

JUDICIARY COMMITTEE

February 8, 1977

The regularly scheduled meeting of the House Judiciary Committee was held at 8:00 A. M. in room 436 of the Capitol Building, Helena, Montana on February 8, 1977, chairman Scully presiding. All members were present with the exception of Representatives Baeth, Conroy, and Seifert, excused and Representatives Dussault and Kennerly, absent.

Scheduled for hearing were House Bills 570, 574 and 654.

THE HEARING OPENED ON HOUSE BILL 570.

This bill will authorize the establishment of insurance companies to provide insurance coverage for professional liability claims resulting from the rendering of or failure to render professional services by doctors or other professionals.

PROPONENT JERRY LEINDORF, MONTANA MEDICAL ASSOCIATION: This bill authorizes the establishment of a variety of self-insurance mechanisms on a multi-state basis, subject to the control of the insurance commissioner and Montana law. During 1976, nine other states enacted into law legislation for self-insurance. Every citizen who has been injured through the negligence of a professional should be entitled to recover adequate compensation and adequate insurance coverage should be available to anyone exposed to liability from suit. No appropriation of money is involved. Right now, Montana physicians and some other professions, are facing severe problems in obtaining adequate medical liability insurance. There are two basic problems; the vanishing availability of medical liability insurance and the skyrocketing cost of such insurance when it was available. There are now less than 10 insurance companies left in the United States willing to provide this insurance. The few companies offering it today are adopting increasingly restrictive underwriting policies. Costs have been rising and Montana was higher than each of the surrounding states and was exceeded by only 16 states in 1972. The cost has increased between 165 and 430 % from 1974 to 1976, depending upon the specialty of the physician.

The self-insurance market is a feasible alternative to private insurance and it may be that a multi-state self-insurance program would be economically and actuarially necessary. One of three forms would be used, a reciprocal insurer, a stock insurer, or a mutual insurer. The Montana Medical Association has been in contact with the adjoining states and with an actuarial firm with this possibility in mind.

PROPONENT CHAD SMITH, MONTANA HOSPITAL ASSOCIATION: We are in favor of this bill. It should help solve our problems.

No other proponents or opponents. Questions from committee members.

Representative Hand: Why not have malpractice insurance set up like hail insurance?

PROPONENT BOB RYAN, Attorney, Billing, Montana: I handle mostly malpractice claims. We tried to do a survey about the medical malpractice insurance as opposed to claims. The study showed about 8 million collected from doctors in Montana, and claims in the amount of approximately 1/2 to 1 million dollars.

No further questions, hearing closed on House Bill 570.

HEARING OPENED ON HOUSE BILL 574.

REPRESENTATIVE KIMBLE, CHIEF SPONSOR, District #94. He stated that this bill attempted to define the obligation of a health care provider, such as physicians, osteopaths, registered nurses, dentists, and so on, although the list of people is not inclusive.

PROPONENT GERALD NEELEY, MONTANA MEDICAL ASSOCIATION: This bill defines health care providers and defines the standard of care assumed toward the patient as that ordinary and reasonable care usually exercised by doctors of the same profession in the same or a similar community in Montana. Expert testimony is limited to health care providers in the same or similar communities in Montana, as of the time of the alleged act, in the same profession. There would be no indirect or direct use of state funds. The standard of care has been defined as those acts performed or omitted that an ordinary, prudent person in the defendant's position would have done or not done. To determine whether a physician may be liable for injury sustained by a patient, it is necessary to determine whether the injury was caused by the breach of the standard of care. This determination depends upon the locality rule, within the jurisdiction in which the cause of the action arises. From the patients point of view, the most restrictive rule is the "same locality" rule. A more expansive rule is that care which is exercised by physicians, in the same or similar localities or communities. It is critical, however, that physicians know in advance of treating their patients what standard of care they must maintain and to which they might be held in the future. The proposed legislation expands the current court doctrine, and provides that advance notice be given.

PROPONENT CHAD SMITH, MONTANA HOSPITAL ASSOCIATION: I would like to go on record as endorsing this bill.

