ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 25, 2004
1:04 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson, Vice Chair
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samuels
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 472
"An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 367
"An Act relating to the licensing and regulation of sex-oriented businesses and sex-oriented business entertainers; relating to protection of the safety and health of and to education of young persons who perform in adult entertainment establishments; and providing for an effective date."

- HEARD AND HELD

HOUSE BILL NO. 424
"An Act relating to review of regulations under the Administrative Procedure Act by the Legislative Affairs Agency; and providing for an effective date."

- SCHEDULED BUT NOT HEARD

HOUSE BILL NO. 385
"An Act relating to awarding child custody; and providing for an effective date."

- BILL HEARING POSTPONED

PREVIOUS COMMITTEE ACTION

BILL: HB 472
SHORT TITLE: CLAIMS AGAINST HEALTH CARE PROVIDERS
SPONSOR(S): REPRESENTATIVE(S) ANDERSON

02/16/04	(H)	READ THE FIRST TIME - REFERRALS
02/16/04	(H)	JUD
02/25/04	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 367
SHORT TITLE: LICENSING SEX-ORIENTED BUSINESSES
SPONSOR(S): REPRESENTATIVE(S) MCGUIRE, GARA

01/12/04	(H)	PREFILE RELEASED 1/9/04
01/12/04	(H)	READ THE FIRST TIME - REFERRALS
01/12/04	(H)	L&C, JUD, FIN
01/30/04	(H)	L&C AT 3:15 PM CAPITOL 17
01/30/04	(H)	Heard & Held
01/30/04	(H)	MINUTE(L&C)
02/02/04	(H)	L&C AT 3:15 PM CAPITOL 17
02/02/04	(H)	Moved CSHB 367(L&C) Out of Committee
02/02/04	(H)	MINUTE(L&C)
02/05/04	(H)	L&C RPT CS(L&C) NT 2DP 3NR 2AM
02/05/04	(H)	DP: DAHLSTROM, ANDERSON; NR: CRAWFORD,
02/05/04	(H)	LYNN, GATTO; AM: ROKEBERG, GUTTENBERG
02/09/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/09/04	(H)	<Bill Hearing Postponed to 2/16/04>
02/16/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/16/04	(H)	Heard & Held
02/16/04	(H)	MINUTE(JUD)
02/23/04	(H)	JUD AT 1:00 PM CAPITOL 120
02/23/04	(H)	Scheduled But Not Heard
02/25/04	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JAMES JORDAN, Executive Director
Alaska State Medical Association (ASMA)
Anchorage, Alaska
POSITION STATEMENT: Testified that HB 472 is an important and necessary element to create the practice environment that will help Alaska recruit the doctors it needs.

ALEX MALTER, MD, MPH; President
Alaska State Medical Association (ASMA)
Juneau, Alaska
POSITION STATEMENT: Related ASMA's support of HB 472.

GEORGE RHYNEER, MD
Alaska Heart Institute
Anchorage, Alaska
POSITION STATEMENT: Encouraged the committee to favor HB 472.

JOHN DUDDY, MD; President
Alaska Physicians and Surgeons
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 472, reviewed how Alaska's practice environment has changed and is on the brink of crisis.

RICHARD COBDEN, MD
Tanana Valley Clinic
Fairbanks, Alaska
POSITION STATEMENT: Testified in regard to the importance of HB 472.

RON NEUPAUER, President
Medical Underwriters of California;
Medical Insurance Exchange of California (MIEC)
California
POSITION STATEMENT: During discussion of HB 472, discussed the medical malpractice environment in Alaska.

LAURIE HERMAN, Director
Government Affairs
Providence Health System in Alaska
Anchorage, Alaska
POSITION STATEMENT: Announced Providence's wholehearted support of HB 472.

PAULA JACOBSON, Attorney and Nurse
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 472, testified that the $250,000 cap would severely penalize the elderly, rural Alaskans, and children.

DONNA McCRADY, Past President
Alaska Academy of Trial Lawyers
Anchorage, Alaska

POSITION STATEMENT: During discussion of HB 472, related the realities of practicing in the area of medical malpractice.

KATHY DALE
Anchorage, Alaska
POSITION STATEMENT: Speaking as a victim of malpractice, implored the committee not to pass the cap proposed in HB 472.

RAY BROWN, Attorney
Dillon & Findley, PC
Anchorage, Alaska
POSITION STATEMENT: Testified that those medical malpractice cases involving people who have been catastrophically injured wouldn't be litigated under the $250,000 cap proposed by HB 472.

MIKE HAUGEN, Executive Director
Alaska Physicians & Surgeons, Inc.
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 472, discussed the medical malpractice environment in Alaska.

ACTION NARRATIVE

TAPE 04-24, SIDE A
Number 0001

CHAIR LESIL McGUIRE called the House Judiciary Standing Committee meeting to order at 1:04 p.m. Representatives McGuire, Anderson, Ogg, and Samuels were present at the call to order. Representatives Holm, Gara, and Gruenberg arrived as the meeting was in progress.

HB 472 - CLAIMS AGAINST HEALTH CARE PROVIDERS

Number 0068

CHAIR McGUIRE announced that the first order of business would be HOUSE BILL NO. 472, "An Act relating to claims for personal injury or wrongful death against health care providers; and providing for an effective date."

Number 0164

REPRESENTATIVE ANDERSON, speaking as the sponsor, said that HB 472 is an important piece of legislation that proposes to modify the current policy regarding how much a person can get for pain and suffering in medical liability cases. Specifically, HB 472

proposes a hard cap of $250,000. Currently, for most injuries, AS 09.17.010 allows for the greater of $400,000 or $8,000 times the life expectancy of the claimant. For severe physical impairment or severe physical disfigurement, the [current] cap is the greater of $1 million or $25,000 times the life expectancy of the claimant. Because these awards "ratchet" to the higher amount they are known as soft caps.

REPRESENTATIVE ANDERSON said he believes that a $250,000 cap will improve the "medical liability risk" environment in Alaska. When medical-liability insurance carriers examine a market for the purpose of [underwriting] policies, they take into account many factors, one of which is the likelihood of big payouts. He opined that because the current situation in Alaska regarding big payouts is uncertain many insurance carriers have "departed from our state." Establishing a hard cap of $250,000 establishes certainty, he stated. Representative Anderson informed the committee that beyond the committee packet, each member should have a black three-ring binder of relevant information. He explained that the desire is to place [Alaska's] health care in line with other states' health care while also ensuring affordable health care.

Number 0423

REPRESENTATIVE ANDERSON turned to medical liability coverage and pointed out that in order to protect their assets most doctors indemnify themselves with insurance. Furthermore, health care facilities require that doctors carry insurance. He pointed out that this insurance also protects the patient. However, restrictions or mandates placed on medical practitioners will extrapolate out to the public, he emphasized.

REPRESENTATIVE ANDERSON said that it's critical that medical liability insurance be available for doctors, which he opined is difficult at this point [in Alaska]. He informed the committee that just a few months ago four carriers offered medical liability insurance in Alaska. However, now there are only two carriers. If one of the remaining two carriers leaves, he predicted disaster because the remaining carrier wouldn't be able to handle all the physicians in the state. Alaska is also experiencing a shortage of doctors. As a result of all this, the number of claims on these insurance policies is rising. He related that the Physician Insurance Association of America reports that nearly 8 percent of all awards exceed $1 million. Without a hard cap, which this legislation proposes, there is no reason to think this trend will change. Representative Anderson

pointed out that [Alaskans] depend on Alaska's health care professionals for quality health care, which is why he sponsored HB 472. Furthermore, these health care professionals need to be indemnified to provide that care. In conclusion, Representative Anderson said that his constituents and their health care providers are depending upon the legislature to create an environment in which insurance carriers have confidence to write these policies.

Number 0717

JAMES JORDAN, Executive Director, Alaska State Medical Association (ASMA), informed the committee that he also serves on the Board of Directors for the Medical Underwriters of California, which is the "attorney in fact," the operating company, for the Medical Insurance Exchange of California (MIEC). He explained that he will first discuss the practice environment and the environment in Alaska with regard to the recruitment of new physicians. Mr. Jordan paraphrased from the following written testimony [original punctuation provided]:

> I would like to tell you a short story about medical care in Alaska. This story is about a patient who had a routine physical last summer done by a general internist in Anchorage. That doctor, during the course of the examination discovered a suspicious tumor in the patient's lower GI tract. A hastily arranged colonoscopy, along with a biopsy, confirmed a very rare cancerous tumor - and one that is normally without symptoms. As a matter of fact, this type of cancer is typically not discovered until it has spread to the brain, heart, and/or lungs. The good news is that it was caught at a very early stage by a skilled doctor and was successfully treated by surgical removal. So, you may wonder why I am relating this story to you that has a happy ending.
>
> For one reason, this story is very personal. The patient referred to is my wife. For another, it highlights the need in Alaska for well-trained physicians in sufficient numbers to provide the care that our citizens need and deserve. The general internist who saw my wife is Dr. Richard Neubauer, who happens to be about my age as well as my own personal physician. Dr. Neubauer graduated from Yale Medical School and did graduate medical education at the University of Michigan. As I previously mentioned, he

> is a general internist. General internists are in very short supply in Alaska. A Fall 2002 Providence study shows a shortage of 43.25 full time experienced general internists in Anchorage alone. I believe you will hear testimony that the number of general internists continues to drop. Those remaining are overtaxed in their practices, in their emergency room call and coverage schedules, and, in some cases, have simply left the state to pursue a practice that allows them to have a family life.
>
> What would have happened had Dr. Neubauer not been around for my wife? Or for that fact, the surgeon, Dr. June George, who is one of only two board certified colo/rectal surgeons in the entire state? Perhaps a general surgeon could have treated her, but that same Providence study also shows a deficiency in Anchorage alone of 19.8 full time equivalent general surgeons. The shortages are real. Dr. Neubauer and I, being contemporaries, often muse, "Who will be around to care for us?"
>
> HB 472 is an important element necessary to create the practice environment that will help us recruit the doctors we need in Alaska.

