Chronological: "Professional Liability: Speech to Hawaii Federation of Physicians and Dentists", Mabel Smythe Auditorium, 1985-08-15

news from
Senator DANIEL K. INOUYE

topic: PROFESSIONAL LIABILITY -- Speech to Hawaii Federation of Physicians and Dentists

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For more than a decade now I have been working with my colleagues in the U.S. Senate to ensure that our nation's health care practitioners will be able to provide the highest possible quality of care, without constantly feeling that either Big Brother or our judicial system is always looking over their shoulder and second-guessing them. Admittedly the issue of professional liability, or medical malpractice, is a highly complex one, and one for which there are no easy solutions. However, it is one which we clearly must address, and address in the near future.

I introduced my first malpractice bill back in 1975 during the 94th Congress. As you may recall those were the days of our first "medical malpractice crisis". Hospitals and health care practitioners across the nation were concerned because they could not obtain malpractice coverage--we were then experiencing a "crisis of availability". A number of private insurance companies had decided to drop their malpractice line. In some areas, rates were increased by more than 100% per year. In other areas, there simply was no private insurer who was willing to provide malpractice insurance, at any price.

The Secretary of the then-Department of Health, Education, and Welfare suggested that defensive medicine alone could cost as much as $7 billion per year. I understand the American Medical Association estimates that defensive medicine costs more than $15.1 billion annually. I might add that $15.1 billion is the conservative AMA figure; their high estimate is $40 billion annually.

The original bill which I introduced (S. 215) was based on our experiences at that time with the Workers' Compensation program. It was my hope that we would be able to develop a "no-fault" injury compensation system that would ensure that those injured as a result of medical malpractice would be adequately compensated and, further, that negligent practitioners would be prevented from causing future harm.

During the 94th Congress several days of intense hearings were held on my bill and several related measures. Evidence was presented that only 20 cents of every dollar paid out in malpractice premiums ever reached the pockets of victims, compared with 65 cents of every dollar paid in workers' compensation programs, and 93 cents for Blue Cross. We were told that most of the premium dollars went to either lawyers or insurance companies. We were informed that, whereas in the 1960s only 6,000 malpractice claims were filed each year, by 1970 this number had doubled to 12,000. By the mid-1970s, the incidence of claims increased to the point that one out of every five physicians could expect to be sued during his or her career, and one out of seven physicians in certain high-risk specialties and suit-prone locations could expect to be sued each year. A 1984 estimate from the American Medical Assurance Company, which I understand is a wholly-owned AMA subsidiary, reports that today one out of every five physicians faces the prospect of a claim or suit, and for some specialties, such as OB-GYN, the risks have more than doubled, and even tripled, during the past decade. Today, 60% of all OB-GYNs in the nation have already been sued, 20% of them three or more times. In Florida, I understand that 25% of the obstetricians/gynecologists are no longer delivering babies. As we know, this is exactly the problem we recently faced on Molokai.

I was just recently informed by the American College of Nurse-Midwives that their membership simply can no longer obtain malpractice insurance at any cost, even though their track record of providing quality care is truly exceptional. I mention this in passing to point out that the crisis is affecting all health care professionals, not only physicians. But it is affecting you more than any of the others -- 60% of all liability claims involve physicians and 31% involve hospitals, with many of these claims arising from activities of physicians. And, as you and I know, it is oftentimes the most competent, the most highly skilled physician who is actually sued.

As abruptly as the 1975 Malpractice Crisis came upon us, it suddenly disappeared. Two major changes in the malpractice insurance system had evolved: new sources of insurance were created, including the formation of new companies -- often owned and administered by local medical societies; and there were changes in how malpractice insurance contracts were written. A number of states enacted so-called "corrective legislation". The Library of Congress informed me, for example, that by 1976, 48 of the 54 jurisdictions in our nation had established, by statute, a plan to assure the availability of malpractice coverage for providers in their area. Thirty-five States had established Joint Underwriting Associations with mandatory participation of all insurers operating in their State. Yet, in my judgment, there still was the need for federal action. Many of the underlying

concepts in my original proposal had grown out of discussions with the past-President of the American Medical Association, but his organization still took the stance that the federal government should not be involved in what they viewed primarily as a State issue. I guessed that the time had not yet come. However, the AMA's House of Delegates recently decided to urge "corrective federal intervention". During the 95th Congress, then-Senator Jacob Javits and I worked closely with President Carter's Department of Justice to develop a comprehensive approach. As part of our background efforts, in June, 1979 we sent a draft bill to every Governor asking his or her input. We also weighed very heavily the comments that had been made during the earlier Senate hearings. On September 25, 1980, I introduced S. 3161, the Health Care Protection Act of 1980 which in this Congress is S. 175, the Health Care Protection Act of 1985.

The essence of my proposal is to build upon the strengths of our States and local medical and legal societies. Rather than begin with the assumption that only "Big Brother" knows what is right, I have started from the frame of reference that the vast, vast majority of our nation's health care practitioners and attorneys really wish to do what is best for their patients or clients. Providing quality health care is an art, it is not an exact science. No one, and especially not the patient, is well-served if physicians are forced to feel that they are constantly in danger of being second-guessed. Hindsight is always 100% perfect, I just wish we knew someone who is so in real life.

