HB
336

HOUSE COMMITTEE REPORT

(7)

Date Referred: May 4, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: 2/8/90

The ~~LABOR & COMMERCE~~ Committee considered: ~~HB 336~~

HOUSE BILL NO. 336 [MEDICAL MALPRACTICE ADVISORY PANELS]
"An Act relating to medical malpractice advisory panels."

RECOMMENDATIONS:
[ ] be replaced with CS HB336(L&C) [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ____________ Committee

ADOPTS: ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact ____
[ ] zero fiscal note ____
[ ] zero with analysis ____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) ____
[ ] zero fiscal note(s) ____
[ ] zero fn/analysis ____

SIGNING DO PASS:

Dave Donley
(Finkelstein) David Finkelstein
(Gruenberg) M. Gruenberg

SIGNING: (Check approp. column)

Name	Do Not Pass	No Rec	Amend
(Collins) [signature]	X		
Karen L. Fanning [signature]		X	
[signature]			

Dave Donley
Chairman's Signature

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: CS HB 336
Publish Date: 5/4/89

FISCAL NOTE

REQUEST:

Revision Date 2/6/90
Title: An Act relating to medical malpractice advisory panels...
Sponsor: Labor & Commerce
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/09/90

Approved by: Arthur H. Snowden, II, Administrative Director
Date: 02/09/90
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
(907) 465-3892

November 23, 1989

MEMORANDUM

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: HB 336 - Medical Review Panels

HB 336 amends Alaska's statute establishing an expert advisory panel to review medical malpractice cases where parties have not agreed to arbitration of the claim to:

1. Change from a panel comprised of three health care providers to a panel of five, three of which shall not be health care providers. (Over thirty states have medical malpractice pre-screening panels. Alaska has the only one without non-physician members).

2. Allow the parties to control the presentation of evidence. (Done in all states with pre-screening panels except Alaska, Kansas, and Nevada).

3. Obtain attendance and allow cross examination of witnesses. (Done in all states with pre-screening panels except Alaska, Kansas, and Nevada).

4. Permit pre-trial discovery. (All states with pre-screening panels except Alaska, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Utah and Wyoming).

5. Permit parties to attend all panel hearings. (In all states with pre-screening panels except Alaska, Kansas and Nevada).

HB 336 does not change provisions under Alaska's current law allowing the advisory panel's report to be admissible as evidence at trial, a provision we share with half the states that have pre-screening panels. Only in Puerto Rico are the findings of the advisory panel binding.

dd/gbi89
b/hb336

HB336

HOUSE LABOR AND COMMERCE COMMITTEE

ALASKA STATE LEGISLATURE P.O. BOX Y, JUNEAU 99811
(907) 465-3892

February 6, 1990

M E M O R A N D U M

To: Members, House Labor and Commerce Committee

From: Representative Dave Donley, Chair
House Labor and Commerce Committee

Re: Proposed CS for HB 336
Work Order # 6-1316E, by Ford, dated 2/6/90

The proposed CS for HB 336 makes the report of the medical malpractice advisory panel adivsory only, prohibiting it from being admitted as evidence except for determining an award of costs or attorney fees. The CS further provides that members of the panel may not be examined as witnesses on the contents of the report.

Arguments in support of the proposed CS are outlined in a letter in members files from attorney Dan Hensley and in testimony offered during the November 30, 1989 hearing on HB 336 in Anchorage.

dd/gbs90
b/hb336-1

HB336

LAW OFFICES
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1015 WEST SEVENTH AVENUE
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L. AMES LUCE
DAN A. HENSLEY

TELEPHONE (907) 276-1191
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February 5, 1990

<u>Via Fax</u>

Rep. Dave Donley, Chairman
Labor and Commerce Committee
Alaska State Legislature
P.O. Box V (MS 3100)
Juneau, Alaska 99511

Re: <u>House Bill Nos. 334, 336, 337, 349 and 350</u>

Dear Representative Donley:

I have reviewed several bills pending in the Labor and Commerce Committee which address issues concerning medical malpractice insurance and medical malpractice litigation. As an attorney who represents plaintiffs in medical negligence cases, I am very pleased to see that your committee is taking steps to address the real problems involved in the medical insurance "crisis" -- that is, availability of insurance and access to the justice system. What a refreshing approach when compared to some prior legislative attempts to solve these problems by reducing or eliminating the rights of injured victims of negligence.

I do have some minor suggestions concerning some portions of the bills which are addressed below. However, please understand that I wholeheartedly support the intent of this legislative package.

House Bill 334, which requires professionals to obtain malpractice insurance, is a step in the right direction in my view. However, I am concerned that the bill, as presently drafted, does not require liability insurance unless the professional has had a judgment entered against him or her. This exception raises two questions.

First, a professional who holds himself out to the public as competent in an area should back that representation with insurance, regardless of whether he or she has been the subject of a negligence judgment. Second, although this exception was apparently designed to focus on the professional with a "track record" of negligence, it does not appear to apply to the professional who may have settled a series of negligence claims short of trial to avoid a negligence judgment. Despite these concerns, I strongly urge the passage of some legislation requiring mandatory liability insurance for professionals.

House Bill 336 makes changes in the medical malpractice advisory panel law presently on the books. The important modifications are the increase in the size of the panel, the addition of non-health care providers to the panel, and a change in the prohibition on discovery in litigation presently written in the law.

There is an additional, significant problem with the panel statute which is not addressed by this bill. That problem is the use to which a panel report may be made in court. Several physicians who testified at the recent committee hearings believe that the role of the panel is only to address "biological" issues, without regard to the important legal-medical issues raised in the litigation. Moreover, many physicians with whom I have spoken personally believe that their role as panel members is to "educate the judge" rather than to prepare a report for use by the trial jury in deciding the case.

Nevertheless, under present law, a panel report may be introduced into evidence at trial <u>without</u> the members of the panel actually testifying. In addition, the Alaska Supreme Court has held that an expert advisory panel report may be used as the basis for summary judgment against a party. <u>Kendall v. State</u>, 692 P.2d 953, 955 (Alaska 1984). Finally, under present administrative rules, although the court appoints the expert advisory panel, often over the objection of a party, a party who wishes to have a member of the panel testify at trial (either to support the panel report or to expose fallacies in the report) must pay for that physician's deposition and appearance at trial.

If the purpose of the panel proceeding is to provide "screening" of cases, it is superfluous. Competent plaintiff's lawyers screen difficult medical negligence cases prior to filing them. The high costs of pursuing a medical negligence case act as a deterrent to filing a non-meritorious case. There are existing court rules for addressing frivolous claims (Rule 82 awards to the prevailing party; Rule 11 sanctions).