MR. JORDAN said that the $250,000 hard cap on noneconomics will set the standard that will help Alaska recruit physicians. Mr. Jordan informed the committee that there are two supreme court cases that address the process of informed consent. Alaska statute, he explained, requires that any time a health care provider suggests a course of treatment, the patient must be provided with sufficient information to make an informed decision with regard to the proposed care. In 1993 Korman v. Mallin was the first seminal case involving informed consent. The aforementioned case established some requirements for the process of informed consent. However, it didn't provide any guidelines for the physicians. Later, there was the Marsingill v. O'Malley case in which the Alaska Supreme Court rendered a judgment in the fall of 2002. The Marsingill v. O'Malley case followed the same course as Korman v. Mallin and again, didn't provide any guidelines for the physicians. Additionally, Korman v. Mallin involved a phone call in the middle of the night from a patient to the surgeon. The surgeon recommended that the patient go to the emergency room, which prompted the patient to ask whether a tub would be put down the nose to the stomach. The patient choose not to go to the emergency room, and

therefore several hours later the patient collapsed and ended up with a cerebral event. In the Marsingill decision the court gave specific directions to the lower court to rehear the [Korman v. Mallin] case involving the informed consent issue with regard to calls in the middle of the night. Mr. Jordan pointed out that [the committee packet should include] a rather extensive analysis by Anchorage attorney Howard Lazar. Mr. Jordan related that Mr. Lazar indicated that this type of potential liability could stop physicians from taking calls from patients and simply rely on the standing instruction to proceed to the emergency room. However, from a patient care standpoint he didn't believe that was a good idea. Therefore, the language in HB 472 that relates to calls in the middle of the night [attempts] to respond to the issues raised in the Marsingill case.

Number 1239

CHAIR McGUIRE explained that [in response to the Marsingill case] at the legislative level, there have been attempts to implement telemedicine across Alaska. Therefore, she inquired as to the impact the Marsingill case will have on telemedicine.

MR. JORDAN answered that he believes that it will help telemedicine. The specific language in HB 472 deals with the means, as in "electronically provided," and deals with the circumstance in which a patient doesn't avail himself or herself of a message provided electronically from [a health care provider].

REPRESENTATIVE ANDERSON, in response to Representative Gara, clarified that his earlier statistic regarding the percentage of million dollar cases was a national statistic.

Number 1321

REPRESENTATIVE GARA stated that he didn't have a problem with the informed consent amendment, which seems reasonable. However, he noted that he bristled a bit with the notion that an informed consent amendment is necessary because the current statute doesn't have any standards. Representative Gara pointed out that the standard is clearly expressed. In the jury instructions, it states "A doctor shall give a patient information that a reasonable patient would need to make an informed decision, and that information would include information about risks and information about alternatives." Furthermore, Representative Gara was concerned with Mr. Lazar's

letter because it did seem to suggest that doctors shouldn't take calls anymore.

REPRESENTATIVE GARA commented that historically Alaska has had a problem with doctor shortages. However, he related his understanding that the growth rate of doctors in Alaska is higher than the national average.

MR. JORDAN said that he didn't have any information with regard to how Alaska compares with the rest of the nation. However, Alaska has the lowest number of physicians per capita in the nation.

Number 1414

REPRESENTATIVE GARA turned to malpractice rates, which have always been high in Alaska. He inquired as to how much doctors are paid in comparison to those in other states.

MR. JORDAN said that such data isn't collected. In regard to the decision-making process of the physician, Mr. Jordan said he would provide the committee with the American Medical Association's (AMA) study regarding the considerations medical students take when deciding where to do their residency. The aforementioned study has shown that the legal environment, and the availability and affordability of medical liability insurance is very important in the recruitment of physicians in Alaska. Mr. Jordan informed the committee that Alaska has one residency program, family practice residency, that produces eight [physicians], which is nominal. Furthermore, an AMA study relates that 70 percent of residents practice in the location where they performed their residency.

REPRESENTATIVE GARA asked if any of the insurance companies have said that they would lower their insurance rates if this legislation was passed.

MR. JORDAN replied no.

Number 1527

REPRESENTATIVE GARA informed the committee that in 1997 the state's second round of major tort reform was suggested by NORCAL Mutual Insurance Company (NORCAL). He explained that NORCAL said that the 1997 tort reform was necessary because when there was tort reform in the medical arena in California, the malpractice rates decreased significantly. Therefore, NORCAL

wrote [to the Alaska State Legislature] saying, "Over the long term Alaska physicians and hospitals should see similar reductions in the cost of malpractice insurance if HB 58 is enacted and upheld by the courts." Representative Gara said that he has always been bothered by the aforementioned promise. Furthermore, he said he was skeptical that promise would "hold any water today."

MR. JORDAN referred to a 1996 study done by the American Academy of Actuaries entitled, "Medical Malpractice Tort Reform: Lessons from the States". Essentially, this study indicates that effective medical liability reform is a matter of a package of reforms. Therefore, what occurred in 1997 was part of the package. He explained that the "gold standard" is California's Medical Injury Compensation Reform Act (MICRA) that was enacted in 1976. [Alaska's tort reform] in 1997 doesn't include all of the key elements of MICRA. The American Academy of Actuaries' study indicates that one of the key elements [for medical malpractice tort reform] is a cap on noneconomic damages that is low enough to make a difference. The cap in California is $250,000. Furthermore, the requirement that judgments be "annuitized" in California is a requirement so long as the judgment is in excess of $50,000. However, in Alaska it's discretionary.

REPRESENTATIVE GARA expressed concern with referring to the California standard as the "gold standard." He explained that noneconomic damages covers the compensation one receives for pain, suffering, the inability to perform various tasks, and other damages that are difficult to measure in dollar terms. Under a $250,000 cap, a badly paralyzed individual with a 40-year projected lifespan would receive about $22 per day. He asked if it's fair for someone with a valid claim to receive $22 per day for the loss of the ability to walk, fish, carry his or her child, et cetera.

MR. JORDAN pointed out that [the noneconomic damages] are only one element, noting that there is recompense for the economic damages. In further response to Representative Gara, Mr. Jordan said that this is a policy decision with regard to whether the desire is to create an environment that would allow recruitment of physicians in the numbers necessary to treat patients. Mr. Jordan acknowledged that the circumstances that Representative Gara proposed are tragic, and reiterated that [noneconomic damages] are only one element of the recompense. He pointed out that there is no limit, nor has one been suggested, on the economic damages. However, the recommendation is that there be

a cap on those damages that are most subjective. Mr. Jordan indicated that the legislature, on a de facto basis, has established caps on noneconomic and economic damages with the Motor Vehicle Safety Responsibility Act.

CHAIR McGUIRE reminded the committee that although she allows quite a bit of latitude in the committee, she didn't want the witnesses to feel as if they are on trial.

REPRESENTATIVE GARA stated that a basic element of the members' decision on this is with regard to whether this is fair. Although Representative Gara recognized that Mr. Jordan doesn't have to answer, he maintained his question regarding whether a $250,000 cap in the situation he posed is fair. If it isn't fair, the committee has to consider a lower noneconomic damage limit for non-serious cases and have a higher limit for serious, debilitating cases.

CHAIR McGUIRE pointed out that once the witnesses have testified, it will be the committee's burden to weigh the policy decisions of this.

Number 1902

REPRESENTATIVE OGG related his understanding that under the current soft cap, with all the factors involved, the maximum is $2 million.

MR. JORDAN said he has seen that estimate.

REPRESENTATIVE OGG turned to the area of intentional tort, which is reckless disregard and gross negligence. He asked if HB 472 leaves an exception for those areas in which there are "bad actors."

MR. JORDAN, noting that he isn't an attorney, answered that he didn't believe HB 472 addresses that.

REPRESENTATIVE ANDERSON said he didn't recall [the legislation] addressing that.

CHAIR McGUIRE recalled this discussion as it related to homebuilders under HB 340 and surmised that issues of actual misconduct, fraud, and other things that would be licensure actions would be dealt with by [ASMA's] licensing board. Furthermore, such issues would probably be dealt with in a separate context. Chair McGuire said she didn't see anything in

HB 472 that would preclude a separate cause of action being brought. However, she indicated the need to look into this between now and the next hearing on HB 472.

REPRESENTATIVE OGG recalled that the language "except for" was included in the homebuilders' legislation. He expressed the need to be sure that the legislation isn't saying that it's acceptable to be a bad doctor.

REPRESENTATIVE GRUENBERG asked if [ASMA] objected to including the above-mentioned exception in HB 472.

MR. JORDAN replied that he didn't believe so, but noted that he hadn't spoken with [ASMA's] board. However, this seems to enter into the disciplinary area as well as the general civil statutes that deal with punitive damages.

REPRESENTATIVE OGG agreed that punitive [damages] is a different category than pain and suffering. He reiterated the need to be sure that someone who is acting badly is liable for pain and suffering.

CHAIR McGUIRE reminded Representative Ogg that HB 340 was intended to be an exclusive limit on all causes of action based on the actions that were derived and thus it would've encompassed everything. Therefore, the committee decided to include the language saying "except in those cases of gross negligence, recklessness, and intentional disregard." Chair McGuire said she believes what is being discussed with HB 472 is a bit different in that it's noneconomic damages, which don't include compensatory or punitive damages.

REPRESENTATIVE GARA pointed out that as written HB 472 would impose a $250,000 cap on pain and suffering damages, even in cases of reckless conduct. If it was intentional conduct and amounted to something like fraud that wasn't a malpractice claim, there would be an argument that this [proposed] cap wouldn't apply.

Number 2152

ALEX MALTER, MD, MPH; President, Alaska State Medical Association, informed the committee that he is an internist in private practice in Juneau. In regard to Representative Gara's comment that Mr. Lazar's letter was a bit inflammatory, Dr. Malter said that his practice has changed since the Marsingill decision. Based on Mr. Lazar's letter, correspondence from his

malpractice carrier, and what he has heard about the Marsingill case, Dr. Malter said he has changed his practice. For example, in the past he would've attempted to keep patients from going to the emergency room when he thought it wasn't necessary. However, he said that now he much more quickly recommends people go the emergency room unless it's completely clear that a patient doesn't need to go in. It's unfortunate that this is the situation, he remarked.

DR. MALTER turned to the earlier question regarding whether salaries are higher in Alaska commensurate with higher rates of malpractice premiums. He related that a year ago he looked at different practices in different states and all the offers he received were higher salaries than he makes in Alaska. Therefore, he felt it might be a bit simplistic to presume that salaries in Alaska are much higher than elsewhere. With regard to the question of a possible decrease in malpractice premiums, Dr. Malter emphasized that this issue isn't simply about malpractice premiums. The issue is the desire to develop a healthy malpractice liability insurance market that doesn't encourage insurers to leave Alaska and is attractive when physicians consider working in Alaska.

Number 2324

DR. MALTER moved on to his prepared testimony and paraphrased from the following written testimony [original punctuation provided]:

> ASMA represents physicians statewide and is primarily interested in ensuring that Alaskans receive high quality health care.
>
> I am here today to express ASMA's support of HB 472, and to urge you to support the bill as well. The medical liability reforms it establishes are important to Alaskans for a variety of reasons. I expect others to testify, for example, how HB 472 will help stabilize the professional liability market, and, by so doing, effectively temper future increases in federal and state expenditures on health care. I would like to concentrate my remarks, however, on explaining how strong medical liability reforms will be critically helpful in recruiting and retaining enough well-trained physicians to provide for the future health care needs of Alaska's citizens.