My proposal is a combination arbitration-screening panel approach. As drafted, in order to be eligible to receive federal financial support, the individual States would agree to follow certain procedural guidelines. All allegations of health care malpractice would be brought before a malpractice screening panel. The composition of the panel, or panels as appropriate, would include, at a minimum, an appropriate health care provider, an individual admitted to practice law in the courts of the State, and a layperson who is not affiliated with a health care practitioner or institution. Under my proposal, each State would have the flexibility to add other members to the panel as the local authorities feel fit. All who serve would be immune from suits for defamation, libel, or slander unless malice or actual knowledge of the falsity of a defamatory statement is proved. Each panel shall have original and exclusive jurisdiction within the State to hear and decide any claims for damages resulting from injury or death as a consequence of alleged malpractice. It is my express intent to ensure that neither patients nor practitioners must suffer long delays in having their concerns addressed. Accordingly, I have proposed authorizing the panel, at its discretion, to call witnesses and expert testimony. The panel shall also have the power to authorize discovery procedures, prior to their hearings, if appropriate under applicable state law.

At the panel's hearing each party may be represented by legal counsel if they so desire. The claimant shall be required to present all evidence supporting his or her claim, and each defendant shall similarly be required to present all evidence rebutting or defending against the claim. After hearing all of the evidence the panel shall then decide whether or not the malpractice was proved, and if so, whether the injury resulted from proven malpractice of the defendant. Within 30 days after the conclusion of the hearing the panel shall submit a written decision to both parties. If the panel finds compensable injury resulting from malpractice, it shall determine the amount of damages owed under applicable State law by each liable defendant. If there is more than one, the panel shall also enter an order against such defendant to pay that amount. If subsequent court proceedings are necessary to enforce the award, the only issue to be considered is whether payment has been made according to the terms of the award order. The decision of the panel shall not be subject to review, unless an allegation of fraud or unlawful conflict of interest against a panel member has been raised. I have also proposed that a strict limit be imposed on attorneys fees such that no more than one third of the first $100,000 would be awarded to the attorney of record, with a gradually increasing scale to include no more than 15% of that in excess of $300,000. I have also provided that any settlements "out of court" must be filed with the panel, and these shall not provide for attorney's fees in excess of what would have been provided if the panel had issued the award agreement. Finally, all findings of malpractice by the panel, and all "out of court" settlements are to be reported to the appropriate licensure board and the State Insurance Commissioner.

I also included a special provision which, in my judgment, is absolutely necessary for the system to work. As an attorney, I have been trained to give a very high priority to the individual's right to seek redress before a jury of his or her peers. Our court system, and its inherent adversarial nature, have served us well for many, many generations. Yet, as one whose life-long ambition was to be a surgeon, I have a special appreciation for the complexities of medicine, and my background research strongly suggests that our current tort-oriented system does not serve everyone well. I keep coming back to the fundamental point that the vast, vast majority of both medical and legal professionals are competent and dedicated. Yet, it is evident to any objective observer that both of our professions include a small percentage of practitioners whom we wish would never have graduated. For example, the recent Bhopal disaster has resulted in more than 65 separate law suits in our own state and federal courts. I have even heard that the number of claimants has exceeded those who were living there. What I have proposed in my bill is that any party shall have the right to a trial De Novo in the State court. However, if either the claimant or a defendant takes this

route, the decision of the panel shall be admissible in evidence in such a trial. Further, if the party requesting the new trial does not "substantially improve" his or her position, then he or she is liable for all costs of the trial, including reasonable attorney's fees. This provision in my judgment will eliminate the so-called "nuisance suit". This has been the real difficulty with arbitration approaches to date: How does one really give "teeth" to the tempered decision of reasonable professionals? There are a number of other provisions which I have suggested in S. 175, such as requiring that each state be encouraged to establish a program requiring that all health care facilities, other than individual physician's offices, participate in a risk-management program. However, I believe that I have covered the fundamental aspects of my program.

During my years in the U.S. Congress I have learned that change takes time. It may seem to some of you that a decade is an awfully long time to wait for Congressional relief. However, there are many conflicting views as to what, if anything, should be done. I am certain that it will be no surprise to any of you that many members of the Bar strenuously disagree with my proposal, especially my insistence on limiting their fees. Yet, I remain convinced that there is indeed a significant federal role, and federal responsibility, still to be articulated in addressing professional liability matters. It makes no sense at all to me, nor do I feel that it is in our national interest, to report that malpractice premiums for all physicians increased 434% between 1970 and 1982, and yet today we now learn of requests from insurance companies in Massachusetts, for example, to once again raise their rates, this time by 163%. All of us wish to curtail the ever-escalating costs of health care in our nation. The most recent statistics indicate that we spent $387.4 billion on health care, or 10.6% of our Gross National Product, during 1984. Once again, this was the highest in our nation's history. There are reasonable ways that we can save. For one, we could aggressively address the issue of Defensive Medicine and Professional Liability. We could start by admitting to ourselves that our current state of affairs serves no one well, especially not the patient. We could ensure that those who do their best to serve those most in need, those who are willing to accept the challenges of the most difficult cases will be praised and rewarded for their efforts, and not forever having someone looking over their shoulder. You may be assured that I shall do my very best.

SPEECH DELIVERED TO:
HAWAII FEDERATION OF PHYSICIANS & DENTISTS
Seminar on tort reform re medical malpractice
Mabel Smyth Auditorium-Honolulu- August 15, 1985

PROFESSIONAL LIABILITY/MEDICAL MALPRACTICE

~~FOR MORE THAN A DECADE NOW~~ I HAVE BEEN WORKING for more than a decade WITH MY COLLEAGUES IN THE U.S. SENATE TO ENSURE THAT OUR NATION'S HEALTH CARE PRACTITIONERS WILL BE ABLE TO PROVIDE THE HIGHEST POSSIBLE QUALITY OF CARE, WITHOUT CONSTANTLY FEELING THAT EITHER BIG BROTHER OR OUR JUDICIAL SYSTEM IS ALWAYS LOOKING OVER THEIR SHOULDER AND SECOND-GUESSING THEM. ADMITTEDLY THE ISSUE OF PROFESSIONAL LIABILITY, OR MEDICAL MALPRACTICE, IS A HIGHLY COMPLEX ONE, AND ONE FOR WHICH THERE ARE NO EASY SOLUTIONS. HOWEVER, IT IS ONE WHICH WE CLEARLY MUST ADDRESS, AND ADDRESS ~~IN THE NEAR FUTURE~~ soon.

