUP. CT. R. 102.5.
[169] *Id.*
[170] *See supra* Part IV.A.1.
[171] SENATE JOURNAL, *supra* note 67, at 159.
[172] Mainor v. Nault, 101 P.3d 308, 324 (Nev. 2004).

action by itself.[173] A plaintiff who loses the right to litigate a medical malpractice claim because the plaintiff's attorney filed a complaint without an expert affidavit, which resulted in a dismissal as void ab initio, would look to the attorney's presumptive violation of Rule 3.1 under subsection (b) as a strong indication that the attorney breached the duty of care. The plaintiff would still have to prove the remaining elements of a legal malpractice claim against the attorney—that the plaintiff suffered actual damages as a result of the breach of duty by the attorney.[174] Nevada's standard on damages requires the damages to be certain, and not contingent on an appeal.[175] The only certain damages for a plaintiff under these circumstances would be the attorney's fees already spent in pursuit of the litigation.

Subsections (a) and (b) may seem like a draconian approach to limiting medical malpractice litigation, given its severe repercussions for attorneys who violate the statute by filing facially deficient complaints.[176] However, the impact that the statute is likely to have is not on the skilled/experienced litigator or even the average attorney, but on those attorneys who do not exercise proper care in the execution of their duties as litigators or those attorneys trying to dabble in medical malpractice casework. The amended statute is specific in its requirements concerning attaching an expert affidavit, and an attorney who chooses to file a complaint without such an affidavit is doing so with either complete disregard for the statute or a complete lack of preparation and knowledge in the area of medical malpractice litigation.

Section 1 of the amended statute may have the unintended consequence of condensing the practice of medical malpractice law into the hands of a smaller number of more experienced attorneys. Attorneys who specialize in particular areas of legal "practice can master the legal knowledge and skill necessary to practice in their field at a high level of competence."[177] "Lawyers who possess greater knowledge of a practice area . . . are less likely to be sued for malpractice than lawyers who lack such knowledge . . . . [E]xperts are less likely to make professional errors than non-experts."[178] It is easy to envision more generalized personal injury practitioners losing this aspect of their business if the amended statute does push the practice of medical malpractice law further towards formal specializations. This small potential loss of business, however, is logically offset by the increase in quality of representation and the prospect that some personal injury attorneys may find themselves the new breed of specialist in medical malpractice litigation.

Section 1 and its two subsections create a bright-line standard that renders any complaint filed without an affidavit dismissed upon filing as void ab initio. The statute also subjects the attorney responsible for the filing to possible sanctions under both NRCP Rule 11 and the Nevada Rules of Professional Conduct

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[173] *Id.* at 320.

[174] *Id.* at 324.

[175] Semenza v. Nev. Med. Liab. Ins. Co., 765 P.2d 184, 186 (Nev. 1988).

[176] *See supra* Part IV.A.1(a)–(b).

[177] Gary Munneke, *Requiem for a GP: The End of an Era*, N.Y. ST. B. ASS'N J., Feb. 2011, at 10, 12.

[178] *Id.* at 13.

Rule 3.1.[179] This new rule should substantially limit frivolous complaints by requiring an appropriate expert affidavit while simultaneously discouraging attorneys from filing facially defective complaints just to cover for their own negligence.

2. Section 2

Section 2 is another entirely new addition to NRS 41A.071, and includes terms under which a defective complaint may be amended to avoid dismissal.[180] The expert affidavits that must be attached to medical malpractice complaints in Nevada are governed both by the expanded pleading statutes[181] and the general evidentiary statute within the overall medical malpractice framework.[182] Though the common law and NRS 41A.071 clearly address the outcome concerning a plaintiff's motion to amend when no affidavit is attached to the complaint,[183] there is no statutory indication as to the exact mechanics of what should happen when the plaintiff's complaint is accompanied by an affidavit that does not conform to the evidentiary standards laid out in either of the aforementioned statutes. Thus, Section 2's purpose is to formalize the procedural steps for amending a defective complaint when an affidavit is attached but the affidavit fails to comply with the Court's evidentiary expectations. This serves the twin goals of bringing judicial predictability to the process and of giving plaintiffs a definite remedy for complaints that would be dismissed outright as void ab initio under Section 1's standards.

Section 2 gives the judge discretion to grant the plaintiff leave to amend the complaint under NRCP Rule 15.[184] Under Rule 15, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party."[185] Section 2 applies when a plaintiff's attorney submits a complaint with an affidavit attached that, due to some defect inherent to the affidavit, is followed by a pre-answer defense motion to dismiss under the statute. The judge would either rule that there was no actual affidavit attached and dismiss the complaint outright under Section 1 or hold the complaint defective under Section 2. If the judge found the affidavit defective under Section 2, the section encourages the judge to grant the plaintiff leave to amend the pleading under the terms of NRCP Rule 15. The defendant's motion to dismiss was filed pre-answer, so there is no significant risk to the defendant's legal interest in this situation beyond a potential small delay in the trial proceedings while the plaintiff secures a compliant affidavit. In the event that the plaintiff fails to secure such an affidavit, Subsection (a) controls, and the complaint is automatically dismissed as void ab initio.[186]

The amendment provision of the proposed statute responds to a principle argument against the current interpretation of NRS 41A.071, namely the inher-

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[179] *See supra* Part IV.A.1.
[180] *See supra* Part IV.A. 2.
[181] NEV. REV. STAT. § 41A.071 (2009).
[182] *Id.* at § 41A.100.
[183] *See supra* Part III.
[184] *See supra* Part IV.B.
[185] NEV. R. CIV. P. 15(a).
[186] *See supra* Part IV.B(a).

ent contradiction between the wording of NRCP Rule 15 and the Supreme Court of Nevada's unwillingness to recognize the possibility of amending a defective medical malpractice complaint under this statute.[187] Amending the statute to facially allow for the amendment of defective complaints under clearly defined circumstances gives plaintiffs a way around their attorneys' potential missteps.

