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Speaker Therese M. Terlaje
I Mina'trentai Sais na Liheslaturan Guåhan
36th Guam Legislature
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

Re: Bill No. 112-36

Dear Senator Terlaje,

I am writing to hopefully present a balanced view on the debate over Bill No. 112-36. The comments made by several medical practitioners expressing their apprehensions and qualms with respect to the proposed repeal of the MMMAA and the passage of Bill 112 largely reflect their fear of being subjected to frivolous lawsuits. On the other hand, the remarks of a few members of the public who claim to be victims of medical malpractice articulate the enormous burden placed upon them by the private arbitration mandated by the MMMAA such that it is an insurmountable obstacle to filing any claim at all.

I have taken the time to read all the comments and I would like to dispel some of the misapprehensions of the purpose and intent of the bill and will address the need for a change in the law and the merits of the approach of Bill 112.

1. ARBITRATION UNDER THE MMMAA IS UNFAIR TO VICTIMS OF MEDICAL MALPRACTICE

The Guam Medical Malpractice Mandatory Arbitration Act (MMMAA) requires every medical malpractice case to go through private arbitration before proceeding to court. The law requires the selection of three (3) arbitrators, a doctor, a lawyer and a non doctor/lawyer, to conduct an arbitration trial and decide if malpractice occurred and if so to award damages. The arbitrators charge for their time at rates of $450.00 per hour or more. That amounts to at least $1,350.00 per hour for an arbitration panel to hear a case. An arbitration proceeding can involve several hours of

arbitrator time in deciding pre-trial issues before a trial begins. A trial involving 8 hour days will cost over $10,000.00 per day. Add to this the cost of renting a conference room for the trial and the airfare and hotel expenses of any off-island arbitrator and the cost becomes even more insurmountable.

In one recent medical malpractice case where I represented the plaintiffs, their ½ share of the cost of arbitration alone was more than $47,000.00. This was just the cost for three arbitrators and the fees and costs charged by the American Arbitration Association. This did not include the costs of expert witness opinions and testimony or other litigation costs such as deposition expenses. The plaintiffs in that case had the means to cover such costs and their claim was worth pursuing since they were ultimately awarded more than $1,300,000.00 for the negligence of the defendant clinic.

Mandatory arbitration under the MMMAA is without a doubt an inordinately expensive undertaking for any medical malpractice claimant. The cost of arbitration that one must pay up front clearly is not insignificant. The MMMAA does not make any provision for indigent claimants who have no funds to pay for arbitration. For those who cannot afford to pay the high cost of private arbitration, they have no choice but to abandon their claim altogether. In its practical application, the MMMAA acts as an effective financial choke hold on claims against private medical care providers on Guam except for the claims of high wealth individuals with high value claims. This is most likely the main reason why doctors and other medical care providers on Guam oppose the passage of Bill 112 because it would repeal the MMMAA and its extreme financial deterrent to bringing medical negligence claims.

2. BILL 112 PROVIDES A FAIR SOLUTION

Bill 112 replaces the costly private arbitration process with a sealed, confidential and non-public screening of medical malpractice claims. This screening process is specifically aimed at allaying the fears of the medical community of frivolous lawsuits and the potential harm to their reputation. The screening is to be done before a Magistrate Judge. A Magistrate Judge is a salaried government employee. The only cost to a plaintiff is the court filing fee. They are not required to shell out in advance thousands of dollars for the fees of three private arbitrators to hear their case. The Magistrate proceeding is sealed and not open to the public. It is only in the event that either party appeals the Magistrate's decision to the Superior Court that the Magistrate's decision will be made public because it will then become admissible evidence.

The suggestion of having medical professionals screen potential medical malpractice claims is inadvisable. Medical professionals have a clear bias against malpractice claims. Medical

professionals are not trained in the law and are unfamiliar with the rules of evidence. Also, will medical professionals be willing to work on the screening process without compensation?

A Magistrate Judge is an experienced professional and lawyer who understands the law of negligence and the rules of relevant and admissible evidence. A Superior Court Magistrate Judge has been appointed by the Guam Supreme Court Chief Justice and confirmed by the Legislature. A District Court Magistrate has been appointed by the Chief Judge who in turn was appointed by the President and approved by the United States Senate. They are vetted and seasoned adjudicators who are proficient in the law of evidence, accustomed to hearing both sides of a case and are adept at rendering a fair and impartial judgment.

Bill 112 provides medical malpractice victims with an affordable remedy for their grievance. It allows eventual access to the courthouse to either party if they are unhappy with the Magistrate's decision satisfying the constitutional right to a jury trial. Eliminating the costly mandatory private arbitration requirement and replacing it with the sealed pre-screening confidential process balances the interests of doctors and their patients and eliminates the financial chock hold the current law places upon victims of medical negligence.