TAPE 04-24, SIDE B

DR. MALTER continued:

Access to health care services is precariously limited in the state. Alaska has one of the smallest-- if not the smallest-- number of physicians per capita in the country. A January 19, 2004 American Medical News story pertaining to the special Medicare payment reforms for Alaska noted the crisis in work force: "Alaska has long ranked among the worst states in terms of physician supply. In 2002, the state had fewer than 1,350 doctors in private practice and another few hundred in the military or other government posts. The state has a population of 644,000.... Only six states had a lower doctor to patient ration".

The article went on to identify Idaho as the state with the worst physician shortage, estimating that state had one non-government physician for every 544 patients. However numbers from ASMA's own 2002 database-- which we believe to be more accurate than data used in the article-- showed only 1,115 physicians in active practice, or approximately one physician per 578 patients. Thus, it is quite probable that for 2002 Alaska actually had the lowest physician to patient ratio in country. Updated calculations based on our 2003 number indicate this is almost certainly still true, with one physician per 553 patients. By comparison, the state would need about 50% more actively practicing physicians to approach the national average of one doctor per 360 patients.

Further exacerbating the problem, Alaska's physician work force is relatively old compared to the rest of the country. The ASMA database shows that over half of the state's practicing physicians are older than 51, setting up a looming recruitment crisis. This scenario was ... corroborated by the State Medical Board in a September 2002 Anchorage Daily News article title "Shingle Shortage?" Finally, a 2002 local study of physicians by Providence Health System confirms the work force is aging, and highlights immediate shortages of certain specialists in Anchorage,

including general internal medicine, psychiatry, and general surgery.

Number 2294

It is because of this imminent recruiting challenge that medical liability reform is so critically important in Alaska right now. This state does not have the capacity to "grow" physicians on its own. Alaska has no medical school, and of the small number of students who graduate annually from the WWAMI [Washington, Wyoming, Alaska, Montana, Idaho Medical Education Program] program, some do not return to practice here. Likewise, our lone family practice residency-training program is relatively small. Alaska is-- and will continue to be-- a net importer of doctors. As such, we compete with other states that have physician shortages, a competition that is largely influenced by the state's medical practice environment.

A recent American Medical Association study of medical students found that the legal environment and the availability of affordable medical liability insurance plays a major part in a graduate's decision as to where to consider setting up practice. Alaska needs to optimize its medical-legal environment to help us recruit the doctors we need. That is why the Alaska State Medical Association supports HB 472. With its $250,000 cap on non-economic damages, the bill provides the "gold standard" liability reforms that will help create the healthy practice environment so important to physician recruitment.

ASMA understands that medical liability reform is only one element in developing this healthy environment. Still, because the State has already had the foresight to enact other important medical practice reforms, we believe liability reform is the most critical element remaining. Indeed, we are pleased to have been able to help [the] state reach this point through our recent work on other important legislation, including the Alaska Patient Bill of Rights, Prompt Pay legislation, Physician Joint Negotiation legislation, and federal Medicare payment reforms targeted to Alaska. ASMA has even offered ideas to the current Administration regarding strategies by which the state

could actively "market" Alaska to out-of-state physicians. As a result of these previous and ongoing efforts, ASMA believes that, except for strong medical liability reform, Alaska's practice environment is actually quite favorable.

Finally, I'd like to point out that in the gallery today are Dr. Jeanne Bonar, ASMA's immediate Past President, and Dr. Paul Worrel, the Association's President Elect. Their attendance today, along with mine, demonstrates that ASMA's past, present, and future are all committed to work to help attract the well-trained doctors the state needs. Thank you for your attention, and I again urge you to support HB 472.

I'd be happy to answer any questions that you may have at this time.

Number 2184

CHAIR McGUIRE recalled that in the late 1960s to early 1970s, Alaska didn't have medical malpractice insurance, and therefore the state formed a risk pool. Chair McGuire stressed the need for everyone to realize the consequences whatever the policy choice. She highlighted the need to understand that if the risk isn't mitigated and the carriers leave, then the state should be prepared to again form a risk pool.

DR. MALTER noted that his partner was around when the medical malpractice crisis occurred some time ago, which did result in the state forming a risk pool. He pointed out that it takes a lot of money for the state to capitalize a pool. It has been estimated that if the situation becomes worse - to the point of not enough carriers or no carriers - it would cost scores of millions of dollars to merely get started. Therefore, Dr. Malter offered his opinion as a layperson that it would behoove the state to have a strong medical malpractice market in place.

DR. MALTER explained that when two of the four medical malpractice carriers left Alaska, one of the remaining two carriers was limited in the number of new policies it could write because of state requirements regarding secondary insurance. Therefore, NORCAL was limited and only able to take on a modest number of the physicians that were left without when the first two carriers left. Because of the aforementioned, the last remaining insurer was almost a monopoly for a month or two.

Thankfully, the physicians seeking coverage didn't feel that they were taken advantage of in this nearly monopolistic situation. Dr. Malter stressed that until recently the situation was one in which there was close to one carrier being left.

MR. JORDAN informed the committee that the capitalization for the medical indemnity appropriation of Alaska was $9 million in the mid 1970s. He explained that the amount of capitalization a company has as well as its surplus determines how much it can write. He agreed with Dr. Malter's characterization of [the late 1960s to early 1970s] as a crisis situation. During that time, a number of physician-owned insurance companies emerged, including MIEC.

Number 1871

REPRESENTATIVE GARA related his understanding that there has been an unintended suggestion that the two carriers that recently left did so because of high malpractice liability exposure. However, Representative Gara said the information he has doesn't support that as the reason those carriers left. He asked if Dr. Malter had any information with regard to why the two carriers left.

DR. MALTER replied no.

REPRESENTATIVE GARA related his understanding that CNA, an insurance company, basically stopped writing malpractice insurance nationwide.

DR. MALTER reiterated that the concern is that this has been a crisis nationwide, with certain states experiencing more of a crisis than others. Dr. Malter reiterated that he didn't mean to suggest that the goal is to reduce malpractice premiums. The main notion is that by setting a cap, the insurance companies have a better idea with regard to future risk, which creates a market that is more attractive to enter. Furthermore, a healthier environment for physicians to practice and recruit new physicians is created.

REPRESENTATIVE GARA commented that he believes that makes sense in that perhaps a hard cap is necessary rather than the current soft cap. He surmised that the soft cap results in a situation in which the [amount of the] soft cap could continue to increase unless there was a firm guess on an individual's life expectancy. Representative Gara inquired as to whether there is

any support for a two-tiered hard cap that would have a lower damage cap, similar to what is suggested in HB 472, for pain and suffering and loss of enjoyment of life and a higher damage cap for a life-long debilitating injury, involving significant disfigurement, paralysis, or something of that nature.

DR. MALTER said he would have to approach the board on the matter. However, he expected that some on the board wouldn't be comfortable with that. He pointed out that the medical malpractice liability market is healthier in the states with a single hard cap. Experiences from other states are being used to develop statutes that will help create a healthy malpractice market in Alaska.

MR. JORDAN turned to Representative Gara's understanding that CNA stopped [writing malpractice insurance nationwide] and said that isn't the case. He informed the committee that CNA is the largest writer of medical liability insurance for physicians in the State of Idaho.

Number 1812

REPRESENTATIVE OGG inquired as to the number of physicians, on an annual basis, in Alaska from 1995 to the present. He also asked if the earlier mention of Alaska [having fewer than] 1,350 physicians [in private practice] includes governmental and quasi-governmental physicians such as Native [physicians].

DR. MALTER specified that the 1,350 number was an estimate from the national association [AMA], but ASMA believes its numbers are [more accurate]. Reiterating his earlier testimony, Dr. Malter related that ASMA data shows that 1,115 physicians were in private practice and thus there is one physician per [578] patients. He noted that these are the same calculations that are done when the [AMA] is comparing states. Although the numbers may not seem parallel, the belief is that the comparisons with other states are as accurate and valid as possible. In further response to Representative Ogg, Dr. Malter said he would provide information with regard to the number of governmental and quasi-governmental physicians.

REPRESENTATIVE OGG turned to the issue of aging physicians in Alaska and the lack of recruitment. Having served on various boards and having held various jobs over the last few years, Representative Ogg opined that the aging population isn't strictly limited to the medical profession. For instance, he predicted that the age of the average fishing permit holder is

probably around [51], and furthermore the recruitment into the fishing industry is [lacking as well]. Representative Ogg suggested that what is occurring in the medical profession is probably reflective of the state as a whole. Furthermore, he suggested that perhaps Alaska just isn't that attractive of an environment, especially in the context of Alaska's fiscal situation.

DR. MALTER said that the analogy of the fishermen is a bit problematic. There are people who need medical care and thus he contended that such a significant dearth of physicians is potentially more problematic to the public health and safety of the state than a dearth of fishermen.

REPRESENTATIVE OGG clarified that he was attempting to attain a better global understanding of what is going on and thus he surmised that physicians looking around would review the fiscal situation of the state. He indicated that the state's current fiscal state could be driving the situation being addressed today.

CHAIR McGUIRE interjected her belief that it's probably a combination of factors, including Alaska's remoteness and lack of a medical school. Therefore, she believes that the focus today should include the other factors. She offered to work on other [factors] while noting that the aging of Alaskan physicians is a large problem, especially in rural areas. Furthermore, since there are no guarantees from the insurance companies, the state can only try to reduce its exposure and remain attractive enough to maintain the current carriers and possibly attract more.

Number 1511

REPRESENTATIVE GRUENBERG asked if [ASMA] is an integrated medical association in which everyone has to join. [The response was inaudible.] Representative Gruenberg suggested that perhaps there could be a survey either directly [to physicians] or through the Division of Occupational Licensing in order to determine the level of job satisfaction. He pondered whether Alaska just doesn't offer enough money for physicians in comparison to other areas of the country.

DR. MALTER recalled that Mr. Jordan pointed out that the largest determinant for the location in which people practice is the location of their residency. Alaska has one small residency program. Therefore, the state needs to import physicians.

Having 50 percent fewer physicians per capita would seem to indicate that Alaskans aren't receiving such high quality care. Although [the state] is a bit constrained in what it can do, [the state] can make the practice environment conducive [to recruitment].

