Approved March 16, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

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

10:00 a.m./~~p.m.~~ on March 14, 1988 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter.

Committee staff present:
Gordon Self, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:
Senator Dave Kerr
Representative Robert Wunsch
Jerry Slaughter, Kansas Medical Society
Dr. Ernie J. Chaney, St. Joseph Family Practice Residency Program
Carol Renzulli, Lawrence
Harold Riehm, Kansas Osteopathic Association

Senate Bill 625 - Actions where exemplary or punitive damages recoverable.

Senate Bill 626 - Statute of limitations, actions involving health care providers.

Senate Bill 627 - Pain and suffering damages in personal injury actions.

Senate Bill 628 - Civil actions, purchase of annuity contracts for future economic losses.

Senate Bill 629 - Health care stabilization fund abolished.

Senate Bill 631 - Medical malpractice liability actions, attorney fees, noneconomic damages, annuity contracts.

House Bill 2692 - Damages for noneconomic loss in personal injury actions limited to $250,000.

House Bill 2693 - Collateral source benefits admissible.

House Bill 2731 - Exemplary damages in civil suits.

House Bill 3052 - Civil procedure and evidence relating to collateral source benefits.

Senator Dave Kerr, co-sponsor of Senate Bill 631, stated he would testify on Senate Bill 631 that deals exclusively with Health Care Stabilization Fund. It represents a different approach to some of the problems we are facing. He explained the bill deals only with a source of payments in case there is a judgment or settlement that can be applied to those funds toward the payment of whatever we deem to be correct. This bill is modeled

Tort Reform Bills

after the Indiana statute. Copies of his handouts are attached (See Attachments I). He further explained the bill to the committee.

Representative Robert Wunsch, Chairman House Judiciary Committee, explained the form in which the four house bills came to this committee from the House Judiciary Committee.

Jerry Slaughter, Kansas Medical Society, stated he would like to introduce his conferee from out of town.

Mr. Slaughter introduced Dr. Ernie J. Chaney, Director of St. Joseph Family Practice Residency Program, Associate Professor Department of Family and Community Medicine-UKSM-Wichita and a family physician. Dr. Chaney testified I believe the greatest impact on the current problem will be on the reproductive age female who will find it very difficult to find medical care in their local rural community. The problem will also impact on rural hospitals. The ripple effect will continue farther and affect academic medicine, particularly in family medicine. Of those individuals who currently do obstetrics, the majority will discontinue delivery of infants because of the rapidly rising liability costs. There is also no question in my mind as an educator and teacher of young family physicians, that we will have a distinctly difficult task in retaining those physicians in the State of Kansas. A copy of his testimony is attached (See Attachment III). A committee member inquired we are to pass these bills in order to protect rural America physicians? Dr. Chaney replied if liability premiums keep going up. The committee member inquired about elimination of the Health Care Stabilization fund? Dr. Chaney replied he has friends in California who carry no insurnace. The effect on a physician of a lawsuit is that the physician feels I have to take that x-ray because of the premiums. Frivolous lawsuits are one of the worst that we see.

Carol Renzulli, Lawrence, testified she would like to point out that tort reform does no only concern doctors, lawyers, insurance companies and the injured. The other player is called health care costs. Health care costs drive hospitals to raise room rates, doctors to charge more per office visit, insurance companies to raise premiums, not only on malpractice but individual health policies, and lawyers to seek larger and larger settlements for their clients. She stated economists on all sides of this issue should take a really close look at innovative ways in which our state could work with the Federal health care system. A copy of her statement is attached (See Attachment II)

Harold Riehm, Kansas Osteopathic Association, testified the situation is serious. Their association has lost 16 physicians doing obstetrics out of 61 who responded to a questionaire. He said he agrees with most of the approaches. In response to the committee member's inquiry concerning decrease in rates, he said we will see progress toward leveling off of the rates. We are all looking for some kind of a sign that the State of Kansas is addressing this. We are ready to bite the bullet. We are willing to pay that charge. He stated this situation has impacted more severely on the osteopathic community. Most of their residency trained physicians are from out of state, and their insurnace is from Medical Protection Insurance Companies. We don't have the cheapest insurance available to

Tort Reform Bills

us. The Kansas State Insurance Department has two actions. They eliminated the 20% surcharge and were instrumental in starting a new company that will insure osteopaths. They did have the problem of availability. These bills address needed approaches to problems we are facing in Kansas.

A committee member inquired of Dr. Chaney, are you convinced that this is the only solution and best solution to problem of increasing rates. Dr. Chaney replied, the best solution at this period of time. Mid-wifery is not the way to go to deliver babies. The committee member inquired we need to have doctors serving in unserved areas and provide service to those areas of the state? Dr. Chaney replied, I wouldn't oppose that. I wouldn't object to help to keep people there. A committee member inquired where are the doctors going? Dr. Chaney replied a lot are going out of state. A lot are going to Oklahoma where rates aren't as high. The committee member inquired are they making a good starting income? Dr. Chaney replied of the 35% that go to rural areas with a population of 5,000 or less, they can't afford doubling of premium this year and next year. They only deliver 50 babies a year in small communities.

The meeting adjourned.

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

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-14-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
ROBIN BEGGS	Wichita	S/A S
Tom Whitaker	Topeka	Ks Motor Carriers Assn
Bob Corkhill	Topeka	KTLA
Walt Bettis	Wichita	KAFP
Jan Olmin	Topeka	Prof Ass Agts
Gerhard Meyer	"	KCCI
Karen S Case	Lawrence	Rep Dyck - Intern
Kirby L Stegman	Topeka	Div of Budget
Brian Johnson	Topeka	Dir of Budget
Matt Tyrrell	Topeka	AP
Carol Rengell	Lawrence KS	Not affiliated
Matt Lynch	Topeka	Judicial Council
Barbara Smith	Topeka	Mo Pac
Bob Wunsch		Ag
Jean Rhodes	Junction City	City of J.C.
Ed Becker	"	"
Bob Corkins	KHA	Topeka
PATRICIA HENSHALL	OJA/SUPREME CT	TOPEKA
Karen Kelly	Overland Park	Sun
Richard Brandt	Topeka	KTLA
Larry Magill	"	NAK
M. Hawver	"	Capital-Journal
HAROLD E. RIEHM	TOPEKA	KAOM
JOE A. MORRIS	TOPEKA	KLSI
Tom Palace	"	SLSI

Att. IV

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Lori Callahan	Topeka	Am. Ins. Assn.
William L. Mitchell	Hutchinson	Alliance Ins Co.

