Approved April 1, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 ~~a.m.~~/p.m. on February 11, 1986 in room 313-S of the Capitol.

All members were present except:
Representatives Douville and Duncan were excused

Committee staff present:
Jerry Donaldson, Legislative Research Department
Jan Sims, Committee Secretary

Conferees appearing before the committee:
Harold Riehm, Kansas Association of Osteopathic Medicine
Ron Smith, Kansas Bar Association
Dick Hite, Kansas Bar Association
Bob Arbuthnot, Kansas Trial Lawyers Association
Lynn Johnson, Kansas Trial Lawyers Association

Rep. Solbach made an announcement acknowledging today being Senior Citizen's Day and recognized and welcomed the senior citizens attending today's meeting.

Harold Riehm of the Kansas Association of Osteopathic Medicine spoke to the committee concerning his association's position on HB 2661. (Attachment 1) Mr. Riehm spoke briefly to the different issues involved in HB 2661 affecting osteopaths and presented some specific requests for amendments to the bill. His association prefers that section 4 be left as is; KAOM supports retaining sections 25 and 29 and the deletion of section 34(4). They further recommend that when averaging the surcharge within classes the averaging be applied against the base premium of St. Paul (before application of the 20% surcharge to the St. Paul rate used to determine the base JUA rate). Many DO's are in the JUA not because of bad histories but because Medical Protective and St. Paul will not insure DO's who provide OB-GYN services. For this reason the JUA rate works as a penalty.

Ron Smith of the Kansas Bar Association introduced Dick Hite, Chairman of the KBA Legislative Committee (Attachment 2). Mr. Hite said that the KBA does believe there is a medical malpractice problem and one of the symptoms of that problem is high premiums. Improvements to alleviate this problem should inclued some improvements in the tort system, but a cap on malpractice awards is not one of those improvements. Mr. Hite said that would be an overreaction and it would be particularly tragic to abort the tort system for a special interest group.

The tort system establishes a standard of conduct, establishes penalties on those whose conduct is not acceptable, and compensates those who are injured by unacceptable conduct. The tort system has adopted the standards set by the doctors. It is impossible for a victim to get an award without doctors testifying that there has been a deviation from the standard. He said that Section 18 of the Kansas Constitution protects the rights of a person to recover damages incurred due to an injury from another.

The KBA believes it is impossible to address tort reform without looking at many factors. There is a much greater number of cases now being filed than in the past. Witnesses are now available that were not available in the past. Many of the present claims are valid and the Fund and insurance companies pay settlements more now than in the past. The abscence of merit rating in the past resulted in no distribution of the economic penalties necessary in the tort system. Totally inadequate premiums were paid through the early years of the Fund.

The coverage in Kansas since the implementation of the Fund is unheard of in insurance history, even since the implementation of the $3 million limitation on the Fund. This has caused actuarial problems in the insurance industry. Premiums

will be affected by the 1985 amendments modifying the collateral source rule in medical malpractice cases. The inflationary factor makes a difference. The history of insurance companies reflects underwriting cycles. With less competition rates increase. We are now in the middle of one of those cycles.

The KBA favors recommendations of the Board of Healing Arts within the bill. The medical profession should put its own house in order.

The KBA supports adoption of a merit rating program.

As pertains to tort reform, the KBA supports the use of itemized verdicts. Economic losses should be broken down for future medical, future loss of earnings. The KBA proposes more reform in this area than is in the current bill. The KBA supports the requiring of proof of present value of future damages. The KBA supports a revision of post judgment interest in line with current market rates. The KBA feels there should be more use of screening panels but feels it is a mistake to make panels mandatory for use in every malpractice case. Competent attorneys will eliminate the majority of unmeritorious cases. There is a need for a mechanism to have attorneys certify they have the proper medical testimony to verify their allegations. The court could then review the certification. The KBA favors the imposition of sanctions against attorneys maintaining frivilous lawsuits and defenses similar to the provisions of current SB 480. The KBA suggests a study be conducted by the Legislature of the jury service in Kansas. The jury system would work better if less people were automatically excused from service.

The KBA believes a cap on damages will defeat the sound principles of the tort system and will be unfair. Despite the publicity, there has been no need demonstrated for caps on medical malpractice cases. The KBA asked the Health Care Stabilization Fund to identify cases with jury verdicts of $500,000 and over since 1976. They were given 5 cases but believe there are 2 additional verdicts. Of those one was reversed on appeal, one is still on appeal, two were affirmed on appeal and one settled after the verdict for less than the amount of the verdict. The remaining two cases are believed to have been settled. In the cases which have been settled the amount of out of pocket expenses of plaintiff were close to the total amount of the verdict. The talk of runaway awards is overstated. There has ben no pattern of awards being too high. There has been only one case awarding punitive damages and the plaintiff's attorney in that case has announced no attempt will be made to collect that portion of the verdict.

In response to questioning by Rep. Vancrum, Mr. Hite stated that the KBA supports penalties imposed for unreasonable attitudes toward settlement. Mr. Hite responded to questions pertaining to the makeup of the Legislative Committee of the KBA in proportion to the total membership of the KBA.

Bob Arbuthnot of the Kansas Trial Lawyers Association introduced Lynn Johnson. (Attachment 3). Mr. Johnson said that the Kansas Trial Lawyers Association feels that caps are arbitrary, that they have no relationship to the particular injuries in a given case and they will have little if any affect on premiums.

Mr. Johnson urged the committee not to take an "all or nothing" approach to this problem. He said there are three problems involved: (1) medical malpractice; (2) medical malpractice litigation; and (3) medical malpractice liability insurance. He said these areas should be separated into individual bills to address the three issues. The KTLA wants relief for doctors with their premium problems and they want less frivilous lawsuits. If the total package as presently proposed passes and has the desired results on premiums, it will never be known if the individual provisions worked because the cap will get all the credit for premium reduction. He stated that the bill will result in increased costs and increased costs means increased premiums. He cited screening panels as an example of increasing costs. He said forced annuities will not save insurance companies any money in that they do not reduce future damages to present values and there are extra costs in buying the annuities.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 11, 19 86

The Chairman proposed that the members of the committee consider a possible amendment which would place a pinhole in the cap by allowing a plaintiff after the receipt of an award to appeal to the Board of Governors of the Health Care Stabilization Fund if there are not enough funds to meet future needs after the expiration of an annuity. In this case the Board of Governors could act as a court of equity. This may be a way of meeting the philosophical and hypothetical questions of members of the committee pertaining to caps.

The meeting adjourned at 5:50 P.M.

2/6 Riehm

TESTIMONY OF THE KANSAS ASSOCIATION OF OSTEOPATHIC MEDICINE ON HB 2661 - PRESENTED TO THE HOUSE JUDICIARY COMMITTEE - FEBRUARY 11, 1986

Mr. Chairman and Members of the Committee:

My name is Harold Riehm and I represent The Kansas Association of Osteopathic Medicine. There are approximately 240 D.O.s practicing in Kansas, most of them in general practice and many in the practice of obstetrics and surgery as a part of their overall practice.

We stand in support of most of the provisions of HB 2661, including most of the amendments that have been introduced to date. Exceptions are noted later in this testimony. I repeat, that we endorse all parts of this bill--the quality assurance provisions, the changes in the health care stabilization fund, the reporting and disciplinary provisions pertaining to providers, and the tort changes.

We view the State as an important partner in resolving the primary problem at which this Bill is directed--namely the rapidly spiraling upward costs of medical professional liability insurance. We appreciate the efforts the State made in the mid 1970's to resolve what was then primarily a problem of availability. And, while not all the institutions established at that time are without flaw, that observation is steeped in hindsight. While HB 2661 is aimed primarily at the issue of cost of insurance, in the osteopathic profession we hold that availability remains a problem, and particularly for osteopathic physicians.

The case for change has been presented so many times in recent years, that a restatement borders on redundancy. Permit me, then, just to make a few observations.

OBSERVATION 1: Many providers need rate relief. Testimony given yesterday by the rural M.D. physician could be repeated with few differences, by a large number of osteopathic physicians. He did not include one partial remedy, however, and that is ceasing the practice of obstetrics. A few have done so; many more will follow if insurance rates continue to spiral upward at 30 to 40 percent each year. A problem of unaffordable rates then also becomes one of a shortage of physician services, with all its attendant consequences.

Rarely does any provider allude to seeking lower rates. What physicians feat most of all is a continuation of the upward spirals. And it is these that we think HB 2661 will at least partially remedy.

OBSERVATION 2: THE ULTIMATE REMEDY IS TO CHANGE THE ENVIRONMENT OF MEDICAL PROFESSIONAL LIABILITY IN KANSAS. Throughout testimony to date, statements have been made that any one major focus of this Bill will not resolve the problem. Those statements are probably true. What it emphasizes is that all of them are needed, and that together they may impact upon the actors in the process in a way that gradually changes the environment of medical professional liability insurance. Part of that environment is the extent of litigation in the State. Some states are more litigious than others. By approaching the problem from the many perspective of HB 2661, we think that environment can be changed.

Another part of that environment is that the physician has lost much of the ability to control the pricing mechanism. There was a time when any increase in overhead was automatically passed on to health care consumers. But with the advent of HMOs, PPOs, Medicare freezes, Medicaid cutbacks, major carrier Cap programs, etc., pass through is

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no longer an automatic recourse. This, then, just changes the nature of the problem. Instead of increasing health care costs, it becomes physician affordability. And as heard yesterday, the Deep Pocket perspective of physicians is often inaccurate.

OBSERVATION 3: THIS IS TOTALLY A PHYSICIANS BILL WITH MUCH GET AND LITTLE GIVE. Few osteopathic physicians would so characterize this bill. The quality assurance provisions of this bill we strongly endorse. But this is not to say that all physicians feel at ease with all of them. Many feel rather strongly that the issue of bad doctors contributing appreciably to the cost of insurance is overplayed. Many, while recognizing the importance of the reporting provisions, question that which makes them report a colleague who has done something that is below the applicable standard of care, but also any such action that may be below that standard. Such is a standard of reporting found in few other professions.

KAOM also endorses the substantially increased involvement in the professional associations of providers in playing a key role in reporting and in investigating their own respective houses.