REPRESENTATIVE GRUENBERG highlighted that the student loan program could be used [to address this problem]. He suggested that perhaps nonresident medical students who enter into an agreement to practice in the state could be eligible for an Alaskan student loan. Representative Gruenberg mentioned that the medical community is accustomed to thinking creatively to address problems, and therefore he requested the medical community's help with this. Representative Gruenberg noted that his own physician was present today.

DR. MALTER noted that the administration has been approached with regard to ideas of addressing the recruitment problem. In further response to Representative Gruenberg, Dr. Malter agreed to provide the committee with a list of the ideas.

Number 1205

GEORGE RHYNEER, MD, Alaska Heart Institute, informed the committee that he is a cardiologist who has been practicing in Alaska since 1971. He further informed the committee that he is a founding member of the Alaska Heart Institute and a board member of Alaska Physicians and Surgeons. Dr. Rhyneer encouraged the committee to favor HB 472, which is about access to medical care. Dr. Rhyneer recalled that when he started practice in 1971 there was no heart program. He and his partner started the heart program and the first cardiac catheterization laboratory in Anchorage. Back in 1973, the heart surgery program was organized.

DR. RHYNEER noted that other physicians were attracted to Alaska because of the opportunities in this state. There was no problem finding good employees, an office, a good hospital in which to practice, and obtaining malpractice insurance. He referred to malpractice insurance [at that time] as an afterthought and noted that it was only $80 a year. Since Alaska was attractive to physicians, Alaskans have enjoyed remarkable improvement in access to medical care. In fact, physicians have moved to smaller communities and the larger cities have sophisticated services. However, conditions are changing. As the technical ability to deal with serious illness is improving, other circumstances are worsening. Many

physicians are nearing retirement age and too few physicians are being trained nationally.

DR. RHYNEER echoed earlier statements with regard to the need to import virtually all physicians in Alaska, but pointed out that it's difficult to recruit physicians to Alaska for a number of reasons. He informed the committee that the Alaska Heart Institute spends $100,000 a year recruiting constantly and the institute has always "been behind." Every advantage to attract physicians is necessary and a good legal climate for the practice of medicine is something the [legislature] can provide. Without readily available malpractice insurance, recruiting will be handicapped. Furthermore, without new physicians, Alaskans will face reduced access to care. If Alaska's malpractice insurance climate worsens, attracting young physicians to Alaska will be nearly impossible, and thus, he opined, one can be sure that some Alaskans will go without medical care.

DR. RHYNEER stated that although Alaska is up to date with medical treatment and technology, Alaska has been behind in the social and business upheavals that have been experienced in the Lower 48. For instance, managed care is something that Alaska has avoided by anticipating it. Dr. Rhyneer recommended that by looking at the Lower 48 one could plainly see Alaska's future. In the Lower 48 there is a lot of access to medical care by patients. Furthermore, in the Lower 48 there are massive physician migrations and early retirement and crisis legislation. He suggested that the aforementioned events have been created by legal climates that have made it difficult for insurance companies to predict losses and so those insurance companies haven't been able to continue in the medical malpractice business.

DR. RHYNEER said that for that reason, many companies have left the business both nationally and locally and some of those remaining in business require premium payments that are so high that it approaches the physician's annual take-home pay. Alaska's [medical malpractice] insurance premiums are very high, and more importantly, there are very few companies offering this insurance. He informed the committee that the remaining two companies are mutual companies owned by physician policyholders, most of which live in California. Last year, Northwest Physicians Mutual, the company who provided insurance for the Alaska Heart Institute, canceled the institute's policy and left the state due to high losses.

DR. RHYNEER related that Northwest Physicians Mutual had requested a 100 percent increase in premium, which the Division of Insurance denied. Another company did the same thing to the large clinic in Fairbanks. The remaining companies face the same legal climate that forced the others to leave. If the remaining companies leave, "virtually all of us" will be without insurance. Although some physicians will probably continue to practice without coverage, many of the older physicians will be forced to take involuntary early retirement. Dr. Rhyneer characterized the aforementioned as a monumental catastrophe that [the legislature] has the ability to prevent. With regard to the notion that the state could form another insurance company as it did in the 1970s, he pointed out that such a company would face the same problems and it would be costly to establish.

DR. RHYNEER said, "It's crystal clear we now need a legislative solution." Although the state has changed tort law over the years, these modifications haven't completely ameliorated the problem, which he admitted is, in part, a societal problem. He identified the $250,000 cap on noneconomic damages as the one legal feature that discriminates between states with a stable malpractice environment from those without it. Therefore, Dr. Rhyneer said he supports [HB 472]. He acknowledged that his increase [in malpractice insurance] from $80 to $20,000 per year is due to many causes. However, it isn't due to an increase in the rate of malpractice suits, he said. "You are faced, I think, with a tradeoff: place a limit on the amount an individual can get for pain and suffering and in return help ensure that all Alaskans continue to have physicians available to provide the medical care that they need and desire," Dr, Rhyneer concluded.

Number 0773

DR. RHYNEER, in response to Representative Gara, explained that Northwest Physicians Mutual would periodically publish data that showed the amount of suits filed and settled or paid out, which has remained about the same over the years. However, the actual cost to settle or pay the claim was increasing exponentially. In further response to Representative Gara, Dr. Rhyneer explained that the data showed that the increase was partially caused by defense costs, but a large portion was the claims paid to the plaintiffs. He said he would try to obtain the above-referenced information and provide it to the committee.

Number 0628

JOHN DUDDY, MD; President, Alaska Physicians and Surgeons, informed the committee that he is an orthopedic surgeon who has practiced in Anchorage since 1999. Dr. Duddy explained that he came to Alaska after being recruited by his now-senior partner, Dr. Mike Neuman (ph), who had spent two unsuccessful years trying to recruit a physician. Dr. Duddy said he found the practice environment in Alaska to be exceptional. He recalled that while practicing physicians in the Midwest were complaining about malpractice rates and availability of malpractice, physicians in Alaska were upbeat and happy. The practice environment in Alaska remained relatively stable until 2001 or 2002 when the AMA declared that Alaska was at-risk with regard to a potential malpractice crisis.

DR. DUDDY said he didn't notice the gradual change until May of 2003, when Northwest Physicians Mutual notified its policyholders that it would no longer issue policies in Alaska. The aforementioned was a wakeup call for many Alaskan physicians, although, fortunately, a relatively small amount of physicians were covered by Northwest Physicians Mutual. However, he suspected that those covered by Northwest Physicians Mutual who had pending lawsuits or past suits may not have been able to obtain malpractice insurance even with MIEC. Dr. Duddy related that the loss of the two malpractice carriers has had a direct negative effect on his ability to recruit new physicians. In the Lower 48 Alaska is being characterized as an unfavorable environment to practice. For example, the three neurosurgeons in the state have been actively and aggressively recruiting for five years, but have been unsuccessful in attracting any new neurosurgeons.

DR. DUDDY echoed earlier testimony that not only is it becoming difficult to attract new physicians or currently practicing physicians to Alaska, but as the crisis develops many of the practicing physicians will retire early. Therefore, the combination of the aforementioned compounds the problem of the physician shortage. He related that some AMA officials believe that Alaska is one year away from such a crisis. He predicted that a crisis would result in the remaining practicing physicians limiting their practice. Therefore, certain high-risk procedures and traumas would be sent to the Lower 48. Dr. Duddy stated that there is the chance to avoid this crisis in Alaska because it's only a matter of time before the crisis impacting the states without medical liability reform in the Lower 48 will effect Alaska. He related his belief that physicians support this legislation.

Number 0230

RICHARD COBDEN, MD, Tanana Valley Clinic; Alaska Healthcare Network; Alaska Orthopedic Association; informed the committee that he is a practicing orthopedist in Fairbanks at the Tanana Valley Clinic. This legislation is important because it will help all three entities retain and recruit physicians. He also informed the committee that the Tanana Valley Clinic and the Alaska Healthcare Network were both covered by CNA until late last year. The aforementioned left the two entities scrambling and ultimately found NORCAL and MIEC to cover all the physicians. However, 41 physicians were within three days of having no coverage at all. Under the rules and regulations of the hospital, those physicians wouldn't have been able to practice in the hospital. The aforementioned would've been a disaster because [those 41 physicians] represent approximately half of the physicians practicing in Fairbanks.

DR. COBDEN related that he was told that CNA left Alaska because of anticipated loss experience, which was a surprise because [the Tanana Valley Clinic] had not experienced any lawsuits, and furthermore of the 41 other physicians he knew of only one lawsuit that was pending. Although there weren't a lot of lawsuits occurring, he agreed with Dr. Duddy that it was related to the amount of loss per claim. He further noted that CNA cited an unfavorable atmosphere for insurance in Alaska. Dr. Cobden mentioned that NORCAL has notified those it covers that it will likely raise the rates in the near future.

TAPE 04-25, SIDE A
Number 0001

DR. COBDEN remarked, "We're all waiting for the other shoe to drop." Dr. Cobden turned to the question regarding whether insurance companies will lower rates if legislation such as HB 472 is passed, and related that they won't. However, the insurance companies may not raise the rates or leave altogether. With regard to why internists are leaving, Dr. Cobden said he didn't believe that it directly has to do with medical liability insurance. He related his understanding that internists are the most highly trained, and yet the most underpaid of all physicians. Furthermore, internists deal largely with Medicare populations and Medicare has been notoriously poor in the realm of reimbursement. As the cost of providing care increases, including insurance, and reimbursement decreases, fewer and fewer people are willing to enter this field. He mentioned that

Tanana Valley Clinic is currently in the midst of recruitment for internists and it's very difficult to get individuals to come to Alaska. However, keeping the insurance rates under control would be helpful with recruitment.

DR. COBDEN turned to the earlier question regarding what a hard cap does to the overall insurance rates. He recalled his experience practicing in the Sacramento, California, area 10 years ago [after that passage of MICRA, with its $250,000 hard cap on noneconomic damages]. He related that many of the insurance companies cite [medical malpractice reform], including MICRA, as one of the reasons the rates weren't raised significantly over the next 20 years. The actual rate increases over that 20 years in California was 26 percent. However, in Nevada, a demographically and geographically situated state, the rates increased by 2,700 percent and Nevada had no hard cap. Therefore, Dr. Cobden said he believes there is an impact by legislation such as HB 472.

Number 0314

REPRESENTATIVE GARA said that he is a bit uncomfortable with the approach in HB 472 because it limits the rights of people with valid claims who have severe injuries. These limits are based upon the potential that insurance companies will begin behaving in a reasonable manner. Representative Gara remarked that he is looking at an insurance crisis that, in many cases, has nothing to do with pain and suffering damages. He pointed out that workers' compensation folks have informed the committee that their rates have increased upwards of 50 percent in the last [few years]. He noted that under workers' compensation, one isn't even allowed pain and suffering damages. Therefore, he surmised that there are other factors causing insurance companies to lose money and cut coverage, especially since [the terrorist attacks of September 11, 2001].