3-141-88

Weeks Ann. Bus. + Prof. Code (1988 Supp) Calif.

1977 Legislation.
Former § 6141.1, added by Stats.1941, c. 144, p. 1187, § 1, relating to the same subject matter as the present section, was repealed by Stats.1977, c. 58, p. 450, § 5.

Derivation: Former § 6141.1, added by Stats.1941, c. 144, p. 1187, § 1.

§ 6142. Certificate of payment

Upon the payment of the annual membership fees, including any costs imposed pursuant to Section 6140.7, each member shall receive a certificate issued under the direction of the board evidencing the payment.

(Amended by Stats.1986, c. 662, § 3.)

1986 Legislation
The 1986 amendment inserted "including any costs imposed pursuant to Section 6140.7,".

§ 6143. Suspension for nonpayment and reinstatement; penalties

Any member, active or inactive, failing to pay any fees or costs after they become due, and after two months written notice of his or her delinquency, shall be suspended from membership in the State Bar.

The member may be reinstated upon the payment of accrued fees or costs and such penalties as may be imposed by the board, not exceeding double the amount of delinquent dues or costs.

(Amended by Stats.1986, c. 662, § 4.)

1986 Amendment. Inserted "or costs" in three places; and at the beginning of the second paragraph, substituted "The member" for "He".

Notes of Decisions

3. Suspension
Evidence supported finding of attorney's culpability on count of failure to prosecute case or answer inquiries and, in view of evidence as to whether attorney received notice of suspension for nonpayment of membership fee, supported finding of violation of suspension order. Taylor v. State Bar (1974) 113 Cal.Rptr. 478, 521 P.2d 470, 11 C.3d 424.

§ 6145. Annual statement

Cross References
Funds for provision of legal services to indigent persons resulting from demand-trust-account interest, to be included in report required pursuant to this section, see § 6222.

ARTICLE 8.5. * * * FEE AGREEMENTS

Section
6146. Limitations; periodic payments.
6147. Contingency fee contracts; duplicate copy; contents; effect of noncompliance; recovery of workers' compensation benefits.
6148. Contracts for services in cases not coming within § 6147; bills for services rendered; contents; effect of noncompliance.
6149. Written fee contract as confidential communication.

Article 8.5 was added by Stats.1975, 2d Ex.Sess., c. 1, p. 3967, § 24.2.

Heading of Article 8.5, "Contingent Fee Agreements: Medical Injury Claims", was amended by Stats.1982, c. 415, § 1, to read "Contingency Fee Agreements", and was amended by Stats.1986, c. 475, § 5, to read as it now appears.

§ 6146. Limitations; periodic payments

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

Att. I

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered.

(4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(Added by Stats.1975, 2nd Ex.Sess., c. 1, p. 3967, § 24.2. Amended by Stats.1975, 2nd Ex.Sess., c. 2, p. 3989, § 1.185, urgency, eff. Sept. 24, 1975, operative Dec. 12, 1975; Stats.1981, c. 714, p. 2580, § 23; Stats.1987, c. 1498, § 2.)

1975 Legislation.

Medical malpractice insurance, action for declaration of rights and duties, see note under Code of Civil Procedure § 364.

Operative effect of Stats.1975, 2d Ex.Sess., c. 2, see note under § 160.

1987 Legislation

Section 1 of Stats.1987, c. 1498, provides:

"This act shall be known and may be cited as the Willie L. Brown Jr.–Bill Lockyer Civil Liability Reform Act of 1987."

Law Review Commentaries

Extending Medical Injury Compensation Reform Act limitations to all negligence actions. (1986) 18 Pacific L.J. 553.

Medical malpractice: Alleged "crisis" in perspective. Wylie A. Aitken (1975) 3 West.St.U.L.Rev. 27.

Medical Malpractice and Contingency Fee Controls: Is the Prescription Curing the Crisis or Killing the Patient? (1985) 19 Loyola L.Rev. (Calif.) 623.

Patient's compensation board: Answer to medical malpractice crisis. Dennis E. Carpenter. (1975) 3 West.St.U. L.Rev. 15.

Price of health care availability: Economics of medical malpractice. (1979) 11 Southwestern L.R. 1371.

Proposed legislation: Amend MICRA to include mandatory mediation of medical malpractice claims. (1980) 14 U.S.F.L.Rev. 439.

Library References

Attorney and Client ⇐147.
C.J.S. Attorney and Client §§ 313 to 317.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this supplement.

Notes of Decisions

½. Validity

This section which places limit on amount of fees attorney may obtain in medical malpractice action when he represents party on contingency fee basis is not unconstitutional

3-14-88
Sen Kiem

Indiana Law Review. Survey of Recent Developments in Indiana Law, XVIII. Torts, 9 Ind. L. Rev. 340.

Survey of Recent Developments in Indiana Law, IV. Constitutional Law (Charles E. Barbieri), 13 Ind. L. Rev. 89.

Valparaiso University Law Review. The Indiana Malpractice Act: Legislative Surgery on Patients' Rights, 10 Val. U.L. Rev. 303.

Cited: Johnson v. St. Vincent Hosp., — Ind. —, 76 Ind. Dec. 131, 404 N.E.2d 585 (1980).

CHAPTER 5

ATTORNEY FEES

SECTION.

16-9.5-5-1. Maximum fee — Fee arrangements.

16-9.5-5-1. Maximum fee — Fee arrangements. — (a) When a plaintiff is represented by an attorney in the prosecution of his claim, the plaintiff's attorney fees from any award made from the patient's compensation fund may not exceed fifteen percent [15%] of any recovery from the fund.

(b) A patient has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment. [IC 16-9.5-5-1, as added by Acts 1975, P.L. 146, § 1.]

Indiana Law Review. Survey of Recent Developments in Indiana Law, XVIII. Torts, 9 Ind. L. Rev. 340.

Valparaiso University Law Review. The Indiana Malpractice Act: Legislative Surgery on Patients' Rights, 10 Val. U.L. Rev. 303.

NOTES TO DECISIONS

Constitutionality.

Since the total amount recoverable by an injured patient is limited, the limitation on attorney fees follows naturally as a means of protecting the already diminished compensation due the claimant and does not violate the due process and equal protection provisions of the constitution. Johnson v. St. Vincent Hosp., — Ind. —, 76 Ind. Dec. 131, 404 N.E.2d 585 (1980).

CHAPTER 6

REPORTING AND REVIEW OF CLAIMS

SECTION.

16-9.5-6-1. Reporting claims settled.
16-9.5-6-2. Review of provider fitness — Discipline.

