M I N U T E S

SPECIAL COMMITTEE ON MEDICAL MALPRACTICE

September 23-24, 1975

Members Present

Senator Wesley H. Sowers, Chairman
Representative Earl D. Ward, Vice-Chairman
Senator Bert Chaney
Senator Frank D. Gaines
Senator Robert V. Talkington
Senator D. Wayne Zimmerman
Representative Ronald Hein
Representative Loren Hohman
Representative Rex B. Hoy
Representative Michael G. Johnson
Representative Marvin L. Littlejohn
Representative Ruth Luzzati
Representative Harry A. Sprague

Staff Present

Emalene Correll, Legislative Research Department
Norman Furse, Revisor of Statutes Office
Bill Wolff, Legislative Research Department
Bill Edds, Revisor of Statutes Office

Others Present

Jack A. Pearson, Kansas Association of Commerce and Industry, Topeka, Kansas
Dan C. McClenny, Kansas Association of Commerce and Industry, Emporia, Kansas
Jerry Slaughter, Kansas Medical Society, Topeka, Kansas
Homer Cowan, Jr., Western Insurance Company, Fort Scott, Kansas
L. M. Cornish, Kansas Association of Property and Casualty Insurance Companies, Topeka, Kansas
J. M. Hatfield, Kansas Association of Property and Casualty Insurance Companies, Wellington, Kansas
A. Clifton Kuplen, Western Insurance Company, Ft. Scott, Kansas
For others attending see attached lists.

The meeting was called to order at 10:00 a.m. by the Chairman.

A motion was made and seconded to approve the minutes of the August 28-29, 1975 meeting as mailed. Motion carried.

L. M. Cornish, speaking for the Kansas Domestic Insurance Industry, presented a written statement and a comparison chart showing recommendations made by selected groups testifying before the Committee at previous meetings. (Attachment 1)

In addition to the recommendations appearing in his written statement, Mr. Cornish noted that domestic companies would also agree to the amount of attorney fees and relicensure requirements for medical providers being determined by statute. They do not favor a patient fund supported by the taxpayer but would accept a surcharge on insurance premiums.

In answer to questions, Mr. Cornish stated that acceptance of the claims made policy would assist in the areas of premium charges and availability of coverage but he could not say to what extent it would help. The domestic companies are concerned about the risk for small domestic companies in a JUA. There is no available reinsurance for these companies to underwrite the medical malpractice exposure they might have.

Answering questions relating to claims review Mr. Cornish stated that if a member of the panel appears as an expert witness in a jury trial, his testimony should be founded on the rules of admissability and the transcript of the review panel should not be admissable as evidence. Under their position on arbitration, the claims review refers to some type of pre-review panel and not to the insurance company's own investigation or review.

Mr. Cornish was asked to explain why his group does not favor allowing a screening panel decision to be admitted in a subsequent proceeding. He noted that the screening panel proceeding will be used as a discovery tool and that if the panel's findings were made available to a jury it would take away the jury's responsibility to determine the facts of the case.

In answer to questions relating to the creation of a patient compensation fund, Mr. Cornish stated they have no fear of such fund if the health care providers put up the money to be used for the residual and excess market. The first $100,000 of an award should be paid by the private insurance carrier and the remainder from the patient compensation fund. The Kansas insurance industry would be willing to help health providers establish a quasi-medical group or combination of private and provider group if necessary to solve the insurance problem. Kansas companies are definitely opposed to a state fund requiring taxpayer support. In response to a question about the doctor who chooses not to be insured, Mr. Cornish noted that some states require insurance as a condition of licensure.

In answer to a question relating to the words "licensed and certified" on page 2 of his presentation, Mr. Cornish stated they have no recommendations as to what specifically should be included in these standards. Their position is that the "bad apple should be eliminated."

Next to appear before the Committee was Homer Cowan, The Western Insurance Companies, Mr. Cowan endorsed the recommendations offered by Mr. Cornish and presented a written statement (Attachment 2).

In response to questions, Mr. Cowan noted that a reduction in the statute of limitations will help to resolve the problem of tail coverage arising from use of the claims made policy because it would result in a shorter period of liability for the doctor. He explained that Western presently writes occurrence policies but would prefer to go to the claims made policy.

Responding to questions, Mr. Cornish stated that Western has renewed an insures policy at the previous year's rate when the policy holder had difficulty in securing other coverage. The renewal rate was based on the filed rates at the time. New rates have been filed. Mr. Cowan also stated that frequency of claims, loss ratio and cooperation are factors that are taken into account in decisions relating to cancellation or non-renewal of a policy.

Mr. Cowan stated that insurers would prefer a trial before a judge to a jury trial because frequently juries do not understand the testimony and evidence before them. A jury trial is more likely to result in a finding against a doctor. A review panel would result in placing highly specialized testimony before highly qualified persons. He also noted that his company advises the insured to settle a claim if they believe the insured has been negligent.

Dan McClenny presented a prepared statement on behalf of the Kansas Association of Commerce and Industry. (See Attachments 3 and 4).

After the conferees had been heard, the chairman distributed copies of a series of possible recommendations which he had prepared. He emphasized that these were points culled from recommendations made by conferees for the purpose of directing discussion only. They are not to be considered as recommendations coming from the chair. (Attachment 5).

Staff distributed copies of additional data supplied by St. Paul Fire and Marine pursuant to the request of the Committee at the August meeting. (Attachment 6). Staff also distributed a summary of legislation enacted by other states. (Attachment 7).

The meeting was reconvened at 1:30 p.m.

The Chairman called attention to a proposed bill mandating the reporting of claims against doctors to the Board of Healing Arts. (Attachment 8).

A suggestion was made to change "may take action" to "shall take action" to strengthen the position of the Board of Healing Arts.

Staff explained that "may" was used because "deemed appropriate" implies that action is at the discretion of the Board.

It was noted that the last time the Healing Arts Act was amended the words "professional competency" were inadvertently left out. The Committee may want to consider reinserting these words.

In answer to questions, staff stated the Board may initiate an investigation on its own; the Board already has immunity; the last clause was put in the draft bill to indicate the Board could use this information in any action they take. The clause was determined to be redundant.

A motion was made and seconded to strike "and the board of healing arts may take action based upon the report as the board deems appropriate." and the bill be recommended as a Committee bill.

It was pointed out the bill is a mandate to the Insurance Commissioner and not the board of Healing Arts. If the authority of the Board is enlarged it should be done in another bill. Motion carried. By consensus, the bill is to be introduced in the Senate.

The Committee was referred to Attachment 5, "Possible Legislative Recommendations Pertaining to Medical Malpractice Insurance".

Statute of Limitations: The six years of age comes from Indiana law. It is alleged that by age six most children have had a physical exam at which time medical problems arising from negligence should be found. Staff clarified that the Kansas court had held there is a ten year maximum period for bringing an action under our present statutes.

A motion was made and seconded to amend the present statute so that a suit shall be filed within no more than six years after the occurrence of the incident giving rise to the action. Motion carried.

A motion was made and seconded not to change existing statutes pertaining to infants or persons under legal disability. In discussion it was noted the long tail, a maximum of 22 years under present statutes, is one of the causes of the malpractice insurance problem. A solution is needed that will still provide some protection to minors, incapacitated persons and persons serving prison terms less than life. It is a question of balancing equities.

A substitute motion was made to amend the statute to give minors to age 12 before the six year limitation starts to run. It was clarified that the substitute motion is to amend the present statute by changing 18 years of age to 12 years of age for all causes of action. The substitute motion died for lack of a second.

It was suggested that the cut-off date should be one year after a conservator is named. However, this would not cover the many cases in which a conservator is not named.

A substitute motion was made and seconded to amend the existing law by setting a limit of eight years from occurrence for bringing an action on behalf of minors, incapacitated persons and persons serving prison terms less than life. Motion carried.

Staff was asked to draft a separate bill for each of the above motions for consideration at the next meeting of the Committee.

Ad Damum Clause. A motion was made and seconded to delete the dollar amount in pleading under civil procedure. The intent is to avoid having the amount of damages sought from appearing in the news media. It was noted that the defense attorney could get the amount by writing a demand letter to the plaintiff's attorney. Motion carried.

Screening Panel. A motion was made and seconded to authorize the court, in medical malpractice cases, to appoint a screening panel, the membership of which is to be determined by the judge with expenses to be paid as court costs; the panel to function in camera; the panel's report, including any dollar figure set by it, to be presented to the court and the parties involved; the panel's proceedings not to be admissable in consequent court proceedings.

There was discussion as to whether or not the proceedings and/or findings of the panel should be admissable as evidence before a jury or whether panel members should appear as witnesses in any subsequent trial so they could be cross-examined. The feeling was expressed that allowing the above would restrict the action of the panel. Concern was expressed that if the panel proceedings were not admissable, it would simply result in another step and additional expense. In answer to a question, staff stated a definition of medical malpractice would not be necessary unless the appointment of a panel were mandatory. It was clarified that the findings of the panel would not be binding. If either party does not accept the report, any disclosure of the proceedings by either party would be considered contempt of court.

Motion carried. Representative Sprague asked to have a "no" vote recorded.

A motion was made to amend the Uniform Arbitration Act so that if both parties are agreeable a malpractice case could go to arbitration. It was noted that the Uniform Arbitration Act covers this type of circumstance. The motion was withdrawn.

The meeting was adjourned at 3:35 p.m.

September 24, 1975

The meeting was called to order by the Chairman at 9:00 a.m. Discussion of Attachment 5 continued.

Patient's Compensation Fund. It was suggested that a significant part of the problem of malpractice insurance is the uncertainty of getting coverage above $100,000. Some states have created a patient's compensation fund as a solution.

Staff explained that in Indiana all health providers covered by the act must carry $100,000 basic coverage and pay an additional amount not to excess 10% of their insurance premium into the patient's compensation fund. If a person was refused basic coverage by at least two insurers, the risk may be covered by the Residual Malpractice Insurance Authority - state insurance agency separate from the Patients Compensation Fund.