I INTRODUCED MY FIRST MALPRACTICE BILL BACK IN 1975, ~~DURING THE 94TH CONGRESS~~. AS YOU MAY RECALL THOSE WERE THE DAYS OF OUR FIRST "MEDICAL MALPRACTICE CRISIS". HOSPITALS AND HEALTH CARE PRACTITIONERS ACROSS THE NATION WERE CONCERNED BECAUSE THEY COULD NOT OBTAIN MALPRACTICE COVERAGE--WE WERE THEN EXPERIENCING A "CRISIS OF AVAILABILITY". A NUMBER OF PRIVATE INSURANCE COMPANIES HAD DECIDED TO DROP THEIR MALPRACTICE LINE. IN SOME AREAS, RATES WERE INCREASED BY MORE THAN 100% PER YEAR. IN OTHER AREAS, THERE SIMPLY WAS NO PRIVATE INSURER WHO WAS WILLING TO PROVIDE MALPRACTICE INSURANCE, AT ANY PRICE.

THE SECRETARY OF THE THEN-DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE SUGGESTED THAT DEFENSIVE MEDICINE ALONE COULD COST AS MUCH AS $7 BILLION PER YEAR. I UNDERSTAND THE AMERICAN MEDICAL ASSOCIATION ESTIMATES THAT DEFENSIVE MEDICINE COSTS MORE THAN $15.1 BILLION ANNUALLY. I MIGHT ADD THAT $15.1 BILLION IS THE CONSERVATIVE AMA FIGURE; THEIR HIGH ESTIMATE IS $40 BILLION ANNUALLY.

THE ORIGINAL BILL WHICH I INTRODUCED (S. 215) WAS BASED ON OUR EXPERIENCES AT THAT TIME WITH THE WORKERS' COMPENSATION PROGRAM.

IT WAS MY HOPE THAT WE WOULD BE ABLE TO DEVELOP A "NO-FAULT" INJURY COMPENSATION SYSTEM THAT WOULD ENSURE THAT THOSE INJURED AS A RESULT OF MEDICAL MALPRACTICE WOULD BE ADEQUATELY COMPENSATED AND, FURTHER, THAT NEGLIGENT PRACTITIONERS WOULD BE PREVENTED FROM CAUSING FUTURE HARM.

DURING ~~THE 94TH CONGRESS~~ 1975 SEVERAL DAYS OF INTENSE HEARINGS WERE HELD ON MY BILL AND SEVERAL RELATED MEASURES. EVIDENCE WAS PRESENTED THAT ONLY 20 CENTS OF EVERY DOLLAR PAID OUT IN MALPRACTICE PREMIUMS EVER REACHED THE POCKETS OF VICTIMS, COMPARED WITH 65 CENTS OF EVERY DOLLAR PAID IN WORKERS' COMPENSATION PROGRAMS, AND 93 CENTS FOR BLUE CROSS.

WE WERE TOLD THAT MOST OF THE PREMIUM DOLLARS WENT TO EITHER LAWYERS OR INSURANCE COMPANIES. WE WERE INFORMED THAT, WHEREAS IN THE 1960S ONLY 6,000 MALPRACTICE CLAIMS WERE FILED EACH YEAR, BY 1970 THIS NUMBER HAD DOUBLED TO 12,000. BY THE MID-1970S, THE INCIDENCE OF CLAIMS INCREASED TO THE POINT THAT ONE OUT OF EVERY FIVE PHYSICIANS COULD EXPECT TO BE SUED DURING HIS OR HER CAREER, AND ONE OUT OF SEVEN PHYSICIANS IN CERTAIN HIGH-RISK SPECIALTIES AND SUIT-PRONE LOCATIONS COULD EXPECT TO BE SUED EACH YEAR.

A 1984 ESTIMATE FROM THE AMERICAN MEDICAL ASSURANCE COMPANY, ~~WHICH I UNDERSTAND IS A WHOLLY OWNED AMA SUBSIDIARY, REPORTS~~ suggests THAT TODAY ONE OUT OF EVERY FIVE PHYSICIANS FACES THE PROSPECT OF A CLAIM OR SUIT, AND FOR SOME SPECIALTIES, SUCH AS OB-GYN, THE RISKS HAVE MORE THAN DOUBLED, AND EVEN TRIPLED, DURING THE PAST DECADE. TODAY, 60% OF ALL OB-GYNS IN THE NATION HAVE ALREADY BEEN SUED, 20% OF THEM THREE OR MORE TIMES. IN FLORIDA, I UNDERSTAND THAT 25% OF THE OBSTETRICIANS/GYNECOLOGISTS ARE NO LONGER DELIVERING BABIES. AS WE KNOW, THIS IS EXACTLY THE PROBLEM WE RECENTLY FACED ON MOLOKAI.