16-9.5-6-1. Reporting claims settled. — All malpractice claims settled or adjudicated to final judgment against a health care provider shall be reported to the commissioner by the plaintiff's attorney and by the health care provider or his insurer or risk manager within sixty [60] days following final disposition of the claim. The report to the commissioner shall state the following:

(a) Nature of the claim;

(b) Damages asserted and alleged injury;

(c) Attorney's fees and expenses incurred in connection with the claim or defense; and

3-14-88
Ken

American Law Reports

ANNOTATION

VALIDITY OF STATUTE ESTABLISHING CONTINGENT FEE SCALE FOR ATTORNEYS REPRESENTING PARTIES IN MEDICAL MALPRACTICE ACTIONS

by

Wanda Ellen Wakefield, J.D.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

7 Am Jur 2d, Attorneys at Law §§ 294–295

Annotations: See the related matters listed in the annotation, infra.

2 Am Jur Pl & Pr Forms (Rev), Attorneys at Law, Forms 122.1, 136, 163, 164; 19 Am Jur Pl & Pr Forms (Rev), Physicians, Surgeons and Other Healers, Forms 131 et seq.

2 Am Jur Proof of Facts 233, Attorneys' Fees; 7 Am Jur Proof of Facts 479, Malpractice; 22 Am Jur Proof of Facts 2d 1, Medical Malpractice —Use of Hospital Records

13 Am Jur Trials 153, Interference with Attorney's Contingent Fee Contract; 16 Am Jur Trials 471, Defense of Medical Malpractice Cases

US L Ed Digest, Attorneys' Fees § 1

ALR Digests, Attorneys §§ 65, 66, 66.5

L Ed Index to Annos, Attorney and Client; Equal Protection of the Laws; Malpractice; Physicians and Surgeons; Statutes

ALR Quick Index, Attorneys; Attorneys' Fees; Equal Protection of Law; Malpractice; Physicians and Surgeons

Federal Quick Index, Attorneys; Attorneys' Fees; Contingent Fees; Equal Protection of the Laws; Malpractice; Physicians and Surgeons

Validity of statute establishing contingent fee scale for attorneys representing parties in medical malpractice actions

This annotation[1] collects and analyzes those state and federal[2] cases in which the courts have determined the validity of state statutes[3] establishing a scale from which the amount of a medical malpractice[4] award attributable to the contingency fee[5] payable to the litigant's attorney must be determined.

Since relevant statutes are discussed herein only insofar as they are reflected in the cases reported in this annotation, the reader is advised to consult the most recent statutory enactments of the jurisdiction in which he or she is interested.

◆

In response to what has been called the medical malpractice crisis brought on by sharply rising malpractice insurance rates and the resultant threats of some health care providers to withdraw their services from the public, state legislatures have enacted a variety of provisions attempting to deal with the problem. One such provision, discussed herein, sets a limit on the amount of attorneys' fees recoverable on a contingency basis by the attorneys for successful litigants in medical malpractice actions. In the following case, a statutory provision placing a limitation on the amount of the contingency fee to be received by an injured patient's attorney was held to be constitutional and free from any equal protection or due process defect.

In concluding that an Indiana statute designed to regulate medical malpractice actions brought in that state was constitutional, the court in Johnson v St. Vincent Hospital, Inc. (1980, **Ind**) 404 NE2d 585, held that the statutory limitation set on contingency fees to be received by the attorneys representing injured patients was not a violation of due process or equal protection. The court pointed out that the statute also provided for a limitation on the amount available to be recovered by an injured patient, and that the attorneys' fees limitation was directly related to that limitation. In addition, the court noted that although the statute provided for a contingency fee of only 15 percent on any award made out of the patient's compensation fund, in practice such a limitation did not affect the first

1. For cases within the precise scope of this annotation, it is no longer necessary to consult the annotation at 80 ALR3d 583, entitled "Validity and construction of state statutory provisions relating to limitations on amount of recovery in medical malpractice claim and submission of such claim to pretrial panel."

2. No federal cases were found.

3. Only cases dealing with statutory provisions are collected herein, although the problems addressed by such statutes may also have been addressed by court rules or by agreements between bar associations and medical societies.

4. Although other statutory schemes, such as those providing for worker's compensation and dram shop actions, also may provide for limitations on the amount of attorneys' fees to be awarded, only statutes specifically dealing with fees in medical malpractice litigation are dealt with herein

5. Presumably, the amount that an attorney could charge a litigant under any other contractual fee arrangement would not be affected by the statutes considered herein.

$100,000 potentially available for recovery, so that the actual range of legal fees following institution of the medical malpractice act would be between 20 percent and 35 percent of the total recovery available to the patient. Thus, in effect, the court explained, the patient's attorney would usually receive, even after the enactment of the act, substantially the same amount from any award made as he would have received had the act not been promulgated. Finally, the court analogized the instant situation to that of the worker's compensation situation, which also involved a statutory limitation on attorneys' fees, and which limitation had been held to be a reasonable exercise of the state's police power. Having also rejected the injured patients' constitutional challenges to other provisions in the statute, the court affirmed the various trial courts that had dismissed the patients' complaints because they had failed to comply with the provisions of the medical malpractice statute.

See Atty. Gen. v Johnson (1978) 282 Md 274, 385 A2d 57, app dismd 439 US 805, 58 L Ed 2d 97, 99 S Ct 60, in which the court rejected an argument put forward by the state bar association to the effect that the state's medical malpractice statute was unconstitutional to the extent that it required that any fees received by attorneys in representing clients under the act be subject to approval by the arbitration panel and by the court should the case go from arbitration to trial. Pointing out that the right to contract is always subject to regulation, the court stated that it was not unreasonable for the drafters of the statute to require the submission of fees received by attorneys to review by the panel and by the court. Thus, having rejected all of the various arguments put forward by the injured patients as well as asserting the unconstitutionality of the statute, the court reversed the trial court's decision holding the statute unconstitutional and remanded to the trial court for further proceedings.

◆

The court in the following case held that portion of a medical malpractice statute establishing limits on the amount of contingency fees payable to individual litigants' attorneys to be unconstitutional.

