HB
484

House Judiciary
May 26, 1977

The meeting was called to order at 9:00 a.m. by Chairman, Gardiner. Members present were Gardiner, Miles, Dankworth, Elaison, Carpenter, Rudd and Brown. All members were present!

HB 484 Medical Malpractice Insurance Coverage HB 484

Dick Block, Director of the Division of Insurance for the Department of Commerce and Economic Development, was here to speak in support of the bill. He explained the bill section by section. The committee had questions of Mr. Block.

Emmett Wilson, representing the Alaska Hospital and Medical Center, from Anchorage also spoke. He indicated that the Legislature had developed MICA to provide malpractice insurance because the insurance companies didn't want to write malpractice. He hoped that the Legislature would approach this issue with concern for the consumer.

Clark King from the Alaska State Medical Association indicated a consensus opinion of 350 doctors that were is support of the bill. Mr. Brown questioned whether this was a consensus opinion.

There were additional questionsof Mr. Block.

The meeting was adjourned at 10:25 when the members received the call to the House.

Sec. 08.64.215 is amended to read:

Sec. 08.64.215. FINANCIAL RESPONSIBILITY. (a) ~~Due~~ to be eligible for an active license under this chapter, a person shall maintain liability insurance in amounts equal to ~~provide coverage for~~ at least $200,000 per claim and $600,000 aggregate claims per year.

(b) A person need not maintain the insurance coverage required in (a) if

(1) the person posts a bond equal to provide the amounts stated in (a);

(2) evidences by proof satisfactory to the Division of Occupational Licensing that the person has sufficient assets to be able to pay an individual judgment of $200,000 and will probably be able to satisfy judgments totaling $600,000 for any individual year; or

(3) from a combination of (1) and (2) above, the person is able to provide an unencumbered source of funds adequate to cover judgments of $200,000 per judgment or total judgments of $600,000 for any ~~individual~~ year.

Sec. 08.64.217. REIMBURSEMENT. (a) A physician who procured a contract providing coverage for medical malpractice from the Medical Indemnity Corporation of Alaska prior to May 1, 1977 shall be entitled to reimbursement in the amount that (1) exceeds (2)

(1) the rate the physician is charged by the Medical Indemnity Corporation of Alaska for the two year period from the effective date of this Act;

(2) the rate that the physician would have been (was) charged for that two year period if the rates and rate plan in effect on May 1, 1977 were in effect during that two year period.

(b) In order to be eligible for reimbursement under (a) of this section, a physician must maintain coverage from the Medical Indemnity Corporation of Alaska for at least two years from the effective date of this Act. delete

See 08.64.219 - The Division shall promulgate regulations necessary to carry out AS 08.64.215 and AS 08.64.215.

Possible exception for pool practice performance by the physician

AMENDMENT TO HB 484

Sec. 18.80.285. DISCRIMINATION IN THE PROVISION OF HEALTH CARE. (a) It is unlawful for a health care provider to deny, discontinue or refuse to afford health care or access to a health care facility to any person on the basis of the person's race, color, national origin, age, sex, marital status or employment or professional status.

(b) It is unlawful for a health care provider to deny, discontinue or refuse to afford to a person health care or access to a health care facility in retaliation for or to deter

(1) exercise by the person of any right guaranteed or conferred by the Constitution or laws of the United States or the state, including but not limited to the right of access to the courts of the United States or any state, whether the person is a litigant, prospective litigant, or person acting on behalf of the litigant or prospective litigant;

(2) exercise by a third person of any right guaranteed under the Constitution or laws of the United States or the state, including but not limited to the right of access to the courts of the United States or the state, whether the third person is a litigant or prospective litigant.

(c) The provisions of (a) of this section do not apply to a practitioner or facility whose practice is limited, based upon a generally accepted category of medical specialization, to persons in a certain age, sex, marital, employment or professional category.

(d) A person who wilfully violates this section is guilty of a felony and, upon conviction, is punishable by a fine of not more than $, or by imprisonment for not less than one nor more than years, or by both.

(e) In this section,

(1) "assistance" means any medical diagnostic, treatment or similar aid for the cure, relief or reduction of disease or bodily injury;

(2) "health care provider" means a physician, chiropractor, dentist or dental hygienist, nurse, dispensing optician, optometrist,

--over--

physical therapist, pharmacist, psychologist, psychological associate or hospital or health care facility.

Sec. 08.64.380(3) is amended by adding a new subparagraph to read:

(G) conviction of an offense involving discrimination in the provision of health care under AS 18.80.285.

Malpractice File

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE POUCH D -- JUNEAU 99811

April 8, 1977

Dear Physican and Hospital Administrators:

The Medical Indemnity Corporation of Alaska, the medical malpractice insurer established by the 1976 Legislature is now an operating reality and insuring over 150 physicians and 19 hospitals.

Although the desirability of some provisions are being questioned by physicians, the administration continues to believe that total participation by all physicians is necessary if the kind of coverage provided by MICA and the kind of rate structure imposed by statute is to continue.

By the same token, if the physicians indicate that they would accept a different level of insurance and a more restrictive rate plan, total participation by all physicians would no longer be a requirement in the plan.

For the past two months I have met with the Ad Hoc Legislative Committee of the Alaska State Medical Society and with Dr. David Beal at their request to discuss which modifications to the coverage and rating provision would be necessary in order to have a voluntary plan.

As a result of these several meetings the members of the Ad Hoc Committee have agreed that they would accept certain changes in coverage and ratings and I have agreed that if the coverage and rating are changed as stipulated, the plan could operate on a voluntary basis.

I have participated with the Ad Hoc Committee in the draft of legislation which would accomplish this end. The proposed bill, a copy of which is attached, will be introduced on behalf of the ASMA Ad Hoc Committee. Provided no substantial changes are made to the language, the administration will not oppose the bill.

It is important that every person entitled to coverage under MICA review and understand the impact of the proposed changes. I have attached a comparis n page. If you have any questions concerning the proposal, I would be happy to have you call.

