THE ATTORNEY GENERAL OF TEXAS

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April 4, 1977

Honorable A. R. Schwartz
The Senate of the State of Texas
Austin, Texas

Letter Advisory No. 135

Re: Constitutionality of Senate Bills 103 and 775 relating to Medical Malpractice.

Dear Senator Schwartz:

You have asked our opinion on 20 questions relating to the constitutionality of Senate Bills 103 and 775, both of which relate to medical malpractice. We initially note the difficulty of this task since the request involves so many questions which must be answered in such a brief time. The major difficulty, however, is that the proposed legislation includes substantial departures from traditional Texas jurisprudence, and thus there is little, if any, direct Texas authority on some of your questions.

All or part of twelve questions ask whether portions of the two bills constitute special legislation in violation of article 3, section 56 of the Texas Constitution which provides in part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:
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> . . . .
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> Changing the venue in civil or criminal cases;
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> . . . .
>
> Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts,

> or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;
>
> . . . .
>
> Exempting property from taxation;
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> Regulating labor, trade, mining and manufacturing.

The major Texas case discussing the standard to be employed in determining whether a bill is a special law is Clark v. Finley, 54 S.W. 343 (Tex. 1899). There the Supreme Court said:

> A law is not special because it does not apply to all persons or things alike. Indeed, most of our laws apply to some one or more classes of persons or of things and exclude all others. Such are laws as to the rights of infants, married women, corporations, carriers, etc. Indeed, it is perhaps the exception when a statute is found which applies to every person or thing alike. . . . The definition of a general law, as distinguished from a special law, given by the supreme court of Pennsylvania in the case of Wheeler v. Philadelphia, 77 Pa. St. 338, and approved by the supreme court of Missouri, is perhaps as accurate as any that has been given. State v. Tolle, 71 Mo. 645. The court in the former case say:
>
> > "Without entering at large upon the discussion of what is here meant by a 'local or special law,' it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition." . . .
>
> To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. When the intent of the legislature is clear, the policy of the

> law is a matter which does not concern the courts. . . . Therefore, should we adopt the rule that, in order to make an act a general law, the classification adopted should be reasonable, we should still be constrained to hold the statute in question a general law, and valid, under our constitution; for we cannot say that the classification is unreasonable.

Id. at 345-346.

More recently the Texas Supreme Court said that a statute which is challenged as a special law must be held constitutional if there is any basis for the classification which could have seemed reasonable to the Legislature. San Antonio Retail Grocers, Inc., v. Lafferty, 297 S.W.2d 813 (Tex. 1957); Gerard v. Smith, 52 S.W.2d 347 (Tex. Civ. App. -- El Paso 1932, writ ref'd).

We have carefully examined the classifications in question and the legislative findings set out in section 1.02 of Senate Bill 103. Additionally, we have examined the Final Report of the Texas Medical Professional Liability Study Commission to the 65th Texas Legislature, the findings of which are adopted in the bill. While we are aware that courts in other states, although a minority, have invalidated malpractice legislation on similar grounds, Wright v. Central DuPage Hospital Assn., 347 N.E.2d 736 (Ill. 1976); Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903 (Ohio C.P. - Montgomery Cty. 1976); Graley v. Satayatham, 343 N.E.2d 832 (Ohio C.P.- Cuyahoga Cty. 1976); contra, Jones v. State Board of Medicine, 555 P.2d 399 (Idaho 1976); Carter v. Sparkman, 335 So.2d 802 (Fla. 1976); McCarty v. Goldstein, 376 P.2d 691 (Colo. 1962); Comiskey v. Arlen, 390 N.Y.S.2d 122 (App. Div. 1976); Halpern v. Gozan, 381 N.Y.S.2d 744 (Sup. Ct. Trial Term 1976); Prendergast v. Nelson, Docket 303, p. 203 (Neb. Dist. Ct. - Lancaster Cty., filed Nov. 26, 1976), we believe the strict nature of the test requires us to conclude that challenges to the statutes based on the special law doctrine would not be successful. In light of these findings we cannot say that the classifications made by the bills are so unreasonable as to constitute special legislation.

You have also asked that we review several of these classifications in light of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The relevant standard for making such an equal protection determination

was discussed by the United States Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970) where it was said:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426.

