

Approved April 1, 1987
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at
Chairperson

12:00 ~~xxxxxx~~ ^{Noon} on March 31, 1987 in room 519-S of the Capitol.

~~All~~ members ~~xxxx~~ present ~~except~~: Senators Frey, Langworthy, Parrish and Yost.

Committee staff present:

Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Justice Donald Allegrucci, Supreme Court Judge
George Barbee, Kansas Consulting Engineers
Richard Mason, Kansas Trial Lawyers

House Bill 2419 - Pretrial screening panel, liability actions against professionals.

Justice Donald Allegrucci stated he is not appearing for or against this legislation. He has had experience with this subject when he was administrative judge. He said he checked with other judges in regard to medical malpractice in relation to screening panels. Screening panels are adapted to medical malpractice. His experience has been in appointing a panel and a chairman. All of the records are presented to the panel members. After the members have reviewed the records, they discuss them in a conference call. The panel members live across the state. He said you will have problems when this is extended to other professionals because you don't have records as you do in medical malpractice. Administrative judges are unanimous that screening panels are not used to settle the case. The statute of limitations can be extended by filing a request by the screening panel. This can be used in delay tactics. Another problem is additional workload for judges and clerks, and also you are talking about expenses. When administrative judge has to appoint the chairman, no attorney wants to be appointed as chairman because it does not pay much, and also the attorneys are limited to who is qualified to serve. The pay is not enough for chairman or panel members. Some of the judges indicated if properly funded and operated it could be of some benefit. Judge Allegrucci said unless you have a problem you don't need a solution. Prior to a year ago, the four years I was administrative judge, they had no screening panel, and last year as administrative judge, I had two or three screening panels. I don't know why. Last year there has been a marked increase and has not provided any results in medical malpractice cases. It can be of some assistance. Not sure with expenses and time involved it really serves the purpose for which it is intended.

George Barbee, Kansas Consulting Engineers, stated he was speaking also on behalf of The Kansas Society of Architects, Kansas Society of Land Surveyors, and the Kansas Engineering Society. He testified in the sense of fair play, it seems that others ought to have the same considerations that have been extended to the health care providers that allow them to utilize screening panels. We believe that it is working for them and certainly has merit for

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 519-S, Statehouse, at 12:00 ~~3:00 PM~~ ^{Noon} on March 31, 1987

House Bill 2419 continued

the cases we are involved in. It seems easiest to define the bill to be applicable to professionals as defined in the professional corporation statutes because they refer to those professionals that require a license to practice. A copy of his testimony is attached (See Attachment I).

A committee member inquired if any other states have screening panels for other professionals. Mr. Barbee reported Hawaii and California have screening panels. He said he really hasn't found any track records to report on. He reported a trial lawyer had testified he had been chairman of five screening panels for medical malpractice and all cases were settled in a shorter length of time. The chairman said the plaintiffs like the screening panels better than the defendants.

Richard Mason, Kansas Trial Lawyers, appeared in opposition to the bill. He testified there are not sufficient records and information available to determine departure from the standard practice. The screening panels will not work because it is difficult to get professional fellows to decide against another professional.

Mr. Barbee responded by stating they have a great deal of records and information available.

The meeting adjourned.

A copy of the guest list is attached (See Attachment II).

Copies of testimony from the Kansas Engineering Society, Kansas Society of Land Surveyors, and the Kansas Society of Architects are attached (See Attachments III).

3-31-87
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GEORGE BARBEE, EXECUTIVE DIRECTOR
1100 MERCHANTS NATIONAL BANK
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TOPEKA, KANSAS 66612
PHONE (913) 357-1824

STATEMENT

DATE: March 31, 1987
TO: Senate Judiciary Committee
FROM: George Barbee, CAE
Executive Director
RE: HB-2419

Mr. Chairman and members of the committee, my name is George Barbee and I am President of Barbee & Associates, appearing on behalf of Kansas Consulting Engineers (KCE). KCE is a state-wide association of consulting engineering firms. Many of these firms are multi-disciplined and offer architectural, land surveying and landscape architectural services as well as engineering services. The following comments are offered to highlight the severe problem with affordability and availability of professional liability insurance now being faced by consulting engineers, and to expand on at least one solution to the problem as offered in House Bill 2419 which would provide for the utilization of screening panels.