Sincerely,

Richard L. Block
Director

RLB/jag5/5

ALASKA MEDICAL MALPRACTICE INSURANCE

COMPARISON

QUESTION	PRESENT LAW	PROPOSED LEGISLATION
Must Physican have Insurance?	Yes - the plan is mandatory.	No -
Must it be procured from MICA?	Yes - it is exclusive.	No - participation in MICA is voluntary.
Must MICA sell the policy to any doctor who applies and pays the premium?	Yes	Yes
Type of coverage?	"Occurrence" - all claims occurring during policy period.	"Claims made" - all claims reported and occurring during period of continuous coverage.
Can tail protection (protection against the late reported claim) be purchased?	Not necessary.	Yes - for an additional premium.
Can the tail protection be procured at any time?	Not applicable.	No - only upon termination of coverage under MICA.
In Calculating Premium: a. Must premium be based upon medical revenue?	Yes	No
b. May medical revenue, or such items as retirement, new practice or bush practice be recognized in the rate?	It is automatically recognized when basing premiums on revenues.	Generally no - although some modest credits might be offered.
c. Will premium for one year be known in that year?	Yes	No - the plan calls for retroactive adjustments for up to three years after the end of the policy period.
d. Will premiums be based on Alaska medical malpractice experience?	To a large degree yes - however, the Alaska experience is not large enough to be fully credible, thus, other factors will have to be included. Overtime, through prospectively applied recognition of Alaska past actual experience, the long-term cost will reflect Alaska experience.	Yes, but because the plan is voluntary, the rates will give less prospective recognition to Alaska experience. Through retrospective rating and because of using a claim made form the recognition of actual MICA experience will be reflected in the insurance cost somewhat more quickly.
e. If insured terminates participation in the plan at the end of a policy period, does the premium obligation also terminate?	Yes - except that there will be a premium adjustment to reconcile actual gross receipts for the last period to estimated gross receipts for the last period.	No - since for three years there is a potential retrospective premium obligation.
Is the plan a permanent solution?	Yes	NO - THE PLAN WILL AUTOMATICALLY ~~It could be, however, if~~ participation falls below UNLESS the stipulation percentage AND the plan automatically TERMINATES TO PRIVATE INSURER THAT ASSUMES THIS BUSINESS.
Will statutory provisions for for management of MICA remain the same?	Yes	Yes - except two additional physicians will be included on the Board of MICA.

Prepared by:

IN THE LEGISLATURE OF THE STATE OF ALASKA

TENTH LEGISLATURE - FIRST SESSION
A BILL

For an Act entitled: "An Act Amending Medical Malpractice Insurance Law, Chapter 102 Alaska Statutes 1976, to repeal mandatory and exclusive provisions and create a state operated, competitive Medical Malpractice Insurance Fund."

*Section 1. AS 08.64.215 is deleted in its entirety.

*Section 2. AS 08.20.115 is deleted in its entirety.

*Section 3. AS 08.32.015 is deleted in its entirety.

*Section 4. AS 08.36.115 is deleted in its entirety.

*Section 5. AS 08.68.165 is deleted in its entirety.

*Section 6. AS 08.71.085 is deleted in its entirety.

*Section 7. AS 08.72.115 is deleted in its entirety.

*Section 8. AS 08.80.115 is deleted in its entirety.

*Section 9. AS 08.86.125 is deleted in its entirety.

*Section 10. AS 09.55.544 is amended by adding a new section to read:

Sec. 09.55.544. LIMITATION OF ACTION. (a) Except as provided in (b) of this section, no person may bring a malpractice action based on the negligence or wilful misconduct of a health care provider unless commenced within two years of the act or omission. However, if the plaintiff first has knowledge of the act complained of on a date within one year of the expiration of the period of limitation, the time limited for commencement of the action is extended one year from that date, but in no event may an action be commenced later than three years from the date of the act complained of.

(b) If the act complained of occurred before the plaintiff attains the age of six years, a malpractice action based on negligence or the wilful misconduct of a health care provider may be commenced at any time before the plaintiff attains the age of eight years, but no later.

*Section 11. AS 18.20.045 is deleted in its entirety.

*Section 12. AS 21.88.050(a)(1) is amended to read:

(1) in the form approved by the director, issue to all physicians and hospitals who pay the premiums for it a contract or contracts indemnifying physicians and hospitals and their employees who are health care providers against loss by reason of liability for [PROFESSIONAL SERVICES RENDERED IN THE STATE ON AN OCCURRENCE BASIS] <u>covered claims for an act or omission in the delivery of professional health care in this state</u>, and agreeing to

tender on behalf of the physicians and hospitals and their employees who are health care providers a defense in a covered claim brought under AS 09.55.530 - 09.55.560; [THE LIMITS OF LIABILITY SHALL BE NO LESS THAN THE MINIMUM LIABILITY COVERAGE REQUIREMENTS TO BE MAINTAINED UNDER AS 08.64.215 AND AS 18.20.045] the limit of liability provided in contracts issued to doctors shall be $200,000. per occurrence and $600,000. aggregate liability per year; the limit of liability provided in contracts issued to hospitals shall be $200,000. per occurrence, and an aggregate liability per year of $1,000,000. minimum, and an additional $20,000. for each bed over 50; the contract shall cover the defense against but need not indemnify a covered claim for punitive damages; at the option of the physician or hospital and for an additional premium the contract may cover claims against the physician or hospital that arise out of professional services performed by the physician or hospital for a period after December 31, 1974 except that coverage will not be provided for a claim already filed or of which the physician or hospital had or reasonably should have had notice at the time the retroactive insurance was purchased;

*Section 13. AS 21.88.050(a)(2) is deleted in its entirety.

*Section 14. AS 21.88.050(a)(7) is deleted in its entirety.

*Section 15. AS 21.88.050(b)(10) is added:

(10) in a form approved by the director and for an additional premium determined under sec. 80 of this chapter, issue endorsements which provide indemnity for claims not yet reported which arise out of professional services rendered during a period of continuous coverage under the originally issued contract, to physicians and hospitals who pay the premium for it and who are terminating their original covered claims contract with the corporation for a period of not less than one year.