OBSERVATION 4: THE PROPOSED CAPS ON RECOVERY ARE REASONABLE AND OFFER SUBSTANTIAL OPPORTUNITY FOR FAVORABLY ALTERING THE PROFESSIONAL LIABILITY ENVIRONMENT. We think that the $250,000 cap on nonpecuniary losses and the overall $1,000,000 cap on recovery reflects a compromise between adequacy for injured consumers and a level offering a chance at significantly contributing to an alteration of the medical malpractice environment. We think the creative structuring aspects will provide adequate compensation for incurred injuries. No doctor making a mistake ever takes it lightly, and there is general condemnation of careless negligence such as was illustrated to you by some who testified yesterday to this Committee. But it is indeed a valid question as to why awards for a lost leg, for example, incurred at the hands of a negligent driver in an automobile accident, or a leg loss in an industrial act of negligence, should be worth substantially less than a leg lost in the course of medical malpractice. The proposed caps, we think, will help in addressing the underlying reasons explaining part of these differences.

In sum, Mr. Chairman, it is as unlikely that this is a panacea anymore than it is likely that it stands to do the permament harm to injured parties as claimed by the Bill's opponents. We think it is a major step in the right direction and urge your support.

The Kansas Association of
Osteopathic Medicine

SPECIFIC REQUESTS FOR CHANGES IN HB 2661

Section 4: Osteopathic Physicians that comprise the Impaired Physician Committee of KAOM have asked that Section 4 provisions dealing with Committee reporting to the Board of Healing Arts be left as is. This would be in opposition to the amendment suggested by The Medical Society.

Section 25: We support retaining this Section that provides for averaging of Fund surcharge among physicians in a given class. As we testified earlier, this is particularly acute to D.O.s because most of them continue to not qualify for Medical Protective coverage (because the Co. will not insure D.O.s that do obstetrics), and also because an increasing number of D.O.s are being forced into JUA coverage. To reiterate earlier testimony:

CLASS - NO SURG. OR MINOR SURGERY	MEDICAL PROTECTIVE	ST PAUL	JUA
Current Base Premium	$ 3,408	$ 4,596	$ 5,515
Base Premium + 110 Fund S/C	7,157	9,562	11,582
Total Premiums with Possible 86-87 Base Increases (MP-30% & SP-45%)	9,304	13,995	16,794

Contrasted with the physician appearing on Monday, February 10 (M.D.), a D.O. would not have the option of coverage with medical protective if the D.O. did obstetrics.

RECOMMENDATION: Since testimony has been presented that the logistics of averaging surcharge within classes would be substantial, KAOM urges that HB 2661 include a provision requiring that for those physicians forced into the JUA due to absence of other alternatives, and who have claims history below a stated level, that the Fund surcharge be applied against the base premium before the addition of the 20% surcharge applied to St. Paul's rates to determine JUA base premium rates. KAOM still feels that the provisions of the recent law for averaging are a reasoned and justified approach, but should they not be enacted we urge consideration of this recommendation.

Section 29: We suggest that the language of this section be retained rather than amended out as provided in HB 2661. The practice of KAOM submitting a list of three suggested physicians for consideration by the Governor in filling a D.O. vacancy on the Board of Healing Arts has worked well. Since the law only requires that the Governor shall consider the list, he or she retains the prerogative of appointing someone not on the list of three, or even someone not a member of the professional association of that branch of the healing arts.

Section 34, Par. (r): We urge deletion of this paragraph which would make it an offense possibly leading to revocation or suspension of license or censure, for a physician to treat himself or herself, or a member of his or her family, with a controlled substance. For doctors practicing in small towns or rural areas, where frequently there may be only one doctor on call at a time a pharmacy is not open, this is an unreasonable--and probably unenforceable--provision.

KANSAS BAR ASSOCIATION

OFFICERS
PRESIDENT
Gerald L. Goodell
215 E. 8th
Topeka, KS 66603 (913) 233-0593
PRESIDENT-ELECT
Jack R. Euler
P. O. Box 326
Troy, KS 66087 (913) 985-2322
VICE-PRESIDENT
Christel Marquardt
1100 1st Nat'l Bank Tower
Topeka, KS 66603 (913) 235-9511
SECRETARY-TREASURER
Dennis L. Gillen
621 1st Nat'l Bank Bldg.
Wichita, KS 67202 (316) 265-9621

EXECUTIVE COUNCIL
DISTRICT 1
John J. Jurcyk
P.O. Box 1398
4th Floor, 707 Minnesota Ave.
Kansas City, KS 66101 (913) 371-3838
DISTRICT 2
Fred N. Six
Massachusetts at South Park
P. O. Box 666
Lawrence, KS 66044 (913) 843-6600
DISTRICT 3
Leigh Hudson
200 Citizens Nat'l. Bank
200 S. Main
Fort Scott, KS 66701 (316) 223-2900
DISTRICT 4
Warren D. Andreas
303 State Bank Bldg.
Winfield, KS 67156 (316) 221-1610
DISTRICT 5
Edward L. Bailey
1100 1st Nat'l. Bank Tower
Topeka, KS 66603 (913) 235-9511
DISTRICT 6
Robert W. Wise
P.O. Box 1143
McPherson, KS 67460 (316) 241-0554
DISTRICT 7
A. J. "Jack" Focht
807 N. Waco
Suite 300, Brooker Plaza
Wichita, KS 67203 (316) 269-9055
DISTRICT 8
William B. Swearer
Box 1907
Hutchinson, KS 67504-1907
(316) 662-3331
DISTRICT 9
Lelyn J. Braun
1505 E. Fulton Terrace
Garden City, KS 67846 (316) 275-4146
DISTRICT 10
Edward Larson
P.O. Box 128
Hays, KS 67601 (913) 628-8226
PAST PRESIDENT
Darrell D. Kellogg
200 W. Douglas, #630
Wichita, KS 67202 (316) 265-7761
YOUNG LAWYERS PRESIDENT
Danton C. Hejtmanek
P.O. Box 2667
Topeka, KS 66601 (913) 357-0333
ASSOCIATION ABA DELEGATES
John Elliott Shamberg
860 New Brotherhood Bldg.
Kansas City, KS 66101 (913) 281-1900
Glee S. Smith, Jr.
P.O. Box 360
Larned, KS 67550 (316) 285-3157
STATE ABA DELEGATE
William C. Farmer
200 W. Douglas, #830
Wichita, KS 67202 (316) 267-5293
KDJA REPRESENTATIVE
Hon. Michael Corrigan
525 N. Main — Courthouse
Wichita, KS 67203 (316) 268-7661
EXECUTIVE DIRECTOR
Marcia Poell
P.O. Box 1037
Topeka, KS 66601 (913) 234-5696

February 11, 1985

Biographical Information
Richard C. Hite

Representing
the
Kansas Bar Association

1. Active member, Kansas and American Bar Associations

2. Kansas Member, National Conference of Uniform State Laws.

3. Fellow in the American College of Trial Advocates, a Organization representing 1% of the American bar which has tremendous influence on the future course of the American legal system.

4. Past President, Kansas Association of Defense Counsel

5. For 20 years, a partner in Kahrs, Nelson, Fanning, Hite & Kellogg, one of the state's largest law firms specializing primarily in defense work.

6. Litigation specialist with extensive trial experience in medical and legal malpractice defense.

Attachment 2
House Judiciary
2-11-85

1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601 • (913) 234-5696

BEFORE THE HOUSE JUDICIARY COMMITTEE

PARTIAL TRANSCRIPT OF TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON HOUSE BILL 2661
ON FEBRUARY 11, 1986

Richard C. Hite
Kansas Bar Association

MR. HITE: Mr. Chairman, members of the committee, I'm certain that there are occasions which most of us think that things are a little bit backwards. I read a comment of the comedian Rodney Dangerfield recently in a sports routine. He commented that he was attending a prize fight one night when a hockey game broke out. And I must confess that there have been times and occasions in the last several years when the Bar Association Legislative Committee has been working on the so-called medical malpractice problem that I thought things were a little bit backwards. And think that we have been told, perhaps, a little bit too frequently, at least in some areas, that in order to solve what amounts to medical malpractice problems, we must make some changes that we believe are very undesirable in the legal system or particularly the tort system.

First of all, however, let me acknowledge that the Kansas Bar Association does believe that there is a medical malpractice problem; that a very important symptom of that problem is that medical malpractice insurance premiums are extremely high, and we acknowledge that actions need to be taken to address these problems, and we acknowledge that the steps that need to be taken include some improvements in the tort system. We believe, however, that particularly with regard to caps on awards, arbitrary artificial caps on awards, that that would constitute a very tragic overreaction

and affect one of the very basic principles of the tort system which is time honored in this jurisdiction and in most others. We believe that it would be particularly tragic to, in effect, abort one of the fundamental principles of the tort system for a special interest group or for any special interest group. We do not believe that that would be in the public interest for the long term.

The tort system may merit some basic comments, to lay the groundwork for the position of the Bar Association. That system, as most of you know, has developed over a long period of time. It has the effect of establishing standards of conduct for all persons. It imposes economic penalties on persons who injure others by conduct which does not meet those established standards. And in that process, it compensates those who are injured by unacceptable conduct.

Now, it's very important, I think, to understand and keep in mind that in establishing conduct, the standards of conduct for professional groups such as doctors, the tort system does not come forth with its own independent thoughts, but it adopts the standards which are set by the professional groups themselves. In the present context, the doctors set the standards that we are concerned with. Thus, in the medical malpractice case, it is impossible to recover unless one or more members of the profession come forth and say that there has been a deviation from an accepted standard of the

medical profession.

The tort system as it's developed in this state and in others has been deemed, in the past, to be of sufficient importance to warrant constitutional protection. I'm sure that you have been reminded prior to this time that Article 18 of the Bill of Rights of the Kansas Constitution protects the right of a person to recover damages for injuries caused by others. But, again, back to the basic premise. The entire theory of the tort system is that there will be economic motivation for persons to abide by accepted standards of conduct, and in a sense that principle and the present situation, the insurance premiums that we are discussing very frequently in this context, show that the system may be working as it's supposed to.

In addressing the basic medical malpractice problem, the Kansas Bar Association believes it's impossible to address the so-called tort reform issues without at least taking cognizance of many other factors which bear upon what should be done about the tort system. First of all, there unquestionably is a much greater number of medical malpractice cases at this time than there have been in the past. There is a lot of speculation. Medicine has become less personal, more of a big business. There are witnesses now available to testify against members of the profession, whereas at one time that was not the case. Whatever the

reasons, there are a growing number of malpractice claims. The fact that many of those claims are meritorious, I think, is well demonstrated by the fact that the Health Care Stabilization Fund and the medical malpractice insurers have seen fit to pay significant and in some cases very substantial sums to settle an ever increasing number of claims.