OPPONENT GREG MORGAN, STATE BAR OF MONTANA: I have two constructive criticisms of this bill. He presented a copy of "the legal perspective to the committee to be included in his testimony. (exhibit "A" attached) He said that Senate Bill 402 which would establish a mandatory medical review program should be examined by the committee.

OPPONENT BOB RYAN, Attorney, Billings, Montana: I have represented claims on malpractice. Although I oppose the bill, I am not in any way against medicine. I respect it. During the last 20 years there have been 20 appellate decisions in Montana, most dealing with the locality rule. I contacted many doctors and talked with them about this problem and I called the principles in the major firms in Montana insurance and talked with them. I asked two questions, how many cases and how many against the doctor. The number was two. The courts apply the rules of evidence as to how you apply the standards of practice.

I suggest you read a book by Lewis Helland Williams. This is an excellent volume about medical malpractice. He gave examples of why he felt the bill could not work. He gave an example of an actual case in which he was involved concerning a small girl with curvature of the spine. She became paralyzed as a result to the wrong operation. He said of cases recently in Montana, 10 went for the doctor and 6 for the patient. This bill tends to limit those cases from outside the state.

Representative Dussault came in.

OPPONENT VICTORIA DUNAWAY, YELLOWSTONE COUNTY BAR ASSOCIATION: The locality rule has been discussed. You must show that there is some liability on behalf of the doctor. The doctors do have a very serious problem with malpractice insurance in this state. I think House Bill 570 is the solution to the problem, but the locality rule is not. With the transportation it is no longer a time-consuming chore to travel from another area to testify, such as Seattle. To not take testimony is not very practical without a medical school in Montana. I think a standard of care should not be based on geography. If a case is going to get to a jury there has to be some expert testimony. Doctors in the same community are reluctant to come forward. It has to be a balancing of public policy. I think the answer is to own insurance company. Generally speaking, the various parts of the body are located the same in New York as they are in Montana.

OPPONENT W. A. MURFITT, MONTANA BAR ASSOCIATION: The rule itself is very restrictive. I oppose on that basis.

OPPONENT TOM DOWLING, TRIAL LAWYERS: I am against the bill.

OPPONENT C. W. LEAPHART, MONTANA TRIAL LAWYERS: I would echo that opinion. I also oppose the bill.

GERALD NEELY, MONTANA MEDICAL ASSOCIATION: I would close with a few comments. If you look at Montana law, it defines the locality rule in Montana. It appears there is some confusion as to what this bill is. This bill expands the law to include the same or similar community in the state of Montana. I would urge the committee to take into account that there are community standards. He went on to explain in further detail the intent of the bill and what it would do.

REPRESENTATIVE KEYSER: What other professions have the right to limit the testimony to professional people within a certain locality or an area.

MR. MURFITT: I don't think there are any.

MR. RYAN: The rule is applied in some legal malpractice cases.

REPRESENTATIVE KEYSER: Are you saying that nobody can come in as an expert witness?

MR. NEELY: It only limits in some cases. Then followed discussion about the cases and where they have to come from in order to give expert testimony. He explained about the medical - legal panel and how it would operate. I do believe this is an answer.

REPRESENTATIVE KIMBLE: It was my understanding that it was the same community rule before in Montana rather than on a national level.

REPRESENTATIVE DAY: Have you ever had any trouble getting a doctor to testify against another doctor?

Representative Seifert came in.

Hearing closed on 574.

HEARING OPENED ON HOUSE BILL 654.

REPRESENTATIVE MELOY, District #29: This bill will prohibit placement of youths in need of supervision at detention facilities and will prohibit evaluations at detention facilities. He talked about the report of the facilities at Pine Hills and the conditions there. The Youth Court Act cannot send a youth in need of supervision to Pine Hills.

There was general discussion about the 45 day evaluation and the reason for that number of days. The bill needed to be clarified on page 2, line 6, also on page 2, lines 16 and 17. He suggested the committee might want to amend the bill in order to clarify these areas.

PROPONENT GENE HUNTINGTON, BUDGET AND PROGRAM PLANNING: We do support the bill. We are trying to locate enough money to support at least one program.

The amendment he presented to the committee is as follows:

Page 2, section 1, subsection (2) (a), line 16.

Following: "youths"

Strike: lines 16 and 17

Insert: "in the most appropriate and designated program at the Department of Institutions."