DR. COBDEN agreed that there are many factors [involved in the insurance crisis] and most of those factors can't be controlled. However, [the insurance industry has said that] this small factor would make a difference. Dr. Cobden opined that the insurance problems throughout the state and the country need constant review.

Number 0486

RON NEUPAUER, President, Medical Underwriters of California; Medical Insurance Exchange of California (MIEC), explained that

Medical Underwriters of California is a physician-owned insurance company that provides coverage to physicians in Alaska as well as three other states in the West. Medical Underwriters of California, the attorney-in-fact for MIEC, began offering coverage to Alaskan physicians in 1977 and began writing policies the following year. Medical Underwriters of California expanded to include Alaska because, at the time, ASMA faced mandated [medical malpractice] coverage from Medical Indemnity Corporation of Alaska (MICA).

MR. NEUPAUER reiterated that Medical Underwriters of California is a physician-owned company that isn't in the business of insurance for its own sake nor is it in the business of insurance to make money. The promise has always been that Medical Underwriters of California would have to charge rates that its actuaries believe were necessary to pay the claims and expenses. If money was left over, it would be used to strengthen the company or be returned to the policyholders in the form of dividends. Over the years, the company has a strong record of returning dividends when claim trends are more favorable than the actuaries predicted. However, when claim costs increase, the rates have to be increased. Unfortunately, that has been the case in every state over the last few years. Mr. Neupauer informed the committee that Medical Underwriters of California has a very strong capital base, and therefore the company was able to step in [when Alaska lost two of its carriers]. Mr. Neupauer recalled a few years ago when Alaska had vigorous competition.

[The gavel was passed to Vice Chair Anderson.]

MR. NEUPAUER turned to California's passage of MICRA tort reform in 1975, which has become the benchmark for proposals by state legislatures across the nation. The centerpiece of that reform package is the $250,000 cap on noneconomic damages. Mr. Neupauer related his personal belief that it's not possible to quantify pain and suffering. However, when [pain and suffering awards] aren't limited, it creates huge uncertainty. In states with no noneconomic cap there are occasionally emotion-laden verdicts for large sums that can't be predicted. The aforementioned drives up the cost of settlements in other cases. He identified that as part of the problem, pointing out that in a small population state such as Alaska a relatively small number of very large cases has a huge impact on the overall result for an insurance company or a risk-bearing pool of any kind. Mr. Neupauer said he thought the aforementioned may have been behind the decision to exit the state by some of these

other carriers. Mr. Neupauer announced that Medical Underwriters of California has no plan to leave the state as long as the company is able to obtain a rate that pays the losses.

[The gavel was returned to Chair McGuire.]

Number 0877

REPRESENTATIVE SAMUELS inquired as to how Alaska ranks with regard to average premiums paid and the rate increase since [MICRA] in 1975.

MR. NEUPAUER said that although he didn't have the data at his fingertips, historically the rates [Medical Underwriters of California] has had to charge for Alaska physicians have been considerably higher than those in California. He recalled that in the early 1980s Alaska's rates had to be raised tremendously due to a number of large cases and that happened again in the late 1980s. In the 1990s the rates of [Medical Underwriters of California] in Alaska began to decrease some while the rates in California were stable. Over the long haul, he recalled that Alaska's rates have been double to about 30 percent higher than California's rates.

REPRESENTATIVE SAMUELS asked if Mr. Neupauer thought the earlier example of Nevada's rate increase of [2,700] percent versus California's 26 percent rate increase was typical.

MR. NEUPAUER characterized Nevada as an extreme example of a tort system gone wrong. Nevada is the only state that MIEC elected to depart after many years. At the end of MIEC's tenure in Nevada last year, MIEC was charging 3.5 times more in Las Vegas than what was charged in Northern California for the same practice. "We didn't see any relief in sight," he mentioned.

REPRESENTATIVE SAMUELS inquired as to what an Alaskan physician pays for liability as compared to another state with similar laws and a hard cap.

MR. NEUPAUER answered that he believes Alaska pays more, on average, than the states with hard caps. In some comparisons, Alaska would pay a lot more. However, he noted that many factors beyond the hard cap determine the [physician's premium]. The existence of the cap in California, he said, has kept the rates lower than they otherwise would be. When one compares what physician-owned companies charge throughout the nation,

last year the average of the five highest states was about 2.5 times the rates in California. He noted that Florida, New York, Texas, Illinois, and Michigan are usually the five highest states. "Alaska's not that high, but it's certainly well above the average," he said. In further response to Representative Samuels, Mr. Neupauer confirmed that he only knew of [MIEC] and one other carrier in Alaska, although he noted that there may be a few other carriers that insure a small number of physicians in Alaska through specialty societies or on a nonlicensed basis. Mr. Neupauer confirmed that currently [MIEC and the other carrier] practically split the market in Alaska 50:50.

MR. NEUPAUER, in further response to Representative Samuels, reiterated that [MIEC] maintains a fairly conservative capital ratio that must be available for its commitments in all four of the states in which it does business. He said he becomes a bit nervous when contemplating being the only carrier in any state because there should be choices.

Number 1112

REPRESENTATIVE GARA asked if the number of physicians, the size of the insurance pool, in Alaska has anything to do with the high insurance rates.

MR. NEUPAUER responded that when actuaries look at all the factors, they review volatility. As the number [of physicians] increases, the volatility decreases and thus there is more assurance that the numbers are credible. Therefore, the smaller the pool, the more variability there is from year to year. The aforementioned would be a factor for Alaska as a smaller state. In further response to Representative Gara, Mr. Neupauer recalled that in comparison to Hawaii, Alaska's rates were higher in the 1990s. However, currently the rates in Hawaii may be slightly higher than in Alaska. Mr. Neupauer pointed out that Idaho has the lowest rates of any of the states in which [MIEC] does business. He noted that Idaho recently re-enacted a hard cap of $250,000; the previous cap had an inflation escalator.

REPRESENTATIVE GARA recalled that Mr. Neupauer said that without a hard cap it's hard for a company to know what its liability exposure might be at the end of the year. He asked if there would still be an actuarial benefit if there were two caps, one for non-serious injuries and a higher one for very serious debilitating injuries, but a hard cap nonetheless.

MR. NEUPAUER said he believes that perhaps one or both of the major actuarial firms that study this insurance have produced a study that specifies that at levels above $250,000, the actuaries can't measure the beneficial effects of a cap.

Number 1312

REPRESENTATIVE HOLM asked if having a hard cap would result in the insurance company merely writing the check rather than fight the case, which would essentially lower the amount of attorney's fees. He pondered whether the unintended consequence of the aforementioned would be settling a number of cases that wouldn't normally be settled.

MR. NEUPAUER disagreed, pointing out that its policies include a clause that a case won't be settled unless the physician agrees to do so. Furthermore, the cases are peer-reviewed. The long-standing history of [MIEC] is that if the physician didn't depart from the standard of care, the company doesn't settle.

REPRESENTATIVE GARA noted that he has information specifying that since 1990 the rise in malpractice insurance rates in California is about twice as high as the rise in malpractice insurance rates nationwide. He asked if that sounds correct.

MR. NEUPAUER said that doesn't sound correct. In further response to Representative Gara, Mr. Neupauer recalled that from 1990 and the present California rates may have increased a bit faster than Alaska's because California's rates came from a lower base. However, when one reviews California's rates against other states without a cap from 1985 to the present, it's clear that California rates have increased a fraction, perhaps 30 percent as much as other states without a cap.

Number 1481

LAURIE HERMAN, Director, Government Affairs, Providence Health System in Alaska, announced Providence's wholehearted support of HB 472. Ms. Herman provided the following testimony:

> As you've heard today in a 2002 study commissioned by Providence, we learned that Anchorage is facing a physician shortage, one of the causes of the healthcare access problem facing Alaska. While limiting the amount of noneconomic damages in medical malpractice cases will no doubt help in attracting physicians to Alaska, it's not the end all, be all of

possible solutions to the physician shortage and resulting access problem. I'm speaking with you today in an effort to assure you that Providence is working on those fronts where we can effect positive impacts on these issues.

It is difficult to recruit physicians to our great state. Research indicates that the majority of physicians begin their practice not farther than within a 50-mile radius of where they completed their residency. Providence's Alaska family practice residency program is designed to help in this area. In conjunction with the WWAMI program, the family practice residency is designed to grow our own physicians and has proven to be very successful in meeting that goal.

Of the 32 graduates who have completed our program, 75 percent of them are practicing in Alaska; half of them are practicing in rural Alaska; and half are practicing in urban Alaska, with many of them serving the underserved or working with the Indian Health Service. Of those graduates not practicing in Alaska, all but one are enrolled to entities who are serving the underserved. We need to grow and expand this successful program and many of us at Providence are working diligently to do just that. Unfortunately, the program costs Providence some $2 million a year, but we are working to find ways to curb those losses and grow the program.

Alaska is facing an aging physician workforce, as you heard today. The average age of our physicians is 51 and we simply are not recruiting at a rate that will allow us to replace those physicians who decide to leave their practices once retirement age is reached. Providence has an aggressive physician recruitment program, which we hope will bring more doctors to Alaska. Continuing to run a successful family practice residency program and to expand it are certainly other ways to assist in this dilemma. Providence stands ready to meet the challenge of the physician shortage in our state, but we need your help.

Alaska's one of the costliest states for physicians, with medical liability insurance being a large

component of that cost. As you've heard, Alaska has experienced some very dramatic increases in the cost of medical liability insurance. As I've mentioned, recruiting physicians to practice in Alaska is difficult at best. We believe that putting a limit on noneconomic damages in medical malpractice cases will be a big help in our effort to bring more physicians to Alaska. I ask for your support on House Bill 472. Thank you very much.

REPRESENTATIVE GARA asked if Ms. Herman has any information regarding how private practitioners' salaries in Alaska relate to the nationwide average.

MS. HERMAN replied no, but offered to find out.

Number 1712

PAULA JACOBSON, Attorney and Nurse, informed the committee that the majority of [legal] cases she handles involves medical issues, including medical malpractice cases. Ms. Jacobson said that she didn't know of any "excess verdicts" in medical malpractice cases. In fact, she only knew of one verdict in excess of $1 million in the last 10-15 years. She related that the cases she handles that result in large awards aren't [recompense] for pain and suffering but rather for medical expenses and lost wages. Despite the fact that insurance companies would like to have certainty with regard to future exposure, there is no certainty in that.