Secondly, we think it's necessary to keep in mind that there has been an absence of merit rating in this state for medical malpractice insurance premiums. Thus, there has not been the distribution of the economic penalties in the manner that's contemplated by the tort system. We believe that it's necessary to keep in mind the totally inadequate premiums that were paid for a number of years under the actuarially unsound inception of the Health Care Stabilization Fund. I'm sure you will all-- you are all aware there were no premiums paid for unlimited coverage for a period of three years, a small percentage of premiums in other years.

The coverage that Kansas has provided to physicians, I believe, is unheard of in underwriting history. The fact that Kansas has provided, starting in 1976, unlimited coverage has created actuarial problems of a very serious source. The fact that it now provides three million dollars worth of coverage, whereas the most provided by any other state fund is one million, continues, in our opinion, to

contribute to the problems which relate to what should be done to the tort system.

We believe that another factor which should be kept in mind is the future impact of the 1985 amendment to the laws of this state modifying the collateral source rule in medical malpractice cases. And certainly we believe that it's fair and warranted to keep in mind the inflationary factor that has been with us over the great majority of the time since the enactment of the original health care stabilization fund legislation. Otherwise, it's impossible to analyze and interpret the figures that we have in a meaningful way.

And another factor - and the last that I will mention - we believe that if you look back in the history of insurance underwriting that there have been underwriting cycles throughout that history, with first increased competition, then lessened competition, followed by an increase in insurance premium rates. For whatever reasons, that is a historical factor and we think that we are in the midst of one of those cycles at this time.

Now, with regard to the Kansas Bar Association's position, I think it's probably been made clear heretofore that we certainly favor the adoption of the recommendations of the Kansas Healing Arts Board to improve discipline within the medical profession and thereby to reduce the number of malpractice claims. That seems extremely basic to us. We

think that any group that comes to the legislature for special interest legislation should put it's own house in order, to start with.

We think, secondly, that there should be the adoption of a merit rating program so that the economic penalties associated with deviation from accepted standards of conduct follow those who have violated the code imposed upon them by their own profession.

Turning now to the specific question of what should be done about the tort system, the Kansas Bar Association has, for some time, advocated the use of itemized verdicts, and we are pleased to see that to some extent, at least, that's a part of the bill that you are now considering. We believe that the verdict should be itemized for several reasons, and even believe that perhaps the language of your bill should be clarified to require more than the courts may interpret that language to require. We think that the economic losses, for example, should be broken down so that there will be separate categories for future medical expense, for future loss of earnings, loss of income of any kind, so that a judge can look at the verdict after it's been rendered and determine whether it's supported by the evidence.

CHAIRMAN KNOPP: Might I interrupt there. Do you believe that should apply across the board and not just to medical malpractice cases?

MR. HITE: Our recommendation at this time is in the medical malpractice area, and I don't believe that the executive council of the Bar has taken a look at that same proposition on an across the board basis.

We also believe that there should be required proof of the present value of future damages. In other words, the principle of structured settlements should be applied in lawsuits determining what is required today to make certain that certain sums are available at some time in the future. We have been on record, I think, for three or four years as advocating revision of post-judgment interest statutes to conform that interest rate to the existing market rate for money, and we are pleased to see that that is part of your bill. We think that even though that may seem not a routine factor, the benefit produced is equal to or greater than the benefit that will be produced with medical malpractice insurance premiums by several more dramatic-sounding proposals.

We agree that there should be more use of screening panels in medical malpractice cases, but we think that a mistake would be made if those screening panels are required for each and every medical malpractice case. For example, there are many attorneys in this state who are experts in this field, who have their own routine for investigating cases and, to my knowledge, those attorneys simply do not

waste their own time or the time of the courts in filing medical malpractice cases unless they have available medical testimony to support the allegations that they make.

Now, in those situations, it would be a waste of time and it would be a waste of money to require submission of the facts to a medical screening panel. We think that there are attorneys, perhaps through experience or for other reasons, who file cases that should not be filed, and they should be required to submit their cases to the screening panels. We would propose a mechanism whereby the attorney filing the case had to certify that he had medical evidence adequate to get the case to a jury, and we also would recommend that the judge at the first discovery conference be authorized to inquire about that certification, satisfy himself that the evidence is adequate to justify the filing of a lawsuit and to require submission to a screening panel if he is not so satisfied. We believe that would be a much more practical way of proceeding, that it would eliminate the potential waste and obtain potential benefits.

CHAIRMAN KNOPP: Might I interrupt you. The argument has been made to this committee that a screening panel composed of Kansas physicians - and I'm not sure whether it's been actually stated this way, but it's certainly been my interpretation - would constitute a quasi mini trial in which the verdict of that screening panel would

then have an impact on a jury's decision when they are faced with a battle of experts hired by the plaintiff and the defense, maybe from out of State, on-- at the time of trial; that this Kansas screening panel might tip the balance one way or the other and therefore have a very beneficial effect towards settlement or resolution of the case before trial. What's your thoughts on that argument?

MR. HITE: I certainly believe that that could be the case, and might well be the case in those situations where persons other than highly-experienced, highly-qualified experts in this field were involved.

CHAIRMAN KNOPP: But highly-qualified attorneys would have their experts, ones from Johns Hopkins the other from Stanford. Plaintiff's is from Johns Hopkins and defense's is from Stanford, and now we are arguing in Wichita over whether or not there is deviation from standard, and we have got now inserted the results of a three panel Kansas physicians and their opinion one way or the other. Both counsel may be well founded in their position. What does the insertion of this screening panel do on that process, is what I'm really getting at.

MR. HITE: Well, it certainly adds a local-- I believe my primary answer to your question is that the system can handle that.

CHAIRMAN KNOPP: Without that screening panel

being inserted?

MR. HITE: If the two attorneys involved have their witnesses, I think that the attorney for the plaintiff has an obligation to proceed with the case. And if, under circumstances that we really don't favor, a screening panel is imposed on that situation, I think through cross-examination, through the quality of proof available to one side or the other, that the facts are going to be made to appear as they should to a jury. I have considerable confidence in the system to handle that given situation and produce a just result, but we do question the need for imposition of that panel on the situation where you do have the witness from Stanford and the one from the other medical school---

CHAIRMAN KNOPP: Thank you.

MR. HITE: -- as a required matter. We-- the Bar Association also favors imposition of sanctions against attorneys or parties who maintain frivolous lawsuits. Now, we have talked a little bit about the increasing number of medical malpractice cases that are filed. I believe that if you could examine each and every one of those cases, we would find out that there is justification for filing a high percentage of them, but clearly there are cases filed which should not be filed. And when that can be determined by the court, we favor imposition of sanctions, not only under

existing legislation but under legislation that has been proposed this year. Senate Bill 480, which is a Judicial Council bill, would add one more authorization for imposition of sanctions against attorneys or parties who file frivolous lawsuits by requiring certification by the attorney of the merits of his case at the time of filing.

We also believe that there should be a study conducted by this committee or by the legislature of jury service in this state. Frequently, we are in discussions of issues such as the medical malpractice issues and are confronted with comments by people, and particularly those from the business community, who criticize the jury system. And yet if you ask those who are critical, "How recently have you served on a jury?," the answer is almost always, "I don't serve on juries. I arrange to get excused from juries." Now, no system is perfect and never will be. No matter what dispute resolution system is in this state-- in effect in this state, there are going to be problems with it.

Jury system is a good system. It's been with us a long time. It almost always achieves a good measure of justice. It would be a better justice system if everyone in the state was required to serve on juries without regard to their status, except for those things now specified by statute which would limit the ability or impair the ability of the individual to participate effectively.

CHAIRMAN KNOPP: Representive Solbach.

REPRESENTATIVE SOLBACH: I have two questions. Are you advocating that-- I mean, would you want someone to be serving on a jury that absolutely did not want to be there and resented the fact he or she had to be there?

MR. HITE: It might depend a little bit on what side I was on and who I thought the person would direct his animosity towards. But, no, there is a problem of that nature, but each side has three preemptory challenges. You can handle that kind of a problem, but what we can't handle is an ever-increasing number of people who think that somehow they are above or beyond or otherwise not available for jury service. The statute, when you read it, that now exists doesn't sound that bad. The problem is out there in the implementation of the statute where the judges simply excuse too many people. The people should take their turn.

REPRESENTATIVE SOLBACH: I'd like to go back to the frivolous lawsuit and the sanctions in filing frivolous lawsuits. We have that statute on the books, but it appears that it's very, very seldom used. You referred to Senate Bill 480. I'm not familiar with that bill, but I am very interested and I think this committee is very interested in the specific recommendations that you might have. If you could lay those out for us rather than just incorporating them by reference to a bill on how we could improve the

frivolous lawsuit statute to make it work better than it does work.

MR. HITE: I-- this is my personal belief. I believe statutes of that nature simply take a while to achieve maximum effect. We are seeing that, I think, in the Federal courts right now, and hopefully we will see the same thing in Kansas. I think that when you are talking about imposition of fairly serious sanctions against attorneys and against parties, there is an initial reluctance. There is an inclination to give the person the benefit of the doubt and to assume that there was action in good faith. But the statute has been used-- the Federal statute is used even more, in my opinion, and I believe we are moving in the right direction without the need for further legislative action. And perhaps the final answer to that won't be known for another year or two down the line. Now, what you're going through right now, I think, adds some impetus to the use of that statute.

The possible recommendations of this committee, of this legislature, are seen by many as a threat to the tort system. I think when you feel threatened you look around more carefully to see what you could do that you haven't been doing and try to do it. I know that I've made that comment to lawyers, and I've made that comment to judges by virtue of what I have seen and heard as a result of serving on the Bar

Association Legislative Committee. I think there are other forces at work that will cause those statutes to be used effectively in the future.

REPRESENTATIVE SOLBACH: I have heard it said to some extent that's what a cap is going to do. More than anything else, it's going to be viewed as a threat to the tort system or punishment for the tort system, which will send waves and messages out there and cause attorneys of plaintiffs to change their behavior. What I am hearing you saying is we don't need to go that far in order to send that message?

MR. HITE: That's correct. That's correct. I also believe that the general subject is fraught with difficulty, that almost always the winning party in a lawsuit thinks the other fellow's position was frivolous, groundless and so forth. So it's not a simple thing to deal with. It requires exercise of good judicial discretion.

