JUDICIARY COMMITTEE
February 15, 1977

An extra meeting for the study of the malpractice insurance bills was held on Tuesday evening at 7:00 p.m. in room 436 of the Capitol Building, Helena, Montana. Chairman Scully presided. All members were present except Representative Colburn.

CHAIRMAN SCULLY explained the ground rules, since all of these bills had already been heard before.

HOUSE BILL #200:

GREG MORGAN, MONTANA BAR ASSOCIATION:
He presented proposed amendments to the committee.

TOM DOWLING, TRIAL LAWYERS ASSOCIATION:
I have prepared a positon paper which I will leave with the committee. This paper includes the other bills in the malpractice series, as well as HB 200.

GARY NEELY, MONTANA MEDICAL ASSOCIATION:
The Medical Association supports House Bill 200. We will accept Mr. Morgan's amendments.

HOUSE BILL #201:

SAM HADDON, STATE BAR OF MONTANA:
I have served for about 5 years on the medical, legal division and the state bar of Montana is on record against House Bill 201. I am told by the medical people that they consider this bill an absolute must.

JAMES MOORE, KALISPELL ATTORNEY:
This bill would cut down the time of the insurance company exposure, theoretically permitting the company to reduce its premiums. The rights of the child cannot be prejudiced until majority, prior to which the child has no standing before the court. Many of the injuries are head injuries. He gave an example of a case he had handled, mentioning that oftentimes these head injuries result in epileptic seizure and maybe not until the statute of limitations has run out.

FRANK MORRISON, WHITEFISH ATTORNEY:
I do a great deal of work in the field of personal injury. I work closely with doctors. This is one of the bills that has very little to do with the problem of the increased premium dollar. You would be taking away the right of compensation without doing what you want this bill to do. I can assure you that this bill won't affect the premium dollar any.

MR. NEELY presented a copy of proposed amendments to the committee. It does go to the availability of insurance. It gives the actuary more predictability and gives a leveling effect over the year. This problem goes to the question of availability. Any time you deal with the statute of limitations you create problems. We feel it should be weighed very seriously. He talked about the 8 year and 2 year statute of limitations and the pros and cons of each.

HOUSE BILL #279:

SAM HADDON, STATE BAR OF MONTANA:
The state bar is in opposition. We feel it is unnecessary. He commented on the rule of civil procedure. An amendment which would reduce the number of uninvolved defendants would certainly provide substantial relief, and would not be opposed by the Bar. If sanctions were to be imposed, such sanctions should be reciprocal. The bill has proposed that there must be a certificate by the attorney that the claim has merit. I suggest that this reveals the old conspiracy of silence.

TOM DOWLING, TRIAL LAWYERS ASSOCIATION:
I wonder if you are considering the impact on the jury system. We are presenting written comments for your consideration. (copy attached)

JERRY LEINDORF:
The certification required is under rule 11. When you are going to try a case right, you are going to use an expert witness. Because of the potential unavailability of a physician in the state, the act would then only require prior consultation with a physician licensed to practice medicine in any state. We have an amendment on page 1, line 20, strike the words, "in this state" and insert the word "medicine".

GREG MORGAN:
We would not object to the amendment. The medical association is in favor of this. I agree with Mr. Haddon, anything to reduce the number of uninvolved defendants would provide relief.

HOUSE BILL #334:

GREG MORGAN: This bill eliminates the "ad damnum" clause of a complaint. The purpose is to avoid adverse publicity. It would certainly apply to all civil cases and the bar very much supports this bill. Senate Bill 402 will satisfy a mandatory panel. That bill would take care of most of these bills except this one.

MR. HADDON:
If I interpret this bill it contemplates that there is going to be a contest in the particular piece of litigation. If there is no ad damnum clause in the claim itself, there is no amount of money that the plaintiff receives. There is the default problem.

TOM DOWLING:
I think you almost have a question of objectionable limits. We have no particular opposition to this particular bill.

JIM MOORE:
The bill has some defects in that it does not take into account jurisdictional limits for claims. It seemed to me that there was a 45 day period. It is my feeling this bill will do little to relieve the physicians from the high cost of malpractice insurance.

MR. LEAPHART:
Right now if you file an action you have a diversity of citizens, which may be found in state court. Unless there is some provision that allows a defendant to ask for the damage this will not transfer to the federal court system.

MR. NEELY:
With the 45 days the judge would be aware of this problem, in relationship to the default. I would like to make you aware of line 5, page 2, section 3, subsection 1.

MR. DOWLING:
The purpose of this bill was to serve the defendant.

MR. NEELY:
If there were a removal to federal court the pleadings could be amended in federal court.