MS. JACOBSON noted that she has witnessed all three rounds of tort reform and each time the arguments driving the tort reform have been the following: frivolous lawsuits, large jury verdicts, the unavailability of insurance for doctors, and access to medical care. In the last 20 years, there is no evidence, to her knowledge, that capping noneconomic damages has made insurance more available or attracted new physicians to the state. In fact, she said, there is no evidence that Alaska has a physician shortage because of the lack of a $250,000 hard cap. Testimony today has reflected that Alaska's physician shortage is caused by many factors, some of which have nothing to do with the medical or legal system in Alaska.

Number 1823

MS. JACOBSON clarified that [the current cap] on noneconomic damages is $1 million, not $2 million as was mentioned earlier.

Furthermore, Alaska has a two-tiered cap and the maximum amount an individual can obtain under the current system is $1 million. She emphasized that very few people receive [the $1 million maximum]. The $1 million in noneconomic damages is reserved for such severely injured people that it rarely happens, she said. The simple fact is that awards haven't increased.

MS. JACOBSON then turned to Representative Gara's earlier comment that there are two sides to every story. On the one hand there is the story of the physician and the insurance company and on the other hand there are the people most affected by this. From the 300-400 people a year who want her to take their case, she is hearing that Alaska's population is aging and these are the people with no economic loss. Therefore, older people as well as rural Alaskans and children will be severely penalized by this $250,000 cap because they have no economic loss. She suggested that there may be other ways to reach a compromise such as Representative Gara's suggestion of a two-tiered system. Ms. Jacobson said that based on her experience, the $250,000 cap is unfair and won't make that much difference in the legal situation of the state.

Number 1964

REPRESENTATIVE SAMUELS inquired as to the average earnings an attorney would receive on [a medical malpractice] case.

MS. JACOBSON answered that an attorney's earnings depends on various factors. She explained that she handles many federal cases and under federal law an attorney's earnings [on a medical malpractice] case is 25 percent. In some of these cases the attorney would receive 30 percent and in rare instances 40 percent. Ms. Jacobson informed the committee that if she feels that she has reached a fair settlement in a sufficient amount of time, she is willing to reduce her fee. However, she emphasized that these [medical malpractice] cases are incredibly difficult to handle, noting that the only persons who can testify that a professional has breached the standard of care are experts [in that field]. In a complicated case, $100,000 can be spent easily. Therefore, many people don't seek a remedy due to what has to be spent to handle the case.

MS. JACOBSON, in response to Representative Samuels' earlier question, clarified that under federal law attorneys are limited to two-tier [fee] system. If a case is settled prior to filing the lawsuit, the attorney would receive 20 percent. If a case is filed and proceeds, the attorney would receive 25 percent.

The nonfederal cases fall under a graduated fee that is dependent upon many factors. She estimated that in the last nonfederal case that she settled she received a contingency fee of 30 percent.

Number 2095

REPRESENTATIVE GARA highlighted that there are no regulations with regard to state rates. He informed the committee that [contingency fees] range from 25 percent to 35 percent, although some do reach 40 percent and higher. He recalled that "we" tend to reduce the rates if the case turns out not to be as difficult as was thought. Representative Gara turned to the current cap and asked if it's $1 million or greater if the individual has a longer life expectancy.

MS. JACOBSON explained that there are two caps. For those individuals who aren't severely and permanently disabled, the cap is $400,000. For those who are permanently and severely disabled, the cap is $1 million. Furthermore, the cap on death claims is $400[,000] regardless of [the number of dependents left]. She pointed out that HB 472 will cap medical malpractice claims at $250[,000]. Ms. Jacobson confirmed that there is a multiple that is multiplied by the age, but may not exceed $1 million.

Number 2207

DONNA McCRADY, Past President, Alaska Academy of Trial Lawyers, said that she wanted to speak to the reality of practicing in the medical malpractice area in Alaska. She informed the committee that there are very few practitioners who are plaintiff attorneys that actually bring medical malpractice cases in the state because these are quite expensive cases. One can spend well over $100,000 in these type cases. She recalled earlier testimony that many medical malpractice cases don't settle or do so late in litigation, and pointed out that's because physicians have to agree to settle. Therefore, a lot of money has been spent.

MS. McCRADY turned to the matter of expert [witnesses] and highlighted that it's very rare to hire expert [witnesses] from within the state and thus one must hire someone from out of state, which is quite costly. Therefore, before she takes such a risk, she carefully reviews the case. Furthermore, if she takes a case and later learns information suggesting that she may not prevail, she takes a look at dismissing the case and

eating the costs. The aforementioned is considered because of the risk to the client who could go bankrupt if he or she doesn't prevail. She pointed out that under Civil Rules 82 and 68 [of the Alaska Rules of Civil Procedure] if a plaintiff goes to trial and doesn't prevail, the plaintiff could end up with a judgment against him or her by the defendant for a portion of the defendant's costs and fees. However, the plaintiff doesn't have insurance to cover the aforementioned and could end up bankrupt.

CHAIR McGUIRE inquired as to whether Ms. McCrady has ever had a client face a Civil Rule 82 case or even heard of such.

MS. McCRADY replied no. She explained that she has experienced one case in which the plaintiff prevailed. In other cases the plaintiff, even with a strong case, was afraid to go forward because of the significant risk. Therefore, those plaintiffs were inclined to settle for much less than what she believes the case was worth.

CHAIR McGUIRE surmised then that Ms. McCrady had never seen Civil Rule 82 applied.

TAPE 04-25, SIDE B

CHAIR McGUIRE acknowledged that there are legitimate cases as well as frivolous cases. Although Civil Rule 82 is a remedy, it's never applied.

MS. McCRADY maintained that she does have clients who settle cases which they ordinarily wouldn't because of the fear [of Civil Rule 82]. Furthermore, she noted that she has read supreme court cases that have discussed judgments against plaintiffs when they haven't been the prevailing party. Although Ms. McCrady didn't have the statistics with her, she said she could inform the committee on this matter anecdotally because it's a small bar of people who perform malpractice cases. Therefore, she is very familiar with malpractice cases. She noted that there are many defense verdicts. Ms. McCrady offered to provide more information to the committee.

MS. McCRADY emphasized that Alaska has had caps since 1997. She commented that she is a bit baffled by some of the [testimony] that she has heard because she if familiar with the malpractice cases in the state. There is such a small percentage of cases that are actually brought forward, and furthermore there are many verdicts that are for defendant physicians. Therefore, she

said she is struggling to understand why there is a [malpractice] premium problem in Alaska. She pointed out that all the data she has reviewed shows that payouts have remained constant in Alaska while premiums have increased. She related her understanding that the aforementioned is related to economic forces and is absolutely unrelated to payouts. Furthermore, there isn't an increase in the number of malpractice cases that have been brought forward in Alaska. In fact, in the history of Alaska there has only been one verdict that summed over $1 million. Therefore, Ms. McCrady viewed HB 472 as hurting those with a valid claim.

Number 2254

MS. McCRADY recalled Representative Anderson's earlier statement that when patients receive a bad result, they file a lawsuit. However, she pointed out that in Alaska one can't file a lawsuit merely because there is a bad result. In fact, the jury instruction specifies that just because one has a bad result one can't infer negligence against the health care provider. Therefore, the plaintiff's attorney and the plaintiff bear the burden of proving that a physician's care fell below the standard of care and caused an injury. Furthermore, it has to be a substantial injury for it to be economical to bring a claim forward.

CHAIR McGUIRE inquired as to the average percentage of contingency fees that Ms. McCrady charges.

MS. McCRADY answered that the average is 30 percent plus costs. However, she noted that there are times when she will compromise that fee. Ms. McCrady remarked that she believes her fee is reasonable, especially when one considers that she spends a lot of money on cases and may recover nothing. She emphasized that she takes substantial risk in taking [medical malpractice] cases. In further explanation, Ms. McCrady specified that in an average medical malpractice case her costs may be $70,000, a large portion of which is expert [witness] fees. She acknowledged that defendants face the cost of expert [witnesses] as well. If the case goes through discovery, travel is required because most of the time the expert [witnesses] are in the Lower 48.

Number 2139

CHAIR McGUIRE asked if most malpractice insurance policies include coverage pertaining to attorney fees.

MS. McCRADY replied yes and deferred to Mr. Brown [who testifies later in the hearing]. Returning to the expert [witnesses], Ms. McCrady clarified that these expert [witnesses] are other physicians. She explained that these cases can't be brought forward unless a physician practicing in the area says that the care provided by the physician being charged fell below the standard of care.

Number 2088

KATHY DALE informed the committee that she and her husband are victims of malpractice. On May 18, 2000, her husband went to have rotator cuff surgery, but came out of surgery with a complex, severe brain injury due to the negligence of the certified nurse anesthetist. If there had been a $250,000 cap, she and her husband wouldn't have been able to bring a case. The only way that she was able to uncover what had happened to her husband and why was because of the ability to hire the expert witnesses. She explained that rotator cuff surgery entails lowering one's blood pressure. When her husband's blood pressure was already low, he was administered two other drugs that had the synergy of lowering the blood pressure [further]. Furthermore, the anesthetist stopped recording his blood pressure or any of his vital signs for 45 minutes. Therefore, Ms. Dale's husband wasn't receiving blood circulation to his brain because of his imperceptible blood pressure and thus her husband now has a complex brain injury that can be seen on an MRI [magnetic resonance imaging]. To even discover that her husband had a brain injury she and her husband had to go to the Lower 48. Ms. Dale stressed that because of this [negligence] she doesn't have the husband she had for over 42 years.

MS. DALE said that she didn't believe the proposed cap will accomplish what is being said. Furthermore, those who have true losses will certainly be robbed of the ability to obtain any remedy. She related that in her case, she was told that she had no economic damages because her husband had recently started a new business and they couldn't prove any economic loss. However, her husband's brain injury makes him unemployable. Ms. Dale implored the committee not to pass the cap that would prevent those in a situation similar to her from seeking remedies under the legal system when there is negligence.

Number 1955

CHAIR McGUIRE remarked that as policymakers, legislators face the challenge regarding whether there will be physicians available to treat rotator cuffs in the future. [Alaska faces a situation] that isn't just the cost of medical malpractice insurance rather it's a case of whether it will even be available. If medical malpractice insurance isn't available and the state has to go to a pool similar to that used in the 1970s, it will be done through a tax or the use of permanent fund dividends, she predicted. Moreover, she questioned what physicians would want to practice in a state that didn't have a sufficient medical malpractice carrier. Chair McGuire assured Ms. Dale that this isn't being done to rob anyone but rather attempts to weigh a serious public policy matter. Chair McGuire inquired as to the percent contingency fee Ms. Dale paid as well as the additional costs.