City of New Orleans v. Dukes, 427 U.S. 297 (1976); San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); Ferguson v. Scrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

For the same reasons involved in our determination of the special law question, it is our view that the legislation probably would not be held by the courts to be unconstitutional under an equal protection challenge.

The two portions of the bill generating the most substantial questions involve the limitation of recovery in health care torts and the use of a mandatory health care screening panel.

Senate Bill 103 would limit the civil liability of physicians or health care providers in health care liability claims to (1) all past and future medical expenses and other recoverable expenses, (2) a maximum of $100,000 for all past and future non-economic loss such as pain and suffering, consortium, inconvenience, physical impairment and disfigurement and (3) a maximum of $400,000 for loss of earnings of an injured person or for all elements of damage recoverable by beneficiaries in a wrongful death action. Thus, if the legislation is enacted the maximum recovery would be $500,000 plus medical and similar expenses. You have specifically asked if this limitation would constitute a special law or a violation of equal protection or due process. As we have already addressed the special law and equal protection concepts, we need discuss only the due process aspect of the question.

The basic due process arguments which have been raised in challenges of medical malpractice legislation involve claims that there is a violation of "substantive due process" and that common law rights cannot be abrogated without provision of a resulting quid pro quo. The standard adopted by the courts under the substantive due process concept is that the due process clause of the Constitution demands only that a law not be unreasonable, arbitrary or capricious and that the statutory means selected have a real and substantial relationship to the object sought to be obtained. North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Williamson v. Lee Optical Co., supra; Nebbia v. New York, 291 U.S. 502 (1934). In light of the similarity between this standard and that discussed in relation to equal protection questions, we believe the same considerations we reviewed in regard to your equal protection questions would be relevant to this issue and that it is unlikely that the legislation would be found to be invalid as a matter of substantive due process.

The abrogation of the right to an unlimited recovery without a specific corresponding quid pro quo was addressed by an Ohio trial court; Simon v. St. Elizabeth Medical Center, supra. The plaintiff in that case did not pray for damages in excess of the statutory limit, and the judge accordingly found that he had no standing to challenge the limitation. Nevertheless, the court addressed the issue and said that the limitation was unconstitutional even though it acknowledged that its remarks were dicta. See also Graley v. Satayatham, supra.

The quid pro quo doctrine was discussed more fully by the Idaho Supreme Court in Jones v. State Board of Medicine, supra. That court reviewed the background of the quid pro quo doctrine. The doctrine had its genesis in dictum in New York Central Railroad Co. v. White, 243 U.S. 188 (1917), and the concept was apparently abandoned by the United States Supreme Court and even undercut in further dictum in Silver v. Silver, 280 U.S. 117 (1929). In light of the highly questionable basis of the quid pro quo standard in out of state cases involving statutory abrogation of common law rights and the failure of the Texas Supreme Court to yet embrace such a standard, we do not believe the statutory limitation of liability would be found to be unconstitutional.

Another group of questions involves the health care screening panels created by the proposed bill. The panels

would consist of three physicians and a district judge, who will preside but have no vote. Evidence would be presented to the panel which would make a finding as to whether the defendant complied with the required standard of care. The panel's finding is admissible in any subsequent trial, but members of the panel are prohibited from acting as witnesses in the trial.

The two most basic questions relating to the panels involve the separation of powers and the right to jury trial. You inquire whether service of district judges on the screening panel violates the separation of powers provision of article 2, section 1 of the Constitution. That constitutional provision prohibits judges from exercising any powers properly attached to the executive or legislative branch of government. We do not believe the role of the judge on the screening panel is executive or legislative in nature, and accordingly we do not believe a separation of powers violation exists.

The right to jury trial questions poses a more difficult inquiry. Article 1, section 15 of the Texas Constitution provides in part:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

The validity of a malpractice screening panel has been considered by several courts with varying result. Panels have been upheld in Florida and New York, Carter v. Sparkman, supra; Comiskey v. Arlen, supra; Halpern v. Gozan, supra, but they have been overturned in Illinois and Ohio. Wright v. Central DuPage Hospital Association, supra; Simon v. St. Elizabeth Medical Center, supra.