At this time I'd like to turn to the Kansas Bar Association's opposition to the imposition of arbitrary caps on awards. This is the one feature of the proposed bill that is most distressing to the Bar Association. We believe that arbitrary caps defeat the sound and fundamental principles of the tort system, and we believe that they are unfair. And I could repeat that - we believe that they are unfair - a number of times in order to emphasize the thoughts of the Bar

Association on that point. And I emphasize at this point that I am speaking for the Bar Association as a whole, no specialized group within the Bar Association.

Furthermore, we believe that despite much imprecise publicity, which tends to create the impression that runaway jury verdicts are rampant and occurring very frequently, that no need has been demonstrated for an arbitrary cap on awards in the medical malpractice field.

Some time ago we asked the Health Care Stabilization Fund to identify those cases in which the Fund is involved in which there were jury verdicts exceeding $500,000. We were given the names of five cases. We have some reason to believe that the research may not have been complete and there may be one or two other cases since 1976 where the Fund was involved where the verdict exceeded $500,000. Of those cases identified by the Health Care Stabilization Fund, one was reversed on appeal by an appellate court which said that there was not adequate proof of the damages, and it's been sent back for a new trial. One is still on appeal. Two have been affirmed on appeal, and one was settled for less than the amount of the verdict. If we are correct that there were two more cases out there that were not identified by the Fund, we believe those two cases were settled and that the records pertaining to the settlement were sealed so that they remained confidential. So we don't really know the outcome

of those cases.

In those cases which have-- which fall in this category, we know that in all cases except perhaps two the amount of the out-of-pocket expenses of the plaintiff are very, very close to the total amount of the verdict. In the one case-- one of the two remaining cases that I can speak about, the nature of the injuries were particularly horrible, and it is not hard to understand why a verdict in excess of the special damages or the out-of-pocket expenses was awarded.

Now, I think that perhaps even members of the Bar Association Legislative Committee have accepted some of the talk about the runaway jury verdicts, the excessive verdicts, and have assumed that there were many more verdicts of a much higher amount out there than there really were. But when this is examined, we submit that under the present economics of this country, with inflation having done to us what it has, with the cost of medical treatment, with the loss of salary being what it is in the cases that we are talking about, that there just is no pattern of excessive verdicts that would justify an arbitrary cap on awards.

I can't help but compare this given situation with the position of the Medical Society a year ago. At that time high on the priorities of the Medical Society legislative program was relief from punitive damages. Now, as far as we can ascertain, and we've spent a great deal of time, there

has only been one verdict in the history of the State of Kansas against a physician for punitive damages. And in that case, plaintiff's counsel announced he would make no effort to collect the punitive damages.

The doctors were simply afraid of what the future might hold, and we submit to you that the same exact situation applies with regard to the alleged runaway, rampant, excessive verdicts. And that if you get beyond the principles of the situation, that there is no statistical data which justifies imposition of an arbitrary cap on awards.

We know that you have done a tremendous amount of work, as have many other people on this subject. We think that the proposed bill contains many thoughtful proposals with merit. We hope in the strongest possible way that your final product will not include a screening panel provision which makes screening panels mandatory in every case regardless of the circumstances, and we hope fervently that your product will not include an arbitrary cap on awards.

I thank you very much. If there are questions, I would be glad to try to answer.

CHAIRMAN KNOPP: Representative Shriver.

REPRESENTATIVE SHRIVER: When you were introduced, you said that you worked for the defense in malpractice cases?

MR. HITE: I'm a partner in a firm which does a substantial amount of defense work. We have no rule against accepting plaintiffs cases, and do on occasion accept plaintiffs cases.

REPRESENTATIVE SHRIVER: In other words, you more or less work for insurance companies in that capacity?

MR. HITE: In our practice we do.

REPRESENTATIVE SHRIVER: Do you have any, for lack of better word, respect for the insurance companies you work for as far as their accuracy of information or actuaries or anything at all?

MR. HITE: Any lack of respect?

REPRESENTATIVE SHRIVER: Either way.

MR. HITE: No, sir, I do not

REPRESENTATIVE SHRIVER: Their actuaries do place caps on their premiums, do they not?

MR. HITE: As I understand the statistical data available, they have-- the actuaries for the Health Care Stabilization Fund have projected the results of caps at various levels

REPRESENTATIVE SHRIVER: That's what I'm getting at. Do you think that this committee should believe those figures?

MR. HITE: I think-- I raise no issue that they were not-- that these projections were not offered to you in

good faith, but we are talking about the future and that creates great doubt, and there is almost always an assumption that the trend that has existed is going to continue and that the tree is going to grow clear to the sky and all that sort of thing, and that just doesn't happen.

REPRESENTATIVE SHRIVER: In cases you have been involved in, there is a requirement that judges review the awards and also the attorney fees, have you ever been involved in a case where they did actually do that and made any reduction or modification at all?

MR. HITE: I have been in cases where questions were raised about the amount of fees and where fees of at least the plaintiff's side were approved by the court.

REPRESENTATIVE SHRIVER: No modification?

MR. HITE: I cannot recall any case where there was a modification. I do believe that many judges have not been aware of the existence of the statute that required them to review those fees, and perhaps one benefit of all these procedures is that they are now becoming aware.

REPRESENTATIVE SHRIVER: One last question. I might have misunderstood you in your opening remarks, but I thought you said-- and I wrote it down. You said you thought that caps would be undesirable for long terms. Could I take that as caps for the next three or four years and that some might be desirable?

MR. HITE: I didn't mean to imply that, no sir. I tended to take into account that members of the committee might believe that there would be some, either, temporary or permanent beneficial effect, but the Bar Association is strongly opposed to caps for any length of time.

COMMITTEE MEMBER: Representative Shriver's question involved also remitters as well as attorney fees. Have you been in cases where there have been remitters of the amount of the verdict?

MR. HITE: Cases generally?

COMMITTEE MEMBER: Well, in medical malpractice.

MR. HITE: I have not. Now, let me emphasize that although I have done some medical malpractice defense work, that in recent years two of my partners have taken that work over and I have tended to do very little of that work personally.

COMMITTEE MEMBER: Within the firm, are you aware of any remitters? In conversations at coffee, you certainly would have been aware of it.

MR. HITE: I know of at least one situation where the judge took some action post-verdict with regard to the verdict.

COMMITTEE MEMBER: Representative O'Neal.

REPRESENTATIVE O'NEAL: Dick, as a member of the KBA, I'm aware the position the KBA has taken on the caps,

and you keep referring to the position as being in opposition to arbitrary caps. And from what I hear, that almost, from the position of the KBA, is redundant; that the KBA takes the position that any cap is going to be arbitrary. Under what circumstances-- my first question is, under what circumstances would a cap not be arbitrary according to the KBA's position?

MR. HITE: Well, we use that term "arbitrary caps," I suppose, to distinguish it from the caps that exist by virtue of the existing law and the judicial process. There are caps on awards by virtue of the requirement that there be evidence to support the verdicts and that no verdict shock the conscience of the court. Now, remititers have been granted over the years in all types of cases, thereby illustrating that there is a cap on awards produced by the requirement that the award be consistent with the evidence, be supported by the evidence.

REPRESENTATIVE O'NEAL: If I could follow up, would it be your position that the existing cap on pain and-- existing cap on wrongful death and Workmen's Compensation and the Tort Claims Act is arbitrary?

MR. HITE: Yes, a legislatively imposed cap applicable to all cases. In that sense, I would say that they are arbitrary.

REPRESENTATIVE O'NEAL: My next question is-- my

mail has been interesting. Being a member of this committee and also an attorney, I'm getting a lot of mail from attorneys, and what's interesting is the fact that I'm getting mail from-- most of the trial attorneys are saying that they don't like the caps, but most of the attorneys that I'm getting letters from who aren't trial attorneys who make up a majority of the membership of the KBA, those that don't practice normally in the courts, are in favor of them. My question is, did the KBA send a out a survey to its membership in general to determine what the attitudes of all the attorneys in the KBA were concerning caps?

MR. HITE: We have not conducted any type of scientific survey. We, theoretically, have consulted with our members in other ways. And I might add that I know that a year ago, perhaps even two years ago, there was pressure placed on defense counsel to write letters of the type that you are referring to. And, therefore, I have some difficulty with accepting that there is a majority of attorneys who favor caps. I think it's a small minority.

COMMITTEE MEMBER: Representative Snowbarger, do you have a question?

REPRESENTATIVE SNOWBARGER: Well, not anymore. I will just make a statement. I had the same question Representative O'Neal had. With all due respect to you, Mr. Hite, and to the Bar and the organization which I'm a part,

and hoping to be a part after the proceedings, no one has ever asked how I felt about it. No one ever asked any of my partners how they feel about it. And now all of a sudden we have our organization standing up speaking for us without having ever attempted to contact us about those.

MR. HITE: Well, I'm sure you are aware that we work on a representative basis. We have a legislative committee that has about 30 members widely distributed around the state. They certainly have been consulted about their views. The executive council represents all portions of the state, and we think that although there has not been a letter sent out to each attorney, we have made an effort to find out where the Bar stands. One reason that we decided not to write a letter to all attorneys is because our experience has been that you hear back only from those with a specific viewpoint, generally a minority, and this is true on all legislative matters. Right or wrong, we thought we had a reason for not doing that.

COMMITTEE MEMBER: Go ahead.

REPRESENTATIVE SNOWBARGER: Did your legislative committee take a vote on these issues?

MR. HITE: Yes.

REPRESENTATIVE SNOWBARGER: What was the vote from the committee?

MR. HITE: The legislative committee voted at

Tantara in the fall of 1985 on a very close vote - I believe it was six to five - to oppose all caps. The minority wanted to investigate other approaches to the subject of caps. There was no support for, that I can recall, and I was presiding at that meeting, for an overall arbitrary artificial cap on the total award. The executive council on the following day voted, and I believe it was a unanimous vote, to approve the position that I represent to you today.

REPRESENTATIVE SNOWBARGER: So basically the position is based on a six to five vote and then went to the executive committee?

MR. HITE: The executive council reestablishes the policy that the committee recommends. I would emphasize that we had, I think, unanimity in the legislative committee to oppose the type of cap that would say under no circumstances shall a plaintiff recover more than X dollars.

COMMITTEE MEMBER: Representative Buehler.

REPRESENTATIVE BUEHLER: Mr. Hite, you referred to the fact that there have only been five claims of $500,000 or more against the Health Care Stabilization Fund, I think.

MR. HITE: A slight distinction. Five-- we were told by the Health Care Stabilization Fund that there have only been five jury verdicts exceeding that amount. We think they have missed one or two.