MS. DALE answered that the contingency fee was 33 percent and her out-of-pocket costs were in excess of $70,000. Ms. Dale said that she understands that [the legislature] is attempting to preserve the medical community in Alaska. However, she suggested that if the physicians were more willing to police their own, there wouldn't be the problem there is now.

CHAIR McGUIRE remarked that the medical licensing board is working as hard as it can to [police it's own community] and agreed that has to be part of the equation as well.

Number 1839

REPRESENTATIVE ANDERSON clarified that he didn't sponsor HB 472 to limit damages, especially with regard to economic damages. Representative Anderson asked if Ms. Dale's case is over.

MS. DALE replied yes. In further response to Representative Anderson, Ms. Dale explained that it was difficult to quantify the economic loss given the current laws. She noted that she and her husband are in the 60-year-old age group.

REPRESENTATIVE ANDERSON said he was shocked that Ms. Dale couldn't obtain any economic damages. Representative Anderson, drawing upon Representative Gara's earlier question regarding whether $22 a day for 40 years is fair, asked Ms. Dale what she believes would've been fair in her case.

MS. DALE clarified that her case didn't take into account pain and suffering. She explained that she settled her case for the cost of caring for her husband if she died first. In further

response to Representative Anderson, Ms. Dale confirmed that she understood the difference between economic damages and pain and suffering.

Number 1707

REPRESENTATIVE GARA announced that he disagreed with some of the policies behind HB 472 and sympathized with Ms. Dale. He said he has a problem with the policy that the legislation might slow the increase of [malpractice] insurance rates because there is no commitment from any insurance company that such will happen. Furthermore, Representative Gara said he had a problem with giving away the rights of those with valid claims of substantial injuries in order to "perhaps punish those who file frivolous lawsuits." Representative Gara said "The fit between the proposal and the evil, we have ... to agree results in an impact upon a completely innocent class of people who don't deserve to have their rights taken away."

REPRESENTATIVE GARA said that he wanted Ms. Dale to know that there are differing thoughts on this committee. He related his frustration with regard to the myths surrounding these lawsuits. Representative Gara explained that Ms. Dale and her husband didn't have a decent economic damages claim because she and her husband were close to 60 years of age. Any defense attorney will claim that [people in the 60 year old bracket] were about to retire anyway, and therefore the economic damages would be limited. Furthermore, those in rural Alaska might live a subsistence lifestyle and the law doesn't do well quantifying the wage value of such a lifestyle. Therefore, Representative Gara specified that for many people there are no economic damages and thus the recovery is limited to pain and suffering damages.

Number 1609

RAY BROWN, Attorney, Dillon & Findley, PC, began by informing the committee that he learned of this hearing this morning. Therefore, he requested an additional opportunity to present some empirical evidence to the committee, including a survey of medical malpractice rates and a history since the initial tort reform of the mid 1980s, in order to determine whether there is any empirical reality to the statements made today.

CHAIR McGUIRE noted that most people have been providing the committee with written testimony and data. She highlighted the latitude that has been afforded those testifying today.

Therefore, when the bill returns before the committee 20 trial lawyers and 20 physicians won't be allowed to testify again, she announced.

MR. BROWN noted his appreciation of any latitude that the committee would provide. However, he emphasized that this matter is so significant and the potential impact is so great that he hopes the committee will allow both sides to be heard.

CHAIR McGUIRE said she would [allow both sides to be heard].

MR. BROWN returned to his testimony and said that he wasn't aware of a medical malpractice crisis in Alaska. Mr. Brown turned to Dr. Neupauer's testimony comparing [medical malpractice] insurance rates between California and Alaska. He said when one traces the history of [medical malpractice insurance], it's easy to discern why [medical malpractice] insurance rates have increased in California while Alaska's have not since the 1990s. He related his recollection that the original noneconomic damages [cap] in the 1986 tort reform was $500,000 while noneconomic damages was unlimited for catastrophic injuries. In 1997 the aforementioned was reduced to what he considered hard caps in the amount of $400,000 or a multiple up to $1 million for catastrophically injured people. Catastrophically injured people would be those who were severely disfigured, blinded, or had brain injuries. Additionally, the medical malpractice carriers were given an additional tort reform incentive in that they don't have to pay subrogation. Therefore, unlike any other insurance carrier in the state, medical malpractice carriers don't have to pay reimbursement to any private health care insurer for medical expenses tendered by those carriers, unless it's Medicare or Medicaid or some other quasi-governmental health care provider. This is the case even if it results in malpractice.

Number 1436

REPRESENTATIVE HOLM inquired as to what Mr. Brown means by subrogation in this case.

MR. BROWN explained by posing an example in which he was injured in an automobile accident and his insurance company paid $35,000 for his recuperation in the hospital. His insurance company would have a right to recoup that $35,000 from the insurance company of the driver who was at fault. However, if he was the victim of medical malpractice, the medical malpractice carrier wouldn't have to pay anything in subrogation because the medical

malpractice carriers are protected from that. Therefore, the medical malpractice carriers have already received tremendous economic benefits from prior tort reform. Mr. Brown reiterated that he wasn't aware that the medical malpractice rates had been increasing, and furthermore he said he would be very surprised [to learn] that medical malpractice rates have increased substantially or at an alarming rate.

MR. BROWN turned to the perceived public policy crisis. Mr. Brown pointed out that NORCAL and MIEC have both written coverage in Alaska since the mid 1970s, and both companies are good companies that are very well capitalized. Of the two companies that left the state, he understood that CNA left Alaska for reasons unrelated to claims in Alaska while Northwest Physicians Mutual was grossly undercapitalized. In fact, he said he wasn't sure Northwest Physicians Mutual was still in existence. Northwest Physicians Mutual leaving doesn't have anything to do with paying out settlements in Alaska, rather it has to do with the company's underwriting policy and perhaps settlements paid in other states.

Number 1317

MR. BROWN remarked that there are exceptionally good physicians in Alaska, many of which are his personal friends. Furthermore, Alaska has a very good health care delivery system. However, it's not without fault, he emphasized. When there are faults, they can result in catastrophic consequences as Ms. Dale testified. He explained that his firm screens over 140 cases per year and only takes 5 cases, at the most. Mr. Brown said, "We save 135 doctors a year from getting sued, some of those are viable cases. Unfortunately, they are not economically viable." Furthermore, no attorney on either side of these cases will prosecute a claim or defend a claim that isn't meritorious.

MR. BROWN noted that in order to take these cases, the firm and the attorneys have to be extremely competent and well funded. Therefore, he said that he wasn't aware of any major law firms or attorneys filing frivolous lawsuits against physicians. It's not done for ethical reasons, and furthermore filing frivolous lawsuits would be economic suicide. Mr. Brown related that he charges 33.3 percent for a medical malpractice case as he does for any contingency case he represents. The defense attorneys charge $175 to $250 an hour. "In the end, I don't know who profits more from medical malpractice, but I know who suffers the most and it's the people like Ms. Dale and her husband," he said.

MR. BROWN remarked that if one is 65 years old and retired, that individual should be at the happiest point in his or her life, a time in which to enjoy things and live off of retirement savings or social security. Unfortunately, many of the victims of malpractice are over age 65 and [in the above-described position], and thus have no economic loss. Accordingly, any claim that could be made would be for the pain and suffering. If this proposed cap of $250,000 is [adopted], those cases involving people who have been catastrophically injured wouldn't be litigated because it would cost more to bring one of those cases than could be recouped under a $250,000 cap. Therefore, those individuals would be without any recourse. In closing, Mr. Brown expressed hope that a compromise could be reached and that there is the opportunity to discuss the matter with empirical evidence.

Number 1004

MIKE HAUGEN, Executive Director, Alaska Physicians & Surgeons, Inc., informed the committee that Alaska Physicians & Surgeons, Inc., represents 170 physicians. With regard to the debate on the caps on noneconomic damages and the formula, he recalled that AS 09.17.010(c) states:

> (c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement.

MR. HAUGEN posed an example of a baby that was injured at birth. The average age is just short of 80 years, and therefore 80 times $25,000 sums close to $2 million, which is the outside limit. It's not the lessor of the $25,000 times the person's life expectancy of $1 million; rather it's the greater of those two. With regard to the solvency of MIEC and NORCAL, he agreed that those two are more stable than the two carriers that left. However, one must remember that the largest malpractice carrier in the country, "St. Paul," left the market because its loss ratio was unsustainable. He noted that St. Paul insured about 60,000 physicians. Therefore, even the best-capitalized companies in the nation are at risk if this problem isn't addressed.

Number 0900

MR. HAUGEN turned to where the money physicians pay in [malpractice] premiums goes and what it pays for in the tort system. He began by noting that about 60 percent of the malpractice claims are actually dropped or dismissed and the defense costs for those are about $16,000. Roughly 32 percent of claims are settled and for those the average defense cost is about $40,000. Only about 7 percent of the claims go to trial and of that 6 percent the defendants win. However, the defendants still pay about $85,000. Therefore, only in about 1 percent of these cases does the plaintiff actually win a jury verdict. He noted that this information is in the [black three-ring binder]. He further related that only about 20 percent of the tort dollar actually goes to compensate the victims for economic damages, while about 58 percent of every tort dollar never reaches the victim because it pays for defense and plaintiff attorney costs, expert witness costs, and administrative costs.

MR. HAUGEN informed the committee that between 1995 and 1997, 36 percent of plaintiff verdicts were over $1 million. However, that increased to 54 percent by 2001. Mr. Haugen pointed out that the tort system in this country costs 2 percent of the gross domestic product and it's expected to increase to 2.4 percent next year. One might think that with this increase in expenses for the malpractice system, physicians would be committing more malpractice. However, the frequency of malpractice claims has been declining for the last 10 years. Therefore, [the problem] is the severity of the claims. Research has shown that the aforementioned has caused physicians to practice defensive medicine, which the [U.S. Department of] Health and Human Services (HHS) has estimated to add 5-9 percent to the health care costs in this country. That estimate amounts to $60-$108 billion a year in physicians ordering extra tests to cover all the bases.

MR. HAUGEN turned to the question regarding whether economic and noneconomic damage caps actually help with patient access in Alaska. He related that HHS studies have also found that states with noneconomic damage caps have, on average, 12 percent more physicians per capita than the states without caps. Premiums in states with caps are 17 percent lower than those without caps. He highlighted that California's MICRA has dramatically demonstrated how caps on noneconomic damages have kept premiums lower. For example, between 1975 and 2001 California's

malpractice rates increased 182 percent while nationally the rates increased 569 percent.