I WAS JUST RECENTLY INFORMED BY THE AMERICAN COLLEGE OF NURSE-MIDWIVES THAT THEIR MEMBERSHIP SIMPLY CAN NO LONGER OBTAIN MALPRACTICE INSURANCE AT ANY COST, EVEN THOUGH THEIR TRACK RECORD OF PROVIDING QUALITY CARE IS TRULY EXCEPTIONAL. I MENTION THIS IN PASSING TO POINT OUT THAT THE CRISIS IS AFFECTING ALL HEALTH CARE PROFESSIONALS, NOT ONLY PHYSICIANS. BUT IT IS AFFECTING YOU MORE THAN ANY OF THE OTHERS -- 60% OF ALL LIABILITY CLAIMS INVOLVE PHYSICIANS AND 31% INVOLVE HOSPITALS, WITH MANY OF THESE CLAIMS ARISING FROM ACTIVITIES OF PHYSICIANS. AND, AS YOU AND I KNOW, IT IS OFTENTIMES THE MOST COMPETENT, THE MOST HIGHLY SKILLED PHYSICIAN WHO IS ~~ACTUALLY~~ SUED.

AS ABRUPTLY AS THE 1975 MALPRACTICE CRISIS CAME UPON US, IT SUDDENLY DISAPPEARED. TWO MAJOR CHANGES IN THE MALPRACTICE INSURANCE SYSTEM HAD EVOLVED: NEW SOURCES OF INSURANCE WERE CREATED, INCLUDING THE FORMATION OF NEW COMPANIES -- OFTEN OWNED AND ADMINISTERED BY LOCAL MEDICAL SOCIETIES; AND THERE WERE CHANGES IN ~~THE~~ MALPRACTICE INSURANCE CONTRACTS. ~~WERE WRITTEN.~~ A NUMBER OF STATES ENACTED SO-CALLED "CORRECTIVE LEGISLATION". THE LIBRARY OF CONGRESS INFORMED ME, FOR EXAMPLE, THAT BY 1976, 48 OF THE 54 JURISDICTIONS IN OUR NATION HAD ESTABLISHED, BY STATUTE, A PLAN TO ASSURE THE AVAILABILITY OF MALPRACTICE COVERAGE FOR PROVIDERS IN THEIR AREA.

THIRTY-FIVE STATES HAD ESTABLISHED JOINT UNDERWRITING ASSOCIATIONS WITH MANDATORY PARTICIPATION OF ALL INSURERS OPERATING IN THEIR STATE. YET, IN MY JUDGMENT, THERE STILL WAS THE NEED FOR FEDERAL ACTION. MANY OF THE UNDERLYING CONCEPTS IN MY ORIGINAL PROPOSAL HAD GROWN OUT OF DISCUSSIONS WITH THE PAST-PRESIDENT OF THE AMERICAN MEDICAL ASSOCIATION, BUT HIS ORGANIZATION STILL TOOK THE STANCE THAT THE FEDERAL GOVERNMENT SHOULD NOT BE INVOLVED IN WHAT THEY VIEWED PRIMARILY AS A STATE ISSUE. I GUESSED THAT THE TIME HAD NOT YET COME. HOWEVER, THE AMA'S HOUSE OF DELEGATES RECENTLY DECIDED TO URGE "CORRECTIVE FEDERAL INTERVENTION".

DURING THE 95TH CONGRESS, THEN-SENATOR JACOB JAVITS AND I WORKED CLOSELY WITH ~~PRESIDENT CARTER'S~~ The DEPARTMENT OF JUSTICE TO DEVELOP A COMPREHENSIVE APPROACH. AS PART OF OUR BACKGROUND EFFORTS, IN JUNE, 1979 WE SENT A DRAFT BILL TO EVERY GOVERNOR ASKING HIS OR HER INPUT. WE ALSO WEIGHED VERY HEAVILY THE COMMENTS THAT HAD BEEN MADE DURING THE EARLIER SENATE HEARINGS. ON SEPTEMBER 25, 1980, I INTRODUCED S.3161, THE HEALTH CARE PROTECTION ACT OF 1980 WHICH IN THIS CONGRESS IS S. 175, THE HEALTH CARE PROTECTION ACT OF 1985.

THE ESSENCE OF MY PROPOSAL IS TO BUILD UPON THE STRENGTHS OF OUR STATES AND LOCAL MEDICAL AND LEGAL SOCIETIES. RATHER THAN BEGIN WITH THE ASSUMPTION THAT ONLY "BIG BROTHER" KNOWS WHAT IS RIGHT, I HAVE STARTED FROM THE FRAME OF REFERENCE THAT THE VAST, VAST MAJORITY OF OUR NATION'S HEALTH CARE PRACTITIONERS AND ATTORNEYS REALLY WISH TO DO WHAT IS BEST FOR THEIR PATIENTS OR CLIENTS. PROVIDING QUALITY HEALTH CARE IS AN ART, IT IS NOT AN EXACT SCIENCE. NO ONE, AND ESPECIALLY NOT THE PATIENT, IS WELL-SERVED IF PHYSICIANS ARE FORCED TO FEEL THAT THEY ARE CONSTANTLY IN DANGER OF BEING SECOND-GUESSED. HINDSIGHT IS ALWAYS 100% PERFECT, I JUST WISH WE KNEW SOMEONE WHO IS SO IN REAL LIFE.

MY PROPOSAL IS A COMBINATION ARBITRATION-SCREENING PANEL APPROACH. AS DRAFTED, IN ORDER TO BE ELIGIBLE TO RECEIVE FEDERAL FINANCIAL SUPPORT, THE INDIVIDUAL STATES WOULD AGREE TO FOLLOW CERTAIN PROCEDURAL GUIDELINES. ALL ALLEGATIONS OF HEALTH CARE MALPRACTICE WOULD BE BROUGHT BEFORE A MALPRACTICE SCREENING PANEL. THE COMPOSITION OF THE PANEL, OR PANELS AS APPROPRIATE, WOULD INCLUDE, AT A MINIMUM, AN APPROPRIATE HEALTH CARE PROVIDER, AN INDIVIDUAL ADMITTED TO PRACTICE LAW IN THE COURTS OF THE STATE, AND A LAYPERSON WHO IS NOT AFFILIATED WITH A HEALTH CARE PRACTITIONER OR INSTITUTION.

