SB

326

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M

May 1, 1978

SUBJECT: Suggestions relating to medicine and hospitals

TO: Representative Joseph H. McKinnon

FROM: Billy G. Berrier, Director
Division of Legal Services

To confirm our conversation, it appears a misunderstanding of the Warren suggestions arose. We entered work orders for bill preparation prematurely.

We have examined those areas the committee decreed we check, and have found that the subject matter is covered in existing law, or would have serious constitutional and practical problems except in the area of composition of the State Medical Board. We have therefore prepared a work draft on that subject, which is enclosed, and have cancelled the remainder of the work orders 5415 through 5422,

BGB:hjd

Enclosure

See AS 08.64.380(3)(G)

PRINCIPLES OF MEDICAL ETHICS

PREAMBLE

These principles are intended to aid physicians individually and collectively in maintaining a high level of ethical conduct. They are not laws but standards by which a physician may determine the propriety of his conduct in his relationship with patients, with colleagues, with members of allied professions, and with the public.

SECTION 1

The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.

SECTION 2

Physicians should strive continually to improve medical knowledge and skill, and should make available to their patients and colleagues the benefits of their professional attainments.

SECTION 3

A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate professionally with anyone who violates this principle.

SECTION 4

The medical profession should safeguard the public and itself against physicians deficient in moral character or professional competence. Physicians should observe all laws, uphold the dignity and honor of the profession and accept its self-imposed disciplines. They should expose, without hesitation, illegal or unethical conduct of fellow members of the profession.

SECTION 5

A physician may choose whom he will serve. In an emergency, however, he should render service to the best of his ability. Having undertaken the care of a patient, he may not neglect him; and unless he has been discharged he

From Bernard Kelly of Kelly v Lacc

OBJECTIONS TO MALPRACTICE BILL

1. A 90 day freeze issue:

The underlying presumption is that a 90-day freeze will result in some exchange of information between the representatives of the injured party and the physician involved. This presumption is erroneous. Extensive experience in the field of malpractice litigation has shown that in spite of repeated attempts by the attorneys and injured parties involved to discuss the presence or absence of a malpractice action, and a medical records treatment and reasons for same involved therein by physician, instituted by the attorneys and injured parties, have inevitably met with a refusal to discuss theissue, to reveal any medical treatment or in any way to attempt to resolve the question amiably without the necessity of filing a formal malpractice action. It is incredibly naive to presume that the granting of a 90-day freeze would in any way alter this response in the medical community.

2. The medical community's definition of malpractice is not that required under the law. The legal definition of malpractice is nothing more nor less than negligent conduct resulting in the injury to an innocent party. The medical community definition of malpractice is a willful and wanton disregard for the safety of the patient. The standard or test that the medical community applies in defining a doctor's conduct as being either malpractice or not is not the test for negligence (malpractice), but is rather the test for an action which would support punitive damages. It is the reckless indifference or a willful or wanton disregard for the safety of the patient. While it is true that conduct which would meet the medical community's standard would certainly be more than enough to justify successful malpractice action, the true test under the law is much less than that which the medical community views as required to sustain a malpractice action.

This distinction between the two tests will carry over to any medical board, to any doctor's willingness to discuss a malpractice action, to any vehicle which is set up which would remain in the control or under the direction of the medical community. It is clearly the position of the medical community that they are not responsible for negligent conduct. Just why a medical practitioner should not be held responsible for injury inflicted by his negligence, while members of any other profession, occupation or walk of life are required (and rightly so), to pay for injuries inflicted by negligent conduct, is something that has never been justified, nor can I conceive of any possibility of such justification in the future.

3. The medical profession in its campaign for the passage of the initial malpractice bill, including MICA, was perfectly willing to place the safety and well being of their patients in jeopardy; threatened the representatives of the people in this State with a cessation of medical care and a mass exodus from the State. Now, in the guise of seeking some relief from what the doctors view to be a great evil of the required coverage of MICA, the doctors wish to remove those reasonable risks from the insurance pool and leave the State of Alaska in the position of insuring those physicians who are incapable of acquiring privately funded malpractice insurance. The justification for this is that certain forms of medical practice comprise a "high risk" form of practice and that adequate insurance coverage is not available.

4. "High risk" defined.