Section 2 is inspired by New Jersey's expanded pleading standards for medical malpractice actions, which include a minimum 60-day grace period for filing the expert affidavit and an exception that allows for actions without expert affidavits to proceed without such an affidavit.[188] The New Jersey statute allows a plaintiff up to 120 days to amend the complaint by attaching the expert affidavit.[189] Though New Jersey courts have fully adopted this standard,[190] a delay of that size seems inconsistent with Nevada's legislative goals of expediting medical malpractice litigation.[191] The 30-day provision of Section 2 should be a realistic amount of time for a plaintiff's attorney to seek out a practicing physician, either locally or nationally, and obtain the requisite amended affidavit to prevent dismissal of the complaint. If the plaintiff's attorney is genuinely unable to find a physician anywhere in the nation who is willing to write an affidavit saying that there is a good faith basis for proceeding with the medical malpractice case, it follows logically that there may not be a good faith basis for the medical malpractice case to move forward.

Section 2(a) connects the two provisions and is an act of deference between the new amendment policy and Nevada's strong policy interest in limiting frivolous malpractice litigation.[192] Subsection (a) mandates that if a plaintiff is unable to amend the complaint to comply with the statute within the 30-day period, the judge shall dismiss the complaint as void ab initio, mimicking the results under Section 1.[193] The only significant argument against this provision posits that the ultimate threat of dismissal hangs over the amendment process like the sword of Damocles. This argument ultimately carries little sway because the claimant's attorney has plenty of opportunity to ensure compliance with the statute beyond the amendment provision of Subsection (a), including performing the appropriate work before initially filing the complaint.

One noticeable feature of the statute is that neither Section 1 nor Section 2 mentions the consequences for a pro se litigant who files a complaint with no expert affidavit attached. NRS 41A.071 also lacks any formal statutory language discussing the nature of pro se filings.[194] Conceivably, the provision in Subsection (a) that subjects the attorney to sanctions under NRCP Rule 11 might also apply in some way to the pro se plaintiff, but the judge would have discretion under the rule, which says that the sanction "shall be limited to what

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[187] *See* Echols *supra* note 13.
[188] N.J. STAT. ANN. §§ 2A:53A-27-28 (West 2000 & Supp. 2011).
[189] *Id.* § 2A:53A-27.
[190] *See* Ryan v. Renny, 999 A.2d 427, 435–36 (N.J. 2010).
[191] Szydel v. Markman, 117 P.3d 200, 204 (Nev. 2005) (discussing the general goals of the legislation, with expediting the litigation being implicit in the discussion).
[192] *Id.*
[193] *See supra* Part IV.A.1–2.
[194] NEV. REV. STAT. § 41A.071 (2009).

is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[195] The pro se plaintiff also has no cause for concern from Section 1(b) because a pro se plaintiff is likely not a member of the Nevada Bar Association and cannot be held accountable under the Nevada Rules of Professional Conduct.[196]

If Section 1 of the proposed amended statute represents Nevada's protection against an influx of frivolous medical malpractice litigation, then Section 2 is the people's shield, providing a meaningful mechanism through which plaintiffs and their attorneys can rectify mistakes in their complaints. The harsh or severe nature of a void ab initio dismissal is tempered by the statutory grant of an opportunity to amend, something the current statute does not allow in any way.[197] The proposed amended statute is facially clear and remains fair to both plaintiff and defendant in its role as gatekeeper against frivolous medical malpractice lawsuits.

Conclusion

The sad reality is that as long as people seek medical treatment, there is a chance for an adverse outcome. Whether it is a preventable error on the part of a health care provider, an accident of nature, or a confluence of factors that no patient would likely survive, the lasting effects of medical error are just as acute for those family members left behind. The focus should ultimately be on the efforts of health care providers to mitigate those negative results and manage patient expectations, but until those efforts come to fruition the American legal system is left to determine how to compensate the victims and their families. Therein lies the obligation to reform the medical malpractice system to make certain that the truly injured receive their just compensation and that those unscrupulous individuals who file baseless claims do not unnecessarily occupy the courts' time.

Though the federal government periodically discusses nationwide standards for medical malpractice reform, as of now it is incumbent on the states to address the issue. Nevada's medical malpractice scheme, as it is now, rests on tenuous ground. Noneconomic damages caps face challenges of application and constitutionality nationwide, including in Nevada. If Nevada's damages cap is ever successfully overturned, the expanded pleading standard of NRS 41A.071 will stand as the lone deterrent against frivolous medical malpractice litigation and a potential insurance premium disaster. The new version of NRS 41A.071 proposed by this Note strengthens the statute's ability to prevent frivolous lawsuits from clogging up the judicial system. The proposed statute's bright-line rule for successfully filing a medical malpractice complaint is enhanced by clear and enforceable consequences when an attorney fails to satisfy the statute while simultaneously showing more compassion to claimants who file defective complaints.

The proposed amended statute is not designed to ultimately solve the problem of medical malpractice and the subsequent need for litigation; instead,

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[195] Nev. R. Civ. P. 11(c)(2).
[196] *See* Nev. Sup. Ct. R. 45, 76–77.
[197] Washoe Med. Ctr. v. Second Judicial Dist. Court, 148 P.3d 790, 792 (Nev. 2006).

its explicit goal is to protect the interests of all litigating parties until the time when that litigation is no longer necessary. Just as a doctor abides by the Hippocratic Oath to "do no harm," this statute embodies the kind of behaviors that lawyers would exhibit were they also bound by that Oath.