Rep. Dave Donley
February 5, 1990
Page -3-

If the panel is to remain a part of Alaska's medical negligence law, its role should be clearly defined. I suggest that House Bill 336 be amended to add the following:

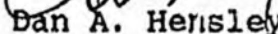
> A.S. 09.55.536(e) is repealed and re-enacted to provide: The panel's report is advisory only. It may not be introduced into evidence at trial and its members may not be called as witnesses. In awarding costs and attorneys' fees at the conclusion of litigation, the trial court may consider the panel report.

Finally, House Bill 350, concerning creating the Alaska Medical Malpractice Matching Fund, is an extremely important piece of legislation. The passage of this bill will do much to alleviate the problems faced by rural physicians in obtaining insurance, without forcing rural Alaskans to settle for second rate medical care.

Thank you for the opportunity to comment on these legislative proposals. If I can answer any questions or provide additional information, I will be happy to do so.

Sincerely yours,

LAW OFFICES OF LUCE & HENSLEY, P.C.



Dan A. Hensley

DAH:fs
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11/29/89
Submitted by Dr. Ross Brudenell

November 17, 1989

The information requested concerning statistics dealing with the expert advisory panel process and the medical malpractice suits follows:

Total number of claims processed since the inception of AS 09.55.536:
338 claims

Annual number of claims:
1977 -- 12
1978 -- 6
1979 -- 15
1980 -- 12
1981 -- 16
1982 -- 27
1983 - 32
1984 -- 37
1985 -- 55
1986 -- 31
1987 -- 37
1988 -- 29
1989 -- 29 to date
TOTAL 338 to date*

Avg. 26/yr.

Information concerning the decision of the expert advisory panel is not complete, since records have not been supplied by the court. Although the court sends notices of dismissals of cases, data concerning the status of the case at this point is unavailable, therefore a determination can't be made concerning fault or no fault on dismissed cases.

The following information might be helpful concerning the final results of some of the cases:
Dismissed cases: 27
Dropped cases: 10
Excused expert advisory panel members: 20 panels
Panel ruled fault and jury ruled against plaintiff: 1
Plaintiff ordered to pay settlement: 2

Expert Advisory Panel determination:
Defendant -- No Fault: 138 or 73% of the total cases
Defendant -- Fault: 40 or 21% of the total cases
No report available: 93

No causation really means @95%

The number of judgements entered in favor of the plaintiff is unknown.

RODMAN WILSON, M.D.
FELLOW OF AMERICAN COLLEGE OF PHYSICIANS
INTERNAL MEDICINE

6234 TANAINA DRIVE, ANCHORAGE, ALASKA 99502, U.S.A.
(907) 243-5583

November 28, 1989

Representative Dave Donley, Chairman
Labor & Commerce Committee
Alaska House of Representatives
P.O.Box V
Juneau, AK 99811

Re: HB 336: "An Act relating to medical malpractice advisory panels."

Dear Representative Donley:

I am writing as a physician who served on the Governor's Commission on Medical Malpractice Insurance in 1975 that devised the three-person expert advisory panel system to assist the courts in adjudicating medical malpractice lawsuits. For 12 years after that I served as chairman of the Medico-Legal Committee of the Alaska State Medical Association. My committee's principal task was to recruit physicians, and occasionally other experts, for nomination to the court for service on panels and to assist panels administratively in doing their job. Thus I am in a position of knowledge concerning the origins of the panel system and how they have worked. Unfortunately there has not been a systematic, complete analysis of panel performance, although I have worked on this to some extent in past years.

HB 336 will emasculate or destroy the expert advisory panel system. This apparently is the purpose of the bill.

The prime reason for the panel, as it was created in AS 09.55.536, is to **explain the biology** of the case to the court-to explain the nature and natural march of disease as altered in most cases by medical intervention. The purpose is **not to apply the law** to cases or to answer the question as to whether medical malpractice occurred.

HB 336 would completely change this because only two at most of the panelists would be physicians. It is even possible that at some times none of the panelists would be physicians. How could a panel with a minority of members being "expert" in the biological issue at hand be "expert"? Who other than attorneys would presume to be qualified to be non-medical experts on the committee? The entire nature of the exercise would be altered and would be then, in my opinion, useless.

P.O. Box 210616
Auke Bay, AK 99821
November 21, 1989

Ray Schalow
Alaska State Medical Association
4107 Laurel Street
Anchorage, AK 99508

Dear Mr. Schalow,

This letter is in response to your requests for comments on HB336. Here are a few of my thoughts.

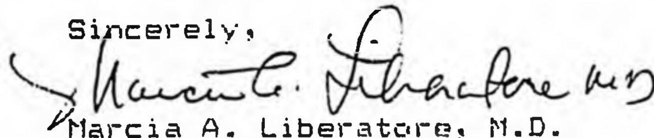
Increasing the number of members on the advisory panel will complicate the process unnecessarily. It will make it less likely to have reports in 30 to 60 days. Going to a five member panel may make this process so awkward that it will undermine the purpose of the panel and lead to stronger sentiments to disband it altogether.

Alaska is the only state listed in Exhibit "A" that has only physician members. In Section 1, paragraph a, line 16 to 19, the court is given the power to determine the professions or specialties to be represented on the expert advisory panel. Stipulating later in Section 1 that three out of five members not be health care providers unnecessarily restricts the courts ability to choose the most appropriate experts for the advisory panel. Why not let the court decide in each case whether there should be one or no non-health care provider on an individual panel?

The discovery issue is confusing, since I don't know how Section 2 originally read. Am I correctly interpreting the information presented when I conclude that as the law now stands, the panel can perform discovery but the respective parties cannot? Does this hinder the process, or would more information be available to the panel if discovery were allowed prior to and during the expert advisory panel report? Would allowing discovery delay the report? The discovery process certainly can be used to generate legal fees --is this more of what the lawyers amending this law are after?

If there are no serious problems with the law as it now stands, will changing it benefit the personal injury lawyers, the court, the injured parties being represented, or the physicians on the panel? Except to possibly allow an non-health care provider on the panel when the court might deem it appropriate, I cannot find any reason the law should be amended.

Sincerely,



Marcia A. Liberatore, M.D.

December 8, 1981

ALASKA'S MEDICAL PANEL REVIEW

OF

MALPRACTICE CASES

1978-1981

(draft - not completed or published)

Alaska's Medical Advisory Panel System

for

Malpractice Lawsuits

by

Rodman Wilson, M.D.
and
Martha MacDermaid, A. B. ?

The singular feature of Alaska's system for pre-trial review of legal actions alleging medical malpractice is that the three-person expert advisory panel is all medical. Although the statute (appendix) in 1976 which created the panels allows any person expert in the matter at hand to sit on a panel, in practice the courts have appointed only physicians or other medical professionals such as dentists, nurses, and optometrists.