REPRESENTATIVE BUEHLER: But in addition to that,

you didn't relate to the fact that there have been some claims filed of greater amounts than that that are still in the pipeline and in the process. And don't you think that would have some indication of the necessity of a cap on awards in the future?

MR. HITE: I certainly did not make any predictions with regard to what's going to happen to existing claims. I don't have personal knowledge. If we judge from past experience, there are probably some cases now working their way towards either settlement or trial that will involve a million dollars or more. Judging from past experience, that's going to be a very low percentage of the total number of claims. Judging from past experience, those claims are going to involve more than a million dollars because there is that much in the way of medical expense, loss of income and other economic losses.

REPRESENTATIVE BUEHLER: You don't think that justifies a cap on awards at any point?

MR. HITE: No, sir, I do not. I do not understand personally or professionally how you can say to a very limited number of people, "Thou shall not be able to recover what the negligence of another has cost you."

REPRESENTATIVE BUEHLER: Another point, but that in effect establishes the size of the insurance premium which indicates whether we are going to have health care or not.

MR. HITE: Well, I really respectfully disagree that this is a significant factor in health insurance or in medical malpractice insurance premiums. If we add up all of the dollars that have flown into the Fund and out of the Fund in the past 10 years and concentrated on the amount required to pay settlements or judgments in excess of a million dollars, it would be a very small percentage. The Health Care Stabilization Fund actuaries predict, and it's in the Interim Committee report, that certain caps will produce only a small percentage reduction in the premiums. Now, the failure of the Fund because of legislation to collect premiums at all in 1981, '82 and '83 has created a hurdle that the Fund must get over, and that alone accounts to about 30 percent of the surcharge on the premium for the immediate future.

REPRESENTATIVE BUEHLER: Thank you.

COMMITTEE MEMBER: Representative Vancrum.

REPRESENTATIVE VANCRUM: Mr. Hite, I appreciate your endorsement of the concept of penalties-- more serious penalties with regard to both frivolous lawsuits and frivolous defenses. As a member of the KBA, I certainly appreciate that.

MR. HITE: Our position does apply both ways. The same attitude should be taken towards frivolous defenses as is taken towards frivolous claims.

REPRESENTATIVE VANCRUM: As a member of the Bar, not a trial attorney, but a member of the Bar, I have thought for some time that both ways something we needed to be doing generally, in any event.

I'm interested, though, in another problem that I thought the summer study committee had addressed, if not adequately, at least had a start towards addressing, was the frivolous refusal to settle cases, which I think is a serious problem as well. I'm interested, given that support of your views, what you would have to say with regard to the provisions of the bill - which several of the parties have now agreed to strike, incidentally - to impose a penalty if the award is not within 25 percent either way of the last settlement offer. Isn't that pretty much along the same lines as you are talking about?

MR. HITE: The principle tends to be similar. I found out this morning that the Medical Society and I guess the Kansas Trial Lawyers Association both oppose the provisions in this bill. I have not had an opportunity to reexamine the provisions relating to the penalties for failure to settle, in light of the comments that were brought to my attention early today.

REPRESENTATIVE VANCUM: I appreciate the fact that you don't have the KBA's position on the question I have just asked you.

MR. HITE: For some time, the Kansas Bar Association has had as a legislative policy the adoption of an even-handed penalty on failure to act reasonably in settlement situations. I'm sorry to confess that we have not articulated that in a real specific fashion at this time, but we certainly do espouse the principle that there should be some kind of a penalty on both sides for taking unreasonable attitudes towards settlement.

REPRESENTATIVE VANCRUM: Thank you.

COMMITTEE MEMBER: Any more questions? Representative Cloud.

REPRESENTATIVE CLOUD: Mr. Hite, I'm interested in a couple of things. Number one, I thought you said earlier in your testimony that the legislative committee for the Bar consisted of 30 people.

MR. HITE: Approximately that.

REPRESENTATIVE CLOUD: If there were 30 people on the committee but yet the vote was six to five, were there some 19 not voting or were they not present or---

MR. HITE: That was the attendance at that particular meeting. This meeting took place at our mid-year meeting. We did not have good attendance, I'm sorry to say. Now, the positions on this were circulated to the members of the committee and they were asked to respond. We have not had any response from the members of the committee which

would indicate a significant departure from the vote that was taken, and also that vote has been taken on several occasions with more people present than just those 11, and different groups present at different times.

REPRESENTATIVE CLOUD: Approximately how many attorneys operate in the State of Kansas right now?

MR. HITE: I believe our association has 42-, 4,300, and I believe 6,000 total.

REPRESENTATIVE CLOUD: And how many on the executive board?

MR. HITE: 13.

REPRESENTATIVE CLOUD: So we have got 6,000 attorneys in the state with 4,300 of them members of the Bar, with a legislative committee of 30, with 11 of those present voting to oppose caps, and that vote came down with a six to five verdict. And so in light of all of that, you're saying that the main association across the state that represents attorneys opposes caps. Do you see some lack of mandate there for 6,000 attorneys and it comes down to a six to five vote?

MR. HITE: No, sir. First of all, let me offer one direction. The five people that did not vote in favor of a flat limit on recovery, the five people included individuals who wanted to consider further the subject of caps.

REPRESENTATIVE CLOUD: I understand.

MR. HITE: And there was at least some suggestion that some of those people wanted to consider caps on non-pecuniary damages, not economic loss.

REPRESENTATIVE CLOUD: But again, the motion was to oppose the provisions of the concept of caps. The motion was to oppose that, and that motion carried on a six to five vote?

MR. HITE: That's correct.

REPRESENTATIVE CLOUD: So there were five people that were at least wanting additional information or for some reason opposed the motion. So that at least says something to me.

MR. HITE: As to the second part of your question, I think that our representative form of government within the Bar Association could be compared favorably with the representative form of government in the State or in other organizations of that size. I think that an impression may be created here that this is not a sufficiently Democratic group. My experience, being a member of the legislative committee for many years, perhaps 15 years, is to the contrary. We have not had a problem taking positions contrary to the wishes of the majority of our members. We have had good support. And without going into individual examples of why I believe that to be the case because of time, I'm convinced personally that the Bar Association is

speaking for a great majority of its members on its position with regard to medical malpractice issues.

REPRESENTATIVE CLOUD: I think I disagree with that. And in the absences of any hard core evidence one way or the other, I guess you and I could debate that all day, and I don't have a stack of letters and you don't have a survey. So I guess we will leave that to the wisdom of the committee. The second part of my question is, you mentioned there were five jury verdicts over 500,000, and that I think has been corrected to maybe one or two more.

MR. HITE: Involving the Health Care Stabilization Fund.

REPRESENTATIVE CLOUD: I understand. Do you have any information as to whether or not there were any out-of-court settlements prior to a jury verdict that would also involve the Health Care Stabilization Fund?

MR. HITE: Yes, sir, I do. I believe that there is information in the interim committee report, I believe that's what I'm thinking of, that there have been settlements in addition to the awards. The number 19 comes to my mind. I hate to vouch for the accuracy of that, 19 total awards and settlements.

REPRESENTATIVE CLOUD: Having not served on the interim committee, is that right, Mr. Chairman?

COMMITTEE MEMBER: I was not on the committee

either.

REPRESENTATIVE CLOUD: How many out-of-court settlements were there? The figure has been thrown around five or six or seven were jury verdicts, but how many total verdicts and out-of-court settlements involved the Health Stabilization Fund.

REPRESENTATIVE SOLBACH: We could probably get that information from---

REPRESENTATIVE CLOUD: A total of 22? Okay.

MR. HITE: Mr. Smith is saying that he believes that there have been a total of 22 situations in which the money involved exceeded $500,000.

REPRESENTATIVE CLOUD: Either as an out-of-court settlement or jury settlement?

MR. HITE: That's my understanding.

REPRESENTATIVE CLOUD: On those 22 cases, would you venture a guess on what the average plaintiff attorney fee was on those 22?

MR. HITE: It would be a guess. I would guess that a most typical fee has been 33 percent, with some of them being 40 percent. The possibility exists that there was a case or two in that quantity where the attorney fee might have exceeded 40 percent.

CHAIRMAN KNOPP: Were those cases where the case had been appealed and retried or do you have any guess

on whether those percentages might exceed 40 percent?

MR. HITE: My experience is that it is very rare, that it is a case that involves expenditure of a lot of time and perhaps incurring very substantial expense, and that's when the fee goes above 40 percent frequently, after trial or after appeal, but I can't give you positive assurance there aren't exceptions, but I know there are a few.

CHAIRMAN KNOPP: Representative Walker.

REPRESENTATIVE WALKER: I just want to make the comment that I appreciate you saying that we have-- you have a representative form of government, and we have a representative form of government in the state and sometimes-- and I want to indicate sometimes our representatives, our people that we represent don't always agree with the people that you represent. So we have a little different problem here. I do want to ask you about your opinion on the settlement conference.

MR. HITE: I think the settlement conference rule is a good one. As a matter of fact, Judge Patrick Kelly of the United States District Court established a settlement conference rule that involves a mediation panel of lawyers that assist the court in this, and I am privileged to be the chairman of that mediation panel and went through-- gone through the mediation process, and I think most lawyers, to some extent, most litigants kind of, you know, wonder about

this. They dig in their heels. They don't want to maybe subject their case to this process, but the experience of about 40 of the best trial lawyers we have in south central Kansas around the Wichita area has been reported back to our mediation panel in confidential forms which I review and then report back to the judge. The percentage that approved that is in excess of 80, combined of highly favorable and favorable reports. And most of the rest are neutral and very few are opposed to it. The percentage is very surprising, in that lawyers have a hard time agreeing that much on something, but I would also say that that procedure has one aspect that I think is missing from the one proposed in this bill, which I think is a key factor, and that is that the trial judge does not become involved in that settlement conference or in that mediation conference. And I think that removes one of the major areas of objection that some attorneys have to the settlement conference procedure.

CHAIRMAN KNOPP: I am going to need to call an end to these questions and get on with the other conferee. We are getting late in the day. Representative Solbach.

REPRESENTATIVE SOLBACH: You are elected to your leadership post in the Kansas Bar Association?

MR. HITE: Appointed.

REPRESENTATIVE SOLBACH: Appointed by?

MR. HITE: The president.

REPRESENTATIVE SOLBACH: Okay. And your executive board and these other people, are they elected?

MR. HITE: They are elected.

REPRESENTATIVE SOLBACH: Are they elected in part because they are professional leaders in the Bar as lawyers of the State of Kansas?

