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HB 1386

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1386

House Judiciary Committee

❑ Conference Committee

Hearing Date 2/2/05

Tape Number	Side A	Side B	Meter #
1		xx	36.2-end
2	xx	xx	0-end/0-29.5
3		xx	4-4.4
Committee Clerk Signature	Dawn Penrose		

Minutes: 14 members present.

Chairman DeKrey: We will open the hearing on HB 1386.

Rep. Lawrence Klemin: I am a sponsor of this bill (see written testimony).

Representative Koppelman: I want to commend you on bringing the bill, I think alternative dispute resolution is, in our litigious society, is a good option. I'm wondering about the mandatory facets of the bill, I understand your point that it isn't being used much, the courts are kind of ignoring it, and so we make it mandatory. It has no fiscal note, yet the Supreme Court is required to set up a program. How does that work.

Representative Klemin: The Supreme Court would be required to adopt rules if this bill passes. What the cost of that rulemaking procedure would be, I don't know, it's not stated in the fiscal note, it doesn't have anything about that. The Supreme Court would not be starting from scratch, however, they already have some rules on that. There is a joint ADR committee that been working. There are a number of other states that have mandatory ADR, they already have

rules in those other states, which could be looked at for some guidance in what we want to do here in ND. I would surmise that that would be procedure they'd follow. They'd look at what they've got, look at what they've done, look at what other states have done in this same area and do their rule making accordingly. As far as the fiscal note is concerned, I don't know.

Representative Koppelman: In mediation, you are typically having a third party look at the situation and sort of try to move the two parties toward mutual agreement. With arbitration the third party is adjudicating the process, based on what I see here's what I think. I take it from your testimony that this would not be binding arbitration, because mediation might fail, then you move on to the court. With an arbitration process that's not binding, what typically happens. There's a best offer presented.

Representative Klemin: In my experience, that is generally what happens. Mediation is probably the most common form of ADR that is used. The mediator may attempt to get the parties to resolve their case, but more often than not, the mediator carries messages back and forth between the two sides. They may be together at the beginning of the mediation, but then separate and then the mediator goes between the parties, and typically what happens is that there is an offers and counteroffers, back and forth through the mediation process. Then, if the mediation is successful, the parties come to an agreement, and then they do the paper documentation to perpetuate that agreement. If it's not successful, they continue on in their litigation just as they were. The only time it would be binding, is if they agreed that it should be binding.

Representative Koppelman: In Section 2, subsection 4, on page 3, it seems to award attorney fees if the case ends up court, not only for the court case but also for the ADR process,

and how the final decision stacks up against the ADR. Is that typical in other states that do this. How does this work.

Representative Klemin: It does tie the two together. It doesn't say the court shall do that, but the court has the discretion to determine, in an equitable manner, and in fact, you can see that the rules on the bottom of page 2, lines 30-31, that the rules the Supreme Court would adopt, would provide for an equitable means for the payment of these fees and expenses. I guess I would assume that in most cases, equitable would probably be equal on each side, but not necessarily in all cases. There may be circumstances where it should be proportioned differently. When we get to the point where the people have decided they're not going to be... They're done with their ADR and they're going to start the lawsuit anyway and they go to trial and I've had this happen to me a number of times, we've gone through mediation, I represented one party and we made an offer, they made a counteroffer, we're a long ways apart, we've tried to explain to the mediator why the other side is unreasonable, and I guess they've tried to explain why our side is unreasonable. In any event, we do not come to an agreement and so we go through the litigation, under the existing process with the ADR, we've already been in litigation, because it's already started, and then we go to trial and we have a jury trial and a jury verdict comes back and it's one way or the other. The losing side is maybe kicking themselves because he didn't settle through the ADR process, because now the jury award might have been zero, which has happened occasionally.

Representative Koppelman: You're dealing with the area of professional malpractice here. Do you find any irony in the fact that lawyers, for example, would be included in that description

and folks who make their living trying cases in court would be in a class, if you are saying that you must go to ADR before they can go to court.

Representative Klemin: I guess it's true that lawyers would be deeply involved in the ADR process, and they may even have some conflicting interests, because there are lawyers that make a good living off of defending, and litigating professional malpractice cases. They could also be involved in the ADR process too. The ADR process would respect claims against lawyers, which come from time to time.

Representative Delmore: Page 3, part 4, who is the prevailing party, is it the one bringing the charges, the one being accused.

Representative Klemin: The intention of this section, is that the prevailing party would be viewed in respect to what happened in the ADR. For example, let's say the last offer of the ADR was $XX. And then we went to trial on the case, the jury came back and awarded $yy. If the $yy dollars is less than the $XX dollars, the defendant in the litigation would be the prevailing party, in so far as this section is concerned even though the defendant had a judgment against him, because the defendant had offered more in the ADR than the plaintiff got from the jury. On the other hand, it could work the opposite if the defendant in the ADR process was unreasonable, and the jury awarded something more than the last offer, then the plaintiff in the jury trial would be the prevailing party. The plaintiff in that case, would be entitled to an award of attorney fees if the court determined it was appropriate.

Representative Delmore: Was there a reason why you didn't put that in the bill.

Representative Klemin: Yes, section 1 is part of the existing law and so as you can see what we're doing here on page 1, lines 10-11, we're taking out the definition there because this chapter

will no longer cover this subject, and those other definitions that are in there, relate to the other sections of this existing law that are not being repealed.

Representative Onstad: Your hope in the bill is to overall reduce liability insurance in certain professions. Is that correct.

Representative Klemin: Yes, that's probably one of the main goals. I think there is also human cost involved in the litigation that we're trying to resolve here and certainly that human cost, any time a professional gets sued by someone, or the plaintiff doing the suing, a litigation and a trial are very stressful, and this would get it into a less stressful environment and maybe they could think of a resolution between them.

Representative Onstad: You referred to 18 other states already have mandatory ADR. Have they seen that result then, the medical professional has reduced his liability insurance because they have ADR in that particular state.

Representative Klemin: I don't know the answer to that question. I don't have any statistics nationwide from what is going on in these other states. I do know that the ADR that we did have, and still do have, under the existing law that was passed in 1995, contained a requirement that the insurance companies were to make a report to the ND Insurance Commissioner for about 3 years, after that to see if there was any effect from the ADR. Well the reports that came back showed that there was no effect, and I think the reason was because nobody was doing it.

Representative Zaiser: Both the old ADR and the new ADR talk about good faith efforts on behalf of both parties. Does the program set up by the Supreme Court define what good faith effort is. To me, that is a very ambiguous term. Would that be a key component to that program.

Representative Klemin: The rules could do that, if the Supreme Court chose to include that. That is something that could be clarified and set out.

Representative Zaiser: As it stands now, there is no difference between the old ADR and the new ADR, in terms of good faith effort.

Representative Klemin: That's still a component.

Representative Zaiser: It's not defined.

Representative Klemin: I think there is in many other areas of the law, including a lot of court cases, a review of what good faith means, and I think it is an objective standard, not a subjective standard, so you can look at those existing decisions to see what good faith is.

Chairman DeKrey: Thank you. Further testimony in support.

Rep. Rick Berg: Support. I think my interest in this bill, is not to reduce insurance but to reduce the legal costs. Quite frankly, my concerns in really what I see going on in the health care industry and Representative Klemin you can blame it on me, I encouraged him to move forward in this area. I think any time you have an attorney who is interested in bringing forward legislation, again from my perspective, I see it as lowering legal costs. It's something that we need to be practical about. My wife is a family practice physician, and she hasn't been directly in a lawsuit; however, she has been an expert witness and called on many things. When I see these cases, and she doesn't disclose things to me, so I'm on the outside, but these aren't a 30 day case. These are a year, two years, they go on and on, they stack up the best attorneys on both sides and Representative Klemin mentioned the human toll. I hadn't realized that until recently. One of the cases that she was involved with, I saw one of the people a year later, and their hair was about ½ white. There's a tremendous human toll. From my perspective, everyone who has been

through the medical system understands that there are challenges and if I'm a patient that has been injured, and live in Hettinger, I don't know if I'll find an attorney that will take my case on a contingency without him going someplace where someone is all geared up. It seems to me that in these medical malpractice cases, all of a sudden, if anyone is going to take a case, it's geared u to the A-team, the pros that send a flurry of paperwork back and forth for months and months, if not years, getting expert witnesses and testimony. To me it seems that here in ND we could streamline that whole process, if we got the parties together in a way that was fair to both sides, maybe gave a person who's been injured a quick way of resolving it, and I think on the medical side as well. If there is a problem, if it can be resolved quickly, then maybe a hospital or clinic, physician needs to change the way they practice to make sure that those things do not happen again in the future. My interest in this bill, is at the end if we can resolve those problems quicker and fairly, I think we've accomplished a good deal for the state. I guess I would like to leave that thought as you go through the testimony you hear to debate.

Representative Koppelman: Along the lines that your advocating the idea of reducing costs of litigation. I think, by and large, that this would probably do that, but I am wondering about the cases where a case ends up in trial anyway. What are the percentages, that go through ADR, how many actually end up in court and beyond that. There is a double layer of legal costs to do both. I am wondering if this process would preclude from doing a contingency attorney. If you go to ADR...

Rep. Berg: Yes, you should ask Rep. Klemin.

Representative Zaiser: As I indicated, I have actually been through this. I did start to talk about a malpractice suit with an attorney because of some major mistakes that were made by the

doctors in my diagnosis. After going through the six step process, on the third step, they decided not to take my case because they said yes, there was damage but they didn't know if there would be any way to collect. They would not take the case unless they would be a 100% winner. So, in my case, ultimately MeritCare decided to let me get free medical care for a number of years because of the situation. My question is what is the degree of satisfaction with other ADR's around the country.

Rep. Berg: I can't respond. I haven't studied around the country. My response is that here in ND, we can resolve our differences. I think one-on-one more so than other places. So if there is an opportunity and there are obviously things that I struggle with in the bill, but also if we can resolve those at an early point, I think it's possible.

Representative Kretschmar: Has your spouse seen insurance premium gone up on medical malpractice insurance over the last several years.

Rep. Berg: I can't respond to that directly, my wife does a lot of family practice and a lot of deliveries. That has gone up dramatically. I don't know if you can say that's directly related to the legal costs.

Chairman DeKrey: Thank you. Further testimony in support of HB 1386.

Sen. Ralph Kilzer: I am proud to appear before you as a person who signed on to the bill, and a supporter of attempting an alternative method of resolving these problems. Our present system is not totally broken, but it is extremely inefficient. I say that because, out of the premium dollar, it's only about 30 cents that ends up in the hands of victims in the cases of medical malpractice. Seventy cents goes to the process and all the things that are apparently necessary. But it is a very inefficient system. It's difficult to get figures on how many cases are won or lost in medical

malpractice court cases. But about a little less than a decade ago, there was kind of a summary on some other reform measures where 40 consecutive cases of medical malpractice, that had gone to trial in ND, were reviewed and 39 of those were not guilty and one case did have an award. So that's a very inefficient system, it's a very heavy load on time and human effects. Hopefully with responsible carrying out of duties by the legal system, that this can be used to improve that. I realize that maybe it is just another step in a long ladder of coming to conclusion in these cases, but if it's used responsibly, hopefully it can ease the system and really get more of the share of the premium dollar into the hands of victims where we can all receive some satisfaction that it's being done.

Representative Koppelman: Do you know if your colleagues in other states, physicians in other states, where they have ADR, have they given you a sense that it help with the process to streamline the process, to keep costs down, or gets to decisions quicker, to keep medical malpractice premiums down.

Sen. Ralph Kilzer: No, I'm not aware of any states that have proven whether or not this is more efficient. As you know, most of the legal reform seems to be in the area of capping of non-economic damages. That apparently does help, particularly in California, which has had a law in effect since 1976, but they also have other things, such as screening panels, and things like that. Indiana is another state that has had several different restrictions in place for a long time, so premiums are lower. In my case, even when I retired from practice 15 years ago, my premiums were in the range of $50,000/yr, with a $25,000 deductible. That was as big a factor as any in practicing defensive medicine and in my early retirement.

Representative Zaiser: In terms of patient resolution, patient satisfaction, do you know whether other states that have mandatory ADR, is there a greater sense of victim satisfaction.

Sen. Ralph Kilzer: No, I don't know the answer to your question.

Chairman DeKrey: Thank you. Further testimony in support.

Paul Wohnoutka, Eide Bailly: Support (see written testimony).

Representative Onstad: It's been stated in testimony that since 1995, we've had a voluntary ADR program. This mandates that. Any reason why it hasn't been used, if it seems to be for the betterment of everybody.

Paul Wohnoutka: I think sometimes we are a little too quick to jump at the court system and go through that process and once you hit the court system, you are really butting heads, you are bringing in the experts, you are doing depositions, etc. And why more people don't go through the ADR system, I don't know. It is a first attempt to try and resolve the matter, get the people to sit down. We see the mandatory as a good move to sit down and see if we can resolve it.

Representative Onstad: In 1995, it was a voluntary program, I can't see why people didn't utilize that.

Paul Wohnoutka: I don't know the answer to that.

Representative Delmore: Are you familiar enough with the ADR to see that in other states, ADR has cause the number of lawsuits to go down.