The panel scrutinizes the medical records, interviews whomever it wants to interview, examines the patient if it wishes, answers eight cardinal statutory questions, expands on its answers if it desires, and within 30 days, or 60 if extension is requested and granted, reports to the court.

The key statutory question is number 4: "Did an injury arise from the medical care?" If the answer is yes, question number 7 is also salient: "Was the medical injury caused by unskillful care?"

Notice that neither of these crucial questions, nor any other, precisely asks the panel to determine whether or not "malpractice" occurred, a matter, as in most jurisdictions, having to do with proximity, standard of care, and the like. The distinction is important, for it allows the panelists to confine their opinion to <u>medical</u> rather than <u>legal</u> questions. Panelists are thus comfortable as a rule in their role as medical consultants to the court.

Other states have created screening panels of varying size and composition but usually including attorneys and lay persons. The closest parallel is the panel in Louisiana where three physicians, observed by an attorney, review cases. By and large they have been cumbersome, costly, and unconstitutional. Panels in Florida, Illinois, Missouri, Nevada, North Dakota, Pennsylvania, Rhode Island, and Tennessee have either been repealed or have fallen to court challenge. Panels persist

in 20 states including Alaska. Alaska's panel system was upheld by the Alaska Supreme Court, albeit obliquely. Plumby vs Hale pointed out that the final vote on the 1976 statute in the State Senate was by voice rather than roll call. The Constitution calls for roll call votes on final adoption of statutes. The Alaska Supreme Court agreed that the vote was procedurally irregular but let the statute stand, throwing the ~~complaining party~~ a bone by allowing the pleader to proceed with two cases without expert advisory panels.

APPOINTMENT OF PANELS

Sixty-three medical malpractice lawsuits were filed in state courts in Alaska in the four-year period 1978-1981. ~~One case was subsequently transferred to federal court jurisdiction.~~ Most cases were filed in the Third Judicial District (3JD) in Anchorage where approximately one-half of the state's 460,000 people live. Most actions named more than one physician. One complaint listed 13 physicians. Ten physicians were named more than once. Dental cases invariably named one dentist. One dentist was named twice. An action against an optometrist named his five colleagues and their corporation. Suits against physicians often named their associates, their clinic, and the hospital where the aggrieved had lain. An action solely against a hospital did occur. A total of 99 health professionals, including 78 physicians, and 33 institutions were named (Tables 1 and 2). Not included in the tables were many "John Doe's" and "XYZ Corporations."

Categories of allegations among 63 lawsuits are arrayed in Table 3. Faulty surgery or avoidable complications of surgery was claimed in 16 cases (25%); no two cases were alike. Mishandling of fracture was alleged in 14 cases (22%): fracture was missed according to the complaint in four instances (cervical vertebra, scapula, wrist, pelvis); angulation of the tibia after healing was specified three times. Faulty dentistry was the issue in 11 cases (17%): six involved oral or facial complaints

after extraction; four involved dissatisfaction with root-canal procedures. The accusation was faulty obstetrical or gynecologic care in eight lawsuits (13%): there were two claims of pregnancy after tubal ligation; two claims alleged damage from forceps delivery with death in one instance and cerebral palsy in another. Missed diagnosis, cancer twice and myocardial infraction twice, was specified in eight actions (13%). Six patients or their survivors (10%) were dissatisfied with management of medical problems; no two cases were alike.

Although the statute ordering expert advisory panels, and at the same time creating a state-sponsored medical professional liability insurance company, initially mandatory for physicians but amended in 1977 to be optional, and working minor tort law alterations, was enacted in June 1976, the first panel was not appointed until October 1978 — partly because of institutional inertias and partly because few complaints were brought in the wake of the new law while attorneys pondered its meaning and because of uncertainty as to whether physicians were insured or not. Most were not for a three-to-four-year period from 1975 to 1978.

In five instances among 62 cases in state courts panels were not appointed. In these five panels were not appointed because certain judges misunderstood the intent of the law, because the cases were dropped after the complaints were answered, or because, in one instance, a charge was defended successfully before a jury and an appeal on the issue of the statute of limitations before the medical issue was considered.

Nineteen judges appointed 57 expert advisory panels. In three cases lawsuits were dismissed before the panels convened. In a fourth case settlement out of court in an amount of $142.500 was made when a

newborn infant died from damage to the head during forceps delivery without using the panel.

Fifty-three panels completed their work by filing reports at the court. Forty-eight of these were available to the authors for review and the opinions as to fault or no fault are known in the five reports which were not in hand.

PROCESS

In 3JD the time line for lawsuits from filing to panel report is shown in the figure. The system is designed to complete this phase in 100 to 130 days.

Nominations for panel seats in 3JD cases were made by arrangement between the court and the Alaska State Medical Association (ASMA) or in a dental case the Alaska Dental Association (ADA). As a rule nine names were submitted together with suggestions as to appropriate specialty representation. Sometimes nine names could not be mustered when, for example, specialists, uninvolved in the case, in a small field like neurosurgery or otolaryngology were scarce.

Nominations were made by ASMA or ADA merely upon a reading of the complaint or occasionally in addition from having wind otherwise of the matter. For example, in a complaint about an infected compound fracture naming an orthopedic surgeon, the ASMA might submit the names of six orthopedic surgeons and three internists especially knowledgeable about infectious disease. None of the nine, of course, would have been

involved in the care of the patient. Or in a case against a dentist alleging mandibular nerve damage after molar extraction, the ADA and the ASMA together might suggest to the court the names of three dentists, three oral surgeons, and three neurologists.

Nominees usually, but not invariably, lived within the same judicial district in which the complaint had been entered, but sometimes out-of-city panelists were deliberately proposed, for example, physicians from Fairbanks to study a Kenai Peninsula case where physicians are few.

In 3JD the court allowed the ASMA or ADA 30 days to make nominations. In the 54 cases under study it took 2 to 41 days (median 14) for the ASMA to do this and from 2 to 30 days (median 10) for the ADA.

0762
0758
1617

The judge hearing the case then selected any three of the nine nominees, usually adhering to the specialty distribution proposed. In other judicial districts judges selected panels in their own manner, listening in some instances to counsel for each side or perhaps even to the judge's personal physician's recommendations. Unsolicited nominations were sometimes offered by the ASMA in judicial districts other than 3JD. In one case a First Judicial District judge allowed the plaintiff to name 2 persons and the defendant to name 1. The plaintiff chose a podiatrist and a non-physician professor of anatomy; the defendant chose a professor of orthopedic surgery. The case was dropped after the all Seattle panel agreed that there was no-fault in the manner in which the Alaska orthopedic surgeon handled Morton's neuroma of the foot (use 36).