MR. HITE: I would certainly look upon them as leaders.

REPRESENTATIVE SOLBACH: Are they elected because of their experience and good judgment and their committment to the profession?

MR. HITE: No question about it.

REPRESENTATIVE SOLBACH: Do you think it's more responsible for them to make a decision based upon exercise of their judgment after studying the issue or by sending a survey out to the membership and doing what the survey dictates?

MR. HITE: The former.

REPRESENTATIVE SOLBACH: Okay. I listened to 130 hours of testimony on this bill this summer and quite a bit more here at this session, and I am, quite frankly, struggling with the issue of caps. I think I know-- very few days go by when I don't question my position one way or the other or one position or the other. Would you recommend to me in order to resolve this issue for me so I can sleep

tonight. Should I just send out a survey to my constituents and do what my constituents say?

MR. HITE: No, sir, I would not.

COMMITTEE MEMBER: Mr. Hite, I want to thank you for coming here today. I'm also a member of the Kansas Bar Association and I do not support caps and I'm not sure among the eight attorneys who are present today that my opinion may be a minority, but I'm happy to see somebody does represent my opinion.

CHAIRMAN KNOPP: Thank you.

CERTIFICATE

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Lora J. Appino, a Certified Shorthand Reporter in and for the State of Kansas, duly commissioned as such by the Supreme Court of the State of Kansas, do hereby certify that I was present at and reported in shorthand the foregoing proceedings had at the aforementioned time and place; further that the foregoing 37 pages is a true and correct transcript of that portion of my notes requested transcribed.

IN WITNESS WHEREOF, I have hereunto affixed my official seal this 20th day of March, 1986.

Lora J. Appino

Lora J. Appino
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KANSAS BAR ASSOCIATION

OFFICERS
PRESIDENT
Gerald L. Goodell
215 E. 8th
Topeka, KS 66603 (913) 233-0593
PRESIDENT-ELECT
Jack R. Euler
P. O. Box 326
Troy, KS 66087 (913) 985-2322
VICE-PRESIDENT
Christel Marquardt
1100 1st Nat'l Bank Tower
Topeka, KS 66603 (913) 235-9511
SECRETARY-TREASURER
Dennis L. Gillen
621 1st Nat'l Bank Bldg.
Wichita, KS 67202 (316) 265-9621

EXECUTIVE COUNCIL
DISTRICT 1
John J. Jurcyk
P.O. Box 1398
4th Floor, 707 Minnesota Ave.
Kansas City, KS 66101 (913) 371-3838
DISTRICT 2
Fred N. Six
Massachusetts at South Park
P. O. Box 666
Lawrence, KS 66044 (913) 843-6600
DISTRICT 3
Leigh Hudson
200 Citizens Nat'l. Bank
200 S. Main
Fort Scott, KS 66701 (316) 223-2900
DISTRICT 4
Warren D. Andreas
303 State Bank Bldg.
Winfield, KS 67156 (316) 221-1610
DISTRICT 5
Edward L. Bailey
1100 1st Nat'l. Bank Tower
Topeka, KS 66603 (913) 235-9511
DISTRICT 6
Robert W. Wise
P.O. Box 1143
McPherson, KS 67460 (316) 241-0554
DISTRICT 7
A. J. "Jack" Focht
807 N. Waco
Suite 300, Brooker Plaza
Wichita, KS 67203 (316) 269-9055
DISTRICT 8
William B. Swearer
Box 1907
Hutchinson, KS 67504-1907
(316) 662-3331
DISTRICT 9
Lelyn J. Braun
1505 E. Fulton Terrace
Garden City, KS 67846 (316) 275-4146
DISTRICT 10
Edward Larson
P.O. Box 128
Hays, KS 67601 (913) 628-8226
PAST PRESIDENT
Darrell D. Kellogg
200 W. Douglas, #630
Wichita, KS 67202 (316) 265-7761
YOUNG LAWYERS PRESIDENT
Danton C. Hejtmanek
P.O. Box 2667
Topeka, KS 66601 (913) 357-0333
ASSOCIATION ABA DELEGATES
John Elliott Shamberg
860 New Brotherhood Bldg.
Kansas City, KS 66101 (913) 281-1900
Glee S. Smith, Jr.
P.O. Box 360
Larned, KS 67550 (316) 285-3157
STATE ABA DELEGATE
William C. Farmer
200 W. Douglas, #830
Wichita, KS 67202 (316) 267-5293
KDJA REPRESENTATIVE
Hon. Michael Corrigan
525 N. Main — Courthouse
Wichita, KS 67203 (316) 268-7661
EXECUTIVE DIRECTOR
Marcia Poell
P.O. Box 1037
Topeka, KS 66601 (913) 234-5696

March 20, 1986

The Honorable Joe Knopp
Chairman
House Judiciary Committee
Statehouse
Topeka, KS 66612

re: Medical Malpractice testimony
on HB 2661

Dear Joe,

In addition to the letter sent by separate cover from this office regarding inclusion of Richard C. Hite's testimony on behalf of KBA during House hearings on behalf of this bill, I would like the committee's minutes to reflect the fact that, should it become appropriate at some later date, that lawyers or other researchers are trying to determine "legislative intent" on this bill, that at KBA's expense the testimony and questions and answers of the following persons were taken by certified shorthand reporters during the three days of hearings on "tort reform" aspects of the bill which began February 10, 1986:

First Day:

Martin Ewing, of the American Association of retired persons. (10)

David Litwin, representing the Kansas Chamber of Commerce and Industry; (10)

Dr. Jimmy Browning, representing the Kansas Medical Society; (20)

Second day:

Dr. Ann Wigglesworth, representing herself (35)

Dodson Bradbury, representing himself (10)

J. Robert Hunter, National Insurance Consumer Organization, representing NICO and Governor John Carlin; (52)

Third Day:

Richard C. Hite, Kansas Bar Association

The numbers in parenthesis is the approximately the pages needed to transcribe the testimony. Transcription can be done through Nora Lyon and Associates, of Topeka, the CSR firm. If this letter could appear in the committee minutes, it would be significant for this purpose.

Sincerely,

Ronald D. Smith
Legislative Counsel

JOE/RON/rds

cc: Mike Heim, Legislative Research

2/11 Johnson

MEMORANDUM OF TESTIMONY

To: House Judiciary Committee

From: Lynn R. Johnson, Chairman
Kansas Trial Lawyers Association
Medical Malpractice Task Force

Subject: House Bill 2661

Date: Tuesday, February 11, 1986

The following will be an outline of H.B. 2661 as it relates to the various subject matters contained therein. KTLA has previously provided this committee with suggested amendments and deletions to H.B. 2661. This testimony will be for the purpose of reviewing and clarifying the suggested amendment and deletions and explaining KTLA's position on various crucial portions of H.B. 2661.

At the outset, KTLA recommends that H.B. 2661 be redrafted into approximately 12 separate bills, based upon the (at least) 12 distinct subject matters which are addressed by H.B. 2661. The "all or nothing" methodology of legislative action as prescribed by H.B. 2661, is simply not appropriate in face of the eveidence that has been presented to date relating to the issues of medical malpractice, medical malpractice liability insurance, and medical malpractice litigation. Those who are most interested, concerned and directly affected by the proposed legislation, to wit, medical malpractice victims, health care consumers within the State of Kansas, and the health care provider community should be given the benefit of separating the

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issues and dealing with them individually in order to accomplish the common goal of providing quality health care, preserving the rights of the health care consumer within the State of Kansas and the concomitant enforcement of responsibility along with the stated legislative goals (if appropriate) of professional liability insurance affordability relief for rural Kansas doctors and doctors practicing in high-risk areas. We do not believe in "all or nothing" justice in the tort system and we should not apply "all or nothing" legislation to a so-called medical malpractice "crisis."

A. Definitions (Section 1).

B. Risk management, peer review and reporting of negligent incidents (Section 2-10).

KTLA is in favor of Sections 2 through 10 of H.B. 2661. However, as stated earlier, it would be more appropriate for Sections 2-10 to be part of a separate bill addressing the specific issue of improving the quality of health care and thus reducing the incidence of medical malpractice and medical malpractice litigation. KTLA would suggest that an added review mechanism be provided relating to "closed claims" of the two major professional liability carriers within the State of Kansas and the Health Care Stabilization Fund. Attached to this memorandum is a recent article from the American Journal of

Perinatology entitled "Investigation of Obstetric Malpractice Closed Claims: Profile of Event." This article clearly demonstrates the beneficial nature of retrospective review and, just as importantly, illuminates clearly that the cause of medical malpractice litigation is simply too much medical malpractice.

C. "Caps" on compensation and "forced" annuity contracts (Section 11-15).

KTLA has provided suggested amendments to Sections 11, 12, 13 and 14. It must be made perfectly clear that by making such suggested amendments we are not in any way whatsoever modifying our strong position opposing any type of arbitrary "cap" on compensatory damages and our opposition to "forced" annuity contracts. There is a note on the "ballooned" copy of H.B. 2661 which was recently provided to KTLA by the chairman of this committee which indicates that the KTLA position as to caps is to "eliminate limits or raise them and make them apply to each provider." That is not our position. We do not favor, under any circumstances, a position which would advocate "caps" on compensatory damages, no matter how "high" the amount of the cap might be.

In Section 11 and all subsequent sections utilizing the phrase "economic loss" (either current or future), consideration should be given to including "disability" as part of the definition of economic loss. Disability as an item of damage has a strong economic component even though it is "lumped" together

in the P.I.K. instructions with more subjective items of damage such as pain, suffering and mental anguish. Disability may result in substantial pecuniary loss even though the victim may not have suffered loss of wages, future loss of wages or loss of earning capacity. Anyone who has been seriously and permanently disabled must be able to, at the very least, recover all pecuniary and economic losses incurred prior to and subsequent to the jury's verdict.