Paul Wohnoutka: In the process of thinking about this bill, we did contact our malpractice attorney in Minneapolis, and MN does have ADR in their system. In talking with that attorney, his comment to me was that litigation, and especially frivolous litigation has gone down dramatically from them having mandatory ADR system.

Representative Delmore: Does MN allow medical malpractice, because I don't believe they do.

Paul Wohnoutka: I don't know.

Representative Koppelman: Would you explain your proposed amendment, deleting the word "unreasonable" on page 2, line 19.

Paul Wohnoutka: Yes, the second part if you look at line 19, page 2 of the bill, one of the things it addresses, it requires the mandatory results for professional misconduct, unreasonable lack of skill. In talking with our malpractice attorney in Minneapolis, he pointed out that the word "unreasonable" in there is an easy loophole for people to avoid the mandatory ADR because all they have to do is put in their claim, is a lack of skill, versus unreasonable lack of skill and therefore they would not be required, which is why we are suggesting that the word be deleted.

Representative Galvin: When you said that ADR was not mandatory, that not many people used it. Would that be because people were not aware of it or informed of it.

Paul Wohnoutka: I don't know the reason for the lack of use of it. It could be one of those things, that if it's not used very much, there isn't as much geared up for that type of a system, and this would be a requirement to use it, then we would be more geared up and it would have to be used.

Chairman DeKrey: Thank you. Further testimony in support of HB 1386.

Paula Grosinger, Executive Director, ND Trial Lawyers Association: Support. This is a very good means of getting the parties to the table and getting them to come to an agreement and providing injured parties with the opportunity to avoid the expense of litigation and pursue their

claims for injury and have it be less adversarial. I'm a registered nurse, I would love to see my malpractice premiums go down. I carry my own malpractice insurance. When I was in acute care practice, I carried it because I was aware that more nurses were being named in malpractice suits. This bill will do nothing to reduce malpractice premiums, and I would predict that it would do nothing for malpractice premiums in any profession because those premiums are based on underwriting and investments. When investments do poorly, premiums tend to rise (see written testimony). I would like to see the language on page 3, line 11 through line 17 struck.

Representative Zaiser: There's been talk about tort reform, and the cost of malpractice litigation is affecting health insurance premium, health costs. I've heard that health care costs have gone up and only about 5% is contributed to malpractice litigation, is that true?

Paula Grosinger: The figures I have seen are less than 1%, so you're correct, it is a very small portion of the health insurance premium.

Representative Galvin: Does that take into consideration how many extra procedures that the medical profession might go through to avoid litigation.

Paula Grosinger: As a nurse in practice, I saw many errors, and many times the patient had no idea that an error had been committed in their case. We hear a lot about defensive medicine, well I guess I'm for defensive medicine from the standpoint that it provides protection to the patient, which should be our primary objective. When we have 98,000 deaths attributable to preventable medical errors in this country every year, and that number actually seems to be growing, I think there is a serious problem in the delivery system. We have excellent doctors here in ND, and fortunately I think our error rates are probably below the national average, but if you still look at that 98,000 deaths each year, that is equivalent of taking a DC 10, full of people, having it take

off from the Bismarck airport and crashing it into the ground, killing everyone on board, every single day for a year. Don't you think there would be a huge outcry if that happened. Don't you think everyone would be saying what can be done to stop these errors. It's not happening in medical malpractice. It's one of the reasons I left nursing practice is because of the problems I saw there and I felt that there were other things that I could do to address those problems. It was brought up earlier about what other states do, MN does have mandatory ADR, medical malpractice is exempt from that, it is the only profession that is exempt.

Representative Klemin: I wanted to follow up on the question that Rep. Galvin previously asked, about whether ADR is not working because people may not know about it, I guess as I understand Rule 8.8, requires the parties to discuss ADR participation and then there has to be a statement filed with the court in which the parties and their attorneys certify that they discussed ADR participation with each other and that the parties' lawyers had discussed ADR with their clients. Isn't that correct. So there should be any reason why they don't know about it.

Paula Grosinger: Yes. That is correct.

Chairman DeKrey: Thank you. Further testimony in support.

Alvin Boucher, Grand Forks attorney: I am a plaintiff malpractice lawyer and I have been for over 20 years, practicing with the Robert Vogel Law Office in Grand Forks. We call ourselves a professional malpractice law firm because we sue not only physicians, we sue lawyers. We are one of the few law firms in the state that actually does sue lawyers. We sue all other kinds of professionals. It's an area of expertise that we've developed over the years. I've also had the opportunity on occasion to represent some defense cases, involving professionals. I wanted to talk about some of the comments that have been made. I think that I have over 20

years, I can't count the number of cases that I've resolved through ADR. In fact, almost all of my malpractice that cases are resolved through ADR So I find it hard to believe that everybody says the system is failing. Most of my cases are, in fact if we go to trial in a medical malpractice case, we will lose that trial 9 times out of 10. We just lost one in Fargo, just the other day. They are extremely difficult to win, ND is an extremely conservative state, they believe that if they bring a verdict against a health care facility or physician in a small town, that they'll lose their doctor, they can't understand that a malpractice verdict against their physician, you're going to lose, but you have to go to trial, because if you don't go to trial and show the other side that you're willing to go to trial, they won't come to the table to negotiate with you seriously during ADR. By way of background, I served on the joint alternative dispute resolution study committee that was put together, a number of years ago, we met with judges and other people, in which we discussed ADR and it did result in Rule 8.8, which is what Representative Klemin had talked about previously, which is a non-mandatory provision. After careful study, and examining various state resolution methodologies, we determined that mandatory ADR would not be the way to go. That it should be voluntary. That mandatory systems did not generally work. I have also participated to learn mediation skills. I've got over 90 hours of mediation training, although I have never mediated a case as a mediator, I have been involved in that process in other ways. I think mediation is a great thing. ADR is a great thing, and Representative Klemin is totally right, that the legal system sometimes is way too expensive and too onerous for personal injury litigation, especially in the malpractice context. I do agree with that. I think it is one of the hardest areas of litigation that you can have personally on any one, but it is extremely expensive. We know that. The problem that we have, about the statute, chapter 32-42, the current ADR bill

that I think was passed in 1995, was that it doesn't work. It doesn't work directly. Everyday that I start a case, I write a letter to the other side and I ask them if they want to engage in ADR. I lay out the facts why I think we have a case, including a summary of my experts' opinions, because in ND you cannot bring a malpractice or any kind of professional malpractice case unless you have an expert opinion. If you do not have that expert opinion, except in obvious cases, such as leaving a sponge in a patient's body, they will not allow you to proceed with the court. I write a letter asking if they would like to talk about this before we sue this matter. The current ADR statute, only applies to medical doctors. It doesn't apply to lawyers, but I write the same kind of letters to lawyers, social workers, psychologists, engineers, whatever. Almost never have I gotten a letter back from them, saying you're right, we messed up, we want to talk about what your case is worth. It almost never happens that way. I don't say never, because I had a recent case where after a series of letters, we were able to resolve the case. We didn't use any mediation services, because mediation is not cheap. This mediation bill, which is mandatory, will not reduce the cost of litigation, it will increase the cost of litigation. Mediators and ADR don't work for free, someone has to pay that bill. I think we should find ways to support the current Rule 8.8 and find methodologies to help people negotiate cases in a non-mandatory fashion, but in a voluntary fashion and to use public education and so forth to encourage these kinds of things. To adopt this bill would add an unnecessary layer of litigation.

Representative Zaiser: My son did a research paper on malpractice issues, he found out about all the difficulties and doctors and hospitals, all the mistakes that were made; the high percentage that weren't reported. I guess one of the things I am thinking about in terms of a reporting mechanism where we could ascertain mistakes made within the medical profession. I guess

that's a very difficult thing and he talked about that, how it's very difficult for doctors to admit they made a mistake. When I tried to confront my doctors, they simply wouldn't address the mistakes that were made, even though they seemed very obvious.

Alvin Boucher: It is interesting that you bring that up. Recently, in the January issue of the Pioneer Press, and also recorded in the Minneapolis Star/Tribune, I know what you mean. I am licensed to practice law in MN and I practice medical malpractice law in MN. MN does have a so-called ADR, methodology there in which you have to identify what ADR you are going to use, but that's not before you sue, it's after you sue, and it's not necessarily mandatory, you can opt out of it if you don't believe it is appropriate. I think it would be interesting to study what kind of malpractice errors there are out there. I think we've always looked at capping pain and suffering damages, doing all kinds of things, putting the onerous on the victims of the malpractice rather than having an examination of what doctors really do wrong and whether those things can be changed. We have a peer review privilege in the state of ND that does not allow us to examine physician's malpractice. It is protected under confidential committee meetings, called peer review committees, so we can't find out. Within the last few years, MN passed a law that stated that every hospital had to report errors and in January, that report came out and in MN for the period of July 1, 2003 to October 6, 2004, the hospitals reported 99 medical errors, these would be avoidable errors that should not have been made, that would constitute malpractice. One of the things, if you look at the errors, the errors were interestingly defined. It doesn't really talk about things that might truly be malpractice, these are obvious things that everybody could agree was malpractice. There were other errors where there may be malpractice, but they might not agree there was. Of those, 20 resulted in death in the state of

MN, obvious errors, there were 52 surgical events that resulted in performing surgery on the wrong body, wrong medication errors, this is in MN alone. Ms. Grosinger had talked earlier about 98,000 deaths in the US. Those statistics are well supported by Harvard studies and those statistics range from 44,000 to 99,000, some every year that are reported resulting in death. I think ND, are generally very excellent doctors. I think the medical board does a really good job of policing, it's one of the most aggressive boards in the country and it's doing a good job. I think we do have safe care. Just because one physician makes a mistake, doesn't mean that they're bad doctors. They are busy, they can make mistakes. Just because you might hurt somebody, or even kill someone with your car, doesn't mean that you should have your driver's license taken away. Mistakes happen, negligent mistakes happen, and the reason there is insurance is to cover that. What makes America great, is that we have a civil jury system, that's one of the things our founders insisted be a part of our constitution. It's constitutionally protected. Litigation is not perfect, it is an ugly system. It is not an easy thing. I don't think that forcing mediation early on like this, done it, especially do the fee shifting. There is no definition of good faith and what one person thinks is good faith, another person may not. That really creates a constitutional ambiguity that will have problems if this statute passes, unless you figure out a way to define it. I think that you would be better off trying to investigate errors, encourage early settlement of obvious cases. One thing good about the bill, is that often times in our litigation, because malpractice is so expensive, both legal and all of them, is that you can't bring the small cases. The $25,000 cases, the $100,000 cases, the $200,000 cases and below, are now considered small cases because of the requirement of expert opinion. I had an expert recently, whose fee for testifying in his own city, is $10,000/day and he said to come to ND, I

don't know what I'll charge, probably $30,000/day and you need these experts to testify and you can never get a ND expert to testify against another ND doctor, they just won't do it, it's a small state. I understand, you have to see them at medical meetings, but they almost never testify. If there could be a system to put small injury cases in some kind of mediation or mandatory mediation, that may be better, but I haven't had time to work that out in my own mind, because those cases don't get brought and a lot of people don't get justice, because you cannot cost effectively bring those cases and some alternative methodology may work better for them. In the big cases, no insurance company is going to give you any kind of money and I am talking about hundreds of thousands or millions of dollar without investigating that case and they won't do it unless they use the formal legal process to actually investigate, to get people under oath, to make sure they are telling the truth, to make sure that when they say they can only lift their hand up this much, they can't lift it up this much. They won't do that.

Representative Boehning: This bill really isn't going to affect your practice because you basically already do this in your cases now. Out of the 99 errors in Minnesota, what kind of % was that, a very low % for MN.

Alvin Boucher: It will affect my practice. I can't tell you what the MN numbers are and what % it is. One way it will affect my practice, is whether we are going to take these cases at all, because if there is a cost shift and I know the other side has failed to negotiate in good faith with me in mediation and low balls me, which they do, they always make low ball offers, they'll continue to do this thinking that if they get you into trial in ND, you can't win in ND, even with a good case. There is a case in southern ND, in which someone had a retained sponge left in them, they went to trial, the jury came back with a defense verdict. A retained sponge is an obvious

case. They couldn't get a plaintiff verdict in that case. This happened a number of years ago. We are a very conservative state, especially when it comes to litigation. Occasionally you will hear about big verdicts in ND, but they are very few. It will affect our practice, we will have to look at seriously whether we want to continue. I don't know if my clients would even want to go forward once I explain the risk of the fees. It would be really tough for them if they had to pay these fees, plus mine.

Representative Onstad: Representative Koppelman asked earlier if this mandate went forward, there would be a fiscal note.

Alvin Boucher: I think there would be a fiscal note on this. I don't see how you can have a fiscal note on it with no impact, and I think it would cost money because there would be committee meetings and so forth to enact the system, hearings, whatever. Committee work is not cheap. I know that when I was working on the ADR study committee, I was paid mileage, hotel, all kinds of things, that all came out of the state coffers.

Representative Klemin: I understood you to say at the beginning of your testimony that your practice is almost all made up of cases that are resolved through ADR, rather than going to trial and it sounds like the effect would be because of the fee shifting portion of this bill. If it weren't for that section, would there be an effect.