*Section 16. AS 21.88.080(4) is amended to read:

(4) rates may not be excessive; rates are excessive if, after a period of time and with respect to an amount of gross premium which are actuarially credible, the premiums exceed losses incurred by the corporation, including losses paid, reserves for covered claims reported and unpaid, reserves for covered claims incurred during the policy period and not reported [PROVIDED THAT RESERVES FOR CLAIMS INCURRED DURING THE POLICY PERIOD AND REASONABLY EXPECTED TO BE REPORTED AFTER THREE YEARS AFTER THE INCIDENT MAY BE INCLUDED ON A DIFFERENT BASIS DUE TO THE ADDITIONAL FINANCIAL FLEXIBILITY PROVIDED BY THE CORPORATION] and reasonable expenses for the operation of the corporation.

*Section 17. AS 21.88.080(5) is amended to read:

(5) rates shall not be inadequate; rates are inadequate if, based on available data, the premiums to be paid by the health care providers are or may reasonably be expected to be insufficient to pay for losses incurred by the corporation, including covered claims paid, reserves for covered claims reported and unpaid, reserves for covered claims incurred during the policy period and not

reported, [PROVIDED THAT RESERVES FOR CLAIMS INCURRED DURING THE POLICY PERIOD AND REASONABLY EXPECTED TO BE REPORTED AFTER THREE YEARS AFTER THE INCIDENT MAY BE INCLUDED ON A DIFFERENT BASIS DUE TO THE ADDITIONAL FINANCIAL FLEXIBILITY PROVIDED BY THE CORPORATION,] and reasonable expenses for the operation of the corporation;

*Section 18. AS 21.88.095 is added:

a) The corporation shall transfer all of its assets and liabilities to the company that meets all of the following qualifications:

1) Possesses a valid certificate of authority to transact casualty business in the State of Alaska. In evaluating the capital and surplus of the company for qualification for a certificate of authority the value of the assets and liabilities of the corporation shall not be considered.

2) Pays to the corporation the full value of any surplus in the corporation not represented by any unrepaid proceeds of loans by the loan fund to the corporation.

3) Executes a complete reinsurance and hold harmless agreement in form approved by the director covering all the corporation's obligations to its creditors and policyholders.

4) Executes modifications of loan agreements with the loan fund in which

i) the company agrees to assume the obligations.

ii) The loan provision shall be modified to provide a scheduled amortized repayment of the principal over a period not to exceed ten years if at any time the company writes less than premium levels provided in AS 21.88.050(a)(8).

iii) The provision for repayment provided in AS 21.88.210(b)(1) shall be modified to provide for annual installments of at least 25% of the excess of premium and investment income collected over the total of claims, reserves, and expenses on the medical malpractice book of business or 25% of the excess of premiums and investment income collected over the total of claims, reserves, and expenses on the corporation's total book of business, whichever is greater.

b) The company buying the business as provided in a) above shall enjoy the benefit of special provisions in c) below if the following provisions are met:

1) The company is an Alaskan domestic stock company.

2) The company continues to write premiums in excess of the levels provided in 21.88.050(a)(8).

c) The company meeting the qualifications in b) above shall

1) be entitled to carry forward and offset against its premium tax obligation the amount by which aggregate claims paid on reinsurance assumed pursuant to a)(3) of this section exceeds aggregate reserves on the same business.

2) the obligation to repay to the loan fund loans assumed at the time of transfer of the business shall not be shown as a liability on the books of the company.

*Section 19. AS 21.88.110 is deleted in its entirety.

*Section 20. AS 21.88.120 is deleted in its entirety.

*Section 21. AS 21.88.130 is deleted in its entirety.

*Section 22. AS 21.88.150 is deleted in its entirety.

*Section 23. AS 21.88.160 is deleted in its entirety.

*Section 24. AS 21.88.170 is deleted in its entirety.

*Section 25. AS 21.88.180 is deleted in its entirety.

*Section 26. AS 21.88.900(1) is deleted in its entirety.

*Section 27. AS 21.18.090(5) & (6) are deleted in their entirety.

*Section 28. AS 21.88.050(a)(8) is added:

(8) cease operation and terminate its affairs, if for two consecutive annual periods the corporation posts written premium in amounts less than 50 percent or if for one annual period posts written premium in an amount less than 35 percent, of the total written premium of all medical malpractice insurance for risks of physicians and hospitals in Alaska; but in any event the corporation shall cease operation and terminate its affairs by June 30, 1979.

*Section 29. AS 21.88.080(15) is added:

(15) if the corporation's collected premiums for any given year are less than its incurred claims, claim expense, underwriting expense, reserves for that year, and provision for repayment of any loans, it shall levy an assessment upon those insureds who held policies during that year; the assessment, which may be made in periodic installments, must be made within three years and may not exceed 150 percent of the physician's premium for that year. Termination of any policy does not relieve the insured of contingent liability for his proportionate share of the obligations to the corporation which accrued while the policy was in force.

*Section 30. AS 21.88.080(16) is added:

(16) if the corporation's collected premiums for any given year exceed its incurred claim expense, underwriting expense, reserves for that year, and provision for repayment of any loan, it may apportion and pay or credit its insureds, who held policies during that year, only out of the part of its surplus fund which represents net realized savings and net realized earnings in excess of the surplus required by law to be maintained; such payment or credit shall be proportionate to the insured's earned premium for that year.

*Section 31. As 21.88.900(16) is added:

(16) "covered claims" means claims by injured patients reported to the corporation during the period of continuous coverage by the corporation of the insured health care provider for an act or omission in the delivery of health care services during the same period of continuous coverage; continuous coverage is one or more successive policy periods which is uninterrupted by cancellation or failure to renew for any reason.

ANCHORAGE PEDIATRIC GROUP
3300 PROVIDENCE DRIVE - SUITE 206
ANCHORAGE, ALASKA 99504
PHONE 279-6461 AREA CODE 907

February 22, 1977

JOHN C. TOWER, M.D.
HARVEY F. ZARTMAN, M.D.
MARIAN WITT, M.D.
R.W. KELLER, M.D., APC.