Most states include the traditional providers and it is optional to enter the program. It was noted this latter could result in too small a base for the fund to function. In one state if funds run short at the end of a year, payments are to be deferred until the following year or are to be pro-rated. In most cases there is a limit on provider liability and on total recovery. In one state the limit on recovery is being tested in court. Staff noted it would seem that Section 18 of the Bill of Rights referred to in testimony is not a problem because a person would still have the remedy of law. However, another problem is classification which, if discriminatory, is unconstitutional.

The following points were noted in discussion of a patients' compensation fund: participation in the fund should be mandatory; top limits should be set to get insurance companies to come in and to protect the patient's compensation fund; the amount of the fund could be determined by the Insurance Commissioner; including hospitals would substantially increase the fund; state money could be used to help establish the fund in the first year if it were repaid; the Insurance Commissioner could manage the fund but an existing board would be responsible for investment; the fund could have a statutory cutoff.

There were differing views as to whether or not this would put the state in the insurance business. Some felt it could put the state in a position of defending the fund and possibly defending a private citizen against a private citizen.

Further discussion was deferred until the afternoon session.

Immunity. It was noted that what is needed is a reasonable amount of immunity so that action can be taken against a professional guilty of negligence or incompetence. People must feel a responsibility for giving only information based on facts.

Staff noted this recommendation refers to giving information before a suit is brought. The court recognizes a privileged communication after suit is brought and case law recognizes as a defense to liable whether the person has an interest in the subject matter and is acting in good faith.

It was suggested in discussion that not having immunity provided by statute may inhibit some people but where people feel something is really wrong they have been willing to give a written statement and to testify.

A motion was made and seconded to adopt item no. 5, Attachment 5, in principle and to direct the staff to draft a bill into details as appropriate and defining frivolous and malicious as best they can. Motion carried.

Relicensure and Mandatory Continuing Education. Presently doctors annually fill out an application for license renewal and send it with the relicensure fee to the Board of Healing Arts. Professionals generally do not consider re-examination appropriate to relicensure.

Jerry Slaughter, Executive Secretary, Kansas Medical Society, stated that representatives of the society had met with the MD's on the Board of Healing Arts to ask them to adopt educational requirements under their existing authority. The Kansas Medical Society has also talked to other states and an attorney for the American Medical Association about peer review but do not have anything on paper yet. As soon as they do have something, they will forward it to the chairman of the Committee. He also noted they have a computer program for recording the additional education hours in which member doctors participate and would include non-members for a small fee.

Mr. Slaughter was asked if KMS does anything about doctors practicing in specialities for which they are not qualified. It was noted this more appropriately falls under the Board of Healing Arts since KMS can only remove a doctor from membership.

Staff noted that each specialty on the Board of Healing Arts can vote to establish educational requirements for its specialty. This could mean that requirements would vary even though those affected could be practicing under a license authorizing them to practice medicine and surgery.

It was suggested that an in-depth review of a doctor's license be required under certain conditions such as a specified number of suits or complaints. The Board of Healing Arts can do this now but it might be more effective if it were formalized by statute.

Since steps are being taken by KMS and the Board of Healing Arts, the Committee agreed to take no action at this time. By consensus, staff is to prepare a letter for the chairman's signature to the Board of Healing Arts asking what plans they have for requiring continuing education for all professions controlled by them. A copy of this letter is to go to the president of KMS.

Limit Contingency Fees. Staff noted fees can be limited by statute or by court determination. In Kansas, if fees were questioned, the court could determine the reasonableness of the fee but this is not the same as determining the fee.

The feeling was expressed that it would be difficult to set up a sliding scale or set a definite fee because the amount of time and work varies from case to case. The court would be able to determine these factors for each case and then approve the fee.

A motion was made and seconded to ask staff to draft a bill requiring the court to approve attorney fees for both the plaintiff and defense attorneys in each case. It was noted this would cover cases going to a panel because a petition would already be filed with the court but it would not apply in cases settled on a letter of demand. It was clarified the motion applies only to medical malpractice cases. It was further noted that since the law speaks only to what can be a lien on money received, this motion will have an effect only on the lien and not on the limit of a contract between a person and his attorney. Motion carried.

Collateral Source Rule. In answer to questions staff stated that any amount the defendant has already paid would be deductible from an award. In some states third party collateral sources are admissable. In other states the information on collateral sources is provided to the jury which determines if they should be considered in determining the award.

The position adopted by the Labor and Commerce Committee of the Council of State Governments was referred to. (Attachment 9). The Council subcommittee, because of its charge, included only medical malpractice in its recommendations but the feeling of the members was that recommendations relating to civil procedure should apply to all tort cases.

A motion was made and seconded to adopt the policy on admissability of collateral sources recommended in Attachment 9 and ask staff to draft a bill reflecting this action. Motion carried.

Limitation on Amount of Recovery. Reference was made to the fact that the wrongful death statute had been amended to remove the limit on the amount of recovery and to set a $25,000 limit for pain and suffering.

A motion was made and seconded that there not be a limit on the amount of recovery for medical malpractice and there be a $25,000 limit on pain and suffering. The motion was adopted.

Attention was called to the position on Reversionary Trusts adopted by the Labor and Commerce Committee of the Council of State Government. (Attachment 9)

It was noted that the court can already provide for this in the case of a minor. However, there is a question whether or not anyone has the right to tell an adult by statute how he can spend his money. Would this also apply to a person getting a large inheritance?

It was noted that further clarification might be needed to provide for paying pecuniary costs first. Questions were raised as to who would hold the fund, who would make the payments, who would get the benefit on income from the fund, and what would happen to any money left at the time of the injured party's death. It was pointed out that the insurance company would have to set aside the amount of the award at the time the award was granted.

A motion was made and seconded to give the court the right to provide for an installment payment program in all tort cases if this would be to the advantage of the parties concerned. It was clarified that the motion did not speak to who would handle the money. Motion carried.

The meeting was recessed at 11:50 a.m. and reconvened at 1:05 p.m. by the chairman.

The chairman referred to items on Attachment 9 not already discussed by the Committee.

Informed Consent. Staff referred to a Kansas case (186 K. 393 and rehearing 187 K. 186) which spells out the Kansas law. Therefore no action was needed.

Locality Rule. This related to the standard of care as applicable to the alleged negligent party. In Kansas a court decision established similar communities, communities can mean another state or area. Local standards are used but the person

who has knowledge and expertise in what is being considered does not have to be from that locality. It is a case determination but the general rule is what is usual and customary for that area. Since Kansas law follows this recommendation, it was decided no action was needed.

Mutual Companies. This recommendation is to make it viable for states to start a mutual company. Some states do not have a large enough base to do this and want to be able to include other states. The Chairman and staff were asked to contact the Insurance Commissioner to get his views on this recommendation and to report to the Committee at its next meeting.

Premium Rules. Kansas complies with this recommendation. The Insurance Commissioner acts on rates but he also has a duty to approve an increase if the company shows a just reason for it.

Report Procedures. Kansas has this now.

Medical Guarantees. In some cases an effort is made to circumvent the statute of limitations by allegation of a verbal contract and plaintiff then sues on basis of breach of alleged contract. It was noted this would not be applicable in Kansas since the limit on a written contract is five years which is less than the statute of limitations applicable to medical malpractice cases.

Staff distributed the draft of a bill relative to screening panels as requested. Staff noted there may be some terminology inconsistencies and 5a and 5b are alternatives to a formal procedure for parties to agree or not agree. In answer to a question, staff stated it is not necessary to set out a formal procedure. You could state that if parties do not agree, plaintiff can continue with the case.

Section 1. Since the Committee took action not to place a limit on the amount that can be recovered, a motion was made and seconded to change "may convene" to "shall convene".

The feeling was expressed that if a screening panel is required, parties will become uncooperative and it will be a waste of time. It was noted some cases come to an attorney just before the statute of limitations runs out so he files suit immediately but may withdraw it after further examination of the case. Also, some cases are clear cut, like a sponge which is left in, so no panel is needed.

Motion lost.

Consideration of this bill draft will be on the early part of the agenda for the next Committee meeting.

Patient's Compensation Fund. It was noted that a patient's compensation fund is more important but more difficult to provide since the Committee is recommending no limit on recovery.

L. M. Cornish, Property and Casualty Insurance Association, stated there are three levels of coverage: (1) $100,000-$300,000 or $200,000-$600,000 - basic coverage; (2) $500,000-$1,000,000 - middle layer; (3) above $1,000,000 - umbrella coverage. The middle layer and umbrella are difficult to obtain. A patient compensation fund would be helpful.

It was suggested that the patient compensation fund pick up the middle layer which would provide a finite limit and open the market. How much it would help is a question.

In discussion it was noted that a patient's compensation fund doesn't have to put up reserves or show a profit; an insurance company could be given the fund and paid a fee to manage it; it is easier to assess a blanket sum than a percentage of a premium; if each doctor was assessed $2,000 the first year, it would provide a fund of $4,700,000; assessments on hospitals have been based on a percentage of the basic premium paid and the number of beds. Further discussion and a decision were deferred until the next Committee meeting.

It was noted the Insurance Commissioner had stated he was going to establish a JUA. From reports he has had second thoughts about this action. It was suggested that the Chairman or staff check with the Insurance Commissioner before the next meeting to ascertain his present thinking. It was suggested they also check with the Attorney General regarding the authority of the Insurance Commissioner to establish a JUA.

The following were suggested by Committee members for consideration:

Making the governing body of a hospital responsible for people practicing there and providing the institution is not responsible except to the extent it has allowed an incompetent to continue practicing there. It was pointed out that case law may have already done this. The feeling was expressed that this needs to be codified. Reference was made to the Florida statute. Staff was asked to see how this is handled in other states.

Additional Reasons for the Board of Healing Arts to Take Action Against a Doctor. Physical sickness and incompetency were mentioned specifically. It was noted that most of the things Dr. Hill, Board of Healing Arts, mentioned in his presentation are already in the amended version of HB 2008. The Committee will consider reinstating the incompetency clause.

