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MEMORANDUM

TO: Patrick J. Crank
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FROM: BLB Barbara L. Boyer
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RE: HB112 - Professional Review Panel

In 1986, the Legislature passed the Medical Review Panel. WYO. STAT. § 9-2-1501 *et seq.* The purpose of the Panel was to "prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are, or reasonably may be, well founded." WYO. STAT. § 9-2-1502.

This panel was charged with reviewing all medical malpractice claims, subject to certain restrictions, and rendering decisions prior to any claim being filed against a health care provider in court. The panel was required to review the claim and set it for hearing, following which the panel would determine whether substantial evidence constituting malpractice had occurred and whether the patient was injured as a result. WYO. STAT. § 9-2-1510. The decision was deemed non-binding, non-reviewable, confidential and not admissible as evidence in any other proceeding. WYO. STAT. § 9-2-1511.

This Act was challenged and found to be unconstitutional by the Wyoming Supreme Court in a 3-2 split decision in *Hoem v. State*, 756 P.2d 780 (Wyo. 1988). Numerous constitutional challenges were raised by Hoem, including Article 1, Sec. 2; Article 1, Sec. 3; Article 1, Sec. 6; Article 1, Sec. 7; Article 1, Sec. 8; Article 1, Sec. 9; Article 1, Sec. 20; Article 1, Sec. 34; Article 1, Sec. 27; Article 3, Sec. 27; Article 5, Sec. 2; Article 10, Sec. 4; and the 14th Amendment of the United States Constitution.

The Court chose to address only the equal protection claims as those were dispositive of the case:

> Article 1, § 2 of the Wyoming Constitution.
>
> "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."
>
> Article 1, § 3 of the Wyoming Constitution.
>
> "Since equality and the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."
>
> Article 1, § 6 of the Wyoming Constitution.
>
> "No person shall be deprived of life, liberty or property without due process of law."
>
> Article 1, § 7 of the Wyoming Constitution.
>
> "Absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

> Article 1, § 8 of the Wyoming Constitution, in pertinent part.
>
> "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay."
>
> Article 1, § 34 of the Wyoming Constitution.
>
> "All laws of a general nature shall have a uniform operation."
>
> Article 3, § 27 of the Wyoming Constitution, in pertinent part.
>
> "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * for limitation of civil actions * * *."

Hoem, 756 P.2d at 781-782.

The Court found that the act was intended

> to prevent the filing in court of claims against certain health care providers where the facts do not permit a reasonable inference of malpractice and to make possible the fair and equitable disposition of well-founded claims against health care providers. In attempting to reduce the number of claims filed in court against health care providers, the legislature was responding to the perceived medical malpractice insurance "crisis." The hope was that, by reducing the number of medical malpractice lawsuits, insurance rates would drop and coverage would become more available and affordable.

Hoem at 782.

The Court concluded, however, that the medical malpractice insurance "crisis" was perceived and not proven, noting the absence of evidence in the record to support this "crisis" or to connect such a "crisis" with medical malpractice

claims. The Court stated, "Apparently, tort reform was the only avenue explored by the legislature in its efforts to solve the 'crisis.'" *Hoem* at 783.

However, for purposes of the opinion, the Court assumed that such a "crisis" did exist, and while stating that the Legislature had a legitimate interest in protecting the health of the citizens of Wyoming, concluded that:

> It cannot seriously be contended that the extension of special benefits to the medical profession and the imposition of an additional hurdle in the path of medical malpractice victims relate to the protection of the public health. To the contrary,
>
> > "if the medical profession is less accountable than formerly because of the special treatment it is afforded by [medical review panel] laws, then a relaxation of medical standards may occur with the public as the victim. '[T]o find that the protection and special dispensation given to health delivery tortfeasors by the challenged legislation is in the best interest of public health is illogical to the point of irrationality.'" [cites omitted]

Hoem at 783.

The Court thus concluded that the act was not "rationally related to the protection of the public health or economic and social stability of the state," which was sufficient to find the act unconstitutional. The Court, however, went on to specifically opine that constitutional protections are not to be suspended "'in time of even the most legitimate crisis.'" *Hoem* at 783, quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589, 72 S.Ct. 863, 867, 96 L.Ed. 1153 (1952) (constitutional provisions exist 'in good and bad times'); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (since discredited-internment of Japanese descendants during war); *Konigsberg v. State Bar [of California]*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957) (fear of communism).

The Court held:

> We cannot condone the legislature's use of the law to protect one class of people from financial difficulties

> while it dilutes the rights under the constitution of another class of people. Every profession confronts financial distress at some time, and that does not justify depriving others of the equal protection guaranteed by the constitution.

Hoem at 784

Following this decision, and perhaps in response to the Court's concluding remarks, the Legislature passed the Professional Review Panel in 1989. WYO. STAT. § 9-2-1801 *et seq.* This act was essentially similar to the Medical Review Panel, except that it covered all persons licensed under Title 33 for whom licensure required at least a year of specialized post secondary education or hospital or nursing care facility training.

This Act was challenged and found to be unconstitutional by the Wyoming Supreme Court in a 4-1 decision in *State ex rel. Wyoming Ass'n of Consulting Engineers and Land Surveyors v. Sullivan*, 798 P.2d 826 (Wyo. 1990). This case was brought as a writ of mandamus against Governor Sullivan to force him to appoint a director of the Professional Review Panel and implement the act.

The Court found the Professional Review Panel to be unconstitutional stating:

> The Wyoming Professional Review Panel Act violates the equal protection guarantees of the Wyoming Constitution in the same manner as the previously enacted Wyoming Medical Review Panel Act. *Hoem*, 756 P.2d 780. The legislature's expansion of the class of professionals to which the Wyoming Professional Review Panel Act applies does not cure the constitutional defect explained in *Hoem*. We decline to reverse *Hoem*.

House Bill 112 repeals WYO. STATS. §§ 9-2-1801 through 9-2-1812 (professional review panel) and recreates it in its entirety, with very minor changes. None of the changes appears to address any of the unconstitutional provisions (violations of equal protection) as determined by the Wyoming Supreme Court in either *Hoem v. State* or *State ex rel. Wyoming Ass'n of Consulting Engineers and Land Surveyors v. Sullivan.*