Pointing out that a statute regulating the amount of contingency fees to be paid to the injured patients' attorneys made no similar provision for regulation of the amount of fees to be paid to the attorneys representing the physicians who had allegedly injured the patients, which fees consumed approximately the same amount of the insurance dollar, the court in Carson v Maurer (1980, NH) 424 A2d 825, 12 ALR4th 1, held that the portion of the state's medical malpractice statute so regulating attorneys' fees was unconstitutional. The court rejected the argument that the contingent fee regulations were constitutional inasmuch as they were designed to insure that the bulk of any award be given to the injured patients, rather than to their attorneys. The court stated that there was no direct evidence that juries ever considered attorneys' fees in awarding damages to individual litigants, so that it was unlikely that the proposed reapportionment of damage awards between attorneys and their clients would have any effect on reducing medical malpractice insurance rates, which was the avowed purpose of the statute. In addition, the court stated that the statute unfairly burdened attorneys and their clients and would work to reduce the number of attor-

neys willing to represent injured patients in medical malpractice actions, which would potentially impede the constitutional right of those patients to have the validity of their claims determined in the courts. Noting, in addition, several other constitutional infirmities in the entire act, the court reversed the judgments of the various trial courts which had found the medical malpractice statute to be constitutional, and it remanded to those trial courts for further proceedings not inconsistent with its opinion.

◆

The following matters are of related interest.

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney. 9 ALR4th 191.

Validity and construction of statute or court rule fixing maximum fees for attorney appointed to represent indigent. 3 ALR4th 576.

Wrongful cancellation of medical malpractice insurance. 99 ALR3d 469.

Validity and construction of state statutory provisions relating to limitations on amount of recovery in medical malpractice claim and submission of such claim to pretrial panel. 80 ALR3d 583.

Validity of exception for specific kind of tort action in survival statute. 77 ALR3d 1349.

Workmen's compensation: attorney's fee or other expenses of litigation incurred by employee in action against third party tortfeasor as charge against employer's distributive share. 74 ALR3d 854.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

Comment Note.—Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 ALR3d 475.

Attorney's death prior to final adjudication or settlement of case, as affecting compensation under contingent fee contract. 33 ALR3d 1375.

Allowance of punitive damages in medical malpractice action. 27 ALR3d 1274.

Validity and effect of contract for attorney's compensation made after inception of attorney-client relationship. 13 ALR3d 701.

Court rules limiting amount of contingent fees or otherwise imposing conditions on contingent fee contracts. 77 ALR2d 411.

Judicial Power Over Contingent Fee Contracts: Reasonableness and Ethics. 30 Case Western Reserve L Rev 523 (Spring, 1980).

Consult POCKET PART in this volume for later cases

AMERICAN LAW REPORTS
FOURTH SERIES
1987 Supplement

VOLUME 12 ALR4th

12 ALR4th 23–26

Validity of state statute providing for periodic payment of future damages in medical malpractice action. 41 ALR4th 275.

Computation of cost of "comparable services" in determining reasonableness of compensation of trustees, examiners, professional persons, and attorneys under 11 USCS § 330(a). 69 ALR Fed 644.

Reasonableness of contingent fee in personal injury action. 46 Am Jur Proof of Facts 2d 1.

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™**. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

In medical malpractice action in which constitutionality of Delaware Health Care Malpractice Act was challenged on ground that attorney fee limitation provisions in Act violated equal protection, court rejected equal protection argument, reasoning that limitation on attorneys fees that could be collected in malpractice actions was rational in that it directly related to reduction of malpractice insurance cost and, consequently, medical costs; statute limited attorneys' fees in medical malpractice cases to 35 percent of first $100,000 in damages, 25 percent of next $100,000, and 10 percent of balance of any damage award. Di Filippo v Beck (1981, DC Del) 520 F Supp 1009.

Statute limiting contingency fee plaintiffs' attorney could recover in medical malpractice action did not violate due process, since right to retain counsel was in no way abrogated; statute did not violate equal protection, since imposition of fee limits only in medical malpractice actions could be rationally justified as measure to reduce malpractice insurance costs; and statute did not violate separation of powers doctrine, since legislature had power to impose limits on attorney fees despite court's inherent power to review attorney fee contracts. Roa v Lodi Medical Group, Inc. (1985) 37 Cal 3d 920, 211 Cal Rptr 77, 695 P2d 164, mod on other grounds 38 Cal 3d 620a and time for gr or den reh extended, app dismd (US) 88 L Ed 2d 352, 106 S Ct 421.

Health Care Services Management Act provision, which regulated fees paid to attorneys prosecuting medical malpractice actions, was unconstitutional as infringing upon exclusive power of the courts of the Commonwealth to govern activities of attorneys relative to their contingent fee agreements. Heller v Frankston (1983) 76 Pa Cmwlth 294, 464 A2d 581.

12 ALR4th 41–45

Medical malpractice: liability for failure of physician to inform patient of alternative modes of diagnosis or treatment. 38 ALR4th 900.

Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment. 42 ALR4th 543.

Liability of physician, for injury to or death of third party, due to failure to disclose driving-related impediment. 43 ALR4th 153.

Physician's failure to disclose diagnosis or test result. 42 Am Jur Proof of Facts 2d 405.

Physician's failure to protect third party from harm by nonpsychiatric patient. 43 Am Jur Proof of Facts 2d 657.

VERALEX™: Cases and annotations referred to herein can be further researched

3-14-88
Rec

Delaware Code Annotated 1986 Supp

§ 6863. Nonassignability of claims.

A claim for compensation under this chapter is not assignable; provided, however, that rights of subrogation shall not be deemed to constitute assignment. (60 Del. Laws, c. 373, § 1.)

§ 6864. Periodic payments; reduction of awards in event of certain contingencies.

(a) Where a person recovers a judgment against a health care provider, the Court may, after making a determination as to the amount of such judgment which was awarded as compensation for future pain and suffering, if any, the amount of such judgment awarded for future expenses of care of the injured party made necessary by reason of the injury involved, if any, and the amount of such judgment awarded as compensation for any other future damages, if any, direct that:

(1) There shall be deducted from the award, and paid to the plaintiff, an amount sufficient to cover the plaintiff's attorney's fees, expenses related to the litigation, expenses incurred for past health care and pain and suffering incurred as of the date of said payment;

(2) The remainder of the award shall be paid to the plaintiff in equal or unequal monthly installments to be fixed by the Court for a period of time to be fixed by the Court; provided, however, that in addition thereto, medical expenses incurred and paid by plaintiff not otherwise reimbursed shall also be paid to plaintiff from the undistributed portion of the award;

(3) Each monthly installment shall, in addition, include a payment of interest on the then unpaid balance at a rate to be fixed by the Court.