MR. HADDON:
There are two things I would like to comment on, the prayer for relief,
1. special damages and it should be stated in a specific sum
2. prayer for general damages (covers any multitude of things)
The prayer for relief generally covers both of these items.

REPRESENTATIVE RAMIREZ:
Would it solve the problem if the judge did not have to file the proof of the service of notice.

REPRESENTATIVE COURTNEY:
Is this to prevent some kind of publicity of the amount of money. It would be to avoid the publicity?

There was some general discussion about the bill and what it would do, whether it would avoid the adverse publicity.

The hearing closed on House Bill 334.

HOUSE BILL #367:

MR. HADDON:
The bar is in opposition to this bill.

MR. DOWLING:
If you remember, Glen Drake was in favor. This bill confuses civil and criminal actions. As proposed, the bill is absolutely unworkable, and there are no amendments that could be offered that would correct the obvious defects of the bill. I am opposed to this bill in its entirety.

MR. LEINDORF:
There is no longer a problem if the amendments are adopted.

The hearing closed on House Bill #367.

HOUSE BILLS #570 and 574:

MR. HADDON:
The locality rule has been rejected. This bill is unnecessarily restrictive. We think it is unrealistic. It limits medical testimony.

MR. SEEBO:
I am primarily engaged in malpractice cases. This bill, as proposed, will not solve the problem.

MR. DOWLING:
I ask you to recall the testimony. They all testified on this locality rule. We object to this bill in its entirety. There is no reason for such a rule in malpractic cases. With the nation-wide standard of training, and testing and the standard of care is a nation-wide standard, there is no logical reason to limit the expert witnesses.

MR. CAVIN:
I am in opposition to this bill. The courts are abandoning the locality rule, with the standardization of medical care. The situation is that, frankly, it is of us who represent the claimant. We are willing to assume the burden of the standard of practice. I see no reason to change.

MR. NEELY:
Under the current judicial ruling the expert testimony has to come

from the same community. It should be a fixed standard. I think it is very important that he should know in advance what his accountability is. I ask that you expecially study section 3.

MR. DOWLING:
What I think we trying to do is make case law statutory.

MR. CAVIN:
These amendments do not in any way meet the objection to the bill.

The hearing closed on House Bill 574.

HOUSE BILL #639:

MR. NEELY:
I ask that you seriously consider the bill. This is concerned with periodic payments. It has one drawback. If the individual judge does not condition upon a certain situation. The bill does provide they have these future damages. This is complicated.

MR. MORGAN:
The Bar Association is strongly in opposition.

MR. HADDON:
This is applicable to all personal injury claims. The most serious thing that this bill does is that it invites litigation forever. I do see any end in litigation in this proposal.

MR. MOORE:
You should consider voluntary and involuntary. In an action or damages, the district court must enter a judgment ordering that money or its equivalent for future damages of the creditor be paid in whole or in part by periodic payments rather than in a lump sum payment. The traditional method of awarding future damages is far less burdened with administrative difficulty, potential inequity, and possible insufficiency of recovery.

The hearing closed on House Bill #639.

HOUSE BILL #647:

MR. LEAPHART:
I want to mention that this is the mandatory arbitration bill and the Montana Trial Lawyers are opposed to it. It establishes a pretrial review panel to require pretrial review of medical negligence claims. There could be a built-in prejudice of the panel, including a financial interest in the results. The no-fault provisions are totally impractical and unrealistic. A truly impartial panel would probably consist of responsible lay persons with a nonvoting medical and a nonvoting legal advisor.

HOUSE BILL #374:

MR. LEAPHART:
The bar is in opposition to this bill. We have offered an amendment. Senate Bill 402 in its place, as an amendment to 374. I would strike the entire bill and substitute SB 402.

MR. DOWLING:
The Trial Lawyers will support SB 402.

MR. NEELY:
We have submitted additional amendments to the mandatory arbitration bill. It is very clear that both the medical and the legal accept the concept. There are limited differences between the two bills. SB 402 is 19 sections taken out of a 32 section bill introduced in New Mexico.

MR. SCULLY:
Are the members of the bar opposed to a panel.

MR. LEAPHART:
NO. If it is fair, I am not opposed to it.

MR. CAVIN:
Look at the compulsory arbitration bill. They adopt the rules of procedure that now applies to law suits. All of these bills inhibit. They do not address the problem. The question still is, what to do about insurance.

After a general question and answer period between the members of the committee, the trial lawyers and the members of the bar, the meeting went into executive session to review and discuss the various bills of the medical malpractice package.

The meeting concluded at 8:45 p.m. and after a short break reconvened for executive action.

JOHN P. SCULLY, CHAIRMAN

Mary Ellen Connelly

Mary Ellen Connelly, Secretary