PLEASE REPLY BY AIR MAIL

Representative Lisa Rudd
2827 Lore Road
Anchorage, Alaska 99507

Dear Mrs. Rudd:

I don't believe you actually are representative from our district (Indian Hills) but I feel that I can write to you as a friend, as well as a representative of the Anchorage area in Juneau, regarding my plight in the present malpractice situation. I am sure that all the legislators are fed up with various bickerings back and forth and especially with some of the less than refined language of certain of our spokesmen (in this particular instance one can take a certain pride in the fact that the women in the medical association have somewhat better control of their tongues). Until November of last year I and John Tower and Marian Witt had for a very reasonable price, all things considered, excellent malpractice coverage through Clyde Clary's association with an umbrella of a one million dollar coverage. For this our group paid, up until last year, approximately $1,600 a year, and last year $4,600. However, as of November 1, the company or companies through which Clyde obtained our insurance all stopped insuring doctors in Alaska and we have been "bare" ever since. Then along comes MICA with its mandatory provision which will decimate my finances and I can't speak with complete knowledge of my colleagues, and this for a coverage of only $200,000. We will each be expected to pay a basic $1,000 which comes to $4,000 for the group, and then will each be expected to pay another $2,600 which comes to another $10,400, bringing the grand total of our premiums for the first year for the Anchorage Pediatric Group to a rousing $14,400. And, as you know from the law, this is not the end since it is an open-ended agreement in which if there are enough adverse judgments the entire membership will be assessed for anything over and above this. The coverage that we will get is a mere $200,000.

With these alternatives I have no choice but to elect to go bare and as things stand now this would be breaking the law. I have lived in Alaska for 20 years so far, my children have all been raised here, our home is here, and we have no desire to live anywhere else. At my age it is very difficult to break away from a practice and re-establish in another area of the country and I feel it is rather unfair to be placed in that position by this kind of a law. Malpractice insurance was formerly thought to be insurance for the physician to protect him and his assets against a possibly adverse suit. Since we have essentially no assets other than our good health and good name (I hope) we can go "bare." I have no plans

to do malpractice and do not feel that I have done malpractice in the past though it took a harrowing five years and a vicious five weeks in court one time to demonstrate that fact to some attorneys who shall remain nameless. I cannot promise my patients that there will not be bad results from medical treatments and I have been more cautious since November to stay out of so-called dangerous situations now that there are other pediatricians in Anchorage. As you may have heard through the grapevine, the case in which I was sued for some three million dollars involved a patient with no previous medical contacts in the community who literally presented an emergency situation which we could not with any honesty decline to cover. But now with so many pediatricians, I feel that the others can cover the anonymous prematures and other risky pediatric emergencies, at least for the time being.

The mandatory nature of this malpractice coverage bothers me from another standpoint. If nothing else was settled in my trial, the Supreme Court did hand down a dictum which has been published in national medical periodicals (the A.M.A. Newspaper) that the presence or absence of malpractice insurance in the portfolio of the physician defendant is not a proper consideration by the jury or the courts at the time of a malpractice suit. And Judge Buckalew was upheld in his refusal to allow the plaintiff's attorneys to inform the juries of the amount of our malpractice coverage since it had nothing to do with the rightness or wrongness of the care I rendered to the baby. If the malpractice law is allowed to stand as is with the mandatory provision, then every juror, every bailiff, every judge, every attorney, every plaintiff in the entire state will know that every doctor is good for a $200,000 judgment once every year. This bit of evidence will unavoidably tarnish every civil suit and it has already been declared improper that the jury have this information. I doubt that Mr. Block has even considered this in making all of his claims for the necessity of this mandatory provision.

I must confess I am not actually sure what committees you serve on and what direct interests you may have in the changes in this malpractice law. However, I would urge, if it is at all possible, to at least let my feelings as a single practicing physician be known among all of the loud noises and confusion over the legislation. At the present time, 2-17-77, I have not paid the MICA insurance, I have not sent back Judge Ripley's court order, I have not taken part in any of the suits, and I am at a loss and quite disturbed about the future of myself and my family. I do not knowingly wish to go out and break the law but the alternative, unfortunately, for me would be bankruptcy. Any help that you could give in this matter would be greatly appreciated.

Sincerely yours,

Harvey F. Zartman, M. D.

HFZ:EM

John Thanks for your contribution.

Alaska State Legislature

Representative
CLARK GRUENING
940 Tyonek Drive
Anchorage, Alaska
99501

907-274-2446

Chairman
SPECIAL COMMITTEE ON
THE ALASKA PERMANENT FUND
Chairman
WAYS and MEANS SUBCOMMITTEE
Member
FINANCE COMMITTEE
LEGISLATIVE COUNCIL

House of Representatives

POUCH V JUNEAU 99811

April 28, 1977

Paul M. Worrell, M.D.
207 E. Northern Lights Boulevard
Anchorage, Alaska 99503

Dear Dr. Worrell:

Thank you for your letter expressing your views on the malpractice situation.

As you point out, malpractice insurance is not just an Alaskan problem, but a national one, and our sister states still seek a solution as well. The only provision in your postcript addressed by HB 484 is the statute of limitations.

We are looking closely into the entire problem and trying to reach an equitable solution. An equitable solution would in my view still contain provisions for compensation for patients injured by malpractice.

Enclosed for your information is a Ketchikan Medical Society's position paper on malpractice. I agree with their view that tort reform ought to apply to all professional liability, including limitation of personal liability.

Cordially,

Rep. Clark Gruening

OPHTHALMOLOGIST
WILLIAM F. KINN, M.D.
BRUCE J. WOLF, M.D.
SAMUEL A. McCONKEY, M.D.

OTOLARYNGOLOGIST
RONALD E. TINSLEY, M.D.
RICHARD P. RAUGUST, M.D.
BRUCE G. WHIPPLE, M.D.

PLASTIC AND RECONSTRUCTIVE SURGEON
WILLIAM W. WENNEN, M.D.