Sections 12, 13 and 14 which relate specifically to the requirement that every verdict be transformed into an annuity contract by the trial judge will not solve any of the purported "problems" that it pretends to address. The requirement that the jury not reduce future economic loss to present value is directly contrary to current law. Obviously, the purpose is so that an annuity can then be priced that will, hopefully, provide the flow of dollars that will satisfy the future economic loss. The same thing is currently being accomplished because juries are instructed that all future economic loss be reduced to present value which, ordinarily is the same or approximately the same as the cost of an annuity. Thus, the only saving based upon the annuity relates back to the $1,000,000 "cap" on all forms of compensatory damages. If the jury's verdict, reduced to present value as required currently, is less than $1,000,000 there would be absolutely no reason to force an annuity on an individual plaintiff. There is virtually no economic benefit to the victim, the health care provider or the health care provider's insurance carrier through the purchase of an annuity, especially with the

presence of a cap on all compensatory damages. There may be some economic benefit to both the victim and the health care provider's liability insurance carrier which will induce them to enter into a voluntary settlement agreement, including the purchase of an annuity contract by the health care provider and the health care provider's professional liability insurance carriers. That inducement, which can be spurred by settlement conferences, is more than adequate to encourge the utilization of structured settlements which have continued to increase in popularity and frequency over the past ten years.

An important aspect of a structured settlement accomplished by a contract commonly called a settlement agreement among the parties is the non-taxability of the flow of cash from the annuity which has been purchased by the health care provider's professional liability insurance carrier. That financial incentive relating to the non-taxability would be jeopardized by the scheme of "forced" annuities after the jury has returned its verdict. In addition to the non-taxable issue, careful attention is always directed toward the financial viability of the defendant, the defendant's liability insurance carrier, and the annuity company chosen by the defendant prior to a plaintiff entering into a structured settlement contract. Clearly, a "forced" annuity contract would eliminate the plaintiff's capability to assess the advisability of entering into such a contract from a financial security viewpoint.

D. Expert witnesses (Section 16).

This section should be completely eliminated absent any evidence of abuse of discretion by trial judges in the State of Kansas as it relates to the admission of testimony of expert witnesses in medical malpractice cases. None of the legitimate public policy issues which are purportedly being addressed by this legislation are in any way related to Section 16.

E. Settlement conferences (Section 17).

KTLA believes in the efficacy of settlement conferences for the settlement of medical malpractice actions. However, due to many factors which are inherent in medical malpractice litigation it would be unjust to require any of the parties to be subjected to the punitive measures prescribed by Subsections (d), (e), (f), (g) and (h) of Section 17. There is already a provision within our statutes for an "offer of judgment" which provides all of the "teeth" that are needed in addition to the judge's discretion as it relates to potential settlement prior to trial. We believe that a settlement conference, properly administered, will hopefully accomplish the goal of getting the Health Care Stabilization Fund to the settlement table early and, even more importantly, to make good faith offers early in the litigation. Examples of the failure on the part of the Health Care Stabilization Fund to settle cases until the last minute are frequent and sometimes appalling.

F. Reporting of claims to the Board of Healing Arts and Department of Insurance (Section 18).

G. Civil fines by Board of Healing Arts authorized (Section 19).

H. Alternative and equivalent professional liability coverage (Section 20).

I. Attorney's fees (Section 21).

We would call attention to KTLA's suggested amendment to Section 21 as it relates to evidentiary hearings. Further, it should be noted that KTLA has taken a position which is consistent with the courts having jurisdiction over attorney's fees in all types of litigation as well as specifically medical malpractice litigation. The trial court is in the best position to exercise its discretion in the approval of attorney fees.

J. Amendment to K.S.A. 1985 Supp. 40-3003 (Section 22).

K. Amendments to Health Care Providers Insurance Act (K.S.A. 40-3401 et seq.) (Section 23-26).

KTLA does not have any objection to the amendments proposed. However, we would suggest that the Board of Governors as created by K.S.A. 1985 Supp. 40-3403 have expanded powers as it relates to the rating schedule and the identity of health care providers who are actually provided insurance coverage through the Health Care Stabilization Fund. We would also suggest expanding the Board of Governors to include at least three attorneys who are experienced in handling medical malpractice litigation, as well as three members from the public at large who are not affiliated with any health care providers. The Board of Governors should be given the authority to engage in retrospective studies of closed

claims of the primary insurance carriers and the Health Care Stabilization Fund or to contract for such investigation in order to ensure that the deviation from appropriate standards of medical care which are identified thereby are reported to the health care community as a whole for the purpose of improving the quality of health care provided to health care consumers within the State of Kansas.

KTLA is on record as promoting the concept of the Health Care Stabilization Fund, as an excess insurance carrier, having its liability limited to $1,000,000 per judgment or settlement against any one health care provider subject to an aggragate of $3,000,000 for all judgments or settlements against each provider. This would correspond to the modification in the Act relating to the amount of insurance required of each health care provider within the State of Kansas. However, limiting the amount of liability insurance required of each health care provider and thus limiting the liability of the Fund to $1,000,000 per occurrence will not limit the total liability of the health care provider.

L. Composition of the Board of Healing Arts and miscellaneous matters relating to licensure of health care providers (Section 27-40).

As we have indicated earlier, these sections of H.B. 2661 should be put into a separate bill that relates specifically to licensure and the Board of Healing Arts. We are all very much aware of the changes required in order to strengthen the capability of the Board of Healing Arts and to ensure that

incompetent physicians and other health care providers are not practicing medicine within the State of Kansas. To that end, KTLA supports all of the changes proposed by Sections 27 through 40.

M. Screening panel (Sections 41-43).

H.B. 2661 has attempted to change the current screening panel provisions of K.S.A. 65-4901 et seq. by making the written report of the screening panel admissible in any subsequent legal proceeding [K.S.A. 65-4904(c)]. This committee and the special committee on medical malpractice is well aware of KTLA's opposition to a mandatory screening panel with admissible results. Although the screening envisioned by H.B. 2661 is not "mandatory" in its language, it will in fact be "mandatory" because of the new provision making the report to the screening panel admissible in any subsequent legal proceeding. It is obvious that the defendant will ask for a screening panel in every instance and, at the very least, a screening panel will increase cost and expenses on both sides and will place an unjustified barrier to the courthouse door for victims with meritorious actions. It has been proven through the experience of other states that have mandatory and admissible screening panels that the number of lawsuits has not decreased, nor has there been any saving of time. As this committee is well aware, in Indiana the per case cost is higher, the number of cases filed per population is higher, and the time from filing the case to final resolution is longer than is currently the situation in

Kansas. If there is any justifiable public policy reason for addressing the issue of affordability of liability insurance for health care providers, it certainly is not found in the screening panel scheme proposed by H.B. 2661.

KTLA would again direct this committee's attention to the proposal made by KTLA and KBA relating to the issue of so-called frivolous lawsuits. There is currently a mechanism available (which to our knowledge has never been used) which will directly address this issue, if it needs to be addressed at all. Further, the modified screening panel proposal by the KBA and KTLA would be infinitely superior in terms of saving of time and costs if we assume that any such mechanism is in fact needed. There has been no evidence presented to date which addresses the issue of the relationship between so-called frivolous medical malpractice cases and the affordability of medical malpractice liability insurance. Until such evidence is brought forward there is no public policy reason for any action in this regard at the present time.

Respectfully submitted,

Lynn R. Johnson

INVESTIGATION OF OBSTETRIC MALPRACTICE CLOSED CLAIMS: PROFILE OF EVENT

Thomas M. Julian, M.D., Doris C. Brooker, M.D., Julius C. Butler Jr., M.D., Marilyn S. Joseph, M.D., Paul L. Ogburn Jr., M.D., Preston P. Williams, M.D., Mark L. Anderson, M.D., Ann C. Shepard, R.N.C., M.S., William C. Preisler Jr., C.S.P., A.R.M., and Melvin L. Capell, C.S.P., A.R.M., C.P.C.U.

ABSTRACT

The files of 220 obstetric closed-claim cases were reviewed by five obstetricians to determine whether information could be collected and analyzed to identify common predisposing factors to claims and to suggest preventative measures. The data suggests these cases contain common easily identified obstetric risk factors, most of which occurred in labor and delivery (66%). Fifty-four percent of the risks were recognized, 32% correctly managed, and a high percentage of risks were considered by the reviewers to be directly related to the obstetric outcome leading to the claim (66%).

The authors feel obstetric closed claims can be studied and suggestions made to aid obstetricians in providing care. Identification of common obstetric risks and correct management of these risks is poor in these cases. Recognition and management guidelines are imperative in ensuring good obstetric outcome. These two physician-controlled factors played important parts in the majority of cases reviewed. It would appear from this study that (1) obstetric malpractice closed claims are amenable to study; (2) physicians and their patients would benefit from better data collection systems to identify risks in individual pregnancies; (3) physicians need readily available resources to aid their management of patients; (4) only through modification of physician behavior can suits be avoided.

INTRODUCTION

Over the last 10 years there has been a dramatic increase in the number of medical malpractice claims and the term "malpractice crisis" has permeated the popular obstetric literature. Obstetric claims have shown a greater increase than those in other specialties.[1-3] A review of the obstetric malpractice literature shows the majority of articles are discussions of individual cases and court rulings.[4-5] Others address documentation in medical charts,[6] shortcomings of the legal system in medical issues,[7-10] and physician-patient relationships.[11,12] There are few articles attempting to study malpractice by analyzing a large number of cases evaluating the pregnancy management as the major issue.[13-15]

With a shortage of this type of evaluation, an attempt at developing a systematic approach to investigate obstetric claims was attempted to help physicians determine:

1. Where can physicians intervene to decrease claims?
2. Which pregnancy risks are likely to lead to an obstetric claim?
3. Can obstetric practices be modified to prevent or reduce obstetric claims?

It was our intention to develop an instrument for the evaluation of obstetric closed-claim cases that would allow us to analyze claims and make recommendations regarding physician behavior.

Department of Obstetrics and Gynecology, University of Minnesota, Minneapolis, Minnesota, and the St. Paul Fire and Marine Insurance, Company, St. Paul, Minnesota

Reprint requests: Dr. Julian, Box 395 Mayo Memorial Building, 420 Delaware Street South East, Minneapolis, MN 55455

Publisher: Thieme Inc., 381 Park Avenue South, New York, NY 10016

MATERIALS AND METHODS

The cases involved were 600 closed claims, closed between 1980 and 1982, of the St. Paul Fire and Marine Insurance Company, the largest single insurer of physicians in the United States. A claim file is begun when a liability has been identified or a suit initiated. The claim is closed when the possibility of suit is eliminated or ajudicated. Because of the massive amount of information involved, only cases in which indemnity was paid or cases in which $1000 or more was expended as legal defense were included. This limited the number of cases to 220. The files for these cases contained portions of the medical record, depositions of the parties involved, testimony of expert witnesses, attorneys' correspondence, and insurance company correspondence.

The Hollister Maternal/Newborn Record System was used as a model to aid in developing a questionnaire to record events in these cases. The questionnaires were filled out from the information available in the claim files. Pregnancy was broken down into prenatal care, high-risk, labor, and delivery as categories.