The high risk forms of medical practice (i.e., heart surgery, thoracic surgery, anasthesiology, etc.) are areas in which a successful malpractice action is an extremely difficult case to prove. If the type of medical treatment carries a high risk of injury to the patient as a direct result of the type of practice involved, it follows that the mere existence of the injury is no evidence of the existence of negligence. To contend that merely because there is a high risk of injury to a given type of medical treatment results in a high incidence of successful malpractice actions is simply not true. The key to malpractice litigation is the presence or absence of the negligent conduct on the part of the treating physician. The mere fact, standing alone, that an injury has resulted from treatment is no proof of the presence of negligent conduct. It is only when a specific surgical procedure or the specific treatment (or absence of same) is established and established through competent medical testimony, that the presence or absence of negligence can be assessed.

ALASKA STATE HOSPITAL ASSOCIATION, INC.

5531 ARCTIC BLVD, SUITE 1
PHONE 277-1633

ANCHORAGE, ALASKA 99502

February 14, 1978

Joseph H. McKinnon, Chairman
Commerce Committee
House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Dear Representative McKinnon,

Several bills having to do with medical malpractice, as relates to our MICA regulations, are in your committee as amendments to MICA. These are HB 123 HB 280, HB 292, HB 309, HB 310 and HB 311. Plus SB 326 which is a companion to HB 484 which is now in Judiciary.

We are not going to attempt to pick out the bits and pieces of these various bills, or cut and paste to come up with what we think such a bill should look like. Rather, we would like to submit to you the three main issues we want to see addressed and let your committee and the Legislature do it up in a manner they see fit. Those three main issues are:

Elimination of the mandatory and exclusive provision of the law

A two-year statute of limitations where no claim can be brought against a provider unless the claim is filed within two years from the date of the alleged act (except in the case of a minor).

A 90-day period of notification where no action based on a provider's alleged negligence may be commenced unless the defendant has been given at least 90 days' notice of the intention to commence action.

Thank you for your consideration of this matter.

Sincerely,

Marion

Marion K Lampman
Executive Director

mkl

LAW OFFICES
KELLY & LUCE
A PROFESSIONAL CORPORATION
1015 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 279-9571

BERNARD P. KELLY
L. AMES LUCE

KENAI OFFICE
HIGHLAND BUILDING
P. O. BOX 3762
KENAI, ALASKA 99611

March 23, 1978

Representative Joseph H. McKinnon
Chairman, House Commerce Committee
Pouch V, State Capitol
Juneau, Alaska 99811

RE: Pending Medical Malpractice Legislation

Dear Representative McKinnon:

It is my understanding that a Senate Bill referred to your committee for house action dealing with the subject of medical malpractice, contains therein a provision which would require notification to a doctor 90 days prior to the time when suit might be initiated against him. While I am certain that there can be argument presented that such a requirement would enable a physician to contact his insurance carrier in order to attempt to resolve the matter prior to litigation, such procedures, if they may be profitably pursued, are now a rather uniform procedure amongst those handling malpractice litigation without mandatory legislation.

In those cases where such a procedure would not prove to be profitable, which I submit would constitute the majority of claims, this 3 month delay would further complicate and extend the period of time when an injured person could expect to receive just compensation.

There is already on the books a provision in our law, passed by our legislature several years ago and applying only to malpractice litigation, where the plaintiff is barred from all discovery pending a report by an expert advisory panel, which is supposed to be appointed immediately by the Court, and is required to submit their finding within 30 days.

In practice, however, in those cases where this procedure has been utilized, it has taken as long as 14 months to find physicians and others willing to serve upon the board, and it has often proven impossible even then, to have an expert recommendation presented. Coupling this delay, which has proved to be unwarranted and unjust, with an additional 3 month delay prior to the time when the plaintiff could even initiate litigation, would tend to so delay the possibility of recovery as to effectively preclude an injured person from seeking prompt

compensation for injuries which have occurred as a result of medical negligence.

I would request that not only the 3 month provision which is contained in the present bill be eliminated, but further that the existing medical malpractice legislation be amended so as to permit discovery to proceed while the advisory board is being appointed and meeting to make their recommendation.

I apologize for not having before me the Senate Bill dealing with the medical malpractice situation which I understand is presently pending before your committee, but I am certain this should present no problem for your staff to address itself to the problem which I have set forth in this correspondence.