(b) If a plaintiff receiving installment payments of a judgment shall die before the expiration of a 20-year period from the date of the award, and prior to the receipt by the plaintiff or on the plaintiff's behalf of all such installment payments, the Court shall deduct from the total of the installment payments then remaining unpaid the amount thereof representing compensation for future pain and suffering and future expenses of care made necessary by the injury involved, shall cause the balance of all such installments after such deduction to be paid to the estate of the plaintiff so dying and shall cause such judgment to be marked satisfied.

(c) If the plaintiff receiving installment payments shall die after the expiration of a 20-year period from the date of the award, then the payment shall automatically terminate as of the date of the plaintiff's death. (60 Del. Laws, c. 373, § 1.)

§ 6865. Limitation on attorney's fees.

(a) The amount of the claimant's attorney's fees may not exceed the amounts in the following schedule:

(1) 35% of the first $100,000 of damages;

(2) 25% of the next $100,000 of damages;

(3) 10% of the balance of any awarded damages.

(b) Notwithstanding subsection (a) of this section, a claimant has the right to elect to pay for the attorney's services on a mutually satisfactory per diem basis. The election, however, must be exercised in written form at the time of employment. (60 Del. Laws, c. 373, § 1.)

This section does not violate equal protection. DiFilippo v. Beck, 520 F. Supp. 1009 (D. Del. 1981).

Rationality of limitation. — It is rational to limit attorney's fees which may be collected in malpractice suits and not in other actions because the limitation is related to reducing malpractice insurance costs and, consequently, medical costs. DiFilippo v. Beck, 520 F. Supp 1009 (D. Del. 1981).

Subchapter VIII. Study Commission

§ 6870. Study Commission.

(a) The Delaware Health Care Injury Insurance Study Commission is hereby created, consisting of the following members: The Commissioner, the Secretary of Health and Social Services and 13 members to be appointed by the Governor. Of the 13 members appointed by the Governor, 2 shall be representatives of the Joint Underwriting Association if one is established pursuant to this chapter or otherwise be from the insurance industry and familiar with health care malpractice problems and not an agent or broker; 2 shall be licensed to practice medicine; 1 shall be a representative of a licensed hospital; 1 shall be from a category of health care provider not represented above; 2 shall be members of the legal profession; 1 shall be a licensed insurance agent or broker; and 4 shall be representatives of the general public, unaffiliated with the insurance or health care industries or the health care or legal professions.

(b) The Commissioner shall be the chairperson of the Commission. Nine of the Commission members then in office shall constitute a quorum for the transaction of any business or the exercise of any power or function of the Commission. The affirmative vote by a majority of the Commission members present at a duly called and noticed meeting at which there is a quorum shall be required to exercise any power or function of the Commission. Each member shall be entitled to 1 vote on all matters which may come before the Commission. The Commission may delegate to 1 or more of its members such duties as it deems proper.

(c) The Commissioner and the Secretary of Health and Social Services may designate a deputy or other officer of their agencies to exercise their power and perform their duties, including the right to vote on the Commission.

(d) Each member of the Commission shall be allowed the necessary and actual expenses which the member shall incur in the performance of the member's duties under this chapter. (60 Del. Laws, c. 373, § 1.)

3-14-88

Smith-Hurd Illinois Ann. Statutes 1987 Supp.

treated patient was more probably negligent than any other. Loizzo v. St. Francis Hosp., App. 1 Dist.1984, 76 Ill.Dec. 677, 121 Ill.App.3d 172, 459 N.E.2d 314.

2. Expert testimony

Lack of supervision of, and failure to use restraints on, patient, who had previously fallen and who was suffering from dizziness and lack of balance, was not a matter involving gross negligence, and proposed use of restraints was not so common that layperson armed with everyday ordinary knowledge could readily appraise it, and thus, plaintiff bringing malpractice action against hospital was required to establish standard of care with expert testimony in order for doctrine of res ipsa loquitur to apply. Taylor v. City of Beardstown, App. 4 Dist.1986, 96 Ill.Dec. 524, 142 Ill.App.3d 584, 491 N.E.2d 803.

2–1114. Contingent fees for attorneys in medical malpractice actions

§ 2–1114. Contingent fees for attorneys in medical malpractice actions. (a) In all medical malpractice actions the total contingent fee for plaintiff's attorney or attorneys shall not exceed the following amounts:

33⅓% of the first $150,000 of the sum recovered;

25% of the next $850,000 of the sum recovered; and

20% of any amount recovered over $1,000,000 of the sum recovered.

(b) For purposes of determining any lump sum contingent fee, any future damages recoverable by the plaintiff in periodic installments shall be reduced to a lump sum value.

(c) The court may review contingent fee agreements for fairness. In special circumstances, where an attorney performs extraordinary services involving more than usual participation in time and effort the attorney may apply to the court for approval of additional compensation.

(d) As used in this Section, "contingent fee basis" includes any fee arrangement under which the compensation is to be determined in whole or in part on the result obtained.

P.A. 82–280, § 2–1114, added by P.A. 84–7, § 1, eff. Aug. 15, 1985.

Historical and Practice Notes

By Albert E. Jenner, Jr., Philip W. Tone and Arthur M. Martin

Section 2–1114, which places restrictions on contingent fees in medical malpractice cases, is one of a number of sections added to the Civil Practice Law by Public Act 84–7, Laws 1985, p. 211, adopted by the General Assembly effective August 15, 1985. For a general discussion of the legislation, see the Historical and Practice Notes to section 2–109, *supra*, this supplement.

Shortly after Public Act 84–7 was adopted, it was the subject of a court challenge and a number of its provisions, including section 2–1114, were struck down on constitutional grounds by the circuit court. Bernier v. Burris, No. 85–6627 (Cir.Ct. Cook Cty. Ill. Dec. 19, 1985). The Illinois Supreme Court reversed the circuit court's holding with respect to section 2–1114, and held that the provision is constitutional. Bernier v. Burris, 113 Ill.2d 219, 252–253, 497 N.E.2d 763, 777–779, 100 Ill.Dec. 585, 599–601 (1986). The circuit court held that section 2–1114 was unconstitutional because it violated the separation-of-powers clause of the Illinois Constitution and the equal protection and due process clauses of the United States Constitution. With regard to the separation-of-powers argument, the Illinois Supreme Court held that the clause is not violated because section 2–1114 allows the trial court to use its discretion in an appropriate case to approve a larger fee than would otherwise be permitted by the section. The Court held that the due process clause of the United States Constitution is not violated by the provision because legislation restricting attorneys' fees more severely than section 2–1114 has been upheld by the United States Supreme Court, citing Walters v. National Association of Radiation Survivors, 473 U.S. ___, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). The Court also rejected the Equal Protection challenge, because the provision is rationally

related to the legitimate governmental interests of encouraging resolution of disputes and discouraging frivolous lawsuits.