Cases were reviewed and the questionnaires completed by five obstetricians (JCB, MSJ, TMJ, PLO, PPW) from the Department of Obstetrics and Gynecology of the University of Minnesota. The questionnaires were completed using history and physical findings in the claims records.

If a risk factor was present, the reviewer determined if it had been recognized by the caregiver in his or her records. The reviewer then determined if the risk factor, whether recognized or unrecognized, was managed by standards accepted by either guidelines suggested by American College of Obstetrics and Gynecology[10] or local standards of care documented in the claim files as journal articles and expert opinion. Lastly, the reviewers determined whether the risk factor identified was directly related to the obstetric outcome leading to the claim.

RESULTS

Tables 1–5 show a representative listing of the risk factors in 220 closed-claim obstetric cases. Most are common, easily recognizable risk factors.

The largest number of risks occurred during labor and delivery. Of 1001 risks identified in these closed-claim cases, 664 (66%) occurred in labor and delivery as opposed to prenatal care.

Of these 1001 risks, 542 (54%) were recognized by caregivers as documented in the medical record.

Of the 1001 risks, 320 (32%) were correctly managed by quality assurance standards of the American College of Obstetrics and Gynecology.

In the opinion of the reviewers, 663 (66%) of the risk factors identifiable in the records were involved with obstetric outcome leading to a claim. Labor and delivery risk factors were related at a

Table 1. Prenatal Care

Risk factor (from Hollister form)	Number of cases in which risk was present *(frequency)*	% of time risk is recognized on chart by medical documentation	% of time risk is correctly managed	% of time risk is involved with obstetrician outcome leading to claim
Rh negative	33	52	33	45
Post-term pregnancy	18	39	33	67
Abnormal presentation	16	56	31	75
Infants > 4000 grams	15	47	20	27
Maternal age < 15, > 35	14	43	21	29
Previous C-section	11	73	18	36
Weight gain < 40 lbs	10	70	40	30
Two or more abortions	9	67	67	33
Smoking > 1 ppd	7	57	43	14
Endocrinopathy	5	40	20	60
Isoimmunization (ABO)	4	25	25	100
Inadequate pelvis	4	25	25	100
Failure to gain weight	4	25	25	0
Surgically scarred uterus	4	100	50	0
Pregnancy without family support	4	50	50	25
Epilepsy	3	100	100	33
Previous preterm or small gestation age infant	3	67	33	33
Previous eclampsia	3	67	0	33
Uterine/cervical malformation	3	33	33	0
Anemia (Hct < 30, Hb < 10)	3	33	0	33
Less than 8th grade education	2	50	0	0
Cardiac disease (Class I or II)	2	100	100	0
Infertility	2	100	50	50
Second pregnancy in 12 months	2	0	0	0
Acute pyelonephritis	2	100	100	0
COPD	1	100	0	0
Thrombophlebitis	1	100	0	0
More than 7 deliveries	1	100	100	100
Hemorrhage during previous pregnancy	1	0	0	100
VD	1	0	0	0
Other	30	40	33	57

Table 2. High Risks

Risk factor	Number of cases in which risk was present (frequency)	% of time risk is involved with obstetrician documentation	% of time risk is recognized on chart by medical documentation	% of time risk is correctly managed	% of time risk is involved with obstetrician outcome leading to claim
Premature ruptured membranes	17	71	29	59	
Hypertension	14	21	14	36	
Severe preeclampsia	11	18	9	91	
Uterine bleeding	11	82	36	91	
Isoimmunization	10	10	0	100	
Diabetes mellitus	7	57	14	86	
Significant social problems	7	57	14	29	
Over 40 years	4	25	0	25	
Prior neonatal death	4	50	50	50	
Fetal growth retardation	4	50	50	75	
Prior fetal death	3	67	33	67	
Chronic renal disease	2	50	50	50	
Incompetent cervix	2	100	50	50	
Prior neurologically damaged infant	2	50	50	100	
Hydramnious	2	50	100	0	
Multiple preterm pregnancy	2	50	50	100	
Drug addiction	1	100	100	0	
Low falling estriols	1	0	0	100	
Other	15	60	27	80	

Table 3. Labor

Risk factor	Number of cases in which risk was present (frequency)	% of time risk is involved with obstetrician documentation	% of time risk is recognized on chart by medical documentation	% of time risk is correctly managed	% of time risk is involved with obstetrician outcome leading to claim
Meconium	32	63	34	72	
Extended fetal bradycardia (FHR < 100 for 15 minutes)	23	78	39	78	
Protracted active phase	22	55	23	77	
Prolonged labor (> 20 hours)	20	45	25	75	
Post-term labor (> 42 weeks)	20	55	50	70	
Cephalopelvic disproportion	19	37	5	95	
Preterm labor (< 37 weeks)	18	67	33	61	
Prolonged latent phase	17	47	18	65	
Prolonged 2nd stage (> 2 hours)	17	59	18	82	
Secondary arrest of dilation	17	71	18	82	
PROM (> 12 hours at admission)	15	47	33	87	
Multiple late decelerations	13	38	8	85	
Decreased FHR variability	10	20	10	80	
Severe toxemia	10	40	20	80	
Mild toxemia	9	44	33	33	
Abruption	8	50	50	63	
Bleeding (site undetermined)	8	38	38	75	
Extended fetal tachycardia (FHR > 160 for 15 minutes)	7	100	57	57	
Febrile (> 100.4 on admission)	6	67	33	83	
Seizure activity (maternal)	6	67	50	100	
Cord prolapse	6	83	50	100	
Foul smelling fluid	5	40	20	80	
Precipitous labor (< 3 hours)	5	40	40	0	
Multiple severe variable decelerations	4	50	0	50	
Hydramnios	3	100	100	0	
Anesthetic complications	3	33	0	33	
Placenta previa	3	67	33	33	
No prenatal care	1	100	100	0	
Acidosis (pH < 7.2) prior to delivery	1	100	0	0	
Other	30	63	43	93	

higher frequency than those identified in prenatal care.

DISCUSSION

In evaluating obstetric care in malpractice claims, several factors make the analysis difficult. There is a paucity of the objective data in the obstetric literature to serve as a design model. Most articles are historic accounts of the development of the "malpractice crisis," evaluations of why there are increased numbers of claims, case reports of individual decisions, and reports regarding problems with our tort system of law. Noticeably lacking is a common denominator to help understand and prevent these cases. There is no previous study using patient files, court records, or testimony of plaintiff, defendant, and expert witnesses to recreate pregnancy profiles for analysis.

Physicians are familiar with case studies, objective measurements, and the formulation of conclu-

Table 4. Delivery

Risk factor	Number of cases in which risk was present (frequency)	% of time risk is recognized on chart by medical documentation	% of time risk is correctly managed	% of time risk is involved with obstetrician outcome leading to claim
Inadequate or incorrect evaluation of fetal heart rate (auscultory or electronic)	53	36	17	83
Method of delivery–cephalic (prolonged 2nd stage, forceps delivery)	48	52	38	75
Method of delivery–cesarean (delay to delivery)	33	55	45	58
Surgery complications (intrapartum)	33	76	27	82
Blood loss: (greater than 1000 cm)	19	89	63	74
Delivery anesthesia: complication	19	58	26	58
Laceration	18	56	44	67
Induced labor	18	50	28	56
Medication for induction	17	47	29	59
Surgical procedure (post delivery)	12	67	67	75
Method of delivery–breech	11	64	45	82
Episiotomy: complications	10	50	50	60
Method of delivery–placenta	9	67	44	78
Delivery room medications: adverse reaction	6	33	17	50

sions from the analysis of existing data. Malpractice cases have not been studied in these ways. The majority of research and analysis has been performed by insurance companies, not by physicians. While the insurance companies understand the problem from an economic perspective, without physician involvement solutions will not be generated to improve patient care.

A primary goal was to develop a questionnaire to provide information to evaluate cases, detailing the profile of the patient, physician, and medical event. By analyzing these claims, changes in patient care were suggested.

Our data show: 1) The majority of risks occurred in labor and delivery. This is supported by the findings of at least one other study.[13] 2) We found that the risks were recognized and documented 54% of the time. These figures were very similar for prenatal care, high-risk pregnancy, labor, and delivery categories (Table 5). 3) Using criteria of the American College of Obstetrics and Gynecology, along with the testimony of expert witnesses and referred articles in the claim records, the reviewers felt correct management of risks occurred for 32% of the risk factors. 4) Identifiable risks were involved in outcomes that lead to malpractice suits in 66% of cases.

This data suggests: 1) Better management of cases by physicians is needed and may be attained by using a thorough questionnaire, helpful in identifying and managing attained risk factors. 2) Pregnancy risks need to be better recognized before they can be documented. 3) Once a risk is recognized, management should be planned in the medical record and references consulted. Better recognition and management of risks in these cases would have led in many instances to improved outcomes. 4) The risks identified in these cases are common, recognizable problems of pregnancy with recognized standards of care. Physician performance was poor by any standard.

During a time of increasing professional liability, this study is an attempt to provide an objective analysis of the causes of obstetric closed claims. Though limited by its retrospective and descriptive nature, we feel that objective analysis by physicians of malpractice claims is the best way to bring better understanding to the malpractice problem. Changes in the system need to be physician initiated and aimed at providing optimal care. In the closed-claim cases we reviewed, common obstetric risks were often not recognized or not recorded in medical records.

Management of risks in these cases suggests that standards of care were violated and as a result lawsuits were brought. However, it must be recognized that suits occurred even in the more than 30% of cases in which risks were appropriately managed.

Table 5. Summary of Risks, Recognition, Management, and Involvement

	Risks	Recognition	Correctly Managed	Involved
Prenatal	218	113 (52%)	72 (33%)	96 (44%)
High-risk	119	58 (49%)	30 (25%)	81 (68%)
Labor	358	202 (56%)	109 (30%)	267 (75%)
Delivery	306	169 (55%)	109 (36%)	219 (72%)
Totals	1001	542 (54%)	320 (32%)	663 (66%)

Thus, we feel that medical malpractice suits in obstetrics can be significantly decreased but not eliminated by improving physician performance. The use of complete, filled-out questionnaires and readily available references for managing common problems in obstetric care may be the first step in eliminating obstetric malpractice and improving standards of patient care. The burden of reducing obstetric claims depends on improved patient management.

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Acknowledgment is given to Hollister Incorporated for allowing the use of their form as a model.