In addition to being individually licensed as engineers so that they can legally offer their services to the public, most firms carry professional liability insurance, either because the client requires it, the competition demands it, or out of pure fear of being sued. The kinds of claims filed against architectural and engineering firms are usually for property damage for things such as leaking roofs, sewer systems that require some correction or water systems that have minor but expensive problems.

I was retained by KCE in 1972. By 1980, I had become quite familiar with the problems the members were experiencing with professional liability insurance and the consulting engineers allowed me to form an independent insurance agency to help them in obtaining adequate insurance coverage at affordable prices.

After about three years, through my independent agency, we were able to write policies for KCE members through several major companies. Through the early part of the '80s we were able to provide considerable savings for our members because we had created new competition by causing new companies to come in to Kansas. However, we began to see the market change to its present status beginning in 1984.

*Attach. I.
Senate Judiciary*

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First, one company notified us that they would no longer accept applications for new business, but would continue reviewing renewal applications. Then they refused to renew the majority of the applicants for renewal business.

Next, the source for most of our policies at that time began to notify us as each insured's policy expired that they would not renew because of "new underwriting guidelines". As well as not renewing, that company has accepted no new business for the past three years.

In 1985, another of our resources notified us that they would not accept applications from firms that had an annual gross billing of less than \$100,000 per year, or more than \$5 million per year. In 1986 that company withdrew totally from the market by issuing notices of non-renewal and telling us they would accept no new business. Well, at least they bothered to tell us which is more than some of the other companies did.

I presently have twenty-one engineering or architectural firms insured through the KCE in-house agency. Availability of coverage is now so restricted that the one admitted carrier we have left that offers broad coverage for architects and engineers is acknowledging receipt of applications by letter, stating that it may be several weeks before they can respond. There are other sources but most of them are not "admitted" carriers which means the company has not proven its financial stability to the State Department of Insurance and, therefore, an additional surplus lines tax is added to the policy premiums of these companies. Naturally, that added tax is paid by the insured. And the premiums for renewal or for the placement of new business with any company continue to climb dramatically, while the coverage continues to decrease.

Increases in premium amounts have run as high as 400% for some firms. The average premium of our insureds is now over \$30,000. Just one year ago that average was just over \$20,000.

Coverage has decreased in several ways. Asbestos or pollution coverage is no longer available from any company. As the premiums have gone up, in many cases, the coverage aggregate limits have gone down. And, nearly every company is now including the cost of defense within the aggregate limit amount of coverage.

Many policy holders have tried to control the increased premiums by raising their deductible amount, so what this means is the policy holders are paying more and more of the defense costs. The average deductible amount paid by the firms with which our agency deals is over \$20,000. That is why screening panels are especially important to us. Defense costs have become as great a problem to us as affordability and availability of insurance. Defense costs are incurred on any claims whether the suit is settled, dropped or ends up in court, and for that matter whether or not the defendant is insured.

This past summer Paul Genecki appeared before the interim committee on tort reform. He is a Senior Vice President with Victor O. Schinnerer and Company, the General Managing Agency for the Continental Casualty Insurance program for architects and engineers. That is the one admitted carrier that is our best resource for coverage at this time. They have been writing insurance for our industry since 1957 and Mr. Genecki was able to share some statistics with the interim committee. He stated that in 1960 there were 12.5 claims filed per 100 firms but that the number increased in 1982 to 44 claims per 100 firms and has been at that number for the past four years. He told the committee that of the 44, 9.5 of those claims required a settlement or judgment payment. The remaining 34.5 claims per 100 firms did not require settlement payment but did require defense costs.

In the interim committee we heard that in the current asbestos settlements, 67 cents of every settlement dollar goes to the cost of defense, while the injured party gets 33 cents. That fits with what we are told by our insurance carriers who allege that for every dollar paid in settlements and judgments, two dollars are spent on cost of defense.

HB-2419 would provide for screening panels for professional malpractice actions against professional licensees other than health care providers. Among others, the bill includes engineers, architects, land surveyors and landscape architects. When a malpractice action is filed with the district court, either the plaintiff or the defense can request a screening panel of four persons to be convened or the request can also be made when the claim is made but has not been formalized by filing of a petition.

The panel consists of one licensed professional selected by the defendant; one licensed professional selected by the plaintiff; one licensed professional selected by both sides; and an attorney selected by a judge. The attorney chairs the panel.

attach. I

The panel will determine whether there was a departure from the standard practice of the profession involved and whether a causal relationship existed between the damages suffered by the claimant and any such departure.