Best regards,

KELLY & LUCE

L. Ames Luce

LAL/cb

cc Representative Fred Brown
Representative Bob Bradley
Representative Charles H. Parr
Representative Larry Carpenter
Representative C. V. Chatterton
Representative Joe L. Hayes

SB 326

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Representative C. V. Chatterton
Representative Joe L. Hayes

ALASKA STATE MEDICAL ASSOCIATION
1135 W. Eighth Avenue • Suite 6 • Anchorage, Alaska 99501 • (907) 277-6391

March 20, 1978

Mr. Terry Gardiner, Chairman
House of Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Gardiner:

At this time, as President of the Alaska State Medical Association, I request your help in the rapid resolution of the ongoing medical malpractice problem by speedy deliberation and passage of HCS for CS SB 326.

At the House of Delegates meeting, which was held at Alyeska on March 10 - 12, 1978, the members there were unanimous in their support for passage of this bill. There was representation from Juneau, Ketchikan, Soldotna, Kenai, Homer, Anchorage, Fairbanks, and the members-at-large as well. The only society which was not represented at our meeting was the society in Sitka. The doctors in Sitka report that four (4) are not in favor repeal of mandatory and exclusive parts of the bill and one (1) is. As far as I know, with careful investigation carried out in the last nine months, these are the only physicians in the State of Alaska who have a strong feeling that leans toward retention of the present law without change. It seems apparent that well over 360 of the 375 practicing physicians in the State of Alaska are in favor of repeal of the mandatory and exclusive parts of the previous malpractice bill.

Again, I would urge you to encourage your colleagues in helping in improving the quality of medicine as it is practiced in the State of Alaska by having the mandatory and exclusive parts of the medical malpractice bill repealed.

Sincerely yours,

David D Beal

David D. Beal, M.D.
President

DDB:ldh

ALASKA STATE HOSPITAL ASSOCIATION, INC.

5531 ARCTIC BLVD, SUITE 1
PHONE 277-1633

ANCHORAGE, ALASKA 99502

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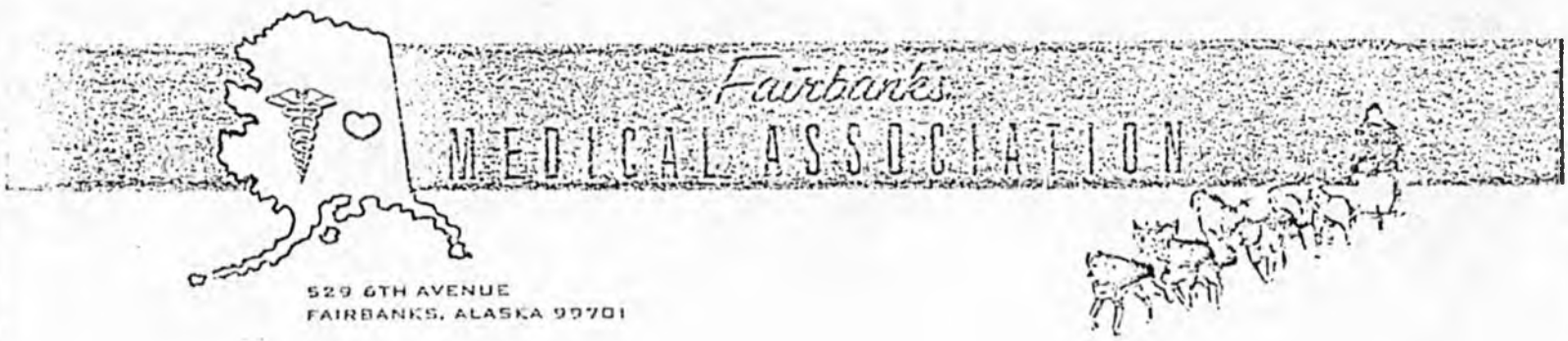
Marion

Marion K Lampman
Executive Director

mkl



529 6TH AVENUE
FAIRBANKS, ALASKA 99701

March 1, 1978

Representative Terry Gardner
Chamber House Judicial Committee
Pouch 5
Juneau, Ak 99801

Dear Representative Gardner:

This letter is to state that the Fairbanks Medical Association agrees with Senate Bill #326, which allows freedom of choice regarding malpractice insurance.

We would like to go on record as agreeing with the Senate on Bill #326. Thank you.