Alvin Boucher: I think there would be an effect. The point I was trying to make, that when we resolve lawsuits in my office, professional liability suits, they're done through informal dispute resolution, whether it's an offer, a negotiation, exchange of letters, telephone calls, those are forms of ADR, not just mediation. But they are settled, some we dismiss, we don't settle at all because we're unable to take the financial risk. If the other side believes that they've got a

tactical advantage by forcing us to pay attorney fees, which I believe this bill would do, I don't think it was intended that way, I think it was intended to apply to both sides, but I think it will have a heavier burden on the plaintiff's side. I do believe it will affect the quality and amount of settlement offers we get from the other side, because they know then they can hardball their position, make a low offer, not necessarily unreasonable, but low and not necessarily adequate to compensate. This would push us more likely into going to trial, because they might become more obstinate in their position, instead of actually encouraging someone, it may actually encourage more trials, because they'll know that now they have the added risk of attorney fees that they can tack on, even if I win, but our amount that the jury awards is lower than what they offered last, then we could lose any recovery having to pay attorney fees. It may force us into positions to take much smaller amounts and inadequate compensation for our clients. I can't say what will happen for sure unless we start doing the process, but that would be my supposition and belief, based on my experience.

Chairman DeKrey: Thank you. Further testimony on HB 1386.

John Risch, United Transportation Union: I would like to commend Representative Klemin for advocating ADR, we certainly support that idea. We are concerned with the one aspect of the bill that relies to paying defendant's attorney fees. I represent railroad workers, they deal with very heavy equipment, injuries occur, often times they are severe and people require extensive medical care. If the victims can't recoup costs, because if they can't recoup the costs, they often become wards of the state, and we as taxpayers pick up the bill. The portion we are concerned about is in section 2, #4, that allows the court to award attorney fees. We believe that this would

have a much bigger impact on the injured party than it would on the insurance companies representing defendants. We would ask that you delete lines 11-17 on page 2.

Chairman DeKrey: Thank you. Further testimony.

Bruce Levi, Executive Director of the ND Medical Association: The association is a professional membership organization for physicians, residents and medical students in ND. I think agree with what Mr. Boucher said about this process and what's going on in ND with respect to the use or nonuse of ADR mechanisms, which are already in place since 1995. I think in the medical community, we rely a lot on the defense attorneys, rely on the medical liability carriers to tell us what is or isn't beneficial, in terms of mechanisms such as mandatory ADR for the medical professional. I think the defense attorneys, perhaps the hospital attorneys, as well as the medical liability carriers told us, that based on experience, particularly in MN, that mandated ADR would not do anything but add another layer, and add additional costs to the process, and potentially increase the cost of litigation, which was also noted by Mr. Boucher, as well. From that standpoint, and particularly at an early stage in the process before the facts are out on the table, I think that's a major concern, particularly by the defense bar, I don't speak for the defense bar, but obviously we rely on them. Based on their reliance, our medical association board decided not to support this bill. There's been a lot of talk about the big picture. There is another bill on the Senate side which has already passed the Senate, SB 2199, the issue of the expert opinion affidavit. That particular statute, which was put in place in 1981, I believe, is being revised and was passed on the Senate and will come before this committee as well. I think everyone is looking at different mechanisms that might be put into place. We're looking particularly at a mechanism at the federal level, there was legislation passed this last year, in both

the House and Senate that didn't come together, but would have set up a process of patient safety organizations requiring reporting of medical errors based on the aviation model, a model that would involve peer review, involve a process for looking specifically at the errors in a non-punitive way, in a manner that would resolve the matter for the patient and the medical team about what they can do better to reduce medical errors.

Chairman DeKrey: Thank you. Further testimony on HB 1386.

Arnold Thomas, President of ND Healthcare Association: (see written testimony).

Representative Zaiser: There was a comment made in terms of how most malpractice are large amounts of money being asked for. Would it make any sense to having something like this for smaller claims, say for $50,000, $100,000, because right now it is hard to proceed because of the cost involved for litigation in a small claim.

Arnold Thomas: I think that is a policy question that needs to be asked. When you set a quantitative benchmark, the person who is one penny below that benchmark receives one option, or is mandated one avenue, and the person one penny over is required to go the other. I think that's a decision that rests with the legislature. From a policy point of view, if a harm has been created, the person should have the full recourse to have that harm evaluated and judgment rendered with respect to who bears liability. So I'm saying that a quantitative threshold would be perhaps administratively doable, the question is on a policy level, does that meet the test of equity and fairness, and a person's right to have be evaluated and compensated and judged appropriately.

Chairman DeKrey: Thank you. Further testimony on HB 1386. We will close the hearing.

(Talked about later in the same session, no action was taken.)

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1386

House Judiciary Committee

❑ Conference Committee

Hearing Date 2/7/05

Tape Number	Side A	Side B	Meter #
2	xx		8-35.2
Committee Clerk Signature	Dawn Rimrose		

Minutes: 13 members present, 1 member absent (Rep. Maragos).

Chairman DeKrey: What are the committee's wishes in regard to HB 1386.

Representative Klemin: I have a letter here from the ND Chiropractic Association supporting the bill. If you recall at the hearing, I had handed out a letter from the Society of CPAs supporting the bill. There was a question raised by Rep. Zaiser, at the hearing, about the definition of good faith. One of the attorneys, Mr. Boucher, said there was no such definition. There is a definition, it's in the general provisions of the Century Code, which I've given you a copy of right now. Explained his amendments of 2/7/05. I move the amendments.

Representative Kingsbury: Seconded.

Chairman DeKrey: Motion carried.

Representative Kretschmar: I move a Do Pass as amended.

Representative Galvin: Seconded.

10 YES 3 NO 1 ABSENT DO PASS AS AMENDED CARRIER: Rep. Klemin

FISCAL NOTE

Requested by Legislative Council
01/18/2005

Bill/Resolution No.: HB 1386

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Since this will be a mandatory program there will be some impact on judge and staff time. The court will get involved when the parties cannot agree on a neutral and the court will have to appoint as a result of a motion to the court. The amount of time cannot be calculated at this time, but it is not anticipated to be substantial.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Ted C. Gladden	**Agency:**	Office of State Court Administrator
Phone Number:	3284216	**Date Prepared:**	01/19/2005

Rep. Klemin February 7, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1386

Page 2, line 19, remove "unreasonable"

Page 2, line 23, remove "Before an action may be commenced, every professional malpractice claim filed" and insert "Before an action alleging a professional malpractice claim may be commenced, notice of a professional malpractice claim and a demand for mandatory alternative dispute resolution must be served by the claimant upon the professional. The requirement for alternative dispute resolution in this section may be waived if all parties consent in writing prior to the commencement of the action.

Page 2, remove line 24

Page 2, line 25, remove "to mandatory alternative dispute resolution"

Page 2, line 27, after the period insert "The supreme court may establish a statewide mandatory alternative dispute resolution program for the resolution of other claims as determined by the supreme court."

Page 3, line 10, remove "agreement" and insert "process"

Page 3, line 11, remove "The court may award attorney's fees in the civil action and the" and insert "The parties must state in the pleadings that they have complied with the alternative dispute resolution process required by this section."

Page 3, remove lines 12 through 17

Renumber accordingly

Rep. Klemin February 7, 2005

HOUSE BILL NO. 1386 AS AMENDED

Page 2, Section 2, subsection 1, line 19, would read as follows:

result of professional misconduct, lack of skill or fidelity in

Page 2, Section 2, subsection 2, beginning on line 23, would read, in part, as follows:

2. Before an action alleging a professional malpractice claim may be commenced, notice of a professional malpractice claim and a demand for mandatory alternative dispute resolution must be served by the claimant upon the professional. The requirement for alternative dispute resolution in this section may be waived if all parties consent in writing prior to the commencement of the action. The supreme court shall establish a statewide mandatory alternative dispute resolution program for the resolution of professional malpractice claims. The supreme court may establish a statewide mandatory alternative dispute resolution program for other claims as determined by the supreme court. The supreme court shall adopt rules governing . . . . .

Page 3, Section 2, subsection 4, beginning on line 9, would read as follows:

4. At the conclusion of the alternative dispute resolution process, a party to the process may initiate a civil action except to the extent otherwise provided in chapter 32-29.3. The parties must state in the pleadings that they have complied with the alternative dispute resolution process required by this section.

Adopted by the Judiciary Committee
February 7, 2005

House Amendments to HB 1386 - Judiciary Committee 02/08/2005

Page 2, line 19, remove "unreasonable"

Page 2, line 23, after "action" insert "alleging a professional malpractice claim", replace "every professional malpractice claim filed" with "notice of a professional malpractice claim and a demand for a mandatory alternative dispute resolution must be served by the claimant upon the professional. The requirement for alternative dispute resolution in this section may be waived if all parties consent in writing before the commencement of the action"

Page 2, remove line 24

Page 2, line 25, remove "to mandatory alternative dispute resolution"

Page 2, line 27, after the underscored period insert "The supreme court may establish a statewide mandatory alternative dispute resolution program for the resolution of other claims as determined by the supreme court."

House Amendments to HB 1386 - Judiciary Committee 02/08/2005

Page 3, line 10, replace "agreement" with "process"

Page 3, line 11, replace "The court may award attorney's fees in the civil action and the" with "The parties must state in the pleadings that they have complied with the alternative dispute resolution process required by this section."

Page 3, remove lines 12 through 17

Renumber accordingly

Date: 2/7/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1386

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep. Kretschmar Seconded By Rep. Galvin

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore		✓
Representative Maragos	A		Representative Meyer		✓
Representative Bernstein	✓		Representative Onstad		✓
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 10 No 3

Absent 1

Floor Assignment Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1386: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1386 was placed on the Sixth order on the calendar.

Page 2, line 19, remove "unreasonable"

Page 2, line 23, after "action" insert "alleging a professional malpractice claim", replace "every professional malpractice claim filed" with "notice of a professional malpractice claim and a demand for a mandatory alternative dispute resolution must be served by the claimant upon the professional. The requirement for alternative dispute resolution in this section may be waived if all parties consent in writing before the commencement of the action"

Page 2, remove line 24

Page 2, line 25, remove "to mandatory alternative dispute resolution"

Page 2, line 27, after the underscored period insert "The supreme court may establish a statewide mandatory alternative dispute resolution program for the resolution of other claims as determined by the supreme court."

Page 3, line 10, replace "agreement" with "process"

Page 3, line 11, replace "The court may award attorney's fees in the civil action and the" with "The parties must state in the pleadings that they have complied with the alternative dispute resolution process required by this section."

Page 3, remove lines 12 through 17

Renumber accordingly

2005 SENATE JUDICIARY

HB 1386

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1386

Senate Judiciary Committee

❑ Conference Committee

Hearing Date March 7, 2005

Tape Number	Side A	Side B	Meter #
1		X	2300 - End
2			0.0 - 999
Committee Clerk Signature	Maria L Solberg		

Minutes: Relating to Relating to alternative dispute resolution: Date *FTE

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Lawrence R. Klemin, Dist. # 47 (meter 2300) Gave Testimony - Att. #1 and letters from CPA, Chiropractors and Transpiration.

Sen. Trenbeath asked what chance Rep. Klemin's bill would have in the real world. Currently ADR law is a voluntary act for a judge currently it states that if you don't make a good faith effort you may be liable to sanctions and this would make it mandatory. Unless either of you don't want to do it If one of you don't want to do it then it is mandatory and you still have to decide which brand of ADR you want and it is non-binding unless you are in agreement.

Rep. disagreed with Sen. Trenbeath assessment, We want the flexibility to improve on what we have. This bill applies only to the health care profession. **Sen. Trenbeath** stated that unless

there is a waiver by both parties, but if one waivers and the other does not what chance does it have? Unless the courts start sanctioning them, which it has not done. **Rep. Klemin** responded that the courts should. This is something that could be put into the procedures to alternative dispute resolutions. We have very little in this regards.

Sen. Nelson stated that **Rep. Klemin** sited two times that it is not working can you give me some examples of how it is not working? It is only a "lip service" at this time and they are not doing anything with it in the health care area.

Rep. Rick Berg, Dist. #45 (meter 3900) My wife, a doctor, has been involved in cases that go on and on. The emotional toll on the Dr.'s. As a legislative body we need to say what is the alternative to a two year case, that is extremely expensive. How can we use an ADR to wrap it up and settle the issues more quickly. The problem is making it flexible and mandatory at the same time.

Sen. Traynor asked Rep. Klemin what the activity in the professional malpractice arena is with mediation? I am not aware of any. Discussion of the mediation process.

Sen. Ralph Kilzer, Dist. #47 - Former Doctor meter 4479) stated that .30 of every premium dollar is spent on malpractice victims. In 1990 I paid $40,000/yr premium in malpractice and I have not lost one case. In 2003 there were 40 malpractice cases and one was lost. This is one of the main reason I stopped practicing so young.

Paul J. Wohnoutka, EideBailly Partner (meter 5050) Gave Testimony - Att. #2 We always try to sit people down to try and resolve before going to trial. Sen. Trenbeath asked where this legislation would make a difference? In a situation where we did not have an engagement letter. The mandate would be a benefit for people to get together and try to resolve the mater before

going to court. Having your name on the front page of a paper before you have been found guilty of anything is devastating to a professional.