There were an average of 385 physicians and 192 dentists in private practice in Alaska during the years 1978-1981. Nominations for panel

positions were made almost exclusively from these pools. Nurses and optometrists were sometimes proposed. In all 243 individuals were nominated from around the state, 95 once, 64 twice, 28 thrice, 27 four times, 15 five times, and 14 six or more times. Forty-two percent of the average physician-dentist pool thus were nominated at least once during the period.

Fifty-six panels were appointed, comprising 168 persons, all but four of whom were physicians or dentists. Make-up of the panels by specialty is shown in Table 4. Except in dental cases it was uncommon for panels to consist of individuals all practicing the same specialty but there were four panels entirely of obstetrician-gynecologists, three of orthopedic surgeons, two of internists, and one each solely of radiologists, otolaryngologists, or ophthalmologists. It was common for an internist to be on a panel involving a complication of surgery, and he was often chosen chairman (Table 5).

Thirty-three individuals were appointed twice, 14 thrice, 4 four times, 1 five times, and 2 six times. A few grumbled when designated again, but no one refused to serve unless he discovered that he had been involved in the care of the patient after all, was ill, or was on an extended holiday.

Modus Operandi of Panels

The statute compels production of all relative medical records and other materials for use by the medical panel. Copies of records were usually provided to the court by the plaintiff, often in triplicate, and were forwarded to the panel. Records, however, were frequently incomplete or copies illegible especially on margins. Laboratory reports were

sometimes copied overlain, only names and dates showing. Accordingly, panelists, having chosen a chairman (two typically fingering one) usually first individually inspected the original hospital chart if the case had occurred in their community, next studied x-rays and other materials, then met informally, sometimes by telephone, to decide how to proceed. This usually involved interviewing the defending physician or dentist, questioning nurses or other persons having first-hand knowledge of the matter, and arranging to examine or at least interview the injured person if still alive. If he had left the state, interviewing was sometimes done by a long-distance conference call.

A murky area has been in the matter of what records to keep and whether to allow representation at hearings and physician examinations. Justices in 3JD have generally been supportive of informality in these areas, leaving it to the panel chairman whether to suffer attorneys and whether to muzzle them or not.

Likewise the court has not insisted upon recorded or written testimony and proceedings so long as a list of the names of those interviewed and documents or other resources used was attached to the report. The statute, however, specifies that the panel "shall maintain a record of any testimony or oral statements of witnesses". Tape recordings of hearings were made by some panels, but as a rule these were not transcribed or submitted.

Physicians understandably felt most at ease when working approximately as they do when consulting, that is to say, investigating the case however they chose. A salient difference between a consultation and this modality, of course, is that it is a three-person consultation, an exercise not customarily practiced by physicians, but on the other hand

not that strange.

After delays for receipt and persual of further records, search of medical writings on the topic, re-interviewing and mulling, often leading to a request for the statutorially permitted 30-day extention of time, and sometimes after prodding from ASMA and ADA, panelists typically met in camera to discuss the case, to decide on their answers to the eight questions, and to draft, or delegate the chairman to draft, further paragraphs or pages of exegesis. When this had been reviewed, revised, and signed by each participant, it was delivered to the court, which promptly distributed it to all parties.[3]

Reports have varied in length from extremely brief answers to the fixed questions to lengthy elaborations running to eight to ten pages. Most have been two to three pages in length and have included a list of materials scrutinized, persons queried, and references consulted. Most reports have been direct and specific, covering each point in the complaint however trivial. Some have been very imaginative. One panel polled twelve general surgeons on the question of what each would do in a hypothetic case like the one before the panel. They used the results of the poll to support their opinion.

It took from 23 to 308 days for panels to complete their work from day of appointment to day of delivery of the report to the court. Average and median times in 1978-1979 was 131 and 104 days respectively, and in 1980-1981, 80 and 63 days respectively (Table 6). As physicians and dentists have become accustomed to the task, work has been done faster but still, as a rule, not quite within the 30-60 day period specified by the statute, and some panels have been extraordinarily slow in completing their chore.

Panel members are entitled by the law to payment for time spent and travel, but pay for time is the State's per diem rate for members of boards and commissions. As panel work has been done an hour here, a quarter hour there, it has been a bother for doctors and dentists to compute bills, and since the State considers per diem as payment for an eight-hour day, or at least a four or five-hour day of duty, most physicians and dentists have not deigned to bill. The amounts authorized do not adequately compensate them for the many hours expended and the gravity of the task. Pay, however, has not been an issue of importance to doctors and dentists thus far. Even counting administrative court costs, the expert advisory panel system has been inexpensive to the public to say the least.

Findings of Panels and Outcomes of Cases

The study will now focus on the 54 instances in which the expert advisory panels finished their work. Outcomes both legal and medical have been traced for at least eighteen months in almost every case. Some dollar data are estimates rather than exact amounts but represent figures as close as the authors could obtain. Amounts of out-of-court settlements and personal legal expenses are, as a rule, private information and hard to get. Valves recorded are probably accurate to within 20 percent.

A. Cases in Which Panels Found Fault

Twelve expert advisory panels (22%) found that injury arose from unskillful care. Table 7 presents features of these 12 cases.

In five instances surgery was deemed to be faulty by reason of mistakes at surgery in three instances and because of postoperative complications in two. In Case 16 the panel thought that a surgeon had severed a trunk of the brachial plexus in performing a scalene anticus operation, but he was fully exonerated by a jury. On appeal, however, the case was remanded when later surgery else where showed that, indeed, the trunk had been severed. An out-of-court settlement in an amount of approximately $250,000 was made. In Case 44 a surgeon cut the femoral artery in the course of a herniorrhaphy on a woman. The vessel was subsequently repaired with a prosthesis at further surgery. There is presently no

evidence of vascular insufficiency in the limb. Final settlement has not been made. In Case 49 a general surgeon of great experience but scant formal training in plastic and reconstructive surgery performed prophylactic simple mastectomy and insertion of a prosthesis on the left after modified radical mastectomy for carcinoma of the right breast. Necrosis of the skin and permanent disfigurement occurred on the left. Originally the surgeon, the hospital, the credentials committee, and the chief of surgery who allowed him to do "plastic" surgery were all named, but the credentials committee and chief of surgery were subsequently dropped from the action. The panelists all agreed that there was some degree of fault on the part of the surgeon, but their report hedged. Jury trial ensued and awarded the plaintiff $220,000. This included a portion of the woman's costs and pre-judgment interest.[5] In Case 13 infection complicated replacement of a knee joint with an artificial device. Ankylosis ensued. The panel did not believe that the orthopedic surgeon was sufficiently trained and experienced to have undertaken the prosthetic procedure. Settlement in the amount of $85,000 was made. In Case 56 glaucoma occurred 500N after cataract surgery. Vitreous material extruded through the iris into the anterior chamber. Although vision was not lost, the panel felt that the patient was at risk for future trouble in the eye. Settlement has not yet been made.