For the manner of reducing future damages recoverable by the plaintiff in periodic installments to a lump sum value see section 2–1712 of Part 17 of the Civil Practice Law, *infra*, this supplement. Part 17, added as part of the same legislation which added this section, deals in great detail with damages in a defined class of healing art malpractice cases, and section 2–1712 set forth a manner of determining an equivalent lump sum value which will be instructive in applying this section.

Note that this section, like section 2–1109, applies only to medical malpractice cases and not to the broader class of "healing art malpractice" cases to which other parts of the legislation are made applicable.

Historical Note

For effective date and application of P.A. 84–7, see note following ¶ 2–114 of this chapter.

Law Review Commentaries

Illinois Medical Malpractice Reform Act of 1985: Illinois operates unconstitutionally on medical malpractice victims. 19 John Marshall L.Rev. 677 (1986).

Library References

Physicians and Surgeons ⇐18.110.
C.J.S. Physicians and Surgeons § 67.

Notes of Decisions

1. Validity

This paragraph limiting amount of contingent fees allowable to attorney representing plaintiff in medical malpractice action was not so restrictive as to violate due process or work to limit litigants access to the courts. Bernier v. Burris, 1986, 100 Ill.Dec. 585, 113 Ill.2d 219, 497 N.E.2d 763.

This paragraph was rationally related to legitimate governmental interest in reducing the burdens existing in the health profession as a result of the perceived malpractice crisis by creating disincentive for filing frivolous suits and preserving for a plaintiff a greater part of his recovery and thus did not violate equal protection or constitute special legislation. Bernier v. Burris, 1986, 100 Ill. Dec. 585, 113 Ill.2d 219, 497 N.E.2d 763.

This paragraph limiting amount of contingent fees that attorney representing a plaintiff in a medical malpractice action may recover but providing that the court could review the contingent fee agreement and approve a larger fee in an appropriate case did not purport to limit the scope of a court's authority to regulate the legal profession or the court's authority to supervise contingent-fee arrangements. Bernier v. Burris, 1986, 100 Ill.Dec. 585, 113 Ill.2d 219, 497 N.E.2d 763.

2–1115. Punitive damages not recoverable in healing art and legal malpractice cases

§ 2–1115. Punitive damages not recoverable in healing art and legal malpractice cases. In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.
P.A. 82–280, § 2–1115, added by P.A. 84–7, § 1, eff. Aug. 15, 1985.

Historical and Practice Notes

By Albert E. Jenner, Jr., Philip W. Tone and Arthur M. Martin

Section 2–1115, which prohibits the recovery of punitive damages in healing art malpractice and legal malpractice cases, is one of a number of sections added to the Civil Practice Law by Public Act 84–7, Laws 1985, p. 211, adopted by the General Assembly effective August 15, 1985. For a general discussion of the legislation, see the Historical and Practice Notes to section 2–109, *supra*, this supplement. Punitive damages had been a particular focus of criticism in the public debates leading up to the passage of the legislation, with concern being especially directed at the ability of a jury to enforce a quasi-criminal sanction without what were felt to be sufficient standards and protections for the litigant against whom damages are sought.

Florida Rules of Court - State - 1957 3-14-88
Any Contingent Fee Kuen

Withholding information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 4–3.4(c) directs compliance with such rules or orders.

4–1.5. Fees

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

(C) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(D) As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (D)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm, representing the client. No lawyer or firm may participate in the fee without the consent of the client as evidencing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint responsibility for the representation. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(a) Any fee in a domestic relations matter the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(b) A contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damage or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(a) The contract shall contain the following provisions:

1. "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

2. "This contract may be cancelled by written notification to the attorney at any time within three (3) business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney(s) for the work performed during that time. If the attorney(s) have advanced funds to others in representation of the client, the attorney(s) are entitled to be reimbursed for such amounts as they have reasonably advanced on behalf of the client."

(b) The contract for representation of a client in a matter set forth in paragraph (D)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

1. Without prior court approval as specified below, any contingent fee which exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. 33-1/3% of any recovery up to $1 million through the time of filing of an answer or the demand for appointment of arbitrators;

b. 40% of any recovery up to $1 million through the trial of the case;

c. 30% of any recovery between $1 and $2 million;

d. 20% of any recovery in excess of $2 million;

e. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

(i) 33-1/3% of any recovery up to $1 million through trial;

(ii) 20% of any recovery between $1 and $2 million;

(iii) 15% of any recovery in excess of $2 million;

f. An additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

2. If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in (D)(4)(b)1, the client may petition the circuit court for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of his or her rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under paragraphs (A) and (B).

3. In cases where the client is to receive a recovery which will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall only be calculated on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, then this limitation does not apply. No attorney may separately negotiate with the defendant for that attorney's fees in a structured verdict or settlement where such separate negotiations would place the attorney in a position of conflict.

(c) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as paragraph (D)(5).

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. The closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for six (6) years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

(E) A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) The total fee is reasonable.

3-14-88

Thank you Chairman Frey for the opportunity to speak to you today. I am not here to tell you my story. I am here to share with you some of my thoughts on Tort Reform. This is not a subject any of us here take lightly. I would point out that Tort Reform does not only concern Doctors, Lawyers, Insurance Companies and the injured. There is another player here. I do not speak of any one group -- but a thing. This thing is amorphous and is why we meet today. It is a huge ballooon the wind has wrested from our grasp that floats silently in the stratosphere. It is invisible -- yet all of us feel and react to it. This "Balloon" is called Health Care Costs. Health Care Costs drive hospitals to raise room rates, doctors to charge more per office visit, insurance companies to raise premiums, not only on malpractice but individual health policies, and lawyers to seek larger and larger settlements for their clients. You will have to agree that no one escapes the sting of the Health Care Cost Wasp.

I see two areas where we might look for solutions to the Health Care Cost problem.