Testimony in Neutral to the Bill

Glenn A. Elliott, Private Citizen (meter 5460) Gave Testimony Att. #3.

Testimony in Opposition of the Bill

John Kapsner, ND Health care Assoc. (meter 6000) Gave testimony - Att. #4

Senator Triplett sited that is it his opinion on the current state law? I am not sure it is designed to "work". A plaintiff makes a claim before cases are filed, this is an effort to mediate the claim with an insurance company. I do not get involve with those. The defendant is represented by the insurance company that is doing the mediation/discussions. They are generally not very productive. It is no different then sending a claim to an insurance company and asking them to talk about it. That is what we would have if we didn't have this current law.

Paula J. Grosinger, Executive Dir. ND Trial Lawyers Assoc. (meter) Att. #5 In Hospital Deaths from Medical Errors - Att. #5a

Sen. Traynor asked that out of the 39 malpractice filings how many had settlements? No we do not have privalage to that information

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1386

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 22, 2005

Tape Number	Side A	Side B	Meter #
2	x		2010 - 3029
Committee Clerk Signature			

Minutes:

Chairman Traynor opened the discussion on HB 1386.

Senator Trenbeath said he does not like this bill.

Senator Traynor said the proponents think it will help their insurance situation.

Senator Trenbeath said he doesn't think it will, it just adds another step. It just adds more cost to the malpractice defense.

Senator Triplett said the most compelling testimony in opposition was from John Kapsner who pointed out courts do not have jurisdiction over cases that have not been filed. He thinks it is highly unlikely the Supreme Court would develop rules relating to things prior to the commencement of a lawsuit and she thinks he is right. It is one of those well intentioned bills.

Senator Nelson said Larry's whole reason for the bill is it is not working. He did not give real convincing testimony.

Senator Hacker said someone said that the procedures for section 2 subsection 3 would take 5 years to write.

Senator Triplett said even longer if they refuse to start.

Senator Triplett moved a do not pass on HB 1386.

Senator Nelson seconded the motion.

Senator Trenbeath said it is human nature, you can't force people to get along and that is what this bill is trying to do. There is a reason the legal system is based on resolution of conflict.

Senator Syverson said he thinks sometimes if a judicial action is available, individuals would prefer to go that way rather than seek an mandatory alternative, negotiation. If there could be some pressure to seek another route, they may not like each other but they might find an avenue that is less destructive.

Senator Trenbeath said the only way to do that is to limit access to the courts and there is a constitutional problem with that.

Senator Traynor said the closest thing the committee had to what the Supreme Court thinks about this is John Kapsner's testimony.

Senator Nelson said he is close to the Supreme Court.

Senator Traynor said they are not going to do it.

Senator Triplett said it isn't that they would have a bad attitude about it, they wouldn't necessarily have jurisdiction, to write rules regarding people's actions prior to the commencement of a case.

Senator Syverson said he is thinking about discovery, in testimony on another bill, and that suit still needs to be filed before discovery can be commenced.

Senator Triplett said virtually everything in the courts relates from the time of service of a summons which is how a case is defined to be commenced and that is what brings the court into it.

Senator Traynor said it is mandatory and that would make it more expensive and would lengthen the proceeding.

Senator Syverson said unless common ground is found.

Senator Trenbeath said if you are both agreeable, you don't need a rule and if one party is not agreeable, it won't succeed.

Senator Triplett said Eide Bailey's letter in support of the bill indicates they include ADR in their contracts, both parties agree up front. This is another way people are using alternative dispute resolution, by contracting to do it. This is appropriate and to be encouraged.

Senator Trenbeath said doctors could do it too.

Senator Traynor asked if the bar does it.

Senator Hacker said Eide Bailey is very proud of how they do it, voluntarily and on their own. He commends them for it.

The motion passed on a roll call vote 5-1-0.

Senator Triplett will carry the bill.

Date: 3/22/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1386

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Senator Triplett Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson		✓	Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 5 6 No 1 0

Absent 0 0

Floor Assignment Senator Triplett

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1386, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO NOT PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1386 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1386

HOUSE BILL NO. 1386
TESTIMONY OF REP. LAWRENCE R. KLEMIN
HOUSE JUDICIARY COMMITTEE
FEBRUARY 2, 2005

Mr. Chairman and Members of the Committee, I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am appearing before you to testify in support of House Bill 1386. This bill relates to alternative dispute resolution (ADR) for professional malpractice.

In 1990, the State Health Council established the North Dakota Health Task Force to review the health care system in North Dakota and make recommendations for improvements. Through the next several years, including studies by interim legislative committees, numerous aspects of the delivery of health care were studied and analyzed, including the delivery of health care, health care insurance, medical malpractice, and the rising cost of medical malpractice insurance. In the 1995 Legislative Session, a comprehensive bill was considered which included provisions for medical malpractice reform, among many other things. The bill passed by the 1995 Legislature included a chapter enacting a modified alternative dispute resolution provision, which is now contained in Section 32-42-03, which merely required plaintiff and defense attorneys to make a good faith effort to utilize ADR to resolve a potential medical malpractice case before a claimant could initiate a health care malpractice action. The attorneys for each side were to certify in the pleadings that they had complied with this requirement. The court could sanction an attorney who failed to comply with this requirement. If the court found that a party refused to make a good faith effort to comply with the ADR requirement, the court could award reasonable costs, including attorney's fees, to the prevailing party. This is the law as it exists today. A copy of Section 32-42-03 is attached to my testimony for your information.

The 1995 law on ADR hasn't accomplished anything. First, it is voluntary to the extent that ADR is not actually required, only that an effort be made to resolve a claim using ADR. To my knowledge, attorneys and parties pay little attention to this and do not actually use ADR to resolve malpractice claims. The attorneys certify they have done the minimum required, and the case proceeds to litigation. The court has never imposed a sanction, to my knowledge and I know of no case in which attorney fees have been awarded under this law. The 1995 law is useless, for all practical purposes.

It should come as no surprise to anyone on this committee that there continues to be increases in the cost of medical malpractice insurance. According to the North Dakota Medical Association, professional liability insurance nationally is at record high premiums. In some areas, rates have increased by as much as 132%. Fortunately, it's not been this high in North Dakota, but rates have steadily increased. Physicians in North Dakota saw a 6.8% increase in 2004 and a 5% increase in 2005 in their already high rates.

The same problem with rising costs of professional liability insurance has also affected other professions. For example, in my small law office of four lawyers, professional liability insurance premiums have nearly tripled in the last few years, even though we have had no claims. In addition, we need higher and higher deductibles in order to keep the increases down to these levels.

I don't have any specific information on the professional liability insurance rates for other professionals, but I can surmise that their rates are also following these trends. The costs of rising insurance have to be passed on to the consumer in the form of higher and higher charges for professional fees. It therefore affects all of us.

What is driving these increases in professional liability insurance? I don't have a detailed answer, but part of the increase has to be attributed to the high cost of litigation. Make no mistake, litigation for even a small case can be expensive. In professional malpractice cases, it can be very expensive with the high cost of expert witnesses, extensive pretrial depositions and other discovery, and pretrial motions, not to mention the time involved in preparing a case for trial and then having the trial. There is also the possibility in any case that there will be appeals and new trials.

An optional lower cost method is alternative dispute resolution or ADR. We already have ADR through rules established by the North Dakota Supreme Court. A copy of Rule 8.8 of the North Dakota Rules of Court is attached to my testimony. However, the Rule 8.8 provisions on ADR only apply ***after*** a lawsuit has been commenced. In addition, ADR is ***voluntary***. No one is required to engage in ADR under this rule.

House Bill 1386 provides for ***mandatory*** ADR ***before*** a lawsuit can be commenced. This ADR requirements in this bill apply to all professionals, not just to health care providers.

Section 1 of the bill amends the definitions section of Chapter 32-42 to remove the definition of "alternative dispute resolution" because ADR would no longer be covered by Chapter 32-42 if this bill passes. Section 3 of the bill repeals Sections 32-42-03 and 32-42-04 for the same reason. The heart of the bill is in Section 2.

Section 2 creates a new Act for mandatory ADR for professional malpractice claims. Under this new Act, no one is required to resolve a case through ADR, but they must actually engage in ADR in order to be in compliance with the Act.

Section 1 of the new Act on page 2, lines 16 through 22, states that a "professional malpractice claim" includes a claim subject to subsection 3 of Section 28-01-18 brought against a professional, or other defendant joined in the action, alleging professional malpractice. Subsection 3 of Section 28-01-18 is the 2 year statute of limitations and provides:

The following actions must be commenced within two years after the claim for relief has accrued:

3. An action for the recovery of damages resulting from malpractice; provided, however, that the limitation of an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was prevented by the fraudulent conduct of the physician or licensed hospital. This limitation is subject to the provisions of section 28-01-25 [disabilities that may extend the statute of limitations]

This statute of limitations applies to physicians, hospitals, nurses, lawyers, accountants, engineers, architects, and other similar professionals. Therefore, all of these professionals would be covered by House Bill 1386.

Section 2 of the new requirements provides that every "professional malpractice claim" is subject to ADR before an action can be commenced. The "action" is the lawsuit. The Supreme Court is required to adopt rules to establish a statewide mandatory ADR program for the resolution of professional malpractice claims. I would prefer that the Supreme Court applied the mandatory ADR program to all claims, not just to professional malpractice claims, but that is beyond the scope of this bill. You have to start somewhere. However, I know of no reason why the Supreme Court could not establish a mandatory ADR requirement on its own, just as it has done with the existing voluntary program.

There can be many forms of ADR and some of these are set out in section 3 on page 3, lines 4 through 8. The parties are to decide which form of ADR they will use. The ADR is nonbinding, unless the parties choose to make it binding by agreement. It should also be mentioned that nothing in this bill prevents the parties form settling the case at any time without going through ADR.

Section 4 on lines 9 through 17 allows a party to initiate litigation after the conclusion of the ADR, except to the extent provided in Chapter 32-29.3. This chapter of existing law is the Uniform Arbitration Act, which has its own requirements. The parties are also free to use the provisions of the Uniform Arbitration Act, if they desire.

Section 4 also contains the ***consequence*** of going to court after the conclusion of ADR. There must be a consequence or I would expect that parties might give lip service to the new Act, just like they have done with the existing ADR law. The consequence is that if the decision of the court or jury is not more favorable than the recommended decision or last offer in the ADR, the court may award attorney fees to the prevailing party.

Section 5 continues the provision of existing law which allows a court to sanction a party who fails to make a good faith effort to resolve the claim through ADR.

Section 6 provides that the ADR process stays the running of any applicable statute of limitation until 90 days after the completion of ADR.

The bill establishes a framework for a mandatory ADR process. This bill may not be perfect but the details of how ADR will actually be done is to be handled by the rules of the Supreme Court. Section 4 of the bill contains a delayed effective date to January 1, 2006, to give the Supreme Court time to adopt the ADR rules.

In summary, this bill provides that ADR will be ***mandatory*** in all professional malpractice cases, ***before*** a lawsuit can be started. No one is bound by the results of the ADR procedure, unless they agree to be bound. The Supreme Court will adopt the rules for ADR. A lawsuit can be commenced after the ADR is concluded, but there is a ***consequence*** in the form of an award of attorney fees if a party is unreasonable and the court or jury verdict is less than what that party would have received through the ADR process. The award of attorney fees works both ways and can apply to either a plaintiff or a defendant.

At least 18 States now have some form of mandatory alternative dispute resolution involving professional malpractice claims. I think this is clearly the trend in the Untied States. North Dakota should also move in this direction. Our existing law for ADR in professional malpractice cases is useless. The ADR requirements should apply to all professionals. Mr. Chairman and Members of the Committee, I encourage you to give favorable consideration to House Bill 1386.

32-42-03. Alternative dispute resolution.

1. Before initiating a health care malpractice action, the attorney representing a claimant shall advise the claimant about all reasonably available alternative dispute resolution options that may be available to the parties to settle the claim.

2. At the earliest opportunity after the attorney for a health care provider has notice of a potential health care malpractice claim or action, the attorney shall advise the health care provider about all reasonably available alternative dispute resolution options that may be available to the parties to settle the claim.

3. The claimant and health care provider shall make a good-faith effort to resolve part or all of the health care malpractice claim through alternative dispute resolution before the claimant initiates a health care malpractice action.

4. The attorneys for the claimant and health care provider shall state in the pleadings that they have complied with subsections 1 and 2 and that the parties have complied with subsection 3.

5. The court may sanction an attorney who fails to comply with subsections 1 or 2.

6. Notwithstanding section 28-26-01, the court, upon a finding that a party refused to comply with subsection 3, may award reasonable actual and statutory costs, including part or all of the attorney's fees to the prevailing party or parties.

Source: S.L. 1995, ch. 246, § 29.

Rule 8.8. Alternative dispute resolution.

(a) Parties to civil suits are encouraged to participate in alternative dispute resolution ("ADR") at an early stage of the case under N.D.R.Civ.P. 16(a)(6), and all parties in civil cases not excluded from application of this rule must discuss early ADR participation and the appropriate timing of such effort. After the filing of an answer, each party must within 60 days serve and file a statement with the district court (in the form shown in appendix F) detailing ADR participation that has occurred or is planned to occur. The statement must certify that the parties have discussed ADR participation with each other and that the parties' lawyers have discussed ADR with their clients. The statement must also set forth whether ADR will be court-sponsored under this rule or performed by a private neutral. If a party does not plan to participate in ADR, the statement must contain the reason for not participating. The statement may be incorporated into a joint informational statement under N.D.R.Ct. 8.3(a). Cases which are limited to review of an administrative decision on an existing record are excluded from this authorization, except upon specific designation by a judicial officer.