In three instances diagnosis was missed to the detriment of the patient in the opinion of panels. In Case 28 an optometrist failed to appreciate that a patient's complaint of sudden loss of vision was due to retinal detachment. Referral to an ophthalmologist was delayed for several days by which time a substantial amount of vision was irretrievably lost. A panel comprised of two ophthalmologists and one optometrist serving as chairman thought that while an optometrist cannot be considered competent

to diagnose retinal detachment, this one should have been alert enough even on a Friday afternoon to suspect from the complaint that something dire was happening and should have referred the patient on an emergency basis to an ophthalmologist. Settlement in an amount of $240,000 followed receipt of the panel report even though the attorney for the defendent protested that the case was still defensible on several grounds.

Case 9 was settled out-of-court for $110,000. The expert advisory panel thought that a family practitioner should have heeded a radiologist's suggestion that more x-rays be taken in a case of injury to the neck. Fracture of the cervical vertebra with partial loss of sensation and strength in the left side of the body occurred, but the patient ambulates satisfactorily with a cane.

In the third case of missed diagnosis the panel blamed an internist for death of a patient due to delay in diagnosing and removing carcinoma of the cecum. Settlement in an amount of $400,000 was entertained until another physician acting as a consultant to the defense reconstructed the case to demonstrate convincingly that death had occurred not from the carcinoma of the cecum but from a second primary adenocarcinoma of the lung. Physicians, in another state (and not named in the suit) caring for the patient at this time had missed this second tumor. When it was finally found, they pretended that it was metastatic spread from the carcinoma of the cecum. The liver was uninvolved. Final settlement was $225,000.

Panels found fault in the way physicians handled two non-surgical cases. A woman had mild viral pneumonia (Case 7) during pregnancy and suffered chest pain and anxiety when one after another of six physicians attended

her during several days of hospitalization including some days on the delivery ward even though she was not in labor. She recovered from the pneumonia and subsequently gave birth to a normal baby. The panel found fault with the handling of the patient, specifically blaming the physicians for inept communication with the woman, thus contributing to her anxiety. An out-of-court settlement in a small amount was made. A panel faulted a part-time jail physician for not consulting a previous physician before re-ordering an oral estrogen preparation (Case 37). The female prisoner claimed injurious, transient galactorrhea. The panel agreed, though precisely what significant injury had occurred, if any, was far from clear in the panel report. The case was settled for $7,000 by the insurance company on behalf of The State of Alaska which insured the jail physician.

Two dental cases (34,35) involving root canal procedures, both done by the same dentist, were poorly handled in the opinion of panels of dentists. Out-of-court settlement in an amount of approximately $15,000 was made in Case 34. Settlement in an unknown amount was reached in Case 35.

B. Cases in Which Panels Did Not Find Fault

Forty-two (78%) of expert advisory panels did not find that injury arose from medical care.[6] Table 8 displays selected features of these 42 actions.

In 25 ± cases the lawsuit was dropped, dismissed, or summarily dismissed soon after the panel report. In 2 ± instances the judge awarded partial costs to the defendant.

It appeared to the panels that many times there was simply confusion on the part of the plaintiff about the nature of his disorder and about the sequence of medical events. Often he did not seem to appreciate what was inevitable and unalterable or what the outcome would have been without medical intervention. Likewise there was misunderstanding about what disease and what was treatment, about decision points in treatment, and about what complications are common and not necessarily to be ascribed to shoddy care. Although lawsuit might well have been averted in many instances had the physician carefully explained these matters to the patient or to loved-ones, yet panelists did not find generally that the injuries claimed were produced by lack of proper explanation. An exception was Case 7 (Table 7 and text).

Fracture outcomes illustrate these points. Everyone wants a "straight", strong bone again no matter how complex the original break. If outcome is less than expected, disappointment ensues. The risks and complications of orthopedic restoration are not often understood and sometimes not fully explained to an injured person or if explained, not heard. Once a panel set out the details and sequence of decision points, perspective usually improved. Indeed there were no instances among this material where fracture treatment was found to be at fault except in Case 9 (Table 7 and text) where cervical fracture was missed.

The value of the all-medical panel in sifting through the intracacies of certain cases is illustrated by an instance of quick death from unrecognized bacteremic pneumococcal pneumonia (Case 32) in which the panel of internists made the fine but telling point, annotating it carefully, that mortality during the first three days of this disease is not altered by penicillin therapy. The case was thereupon dropped, but

the trial lawyer exacted a promise from the defendant that he would not countersue him for bringing the action.

In Case 54 action was brought against a family practitioner 11 years after the birth of a child with cerebral palsy. Prgenancy in 1970 had been uneventful until membranes ruptured at 36 weeks. The doctor ordered an intravenous drip of posterior pituitary extract three days later to stimulate labor. When varying fetal heart rate and meconium staining were noted, the physician came to the hospital and extracted a flaccid infant by low forceps technique. The child remains brain damaged. The panel was able to show from its accurate knowledge of the standards of practice in Anchorage in 1970 (before sophisticated fetal monitoring) that the family practitioner had not strayed from accepted practice of the day.[7]

In another instance (Case 33) a panel succinctly explained that salpingitis and sterility were not necessarily produced by an intra-uterine device placed by a family practitioner but could have just as well been associated with two episodes of sexually transmitted infection.

Twice (Cases 18, 22) family practitioners were excused by panels from not recognizing acute myocardial infarction, eventually fatal, in emergency rooms in small communities. In one instance (Case 22) the patient was seen initally by a physician's assistant on behalf of the physician. He was quite unaware that myocardial infarction could occur in a 30-year-old women who was neither hypertensive, diabetic, or obese. She did smoke and was on birth control pills but these details were not known to the PA. The case was eventually dismissed. The other case (Case 18) went to trial. A family practitioner, a medical student, and a hospital

were blamed for allowing a man who earlier in the day had had chest pain leave an emergency room. In the ER he had been asymptomatic and the electrocardiogram was either normal or close to normal (later interpretations varied). He died a few hours afterwards on a flight to Seattle. The medical student was dropped from the case shortly before trial began. The jury exonerated the physician and the hospital.

In 16 ± of 38 instances suits progressed toward trial despite exonerating panel opinions. In one case (Case 2) two of three panel members were deposed.[8] A neurologist and an orthopedic surgeon reiterated their stance that a neursurgeon was not culpable for footdrop caused by damage at reoperation of an already compromised lumbar nerve. Nonetheless the neurosurgeon, on advice from his insurer, settled out-of-court for $50,000.

In the 15 ± other cases (table 8) 8 ± out-of-court settlements were reached ranging from $10,000 to $80,000 ± (average $40,000 ±, median $25,000 ±). Seven ± cases are pending but only 2+ are ever likely to reach a jury???