Requiring a Doctor's Estate to Pay the Endorsements if he was Covered by a Claims Made Policy at the Time of his Death. It

was suggested that other circumstances might also be considered under which payment of the endorsements would be required. It was noted that companies may have an added premium built in to take care of this and this may need to be checked before any action is taken.

Staff was asked to see if they can get information about the total amount of medical malpractice premiums paid in Kansas.

It was suggested the Committee needs to consider steps to motivate health providers to eliminate malpractice incidents to the extent possible and to testify against each other. References were made to the Florida law and to the two programs mentioned by a conferee. Staff stated they still had not received the information about these programs.

The next meeting will be October 14 and October 28. The agenda will include consideration of the bills staff has been asked to draft, reports from staff requested by the Committee, further consideration of a patient's compensation fund, and consideration of items suggested by Committee members.

The Chairman complimented the Committee on its interest and the way in which it has proceeded.

The meeting was adjourned at 2:35 p.m.

Prepared by Emalene Correll

Approved by Committee on:

10/14/75
Date

Attachment No. 1

MEDICAL MALPRACTICE
POSITION PAPER

of

The Kansas Domestic Insurance Industry

The domestic property and casualty insurance companies domiciled in Kansas represent approximately 500,000 Kansas policyholders. Only The Western Company of Fort Scott writes medical malpractice coverage, although all but two companies write some form of general liability insurance. Most of these companies are small, operating only in Kansas. Many Kansas companies write liability coverage only as a part of their Homeowner and Farmowner coverages. These policies provide only a very small amount of general comprehensive liability coverage. These Kansas companies write approximately 80% of the rural coverage in Kansas.

There are approximately 500 property and casualty companies admitted in Kansas of which only 15 - 20 write medical malpractice insurance.

THE PROBLEM

There are various opinions as to the intensity of the medical malpractice problem in Kansas. However, there seems little doubt but that a problem exists. Certainly some

medical providers are experiencing difficulty in obtaining the coverage limits they desire, and certainly some believe their premium rate is too high. The acute problems therefore seem to be liability insurance coverage and its cost.

The Kansas insurance industry is committed to the position that all persons and institutions licensed and certified to engage in the business of delivering health services should be able to procure liability coverage. We would believe that each licensed and certified medical provider should be able to obtain such coverage at reasonable cost. However, reasonable minds may differ as to what is a reasonable cost or premium.

Premiums are determined by experience with a particular risk or classification of risk. It has been the accepted practice to require each classification to in effect "pay its own way." In this way the lower risk pays the lower premium.

The problems of coverage premium in medical malpractice underwriting are extremely complex. There are no single solutions...nor do we know with exactness the required solutions. We do recognize that certain "reforms" or changes in tort law, the delivery of medical services, and insurance underwriting practices can stabilize premiums and possible open the malpractice market. Certainly there must be a balancing of equities in order that the consumer, who ultimately must pay the cost, will receive the most value for the least cost.

"Reforms" or changes which have been suggested include:

I

TORT REFORM

1. Arbitration.

We believe that mandatory non-binding arbitration, as a condition precedent to legal action, could serve a meaningful purpose. While it would probably serve as a "discovery arena" for both the aggrieved patient and the medical provider it would also serve to isolate areas of disagreement and possibly demonstrate the true facts in malpractice claims. Evidence submitted to the arbitration panel should be admissable in later court proceedings, the determination of the arbitration panel should not be. We believe arbitration should be carried on with claims review so that there is no duplication of effort or expense.

2. Limitation on Recovery.

It would appear that a "cap" on awards in malpractice cases would have considerable effect upon malpractice coverage and premiums. While few Kansas awards today reach over $500,000 the premium structure must be determined upon future occurrence. The trend is toward much larger verdicts unless a change is

made. A limitation on awards will have a great effect on the premium structure. We suggest a limitation of $500,000 similar to the comprehensive act adopted by the Indiana Legislature.

3. Ad Damnum Clause.

We believe the elimination of a dollar amount from the plaintiff's petition will curtail prejudicial publicity which calls attention to the large amounts sought by plaintiffs.

4. Statute of Limitations.

The "long tail" has created acute acturial problems for the insurance industry. We suggest a retention of the present 2 year statute of limitations for all torts and an additional two years for discovery with a maximum period of four years. In addition, we believe the school age minor should also have this limitation.

5. Collateral Source Rule.

Evidence of collateral sources of economic loss reimbursement should be admissable in evidence.

6. Modification of Attorney Fees.

We suggest a reasonable scale of the contingent attorney fee and suggest this be determined by the Supreme Court.

7. Res Ipsa Loquitor.

We have no position at this time.

8. Informed Consent.

We have no position at this time.

9. Punitive Damages.

We have no position at this time.

10. Breach of Contract.

We have no position at this time.

11. Good Samaritan Rule.

We believe the present "emergency" statute (K.S.A. 1975 65-2891) should be amended to provide the physician or other provider, who in good faith renders emergency care, the protection of the Rule in the office, clinic, emergency room or hospital. In all such instances this must be an actual "emergency" which is not only limited to highway or outside areas.

II

MEDICAL REFORM

12. Recertification of Medical Providers.

We believe that it is necessary for the various professional segments of health care providers to carefully scrutinize its licensed membership with particular emphasis on re-licensure and recertification.

13. Peer Review.

We believe that all incidents of malpractice should be studied and acted upon by peer groups.

14. Claim Review.

We believe a claim review apparatus is most important. It will provide a formalized structure to which the injured patient may present his claim. However, we believe this is closely related to an arbitration proceedings and care should be exercised that the injured patient is not required to walk through a "thicket" in order to present his claim.

15. Grievance Procedure.

We believe this procedure should be set up to deal with patient complaints at an early stage. In this way it is possible to have an early disposition of some claims, with reduction in cost.

III

INSURANCE REFORM

16. Consent to Settle.

Traditionally, medical malpractice insurance policies have contained a clause prohibiting settlement without express authority of the medical care provider. Many providers have felt settlement to be an admission of guilt and have refused their authorization when an early settlement could dispose of a claim at small cost. Removal of the clause by statute or Insurance Department approval should correct this problem.

17. Cancellation or Termination of Malpractice Policies.

Although this seriously restricts the company in cancellation and refusal to renew, we are willing to support legislative action similar to the statutes governing auto cancellation and non-renewal as a part of an overall legislative package. It should be understood, however, that this requirement could seriously inhibit a company from assuming in the initial instance a questionable or high percentage risk.

18. Group Insurance.

We have no current data on this area and therefore take no position at this time.

IV

OTHER LEGISLATIVE REFORMS

19. Patients Compensation Fund.

We support a state fund for the payment of malpractice awards. To provide this fund, licensed health care providers would be assessed an annual amount which would provide $1.5 million per year. It would appear at this time that the fund should accumulate not less than $5,000,000 from which awards may be paid.

20. Joint Underwriting Association (JUA).

We oppose this concept which would require insurance companies which do not write malpractice insurance to contribute to its support. The constitutionality of this approach is highly questionable. It would expose the small domestic

casualty company to a risk or series of risks that the large underwriters are reluctant to handle because of serious loss exposure. This will seriously erode the position of Kansas policyholders in companies that write only home owner or farm owner coverage.

RESPECTFULLY SUMBITTED,

Ad Hoc Malpractice Committee

Kansas Domestic Casualty Insurance Industry

John Hatfield
President, Southern Kansas Mutual Insurance Co., Wellington, Kansas

Clair Hyter
President, Central Plains Ins. Co., Hutchinson, Kansas

William Patterson
General Manager, Kansas Mutual Ins. Co., Topeka, Kansas

Homer Cowens
Asst. Vice President, The Western Companies, Fort Scott, Kansas

Dale Crown
Vice President, The Western Companies, Fort Scott, Kansas

Leigh Warner
President, Cimarron Ins. Co., Cimarron, Kansas

Dale Skupa
President, Farmers Alliance Mutual Ins. Co., McPherson, Kansas
Committee Chairman

L. M. Cornish
610 1st National Tower, Topeka, Kansas
Legislative Counsel

Attachment No

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NEUROSURGERY
GREGG M. SNYDER, M.D.
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NEUROLOGY
ELECTROENCEPHALOGRAPHY
LAUREN K. WELCH, M.D.
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October 10, 1975

The Honorable Wesley Sowers, Ewq.
Chairman
Joint Legislative Study Committee
on Malpractice
State Capital Building
Topeka, Kansas 66612

Dear Senator Sowers:

Concern over the status of recommendations presented by the KMS prompts me to respectifully draw your Committee's attention to certain of our key recommendations, which may not be fully understood. We appreciate the generous time allotted by your Committee for presentation of our concept of their problem. We did not formally present our recommendations for correction of the situation. You will recall that indeference to your Committee's congested schedule, the KMS relinquished it's valuable time for testimony to outlining our recommendations so that others could be heard, hoping the thrust of our proposals receive your attention through written material. We are concerned that some of our recommendations have not been fully emphasized nor well understood, and submit the following information in several important areas for your continued studious review.

Serious insurance problems remain unsolved. One of these, claims-made policies, impose an enormous burden on physicians. At retirement, disability, or the need to change from a claims-made company to another company, a physician is required to purchase a so-called reporting endorsement providing him protection for the "long tale" occasion by the Statute of Discovery and Limitations. The present Discovery and Filing Statute are excessive, all groups readily agree. Reduction of the Statuates to a maximum of six years as currenctly considered, simply fails to meet the crucial need of thirty six percent of our physicians insured by one company. The St. Paul Fire and Marine Insurance Company has gone on record with it's intentions of offering only claims-made policies. They do insure thirty six percent of Kansas Physicians. No other market is available to these physicians. Therefore, the Kansas Medical Society simply cannot live with a Discovery Statuate and Statute of Limitations which succeeds a two year total. The combined discovery and filing period must coincide with the terms of the new claims-made policies, since these appear to be the form most likely to be adopted by all companies offering medical liability insurance. In the states surrounding Kansas, Statuates for Discovery and Limitations have created no problem because they are shorter. Your Committee absolutely must recommend a Statuate in concert with our unique needs as imposed by the insurance companies, who we have discovered much to our chagrin, remain insensitive to the needs of medicine.