Sincerely yours,

James R. Creps, M.D.
President

JRC:emc

Fairbanks
MEDICAL ASSOCIATION
529 6TH AVENUE
FAIRBANKS, ALASKA 99701

March 1, 1978

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Chamber House Judicial Committee
Pouch 5
Juneau, Ak 99801

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James R. Creps, M.D.
President

JRC:emc

February 20, 1978

The Honorable Terry Gardiner
The House of Representatives
P.O. Box 1092
Ketchikan, AK 99901

Dear Mr. Gardiner:

The Kenai Peninsula Medical Society supports the House substitute for Senate Bill No. 325, A Bill for an Act entitled "An Act Relating to Medical Malpractice Insurance Coverage and Providing for an Effective Date."

As we understand it, this removes the onerous mandatory and exclusive clauses previously imposed by Ch 102 SLA 1976 and also allows means for the Medical Indemnity Corporation of Alaska to function as an insurer in the future.

Again, we support this Bill.

Thank you.

Sincerely,

ALEX B. RUSSELL, M.D.
President
Kenai Peninsula Medical Society

ABR/as
cc: Dr. David Beal

ALASKA STATE MEDICAL ASSOCIATION
1135 W. Eighth Avenue • Suite 6 • Anchorage, Alaska 99501 • (907) 277-6891

March 20, 1978

Mr. Terry Gardiner, Chairman
House of Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Gardiner:

At this time, as President of the Alaska State Medical Association, I request your help in the rapid resolution of the ongoing medical malpractice problem by speedy deliberation and passage of HCS for CS SB 326.

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Sincerely yours,

David D. Beal

David D. Beal, M.D.
President

DDB:ldh

Gary R. Hedges, M.D.
P.O. BOX 609
JUNEAU, ALASKA 99801
586-6050

March 21, 1978

Terry Gardiner, Chairman Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. Gardiner:

We the members of the Juneau Medical Society have received a plea to support HCS for CS for SB326 in the broad concept that it provides for the repeal of manditory and exclusive MICA malpractice insurance as a condition of medical licensure in Alaska, permits the perpetuation of MICA as a voluntary source of malpractice insurance and allows the entry of the continuation of the alternate source of malpractice insurance within the state.

Following numerous informal discussions and discussion of the problem at our Medical Society Meeting on 3-7-78, the above would appear not to accurately reflect the feelings of the Juneau Medical Society.

The section regarding notice to a health care provider is an interesting innovation and it was felt by all to be a positive step forward and quite possibly in many instances get parties to begin communicating rather than suing.

In summary, the feelings of the Juneau Medical Society in regard to this bill, except for the final section just mentioned are relatively neutral. If the Legislature of the State of Alaska in its wisdom feels that passage of this bill will permit the perpetuation of MICA and allow the entry of alternate sources of malpractice insurance within the state, it should be passed. However, we feel that the burden of these things occurring are then on the Legislature. It would appear to the Juneau Medical Society that the main advantages of this bill are financial. 1. It would save the Alaska Court System the difficulty of deciding the constitutionality of the present MICA bill. 2. It would save the medical practitioners the expense of pursuing the suit regarding its constitutionality. 3. It would obviate the need for numerous practitioners to pay back insurance premiums for approaching two years. The other major accomplishment of this bill is to further diminish the desirability of MICA insurance by making it a claims made policy, without a change in the statute of limitations to make a claims made policy adequate coverage.

It is our opinion that this bill in itself does nothing to make the Alaska malpractice insurance market more viable, more equitable or available. If, in its wisdom, the Alaska State Legislature passes this bill and also, in its wisdom, creates other tort reforms other than the notice to health care providers and indeed causes the malpractice insurance market in Alaska to be equitable, available, and viable the members of the Juneau Medical Society will be forever grateful.

Yours truly,

Gary R. Hedges, M.D.

ANCHORAGE MEDICAL SOCIETY
1135 W. 8TH AVE., SUITE 6
ANCHORAGE, ALASKA 99501
907-277-6891

March 3, 1978

Terry Gardiner, Chairman
Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Representative Gardiner:

The Anchorage Medical Society supports HCS for CS SB 326 in the broad concept that it provides for the repeal of mandatory and exclusive MICA malpractice insurance as a condition of medical licensure in Alaska, permits the perpetuation of MICA as a voluntary source of malpractice insurance, and allows the entry and continuation of alternate sources of malpractice insurance within the state.