EYE, EAR, NOSE & THROAT CLINIC

April 26, 1977

Fairbanks Legislators
Pouch V
Juneau, Alaska 99811

ATT: Larry Carpenter, Don Bennett, Sally Smith, Fred Brown, Charlie Parr, John Butrovich, Glenn Hackney, Steve Cowper, John Huber

SUBJECT: Malpractice Legislation

Dear Legislators:

I feel it is timely and necessary that I make our Fairbanks Legislators aware of many of the physician's, in the Fairbanks area, disagreement with the recommendations of our recent leaders in the Alaska State Medical Society. We also vehemently disagree with the tactics in which they have employed to bring the issue to the attention of the legislators.

It is my opinion, after considerable involvement with the Malpractice Commission, that the mandatory provision in the law should not be discarded lightly and would urge you not to allow this to happen during this legislative session. If the mandatory requirement for malpractice insurance through the M.I.C.A. is eliminated, it would be my prediction that within a year or two we will be back to the same situation that we were two years ago, namely nonavailability of any insurance at what any of us could call reasonable cost. It would be my suggestion that the M.I.C.A. remain a mandatory requirement on the part of all practicing physicians in the state of Alaska, at least for one and probably two years until enough experience has been gained to make an intelligent nonemotional decision regarding its necessity.

There are several other changes that are being recommended, such as increased physician representation on the board, a more restrictive statute of limitations, none of which we obviously have any objection to. There are many other changes in the law that I see being required before we truly have a workable situation, but feel it is inappropriate at this time to urge these changes until a period of experience has been obtained. I would be happy to answer any questions regarding this subject and could even travel to Juneau should any of you feel it advisable.

Sincerely,

W. F. Kinn, M.D.

cc: Richard L. Block, Director of Insurance

1919 LATHROP STREET, P.O. 1248, FAIRBANKS, ALASKA 99707, PHONE 456-7767

WFK/dls

April 25, 1977

Mr. Richard L. Block
Director Division of Insurance
Department of Commerce &
Economic Development
Pouch D
Juneau, Alaska 99811

Dear Mr. Block:

We have reviewed your letter of April 8th and the proposed revisions of the malpractice law and wish to record our impressions.

The proposed revisions appear to abolish a malpractice insurance program which offers good insurance at reasonable cost and substitute an inadequate claims made program which will almost certainly fail to provide any satisfactory insurance. Because of this we strongly oppose the proposed revisions.

Prior to the passage of the Medical Malpractice Insurance Law and formation of MICA there was a malpractice insurance problem with many physicians unable to obtain insurance at any price and for many more inadequate claims made insurance available only at exorbitant cost. We prefer to have adequate insurance to protect ourselves and our patients and it is disturbing to see a potentially good and workable program for provision of insurance scuttled.

The reasons for and methods of arriving at the proposed changes in the law are also of concern. While the mandatory provision may cause an initially negative response, the possibility of any satisfactory program without total participation of all providers seems nonexistent. While costs for some groups may be greater now under the program, if the general trend persists rates will almost certainly be comparable in a short time. As for the methods of arriving at the recommended changes, we certainly do not feel that the ad hoc committee of the Alaska State Medical Association has represented us and doubt that it has represented the opinion of the majority of practicing physicians in the state. Rather, we feel it represents the feelings and recommendations of some members of the Anchorage medical community and we would question whether these views are consistent with the best interests of medical care statewide.

While the Medical Malpractice Insurance Law may not stand proposed court test, we feel it should have that chnace and accordingly should not be revised at this time.

Sincerely,

J. Paul Lunas, M.D.

Edward D. Spencer, M.D.

Donald D. Funk, M.D.

Paul D. White, M.D.

George H. Longenbaugh, M.D.

M. Theodore Silver, M.D.

cc: Governor Jay Hammond
Honorable Richard Eliason
Honorable Pete Meland
Arthur N. Wilson, M.D.
William F. Kinn, M.D.
Harriet Schirmer, M.D.

Fairbanks Family and General Practice
A Professional Corporation
Dr. Cammack Dr. Roth
Medical Dental Arts Building
1919 Lathrop, Suite 207
Fairbanks, Alaska 99701

May 2, 1977

Fairbanks Legislators
Pouch V
Juneau, Alaska 99811

ATTN:	Larry Carpenter	Fred Brown	Glenn Hackney
	Don Bennett	Charlie Parr	Steve Cowper
	Sally Smith	John Butrovich	John Huber

Dear Legislators:

Although we physicians in Fairbanks have not been as vocal as our counterparts in Anchorage and we may disagree with their tactics, the question of malpractice insurance is a concern of ours also. The issue does not appear to be any clearer here in Fairbanks however, with some physicians wanting mandatory insurance and others against it. We, at Fairbanks Family and General Practice, are against M.I.C.A. for the following reasons:

1. It is mandatory.
2. It is rediculously expensive.
3. It really doesn't address the problems of defining malpractice, setting amounts of awards, defining damages, and setting time limits.

At the present time, we do not have insurance coverage and haven't had coverage for almost 3 years. We feel that with the current situation, insurance coverage only invites lawsuits. Also, the expense could necessitate raising fees to patients 10% at least.

I don't have any easy solutions to this problem, but at the present, the placard "PROTECTED BY THE MAFIA" seems like an attractive alternative.

Sincerely,

David M. Cammack, M.D.

KETCHIKAN MEDICAL SOCIETY

3100 TONGASS AVENUE - KETCHIKAN, ALASKA 99901

POSITION PAPER ON MALPRACTICE
December 28, 1976

Few issues recently confronting medicine and the public interest have provoked more discussion, sentiment, legislative action and judicial review than the medical malpractice situation. We want to outline our position on several aspects of the medical malpractice situation in Alaska. First, we wish to present our evaluation of Alaska's current malpractice law. Second, we want to discuss implementation of the insurance provisions by the Medical Indemnity Corporation of Alaska (MICA). Finally, we wish to recommend legislation bringing tort reform.

I. EVALUATION OF ALASKA'S CURRENT MALPRACTICE LAW.

An enormous amount of work by physicians, attorneys, laypeople, state officials and particularly legislators culminated last May 28. On that date Governor Hammond signed Chapter 102 of Alaska Statutes 1976, commonly referred to as Alaska's Medical Malpractice Insurance Law. Nothing in our evaluation is intended to overlook or belittle this significant accomplishment.