In the area of insurance availability physicians still face insurmountable obstacles in obtaining excess coverage at reasonable premiums as well as continued scarcity in basic limits coverage. We are assured that our State Insurance Commissioner has some input into regulation of premiums for basic coverage. However, the excess market is quite beyond his reach, and will continue to be so in the foreseeable future. To compensate for loss of excess coverage, increasing numbers of physicians are forced to extend basic coverage limits to higher levels of $200-600,000 or $300-500,000 levels. With proper legislative stabilization, availability of basic limits of $100-300,000 should prevail. Hence, our recommendation that a maximum liability of $100,000 for any health care provider be guaranteed through proper legislation. This brings us to the epitome of the quid pro quo and the recommendation of the patient's compensation fund. The Kansas Medical Society would not have the audacity to ask for special protection without willingness to provide benefits and protections to the public. The patient's compensation fund is such a benefit. It provides protection for recovery of the medically injured patient in claims exceeding the basic $100,000 gate. It is created and supported by the willingness of all health care providers to pay a surcharge based on a percentage of the basic coverage premium into the fund. It is designed to replace conventional excess coverage which is rapidly being priced out of the market. However, protection against fund depletion by excess or coincidental claims is essential and would be insured by establishing a maximum limit on claims not to exceed $500,000. We recognize the potential constitutionality question of limiting claims based on tort, and we are prepared to propose alternative methods of fund protection. We understand a proposal has been considered in your Committee, to develop a patient's compensation fund to satisfy judgements over a maximum individual liability level, then a recovery pool through a patient's compensation fund, finally supported by the concept of excess insurance for claims exceeding an arbitrary figure of something like one million dollars. This proposal actually requires the health care provider to foot the bill for providing not only basic, excess coverage, but also a third new layer in the middle between basic and excess. Such a program would be at least as expensive if not more so than the present combination of basic and excess coverage, and again would be unacceptable to all members of the Kansas Medical Society.

In another area, we have proposed screening panels which are designed to provide equal protection to plantiff and defendant alike, and would continue to operate within the present legal structure. Virtually all groups appearing before your Committee favor screening panels. Such a panel would study the medical facts in any given claim and relate these to medical injury. A variety of recommendations from the panel would be possible ranging from confirming the presence or absence of negligence, or making the recommendation that the facts at hand would not and could not permit a clear cut recommendation. In such cases, the screening panel might recommend that the case be remanded for conventional trial. Since these cases involve complicated medical facts and issues, we recommend they be composed of physicians only, chaired by an attorney who would serve as a source of guidance and legal information. Your Committee has recommended a panel composed partially of physicians, and attorneys, and possibly lay members. While there is great public appeal for such a balanced panel, it will ultimately fail in establishing facts since the minority physician member must strive to educate non-medical members in the hopelessly complex medical facts to sufficient degree they can make medical decisions. In an arbitration area, a balanced, mixed panel might work well because the issues are those with which all citizens have some

exposure and understanding. However, the Kansas Medical Society feels strongly that the panel should be composed only of physicians. To insure objectivity, and protect against any possibility of conspiracy, one panel member should be appointed by the plantiff, one by the defendant, and a third by the combined agreement of those two appointed panel members. Appointments would be made from lists of recognized, prominent, fully qualified physicians who after service on a panel would drop from the head to the foot of the list so that members would rotate. In support of the panel concept the Kansas Association of obstetricians and gynecologists has used a similar system in adjudicating forty nine cases. In addition to savings in cost, high creditability has distinguished this pilot program. We submit that this method of establishing fact at an early level in negotiation will serve all Kansans well by providing the purest talent available for the task. Keeping in mind the voluntary nature of any panel system, we seriously doubt that Kansas Health Care Providers would be willing to serve on mixed panels because of the extreme difficulty educating non-medical personnel to make proper judgements.

The Kansas Medical Society continues to feel that contingency fee practices are long overdue for review and modifications. By a growing number of attorneys, including those in high positions of the KBA, KTLA, and KDA, in spite of their published opinions. In full agreement with them however, we recognize that contingency fees per se do not cause the present malpractice crisis. To the extent that they contribute to high claims, we submit that an attorney becomes a prejudical party to the action when in fact his fee is determined by a percentage of the total claim. The higher the claim, the higher his fee. In order that sufficient remains to provide reasonable amounts for the plantiff, the claims must be higher to allow also for a contingency fee. The Kansas Medical Society does not have the temerity to recommend fee regulation for any profession. However, in the public interest, we feel the contingency fee system must be modified. Precident exists in the Federal Claims Tort Act establishing a twenty five percent maximum contingency fee. The Relative Sliding Scale Contingency Fee of New Jersy provides another model. Other deserving systems can be devised. A positive constructive recommendation pertaining to the contingency fee system by your Committee could achieve mutual cooperation and understanding from the Members of the Kansas Medical Society in greater measure than virtually any single recommendation you could make.

As negotiations progress, trends within KMS are developing which concern us greatly. Physicians with a retirement option available by virtue of age or outside income sources are in increasing numbers exercising it. Physicians are simply saying by their actions, that rather than continue to expose themselves to the distracting forces of the current malpractice crisis, they will opt out if given a reasonable choice. Frankly, we can't blame them, especially those physicians in the retirement or near retirement age. Other members to whom the retirement option isn't available, are becoming more militant, and restive. To date, the many small fires have been quelled. By the concerted efforts of the KMS leadership, demonstrations have been forestalled. While not intended in any way to be construed as a threat, the KMS leadership advises you and your Committee of these changing attitudes, at the same time reassuring you that we commit ourselves to every means possible to insure quietude in the days ahead. We hope reason, equanimity, and wisdom will prevail. To the extent possible, we will advise all KMS Members of the diligent com-

mitment you and your Committee Members have devoted to the monumental study of the malpractice crises.

In conclusion, the strong support afforded our program by the Kansas Association of Commerce and Industry, the Kansas Hospital Association, the Kansas Association of Nurse Anesthetist, the Kansas Association of Osteopathic Medicine, The Kansas Association of Nurses, and many other professional organizations is drawn to your attention. In increasing numbers individual members of the public who understand the problem are volunteering their support in our behalf. We are convinced that our proposal guarantees the rights of patients to recover, protects the physician, and should provide the stability which seems high in the minds of the insurance industry. We desperately need your understanding and support in these recommendations, but no less than Kansas desperately needs to serve and encourage it's devoted physicians to continue in their service to the public. Toward this proposition do we respectfully request your continued assistance and cooperation.

With kindest appreciation, and best regards, I remain

Sincerely yours,

Gregg M. Snyder, M.D.

GMS:saw

cc: John W. Travis, M.D.
Mr. Jerry Slaughter
Mr. Wayne Stratton
Payne Ratner, Jr., Attorney
Mr. George Trombold

POSITION MEMORANDUM

OF

THE WESTERN INSURANCE COMPANIES
FORT SCOTT, KANSAS

Your committee has already received, or will receive, testimony representing the position of the Kansas Insurance Industry. The Western participated in and endorses the position paper submitted by the domestic companies of Kansas.

Of all the companies that comprised the Kansas Insurance Industry Study Committee, The Western is the only Kansas company that writes malpractice insurance and the only company that is exposed to the problem on a national basis. Since we have been subject to all of its ills, so must we be vitally concerned with its remedies.

Never has a subject matter produced more instant experts than the present medical malpractice crisis. Never have so few been so divided to the ultimate detriment of so many. Three wedges, each forming a part of a circumference, with a circle in the middle. The legal profession, the medical profession and the insurance industry squeezing inward on the circle in the middle, the public. Each obstreperous segment postulates their own remedy as if the solution can be had by way of interdiction. The Legislature must determine what is best for all concerned, not any one segment, despite objections of a few.

First and foremost, Kansas must provide an atmosphere to assure its citizens the finest health care providers. We cannot afford for our finest physicians to leave the state or seek early retirement.

While the medical profession must not be shackled with fear of professional performance, the citizens of Kansas must not be deprived of a proper remedy for a wrong that causes damage. Yet, in this analysis, you must consider --- "How much protection can the public afford?" Because whether it is calling in two additional doctors to confirm the opinion of one, or subsidizing an insurance premium by way of funds, or pools, it is still the public who picks up the tab, whether with increased medical costs or higher insurance premiums that, by way of assessment, extend to every area of insurance. Thus, automobile and homeowners premiums may be inadvertently pledged to underwrite a single loss resulting from malpractice. The assets of the public and the assets of an insurance company may be pledged to correct a social enigma.

There is not any one solution. Each of the three industry segments must reduce the size of its wedge for any pandemic effect.

There is one thing that everyone agrees to, that is -- some type of LEGISLATIVE REFORM IS NEEDED NOW! What form, simply depends upon who you are listening to at the time.

Commissioner Bell appointed several committees. Each committee consisted of a representative of the legal, the medical and insurance profession. In addition, each committee had a member representing the public. Each committee studied one proposed solution only. With all sides represented, each committee submitted recommendations. Commissioner Bell has presented his recommendations based upon these study committees.

As a major Kansas industry, doing business not only in Kansas, but across the nation, The Western agrees in part with some committee recommendations, and there are, of course, other areas we personally

feel are inadequate. Nevertheless, since each committee recommendation was considered by all segments, we endorse such recommendations as being a reasonable compromise. We commend the proposals of Commissioner Bell.

This position paper then is one of endorsement, a voice in support of the work product produced by the appointed committees. It offers potential solutions worthy of being tested. Time alone will tell if such potential solutions will require expansion, modifications or repeal, but they represent a starting point - a new base.