Suits against clinics and hospitals were generally settled or otherwise disposed of soon after the panel decided about the doctor. In no case has an action against a clinic or hospital progressed alone to trial.

C. Cases Without Expert Advisory Panel Action

Table 9 lists lawsuits in which medical advisory panels were either

not appointed for one reason or another or, if appointed, did not finish their work before the case was settled. In one important case (Case) in 1978 a judge misunderstood the intent of the statute and granted a motion by the plaintiff to proceed without a panel in a case of suicide by drug and alcohol. The defense was able to convince the jury that a family practitioner and a hospital were not responsible for the death and the jury decision was narrowly sustained on appeal. The cost of defending the doctors and the hospital was $150,000. In two instances (Cases) referred to earlier the plaintiff was excused from having panel scrutiny because of an irregularity in the way in which the legislature voted on the statute creating the panels. This ruling did not apply to other cases.

In several other cases panels were appointed but hardly began their work before the case was dropped, dismissed, or settled out-of-court. In ? instances panel reports have still not been received.

In another First Judicial District case a panel still had not been appointed one year after filing of the suit. The case went to trial without panel findings and found

Acceptance

(1) The courts in Alaska have generally been helpful in implementing the panel mechanism. In 3JD the presiding justice, the court administrator and his assistants, defense and trial attorneys, and representatives of ASMA met several times to work out orders and schedules for panel appointment and operation.

Although the statute allows attorneys "to object or make suggestions" concerning panelists, the presiding justice of 3JD has not permitted objections to be pre-emptory. Judges have almost invariably followed the recommendations of ASMA for specialty distribution.

The courts have let panels proceed informally and have left it to the panel chairmen whether to allow attorneys at hearings. The courts have ordered that reports be on time, but these dates have sometimes slipped anyway. Judges have distributed the opinions to all parties promptly but not before reading them, for in one instance (Case 15) a judge considered a panel report to be so brief and so poorly prepared that he sealed it, allowing the action to proceed without panel report.

(2) Attorneys understandably do not welcome onto their turf new players who can truncate their cherished jousting. To a man trial lawyers object to the expert advisory panel system. Defense attorneys by-and-large do too, though some see merit in the system, particularly in the authority of some of the more scholarly reports. Both trial and defense lawyers have commented on the speed and specificity with which physicians bore in upon what actually injured or bothered a plaintiff. They have also been surprised at how effectively doctors can locate records or other important material of which they were not aware. Panels thus have abetted discovery. On the other hand some panels have not looked beyond materials provided by the court.

To date there has not been much to suggest that otiose attorneys are using panels to work up a case for them to see if a quick, favorable opinion and three expert witnesses can be suddenly accrued. The court has the power under the law to assess costs if it determines that a

claim or a denial of liability is "patently frivolous". Moreover, some of the costs of defense are recoverable if there is summary dismissal of the case under Alaska Court Rule 82.[10]

(3) Insurance companies, returning to the field after the 1976 act, have been uneasy about the panels. There is no way that they can legitimately influence a panel.[11] Thus they feel a loss of control of the case. If a panel does not find fault, the carrier is in a good, though not unassailable, position. If the panel finds fault, capitulation is likely even if there remain possible defenses since at least two and usually three Alaska physicians have opined that their insured was unskillful[12] and can be led into court to say so to a jury.

Despite their misgivings, and perhaps heartened by the fact that there has never been an award or settlement in excess of $500,000 for medical malpractice in Alaska, insurance companies have watched the panel system with interest[13] and have from time to time even made helpful general suggestions, in particular warning that panels should not gratuitously enlarge a case.

(4) Physicians for their part have mixed feelings about the panels, though there feelings are more favorable than not. From a desperate time in 1975 when professional liability insurance was available to a few psychiatrists and to almost no one else in Alaska to the present when at least three companies, including the one created by the state in the 1976 law, underwrite coverage at rates slightly less than those in Northern California, some order and ease of mind has at least been restored. Some doctors choose to remain uninsured, feeling among other things that insurance invites claims. These, in particular, like the

panels for they give quick determinations without high legal fees or interferring advice from carrier attorneys. For insured doctors, pari passu, costs can also be less. This should eventually make insurance cheaper.

Physicians have been outstandingly tractable, though newcomers are unfamiliar with the system and occasionally seem not to take it seriously. No one has wanted to be on a panel because the task is difficult, even painful. More often than not in this sparsely populated state, a panelist is judging someone he knows and with whom he may even share cases. But no one has refused to serve.

(5) There has been no way to tell what the public thinks about the expert advisory panel system. It has had no publicity since enactment. Inasmuch as a majority of panel reports favor defendants, there are undoubtedly many disgruntled plaintiffs. But this hardly measures public sentiment. Legislators, surfeited with the issue in 1975-1977, have paid the matter no attention since.

Discussion

During the deliberations in 1975 of the Governor's Commission on Medical Malpractice Insurance physicians insisted that a major defect in malpractice actions was that the medical story was not laid out early and in proper

clinical perspective. Even at trial this is sometimes not done.

The expert advisory panel mechanism was fashioned from the Commission's recommendations to do this. The aim was to provide both parties soon after filing and while further costly discovery was stayed an explanation by three knowledgeable persons of the biology of the case and how the natural process in question had been altered by medical intervention. The eight statutory questions were to provide the matrix for the response. Further explanation was also invited.

A special feature of the law allows panel members the opportunity to examine physically the aggrieved person, if alive, to help determine for themselves the nature and extent of injury. Physicians have not availed themselves enough of this unusual privilege, perhaps because the situation is awkward. They have tended to depend entirely upon review of records and interviews.

Detailed questioning (medical history) is a powerful tool in the hands of physicians for determining "truth", just as interrogatories and cross-examination are for attorneys. Physicians, however, are more gullible than lawyers in accepting what a person says as fact, for in the usual doctor-patient relationship there is little incentive to exaggerate or deceive.

In the malpractice setting, however, a part of the game seems, at least to physicians, to be exaggeration or even mendacity. Doctors may fall prey to this by believing everything a plaintiff says. Perspicacious physicians on a panel, however, have been able to detect hyperbole and prevarication, recognizing it sometimes as behavioral sickness or neurosis.

Still they should seek more often to corroborate what the plaintiff avers by careful physical examination of their own.

It had been feared by many that bias would be so strong that panel reports would regularly whitewash defendants. Some attorneys continue to assert this. But the overriding afflatus of panel work has been professionalism rather than animus toward attorneys. Too much is at stake in terms of credibility as a specialist or simply as a physician to risk shading an opinion for the benefit of a colleague. The fact that three work in concert helps. Each keeps the others true.