A. Several strong points in Chapter 102.

We believe that Chapter 102 made several important changes. The advisory panels will bring relevant medical facts to the courts promptly. Definition of the necessary burden of proof in court and of the concept of informed consent in clinical settings will protect the orderly practice of medicine. Spelling out the place of advance payments, elimination of ad damnum clauses, inclusion of payment for damages by category of loss and consideration of collateral resources in judgements will restrict financial liability while protecting the plaintiff.

We welcome the expansion in Chapter 102 of the responsibilities of, and options available to, the State Medical Board. Addition of two consumer members to the board may well be of value, given that the majority remain physicians. We recognize that policing our profession is difficult, but believe that physicians are best qualified to oversee their ranks.

information JLS.

B. Chapter 102 does not include tort reform.

Any sort of insurance without meaningful tort reform promises to be an expensive venture, virtually certain to founder financially. While Chapter 102 does modify previous law in several significant particulars, it does not attack this major problem.

C. Chapter 102 creates MICA'S mandatory insurance.

Reaction to the mandatory aspects of MICA insurance by the medical profession throughout the state has been largely negative. We share philosophical reservations regarding mandatory participation in a state sponsored system of insurance. We do not share philosophical objection regarding required insurance for the protection of both our patients and our profession. Even though state sponsored insurance programs are new, the legal system has always recognized the responsibility of physicians for their patients. The fact that medical liability law has been seriously mishandled in contemporary society does nothing, in our view, to upset the tenability of requiring responsibility for professional actions.

D. We support MICA.

Question remains whether MICA is the single [illegible]opriate source of insurance. We reluctantly support MICA, se[illegible] o workable alternative at this time. In view of the re[illegible]ly small number of physicians statewide, this spreads the risk a[illegible] as possible. Further, it makes the composition of the group [illegible]nsistently predictable to the greatest possible degree.

Mandatory insurance with a single source avoids problems of adverse selection present in an open insurance program, and assures that insurance is available for everyone. A single source of insurance equalizes premium rates to the greatest possible degree.

Single source insurance permits the most complete data collection. It encourages the most vigorous possible defense against suits, since all physicians in practice in the state are involved in any legal action directly or indirectly.

Mandatory MICA insurance makes the medical malpractice insurance issue completely public. It renders information readily available to the legislature, which has responsibility to make necessary changes in the legal system.

E. Alternatives to MICA.

Possible alternatives to mandatory MICA insurance apparent to us include either permitting personal posting of resources in escrow

to the limits set by the legislature, or MICA signing a contract with some separate entity which would guarantee participation by a contracted minimum number of physicians and provide coverage to any physician needing it. We are concerned that the unavailability of reinsurance to MICA at a reasonable cost confirms that a viable voluntary, widely available insurance program in Alaska is most unlikely at this time. There appears to be no other alternative to MICA that would guarantee availability of insurance for all physicians, and protection for all patients.

II. IMPLEMENTATION OF THE INSURANCE PROVISIONS BY THE MICA BOARD.

A. Positive accomplishments by the MICA board.

We believe that the MICA board has worked hard and conscientiously. Two of the issues inciting most violent reaction, namely mandatory MICA insurance and consideration of medical revenues in setting premiums, were included in Chapter 102. To their individual credit, board members have dealt with unrestrained and at times unjustified criticism with equanimity. They have accomplished a great deal in a relatively short time.

At the point of proposed premium fees, we find the documentation of the actuarial process complex but defensible. We question the wisdom of including California, an exceedingly high risk state, in the calculations for Alaska, thought by most to be a low risk state. While we are admittedly in a position where self interest is served by a differentiation in premium rates between urban and rural communities, we find the fifteen percent differential granted well supported by actuarial data at a significantly higher level. The system of classification by specialty is complex, but seems to approximate others with which we are more familiar.

While we believe that MICA has been unnecessarily rigid in the primary basis of premiums in medical revenues, the concept of basis in revenues is not offensive. In fact, it provides safeguards for physicians beginning their practice, closing their practice, or in a low volume practice. The combination of a maximum fee by classification with an alternative rate for each classification based in revenues appears the most flexible and realistic option. Problems peculiar to specific practices with exceptionally high overhead expenses may well require broadening the discretionary powers of the board to individualize rates further.

B. Criticisms and suggestions for changes for the MICA board.

Unfortunately, the MICA board has distinguished itself with arbitrary action that has irritated many of us. The tone of many of their belated releases of information remains imperial. We

welcome dialogue between physicians and the MICA board, and urge opening of all MICA board meetings to any MICA-insured professional, except when particular case discussions require confidential proceedings.

We believe that the arbitrary time limitation for applications for retrospective coverage served no useful purpose, and should have been significantly more lenient.

We do not believe that the $200,000 per occurance limitation of liability claimed by MICA to include all physicians in a group satisfies the requirement of the law for $200,000 coverage per occurance for each physician. MICA's position seems particularly unreasonable, since each physician pays a separate premium for separate coverage.

With mandatory insurance available to well publicized limits, we believe that MICA must rigorously defend all claims where any questions of liability exists. MICA must function as a mutual defense organization, since its clientele is completely captive and its availability transparently public.

We remain extremely uncomfortable with the claimed prerogative of MICA to limit its liability below statutory limits in seeking settlement against the involved physician's wishes rather than pursuing defense. While we understand the rationale, we prefer that a clearly defined series of peer reviews take place prior to this step. Such a series might include a unanimous opinion against the physician by the expert advisory panel and similar opinion by another, uninvolved physician prior to MICA action. We believe that a MICA decision to settle against the involved physician's wishes should require unanimous board action.

We persist in protesting the obvious presumption of guilt in penalizing physicians for suits filed with increased premiums. The doublespeak of titling the penalty system a "merit rating plan" is ludicious. It should more properly be labeled a "claim penalty plan".

III. RECOMMENDED LEGISLATIVE TORT REFORM.

We believe that the key to solving the malpractice problem includes significant tort reform, and this requires further legislative action. This tort reform should apply in the broadest sense to all professional liability, rather than simply to medical malpractice. We believe that three specific reforms are necessary.