(b) Confidentiality. The court-sponsored ADR process is confidential and not open to the public. Disclosure of confidential ADR communications is prohibited, except as authorized by the court and agreed to by the parties.

(1) Statements made and documents produced in non-binding ADR processes which are not otherwise discoverable are not subject to discovery or other disclosure and are not admissible into evidence for any purpose at trial.

(2) The neutral conducting an ADR proceeding may not be called to testify in connection with any dispute relating to the ADR proceeding or its result except upon written agreement of the parties and the concurrence of the district court, or when otherwise required by law.

(3) Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral unless all parties and the neutral agree to such disclosure or such disclosure is required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved.

(c) The primary forms of ADR offered by the district court are mediative court-sponsored settlement conferences other than pretrial conferences under N.D.R.Civ.P. 16 and domestic

relations mediation. Additionally, parties are encouraged to arrange and participate in ADR in the private market as an alternative to court-sponsored ADR.

(d) A sliding fee schedule based on participants' assets and income will be established by administrative order and applied to court-sponsored mediation services in all cases involving domestic relations.

(e) The trial judge will not serve as the settlement judge under this rule. The trial judge will not be informed of any positions taken by parties during ADR and will only be advised whether the case settled.

(f) Administration. Each district court will designate by order of appointment a judicial officer or employee for its district to serve as program administrator to implement, oversee, and evaluate the district's ADR program.

(g) Disqualification. A judicial officer or employee conducting an ADR proceeding may be disqualified for bias or prejudice or for a conflict of interest.

(1) Any party who believes a judicial officer or employee conducting an ADR proceeding has a conflict of interest must file a request for recusal at the earliest opportunity.

(2) Upon disqualification of a judicial officer or employee from conducting an ADR proceeding, the presiding judge will assign another judicial officer or employee to conduct further ADR proceedings.

(h) Availability. Court-sponsored ADR will depend on available resources.

EideBailly

CPAs & BUSINESS ADVISORS

February 2, 2005

Chairman and Committee Members
House Judiciary Committee

RE: HB 1386 – Alternate Dispute Resolution

Eide Bailly LLP is a certified public accounting firm with offices in Fargo, Bismarck and Minot.

Eide Bailly supports HB 1386 requiring mandatory alternate dispute resolution (ADR) for claims against professionals.

Our firm has included ADR provisions in our client engagement letters for several years. We see ADR as a first opportunity to try to resolve differences before they become involved in a lengthy and costly court proceeding.

We are not able to state with certainty if the current draft of HB 1386 would commence ADR without filing something with the courts.

In adopting ADR, we feel it if very important that ADR take place before something is filed with the courts and available to the news media. Currently, ADR can be accomplished without any filing with the courts, and we feel it should remain that way. When a professionals name appears negatively in the news media, they have already lost significantly regardless of the merits or lack thereof relating to the claim.

Attached is suggested wording for two amendment to the bill. One to fortify that ADR will take place prior to the filing with the courts. The other is to delete a word that if left in, would provide a significant opportunity to circumvent ADR.

Thanks you for your consideration.

Sincerely,

Eide Bailly LLP

Paul J. Wohnoutka, Partner

Requested amendment to HB 1386

Amend page 2 lines 23 through 24 as follows

2. Before an action may be commenced regarding a professional malpractice claim, a notice of a potential malpractice claim and demand for state mandatory alternative dispute resolution shall be given to the defendant and a certificate issued verifying completion of alternative dispute resolution, or defendant noncompliance, shall be filed along with any complaint. The supreme court shall establish a

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Amend page 2, line 19

Delete the word "unreasonable"

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House Judiciary Hearing
Testimony presented by Paula J. Grosinger
Executive Director, North Dakota Trial Lawyers Association
Lobbyist #114

House Bill 1386
2 February 2005
701-202-1293

According to the District **North Dakota Courts Annual Report 2003** (North Dakota Supreme Court), there were 39 malpractice filings (all types) in 2003 out of 31,673 total filings.

Malpractice defendants rarely, if ever, agree to pre-litigation mediation or alternative dispute resolution. Taking malpractice claims to trial, especially medical malpractice, becomes very expensive for injured plaintiffs because of the need to present expert testimony to meet their burden of proof.

From the standpoint of an injured individual, alternative dispute resolution (ADR) might help avoid the expense and strain of a trial while allowing the individual to receive compensation for injuries. Mandating ADR could be beneficial to plaintiffs in cases with lower damage claims because these cases are usually not economical to litigate. House Bill 1386 could actually encourage more individuals to pursue claims for injuries and attorneys may be more willing to take such cases.

Currently:

Chapter 32-42-03 of the North Dakota Century Code requires attorneys representing claimants to advise their clients about alternative dispute resolution options available to settle a claim prior to initiating any health care malpractice action. Defense attorneys are obligated to notify potential defendants about alternative dispute resolution options at the earliest opportunity after receiving notice of a potential malpractice claim or action. The statute also requires a good faith effort by both parties to resolve the claim through alternative dispute resolution prior (ADR) to initiation of a malpractice action.

An action is considered to have commenced with the service of a summons upon a defendant. (Rule 3. North Dakota Supreme Court Rules N.D.R. Civ. P.)

How it works in medical practice:

A patient (or the patient's family member) who is the victim of malpractice may not be aware of the actual injury until another health care practitioner makes such an observation.

Or, a patient (or family member) suspects injury due to malpractice. Usually this is because of a persistent problem such as infection, pain, unexpected result, or some obvious adverse response to medical treatment.

Contact is made with an attorney and the patient presents the problem. The attorney advises there may be cause for action and advises about the option of ADR to resolve the claim. A request to meet with the defendant may be made or a request for patient records. At this point the defense attorney would advise about ADR.

The potential plaintiff's attorney usually tries to speak with the health care provider. Potentially, the attorney may have enough information to decide not to proceed after such discussion. In practice, this does not generally occur because the provider usually refuses to discuss anything until the action has actually commenced with the service of summons. After the action has commenced there is usually a denial of any wrongdoing.

Effect of House Bill 1386:

House Bill 1386 would make alternative dispute resolution mandatory and not voluntary.

Language in Section 2, Part 2 of the bill seems to confuse the chronology relating to when an action is considered to have commenced. Unlike Federal Rules of Civil Procedure, North Dakota Rules of Civil Procedure derived from Section 28 0501, North Dakota Revised Code of 1943 state that for commencement of an action all that is required is service of a summons. Therefore, commencement precedes filing of a complaint with the court.

The bill requires the Supreme Court to establish a statewide ADR program but there is no appropriation or budget for this purpose.

Section 2, Part 5: This section is a fee-shifting departure from the ***American Rule*** which is that parties in legal actions pay their own way. Rule 68 of the Rules of Civil Procedure already applies to pre-trial settlement offers. However, the language in this bill is ambiguous depending on whether it is interpreted from the perspective of the defense or the plaintiff.

- Some plaintiffs would be happy to receive attorney fees if they were to make an ADR offer that was rejected by the defense and later resulted in a larger award for the plaintiff, or if there was an ADR decision favoring a plaintiff and the defendant decided to reject that decision and the claim proceeded to trial.
- But, if the defendant prevails at trial, regardless of any offers or a contrary ADR decision, under this law it could be interpreted that the result was not more favorable to the plaintiff. Plaintiff could be ordered to pay all defense attorney fees.
- If the defendant makes a lowball offer, and the plaintiff prevails at trial, and the result is "more favorable" to the plaintiff, there is no provision for awarding attorney fees to the plaintiff.
- If there is no offer or decision resulting from ADR, if the plaintiff goes to trial and loses the result is "not more favorable" to the plaintiff.

Conclusion

Altering attorney fee provisions would have a chilling effect on the ability of plaintiffs to pursue their Seventh Amendment rights should they not accept an ADR decision, recommendation or resulting offer. This, in combination with the caps already imposed on medical malpractice claims constitute something I refer to as a "red shift." In communist countries, when someone suffered a serious injury, they were paid a small set amount established by the government. In contrast, our constitution requires that a jury of our peers is asked to set a full and fair amount of money for a loss suffered by a fellow citizen. Why should state government make injured individuals pass through another layer of bureaucracy before pursuing redress in the courts?

TESTIMONY

OF THE
NORTH DAKOTA HEALTHCARE ASSOCIATION
IN OPPOSITION TO
HOUSE BILL NO. 1386

Chairman DeKrey -- members of the Committee. My name is Arnold R. Thomas. I am the President of the North Dakota Healthcare Association. The Association opposes passage of House Bill 1386.

We believe that requiring mandatory alternative dispute resolution prior to the commencement of a lawsuit involving professional negligence increases the cost of professional negligence litigation, engages the alternative dispute resolution process at too early a stage, and, as currently constructed, creates serious impediments to implementation.

1. By requiring alternative dispute resolution prior to the commencement of a lawsuit, the Bill institutionalizes an intractable problem involving the disparity of information available during the early stages of a professional negligence case. Professional negligence cases have a two year statute of limitations from the time the alleged negligence is "discovered". Thus, claimants and their attorneys have up to two years (and possibly more) to prepare a case, including acquiring all necessary records and securing expert testimony, prior to a

demand for mandatory alternative dispute resolution. At that stage, defendants and their counsel are at a tremendous information disadvantage. Therefore, any alternative dispute resolution process will inevitably be delayed for many months while defendants and their counsel accumulate appropriate information and secure expert reviews. Only when the parties are on an equal information footing can alternative dispute resolution be productive. Imposing the alternative dispute resolution process at a stage prior to the commencement of a lawsuit will likely extend the time period during which a professional is subject to potential damages.

2. By adding a lengthy step before a lawsuit for professional negligence can be commenced, we believe the Bill increases rather than decreases the cost of litigation.

3. Alternative dispute resolution is currently being utilized in virtually every professional negligence case which is not settled at an early stage or dismissed at an early date. The current use of alternative dispute resolution occurs at a time in the lawsuit when the parties have similar information and are able to more properly evaluate the merits and shortcomings of their case. While House Bill 1386 may increase the number of cases using alternative dispute resolution, those additional instances most likely involve cases which are disposed of at early stages in the current process.

4. Our review of House Bill 1386 leads us to conclude that implementation of its provisions will have no real impact on the costs of malpractice premiums, nor will the Bill increase the number of carriers willing to write professional negligence policies in North Dakota.

5. House Bill 1386 also provides that the North Dakota Supreme Court must develop rules relating to arbitration, separate rules relating to private trials, separate rules relating to neutral expert fact finding, separate rules relating to mediation, and separate rules relating to mini trials. It also requires the Supreme Court to develop any other rules it deems appropriate. Because House Bill 1386 requires alternative dispute resolution prior to the commencement of a lawsuit, it is highly unlikely the North Dakota Supreme Court will develop the required rules. The Bill provides for alternative dispute resolution prior to the initiation of litigation. The courts of North Dakota have no jurisdiction over matters where litigation has not been commenced. The Court's existing rules for alternative dispute resolution, relating primarily to family law, engage only after litigation has been commenced in North Dakota courts. We believe it unlikely the Supreme Court will agree to develop rules relating to matters over which the courts have no jurisdiction.

Further, even if the Supreme Court were to agree to adopt such rules, the

development of such a vast array of rules would take years, not months.

In conclusion, we do not believe this Bill will achieve its hoped-for results. We believe costs associated with professional negligence cases are more likely to increase than decrease if House Bill 1386 is adopted . We believe the alternative dispute resolution process envisioned will be lengthy and expensive. The vast majority of professional negligence cases not now disposed of early in the court process, and which are likely to proceed to trial, are already being mediated. Finally, we do not believe the North Dakota Supreme Court will undertake to develop rules where the courts of North Dakota have not yet assumed jurisdiction.

CPA
NORTH
DAKOTA
ND Society of CPAs
2701 South Columbia Road
Grand Forks, ND 58201-6029

January 30, 2005

To The Honorable Representative Lawrence R. Klemin,

I am writing, as the President of the North Dakota Society of CPA's, in support of House Bill 1386, to provide for mandatory alternate dispute resolution for professional malpractice claims.

Our Society supports the use of alternative dispute resolution, described in Section 2, as a productive means to resolve malpractice claims.

Respectfully submitted,

Terry Delaney

Terrence P. Delaney, CPA,ABV, President
North Dakota Society of CPAs

Page 11A

Legal myths: Hardly the whole truth

The stories are humdingers: People are injured, often while doing foolish things, yet they win huge payouts in court. The tales would be harmless, except that they're the backdrop for a very real push for tort reform.

By Jonathan Turley

Have you heard about the guy who injured himself while using his lawn mower as a hedge clipper, and then won $500,000 in a lawsuit against the lawn mower company? How about the woman who threw a soft drink at her boyfriend, slipped on the wet floor, and then won $100,000 in a lawsuit against the restaurant? These are only two of the common examples of lawsuit abuses that are fueling the call for "litigation reform." They are also completely untrue — part of a growing collection of legal mythologies that are appearing widely in the national media.