3. THE FEAR OF FRIVOLOUS CLAIMS

The current arbitration law does not prevent the filing of frivolous claims. It prevents the filing of ANY claim by anyone who cannot afford the high cost involved.

I have been in the practice of law on Guam since 1981. There were several years when I had a full page ad in the Guam phone book and even had a front cover ad as well for handling personal injury and medical malpractice cases. I have searched my records for the past 24 years, since 1997, and I have found that I only took 23 medical malpractice cases in those 24 years. My statistical analysis shows the following:

Total number of cases handled by my office since 1997: 1,242

Total medical malpractice cases:	23
MMMAA arbitrations:	5
Cases withdrawn by client:	5
Private claims settled with no arbitration:	7
GovGuam Claims (MMMAA not applicable):	4
Federal Tort Claims (MMMAA not applicable):	2

There were additional cases I handled before 1997 but I have

only kept this type of statistical record since 1997. I also do not have statistics for the number of medical malpractice inquiries I have received although by my recollection, they were not plentiful. For most of those inquiries, once the prospect of having to advance the high cost of arbitration was relayed to the potential clients, they deferred pursuing their claim and thus, no case file was opened. I have also found that oftentimes people mistake a bad medical outcome for medical malpractice. This is not necessarily so. A medical malpractice case has to show that the treatment provided was below the standard of care and that the substandard treatment was the direct cause of the bad outcome.

To begin with, any medical malpractice claim is extremely expensive to litigate. As the claimant has the burden of proof, the testimony of medical experts is required to establish what the standard of care is and how the treatment fell below the standard of care. Oftentimes, the expense of obtaining an expert opinion alone generally discourages claimants from pursuing a medical malpractice claim. Thus, even in cases where there was malpractice, for a case to be economically viable the claim must involve significant damages to justify the litigation expenses that will surely be incurred. If the damages are small and the cost of pursuing the case would be greater than the eventual recovery, litigation is not advisable. Thus, medical malpractice claims are often limited to those circumstances where the likely compensation for the injury is sizeable enough to justify the cost of litigation. The exemption in Bill 112 for claims under $20,000.00 being eligible to proceed in Small Claims Court is designed to address this concern.

The screening process contained in Bill 112 will help to (1) identify claims of professional negligence which merit compensation and encourage early resolution of those claims prior to commencement of a lawsuit; and (2) identify non-meritorious claims of professional negligence and encourage early withdrawal or dismissal of such claims. Under Bill 112, the parties also have the option to go into arbitration and/or mediation if they agree that doing so would be advantageous. Overall, this process will promote early resolution of all claims in a confidential manner before resorting to litigation in court. This process is best handled by a Magistrate Judge who will screen all claims and if appropriate declare any frivolous claims as being such in his or her decision. The decision then becomes admissible in any subsequent appeal lawsuit for a jury to deliberate on if it comes to that. The admissibility of the Magistrate's decision is designed to deter proceeding to court for a trial de novo.

4. STANDARD OF CARE

Many doctors have commented that due to Guam's remoteness and lack of doctors in certain specialist fields or absence of

specialized equipment they will be more subject to suit because they are forced to perform services for which they are not trained or for which they lack the necessary equipment. The solution to this fear is the provision in the Bill containing the Community Standard of Care. A doctor can only be held liable for treatment that was below the standard expected of a physician in his or her field within the same community. For example, a Guam family practitioner cannot be held liable for failure to perform treatment to the level of a specialized physician or for failure to refer a patient to such a specialist physician when there is no such specialist physician available. Similarly, a Guam doctor cannot be held liable for failure to utilize specialized diagnostic equipment when treating a patient if no such equipment is available on Guam. This is what the "community standard of care" means.

The medical profession has recognized standards of acceptable medical treatment by reasonably prudent medical practitioners in like circumstances. This minimum acceptable treatment is what is referred to as the standard of care. The law has recognized that treatment that falls below those standards and causes injury constitutes malpractice and calls for appropriate compensation. In order for an injured patient to establish a medical malpractice claim he or she must establish that the medical care provider had a duty toward him or her, that the provider failed in that duty by not performing within the standard of care expected of someone in his or her field of expertise and that the failure caused injury and damage.