Notice, I have not charged any of the three professions represented here. They are not guilty. Health Care Costs are the reason for run-away medical inflation, not tort law. What good is it for doctors, lawyers and insurers to fight each other while Health Care Costs soar? The courts have given us some direction about what cannot be done. How can we grasp again the string on the Health Care Cost Balloon and anchor it to terra firma? We don't have to look for foreign solutions because it is in our backyard. Let's consider the Medicaid Program. When you go to your docotr he orders a chest x-ray. His receptionist will take

Att. II

a photocopy of your card. Your doctor bills medicaid for your x-ray. Medicaid will pay your doctor the national average rate for the x-ray. I will tell you that Meidicaid has a firm grip on the Health Care Cost Balloon. Truly, Medicaid does not care if the x-ray machine your doctor uses is ten years old or is new. They will not help you pay for a new machine, but perhaps you as a group of P.A.'s might cost share or lease or utilize your local hospital's machine or even have a leasing agreement with the manufacturer. Another pricing policy tha+ would make much more sense than putting a price on our heads is to "cost out" an illness or disability. That, of course, is where we are headed with DRG's (Diagnostic Related Groups). Let us price the cost of guadraplegia, taking stock of procedures which might have to be done during a quad's lifetime. Illyosotmy, cholostomy, trach-eostomy, etc.

Let us lower our voices, stop the bickering and most of all stop trashing our state and federal constitutions. Let us not throw out hundreds of years of common law. We must rediscover the guilty party and call it by name - Health Care Costs Out of Control! This is the only way to bring quality health care to all; at a price society can reasonably afford to pay.

Clearly there is no quick fix. We must start somewhere. Economists on all sides of this issue should take a really close look at innovative ways in which our state could work with the Federal Health Care System. I have been part of the problem for years - perhaps too long - I would very much like to be part of the solution.

Carol Renzuli
Lobbyist N/A

KANSAS ACADEMY OF FAMILY PHYSICIANS
818 Carriage Parkway • Wichita, Kansas 67208 • (316) 651-2238

Executive Summary

In September of 1987, the Kansas Academy of Family Physicians surveyed their membership to assess Family Physicians role in obstetrical service for their Kansas patients.

In addition to current activity in the obstetrical area of practice, the KAFP obtained data that indicates the immediate future of the Family Physicians continued role in obstetrical care.

The information and data being reported is based on a 70 percent (428) response from the 607 members of the KAFP, representing 7,191 years of total practice experience.

According to the survey, Family Physicians deliver approximately 25 percent (9750) of the infants in Kansas on an annual basis.

Forty six percent of Family Physicians (195) have discontinued obstetrics citing medical liability as the primary reason for ceasing this service. Interestly enough, close to half of these Family Physicians have quit practicing obstetrics within the last 5 years, indicative of the escalation in medical liabilty premiums and as a part of on going risk management. After careful examination of the reasons Family Physicians had discontinued obstetrics cited 63 percent (123) ceased due directly to malpractice premiums and extended liability risk.

Currently, 54 percent (233) of the Family Physicians include obstetrics as an active part of their practice. Of the 233 Family Physicians currently practicing obstetrics, we discovered a significant number of these physicians will soon discontinue this portion of their practice. Specifically, when asked "if annual premiums continue to increase (question 12 on the practice survey) will you continue obstetrical practice", the response was alarming. Twenty one percent (90) will stop delivering babies. Twenty percent (86) indicate they will continue to offer obstetrical care to their patients. Thirteen percent (56) are undecided in regard to their continuation of obstetrical care in 1988.

The survey indicated 197 suits had been filed against the responding 428 Family Physicians. Forty two of these cases involved obstetrics. Of the responding physicians, twenty one percent had been named as a defendant in one or more cases. Taking into consideration the number of participating physicians in this survey coupled with their years in practice and extensive patient contacts, we feel the malpractice case load is significantly low for Family Physicians, yet the medical liability crisis is still felt by the specialist in Family Medicine.

Conclusion

The survey by the Kansas Academy of Family Physicians supports suspected trends in obstetrical practice by Family Physicians in the state of Kansas. As the data indicates, Family Physicians will curtail those segments of their practice that involve the greatest degree of litigious risk, in this case obstetrics. This allows Family Physicians to enter a lower risk classification realizing lower premium rates. The availability and affordability of quality comprehensive health care for the patients of Kansas is certainly in jeopardy based on the current climate of medical liability in Kansas.

Att. III

KAFP Practice Survey- 1987

1) _____Age

2) _____Years in practice

3) Please circle the style of practice that best describes your current situation.
   a) Solo
   b) Group
   c) Multi-speciality group

4) ____yes ____no Are you currently Board Certified?

5) ____yes ____no Are you currently practicing obstetrics? (IF YOU HAVE DISCONTINUED OBSTETRICS, PLEASE CONTINUE WITH WITH QUESTION 8)

6) _____1985
   _____1986
   _____1987
   How many deliveries annually? (projected estimate)

7) _____1985
   _____1986
   _____1987
   What was your annual malpractice premium?

8) _____year in which you ceased obstetrics in your practice?

9) Why did you discontinue OB? (Please circle one or more appropriate answers)
   a) Malpractice premiums
   b) Other economic considerations
   c) Lifestyle (i.e. time) considerations
   d) Inability to obtain or maintain privileges

10) _____ How many malpractice cases have you been a defendent?

11) _____ How many cases were OB related?

12) ____yes ____no If projections in annual premiums continue to increase (Medical Defense - 60%, PHICO - 35%, St. Paul - 36%, Medical Protective - expects to announce an increase as of Jan. 1) will you continue obstetrical practice?

13) If you were to discontinue obstetrics how far would your patients have to travel for their obstetrical care? (Please Check)
   _____ 0 - 5 miles
   _____ 5 - 15 miles
   _____ 15 - 30 miles
   _____ 30 - 50 miles
   _____ 50 or more

14) ____yes ____no Do you feel the Kansas Academy should take a public position on the medical malpractice issue?

15) ____yes ____no In addition to public awareness programs that have been conducted by the Kansas Medical Society, do you feel the KAFP should conduct similar efforts of public education regarding the malpractice situation from the perspective of the Family Physician. (This type of program could be initiated and coordinated with KMS in order for a unified approach this situation.)

# of Responses	428	70.16 %
Average Age of Physicians who Responded	46	
Average Years in Practice	17	
Solo Practice	149	34.81 %
Group Practice	222	51.87 %
Multi-Specialty Practice	37	9.64 %
Other Practice	6	1.40 %
Board Certified	335	78.27 %
Not Board Certified	92	21.49 %
Practicing OB	233	54.44 %
Not Practicing OB	195	45.56 %

Reason for Discontinuing OB? (Percentage based on Physicians not practicing OB and has multiple answers)

Malpractice Premiums	123	63.08 %
Lifestyle Considerations	102	52.30 %
Unable To Obtain/Maintain Privileges	1	.51 %
Other Economic Considerations	26	13.33 %

Should the KAFP take a public position on the medical malpractice issue?