Image is everything in tort reform, such as President Bush's visit earlier this month to a "judicial hellhole" in Illinois where tort cases supposedly flourish. He has made tort reform a priority of his second term and is expected to repeat these calls in his State of the Union address Wednesday. It is all part of a well-funded campaign to limit damages against companies and physicians across the country.

Horror stories offered by industry groups play to a weakness in the media for "you-are-not-going-to-believe-this" stories. Of course, it is not surprising that the stories are unbelievable — because many never occurred.

Take the ubiquitous hedge-clipper man story. It has appeared in print, on TV programs, in law school classrooms and in political speeches for decades. Former vice president Dan Quayle used it in his call for reform (though he reportedly referred to the man cutting his hair with a lawn mower). In reality, the story originated in an ad campaign by the insurance firm Crum & Forester, which later admitted that it knew of no such case. Yet, proving that facts should never stand in the way of a good story, it remains perhaps the most cited example of abuse — the best $500,000 that the insurance industry never paid.

Even true stories often prove not to be examples of bad law, but bad lawyering. Take the list of the "wackiest consumer warnings," released this month by the Michigan Lawsuit Abuse Watch to show the need for reform. Included are such things as a warning on a toilet brush that reads, "Do Not Use for Personal Hygiene" or a sign on a scooter that reads, "This product moves when used." These are not fabrications, but none of these warnings make any more legal sense than they do practical sense. No company has to warn consumers not to use a toilet brush on their teeth or hair.

Legal legends can be irresistible, even for the most respected newspapers, magazines and networks.

*U.S. News & World Report*owner Mort Zuckerman used the story of the soft drink lady in Pennsylvania in an article denouncing lawsuit abuse. He is not alone. The tale of Amber Carlson and her soda has appeared in countless television and print sources. Zuckerman also cited the case of a woman who knocked her teeth out while sneaking through a nightclub's restroom window to avoid paying a $3.50 cover charge — and then won $12,000 from a jury. It is also false.

Both stories have been attributed to the Stella Awards, an annual listing of loony lawsuits. But the Stella Web site points out that they both are complete fabrications. Yet they continue to appear in print and on the Internet.

Other examples of fabricated "true cases of lawsuit abuse":

•Kathleen Robertson of Austin received $780,000 from a jury after she tripped over her own son in a furniture store.

•Carl Truman, a 19-year-old in Los Angeles, was awarded more than $74,000 when his hand was run over by a neighbor. The neighbor did not see Truman, who was in the process of stealing his hubcaps.

•Terrence Dickson of Bristol, Pa., was given a $500,000 award after he was inadvertently trapped in the garage of a house that he was burglarizing.

•A Mr. Grazinski won more than $1,750,000 and a new Winnebago after he put his new motor home on cruise control at 70 mph and then went into the back to fix himself some coffee — only to crash on the highway.

These are the legal versions of the urban legends about alligators living in the New York City sewers. Everyone knows that alligators brought back by kids as pets from Florida have been flushed down the toilets, only to thrive below the streets of New York City.

Legal legends fit the stereotype of litigation so well that their falsity becomes secondary. Of course, law is not alone in such fabrications. Consider my favorite story about Pia Zadora's dismal performance as the lead in *The Diary of Anne Frank*. Zadora was so bad that, during the scene where Nazis break into the house screaming, "Where is Anne Frank?" audience members screamed, "She's in the attic!" It is a brilliant story, but I was crushed to learn recently that it is also completely untrue: Zadora has never played Anne Frank, and there is no such scene in the play.

I loved the Zadora story for the same reason people such as Zuckerman loved the fabricated lawsuit stories: They capture a critical idea with an element of humor or absurdity. There is, however, a great difference between using urban legends to dish on some actress and using them to make massive changes in the law. So, as we begin this latest debate over tort reform, one small piece of advice: If you hear about a case that is almost too good to be true, it probably isn't.

Jonathan Turley is the Shapiro Professor of Public Interest Law at George Washington University and has testified before Congress on tort reform. He is also a member of USA TODAY's board of contributors.

North Dakota
Chiropractic
Association

February 3, 2005

Honorable Lawrence R. Klemin
State Representative
600 E. Boulevard Ave.
Bismarck, ND 58505

Dear Representative Klemin,

I am writing, as the President of the North Dakota Chiropractors Association, in support of House Bill 1386, to provide for mandatory alternate dispute resolution for professional malpractice claims.

Our Association supports the use of alternative dispute resolution as a means to resolve malpractice claims.

Respectfully submitted,

Jeffrey J. Askew, D.C.

P.O. Box 2144 • Bismarck, ND 58502-2144 • 701-530-2141

1-01-20. Valuable consideration — Definition. A valuable consideration means a thing of value parted with, or a new obligation assumed at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It also is called simply "value".

Source: Civ. C. 1877, § 2121; R.C. 1895, § 5130; R.C. 1899, § 5130; R.C. 1905, § 6716; C.L. 1913, § 7303; R.C. 1943, § 1-0120.

Negotiable Notes as Consideration for Antecedent Debt.

One is a purchaser for value who takes a negotiable promissory note in the usual course of business from the payee who transfers it by endorsement of a guaranty of payment and the paper is in payment of an antecedent debt. Dunham v. Peterson (1896) 5 ND 414, 67 NW 293, 36 LRA 232, 57 AmStRep 556.

Where a note was transferred by the endorsement of a written guaranty of payment by the payee, the holders were not endorsees in due course who took the note as collateral security for an antecedent debt. Porter v. Andrus (1901) 10 ND 558, 88 NW 567.

Value.

Where a person furnished funds to another to purchase a house, and the funds were misappropriated and the lender later took a mortgage, he was not an encumbrancer for value as against a bank which was a good faith encumbrancer without notice and for value. Merchants' Bank of Napoleon v. Schatz (1930) 59 ND 365, 230 NW 18.

Collateral References.

Contracts ⇐ 49 et seq.
17 Am. Jur. 2d, Contracts, § 85 et seq.
17 C. J. S. Contracts, § 74 et seq.

1-01-21. Good faith — Definition. Good faith shall consist in an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

Source: Civ. C. 1877, § 2105; R.C. 1895, § 5114; R.C. 1899, § 5114; R.C. 1905, § 6699; C.L. 1913, § 7286; R.C. 1943, § 1-0121.

Presumption of Good Faith.

Where the grantors of mineral interests in land were dealing with strangers and the grantors signed a mineral deed thinking it was a copy of a mineral lease executed at the same time, the grantors must bear the resulting loss as against bona fide purchasers for value from the grantee. The purchasers from the grantee had a right to rely on the presumption of fair and honest dealing. Hoffer v. Crawford (1954) 65 NW 2d 625.

It was not error to instruct a jury that transfers by failing debtors to relatives should be scrutinized with special care, when the court further stated that the mere fact of relationship is not a badge of fraud and that the law presumes good faith and honest intentions. Shauer v. Alterton (1894) 151 US 607, 38 LEd 286, 14 SupCt 442.

Purchaser of Real Estate.

Purchaser who was well acquainted with his grantor and knew that the grantor was not in actual possession of the premises and was aware of a prior recorded quitclaim deed was not a bona fide purchaser in good faith. Gajewski v. Bratcher (1974) 221 NW 2d 614.

Purchaser of mineral title was a bona fide purchaser where he paid valuable consideration, had no intent to take unfair advantage, and had no notice, actual or constructive, of outstanding rights of others. Rosenquist v. Harris (1956) 138 FSupp 21.

Question of Fact.

Good faith is a question of fact to be determined in a case. Merchant v. Pielke (1900) 10 ND 48, 84 NW 574; Thompson v. Sioux Falls Nat. Bank (1893) 150 US 231, 37 LEd 1063, 14 SupCt 94.

Recording Act Requires Good Faith.

"Good faith", within the recording act, implies the absence of information and belief of facts rendering the transaction unconscientious. Hunter v. Coe (1903) 12 ND 505, 97 NW 869; Harry E. McHugh, Inc. v. Haley (1931) 61 ND 359, 237 NW 835.

Law Reviews.

Is Good Faith in Insurance Contracts a Two-Way Street? 62 N.D.L.Rev. 355.

AH #1

HOUSE BILL NO. 1386
TESTIMONY OF REP. LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
MARCH 7, 2005

Mr. Chairman and Members of the Committee, I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am appearing before you to testify in support of House Bill 1386. This bill relates to alternative dispute resolution (ADR), primarily for professional malpractice cases.

Alternative dispute resolution can take many forms. The most common forms are mediation and arbitration. The courts have often said that alternative dispute resolution is favored over litigation. In the usual case, the cost of ADR is much less than litigation, which can be very expensive. In addition, there is the human cost. Trials can be very stressful for the parties involved. Alternative dispute resolution involves much less stress than a jury trial. The use of ADR can also keep claims out of court, which reduces the workload of the courts.

A little history on ADR in North Dakota. In 1990, the State Health Council established the North Dakota Health Task Force to review the health care system in North Dakota and make recommendations for improvements. Over the next several years, including studies by interim legislative committees, numerous aspects of the delivery of health care were studied and analyzed, including the delivery of health care, health care insurance, medical malpractice, and the rising cost of medical malpractice insurance. In the 1995 Legislative Session, a comprehensive bill was considered which included provisions for medical malpractice reform, among many other things. The bill passed by the 1995 Legislature included a chapter enacting a modified alternative dispute resolution provision, which is now contained in Section 32-42-03, which merely required plaintiff and defense attorneys to make a good faith effort to utilize ADR to resolve a potential medical malpractice case before a claimant could initiate a health care malpractice action. The attorneys for each side were to certify in the pleadings that they had complied with this requirement. The court could sanction an attorney who failed to comply with this requirement. If the court found that a party refused to make a good faith effort to comply with the ADR requirement, the court could award reasonable costs, including attorney's fees, to the prevailing party. This is the law as it exists today. A copy of Chapter 32-42 is attached to my testimony for your information.

The 1995 law on ADR for medical malpractice cases hasn't accomplished anything in the past 10 years. First, it is voluntary to the extent that ADR is not actually required, only that an effort be made to resolve a claim using ADR. To my knowledge, attorneys and parties pay little attention to this and do not actually use ADR to resolve malpractice claims. The attorneys certify they have done the minimum required, and the case proceeds to litigation. The court has never imposed a sanction, to my knowledge, and I know of no case in which attorney fees have been awarded under this

law. The 1995 law has not worked..

I think that one of my responsibilities as a lawyer and as a legislator is to improve legislation on legal procedure that isn't working. If it's not working, then maybe a new approach is necessary. Our legislative committees should take a close look at bills like this and strive to improve the law so that it works. The status quo on ADR in our law should not be acceptable.

ADR is intended to be a means to reduce the high cost of litigation. Litigation for even a small case can be expensive. In professional malpractice cases, it can be very expensive, considering the high cost of expert witnesses, usually from out of state, pretrial depositions and other discovery, and pretrial motions, not to mention the time involved in preparing a case for trial and then going to trial. There is also the possibility in any case that there will be appeals and new trials. A lawsuit involving professional malpractice can easily cost from $30,000 to $100,000, or more, depending on the nature of the case.

A lower cost method is alternative dispute resolution or ADR. I think ADR should apply to all types of professional malpractice cases, not just to medical malpractice, as well as to other types of cases. We have an ADR rule that was adopted by the North Dakota Supreme Court in 2001 that is intended to apply to all types of cases. A copy of Rule 8.8 of the North Dakota Rules of Court is attached to my testimony. However, the Rule 8.8 provisions on ADR only apply after a lawsuit has been commenced and only require parties to consider ADR as an alternative. ADR under this rule is voluntary. No one is required to engage in ADR. They just have to file a form with the court stating that they have considered it. The current rule establishes no procedures for how ADR is to be conducted.

House Bill 1386 provides for mandatory ADR before a lawsuit can be commenced. Section 1 of the bill amends Section 32-42-01, the definitions section of Chapter 32-42, to remove the definition of "alternative dispute resolution" because ADR would no longer be covered by Chapter 32-42. The other definitions in Section 32-42-01 are retained because they're needed in other parts of Chapter 32-42.

Section 2 contains the revised provisions for alternative dispute resolution. First, in subsection 1, the term "professional malpractice claim" is defined by reference to the two year statute of limitations in section 28-01-18(3). A copy of Section 28-01-18 is attached to my testimony. This statute of limitations applies to physicians, hospitals, nurses, lawyers, accountants, engineers, architects, chiropractors, dentists, and other professionals. Therefore, all of these professionals would be covered by ADR under House Bill 1386.

Subsection 2 of Section 2 provides that before an action alleging a professional malpractice claim can be commenced, notice of a claim and a demand for ADR must be served on the professional. However, if all parties to the claim agree, then the

requirement for ADR can be waived. The Supreme Court is to adopt rules governing the practice and procedure for the alternative dispute resolution of professional malpractice claims. The Supreme Court is also authorized to establish a mandatory ADR program for other types of cases. The rules must provide for an equitable means for the payment of the fees and expenses of ADR and must also provide that the damages awarded in ADR cannot exceed any statutory limitations.

Subsection 3 lists some of the types of ADR that can be used. Arbitration and mediation are the most commonly used types of ADR, but the parties are free to agree on what they want to do. Regardless of the type of ADR used, it is nonbinding unless the parties agree to make it binding.