PROPONENT DAN RUSSELL, DEPARTMENT OF INSTITUTIONS, Director, After-care: He discussed the after-care program and the need for some further screening facilities. He mentioned they now have an evaluation center in Great Falls.

PROPONENT WAYNE PHILLIPS: I am the director of a detention center here in Helena. In a little over two years we have had 300 youths pass through the home. We feel that evaluations in a restrictive environment are not very good. They should be in a home or somewhat similar environment.

ARLENE HOWELL: I was involved in the investigations of Pine Hills, when we did the survey for evaluations. The biggest problem was mixing the young with other youths. If you will notice on line 6, this is addressing a problem of children on probation violations and you should consider changing it.

ELIZABETH CLARK, YOUTH PROBATION OFFICER: Look at line 7, page 2. If they are talking about institutions, use that language instead of detention center. We are concerned about taking away the 45 day evaluation.

There was general discussion about the status offender and the juvenile

delinquent. Miss Clark said a status offender is a runaway, a truant, or that type of offense. The hardest kinds we work with are the hard-core status offenders, because they do not care what their parents think or feel. All we are saying is that we want you to be realistic. Don't take away the 45 day evaluation unless you give us something in place of it.

REPRESENTATIVE MELOY: In closing, let me say that the present code is ambiguous. On page 2, line 7, this bill makes clear what the law presently provides. It is not our intent to take away the 45 day evaluation.

Miss Clark explained the 45 day evaluation and the reason for it. How it works, etc. We have to look at the quality of evaluation. If we could get someone professional in the community we would do it.

REPRESENTATIVE HOLMES: Are you finding that status offenders in the same category will be better served?

Mr. Phillips: He discussed behavior patterns, and stated that from his experience you will not get a worthwhile evaluation in a detention environment.

REPRESENTATIVE ROTH: How many alternative institutions would take care of this?

Miss Clark: A lot depends on whether we can continue to use Pine Hills and Mountain View, and Yellowstone Boy's Ranch. We are not talking about expanding the program greatly. We want to use local facilities where they are available.

REPRESENTATIVE SEIFERT: Would you define youth as used in this bill.

REPRESENTATIVE MELOY: He explained what is meant by youth. What is meant by an evaluation and detention center.

Mike Papich: He discussed the alternative programs, the number and the cost, etc.

REPRESENTATIVE KEYSER: I think Twin Bridges should not have been used in the first place.

A general discussion followed about the cost per day. It was stated that Pine Hills cost \$36.50 per day, Mountain View, \$45.00 and locally they could keep a youth for \$20.00 per day. They then discussed how this could be so. They discussed how a youth might be too incorrigible for a group home, thus would have to be in a place with some type of restrictions.

REPRESENTATIVE COURTNEY asked if any evaluations were done in a group home. Mr. Phillips explained about the fact they did not have a professional staff, and that if they did the cost would be comparable to the institutions. The really incorrigible youth is sent to Pine Hills. Discussion about the ages of the youths, the length of stay is 18 days. Discussion about handling some from other institutions.

Mr. Russell: Our plan is to start one facility. One thing in the

community which we are going to pilot that will show how feasible it is.

Discussion about transferring of a youth if he has been sent to Pine Hills, and that the youth act must designate where they could go.

Discussion about what the most important rule would be in getting a youth back into the community or Pine Hills.

Representative Scully asked what is the particular significance of the 45 day evaluation or is there any.

Meloy: The law merely says not over 45 days, not to exceed that number of days.

Representative Scully: Why not just provide monetary services to the local community, why build a facility?

Mr. Russell: We are talking about using existing facilities.

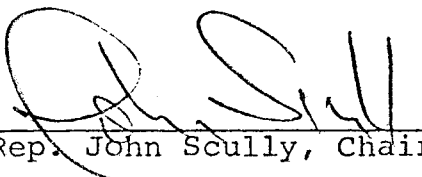
Representative Scully: My point is, do we really need the building or do we need the care?

Mr. Phillips: We need the care.

No further questions.

The hearing closed on House Bill 654.

Meeting adjourned at 9:55 A. M.


Rep. John Scully, Chairman


Mary Ellen Connelly, Secretary