UNDER MY PROPOSAL, EACH STATE WOULD HAVE THE FLEXIBILITY TO ADD OTHER MEMBERS TO THE PANEL AS THE LOCAL AUTHORITIES FEEL FIT. ALL WHO SERVE WOULD BE IMMUNE FROM SUITS FOR DEFAMATION, LIBEL, OR SLANDER UNLESS MALICE OR ACTUAL KNOWLEDGE OF THE FALSITY OF A DEFAMATORY STATEMENT IS PROVED. EACH PANEL SHALL HAVE ORIGINAL AND EXCLUSIVE JURISDICTION WITHIN THE STATE TO HEAR AND DECIDE ANY CLAIMS FOR DAMAGES RESULTING FROM INJURY OR DEATH AS A CONSEQUENCE OF ALLEGED MALPRACTICE. IT IS MY EXPRESS INTENT TO ENSURE THAT NEITHER PATIENTS NOR PRACTITIONERS MUST SUFFER LONG DELAYS IN HAVING THEIR CONCERNS ADDRESSED.

ACCORDINGLY, I HAVE PROPOSED AUTHORIZING THE PANEL, AT ITS DISCRETION, TO CALL WITNESSES AND EXPERT TESTIMONY. THE PANEL SHALL ALSO HAVE THE POWER TO AUTHORIZE DISCOVERY PROCEDURES, PRIOR TO THEIR HEARINGS, IF APPROPRIATE UNDER APPLICABLE STATE LAW.

AT THE PANEL'S HEARING EACH PARTY MAY BE REPRESENTED BY LEGAL COUNSEL IF THEY SO DESIRE. THE CLAIMANT SHALL BE REQUIRED TO PRESENT ALL EVIDENCE SUPPORTING HIS OR HER CLAIM, AND EACH DEFENDANT SHALL SIMILARLY BE REQUIRED TO PRESENT ALL EVIDENCE REBUTTING OR DEFENDING AGAINST THE CLAIM.

AFTER HEARING ALL OF THE EVIDENCE THE PANEL SHALL THEN DECIDE WHETHER OR NOT THE MALPRACTICE WAS PROVED, AND IF SO, WHETHER THE INJURY RESULTED FROM PROVEN MALPRACTICE OF THE DEFENDANT. WITHIN 30 DAYS AFTER THE CONCLUSION OF THE HEARING THE PANEL SHALL SUBMIT A WRITTEN DECISION TO BOTH PARTIES. IF THE PANEL FINDS COMPENSABLE INJURY RESULTING FROM MALPRACTICE, IT SHALL DETERMINE THE AMOUNT OF DAMAGES OWED UNDER APPLICABLE STATE LAW BY EACH LIABLE DEFENDANT. IF THERE IS MORE THAN ONE, THE PANEL SHALL ALSO ENTER AN ORDER AGAINST SUCH DEFENDANT TO PAY THAT AMOUNT.

IF SUBSEQUENT COURT PROCEEDINGS ARE NECESSARY TO ENFORCE THE AWARD, THE ONLY ISSUE TO BE CONSIDERED IS WHETHER PAYMENT HAS BEEN MADE ACCORDING TO THE TERMS OF THE AWARD ORDER. THE DECISION OF THE PANEL SHALL NOT BE SUBJECT TO REVIEW, UNLESS AN ALLEGATION OF FRAUD OR UNLAWFUL CONFLICT OF INTEREST AGAINST A PANEL MEMBER HAS BEEN RAISED. I HAVE ALSO PROPOSED THAT A STRICT LIMIT BE IMPOSED ON ATTORNEYS FEES SUCH THAT NO MORE THAN ONE THIRD OF THE FIRST $100,000 WOULD BE AWARDED TO THE ATTORNEY OF RECORD, WITH A GRADUALLY INCREASING SCALE TO INCLUDE NO MORE THAN 15% OF THAT IN EXCESS OF $300,000.

I HAVE ALSO PROVIDED THAT ANY SETTLEMENTS "OUT OF COURT" MUST BE FILED WITH THE PANEL, AND THESE SHALL NOT PROVIDE FOR ATTORNEY'S FEES IN EXCESS OF WHAT WOULD HAVE BEEN PROVIDED IF THE PANEL HAD ISSUED THE AWARD AGREEMENT. FINALLY, ALL FINDINGS OF MALPRACTICE BY THE PANEL, AND ALL "OUT OF COURT" SETTLEMENTS ARE TO BE REPORTED TO THE APPROPRIATE LICENSURE BOARD AND THE STATE INSURANCE COMMISSIONER.

I ALSO INCLUDED A SPECIAL PROVISION WHICH, IN MY JUDGMENT, IS ABSOLUTELY NECESSARY FOR THE SYSTEM TO WORK.