While the question is not free from doubt, we do not believe the Texas Supreme Court would find that introduction of the finding of a health care screening panel in evidence in a malpractice trial would violate the right to a jury trial in and of itself. Admittedly though, the introduction of such a finding on a complex and scientific question with the imprimatur of a panel of physicians officially constituted by the State causes a risk that a lay jury will accept that finding without question.

Although it is our prediction that the introduction of the screening panel's finding probably would not be ruled per se unconstitutional, we seriously question the portion of the statute prohibiting the panel members from being called as witnesses. The introduction of the panel's finding does not invade the jury's function because of the opportunity of the parties to challenge that finding before the jury. If the members of the panel are statutorily prohibited from being required to be available to justify their finding under cross-examination, the practical opportunity for a meaningful jury trial will be substantially diminished. Accordingly, we believe there is a reasonable probability that the courts will find constitutional infirmities in a statute which permits the introduction of the conclusion of an expert panel, while the experts composing the panel are exempted from being called to justify their conclusion before the jury. We note that the Texas Medical Professional Liability Study Commission apparently concurs with the determination that serious problems involving the right to jury trial exist if there are statutory barriers to the effective challenge of the panel's finding. The Commission's Report discussed the admissability into evidence of the panel's decision and said at pages 17 and 18 that

> [t]he minority felt that regardless of the makeup of the panel the decision would be so overwhelming that for all practical purposes it could not be overturned with additional testimony. It would, therefore, substitute the panel for the jury as factfinders without giving the jury the benefit of the testimony heard by the panel. . . . The majority felt that the introduction of additional expert witnesses and their cross examination, coupled with the ability to call panel members for questioning and cross examination was sufficient to offset the paper record of the panel's decision.

You have also asked if portions of Senate Bill 103 relating to the Texas Medical Disclosure Act violate the guarantee of trial by jury. The Medical Disclosure Panel is composed of three attorneys and six physicians and is charged with the task of determining the type of disclosure, if any, that is to be required before a patient can be said to have given his

informed consent to a medical or surgical procedure. Consent is considered effective if it is given in writing and signed by the patient or person authorized to give consent for him and by a competent witness. The written consent must include statements of the risks and hazards involved in the particular procedure as determined by the panel. The statute provides that the giving of written consent as outlined above constitutes compliance as a matter of law with the doctor's duty to disclose and to obtain informed consent.

Since the utilization of the signed form would constitute consent as a matter of law, the jury would be unable to inquire into the actual validity of the consent. Presumably the form could be signed by a person who could not read or by an individual who was not competent to understand the document. Yet the statute would make such consent effective without further inquiry. What has been a fact issue would be taken from the jury's consideration and would be transformed into an irrebutable presumption. Where the statute makes signature on the form conclusive on the issue of consent, it would be a denial of the constitutional right to have the issue determined by a jury. Floeck v. State, 30 S.W. 794, 795-6 (Tex. Crim. App. 1895).

Your remaining questions ask (1) whether a limitation on doctors who testify as experts in any malpractice proceeding to those licensed in Texas or contiguous states during the year preceding the date in which the alleged malpractice occurred unless such limitation is waived by the court for good cause is a denial of due process, (2) whether a provision providing for temporary suspension of a physician's license until a hearing can be held before the Board of Medical Examiners at the earliest opportunity consistent with notice requirements is a violation of due process, (3) whether the provision of staggered six-year terms for members of medical review committees is a violation of article 16, section 30 of the Texas Constitution (See Texas Constitution, article 16, section 30a), (4) whether article 16, section 31 of the Texas Constitution prohibits any legislation affecting doctors except insofar as it prescribes qualifications for licensing and punishes malpractice, and (5) whether Senate Bill 775 creates a contingent liability on behalf of the State to pay malpractice claims if the Texas Professional Liability Insurance Association is unable to pay. We have reviewed each of these inquiries and believe the answer to each is in the negative.

Accordingly, it is our view that if the questions you have raised concerning Senate Bills 103 and 775 were presented to the courts, both bills would be found to be constitutional with the exception of two provisions of Senate Bill 103 discussed above.

Very truly yours,

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APPROVED:

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