Contrariwise there has been little to suggest conspiracy to hurt a physician. Not that there is not internecine strife among doctors; there is, but panels have not been a battleground for extraneous issues.

It should surprise no one that a large majority of panels, 78% in this experience, have, so to speak, found for defendants. Approximately 80% of malpractice claims across the nation prove to be without merit. The surprise rather may be that professionals have adjudged professionals unskillful 24% of the time. Doctors may prove to be harsher judges of their bretheren than juries. It has not always been easy to continue to practice in a community where one has declared a colleague at fault.

On the other hand physicians may measure the extent of an injury (question 5) less than a jury might, for they eschew quantifying unquantifiable things such as pain, suffering, and loss of consortium. Fortunately, the statute does not call upon the panel actually to rate impairment or disability and certainly not to transmute disability into gold.

Panel performance has been uneven in quality, some of it poor, some adequate, some brilliant. Although competent to do consultations, physicians are not accustomed to working by threes and not attuned in consultation work to answering interrogatories, even the disarmingly straightforward questions in the statute. But there is reason to believe that Alaskan physicians are learning how to do this chore. More thoroughgoing, balanced, well-documented reports are now flowing to court.

Problems remain: (1) Complaints are frequently vague and filled with errors of fact. It may not be of much importance legally at that stage of the action, but it does make it difficult at times to tell what the medical problem may be and therefore hard to advise the court what specialists should be impaneled.

(2) Copies of all the medical records are supposed to be delivered to the panel upon appointment. It has sometimes been difficult for the court to get these from plaintiff's attorney. Delay comes when the panel chairman has to commandeer records himself.

(3) Expansion of a case by a zealous panel, as mentioned above, may prove to be troublesome. Blame not posited by the plaintiff may be fixed. Rattlesnakes thus aroused may be hard to shoot.

(4) In this and other regards, can the substance of a lawsuit be amended after receiving a panel report? If so, does the panel reconvene to ponder the revised charge? When would such cycles terminate? What about discovery of important medical material after the report of the panel has been filed?[14] These are questions of legal procedure which may require definition.

(5) Physicians up to now have been entirely cooperative. Will they maintain this attitude, particularly when the state is parsimonious in paying them for their labor? Most have not minded, indeed have not even billed. But is is a proper question to ask how long physicians will continue to do grave, unpleasant work for a fraction of what they customarily fetch for their time.[15]

(6) A more important question is will physicians tire? Will their work on panels deteriorate? Overall it has been far from perfect. The better trial attorneys virtually ignore overly terse, obscure, or fence-sitting[10] reports. If the load of malpractice actions increases, physicians in certain specialties like obstetrics-gynecology, neurosurgery, otolaryngology, and oral surgery will be overused. Practicing physicians concentrate enormous energy and attention upon their patients. Nothing else, except matters in their personal lives, can repeatedly command that much focus. There is also a problem with new physicians, perhaps attracted to Alaska in part by relatively low medical malpractice insurance rates. They did not know the wrenching days of the mid-1970's and have little or no familiarity with the panel mechanism. How well will they perform on a panel? Thus there is a possibility that the panel device will wither by default on the part of physicians.

In sum, then, what of the expert advisory panel system? Is it worthwhile? Is it socially constructive? It is too early to say. The courts and medical professionals are still learning how to use it. Attorneys and insurance companies are still learning how to live with it. More experience is needed.

In the final analysis the panel mechanism should be measured by whether it is fairer, quicker, and operationally cheaper than the previous

system. Perhaps the only way to determine this with scientific certainty would be to randomize or alternate cases prospectively over a four or five-year period, then compare the two groups. It is unlikely, however, that the court or the Legislature would allow such rationality. Someone would surely appeal his draw.

Summary

Expert advisory panels composed of three medical professionals found among 54 malpractice actions in Alaska that defendants had not caused injury by unskillful care in 42 cases (78%) and that they had in 12 instances (22%). Panel opinions appear to have led to early settlement of suits in many instances, but it is premature to conclude that the new system is fairer, quicker, and cheaper than traditional ways of handling medical malpractice lawsuits.

Acknowledgment

Many people gathered data for this study. We thank particularly the members of the Judiciary Committee of the Alaska State Medical Association. We also especially thank The Honorable Ralph A. Moody, Presiding Justice. Third Judicial District, Alaska for helping to make the medical panel

system work.

appendix: The statute 09 55 036

Footnotes

1. AS 09.55.536 does not absolutely require a panel "if the court decides that an expert advisory opinion is not necessary for a decision in the case." It was, however, clearly the recommendation of the Governor's Commission on Medical Malpractice Insurance in 1975 and clearly the intention of the Legislature which incorporated most of the Commission's recommendations into law in 1976 that a panel be seated in every case. The courts have now adopted this practice.

2. One United States Public Health Service physician and one state-employed physician were nominated but not selected. One USPHS optometrist was named to a panel and was chairman.

3. AS 09.55.536 allows concurring or dissenting reports. So far no dissenting report has been submitted. Two concurring opinions were offered.

4. Fifty-five dollars per day.

5. As allows awards to be increased by an amount of interest computed from the day to filing to the day of payment. The interest rate is

6. When the answer to question number 4 was "no", the remaining questions were left unanswered or were marked "N/A."

7. Alaska law, AS 09.55.510, allows "the circumstances at the time of the act complained of" to be considered in measuring the standard of care.

8. Panel reports are admissible.

9. Panelists may be called to court.

10. In addition at least one countersuit against an attorney for allegedly bringing action falsely is under way in Alaska.

11. Parties to a case and their counsel are enjoined by the statute from initiating communication out-of-court with an expert advisory panel.

12. The word "unskillful" was chosen with great care in drafting question 7, "Was the medical injury caused by unskillful care?" A physician above all all else is supposed to be skillful. If he is not, he is no more than a "man on the street." Lay persons have difficult in distinguishing skill from lack of skill, but physicians do not and tend to scorn ineptitude. This is the quintessential talent of the all-medical professional panel and largely explains why there has not been dissent amoung panelists.

13. Tacit approval of the panel design by one insurance company came when it began to appoint its own paid expert advisory panels of local doctors to interpret claims, even using the eight-qyestion format of the new law. This initially created confusion among physicians and others. The company is now more discreet and calls its physician-investigators something other than "expert advisory panels."

14. One panel did reconvene several months after submitting its report when a subsequent operation added information, but the panelists opinion about the case did not change.

15. A flat, worthwhile stipend (plus travel expenses, if any) however simple or convoluted the case, would be preferable to the present perdiem allowance. It would also be easier for the court pay clerk than piecing together as now snatches of time here and there into one perdiem unit. The matter f who pays for deposition subsequent to the panel report is also confusing, although the statute clearly specifies that a panelist will be paid up to $150 per day for appearance in court as an expert witness. Panelists feel harrassed when they are deposed at low fees to repeat what they have already said. Perhaps requiring the party deposing a panelist to pay the physician at his customary or an agreed upon fee would solve this problem.