We are attaching to this paper a chart. It represents all of the advanced solutions. The format indicates the positions of:

Kansas Insurance Department (KID)
Kansas Medical Society (KMS)
Kansas Bar Association (KBA)
Kansas Defense Attorneys (KDA)
Committee Study
Kansas Association of Property & Casualty Ins. Companies (KAPCI)
The Western Insurance Companies, a Kansas Corporation

While the Kansas Insurance Industry paper touches on all points, we feel compelled to amplify what we believe to be the two most critical areas ---

(1) The Statute of Limitations
(2) A Limit of Recovery

Statute of Limitations: It seems ALL SEGMENTS AGREE that the statute of limitations needs to be reduced. The question is, reduce it to what?

The Commissioner's Study Committee recommended 2+2 or a maximum of 4 years, with special exception for the minor to age 9.

The Kansas Medical Society recommends two years maximum with exception for the minor to age 6.

The Kansas Bar Association recommends six years with no change as to minors.

The Kansas Department of Insurance has adopted the position of the Kansas Bar Association of 6 years without any change in regard to minors. We feel strongly that a change must be made in regard to a minor, else the "long tail" problem will remain a critical problem to the malpractice crisis.

An exception, extending the statute to "school age" in case of minors, should allow sufficient time for an "unknown" medical problem to be ascertained. Indeed, it could encourage more prompt and more probing medical examinations if there is any remote possibility that a problem could exist. Fraud and concealment should be excepted.

The problem has been studied by nearly every state in the Union. It is most interesting to note that the following states have reduced their statute of limitations.

Florida	Massachusetts	South Dakota
Idaho	Nebraska	Tennessee
Maryland	New York	Louisiana
Iowa	North Dakota	Ohio
Oregon	Texas	

Almost all have given special treatment to a minor. The lowest age factor has been age 6 --- the highest age 14. The majority seem to be in the age 6 - 8 category.

The Western then must support the Commissioner's Study Committee's recommendation, which is also endorsed by the Kansas Domestic Insurance Industry. We feel this change would not endanger ligitimate injuries to the public. We must point out that while we speak on behalf of the insurance industry, we too, as are our loved ones and employees, members of the public.

Limit of Recovery: We support the position of the several study committees that made "special" recommendations that some limitation be placed upon recovery.

Rate mechanism is not geared to contemplate judgments of two, three and five million dollars. This is particularly true when the mechanism must speculate the amount of judgments ten to twenty years from now.

Some nineteen states either have or are contemplating a limit of recovery. The Legislature can always increase the level if found to be inadequate in subsequent years.

It has been argued this would work a hardship on a particularly bad injury --- "the vegetable case" --- but one is overlooking the annual income such an award can produce. For example, a $500,000.00 award can produce $50,000.00 annual income without disturbing the principal.

We believe that while the three involved segments of legal, medical and insurance must each contribute to an ultimate solution, so must the public segment. We are not advocating inadequate awards, but when a social problem requires a subsidy, such subsidy should not have to carry an unreasonable burden, to the detriment of many for the benefit of few.

Again, the "cap" on liability has been studied by nearly all states. Over 19 states either have or are proposing a limitation of liability. Some simply limit liability similar to death statutes. Others limit liability by way of "pool mechanism" or patient compensation funds to carry any excess. Regardless of the mechanism, it seems clear that a "cap" is deemed extremely important to a malpractice solution.

We know that those opposed to a limitation cry out -- It would be unconstitutional! That same cry was heard across the land as legislators contemplated "no fault." It is interesting to note the language of the Connecticut Supreme Court when it ruled on "No-Fault":

> "Individual rights and remedies must at times and of necessity give way to the interests and needs of society. If the law is to continue on the path of homogeneity to be the means of order in the complex social scheme of our growing populace, the legislature must be allowed to create alternate remedies for ills where the machinery of justice is so burdened that justice is, in fact, denied to many. We are in an age of the nasence of a new form of government, which might best be labeled an "administrocracy" -- rule by administrative agencies. Even the legislative branch of government, both state and federal, must so delegate many of its tasks or fail to provide the people all that their government should. It is no different with the judiciary. No longer may we align with the ancient civil law premise that recourse to the courts is the primary or only alternative to force for redress of injuries. We must recognize today the power of the legislature to aid the process of justice with the reasonable alternate remedies, and, no less may we do if our courts are to remain open to those suffering grievious wrongs and the legal process is to remain untethered and vital."

It would seem that if the Kansas Legislature enacted a limitation, that by the time the court ruled one way or another, the malpractice crisis might be over. If enacted, they can increase or decrease whenever it seems justified.

OF ALL THE REMEDIES ADVANCED, THE STATUTE OF LIMITATIONS AND SOME LIMITATION OF RECOVERY WOULD DO MORE TO SOLVE THE PRESENT CRISIS THAN ALL THE REST OF THE REMEDIES PUT TOGETHER.

We solicit your attention to the chart exhibit attached. We feel that without legislative action, the malpractice market will continue to deteriorate. Without legislative action, any form of J.U.A., no matter how well intentioned, will be nothing more than a synthetic and expensive solution, that will be unable to stand the test of time.

With proper remedies, the marketplace will once again function with competitive, private industry which, in the final analysis, means a better product for the lowest possible price. The alternative to competition has never been proven to be in the best interest of the public since so few benefit from the chains that bind.

I believe it was Andrew Jackson who said -

> "Nothing will ever be attempted if all possible objections must be overcome."

Respectfully Submitted.

The Western Casualty & Surety Company
The Western Fire Insurance Company
The Western Indemnity Company, Inc.

By: Homer H. Cowan Jr.

HOMER H. COWAN, JR.
ASSISTANT SECRETARY *
LEGAL DEPARTMENT

*Registered Lobbyist - 1975

	TYPE OF ACTION	KID	KMS	KBA	KDA	Study Comm.	KAPCI	THE WESTERN
1.	Relicensure, Recertification, of health care providers and institutions	Centralize licensing requirements for health care providers under one state agency	Continuing Education Re-registration limitations on medical licenses (quality assurance of health care providers)	No Comment	Perhaps improvement and stricter requirements	Supports	Supports	Supports the Study Committee or Dept. of Insurance
2.	Peer Review	This activity would be included in the proposed centralized state agency	Yes-A part of licensure control (with immunity)	No Comment	Yes	Supports	Supports	Supports* the Study Committee or Department of Insurance
3.	Claims Review	This activity would be included in the proposed centralized state agency	Yes-Prior to litigation, admissable findings, expert witnesses	Yes, with limitations further study required	Yes-screening panel voluntary-findings not admissable-further study required	Supports - with Immunity and Admissibility	Supports Study Committe Recommendation	Supports Study Committee Recommendations* or Department of Insurance
4.	Grievance Procedures	This activity would be included in the proposed centralized state agency	Yes	No Comments	Yes	Supports	Supports	Supports Department of Insurance
5. (?)	Arbitration	Yes	Yes	Yes-stringent limitations	NO	Supports - voluntary&binding compulsory-non-binding	Supports	Supports. Link with Claims Review
6.	Limitation on Recovery	None recommended	Yes $500,000 Dr's liab. $100,000	No	No	No Study Comm. appointed	CONSIDERED CRITICAL $500,000 Limit	Limitation considered critical *
7.	Patient's Compensation Fund	None recommended	Yes-assessment on providers, maximum recovery from fund $500,000.	Yes-assess on providers	No-but if implemented, assess providers	No Study Committee appointed	Supports Kansas Medical Society	Supports K.M.S. or "Stabilization Fund" approach *
8.	Ad Damnum	Eliminate	Eliminate	Eliminate-discoverable by motion of defendant	Eliminate	Do not have copy of Committee Report	Eliminate	Eliminate

*Peer Review: Arkansas, Florida, Indiana, Maryland, Iowa Montana, Nevada, New York, South Dakota, are among states adopting a Peer Review Committee.

*Claims Review: Arkansas, Florida, Indiana, Massachusetts, Nevada, New York and Tennessee are among states adopting a Claims Review approach.

*Limitation of Recovery: Nineteen (19) states either have, or are, proposing some type of limitation on recovery.

*Stablization Fund: (or patients compensation fund) These are two separate approaches. Either one should have a limitation of recovery and it could be mandatory for a "Stabilization Fund".

	Statute of Limitation	Change discovery to four years Minors no change	Change to no discovery retaining two year time limitation of suit Two years from age 6(minors)	Discovery reduced to six years on all P.L. Tort claims Minors-no change	Discovery reduced to six years on all P. L. Tort Claims Minors-no change	2+2 years maximum of 4 yrs. minor to age 9	Supports Study Comm.	Supports Study Committe and/or Kansas Medical Society*
10.	Consent to Settle on insurance policies	Remove by statute prohibition	No comment (but probably opposed)	No comment	No comment	No Study Committee Appointed	Would support Department of Insurance	Would support Department of Insurance
11.	Pooling Mechanism for Medical Malpractice (J.U.A.).	Implement upon demonstration of lack of availability	Yes-assignment of risk for any licensed provider	Yes	Yes	No Study Committee Appointed	Opposed	Basically opposed, but would * support Dept. of Insurance on basis of necessity and Legislative Reform
12.	Cancellation or termination of malpractice policies	Yes-similar to auto-60 day notice required	No comment-(probably support)			No Study Committee Appointed	No Comment	Would support reasonable restraint *
13.	Provisions for group insurance policies	Yes-similar to Life and A&H programs				No Study Committee Appointed	No Comment	No Comment
14.	Collateral source rule	No comment	Yes-provide for submission of other payments to claimant from other sources	Opposed to any change	Opposed to any change	No study Committee Appointed	Would support Kansas Medical Society	Would support Kansas Medical Society
15.	Modification of attorney's fees	Not recommended at this time	Yes: 50% 1st $1,000 40% next 2,000 33 1/3% next 47,000 20% next 50,000 10% next 150,000 5% next 250,000	Opposed to any change-subject now to court review	Opposed to any change-subject now to court review	No Recommendations	No Comment	Would feel this is a matter between the public and the Kansas Bar Association
16.	Reporting of malpractice claims	Recommended responsibility of the centralized state agency	Yes-report claims to peer review board and insurance commissioner	No comment	Yes-as part of insurance regulation	No study Committee Appointed	No comment	Would support Department of Insurance
17.	Burden of Proof (Res ipsa loquitor and other)	No comment	Clarification of Res Ipsa Loquitor: should be applied in only most obvious cases	No comment	oppose any change	No Study Committee Appointed	No Comment	No Comment
18.	Infomed Consent	No comment	Provisions for a written document consent to all medical matters-unless fraudulently	Provisions for a written document consent to all medical matters unless fraudulently Position not known	not recommended for change	Recommends Changes	No Comment	Would support Kansas Medical Society and Kansas Bar Association

*Statute of Limitations: Florida, Idaho, Maryland, Massachusetts, Oregon, Nebraska, New York, North Dakota, South Dakota, Tennessee, Ohio, Iowa, and Texas have modified the Statute of Limitations.