Sincerely yours,

William C Compton MD

William C. Compton, M.D.
President

WCC:mlm

cc. Jeff Landry, Lobbyist

URGENT - RETURN IMMEDIATELY IN ENVELOPE PROVIDED

February 27, 1978

Terry Gardiner, Chairman
Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Dear Representative Gardiner:

I, the undersigned member of the ANCHORAGE MEDICAL SOCIETY support HCS for CS SB 326 in the broad concept that it provides for the repeal of mandatory and exclusive MICA malpractice insurance as a condition of medical licensure in Alaska, permits the perpetuation of MICA as a voluntary source of malpractice insurance, and allows the entry and continuation of alternate sources of malpractice insurance within the state.

MICHAEL NEWMAN, MD — Michael Newman, MD.

(print name) (signature)

URGENT - RETURN IMMEDIATELY IN ENVELOPE PROVIDED

February 27, 1978

Terry Gardiner, Chairman
Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Dear Representative Gardiner:

I, the undersigned member of the ANCHORAGE MEDICAL SOCIETY support HCS for CS SB 326 in the broad concept that it provides for the repeal of mandatory and exclusive MICA malpractice insurance as a condition of medical licensure in Alaska, permits the perpetuation of MICA as a voluntary source of malpractice insurance, and allows the entry and continuation of alternate sources of malpractice insurance within the state.

David D. Leal. David D Leal
(print name) (signature)

HB 326

MICA Medical Indemnity Corporation of Alaska

1200 AIRPORT HEIGHTS ROAD • SUITE 510
ANCHORAGE, ALASKA 99504
TELEPHONE 907 274-9232

March 3, 1978

Mr. Terry Gardiner, Chairman
Alaska House of Representatives
Judiciary Committee
Pouch V
State Capitol
Juneau, Alaska 99811

Dear Representative Gardiner:

In the past two months, the M.I.C.A. legislative committee has met several times to discuss the proposed changes concerning the Medical Malpractice Act. It was the general concensus of the members that the suggested changes would not only be acceptable but might obviate many of the objections emanating from the physicians who resisted active participation in the program. Since MICA is currently writing indemnity policies for less than forty percent (40%) of the physician population, eighty percent (80%) of whom are the low premium policy holders, it would seem that modifications in the current act would be appropriate.

The most objectionable feature concerning the physicians of the current act involves the mandatory and exclusive provisions. Since the mandatory condition was legislated with the intent to prevent "adverse selection" which would effect appropriate underwriting and since th exact opposite has occurred (the "low risks" have joined and the "high risks" have not), then it would seem that the mandatory clause is purposeless while creating most of the physicians objections. Obviously there would be no reason for these current low risk (low premium) policy holders to abandon this program if it were made voluntary. The latter change might logically encourage greater participation from the non-participating physicians.

At a recent MICA board meeting it was the unanimous opi on that the proposed legislative changes were acceptable. There were also several other salient changes which the MICA board would endorse.

We would have to see a clearer and consistent definition of health care providers throughout the statute. Many problems have arisen classifying clinic members, corporate employees, hospital personnel etc.

Medical Indemnity Corporation of Alaska

Although Section 21,88.030 (f) limits liability against MICA governors, officers and employees, insolvency might create a problem wherein we might find ourselves as defendents in a law suit which could result in a substantial cost. If this is known then it might restrict recruitment of talented people to administer the program.

The language in Section 21,88.050 (1) and (7) seems to obligate MICA to write insurance for any physician or hospital on request. We would much rather be allowed to have some underwriting discretion which might be accomplished by eliminating the legal directive "shall" and substituting "may".

Also Section 21,88.090 which may limit our right to cancel a policy solely due to non payment seems too restrictive. Again, we feel that there should be more underwriting discretion allowed which could be judiciously administered.

Section 21,88.055, regarding the decision affecting termination of the corporation, would be more acceptable to us if the MICA board were given some authority in arriving at this decision.

In conclusion the MICA Board members strongly support the proposed legislative changes but would also appreciate legislative consideration regarding the above mentioned issues.

Sincerely,

James A Baldauf

James A. Baldauf, M. D.
Chairman, Legislative Committee

JAB/jb
CC: Board of Governors *Mr. Art Weatherford* *Division of Ins.*
Administrator *Mr. Ove Arvidson* *Marilyn Van Vleit*