16. Such as when the answer to question 4 is "no", but expository paragraphs say "maybe".

17. And constitutional (see page 1).

June 4, 1986

Closed Cases

No Fault Found by Expert Advisory Panel

Case	Description	Legal Outcome	Cost of Defense
1	Infected laminectomy	dropped	
2	Footdrop after disc surgery	settled $50,000	
3	Lacerated uterus at colposcopy	dismissed	
4	malaligned wrist fx	dismissed	
5	missed wrist fx	dismissed	1,500
8	post-op adhesions	dismissed	15-20,000
10	angulated leg fx	dismissed	
12d	facial paresis after extraction	dismissed	
15	angulated fx femur	dismissed	
18	missed myo infarction	exonerated by jury	91,717
20	pg after tubal ligation	dismissed	10,000
22	missed myo infarction	dropped	
23d	root canal	settled 11,000	
24	missed sickle cell anemia	dismissed	
25	unnecessary rib biopsy	dropped	
27	mgmt carcinoid	dropped	5-10,000 x 4 (?)
30	malfunctioning defibrillator	settled 45,000	83,666
31	tinnitus p ear surgery	dismissed	8,000
32	missed pneumonia	dropped	
33	IUD complications	dismissed	
36	Morton's neuroma foot	dropped	5,843
38	ankle fx surgery	exonerated by jury	45,000
39	non-union fx femur	dismissed	6,000
40	cast phlebitis	dropped	3,000
41	K-wire hand	dropped	
42	T & A sore throat	dropped	5,000 +
45d	numb face p extractions	settled 15,000	
47	missed Hodgkin's breast	dropped	
48	pg after ligation	settle 5,000	
54	cerebral palsy forceps	settled 1,300,000	
61	stillborn	settled 60,000	
64	cast phlebitis	dropped	
66	dissatisfied about gastroplasty	dropped	5,000
68d	multiple tooth extractions without written consent	settled 30,000	
70d	unsatisfactory orthodontics	dismissed	6-7,000
74	herniorraphy atrophy testis	jury award 50,000	
75	hung self at hospital	settled 780,000 (?)	
85	bladder torn at surgery	dropped	
90	missed pn child	dismissed	12,000

May 20, 1986

Closed Cases

No Expert Advisory Panel

Case	Description	Legal Outcome	Cost of Defense
11	ovary removed s consent	dismissed	
17	nerve damage p shoulder disloc	dropped	
19	hypoparathyroidism p surg	settled 35,000	<20,000
26	missed diverticulitis	settled 600,000	
43	fx ankle surgery	dismissed	
46d	numb face p extractions	dismissed	
50	severed tendons	not served	
51	forceps crushed head	settled 142,000	
55	Hodgkins staging surgery	dismissed	
57	hematoma p groin surgery	dismissed	
58	missed stress fx femur	dismissed	1,000
59	missed fx scapula	dismissed	6,394
62n	infection after Bl inj	not served	
63pa	delay in dx head inj	not served	
92	negligent rx craniotomy	not served	
94	Darvon suicide	exonerated by jury	150,000
95	alteration of records	statute of limitations	15,000
96	drowning resusitation child	jury award 1,175,000	
97	IV infiltration arm child	settled 250,000	
133		SETTLED 3.69 MILLION	

6-1316E
Ford
2/6/90

Original sponsor(s): Labor & Commerce Committee

1 IN THE HOUSE BY THE LABOR & COMMERCE COMMITTEE

2 CS FOR HOUSE BILL NO. 336 (L&C)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to medical malpractice advisory
7 panels and amending Alaska Rule of Civil Procedure
8 72.1."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. AS 09.55.536(a) is amended to read:

11 (a) In an action for damages due to personal injury or death
12 based upon the provision of professional services by a health care
13 provider when the parties have not agreed to arbitration of the claim
14 under AS 09.55.535, the court shall appoint within 20 days after
15 filing of answer to a summons and complaint a <u>five-person</u> [THREE-
16 PERSON] expert advisory panel unless the court decides that an expert
17 advisory opinion is not necessary for a decision in the case. When
18 the action is filed the court shall, by order, determine the profes-
19 sions or specialties to be represented on the expert advisory panel,
20 giving the parties the opportunity to object or make suggestions.
21 <u>Three members of the panel shall be persons who are not health care</u>
22 <u>providers.</u>

23 * Sec. 2. AS 09.55.536(b) is repealed and reenacted to read:

24 (b) The expert advisory panel shall consider only evidence
25 presented by the parties. Under the applicable rules of the Alaska
26 Rules of Civil Procedure, a party may perform discovery, obtain the
27 attendance of witnesses, examine or cross-examine witnesses, obtain a
28 physical examination of the injured person if alive, and obtain the
29 production of all relevant hospital, medical, or other records or

1 materials relating to the health care provided to the injured person.
2 The parties may attend all hearings of the panel. The panel shall
3 maintain a record of testimony or oral statements of witnesses, and
4 shall keep copies of all written statements it receives.
5 * Sec. 3. AS 09.55.536(e) is repealed and reenacted to read:
6 (e) The report of the panel is advisory only and may not be
7 admitted as evidence except the report may be admitted as evidence in
8 determining an award of costs or attorney fees. The members of the
9 panel may not be examined as witnesses on the contents of the report.
10 * Sec. 4. AS 09.55.536(f) is amended to read:
11 (f) <u>Discovery</u> [NO DISCOVERY] may be undertaken in a case <u>before</u>
12 [UNTIL] the report of the expert advisory panel is received. [HOW-
13 EVER, THE COURT MAY RELAX THIS PROHIBITION UPON A SHOWING OF GOOD
14 CAUSE BY ANY PARTY.] If the panel has not completed its report within
15 the 30-day period prescribed in (c) of this section, the court may,
16 upon application, grant it an additional 30 days.
17 * Sec. 5. AS 09.55.536(a), as amended in sec. 1 of this Act, has the
18 effect of amending Alaska Rule of Civil Procedure 72.1 by providing that an
19 expert advisory panel consists of five persons, three of which are not
20 health care providers.
21 * Sec. 6. AS 09.55.536(b), as repealed and reenacted in sec. 2 of this
22 Act, has the effect of amending Alaska Rule of Civil Procedure 72.1 by
23 changing the evidence that the expert advisory panel can consider.
24 * Sec. 7. AS 09.55.536(f), as amended in sec. 4 of this Act, has the
25 effect of amending Alaska Rule of Civil Procedure 72.1, by allowing discov-
26 ery before the report of the expert advisory panel is received.
27
28
29