*Pooling Mechanism: We feel that any J.U.A., temporary or permanent, should be on a "claims made" basis. "Tail coverage" should be provided. Such J.U.A. must be created by statute and it is mandatory that a Limitation of Recovery be provided.

*Cancellation: A carrier must be able to refuse to renew or cancel. A 60 day notice requirement would, however, be reasonable.

		KBA	KDA	Committee		
Punitive Damages	No comment	No punitive damages should be recoverage1	opposed to elimination of punitive damages in cases of willful, wanton or reckless misconduct.	opposed to elimination of punitive damages in cases of willful, wanton or reckless misconduct	No Study Committee Appointed	No Comment	No Comment
Breach of contract	No comment	No liability for alleged breach of contract, expressed or implied, because of a guarantee of result			No Study Committee Appointed	No Comment	Supports Kansas Medical Society
Good Samaritan Principal for Emergency treatment	No comment	No liability in emergency treatment	oppose any change	oppose any change	No Study Committee Appointed	No Comment	Supports Kansas Medical Society

_____ BILL NO._____

By

AN ACT directing the commissioner of insurance to provide certain reports relating to medical malpractice claims or actions to the state board of healing arts; amending K. S. A. 1975 Supp. 40-1128 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K. S. A. 1975 Supp. 40-1128 is hereby amended to read as follows: 40-1128. The commissioner of insurance shall make such reports available to the public in a manner which will not reveal the names of the individuals involved and shall provide a copy of each report to the state board of healing arts, which copy shall include the information required to be reported by K. S. A. 1975 Supp. 40-1127, and the board of healing arts may take action based upon the report as the board deems appropriate.

Sec. 2. K. S. A. 1975 Supp. 40-1128 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the official state paper.

Report to the Labor and Commerce Committee of the
Council of State Governments on

Recommendations on Possible Alternatives for Dealing with the Medical Malpractice Problem

Developed by the Subcommittee on Medical Malpractice

September 17, 1975

Ad damnum - It is recommended that the specific amount of damages sought not be included when a malpractice suit is filed.

Collateral Source Rule - It is recommended that other sources of monetary reimbursement received by the plaintiff, except for privately purchased insurance paid for in whole or in part by the plaintiff or his employer, be permitted as evidence during the trial proceedings.

Statute of Limitations - It is recommended that the length of time during which one may sue for damages should be limited (possibly two years from occurrence, except in the case of infants up to eight years of age).

Informed Consent - It is recommended that no legislative definition is needed when adequate precedent exists in case law.

Reversionary Trust - It is recommended that the courts be granted discretion in making either lump sum awards or giving the plaintiff adequate income at periodic intervals throughout his life or infirmity on awards up to $200,000; it should be mandatory that a reversionary trust be set up for awards larger that $200,000.

Locality Rule - It is recommended that provision be made for acceptance of the level of skill which is prevalent in medically similar localities at the time of the incident.

Res ipsa loquitur - It is recommended that the application of this doctrine be applied as it is in other tort actions.

Damage Limitations - It is recommended that there be a limit on awards for pain and suffering, such as to the amount of $250,000. There should be no ceiling on other aspects of damage awards.

Medical Malpractice Review Panel - It is recommended that the establishment of a medical malpractice review panel is one means of screening for legitimate malpractice claims and reaching a timely resolution of the action.

Underwriting Pools - It is recommended that joint underwriting associations should not be created unless a state has no alternative solution for assuring the provision of medical malpractice insurance.

State Fund - It is recommended that states should not assume the responsibility for providing medical malpractice insurance.

Assigned Risk Pools - It is recommended that states should not assume the responsibility for insuring health care providers in high risk categories unless there is no other alternative.

Workmen's Compensation-type Insurance - It is recommended that a workmen's compensation-type insurance is not a feasible or workable solution to the medical malpractice problem.

Mutual Companies - The Western Conference of the Council of State Governments, during its annual meeting September 1-4, 1975, adopted a policy statement calling for the development of legislation which would enable the respective states to enter into interstate agreements providing for self-insurance for appropriate health care providers between the states. This approach appears to have merit and it is recommended that the Midwestern Conference work with the Western Conference in the development of this legislation.

Premium Rates - It is recommended that there be state regulation of malpractice insurance premium rates.

More Stringent Licensure Requirements - It is recommended that states should:

a. Provide for the removal, suspension or limitation of practice of health care providers on the grounds of professional incompetence;

b. Require periodic relicensure, subject to the fulfillment of mandatory continuing education requirements;

c. Create peer review and reporting mechanisms armed with qualified immunity from legal action taken because of various recommendations. These mechanisms should also be granted the power to extend the immunity when deemed necessary.

Report Procedures - It is recommended that:

a. The insurance industry be required to furnish each state ~~legislature~~ with complete and detailed information, regional and state-by-state, on medical malpractice premium income, investment income from such premiums, payouts on claims in that field, and all

considerations for setting reserves in that field, and such other information an individual insurance commissioner may recommend as appropriate in order to determine the financial condition and malpractice claims history of the insurer.

b. All future medical malpractice claims settled or adjudicated to final judgment be reported to the state insurance department.

c. Reports be required to be sent to the appropriate board of professional licensing on any health care provider against whom a settlement is made or judgment rendered.

Medical Guarantees - Require that any guarantees of cure or amelioration of medical problems be put in writing.

Contingency Fees - The subcommittee could reach no consensus on how contingency fees should be handled. The alternatives considered were:

a. Set a cap (such as 15 per cent) on the amount of attorney's fees which may be collected.

b. Provide for a sliding scale, with the highest percentage on the lowest amount and the lowest percentage on the highest amount.

c. Leave it to the discretion of the court to determine the reasonableness of fees requested.

_____ BILL NO. _____

By

AN ACT authorizing the convening of medical malpractice screening panels; providing for the powers, duties and functions thereof.

Be it enacted by the Legislature of the State of Kansas:

Section 1. Where a petition is filed in a district court of this state claiming damages for personal injury or death on account of alleged medical malpractice, the judge of the district court or of the division of the district court to which such case is assigned may convene a medical malpractice screening panel hereafter referred to as the "screening panel." The district judge shall appoint such persons as he or she deems necessary to serve on the screening panel.

Sec. 2. The persons selected shall constitute the screening panel for the particular medical malpractice claim to be heard, and the district judge shall notify the parties to the action that a screening panel has been convened and that the members of such screening panel have been appointed. One member of the screening panel shall be designated by the district judge to serve as chairman of the screening panel. Members of such screening panel shall receive compensation and expenses as may be provided by rules of the supreme court of Kansas.

Sec. 3. The screening panel shall convene with notice in writing to all parties and their counsel and shall hear evidence and argument on the question of liability and on the question of damages. The screening panel shall conduct its meetings in accordance with rules of procedure adopted by the supreme court of Kansas to govern such meetings, except strict adherence to the rules of procedure and evidence applicable in civil cases shall not be required. All meetings of the screening panel shall be held in camera.

The chairman of the screening panel shall preside at all meetings of the screening panel and shall determine all questions of procedure, including the admissibility of evidence. Witnesses may be called, all testimony shall be under oath, testimony may be taken either

orally before the screening panel or by deposition, copies of records, x-rays and other documents may be produced and considered by the screening panel and the right to subpoena witnesses and evidence shall obtain as in all other proceedings in the district court. The right of cross-examination shall obtain as to all witnesses who testify in person. The parties to the action shall be entitled, individually and through counsel, to make opening and closing statements. No transcript or record of the proceedings shall be required, but any party may have the proceedings transcribed or recorded. No screening panel member shall participate in a trial arising out of the cause of action either as counsel or witness.

Sec. 4. (a) The screening panel shall make its determination according to the applicable substantive law. Its determination on the issue of liability and, if liability is found on the issue of fair and just compensation for damages shall be made in a written opinion. The screening panel shall state its findings of fact and its conclusions of law. A concurring or dissenting member of the screening panel may file a written concurring or dissenting opinion.

(b) The screening panel shall notify all parties when its determination is to be handed down, and, within seven (7) days of its decision, shall provide a copy of its opinion and any concurring or dissenting opinion to each party and each attorney of record and to the district judge.

(c) The findings of fact, conclusions of law and final determination of the screening panel shall not be admitted into evidence in any subsequent legal proceeding.

Optional SA/SB

Sec. 5A. Within thirty (30) days following the date of the decision of the screening panel, the parties shall file written notice with the clerk of the district court, with copies to each other of their acceptance or rejection of final determination of the screening panel. If all of the parties accept the final determination of the screening panel, the party or parties against whom any damages are assessed shall pay, or cause the amount assessed to be paid to the prevailing party or parties within sixty (60) days of the decision. In the event that one or more of the parties rejects

the final determination of the screening panel, the plaintiff may proceed with the action in the district court. Nothing herein shall be construed to prohibit the parties from agreeing in writing at any time prior to the final determination of the screening panel that such determination shall be binding upon the parties.

Sec. 5B. (a) The parties may, by unanimous written agreement, elect to be bound by the determination of the screening panel at any time. In such event, the determination of the screening panel shall be binding and conclusive, and judgment may be entered thereon.