Subsection 4 allows a party to initiate litigation at the conclusion of ADR. This would only occur if the ADR was unsuccessful. However, the parties must state in the pleadings that they have complied with the ADR provisions of this section. This is a carryover from the current ADR law. [See 32-42-03(4)] There is an exception to the commencement of litigation following ADR if the parties are subject to Chapter 32-29.3, the Uniform Arbitration Act, which has its own requirements.

Subsection 5 allows a court to impose sanctions if a party is not making a good faith effort to resolve the claim through ADR. This is also a carryover from the current ADR law. [See 32-42-02(5)]

Subsection 6 provides that the ADR process stays the running of any applicable statute of limitation until 90 days after the completion of ADR. The intention here is that a stay of the running of any statute of limitation would begin when the notice of claim under subsection 1 is served, and would continue until 90 days after the end of ADR. It is not intended to shorten a statute of limitations, merely to interrupt its running while the parties are in ADR.

Section 3 of the bill repeals Sections 32-42-03, which is the current ADR statute. The bill also repeals Section 32-42-04, which contains some effective dates under the old law that no longer apply.

Section 4 provides a delayed effective date of January 1, 2006, in order to allow the Supreme Court some extra time to adopt the rules.

The ADR requirements in this bill are intended to be mandatory, yet flexible. Also, the ADR requirement does not prevent parties from settling out of court without going through ADR if they should choose to settle. The ADR requirement does not supercede other laws that may place limitations on claims or which may affect a party's right to bring a claim, such as the expiration of a statute of limitations or, in the case of claims against the State, failure to comply with the requirements of Chapter 32-12.2.

At least 18 States have some form of mandatory alternative dispute resolution involving

professional malpractice claims and other claims. I think this is the trend in the United States. North Dakota should also move in this direction. Our existing law for ADR in professional malpractice cases is not working.

I have been authorized to give you letters from the North Dakota Society of CPAs and the North Dakota Chiropractic Association supporting the mandatory ADR provisions of this bill.

Mr. Chairman and Members of the Committee, I encourage you to give favorable consideration to House Bill 1386. Let's have a law on ADR that actually works.

CHAPTER 32-42
ALTERNATIVE DISPUTE RESOLUTION

Section

32-42-01. Definitions.

In this chapter:

1. "Alternative dispute resolution" means the resolution of a health care malpractice claim in a manner other than through a health care malpractice action.

2. "Claimant" means any person who alleges a health care malpractice claim, and any person on whose behalf the claim is alleged, including the decedent in the case of an action brought through or on behalf of an estate.

3. "Health care malpractice action" means a claim for relief brought against a health care provider, or other defendant joined in the action, regardless of the theory of liability on which the claim is based, in which the claimant alleges a health care malpractice claim.

4. "Health care malpractice claim" means a claim brought against a health care provider or other defendant joined in a claim alleging that an injury was suffered by the claimant as a result of health care negligence or gross negligence, breach of express or implied warranty or contract, failure to discharge a duty to warn, or failure to obtain consent arising from the provision of or failure to provide health care services.

5. "Health care negligence" means an act or omission by a health care provider which deviates from the applicable standard of care and causes an injury.

6. "Health care provider" means a person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession.

7. "Injury" means an injury, illness, disease, or other harm suffered by an individual as a result of the provision of health care services by a health care provider.

8. "Noneconomic damage" means damage arising from pain; suffering; inconvenience; physical impairment; disfigurement; mental anguish; emotional distress; fear of injury, loss, or illness; loss of society and companionship; loss of consortium; injury to reputation; humiliation; and other nonpecuniary damage incurred by an individual with respect to which a health care

malpractice action or claim is pursued.

Source: S.L. 1995, ch. 246, § 29.

Effective Date: This chapter became effective July 1, 1995, pursuant to N.D. Const., Art. IV, § 13.

Collateral References.

Medical malpractice: physician's admission of negligence as establishing standard of care and breach of that standard,, 42 A.L.R.5th 1.

Medical malpractice in connection with diagnosis, care, or treatment of diabetes,, 43 A.L.R.5th 87.

32-42-02. Noneconomic damages limited - Reduction of award.

With respect to a health care malpractice action or claim, the total amount of compensation that may be awarded to a claimant or members of the claimant's family for noneconomic damage resulting from an injury alleged under the action or claim may not exceed five hundred thousand dollars, regardless of the number of health care providers and other defendants against whom the action or claim is brought or the number of actions or claims brought with respect to the injury. With respect to actions heard by a jury, the jury may not be informed of the limitation contained in this section. If necessary, the court shall reduce the damages awarded by a jury to comply with the limitation in this section.

Source: S.L. 1995, ch. 246, § 29.

32-42-03. Alternative dispute resolution.

1. Before initiating a health care malpractice action, the attorney representing a claimant shall advise the claimant about all reasonably available alternative dispute resolution options that may be available to the parties to settle the claim.

2. At the earliest opportunity after the attorney for a health care provider has notice of a potential health care malpractice claim or action, the attorney shall advise the health care provider about all reasonably available alternative dispute resolution options that may be available to the parties to settle the claim.

3. The claimant and health care provider shall make a good-faith effort to resolve part or all of the health care malpractice claim through alternative dispute resolution before the claimant initiates a health care malpractice action.

4. The attorneys for the claimant and health care provider shall state in the pleadings that they have complied with subsections 1 and 2 and that the parties have complied with subsection 3.

5. The court may sanction an attorney who fails to comply with subsections 1 or 2.

6. Notwithstanding section 28-26-01, the court, upon a finding that a party refused to comply with subsection 3, may award reasonable actual and statutory costs, including part or all of the attorney's fees to the prevailing party or parties.

Source: S.L. 1995, ch. 246, § 29.

32-42-04. Effective date.

Within two years of July 1, 1995, each medical malpractice insurance provider shall file with the insurance commissioner, pursuant to chapter 26.1-25, revised rates, rate schedules, or rate manuals for medical malpractice insurance coverages which reflect the projected impacts of this chapter and shall file a statement of the actual impacts of this chapter on the company's rates, rate schedules, or rate manuals no later than February first of each year in 1997, 1998, and 1999.

Source: S.L. 1995, ch. 246, § 29.

28-01-18. Actions having two-year limitations.

The following actions must be commenced within two years after the claim for relief has accrued:

1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute for a forfeiture or penalty to the state.

3. An action for the recovery of damages resulting from malpractice; provided, however, that the limitation of an action against a physician or licensed hospital will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was prevented by the fraudulent conduct of the physician or licensed hospital. This limitation is subject to the provisions of section 28-01-25.

4. An action for injuries done to the person of another, when death ensues from such injuries, and the claim for relief must be deemed to have accrued at the time of the death of the party injured; provided, however, that when death ensues as the result of malpractice, the claim for relief is deemed to have accrued at the time of the discovery of the malpractice. However, the limitation will not be extended beyond six years of the act or omission of alleged malpractice by a nondiscovery thereof unless discovery was prevented by the fraudulent conduct of the physician or hospital.

5. An action for recovery of damages arising under chapter 5-01, and the claim for relief is deemed to have accrued at the time of the alleged offense. This limitation does not apply to any claim for relief existing at the time of the enactment of this subsection.

AH #2

EideBailly

CPAs & BUSINESS ADVISORS

March 7, 2005

Chairman and Committee Members
Senate Judiciary Committee

RE: HB 1386 – Alternate Dispute Resolution

Eide Bailly LLP is a certified public accounting firm with North Dakota offices in Fargo, Bismarck and Minot.

Eide Bailly supports HB 1386 requiring mandatory alternate dispute resolution (ADR).

Our firm has included ADR provisions in our client engagement letters for several years. We see ADR as a first opportunity to try to resolve differences before they become involved in a lengthy and costly court proceeding.

We support the amendments that were made to HB 1386 in the House.

Thanks you for your consideration.

Sincerely,

Eide Bailly LLP

Paul J. Wohnoutka

Paul J. Wohnoutka, Partner
Lobbyist # 559

Att #3

Testimony Neutral to House Bill 1386

by Glenn A. Elliott, a private citizen and resident of Mandan, North Dakota, appearing on his own behalf on Monday, 7 March 2005

Before the Judiciary Committee of the North Dakota Senate

To the Chair and Senators of the Committee:

I am offering this testimony neutral to House Bill 1386. I am testifying from a neutral position because I support the concept of the bill but I believe that it does not properly address certain important topics. My concerns are with Subsection 2 of Section 2 of the bill:

1. On Lines 29-31 of Page 2, the wording provides that the North Dakota Supreme Court may also establish a statewide mandatory ADR process for other claims (i.e. other than "professional malpractice claims"). This wording should be removed.

a. Considering the breadth of the definition of "professional malpractice claim" in Subsection 1 of the same section (Lines 18-22 of Page 2), I do not see why the Supreme Court needs to be optionally empowered to establish mandatory ADR for other claims to enable it to establish a mandatory ADR system for ~~health care~~ malpractice claims.

b. While ADR is a valuable tool in dispute resolution, and neither the statutes nor constitutions of the United States and North Dakota are hostile to it, I do not believe that the framers of the North Dakota Constitution intended that the Supreme Court be able to establish dispute resolution forums at its will or that the Legislature be able to allow the Supreme Court to do so.

(1) Section 1 of Article VI of the North Dakota Constitution says that "[t]he judicial power of the state is vested in a unified judicial system consisting of a supreme court, a district court, and such other courts as may be provided by law."

(2) Section 1 of Article III of the North Dakota Constitution states in part that "...the legislative power of this state shall be vested in a legislative assembly consisting of a senate and a house of representatives..." The word "legislative" is defined as "[h]aving the power to create laws" or "[o]f or relating to a legislature" (American Heritage Dictionary of the English Language, Houghton-Mifflin Company, 2004).

(3) Reading Section 1 of Article VI in light of the definition of "legislative," I believe that section implies that the Legislature, having the power to enact laws, has the power to establish courts other than the Supreme and District Courts, and that it reasonably follows that the Legislature has the power to create ADR forums. However, since the North Dakota Supreme Court does not have the power to enact laws (other than rules necessary for operating the courts), it cannot have the power to create courts or ADR forums.

(4) I differentiate the establishment of a health care malpractice ADR system per this bill from the prospective establishment of other ADR systems. By this bill, the Legislature effectively establishes an ADR system for a specific purpose, and is basically instructing the Supreme Court to come up with the particulars, which makes some sense as the courts will inherit cases where ADR fails. However, giving the Supreme Court the power to establish ADR systems for unspecified purposes, in essence "creating" ADR forums, is a delegation and not a directive, and at least violates the spirit of the North Dakota Constitution.

2. On Lines 1-8 of Page 3, the Supreme Court is directed to adopt rules for the practice, procedure, and jurisdiction of these malpractice ADR processes, and these rules are to incorporate two specific provisions. A third provision should be included.

a. A criticism of binding arbitration as required by many consumer contracts is that if the forum specified, or one of them, issues too many opinions in favor of consumers, or awards damages too favorable to them, the forum in question will no longer be retained by the non-consumer party.

b. Despite the ADR here not being binding except by agreement, a Paragraph c should be added to Subsection 2 to "provide for the neutral assignment of a particular alternative dispute resolution forum or method if the parties cannot agree on such a forum or method."

Att #4

TESTIMONY

OF THE
NORTH DAKOTA HEALTHCARE ASSOCIATION
IN OPPOSITION TO
HOUSE BILL NO. 1386

Chairman Traynor -- members of the Committee. My name is John Kapsner. I am counsel to the North Dakota Healthcare Association. The Association opposed this Bill in the House Judiciary Committee. While we recognize that amendments have been made, those amendments do little to remedy the fundamental problems with this Bill. The Association continues to oppose passage of House Bill 1386.

We believe that requiring mandatory alternative dispute resolution prior to the commencement of a lawsuit involving medical professional negligence increases the cost of litigation, engages the alternative dispute resolution process at too early a stage, and, as constructed, creates serious impediments to implementation.

1. By requiring alternative dispute resolution prior to the commencement of a lawsuit, the Bill institutionalizes an intractable problem involving the disparity of information available during the early stages of a medical negligence case. Medical negligence cases have a two year statute of limitations from the time the alleged negligence is "discovered". Thus, claimants and their attorneys have up to two

years (and possibly more) to prepare a case, including acquiring all necessary records and securing expert testimony, prior to a demand for mandatory alternative dispute resolution. At that stage, defendants and their counsel are at a tremendous information disadvantage. Therefore, any alternative dispute resolution process will inevitably be delayed for many months while defendants and their counsel accumulate appropriate information and secure expert reviews. Only when the parties are on an equal information footing can alternative dispute resolution be productive. Imposing the alternative dispute resolution process at a stage prior to the commencement of a lawsuit will likely extend the time period during which a hospital or health care professional is subject to potential damages.

2. By adding a lengthy step before a lawsuit for medical negligence can be commenced, we believe the Bill increases rather than decreases the cost of litigation.

3. Alternative dispute resolution is currently being utilized in virtually every medical negligence case which is not settled at an early stage or dismissed at an early date. The current use of alternative dispute resolution occurs at a time in the lawsuit when the parties have similar information and are able to more properly evaluate the merits and shortcomings of their case. While House Bill 1386 may increase the number of cases using alternative dispute resolution, those additional

instances are most likely to involve cases normally disposed of at early stages in the current process.