The panel will prepare a written report that shall be admissible evidence in any subsequent legal proceedings.

The use of screening panels is not mandated but available upon request and when used will help to weed out speculative action and will aid in the prompt settlements and payments of claims when professional malpractice has, in fact, occurred. It is necessary for this panel to be composed of professionals licensed in the same practice because they can best determine whether the appropriate standard of care was breached.

In handling malpractice actions, too much time, money and other resources are spent on litigation. As previously mentioned, approximately 60 - 65% of total amounts expended go to cost of defense while approximately one third go to actual settlements.

This piece of tort reform should have the impact of eliminating many speculative actions and defenses. Nationally, as mentioned before, about 75% of all malpractice cases are closed without payment. This seems to indicate that a number of speculative malpractice claims are being filed. However, even in those cases, the defendant must pay the cost of legal defense. These costs can amount to thousands of dollars per case and by giving an early indication that no malpractice has occurred, the pre-screening panel would aid in eliminating the cost resulting from the handling of some of these lawsuits.

On the other hand, the use of a pre-screening panel could also speed up payment to a wronged party that has a legitimate claim. By establishing at the outset that negligence had occurred, the screening panel system creates an incentive for defendants to settle these cases quickly.

In medical malpractice cases, this process has demonstrated that ability to speed up disposition of malpractice cases. For example, in Michigan, it currently averages 36 months from the filing of a lawsuit to the final resolution, but in states with a pre-screening panel, the average is only 24 months. In fact, in Indiana, which recently adopted a pre-screening panel act, it takes 18 months -- one-half the time required in Michigan. Needless to say, the longer it takes to close a case, the more it will cost in legal fees and costs to handle it.

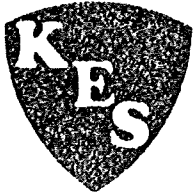
In the 1985 interim committee report on medical malpractice, there was a minority report that took exception to screening panels for doctors. The Legislators opposed seemed to be mainly concerned with the mandatory provisions in utilizing screening panels. Let me point out that the utilization of screening panels is available on request or if the judge determines the need. It is not automatically implemented.

In the sense of fair play, it seems that others ought to have the same considerations that have been extended to the health care providers that allow them to utilize screening panels. We believe that it's working for them and certainly has merit for the cases we're involved in. It seems easiest to define the bill to be applicable to professionals as defined in the professional corporation statutes because they refer to those professionals that require a license to practice.

Mr. Chairman, on behalf of Kansas Consulting Engineers, we'd like to thank you for the opportunity to present our feelings on the support of this bill and would urge you to act favorably on House Bill 2419.

I would be glad to attempt to answer any questions that you might have.

Carroll J.



Kansas Engineering Society, Inc.
627 S. Topeka, P.O. Box 477
Topeka, Kansas 66601 (913) 233-1867

Testimony before the
Senate Judiciary Committee
March 31, 1987

Mr. Chairman, members of the committee, the Kansas Engineering Society is pleased to present written testimony in support of H.B. 2419.

H.B. 2419, as it has been explained to you, establishes a pre-trial screening panel procedure for certain professional groups whereby a panel could be formed upon the request of one of the parties or by the motion of the district court judge to determine whether there was a departure from the standard practice of the profession.

The Kansas Engineering Society feels this bill is very important to its more than 1,000 members who practice in consulting, government, construction, industry and education.

One of the major concerns of the engineering profession is the deterrence of non-meritorious lawsuits. A majority of the insurance liability policies carried by professional licensed engineers have high deductibles, and as a result engineers, even when they successfully defend themselves in a lawsuit, still come out the loser because of the legal costs the engineer must pick up in defending himself or herself.

Last spring I was one of four individuals, representing professions, who were appointed to Fletcher Bell's Citizens' Insurance Committee. One of the recommendations of that group was to seek legislation identical to H.B. 2419. It was the feeling of the citizens group that a screening panel would be a good method of handling lawsuits, particularly against the technical professions and providing an alternate means of resolving these matters.

The bill is modeled on the medical malpractice screening panel that was passed by the legislature last year. Unlike some of the other measures you have studied in the area of tort reform we feel this bill is a measure that can be of equal benefit to the plaintiff as well as the defendant.

For instance, in the case where a defendant is delaying progress in litigation a plaintiff with a valid case against a professional could seek to have a panel review the matter and the defendant could not object. This mechanism, available both to the plaintiff and to the defendant, could actually speed up litigation where one side is delaying.

