October 29, 2013

Medical Malpractice Interim Study Committee
c/o Rachele Hjelmaas
Legislative Services Agency
Iowa Statehouse
Des Moines, IA 50319

Via Electronic Mail: rachele.hjelmaas@legis.state.ia.us

Dear Medical Malpractice Interim Study Committee:

Thank you for the opportunity to comment on HF 618, an act relating to medical malpractice actions.

NCMIC Group, Inc. is an Iowa domiciled medical malpractice insurer. Through NCMIC Insurance Company and Professional Solutions Insurance Company we provide malpractice insurance to physicians, surgeons, dentists, chiropractors, naturopaths and attorneys. NCMIC Group, Inc. insures professionals in all 50 states and U.S. territories. Our geographic reach provides a nationwide perspective and experience with many different sets of laws regarding medical malpractice.

We have reviewed the proposed bill and respectfully submit the following comments for your consideration.

First, we support efforts of the Iowa legislature to examine professional liability issues and propose legislation to address issues affecting cost of coverage. Professional liability premiums are a contributor to health care costs and addressing factors which increase that cost is an important part of the reform process.

Following are our comments regarding the language in the bill.

Expert Witness Testimony
The current statutory language in Section 1 of the bill relating to Section 147.139, Code 2013 discusses "the standard of care given by a physician and surgeon or an osteopathic physician and surgeon licensed pursuant to chapter 148, or a dentist licensed pursuant to chapter 153". This language is limiting in that it only applies to certain health care providers. This would presumably not apply to other health care providers and we would suggest language applying to all health care providers licensed within the state. The language in Sec. 2 of the bill relating to medical malpractice review panels is much broader, which we find preferable. The same issue applies to the Sec. 3 of the bill relating to evidence-based medical practice guidelines in that it is limited to "a physician and surgeon, osteopathic physician and surgeon, physician assistant, or advanced registered nurse practitioner".

Consideration may also be given to language adopted in Arizona and Maryland. Those states have changed the language relating to expert testimony to require the witness to be the same specialty as the defendant/treating physician. In this manner, "health care provider" does not need to be defined and provides more certainty about acceptable expert testimony.

Sec. 1, 2. relates to a person licensed in another state who testifies as an expert against the defense. The same provisions are not included for experts testifying against the plaintiff.

Medical Malpractice Review Panels

In general, we have concerns about implementation of review panels for medical malpractice cases. Our experience in other states that have implemented review panels is generally increased costs and time to defend the insured. In many states, the review process provides the plaintiff with a dress rehearsal for trial, helping them identify and address weaknesses in the case against the health care professional.

Further, the review process rarely results in an agreement amongst the parties and the cases proceed to litigation.

For example, the state of Maine has a similar process to what is being proposed in HF 618. In a case defended by NCMIC, initiated in 2008, $135,140 was spent to defend the case through the pre-suit panel review process. The panel unanimously found in favor of the defense. The plaintiff was unwilling to dismiss the claim and filed suit against the defendant. In April of 2010, suit was served and in August of 2012, after spending an additional $290,213 in defense costs, a jury returned a defense verdict. The review process in this case added two years and over $135,000 to the process.

While in some cases the review process may eliminate frivolous claims against health care providers, most plaintiffs' attorneys will only pursue cases with merit. The expense and resources required for a plaintiff's attorney to pursue a case without a reasonable expectation of an award or settlement discourages proceeding with a case with little merit. And, in cases where the plaintiff's attorney is determined to pursue the case, as in the Maine example above, the review panel process may have little impact on the decision to pursue a suit.

The bill does contain positive aspects in the review process which potentially would decrease costs to defend and may discourage weak cases from being pursued. Sec. 2, 11., b, (1) of the bill, would require the plaintiff to pay all expert fees and court costs incurred by the defense in the event of a defense verdict. The potential for this expense may be a further deterrent for plaintiffs and their attorneys to pursue a meritless claim.

Sec. 2, 11.,b, (2) caps noneconomic damages awarded to the plaintiff in the event of a plaintiff's verdict at $250,000. While we are supportive of caps on noneconomic damages, the cap would likely be tested and in some other states caps have been deemed unconstitutional.

The certificate of merit language may have little impact on deterring cases without merit. Plaintiffs' attorneys would likely have little difficulty finding experts willing to issue the certificates, not unlike the availability of experts currently available to testify in support of plaintiffs' cases.

Additional considerations for a certification process include admissibility of federal compliance issues by the health care provider. The state of Florida, for example, prohibits a health care provider's failure to comply with or breach of a federal requirement to be admissible as evidence in the certification process. This keeps the focus on negligence and prevents character assignation from clouding the certification process.

The composition of the review panels raises issues of the ability to conduct the review process in a timely manner. We are generally concerned with the availability of a defense attorney, a plaintiffs' attorney, an attorney to serve as chair and a health care professional. These professionals would not be compensated and would experience time away from practice to serve on the panel. This composition has the potential to slow the process down significantly and again add to the cost of the process to defend a case. As a result of this challenge, some other states have limited the scope of the panels by providing immunity for certain providers. For example, Virginia, West Virginia, Indiana, Florida, Rhode Island and Arkansas grant immunity for negligence for providers gratuitously and in good faith conducting evaluations for school team events in the absence of gross negligence.

Evidence-based medical practice guidelines

The bill defines evidence-based medical practice guidelines as "voluntary medical practice parameters or protocols established and released through a recognized physician consensus-building organization approved by the United States department of health and human services, through the American medical association's physician consortium for performance improvement or similar activity, or through a recognized national medical specialty society." The section also narrowly defines health care provider as "a physician and surgeon, osteopathic physician and surgeon, physician assistant, or advanced registered nurse practitioner." Again, this definition is inconsistent with other sections of the bill and we question how guidelines would be applied to other health care professionals such as dentists or chiropractors.

Again, thank you for the opportunity to comment on H.F. 618. We are available at your convenience to discuss the provisions of the bill.

Respectfully submitted,

Rod Warren
President
NCMIC and Professional Solutions Insurance Companies