(b) In cases where the determination of the screening panel is unanimous, and where the parties have not unanimously agreed in writing to be bound by the determination of the screening panel, each party shall file with the clerk of the district court a written acceptance or rejection of the determination within thirty (30) days of receipt of the written opinion. Any party not timely filing a rejection of the determination shall be deemed to have accepted such determination. If the determination is accepted by all parties, the district court may enter judgment thereon.

(c) Whenever the parties have unanimously agreed to be bound by the determination of the screening panel, the district court shall enter judgment thereon, unless the parties shall unanimously agree that no judgment be entered.

(d) In the event that one or more of the parties rejects the final determination of the screening panel, the plaintiff may proceed with the action in the district court.

Sec. 6. All proceedings, records, findings of fact, conclusions of law, final determinations and deliberations of a screening panel shall be confidential and shall not be used in any other proceeding, or otherwise publicized, except as herein provided, nor disclosed by any party, witness, counsel, screening panel member, or other person, on penalty of being found in contempt of court. The manner in which a screening panel and each member thereof deliberates, decides, and votes, on any matter submitted to the screening panel, including whether the final determination is unanimous or otherwise, shall not be disclosed or made public by any person, except as herein provided.

Sec. 7. No member of the screening panel shall be liable in damages for libel, slander or defamation of character of any party to the proceedings for any action taken or recommendation made by such member acting without malice and in good faith within the scope of such member's official capacity as a member of the screening panel.

Sec. 8. Unless otherwise provided by order of the district judge, the costs shall be allowed to the party in whose favor the final determination of the screening panel was made. Items which may be included in the taxation of costs shall be those items enumerated by K. S. A. 1975 Supp. 60-2003.

Sec. 9. This act shall take effect and be in force from and after its publication in the statute book.

COMPARISON CHART

TYPE OF REFORM	KANSAS INSURANCE DEPT.	KANSAS MEDICAL SOCIETY	KANSAS BAR ASSOC.	COMMISSIONER'S STUDY COMMITTEE	KANSAS INS. INDUSTRY
I TORT REFORM					
1. Arbitration	Supports	Supports	Supports with stringent Limitations	Supports - voluntary - Binding compulsory - non binding	Supports - coordinate with Claims review
2. Limitation on Recovery	None Recommended	Yes - $500,000 "Cap" - Dr's Liability $100,000	No	No study	Supports $500,000 "Cap"
3. Ad Damnum Clause	Eliminate	Eliminate	Eliminate - discoverable by motion of defendant	No study	Eliminate
4. Statute of Limitations	Change discovery to four years - minors no change	change to no discovery retaining two year time limitation of suit - two years from age 6 (minors)	Discovery reduced to six years on all P.L. Claims Minors no change	2 + 2 years maximum of 4 years - minor to age 9	Two years Two years discovery (maximum 4 years) up to age 9 for minors (supports study Committee)
5. Collateral Source Rule	No comment	yes-provide for submission of other payments to claimant from other sources	Opposed to any change	No study	Supports medical society position

6. Modification of Attorney Fees	Not recommended at this time	Yes - 50% 1st $1,000 40% next $2,000 33 1/3% next 47,000 20% next 50,000 10 % next 150,000 5% next 250,000	Opposed to any change - subject now to court review	No study	No position
7. Res Ipsa Loquitor	No comment	Clarification of Res Ipsa Loquitor: should be applied in only most obvious cases	No comment	No study	No comment
8. Informed Consent	No comment	Provisions for a written document consent to all medical matters- unless fraudently obtained		Suggests change	No comment
9. Punitive Damages	No comment	No punitive damages should be recoverable	Opposed to elimination of punitive damages in cases of wilful, wanton or reckless misconduct	No study	No comment
10. Breach of Contract	No comment	No liability for alleged breach of contract, expressed or implied, because of a guarantee of result		No study	No comment
11. Good Samaritan Rule	No comment	No liability for emergency treatment in emergency room or doctor's office	Oppose any change	No study	supports Kansas Medical Society

II MEDICAL FORM					
12. Recertification of Medical Providers	Centralized agency to supervise licensing requirements for health care providers	Continuing Education re-registration limitations on medical licenses	No comment	Supports	Support necessary legislation
13. Peer Review	Proposed centralized state agency	yes-a part of licensure control (with immunity)	No comment	supports	supports concept
14. Claims Review	Proposed centralized state agency	yes-prior to litigation, admissable findings, expert witnesses	yes, with limitations further study required	Supports with immunity and admissability	supports Study Committee
15. Grievance Procedure	Proposed centralized state agency	yes	No comments	Supports	Supports Study Committee
III INSURANCE REFORM					
16. Consent to Settle	Remove by statute prohibition	No comment (possibly opposed)	No comment	No study	Eliminate
17. Cancellation or termination of Malpractice Policies	Yes-similar to auto 60 day notice required	No comment -(probably support)		No study	yes - 60 days notice
18. Group Insurance	yes - similar to Life and A & H programs			No study	No comment

OTHER LEGISLATIVE REFORM					
19 Patient's Compensation Fund	None recommended	Yes-assessment on providers, maximum recovery from fund $500,000	Yes-assessment on providers	no study	Yes-assessment on providers
20. Joint Underwriting Association (JUA)	implement upon demonstration of lack of availability	yes - assignment of risk for any licensed provider	yes	no study	opposed
21. Reporting of Malpractice Claims	Recommend responsibility of the Centralized state agency	yes - report claims to Peer Review board and Insurance Commissioner	no comment	no study	support

Attachment No 3

KACI Policy Statement

on

PROFESSIONAL LIABILITY OF HEALTH CARE PROVIDERS*

KACI believes current developments in the field of professional liability problems are adversely affecting the Kansas health care delivery system. It is in the public interest, particularly from the standpoint of the patient - consumer of health services - that the present threat to health care state-wide be resolved by concerted action of all affected groups to assure high quality health care including comprehensive legislation to stabilize malpractice insurance coverage. Therefore, KACI urges legislative consideration of this matter to provide a long-term solution to assure Kansans access to a competitive enterprise system of health care. KACI believes that the competitive private enterprise system of health care is far superior to any other system and that the public is best served by a compensation system grounded upon the negligence or fault theory of law. Patient injuries should not be the burden of the general public of the state of Kansas.

Legislative Consideration Urged. KACI believes that improvements in the health care liability system can be accomplished within our existing framework by:

(1) Quality Assurance. Strengthening the medical review procedures through appropriate regulatory and licensing authorities, quality control programs and granting immunity to persons performing such review functions with findings admissible in evidence, and developing a meaningful procedure for consumers having alleged grievances with providers of health care services.

(2) Limitation on Awards. Placing a reasonable limitation on the overall amount of recovery on injury awards including attorney fees as set by the court.

(3) Limitation of Time for Actions. Substantially reducing the discovery period and establishing a reasonable statute of limitations which will provide fair and equitable treatment.

(4) Arbitration. Modifying legal procedures to make arbitration more attractive with findings either voluntary and binding or mandatory and non-binding.

(5) Modification of Legal Procedures. Eliminating pleading the specific amount of damages (Ad Damnum Clause) and also recommending further study by the Legislature of such matters as the collateral source rule, informed consent and punitive damages.

(6) Provision for Insurance. Assuring there is liability coverage available to qualified health care providers through the private insurance market.

* Approved September 11, 1975

Attachment 2-4

Kansas Association of Commerce and Industry

A consolidation of the Kansas State Chamber of Commerce/Associated Industries of Kansas/Kansas Retail Council

500 First National Tower
One Townsite Plaza
Topeka, Kansas 66603
A/C 913 357-6321

September 22, 1975

Statement for: The Special Committee on Medical Malpractice

Mr. Chairman and members of the Committee.

My name is Dan McClenny. I am Assistant Vice President and Manager of Industrial Relations for Didde-Glaser, Inc., Emporia, Kansas. I am here today to represent the Kansas Association of Commerce and Industry and we appreciate the opportunity to appear before this Committee.

Prompted by the evidence of possible decline or loss of medical services for the citizens of the State of Kansas and the obvious increase in health care costs that will be borne by the consumer, the KACI Board of Directors asked its Health Care Committee to study and establish recommendations on the issue of professional liability of health care providers. As Chairman of this KACI Committee, I can safely say that our task was not an easy one.

The Health Care Committee of KACI met on several occasions to consider this question. We reviewed comments and facts presented by the Kansas Medical Society, the Kansas Bar Association, the Commissioner of Insurance, the insurance providers, and other interested parties.

The members of this Interim Committee have before them a copy of our Association's position on this important issue.

Briefly, KACI's position calls for:

1. Legislative consideration to assure that private enterprise system of health care is maintained.
2. Retention of a patient injury compensation system grounded upon the negligence or fault system of law.
3. Assurance that professional liability coverage is available to qualified health care providers through the private insurance market.
4. Strengthening the Quality Assurance of the Health Delivery System in Kansas.
5. Modification of legal proceedings by the legislature to accomplish the above objectives.

KACI's policy position supports in principle -- specifically --

1. A limitation on awards by placing a reasonable limitation on the overall amount or recovery on injury awards including attorney fees as set by the court.
2. A substantial reduction in the time period in which to bring actions.
3. Elimination of pleading of specific amounts of damages.
4. Provision for expanded use of arbitration so as to make findings either voluntary and binding or mandatory and non-binding.
5. Providing immunity from suits to persons for actions taken in the performance of review functions.
6. Strenthening the developments of meaningful procedures for consumers having alleged grievances with providers of health care services.

Attachment No. 5

POSSIBLE LEGISLATIVE RECOMMENDATIONS PERTAINING TO MEDICAL MALPRACTICE INSURANCE

1. Reduce statute of limitations to four years with two additional years for filing except for infants up to age 6 who have from that age plus two years for filing.

2. Delete dollar figures from plantiffs ad damum clause.

3. Provide a screening panel of one doctor chosen by the plantiff, one doctor chosen by the defendent, and an attorney chairman designated by a district judge. The use of the panel would be compulsory with non-binding findings. Proceedings of the panel would be admissible in subsequent court proceedings and the panel members would be required to testify in court if called upon.