For a plaintiff to prevail in a medical negligence claim they must establish that the medical care provider's treatment fell below the standard of care and that injury was directly caused by that failure. A plaintiff must have an expert witness, that is someone with the training, skill and knowledge in the same field of medicine, testify to establish what the standard of care in the circumstance was, that the treatment provided fell below the standard of care and was the cause of the plaintiff's injury. This is a difficult barrier to overcome before a malpractice claim can be pursued. Expert witness testimony is expensive and difficult to obtain. A qualified doctor in the same field must be found to review the patient's medical records and give testimony under oath that the treatment provided by the treating doctor fell below the standard expected of him or her and thus amounted to malpractice.

5. THREAT TO STOP PROVIDING TREATMENT OR THAT SERVICE RATES WILL INCREASE

The threat by some of the commenting doctors that they will have to stop providing certain specialized treatment or service which is necessary but is outside of their area of expertise for fear of being sued for performing such services is a curious one. The threat implies that providing those services now is below the

standard of care and that without the high cost of arbitration they will more likely be sued for providing them. This is nothing more than veiled extortion.

If providing those services is below the standard of care then they should not be provided regardless or whether it is more likely that you will be sued. If the care referred to is necessary specialist care for which there is no specialist on Guam and the treating physician performs the specialized treatment to the best of his or her ability within his or her field of expertise then the community standard of care will have been met and no liability will attach.

The threat that rates for services will increase if Bill 112 becomes law is also a non-sequitur. The rates doctors can charge for specific services is largely the result of negotiations between the medical community and the health insurance providers. Regardless, even if some rates do go up and health insurance costs rise, that is exactly how an insurance system is designed to work. It spreads the risk throughout the entire community and does not place the entire burden on the victims of negligence.

Take automobile insurance as an example. Everyone who owns and operates a motor vehicle is required by law to have liability insurance so that if someone is injured by the negligence of a driver they can be compensated for the damage suffered. Not every driver causes an accident but they all must bear the expense of insurance so that those who are injured in automobile accidents can be fairly compensated. This spreads the risk of the damage caused by a few negligent drivers over the entire driving community. This is how insurance is designed to work. It is designed to spread the risk throughout the entire community of drivers so that the victims of negligence are not required to bear the entire burden of the negligence of a few drivers.

This is just as true with medical malpractice as it is with automobile drivers' negligence. After all, medical malpractice is nothing more than negligence committed by a doctor. Drivers who have more accidents than others may have their rates go up, which is justified. A doctor who has more malpractice claims than others may have their insurance rates go up as well. This spreads the burden of medical negligence around the entire medical practicing and patient community but also increases the financial burden for those who are more negligent.

The expressed fear that malpractice insurance rates will go up is yet another smoke screen. My understanding is that most doctors practicing on Guam do not even have malpractice insurance. They can get away with this because the cost of MMMAA arbitration is so high that most victims of negligence cannot afford to sue. Any malpractice insurance rate will be higher than zero, which is what is being paid now. Many states have laws that require that doctors

have malpractice insurance in order to be licensed to practice, just the way that drivers are required to have insurance to get a drivers license. Guam does not have such a requirement.

6. THE FEAR THAT BILL 112 WILL OPEN THE FLOODGATES OF MALPRACTICE CLAIMS.

The fear has also been stated that Bill 112 will open the floodgates of medical malpractice claims. It is true that some claims that previously could not be brought because of the high cost of MMMAA arbitration might now be able to be brought under the Bill 112 confidential Magistrate screening process. But as the statistics above show, a flood of such claims is not likely. However, even if the number of claims will increase to some extent, this is a fair outcome for the people of Guam.

One suggestion I have made to monitor such an outcome is to include a provision in Bill 112 that the Judiciary report annually to the Legislature its experience with the Bill 112 Magistrate screening process. The report should include a statement of the number of medical malpractice claims filed, the number that opted for mediation or arbitration, which is provided for in Bill 112, the number of cases resolved through the screening process, the number of cases found to be meritorious or non-meritorious and the number of and outcomes of cases that proceeded to trial. If indeed there is a flood of malpractice cases the Legislature can revisit the issue and consider other options to solve the problem. This is what the State of Pennsylvania, the state I practiced in before coming to Guam 44 years ago, did in the 1970s. They enacted a mandatory arbitration process, although it was paid for by the government and did not require the parties to pay for it, then after 2 years of experience and reporting repealed the law because of the slow process arbitration presented.

I commend the Legislature for taking on this difficult issue. The medical community has launched a strong lobbying campaign to prevent the repeal of costly MMMAA arbitration. The victims of medical negligence do not have a strong organized lobby since people do not know they are a member of the victim community until they become one and then it is too late for them to do anything to lobby for a change in the law as it affects them.

Sincerely,

ROBERT L. KEOGH

RLK/tbm