AS AN ATTORNEY, I HAVE BEEN TRAINED TO GIVE A VERY HIGH PRIORITY TO THE INDIVIDUAL'S RIGHT TO SEEK REDRESS BEFORE A JURY OF HIS OR HER PEERS. OUR COURT SYSTEM, AND ITS INHERENT ADVERSARIAL NATURE, HAVE SERVED US WELL FOR MANY, MANY GENERATIONS. YET, AS ONE WHOSE LIFE-LONG AMBITION WAS TO BE A SURGEON, I HAVE A SPECIAL APPRECIATION FOR THE COMPLEXITIES OF MEDICINE, AND MY BACKGROUND RESEARCH STRONGLY SUGGESTS THAT OUR CURRENT TORT-ORIENTED SYSTEM DOES NOT SERVE EVERYONE WELL. I KEEP COMING BACK TO THE FUNDAMENTAL POINT THAT THE VAST, VAST MAJORITY OF BOTH MEDICAL AND LEGAL PROFESSIONALS ARE COMPETENT AND DEDICATED.

YET, IT IS EVIDENT TO ANY OBJECTIVE OBSERVER THAT BOTH OF OUR PROFESSIONS INCLUDE A SMALL PERCENTAGE OF PRACTITIONERS WHOM WE WISH WOULD NEVER HAVE GRADUATED.

FOR EXAMPLE, THE RECENT BHOPAL DISASTER HAS RESULTED IN MORE THAN 65 SEPARATE LAW SUITS IN OUR OWN STATE AND FEDERAL COURTS. I HAVE EVEN HEARD THAT THE NUMBER OF CLAIMANTS HAS EXCEEDED THOSE WHO WERE LIVING THERE. WHAT I HAVE PROPOSED IN MY BILL IS THAT ANY PARTY SHALL HAVE THE RIGHT TO A TRIAL DE NOVO IN THE STATE COURT. HOWEVER, IF EITHER THE CLAIMANT OR A DEFENDANT TAKES THIS ROUTE, THE DECISION OF THE PANEL SHALL BE ADMISSIBLE IN EVIDENCE IN SUCH A TRIAL.

FURTHER, IF THE PARTY REQUESTING THE NEW TRIAL DOES NOT "SUBSTANTIALLY IMPROVE" HIS OR HER POSITION, THEN HE OR SHE IS LIABLE FOR ALL COSTS OF THE TRIAL, INCLUDING REASONABLE ATTORNEY'S FEES. THIS PROVISION IN MY JUDGMENT WILL ELIMINATE THE SO-CALLED "NUISANCE SUIT". THIS HAS BEEN THE REAL DIFFICULTY WITH ARBITRATION APPROACHES TO DATE: HOW DOES ONE REALLY GIVE "TEETH" TO THE TEMPERED DECISION OF REASONABLE PROFESSIONALS?

THERE ARE A NUMBER OF OTHER PROVISIONS WHICH I HAVE SUGGESTED IN S. 175, SUCH AS REQUIRING THAT EACH STATE BE ENCOURAGED TO ESTABLISH A PROGRAM REQUIRING THAT ALL HEALTH CARE FACILITIES, OTHER THAN INDIVIDUAL PHYSICIAN'S OFFICES, PARTICIPATE IN A RISK-MANAGEMENT PROGRAM. HOWEVER, I BELIEVE THAT I HAVE COVERED THE FUNDAMENTAL ASPECTS OF MY PROGRAM.

DURING MY YEARS IN THE U.S. CONGRESS I HAVE LEARNED THAT CHANGE TAKES TIME. IT MAY SEEM TO SOME OF YOU THAT A DECADE IS AN AWFULLY LONG TIME TO WAIT FOR CONGRESSIONAL RELIEF. HOWEVER, THERE ARE MANY CONFLICTING VIEWS AS TO WHAT, IF ANYTHING, SHOULD BE DONE.

I AM CERTAIN THAT IT WILL BE NO SURPRISE TO ANY OF YOU THAT MANY MEMBERS OF THE BAR STRENUOUSLY DISAGREE WITH MY PROPOSAL, ESPECIALLY MY INSISTENCE ON LIMITING THEIR FEES. YET, I REMAIN CONVINCED THAT THERE IS INDEED A SIGNIFICANT FEDERAL ROLE, AND FEDERAL RESPONSIBILITY, STILL TO BE ARTICULATED IN ADDRESSING PROFESSIONAL LIABILITY MATTERS. IT MAKES NO SENSE AT ALL TO ME, NOR DO I FEEL THAT IT IS IN OUR NATIONAL INTEREST, TO REPORT THAT MALPRACTICE PREMIUMS FOR ALL PHYSICIANS INCREASED 434% BETWEEN 1970 AND 1982, AND YET TODAY WE NOW LEARN OF REQUESTS FROM INSURANCE COMPANIES IN MASSACHUSETTS, FOR EXAMPLE, TO ONCE AGAIN RAISE THEIR RATES, THIS TIME BY 163%.

ALL OF US WISH TO CURTAIL THE EVER-ESCALATING COSTS OF HEALTH CARE IN OUR NATION. THE MOST RECENT STATISTICS INDICATE THAT WE SPENT $387.4 BILLION ON HEALTH CARE, OR 10.6% OF OUR GROSS NATIONAL PRODUCT, DURING 1984. ONCE AGAIN, THIS WAS THE HIGHEST IN OUR NATION'S HISTORY. THERE ARE REASONABLE WAYS THAT WE CAN SAVE. FOR ONE, WE COULD AGGRESSIVELY ADDRESS THE ISSUE OF DEFENSIVE MEDICINE AND PROFESSIONAL LIABILITY. WE COULD START BY ADMITTING TO OURSELVES THAT OUR CURRENT STATE OF AFFAIRS SERVES NO ONE WELL, ESPECIALLY NOT THE PATIENT.

WE COULD ENSURE THAT THOSE WHO DO THEIR BEST TO SERVE THOSE MOST IN NEED, THOSE WHO ARE WILLING TO ACCEPT THE CHALLENGES OF THE MOST DIFFICULT CASES WILL BE PRAISED AND REWARDED FOR THEIR EFFORTS, AND NOT FOREVER HAVING SOMEONE LOOKING OVER THEIR SHOULDER. YOU MAY BE ASSURED THAT I SHALL DO MY VERY BEST.