MR. HAUGEN provided a quote from the January 2004 Health Tracking by Ken Thorpe who states: "It appears that a substantial share of the multi-state physician-owned companies have refocused their efforts on their state of domicile." Mr. Haugen pointed out that there are no medical malpractice insurance companies that are domiciled in Alaska. Therefore, [Alaska Physicians & Surgeons, Inc.] fear that if this situation isn't addressed, the state may return to the 1970s with a state-funded plan. Mr. Haugen related a quote from Dr. Neupauer: "With the supply of physicians in Alaska already at risk, any tort lottery induced spiking claims and subsequent needed premium hikes could be devastating to patient access." Therefore, he surmised that MIEC, the stronger of the two carriers left in Alaska, is concerned as well.

MR. HAUGEN said that one must remember that in Alaska the amount of total premiums written in the state is a rounding error when one considers how much premium is written in California and the rest of the country. Mr. Haugen concluded by relating his belief that Alaska should be in the forefront of medical liability reform in order to keep the remaining medical malpractice companies in the state and, almost more importantly, to attract young, new physicians. The state desperately needs to create a "gold standard."

Number 0539

REPRESENTATIVE GARA said that there is a response statistic to most of those provided by Mr. Haugen. However, with regard to the study reporting that states with caps do better with [malpractice] premiums than states without caps, Representative Gara pointed out that Alaska has a cap now.

MR. HAUGEN emphasized that there are various types of caps.

REPRESENTATIVE GARA surmised that the study addressed states including Alaska because Alaska was a state with a cap.

MR. HAUGEN said he would have to check. He reiterated that the states with the most significant increase are the states with hard caps. More and more states are going toward hard caps, he said.

REPRESENTATIVE GARA reiterated that he would be sympathetic to a hard cap so long as it was flexible and fairer [than the one proposed in HB 472]. Representative Gara recalled the statistic that 60 percent of [medical malpractice] cases are dismissed, and suggested that the aforementioned statistic isn't just referring to cases that have been filed because it includes prefiling.

MR. HAUGEN clarified that the study specified that 60 percent of medical malpractice claims never reach trial.

REPRESENTATIVE GARA said that such studies often define when an attorney or a client contacts a physician's office to alert the physician of a malpractice issue as a claim even if the case isn't pursued.

MR. HAUGEN interjected that such claims are still costing the defense over $16,000.

REPRESENTATIVE GARA highlighted that there is a difference between invalid cases that people pursue versus invalid cases that people didn't pursue.

CHAIR McGUIRE announced that HB 472 would be held over.

HB 367-LICENSING SEX-ORIENTED BUSINESSES

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 367, "An Act relating to the licensing and regulation of sex-oriented businesses and sex-oriented business entertainers; relating to protection of the safety and health of and to education of young persons who perform in adult entertainment establishments; and providing for an effective date." [Before the committee is CSHB 367(L&C).]

CHAIR McGUIRE explained that the committee has two proposed committee substitutes (CS) in the committee packet: Version 23-LS1394\V, Craver, 2/23/04; Version 23-LS1394\W, Craver, 2/25/04. She also informed the committee that the committee packet should contain written testimony from Carol and Kathy Hartman, the police department, and other written testimony. Chair McGuire noted that Colleen Duree (ph), clinical counselor, had misunderstood that public testimony would be allowed today, and therefore she suggested that Ms. Duree provide written testimony or oral testimony during the House Finance Committee hearing on this legislation.

The committee took an at-ease from 4:15 p.m. to 4:16 p.m.

Number 0290

CHAIR McGUIRE turned to her proposed CS, Version W. She pointed out that the committee packet includes an amendment to page 10 of Version W. The language being inserted by the amendment to page 10 would incorporate language that is in Version V by Representative Gara. She pointed out that on page 11 of Version V there are two paragraphs labeled (8) in Section 3, and therefore on page 11, line 9, of Version V "(8)" should be changed to "(9)".

CHAIR McGUIRE explained that both she and Representative Gara agree that an individual must be 21 years of age to strip. However, the disagreement comes into play with regard to the age at which an individual can patronize adult-oriented businesses. Version W specifies that one must be 21 years of age to strip or patronize an adult-oriented businesses. The supreme court opinions that she has read specify that there is no constitutional right to entertainment. Therefore, she indicated that [Version W] is constitutional.

CHAIR McGUIRE opined that she wanted a situation in which one who enters or strips in an adult-oriented business would have to be 21 years of age regardless of whether the business serves alcohol. There has been compelling and overwhelming evidence that drug solicitation, drug use, and a presence of alcohol are prevalent at adult-oriented businesses.

TAPE 04-26, SIDE A
Number 0001

CHAIR McGUIRE related her opinion that the policy behind changing the alcohol laws in Alaska, as well as in the Lower 48, was the desire not to allow people under the age of 21 to drink. The aforementioned was [decided] in light of the information regarding the brain development [during the time prior to age 21], the fact that young people who are drinking are more likely to be in automobile accidents and place themselves in a position of danger, and young people are less experienced with regard to handling alcohol. Because alcohol is present in these clubs, she opined that this is an opportunity for entertainment at the age of 21.

Number 0109

CHAIR McGUIRE acknowledged that there are some women that are patrons and some men that strip, but generally speaking women are stripping and men are patrons. She recalled the concern of discrimination against certain genders if the age at which one is allowed to strip is 21 and the age at which one is allowed to patronize an adult-oriented establishment is 18. She said she believes there is some practical merit to that, although it doesn't seem to "fair out" constitutionally because of the need to look at each class: stripper versus patron. Chair McGuire related her belief that under Version W, strip clubs that serve alcohol will become the predominant "fixture." Therefore, there would be additional [oversight] from the Alcoholic Beverage Control Board (ABC Board) due to the presence of alcohol in the establishment. She noted that she had considered linking the stripper license to an alcohol license, but ultimately decided against it. She mentioned that at age 18 one can't smoke or purchase cigarettes.

CHAIR McGUIRE, in response to Representative Anderson, clarified that under Version W the dancer and patron of adult-oriented businesses have to be 21 years of age. In Version V, the [dancer] has be 21 years of age at an adult-oriented business while a patron of such an establishment can be 18-21 years of age.

REPRESENTATIVE GARA specified that [under Version V] an individual under the age of 21 can patronize nonalcoholic adult-oriented business.

REPRESENTATIVE ANDERSON pointed out that CSHB 367(L&C) specified that both the patron and the dancer had to be 21 years of age, which is the same as Version W.

Number 0366

CHAIR McGUIRE agreed that CSHB 367(L&C) is what is encompassed in Version W while Version V embodies Representative Gara's bifurcated age concept. Chair McGuire highlighted that [both versions] changed the references to "sex-oriented businesses" to "adult-oriented businesses" in response to those who were offended by the reference to "sex-oriented businesses." [Both versions] specify that regardless of whether the adult-oriented business serves alcohol or not, the business will be regulated under the state's laws. These businesses will have to obtain a license. The only difference in the licensing requirements from the original legislation is that [these two versions] no longer license the stripper. Both versions added a proof of age

requirement, which specifies that if [a business] is criminally negligent in failing to ascertain the person's age, then that [business'] license may be pulled.

CHAIR McGUIRE highlighted that a new addition to this legislation is the business hours requirement. On page 7 of both versions it specifies that the business hours are set to those of similarly situated businesses that serve alcohol. Therefore, between the hours of 5:00 a.m. and 8:00 a.m., the establishment has to be closed. She noted that most municipalities have superseded the aforementioned law and require closure at an earlier hour. Both versions specify that the business hour requirement is either the state law or the municipal ordinance that supersedes the state law. This attempts to address testimony that related that these clubs have began to serve as an "after-hours" club.

Number 0625

REPRESENTATIVE GARA agreed that there is only one major difference between the versions, which he characterized as a policy call. With regard to constitutional considerations, Representative Gara suggested that those are probably a wash between the versions. The belief, he said, is that with any [constitutional] challenges either legislation would be upheld. Returning to the policy decision, Representative Gara said that both he and Chair McGuire believe that the harm to young people who perform naked [in these adult-oriented] businesses is phenomenal. Evidence shows that in some places drunken customers verbally assault dancers, pimps and drug dealers proposition dancers, and there are wage violations. Furthermore, the no-touching rules at these [adult-oriented businesses] are repeatedly violated.

REPRESENTATIVE GARA noted that one report specifies that 100 percent of all dancers report physical abuse at some point during the dancers' career and 100 percent witness abuse of other dancers. Furthermore, 77 percent of the dancers report being stalked after leaving the club and 100 percent have been propositioned for prostitution. These [adult-oriented businesses] aren't a place at which 18-year-old girls should work. At age 21, one can make a more mature decision, he opined.

REPRESENTATIVE GARA explained that [both he and Chair McGuire] want to regulate those dancers who are considered to be too young to perform nude. However, he noted that [he and Chair

McGuire] differ with regard to whether the patron has to be 21 years of age. There is a valid argument that can be made regarding not allowing 18-20 year olds to patronize these clubs. However, Representative Gara said that [restricting the age of the patron to 21 and older] goes too far for his comfort level. He explained that he was convinced of the aforementioned by the notion that if one is old enough to be in the military, one is old enough to make the decision to patronize a strip club. Therefore, he wanted to maintain a narrower focus and regulate what he considered to be the greater problem with those working [naked at these clubs].

REPRESENTATIVE GARA opined that there shouldn't be concern that if you regulate the dancer's age one would necessarily have to regulate the patron's age. Both of the versions require that these [adult-oriented businesses] are going to be licensed. Therefore, if these [adult-oriented businesses] allow someone under the age of 18 to enter the business, it can be closed. Furthermore, if people under the age of 18 are employed at these [adult-oriented businesses], the business can be closed. Moreover, persistent wage violations can result in the establishment's closure.

REPRESENTATIVE GARA highlighted that [both versions] prohibit private rooms because there is more touching. He recalled that some of the former entertainers were concerned because [the adult-oriented business] shared an entrance with apartment buildings or other places where young children were in attendance. Therefore, [adult-oriented businesses] have to have a separate entrance and washroom. Representative Gara reiterated that both versions are the same, save the age difference discussed earlier, thus he left it to the committee to decide which proposed CS is best.

The committee took an at-ease from 4:35 p.m. to 4:38 p.m.

Number 1020

[Not on tape, but reconstructed from the committee secretary's log notes, was the following: CHAIR McGUIRE announced that HB 367 would be held over.]

ADJOURNMENT

Number 1021

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:40 p.m.