4. Provide umbrella coverage beginning at maximum level of readily available medical insurance from commercial carriers. Umbrella coverage would be provided by patient's compensation fund similar to that set up in the State of Indiana.

5. Provide immunity from civil suit for individuals giving our Healing Arts Board and Screening Panels, as well as Screening Panel members, information in good faith concerning alleged malpractice incidents.

6. Provide for the Healing Arts Board to require periodic re-licensure and mandatory continuing education.

7. Limit contingency fees on a sliding scale similar to that provided in New Jersey or require court to approve as to reasonableness.

8. Eliminate or modify the Collateral Source Rule.

9. Limit amount of recovery, i.e., $100,000,000; also consider limiting recovery for pain and suffering.

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September 19, 1975

Mr. William Wolff
Legislature Research Department
State House
Topeka, Kansas 66612

Dear Mr. Wolff:

Enclosed is a ten-year history of actual loss payments, outstanding reserves as of 12/31/74 and year-end estimates of IBNR. If you have any questions, please call or write.

Sincerely yours,

Frederick J. Knox
Vice President - Actuarial

FJK/sj

Enclosures

ST. PAUL FIRE AND MARINE INSURANCE COMPANY
PAID LOSS AND ALLOCATED LOSS EXPENSE
KANSAS PRIMARY PHYSICIANS AND SURGEONS

Accident Year	Earned Premium	Calendar Year of Payment									
		1966 & Prior	1967	1968	1969	1970	1971	1972	1973	1974	Total to Date
1964	45,126	12,191	0	0	0	0	0	0	6,500	0	18,691
1965	57,002	7,228	37	5,281	0	0	1,716	8,882	465	0	23,609
1966	62,779	0	0	4,106	0	0	0	717	8,737	6,304	19,864
1967	87,123	-	4,017	16,510	2,611	81	696	6,704	0	0	30,619
1968	126,732	-	-	0	296	8,785	7,339	14,279	4,357	60,219	95,275
1969	168,623	-	-	-	0	0	11,940	13,245	42,694	1,826	69,705
1970	189,085	-	-	-	-	790	8,599	6,375	29,060	56,389	101,213
1971	348,144	-	-	-	-	-	3,102	2,050	19,062	48,530	72,744
1972	585,911	-	-	-	-	-	-	329	14,668	28,476	43,473
1973	668,197	-	-	-	-	-	-	-	0	25,435	25,435
1974	692,562	-	-	-	-	-	-	-	-	3,500	3,500
Total	3,031,284	19,419	4,054	25,897	2,907	9,656	33,392	52,581	125,543	230,679	504,128

ST. PAUL FIRE AND MARINE INSURANCE COMPANY
SUMMARY OF LOSS HISTORY
KANSAS PRIMARY PHYSICIANS AND SURGEONS

(1) Accident Year	(2) Earned Premium	(3) Paid Loss and Loss Expense	(4) Case Outstanding Loss and Loss Expense	(5) IBNR Loss and Loss Expense	(6) Total Incurred Loss and Loss Expense (3) + (4) + (5)	(7) Loss and Loss Expense Ratio (6) ÷ (2)
1964	45,126	18,691	0	0	18,691	41.4
1965	57,002	23,609	0	0	23,609	41.4
1966	62,779	19,864	3,750	0	23,614	37.6
1967	87,123	30,619	0	0	30,619	35.1
1968	126,732	95,275	45,000	0	140,275	110.7
1969	168,623	69,707	87,750	0	157,457	93.4
1970	189,085	101,213	4,371	0	105,584	55.8
1971	348,144	72,744	258,000	13,160	343,904	98.8
1972	585,911	43,473	213,000	153,978	410,451	70.1
1973	668,197	25,435	435,000	601,560	1,061,995	158.9
1974	692,562	3,500	21,000	892,158	916,658	132.4
Total	3,031,284	504,130	1,067,871	1,660,856	3,232,857	106.6

Legislative Research Department September 10, 1975

SURVEY OF MALPRACTICE LEGISLATION BY STATE

Boards of Review

Tennessee
Mandatory (3 panels for the state)
7 members (1 judge, 1, attorney, 2 physicians, 2 general public (?))
Formal statement of the Board admissible in evidence - participants may not appear.

Nevada
Mandatory (2 panels for the state)
6 members (3 lawyers, 3 physicians)
Finding of screening panel forwarded to the State Board of Medical Examiners, the County Medical Society, and to the Attorney General.

Indiana
Mandatory
4 members (1 attorney, 3 physicians)
Report of the Review Board is admissible in evidence and members may be required to appear in subsequent trial.

Florida
Mandatory (for each judicial circuit)
3 member panel (1 judge, 1 physician, 1 layman)
Conclusion of hearing panel admissible in evidence.

Arkansas
Voluntary
3 member panel (1 judge, 1 physician, 1 layman)
Findings of the hearing panel are confidential and cannot be used in other proceedings.

Wisconsin
Mandatory
Formal-5 members/Informal-9 members (type of panel depends upon the amount of claim)
Formal - findings admissible/Informal - findings not admissible

Illinois
Mandatory
3 members (1 judge, 1 physician, 1 attorney)
The determination of a panel shall not be admissible in evidence at a subsequent trial.

New Hampshire
Voluntary
3 members (1 judge, 1 physician, 1 layman)
All proceedings, records, findings and deliberations of a panel shall be confidential and shall not be used in any other proceedings.

Louisiana

Mandatory
4 members (1 attorney (non-voting), 3 physicians)
Report of the panel is admissible in evidence and members of the panel may be called as witnesses.

Alabama

Mandatory and binding (2 boards for the state)
3 members (1 physician, 1 attorney, 1 layman)
Patients' Compensation Board decision is binding and award made within statutory provisions of compensation limits.

Massachusetts

Mandatory
3 members (1 justice of the superior court, 1 physician, 1 attorney)
Testimony of witnesses and the decision of the tribunal shall be admissible as evidence.

New York

Mandatory
3 members (1 judge, 1 physician, 1 attorney)
If the panel members concur, their recommendation shall be admissible in evidence. The physician or attorney may be called as a witness.

Summary

Voluntary Panels - 2 (Arkansas, New Hampshire)

Mandatory - 9 (New York, Massachusetts, Louisiana, Illinois, Wisconsin, Florida, Indiana, Nevada, Tennessee)

Mandatory and Binding - 1 (Alabama)

Statute of Limitations

New York	Adults - 2 years, 6 months Minors - no more than 10 years
North Dakota	Adults - 6 years maximum Minors - no distinction for minor
South Dakota	Adults - 6 years maximum Minors - no distinction for minor
Alabama	Adults - 6 years maximum Minors - no distinction for minor
Louisiana	Adults - 3 years maximum Minors - no distinction for minor
Illinois	Adults - 5 years maximum Minors - period of limitation does not begin until majority
Indiana	Adults - 2 years Minors - until 8th birthday
Maryland	Adults - 5 years maximum Minors - period of limitation does not begin until majority
Iowa	Adults - 6 years maximum Minors - no distinction for minor
Florida	Adults - 4 years maximum Minors - no distinction for minor
Massachusetts	Adults - 3 years Minors - until 9th birthday
Tennessee	Adults - 3 years maximum Minors - no distinction for minor
Texas	Adults - 2 years Minors - under 6 years to 8th birthday

Summary

13 states have adjusted statutes for discovery or limitation on action.

6 year limit - 4 (North Dakota, South Dakota, Alabama, Iowa)

5 year limit - 2 (Illinois, Maryland)

3 year limit - 3 (Louisiana, Massachusetts, Tennessee)

2 year limit - 2 (Indiana, Texas, New York (2½ years))

Informed Consent

New York	Limitation of action based on lack of informed consent.
Louisiana	Written consent presumed valid and effective.
Iowa	Written consent presumed valid and effective.
Florida	Written consent presumed valid and effective.
Nevada	Physician has obtained consent if he has done certain prescribed acts.
Tennessee	Issue may not be submitted to jury unless claimant proves defendant did not supply appropriate information in obtaining consent.
Ohio	Written consent presumed valid and effective if obtained according to statutory procedure.

Summary

7 states have adopted some statutory language which specifies a criteria for obtaining informed consent.

Collateral Source

New York	Information available on all sums paid or payable.
North Dakota	Information available on all sums paid or payable.
Alabama	Information available on all sums paid or payable.
Iowa	Collateral sources deductible from award.
Tennessee	Award limited to that not covered by public or private compensation (except private individual insurance).

Summary

5 states have adopted some statutory language to abolish or limit the use of the collateral source rule.

Ad Damnum

Ohio	No statement allowed.
Tennessee	Plaintiff may state a demand but the demand cannot be disclosed to the jury during a trial.
Massachusetts	No statement allowed.
Florida	Amount of general damages may not be stated.
Iowa	No statement allowed.
Wisconsin	No statement except whether amount sought is over or under $10,000
Indiana	No statement of amount.

Summary

7 states have adopted legislation which regulates the statement of the amount of an award.

Contingency Fee	
Ohio	Establishes limits.
Tennessee	Amount determined by the court. not to exceed 33⅓%
Iowa	Court determines reasonableness of fee.
Wisconsin	Some modification of fees.
Indiana	Limited to 15% of any recovery from Patients' Compensation Fund - no statutory limits on first $100,000.
Alabama	Establishes schedule of fees.

Summary

6 states have adopted legislation affecting contingency fees.

Limits Physician/Hospital Liability

North Dakota	$500,000/$1,000,000
Alabama	$300,000
Louisiana	$100,000
Illinois	$500,000
Indiana	$100,000
Wisconsin	$200,000/$600,000
Florida	$100,000

Summary

7 states have adopted legislation which limits physician/hospital liability.

Limits Awards	
Alabama	$300,000
Louisiana	$500,000
Illinois	$500,000
Indiana	$500,000

Summary

4 states have adopted legislation which places an upper limit on malpractice awards.

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* Information contained herein was gained from an uncritical reading of the state laws and should, therefore, be used to allow for error.