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May 23, 2005

C. Michael Pride, Editor
CONCORD MONITOR
P.O. Box 1177
One Monitor Drive
Concord, NH 03302-1177

Re: Senate Bill 214 and House Bill 702

Dear Mr. Pride:

New Hampshire is fortunate to have many well-qualified and dedicated doctors, who face a multitude of pressures, including decreasing reimbursement rates and increasing malpractice insurance rates. Unfortunately, despite the overall excellence of New Hampshire medical care, some patients are hurt badly by poor care, and such patients are guaranteed a "certain remedy" by Part I, Article 14, of the New Hampshire Constitution. As much as we might want to do so, it is not possible to take away doctors' liability for malpractice without also taking away the right - and need - of patients to be compensated for harm caused by poor care.

The New Hampshire Legislature is considering two medical malpractice "screening" bills, which are intended to weed out groundless claims. It is unlikely that any such legislation is needed in New Hampshire because, as the New Hampshire Medical Society has acknowledged, New Hampshire does not have a problem with "frivolous" medical malpractice cases. The reason New Hampshire does not have frivolous malpractice cases is because New Hampshire law requires that all malpractice cases be supported by expert opinions from qualified doctors, and New Hampshire juries tend to give doctors the benefit of the doubt. Therefore, New Hampshire lawyers know that only valid claims, supported by highly qualified experts, are likely to succeed. Although some blame lawyers for medical malpractice cases, the key decisions about whether malpractice cases should be pursued are made by qualified doctors, who are willing to evaluate the

care provided by other doctors. Bad outcomes do not result in lawsuits unless qualified doctors express the opinion that substandard care caused the bad outcomes.

New Hampshire Court Rules provide efficient procedures to quickly dispose of groundless claims in response to either a motion to dismiss or motion for summary judgment. Also, we have efficient procedures to quickly dispose of meritorious claims through court-sponsored and private mediation. In cases that go to trial, a just result is assured because the verdict may be set aside or modified if the judge believes the verdict was not supported by the evidence, and the losing party has a right of appeal. The bottom line is that there are many safeguards built into the present system to assure fairness for doctors while at the same time protecting the rights of patients.

If, despite the fairness and efficiency of the present system, political realities require passing some malpractice legislation, House Bill 702 is far superior to Senate Bill 214 because House Bill 702 provides a fair, efficient, and cost-effective screening system while Senate bill 214 does just the opposite. House Bill 702 would establish a streamlined screening system by a single judge, while Senate Bill 214 would require a full-blown mini-trial before a three-person panel. The basic unfairness of Senate Bill 214 is that it would allow a doctor, who probably would not be permitted to serve on a malpractice jury because of a natural tendency to favor a fellow doctor, to sit in judgment on a screening panel. Requiring cases against doctors to be screened by doctors seems to violate Part 1, Article 35 of the New Hampshire Constitution, which guarantees that, "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." Although the language of Part 1, Article 35 applies only to Supreme Court judges, Supreme Court cases have decided that the requirement of impartiality also applies to jurors, lower court judges, and administrative boards. Another problem with Senate Bill 214 is that it would permit a unanimous decision of the screening panel, which may be based in part on hearsay evidence, to be offered as evidence in a subsequent jury trial despite the time-honored prohibition against such evidence in jury trials.

Proponents of Senate Bill 214 claim that the Maine Screening Panel system has been responsible for lower malpractice premiums in Maine, but an audit of that system commissioned by the Maine Bureau of Insurance was unable to determine (1) whether Maine's screening panel law produced lower premiums and (2) whether cases being eliminated by the screening panel system were meritorious or non-meritorious. If Mainers cannot say whether their own screening panel system has saved money for doctors or been fair

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to patients, the New Hampshire Legislature certainly should not assume it will accomplish those goals here.

Even if the Maine Screening Panel Bill would bring about somewhat lower medical malpractice premiums in New Hampshire, those lower premiums are unlikely to reverse the more fundamental challenges doctors face because of commercialization of medical care, which has reduced reimbursement rates for doctors and forced their consolidation into large medical centers.

Although Senate Bill 214 is being promoted by the New Hampshire Medical Society and doctors, who hope that it will reverse long-term changes in medical practice, the only group sure to benefit from Senate Bill 214 is the insurance industry, which can expect higher profits if additional costly and time-consuming roadblocks are thrown in the way of patients seeking justice for harm caused by malpractice. Before rewarding the insurance industry with such legislation, the Legislature should investigate why insurers have rapidly increased rates, particularly for doctors in small practices in small communities. Do the insurers fear that such doctors, with low-volume practices, are unable to maintain proficiency in their specialties, so that they put patients - and insurers - at increased and unnecessary risk. In other words, have the insurers decided that it is really in the best interests of patients to have certain complex procedures performed by doctors who have frequent experience with such matters. If that is the thinking behind unaffordable malpractice premiums, then the forces driving such doctors out of practice will not be reversed by any type of malpractice screening panel.

Sincerely,

Michael P. Hall