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Particularly important in the disposition of malpractice matters is the fact that under this bill the panel's written report would be admissible in any subsequent legal proceedings. In addition there is a deadline whereby a panel must return its findings to the parties or the judge as may be the case.

We appreciate the committee reviewing this issue at this late date in the legislature and we hope this committee will act favorably and recommend H.B. 2419 favorable for passage.

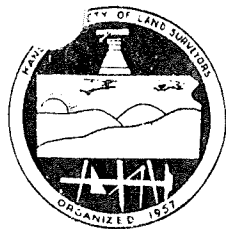
If any member of the committee has particular questions on this issue we would be most happy to respond to them at any time.

Respectfully submitted,

William M. Henry
Executive Vice President
Kansas Engineering Society

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KANSAS SOCIETY OF LAND SURVEYORS

Affiliated With the American Congress on Surveying and Mapping
7722 Chadwick - Prairie Village, Ks. 66208 - 913-648-4566

SENATE JUDICIARY COMMITTEE
March 31, 1987

House Bill No. 2419

Mr. Chairman and Members of the Committee:

Thank you for allowing Mr. George Barbee the time to speak with you today and to present our written testimony.

The Kansas Society of Land Surveyors supports House Bill No. 2419, as we believe it will be of benefit to the citizens of Kansas and to all members of the technical professions.

A screening panel comprised of others licensed in the technical profession in question would clarify the proceedings, enable the judicial system to continue its cases in other areas and save the state and the citizens time and money.

We ask that you report House Bill No. 2419 favorably.

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THE KANSAS SOCIETY OF ARCHITECTS, AIA

612-614 Kansas Avenue Topeka, Kansas 66603 913.357-5308 A Chapter of the American Institute of Architects

March 31, 1987

The Honorable Robert B. Frey
Chairperson - Judiciary Committee
Kansas Senate
Room 128 S, State Capitol
Topeka, Kansas

Dear Senator Frey:

The Kansas Society of Architects, AIA supports HB 2419; an Act that provides for pretrial screening panels. We believe this to be one of several pieces of important legislation that should be enacted as our legislature strives to maintain an equitable civil justice system while creating a stable long-term environment that insures affordable and high-quality liability insurance.

This bill would put in place the mechanism for the peer review of liability cases prior to trial with the intent of eliminating "marginal" cases where the "standard of care" may be misunderstood. In other words, the merit of a court action could be debated by a defendant's professional peers prior to the expense and time associated with a trial. Because this bill stipulates that the written report of the panel shall be admissible in any subsequent legal proceeding, the time spent during the panel review would not be lost. The panel's effort simply becomes part of the fact-finding of the pretrial process.

A few states have adopted similar legislation. Hawaii has had a Design Professional Conciliation Panel in place since 1981. Even though a Hawaiian Department of Commerce and Consumer Affairs audit in 1984 concluded that parts of their process should be changed, some of their published survey results are quite enlightening. Almost 60% of the attorneys and the design professionals responding to the survey believe that the panel prevents marginal/speculative actions from reaching court. Almost half of the attorneys and more than 60% of the design professionals believe that the panel encourages settlement of claims. We should note that most of the problems identified by the audit have been successfully addressed by HB 2419.

As contemplated by HB 2419, there is no cost to the State. The panel review would not impede



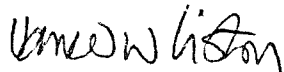
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the judicial process. HB 2419 would simply help insure that the "standard of care" by which our profession is judged is understood by the parties bringing the action. Contrary to what some members of the Bar have said, we're not striving to keep plaintiffs out of court. We're striving to insure equitable, knowledgeable consideration of the merits of each case. Contrary to what some members of the Bar have said, Tort Reform measures such as this legislation will provide a stabilized climate that insures availability and affordability of liability insurance. Contrary to what some members of the Bar would have you believe, Tort Reform has worked; Kansas provides a good example for other states to follow. The people of Kansas have enjoyed the benefits of one of the more equitable civil justice environments in the country for several years. For this, we are thankful!

There are still problem areas that need our attention and action in order that all of our state's citizens enjoy equitable treatment. We urge your thoughtful consideration for passage of HB 2419.

Respectfully submitted,



Vance W. Liston, AIA
Chairperson - Public Policy Committee
Kansas Society of Architects, AIA