(PAT)

FOR AUGUST 15 - Hi. Fed. of Physicians & Dentists

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D-R-A-F-T August 2, 1985

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PROFESSIONAL LIABILITY SPEECH

For more than a decade now I have been working with my colleagues in the U.S. Senate to ensure that our nation's health care practitioners will be able to provide the highest possible quality of care, without constantly feeling that either Big Brother or our judicial system is always looking over their shoulder and second-guessing them. Admittedly the issue of professional liability, or medical malpractice, is a highly complex one, and one for which there are no easy solutions. However, it is one which we clearly must address, and address in the near future.

I introduced my first malpractice bill back in 1975 during the 94th Congress. As you may recall those were the days of our first "medical malpractice crisis". Hospitals and health care practitioners across the nation were concerned because they could not obtain malpractice coverage--we were then experiencing a "crisis of availability". A number of private insurance companies had decided to drop their malpractice line. In some areas, rates were increased by more than 100% per year. In other areas, there simply was no private insurer who was willing to provide malpractice insurance, at any price. ~~In other areas, rates were increased by more than 100% per year.~~

The Secretary of the then-Department of Health, Education, and Welfare suggested that defensive medicine

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alone could cost as much as $7 billion per year. I understand the American Medical Association estimates that defensive medicine costs ~~today range from between 25% and 50% of the total cost of treatment, or~~ more than $15.1 billion annually. I might add that $15.1 billion is the conservative AMA figure; their high estimate is $40 billion annually.

The original bill which I introduced (S. 215) was based on our experiences at that time with the Workers' Compensation program. It was my hope that we would be able to develop a "no-fault" injury compensation system that would ensure that those injured as a result of medical malpractice would be adequately compensated and, further, that ~~truly errant~~ negligent practitioners would be prevented from causing future harm.

During the 94th Congress several days of intense hearings were held on my bill and several related measures. Evidence was presented that only 20 cents of every dollar paid out in malpractice premiums ever reached the pockets of victims, compared with 65 cents of every dollar paid in workers' compensation programs, and 93 cents for Blue Cross. We were told that most of the premium dollars went to either lawyers or insurance companies. We were informed that, whereas in the 1960s only 6,000 malpractice claims were filed each year, by 1970 this number had doubled to 12,000. By the mid-1970s, the incidence of claims increased to the point that one out of every five physicians could expect to be sued during his or her career, and one

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out of seven physicians in certain high-risk specialties and suit-prone locations could expect to be sued each year. A 1984 estimate from the American Medical Assurance Company, which I understand is a wholly-owned AMA subsidiary, reports that today one out of every five physicians faces the prospect of a claim or suit, and for some specialties, such as OB-GYN, the risks have more than doubled, and even tripled, during the past decade. Today, 60% of all OB-GYNs in the nation have already been sued, 20% of them three or more times. In Florida, I understand that 25% of the obstetricians/gynecologists are no longer delivering babies. As we know, this is exactly the problem we recently faced on Molokai.

I was just recently informed by the American College of Nurse-Midwives that their membership simply can no longer obtain malpractice insurance at any cost, even though their track record of providing quality care is truly exceptional. I mention this in passing to point out that the crisis is affecting all health care professionals, not only physicians. But it is affecting you more than any of the others -- 60% of all liability claims involve physicians and 31% involve hospitals, with many of these claims arising from activities of physicians. And, as you and I know, it is oftentimes the most competent, the most highly skilled physician who is actually sued. ~~For example, in the mid-1970s I was informed that seven chiefs of neurosurgery in New York City had collectively been sued 25~~

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~~times, and when I met with one of them, the then-pending potential judgment against them was $67 million.~~

As abruptly as the 1975 Malpractice Crisis came upon us, it suddenly disappeared. Two major changes in the malpractice insurance system had evolved: new sources of insurance were created, including the formation of new companies -- often owned and administered by local medical societies; and there were changes in how malpractice insurance contracts were written. A number of states enacted so-called "corrective legislation". The Library of Congress informed me, for example, that by 1976, 48 of the 54 jurisdictions in our nation had established, by statute, a plan to assure the availability of malpractice coverage for providers in their area. Thirty-five States had established Joint Underwriting Associations with mandatory participation of all insurers operating in their State. Yet, in my judgment, there still was the need for federal action. Many of the underlying concepts in my original proposal had grown out of discussions with the past-President of the American Medical Association, but his organization still took the stance that the federal government should not be involved in what they viewed primarily as a State issue. I guessed that the time had not yet come. ~~As an aside, In light of this, I was most pleased to learn of~~ However, the AMA's House of Delegates recently decided to urge "corrective federal intervention", ~~-- you may be assured that I would be pleased to be of any assistance that I can.~~

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During the 95th Congress, then-Senator Jacob Javits and I worked closely with President Carter's Department of Justice to develop a comprehensive approach. As part of our background efforts, in June, 1979 we sent a draft bill to every Governor asking his or her input. We also weighed very heavily the comments that had been made during the earlier Senate hearings. ~~The Department of Justice staff found out, for example, that malpractice costs were, by themselves, adding approximately $5 per day per person to our hospital costs.~~ On September 25, 1980, I introduced S. 3161, the Health Care Protection Act of 1980 which in this Congress is S. 175, the Health Care Protection Act of 1985.