First, there must be some limitation of personal liability. With mandated insurance and thus mandated vulnerability for the professional, no feasible premium structure can cope with exponentially increasing settlements and awards.

Second, elimination of judgements for pain and suffering is similarly essential. Quantification of such loss in clearly impossible.

Third, there must be a rational statute of limitations. We firmly believe that two years from time of incident or age six years, which ever is later, would be the best alternative. Such a statute of limitations would protect the injured party, bring legal action while information and facts were more likely available and render rate setting for insurance considerably easier.

We are opposed to statutory limitations of legal fees, and consider it improper to intrude into a private matter between professional and client. Public notification of the settlement or verdict in any suit should include mention of court awarded attorney's fees. We urge continued evaluation and surveillance of the alleged benefits of the contingency fee system.

IV. SUMMARY.

In summary, we believe Alaska's Medical Malpractice Insurance law made several significant changes. We reluctantly support the current MICA program. We believe that for this or any other insurance program to remain viable tort reform is necessary. We believe a limitation of personal financial liability, elimination of awards for pain and suffering, and a statute of limitations of two years after incident or age six years, which ever comes last, are all urgently needed.

Pat copies in Members Mail Boxes

Charles P. Flynn
918 "R" Street
Anchorage, Alaska 99501

March 31, 1977

Honorable Lisa Rudd
House of Representatives
Juneau, Alaska 99811

Dear Lisa:

I would like to bend your ear for a few minutes on the subject of medical malpractice legislation, and some of the proposals that are currently being made. First, I should say that I have resigned from the Board of Governors of the Medical Indemnity Corporation of Alaska, for a variety of reasons, and the opinions expressed are purely my own. Second, a similar caveat, my understanding of the present proposals being made by the Medical Association is gleaned solely from newspaper accounts, and is therefore subject to whatever reporting error may be in those stories.

I think the point that most concerns me about the proposals which are now being made is that they involve what is apparently a hidden subsidy to the medical profession by the taxpayers of this state. You may recall that when the Governor appointed his task force on medical malpractice insurance, one of the most hotly debated issues before the task force was the question of whether or not the state should subsidize the doctors medical malpractice insurance premiums. The task force concluded that it should not, and I am confident that that was the correct decision. I think it is clear, however, that if the state sets up a malpractice insurance company which is not run on an economically sound basis, that there will be an indirect subsidy to the doctors, to the extent that their premiums are not truly reflective of the cost of providing the insurance. Setting medical malpractice insurance premiums is an extremely difficult job, as I can certainly attest from my experience with the Medical Indemnity Corporation of Alaska. There is a wide range of possibilities, and substantial judgment which must be exercised in determining what are the true comparables in establishing an appropriate cost for the insurance. In

addition, it is the nature of insurance, and particularly medical malpractice insurance, that the accuracy of your predictions will not be known for many years after the fact. Thus, if the state chartered corporation were to set its premiums significantly below the true cost of the insurance, I have been led to believe that it would be a minimum of five years before that fact would become apparent. Needless to say, this problem is a continuous one, in that you never really catch up with your experience. Thus, merely requiring that the corporation be managed on an actuarily sound basis does not necessarily assure that the state will not be subsidizing the doctors premiums, especially when you consider the extremely strong lobbying pressure that is applied to the members of the board by the medical profession. For example, the board originally adopted a plan of operation which called for closed meetings. The theory behind this was that it allowed a full and free and candid exchange of views between the members of the board as to the problems they faced. After receiving substantial criticism from the medical professional, and Governor Hammond, the board amended the plan of operation to provide that any member of the medical profession could attend meetings of the board, but that the meetings were to remain closed as to members of the general public. Although it is true that any person may request to be heard by the board, and I am sure such requests will be granted freely, the practical effect of such a distinction will be to create a extremely strong, and one-sided, lobbying force which is being applied to the Board of Governors. This would have the natural effect of minimizing the premium, and therefore maximizing the possibility of a state subsidy.

In addition, if the plan is not mandatory, any true correction of the premium level, if it is determined to be too low, will be extremely difficult. This is because if the corporation raises its rates to an economically sound level, or raises them even further to a level which will equalize for the prior undercharges, it will have a tendency to drive doctors out of the state corporation, and into the private market, which will be able to undersell the state, because it will be able to exercise underwriting judgment as to which doctors to accept as insureds. Thus, adverse selection will compound the problem of determining rates. Presumably one of the features of the state plan is that the state corporation will be required to accept any doctor as an insured. If that assumption is not correct, it seems to me

a legitimate question as to why the state is getting in the business of chartering a company which will perform just like any other insurance company, and may decline to write insurance for either specific doctors or specific groups or categories of doctors.

I have heard Dave Bickerstaff, an actuary who advises the M.I.C.A., testify at length that it would be very difficult, and perhaps impossible, to calculate a sound rate in the Alaska situation, if there were no mandatory and exclusive requirement. Thus, if the state sets up an insurance company as a last resort, I assume there is a very high chance that it will underprice the insurance. This would, in turn, mean that the taxpayers were picking up the difference, by putting up the capital which would be used to pay losses in excess of premiums.

All in all, it seems to me that the primary problem to be avoided is having the taxpayers subsidize premiums of the doctors. I think, in general, the medical community agrees with this proposition, and feels that if insurance premiums must be paid, that the doctors should pay their own way. While they properly point out that the system may be getting away from us in terms of the economic cost of maintaining our existing tort system, they are certainly not alone in suffering the consequences of that problem. Other professional groups, such as lawyers, are just beginning to feel the price escalation in malpractice insurance, and other groups, such as architects and engineers, have been under severe pressure even longer than the doctors. If it is appropriate to create an insurance company which will assure the doctors coverage, it seems to me at least equally appropriate to widen the jurisdiction of that company to include other professional groups such as lawyers, architects and engineers. The same analysis might well be used for problems such as automobile and homeowners insurance in the state, which I understand is becoming increasingly difficult to obtain, and increasingly expensive for more limited coverage. Thus, the point is not, to some extent, whether the doctors are entitled to this kind of treatment, but whether they are the only ones who are entitled to this kind of treatment.