Yes	415	96.96 %
No	3	.70 %
No Response	10	2.34%

Should the KAFP conduct efforts of public education RE: the malpractice situation from the perspective of Family Physicians?

Yes	407	95.09%
No	6	1.40%
No Response	15	3.50%

Practicing OB	2 3				-50	Years
Not Practicing OB	195					in
Deliveries in '85	8349	'86	8255	'87	8517	Practice
Malpractice Suits	197					
OB Related	42		21.32%			

If premiums continue to increase will you continue to practice OB?

OUT OF PRACTICING OB PHYSICIANS

Yes	86	20%
No	90	21%
Maybe	56	13%

Miles Patients would have to drive?

OUT OF NONPRACTICING OB PHYSICIANS

0-5	42	21.54%
5-15	5	2.56%
15-30	14	7.18%
30-50	6	3.08%
50 or more	2	1.03%
No Response	126	64.62%

OUT OF PRACTICING OB PHYSICIANS

0-5	105	45.06%
5-15	16	6.87%
15-30	35	15.02%
30-50	43	18.45%
50 or more	22	9.44%
No Response	12	5.15%

NOTE

To indicate what percentage of Family Physicians practice obstetrics, we have obtained the 1986 live births by county from the Department of Health and Environment. According to the 1986 data, 39,177 babies were delivered. According to our survey 8,255 of those 39,177 births were delivered by Family Physicians 21%

Premiums: Responses	Practicing OB Total	Average		Not Practicing OB Responses	Total	Average
166	1,198,599	7,220.48	'85	22	123,831	5,628.68
188	1,586,055	8,436.46	'86	22	141,322	6,423.73
200	1,836,198	9,180.99	'87	22	140,263	6,375.59

March 14, 1988

Formal Testimony

to

Kansas Senate

Judiciary Committee

The Honorable Robert G. Frey, Chairman

The Honorable Jeanne Hoferer, Vice Chairman

by

Ernie J. Chaney, M.D.
Director- St. Joseph Family Practice Residency Program
Associate Professor-Dept. of Family and Community Medicine-UKSM-Wichita
Chairman-Medical Liability Committee-Ks. Academy of Family Physicians

Kansas Academy of Family Physicians

818 Carriage Parkway, P.O. Box 20597 • Wichita, Kansas 67208 • (316) 651-2238

Walter D. Bettis
Executive Director

I am Ernie J. Chaney, M.D., Associate Professor of Family & Community Medicine at the University of Kansas School of Medicine-Wichita and Director of the St. Joseph Family Practice Residency Training Program. I am a graduate of the University of Kansas School of Medicine and practiced in north central Kansas in Republic County, Belleville, Kansas from 1957 to 1983. I joined the faculty at the University of Kansas School of Medicine-Wichita in 1983 and have been Director of the Residency Training Program at St. Joseph Medical Center since that time. I have had the privilege of serving as President of the Kansas Academy of Family Physicians and President of the American Academy of Family Physicians, the country's largest specialty society, and currently serve as President of the Family Health Foundation of America. I service as a Technical Advisor to the Harvard AMA Relative Value Study and am actively involved in the Practice of Family Medicine including Obstetrics, both normal and complicated deliveries.

In my role as health care provider to rural Kansas I have delivered several thousand children and have performed multiple operative Obstetrical procedures. I appreciate the opportunity to express my concerns to this august body in regard to our current problem with Medical Liability Insurance.

I believe the greatest impact on the current problem will be on the reproductive age female who will find it very difficult to find medical care in their local rural community. The problem will also impact on rural hospitals as they find decreasing census, decreasing income, lack of physicians to support the institution and eventual closure. The ripple effect, however, will continue farther than that and effect academic medicine, particularly in the specialty of Family Medicine. Family Practice is that specialty of medicine that is not limited to treatment of individuals by disease, organ sites, sex or age. One of the core areas in Family Medicine is Obstetrics because that is the beginning of family existence. Indeed, as the liability crisis precludes the practice of that part of our specialty, we will see a decrease emphasis on that training in the training sites and physicians will enter the practice of medicine without the skills necessary to deliver obstetrical care to the citizens in the State of Kansas. Recently, the Kansas Academy of Family Physicians surveyed its active membership in regards to their practices and anticipated changes that may occur with the increasing medical liability insurance premiums. A copy of those findings are included in your handouts and I would be most pleased to answer specific questions that you might have regarding the survey.

If I might briefly summarize those, I would say that the results indicate a significant number of Family Physicians who have been in practice a reasonably long period of time and who have probably attained the peak of their medical practice have already discontinued doing Obstetrics because of the increase in liability problems and changing lifestyles. Of those individuals who currently do Obstetrics, the majority will discontinue delivery of infants because of the rapidly rising liability costs. In many rural hospitals the Family Physicians deliver from 20-50 infants a year, and if the cost of liability insurance increases by $10,000-$15,000 it is easy to see that the patient must bear an additional $200-$500 cost to their deliveries. You all are aware that wheat is less than $3.00/bushel and the farm economy certainly is not flourishing and I am doubtful that any of the individuals that I took care of in Republic County would be able to bear that increase in cost. It would, therefore, seem logical that many physicians would discontinue Obstetrics. If, indeed, they live on the borders as I did in north central Kansas and as I am currently located in Wichita, Kansas, it would seem also reasonable that they may move across the border to continue their medical practice and utilize the lower liability rates available in the border states.

There is also no question in my mind as an educator and teacher of young Family Physicians, that we will have a distinctly difficult task in retaining those physicians in the State of Kansas. Many of my residents are indebted to Kansas for their educational expenses and intend to pay back by practicing in underserved areas. However, it will not be economically feasible to do so in

the practice of Obstetrics, and consequently, many will leave the state. While they will pay back their loans; that certainly does not solve the physician supply problems that we are currently facing in the specialty of Family Medicine.

I might parenthetically add that if you have any questions of the need for Family Physicians, I certainly can supply you with the information indicating that we are grossly underserved in my specialty in the State of Kansas and, indeed, nationally also. I am sure you will hear other testimony regarding the causes of the Medical Liability Crisis, and while I have my own suggestions for improvement, I don't believe that is the reason for my testimony, but I would be pleased to answer any questions you may have along that line.

Once again, I appreciate your kindness in allowing me to share my deep concerns with you for it is my belief that unless some solution to this very difficult problem is not found, and found rapidly, the State of Kansas will suffer irreparable damage to the high quality of medical care it now enjoys.

E.J. Chaney, M.D.
Director, Family Practice Residency Program
Associate Professor
Department of Family and Community Medicine
University of Kansas School of Medicine-Wichita