The essence of my proposal is to build upon the strengths of our States and local medical and legal societies. Rather than begin with the assumption that only "Big Brother" knows what is right, I have started from the frame of reference that the vast, vast majority of our nation's health care practitioners and attorneys really wish to do what is best for their patients or clients. Providing quality health care is an art, it is not an exact science. No one, and especially not the patient, is well-served if physicians are forced to feel that they are constantly in danger of being second-guessed. Hindsight is always 100% perfect, I just wish we knew someone who is so in real life.

My proposal is a combination arbitration-screening panel approach. As drafted, in order to be eligible to receive federal financial support, the individual States

would agree to follow certain procedural guidelines. All allegations of health care malpractice would be brought before a malpractice screening panel. The composition of the panel, or panels as appropriate, would include, at a minimum, an appropriate health care provider, an individual admitted to practice law in the courts of the State, and a layperson who is not affiliated with a health care practitioner or institution. Under my proposal, each State would have the flexibility to add other members to the panel as the local authorities feel fit. All who serve would be immune from suits for defamation, libel, or slander unless malice or actual knowledge of the falsity of a defamatory statement is proved. Each panel shall have original and exclusive jurisdiction within the State to hear and decide any claims for damages resulting from injury or death as a consequence of alleged malpractice. It is my express intent to ensure that neither patients nor practitioners must suffer long delays in having their concerns addressed. Accordingly, I have proposed authorizing the panel, at its discretion, to call witnesses and expert testimony. The panel shall also have the power to authorize discovery procedures, prior to their hearings, if appropriate under applicable state law.

At the panel's hearing each party may be represented by legal counsel if they so desire. The claimant shall be required to present all evidence supporting his or her claim, and each defendant shall similarly be required to present all evidence rebutting or defending against the

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claim. After hearing all of the evidence the panel shall then decide whether or not the malpractice was proved, and if so, whether the injury resulted from proven malpractice of the defendant. Within 30 days after the conclusion of the hearing the panel shall submit a written decision to both parties. If the panel finds compensable injury resulting from malpractice, it shall determine the amount of damages owed under applicable State law by each liable defendant. If there is more than one, the panel shall also enter an order against such defendant to pay that amount. If subsequent court proceedings are necessary to enforce the award, the only issue to be considered is whether payment has been made according to the terms of the award order. The decision of the panel shall not be subject to review, unless an allegation of fraud or unlawful conflict of interest against a panel member has been raised. I have also proposed that a strict limit be imposed on attorneys fees such that no more than one third of the first $100,000 would be awarded to the attorney of record, with a gradually increasing scale to include no more than 15% of that in excess of $300,000. I have also provided that any settlements "out of court" must be filed with the panel, and these shall not provide for attorney's fees in excess of what would have been provided if the panel had issued the award agreement. Finally, all findings of malpractice by the panel, and all "out of court" settlements are to be reported to the appropriate licensure board and the State Insurance Commissioner.

I also included a special provision which, in my judgment, is absolutely necessary for the system to work. As an attorney, I have been trained to give a very high priority to the individual's right to seek redress before a jury of his or her peers. Our court system, and its inherent adversarial nature, have served us well for many, many generations. Yet, as one whose life-long ambition was to be a surgeon, I have a special appreciation for the complexities of medicine, and my background research strongly suggests that our current tort-oriented system does not serve everyone well. I keep coming back to the fundamental point that the vast, vast majority of both medical and legal professionals are competent and dedicated. Yet, it is evident to any objective observer that both of our professions include a small percentage of practitioners whom we wish would never have graduated.

For example, the recent Bhopal disaster has resulted in more than 65 separate law suits in our own state and federal courts. I have even heard that the number of claimants has exceeded those who were living there. What I have proposed in my bill is that any party shall have the right to a trial De Novo in the State court. However, if either the claimant or a defendant takes this route, the decision of the panel shall be admissible in evidence in such a trial. Further, if the party requesting the new trial does not "substantially improve" his or her position, then he or she is liable for all costs of the trial, including reasonable attorney's fees. This provision in my

judgment will eliminate the so-called "nuisance suit". This has been the real difficulty with arbitration approaches to date: How does one really give "teeth" to the tempered decision of reasonable professionals? There are a number of other provisions which I have suggested in S. 175, such as requiring that each state be encouraged to establish a program requiring that all health care facilities, other than individual physician's offices, participate in a risk-management program. However, I believe that I have covered the fundamental aspects of my program.

During my years in the U.S. Congress I have learned that change takes time. It may seem to some of you that a decade is an awfully long time to wait for Congressional relief. However, there are many conflicting views as to what, if anything, should be done. I am certain that it will be no surprise to any of you that many members of the Bar strenuously disagree with my proposal, especially my insistence on limiting their fees. Yet, I remain convinced that there is indeed a significant federal role, and federal responsibility, still to be articulated in addressing professional liability matters. It makes no sense at all to me, nor do I feel that it is in our national interest, to report that malpractice premiums for all physicians increased 434% between 1970 and 1982, and yet today we now learn of requests from insurance companies in Massachusetts, for example, to once again raise their rates, this time by 163%. All of us wish to curtail the

ever-escalating costs of health care in our nation. The most recent statistics indicate that we spent $387.4 billion on health care, or 10.6% of our Gross National Product, during 1984. Once again, this was the highest in our nation's history. There are reasonable ways that we can save. For one, we could aggressively address the issue of Defensive Medicine and Professional Liability. We could start by admitting to ourselves that our current state of affairs serves no one well, especially not the patient. We could ensure that those who do their best to serve those most in need, those who are willing to accept the challenges of the most difficult cases will be praised and rewarded for their efforts, and not forever having someone looking over their shoulder. You may be assured that I shall do my very best.