Although the present statute certainly has defects, I do think it is significantly more fair to the taxpayers of the state than is the apparent proposal being made at the present time. I do think, however, that the present statute cannot realistically be expected to work, and accomplish its purposes, without the cooperation, or at least the acquiescence, of the medical community. Since that acquiescence is apparently not going to be forthcoming, I agree that it is appropriate to look for a realistic alternative. It seems to me that the alternative is not to place the state in an even more vulnerable position with respect to the cost of insurance, but to use the state's financial resources to make it possible for the doctors to solve their own problems. I would suggest that this might be accomplished by having the state loan to a mutual insurance company, which could be chartered by the medical community, a sufficient sum to capitalize the mutual insurance company. This loan would then be paid back over some reasonably short period of time, such as five or ten years, and during the same period of time the members of the mutual company would be required to make capital contributions sufficient to capitalize the company. These "bed pan mutuals" have had some success in other areas of the country, and it would seem to me to put the insurance problem back in its proper prospective. It gets the state out of the business, it allows the doctors full control over their own destiny, and it makes insurance available on the terms that the doctors themselves view as appropriate. While I have certainly not thought through this proposal in any great detail, it seems to me that it could be worked out in such a fashion that it would reasonably assure the return of the state's investment, and at the same time make it possible for the medical community to form an insurance company which would meet their needs, and in a way that there is not an immediate imposition of a large demand for a capital contribution.

I am sorry I have burdened you with this somewhat overlong letter, but it seemed to me that I should try to make some use of the accumulated information, if not wisdom, I have collected in the course of working with this problem.

Very truly yours,

Charles P. Flynn

CPF/lf

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February 22, 1977

JOHN C. TOWER, M.D.
HARVEY F. ZARTMAN, M.D.
MARIAN WITT, M.D.
R.W. KELLER, M.D., APC.

PLEASE REPLY BY AIR MAIL

Representative Lisa Rudd
2827 Lore Road
Anchorage, Alaska 99507

Dear Mrs. Rudd:

I don't believe you actually are representative from our district (Indian Hills) but I feel that I can write to you as a friend, as well as a representative of the Anchorage area in Juneau, regarding my plight in the present malpractice situation. I am sure that all the legislators are fed up with various bickerings back and forth and especially with some of the less than refined language of certain of our spokesmen (in this particular instance one can take a certain pride in the fact that the women in the medical association have somewhat better control of their tongues). Until November of last year I and John Tower and Marian Witt had for a very reasonable price, all things considered, excellent malpractice coverage through Clyde Clary's association with an umbrella of a one million dollar coverage. For this our group paid, up until last year, approximately $1,600 a year, and last year $4,600. However, as of November 1, the company or companies through which Clyde obtained our insurance all stopped insuring doctors in Alaska and we have been "bare" ever since. Then along comes MICA with its mandatory provision which will decimate my finances and I can't speak with complete knowledge of my colleagues, and this for a coverage of only $200,000. We will each be expected to pay a basic $1,000 which comes to $4,000 for the group, and then will each be expected to pay another $2,600 which comes to another $10,400, bringing the grand total of our premiums for the first year for the Anchorage Pediatric Group to a rousing $14,400. And, as you know from the law, this is not the end since it is an open-ended agreement in which if there are enough adverse judgments the entire membership will be assessed for anything over and above this. The coverage that we will get is a mere $200,000.

With these alternatives I have no choice but to elect to go bare and as things stand now this would be breaking the law. I have lived in Alaska for 20 years so far, my children have all been raised here, our home is here, and we have no desire to live anywhere else. At my age it is very difficult to break away from a practice and re-establish in another area of the country and I feel it is rather unfair to be placed in that position by this kind of a law. Malpractice insurance was formerly thought to be insurance for the physician to protect him and his assets against a possibly adverse suit. Since we have essentially no assets other than our good health and good name (I hope) we can go "bare." I have no plans

to do malpractice and do not feel that I have done malpractice in the past though it took a harrowing five years and a vicious five weeks in court one time to demonstrate that fact to some attorneys who shall remain nameless. I cannot promise my patients that there will not be bad results from medical treatments and I have been more cautious since November to stay out of so-called dangerous situations now that there are other pediatricians in Anchorage. As you may have heard through the grapevine, the case in which I was sued for some three million dollars involved a patient with no previous medical contacts in the community who literally presented an emergency situation which we could not with any honesty decline to cover. But now with so many pediatricians, I feel that the others can cover the anonymous prematures and other risky pediatric emergencies, at least for the time being.

The mandatory nature of this malpractice coverage bothers me from another standpoint. If nothing else was settled in my trial, the Supreme Court did hand down a dictum which has been published in national medical periodicals (the A.M.A. Newspaper) that the presence or absence of malpractice insurance in the portfolio of the physician defendant is not a proper consideration by the jury or the courts at the time of a malpractice suit. And Judge Buckalew was upheld in his refusal to allow the plaintiff's attorneys to inform the juries of the amount of our malpractice coverage since it had nothing to do with the rightness or wrongness of the care I rendered to the baby. If the malpractice law is allowed to stand as is with the mandatory provision, then every juror, every bailiff, every judge, every attorney, every plaintiff in the entire state will know that every doctor is good for a $200,000 judgment once every year. This bit of evidence will unavoidably tarnish every civil suit and it has already been declared improper that the jury have this information. I doubt that Mr. Block has even considered this in making all of his claims for the necessity of this mandatory provision.

I must confess I am not actually sure what committees you serve on and what direct interests you may have in the changes in this malpractice law. However, I would urge, if it is at all possible, to at least let my feelings as a single practicing physician be known among all of the loud noises and confusion over the legislation. At the present time, 2-17-77, I have not paid the MICA insurance, I have not sent back Judge Ripley's court order, I have not taken part in any of the suits, and I am at a loss and quite disturbed about the future of myself and my family. I do not knowingly wish to go out and break the law but the alternative, unfortunately, for me would be bankruptcy. Any help that you could give in this matter would be greatly appreciated.

Sincerely yours,

Harvey F. Zartman, M. D.

HFZ:EM