4. Our review of House Bill 1386 leads us to conclude that implementation of its provisions will have no real impact on the costs of malpractice premiums, nor will the Bill increase the number of carriers willing to write professional negligence policies in North Dakota.

5. House Bill 1386 also provides that the North Dakota Supreme Court must develop rules relating to arbitration, rules relating to private trials, rules relating to neutral expert fact finding, rules relating to mediation, and rules relating to mini trials. It also requires the Supreme Court to develop any other rules it deems appropriate. Because House Bill 1386 requires alternative dispute resolution prior to the commencement of a lawsuit, it is in our view highly unlikely the North Dakota Supreme Court will develop the required rules. The Bill provides for alternative dispute resolution prior to the initiation of litigation. The courts of North Dakota have no jurisdiction over matters where litigation has not been commenced. The Court's existing rules for alternative dispute resolution, relating primarily to family law, engage only after litigation has been commenced in North Dakota courts. We believe it unlikely the Supreme Court will agree to develop rules relating to matters over which the courts have no jurisdiction.

Further, even if the Supreme Court were to agree to adopt such rules, the development of such a vast array of rules would take years, not months.

In conclusion, we do not believe this Bill will achieve its hoped-for results. We believe costs associated with medical negligence cases are more likely to increase than decrease if House Bill 1386 is adopted . We believe the alternative dispute resolution process envisioned will be lengthy and expensive. The vast majority of medical negligence cases not now disposed of early in the court process, and which are likely to proceed to trial, are already being mediated. Finally, we do not believe the North Dakota Supreme Court will undertake to develop rules where the courts of North Dakota have not yet assumed jurisdiction.

AH #5

Senate Judiciary Hearing
Testimony presented by Paula J. Grosinger
Executive Director, North Dakota Trial Lawyers Association
Lobbyist #114 (opposed)

House Bill 1386
7 March 2005
701-202-1293

1. According to the **North Dakota Courts Annual Report 2003** (North Dakota Supreme Court), there were 39 malpractice filings (all types) in 2003 out of 31,673 total filings.

2. Nationally, the cost of the medical malpractice tort system is less than one percent (Office of Technology Assessment, *Defensive Medicine and Medical Malpractice*: Washington, DC, July 1994).

3. "Legal costs do not seem to be at the root of the recent increase in malpractice insurance premiums. Government and industry data show only a modest rise in malpractice claims over the last decade. And last year, the trend in payments for malpractice claims against doctors and other medical professionals turned sharply downward, falling 8.9 percent." (*New York Times*, "Behind Those Medical Malpractice Rates" Feb. 22, 2005,)

4. Plaintiff costs for expert physician testimony in medical malpractice cases typically exceed $5,000 per day and increasingly exceed $10,000 per day.

5. Preventable medical errors result in over 98,000 patient deaths and many more injuries each year, with only about one in fifty of the injured ever pursuing a malpractice claim. (*To Err is Human*, Institute of Medicine Report: Washinton, D.C.,1999.)

6. In-hospital deaths from medical errors at 195,000 per year. (HealthGrades Patient Safety in America Study: 2000-2002: Lakewood, Colorado, July 2004)

7. Dennis Kelly, a spokesman for the American Insurance Association, told the *Chicago Tribune* on Jan. 3 of this year, "We have not promised price reductions with tort reform."

Malpractice defendants rarely, if ever, agree to pre-litigation mediation or alternative dispute resolution. Taking malpractice claims to trial, especially medical malpractice, becomes very expensive for injured plaintiffs because of the need to present expert testimony to meet the burden of proof.

From the standpoint of an injured individual, alternative dispute resolution (ADR) might help avoid the expense and strain of a trial while allowing the individual to receive compensation for injuries. Mandating ADR could be beneficial to plaintiffs in cases with lower damage claims because these cases are usually not economical to litigate. House Bill 1386 could actually encourage more individuals to pursue claims for injuries and attorneys may be more willing to take such cases.

Currently:
Chapter 32-42-03 of the North Dakota Century Code requires attorneys representing claimants to advise their clients about alternative dispute resolution options available to settle a claim prior to

initiating any health care malpractice action. Defense attorneys are obligated to notify potential defendants about alternative dispute resolution options at the earliest opportunity after receiving notice of a potential malpractice claim or action. The statute also requires a good faith effort by both parties to resolve the claim through alternative dispute resolution prior (ADR) to initiation of a malpractice action.

An action is considered to have commenced with the service of a summons upon a defendant. (Rule 3. North Dakota Supreme Court Rules N.D.R. Civ. P.)

How it works in medical practice:

A patient (or the patient's family member) who is the victim of malpractice may not be aware of the actual injury until another health care practitioner makes such an observation.

Or, a patient (or family member) suspects injury due to malpractice. Usually this is because of a persistent problem such as infection, pain, unexpected result, or some obvious adverse response to medical treatment.

Contact is made with an attorney and the patient presents the problem. The attorney advises there may be cause for action and advises about the option of ADR to resolve the claim. A request to meet with the defendant may be made and/or a request for patient records. At this point the defense attorney would advise about ADR.

The attorney for the potential plaintiff usually tries to speak with the health care provider. The attorney may have enough information to decide not to proceed after such discussion. In practice, this does not generally occur because the provider usually refuses to discuss anything until the action has actually commenced with the service of summons. After the action has commenced there is usually a denial of any wrongdoing.

Effect of House Bill 1386:

House Bill 1386 would make alternative dispute resolution mandatory and not voluntary, and sets ADR as a requirement before commencement of a professional malpractice action in any case of professional malpractice.

Unlike Federal Rules of Civil Procedure, North Dakota Rules of Civil Procedure derived from Section 28 0501, North Dakota Revised Code of 1943 state that for commencement of an action all that is required is service of a summons. Therefore, commencement precedes filing of a complaint with the court. This bill requires ADR be pursued before the service of the summons.

Conclusion

Our constitution provides that a jury of our peers is asked to set a full and fair amount of money for a loss suffered by a fellow citizen. Why should the state make injured individuals pass through another layer of bureaucracy before pursuing redress in the courts?

The problem with medical malpractice is medical malpractice. There are over 100,000 deaths and many more injuries due to preventable medical errors each year. There should be emphasis on bringing medical errors to light and preventing them rather than limiting discovery and legal options available to those who have been harmed.

The AMA opposes opening reports of professional malpractice to public review and even advises physicians on how to avoid a report to the National Practitioner Databank. NDPB is a malpractice claims information clearinghouse for medical and insurance professional use.

Instead, all parties from health consumers to attorneys to providers should be working to create a culture of safety instead of culture that denies and hides the real harm done to those injured by malpractice.

AH #5a)

HEALTHGRADES
THE HEALTHCARE QUALITY EXPERTS

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IN-HOSPITAL DEATHS FROM MEDICAL ERRORS AT 195,000 PER YEAR, HEALTHGRADES STUDY FINDS

Little Progress Seen Since 1999 IOM Report on Medical Errors

HealthGrades Honors 88 Hospitals Nationwide with Distinguished Hospital Award for Patient Safety™

Patient Safety Incidents In Hospitals Account for $6 Billion Per Year in Extra Costs

Lakewood, Colo. (July 27, 2004) – An average of 195,000 people in the U.S. died due to potentially preventable, in-hospital medical errors in each of the years 2000, 2001 and 2002, according to a new study of 37 million patient records that was released today by HealthGrades, the healthcare quality company.

The HealthGrades Patient Safety in American Hospitals study is the first to look at the mortality and economic impact of medical errors and injuries that occurred during Medicare hospital admissions nationwide from 2000 to 2002. The HealthGrades study applied the mortality and economic impact models developed by Dr. Chunliu Zhan and Dr. Marlene R. Miller in a research study published in the Journal of the American Medical Association (JAMA) in October of 2003. The Zhan and Miller study supported the Institute of Medicine's (IOM) 1999 report conclusion, which found that medical errors caused up to 98,000 deaths annually and should be considered a national epidemic.

The HealthGrades study finds nearly double the number of deaths from medical errors found by the 1999 IOM report "To Err is Human," with an associated cost of more than $6 billion per year. Whereas the IOM study extrapolated national findings based on data from three states, and the Zhan and Miller study looked at 7.5 million patient records from 28 states over one year, HealthGrades looked at three years of Medicare data in all 50 states and D.C. This Medicare population represented approximately 45 percent of all hospital admissions (excluding obstetric patients) in the U.S. from 2000 to 2002.

"The HealthGrades study shows that the IOM report may have underestimated the number of deaths due to medical errors, and, moreover, that there is little evidence that patient safety has improved in the last five years," said Dr. Samantha Collier, HealthGrades' vice president of medical affairs. "The equivalent of 390 jumbo jets full of people are dying each year due to likely preventable, in-hospital medical errors, making this one of the leading killers in the U.S."

HealthGrades examined 16 of the 20 patient-safety indicators defined by the Agency for Healthcare Research and Quality (AHRQ) – from bedsores to post-operative sepsis – omitting four obstetrics-related incidents not represented in the Medicare data used in the study. Of these sixteen, the mortality associated with two, failure to rescue and death in low risk hospital admissions, accounted for the majority of deaths that were associated with these patient safety incidents. These two categories of patients were not evaluated in the IOM or JAMA analyses, accounting for the variation in the number of annual deaths attributable to medical errors. However, the magnitude of the problem is evident in all three studies.

"If we could focus our efforts on just four key areas – failure to rescue, bed sores, postoperative sepsis, and postoperative pulmonary embolism – and reduce these incidents by just 20 percent, we could save 39,000 people from dying every year," said Dr. Collier.

The HealthGrades study was released in conjunction with the company's first annual *Distinguished Hospital Award for Patient Safety*™, which honors hospitals with the best records of patient safety. Eighty-eight hospitals in 23 states were given the award for having the nation's lowest patient-safety incidence rates. A list of winners can be found at http://www.healthgrades.com.

Study Highlights

Among the findings in the HealthGrades Patient Safety in American Hospitals study are as follows:

- About 1.14 million patient-safety incidents occurred among the 37 million hospitalizations in the Medicare population over the years 2000-2002.
- Of the total 323,993 deaths among Medicare patients in those years who developed one or more patient-safety incidents, 263,864, or 81 percent, of these deaths were directly attributable to the incident(s).
- One in every four Medicare patients who were hospitalized from 2000 to 2002 and experienced a patient-safety incident died.
- The 16 patient-safety incidents accounted for $8.54 billion in excess in-patient costs to the Medicare system over the three years studied. Extrapolated to the entire U.S., an extra $19 billion was spent and more than 575,000 preventable deaths occurred from 2000 to 2002.
- Patient-safety incidents with the highest rates per 1,000 hospitalizations were failure to rescue, decubitus ulcer and postoperative sepsis, which accounted for almost 60 percent of all patient-safety incidents that occurred.
- Overall, the best performing hospitals (hospitals that had the lowest overall patient safety incident rates of all hospitals studied, defined as the top 7.5 percent of all hospitals studied) had five fewer deaths per 1000 hospitalizations compared to the bottom 10th

percentile of hospitals. This significant mortality difference is attributable to fewer patient-safety incidents at the best performing hospitals.

- Fewer patient safety incidents in the best performing hospitals resulted in a lower cost of $740,337 per 1,000 hospitalizations as compared to the bottom 10th percentile of hospitals.

The complete study, including the list of AHRQ patient-safety indicators, can be found at http://www.healthgrades.com.

"If the Center for Disease Control's annual list of leading causes of death included medical errors, it would show up as number six, ahead of diabetes, pneumonia, Alzheimer's disease and renal disease," continued Dr. Collier. "Hospitals need to act on this, and consumers need to arm themselves with enough information to make quality-oriented health care choices when selecting a hospital."

Distinguished Hospital Awards and Findings

In addition to its findings on patient safety, HealthGrades today honored 88 hospitals in 23 states with the *Distinguished Hospital Award for Patient Safety*, the first national hospital award to focus purely on hospital patient safety. The award was designed to highlight hospitals with the best records of patient safety in the nation and to encourage consumers to research their local hospitals before undergoing a procedure.

HealthGrades based the awards on a detailed study of patient safety events in hospitals nationwide from 2000 to 2002, using the list of patient-safety incidents developed by AHRQ. "Best" hospitals were identified as the top 7.5 percent of the hospitals studied and had significantly different patient-safety incident rates and costs compared to hospitals that were average or in the bottom 10th percentile. Among the "best" hospitals, the lower number of avoidable deaths and in-patient hospital costs were directly related to their lower overall patient-safety incident rates.

"If all the Medicare patients who were admitted to the bottom 10th percentile of hospitals from 2000 to 2002 were instead admitted to the "best" hospitals, approximately 4,000 lives and $580 million would have been saved," said Dr. Collier.

About HealthGrades

Health Grades, Inc. (OTCBB: HGRD) is the leading independent healthcare quality company, providing ratings, information and advisory services to healthcare providers, employers, health plans and insurance companies. HealthGrades works with healthcare providers to help assess, improve and promote their quality. HealthGrades provides consumers access to information about healthcare providers and practitioners through its Web site and provides liability insurers, employers and payers with critical information about healthcare quality.

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