

MINUTES OF MEETING  
SENATE JUDICIARY COMMITTEE  
January 12, 1977

The meeting of the Judiciary Committee was called to order by Chairman Jean Turnage on the above date in Room 442 of the State Capitol Building.

ROLL CALL:

All members were present with the exception of Senator Roberts who was excused. Senator Warden was excused at 10:00 a.m. as she had to testify at another meeting.

The following witnesses were present to testify:

Representative John Vincent - District 78  
Glen Drake, Helena attorney - Montana League of Cities and Towns and the American Insurance Association  
Gregg McCurdy - Montana Association of Counties  
W. Boyce Clarke - Independent Insurance Agents of Montana  
Arnold Kuenning - Insurance Consultant representing the Independent Insurance Agents of Montana and the Mutual Agents of Montana  
Mike Young, Attorney - Department of Administration  
Bob Biggerstaff - Montana Association of Conservation Districts  
Gregg Morgan, Bozeman attorney - Montana State Bar Association  
Robert Corcoran, Chief Tax Counsel - Montana Department of Revenue  
William L. Romine - Montana attorney  
John Bell, Helena - attorney

CONSIDERATION OF SENATE BILLS 40, 41, 42, 43 and 53:

Senator Towe requested that the bills be taken up in the following order: S.B. 43, 53, 41, 42 and 40. The request was granted by Chairman Turnage. Sen. Towe noted S.B. 32 is identical to S.B. 40.

Senator Towe then explained each bill in the above order. While doing this, he told the committee that these bills, in order to pass, would require a two-thirds vote by each House. This is an exception to the general rule governing sovereign immunity.

Representative Vincent, appearing as a proponent of S.B. 43, stated that he supported this bill with one exception and that is relative to the limits in subsection (b) on pages 4 and 5. He offered the committee two suggested alternatives which he thought would improve the bill. He was then thanked by the Chairman for his testimony.

Other proponents of the bills appearing and offering testimony to the committee were:

Glen Drake, Helena attorney, representing the American Insurance Association and the Montana League of Cities and Towns;

Gregg McCurdy, representing the Montana Association of Counties, who had one question on S.B. 43, page 5, line 3, regarding the words "taxing districts";

W. Boyce Clarke, representing the Independent Insurance Agents of Montana, who presented a prepared statement on each bill to the committee (see attached). Mr. Clarke also commended the subcommittee and their staff on doing a very good job on these bills.

Arnold Kuenning, an Insurance Consultant representing the Independent Insurance Agents of Montana and the Mutual Agents of Montana. Mr. Kuenning presented the committee with a prepared statement. (See attachment)

Mike Young, Attorney for the Montana Department of Administration;

Bob Biggerstaff, representing the Montana Association of Conservation Districts, who said that they are proponents but are concerned that they might not be included.

Gregg Morgan of the State Bar Association said that they wished to applaud the committee and support the work done.

Opponents appearing were:

Bob Corcoran, representing Bill Groff, Director of the Department of Revenue, who said the Department of Revenue was concerned with a couple of items in the bills, namely, in Title 84 the portion referring to claims of refunds of taxes and the portion on quiet title actions in S.B. 40. Senator Towe said that was just a deletion of language.

Bill Romine, attorney, representing only himself. Mr. Romine presented the committee with a prepared statement on S.B. 41. (Attached)

At this time, Gregg Morgan of the State Bar of Montana testified before the committee, suggesting amendments or withdraw S.B. 41 as it may be unconstitutional as a breach of contract. (See Exhibit 1)

John Bell, a Helena attorney who said he believes S.B. 41 is clearly unconstitutional.

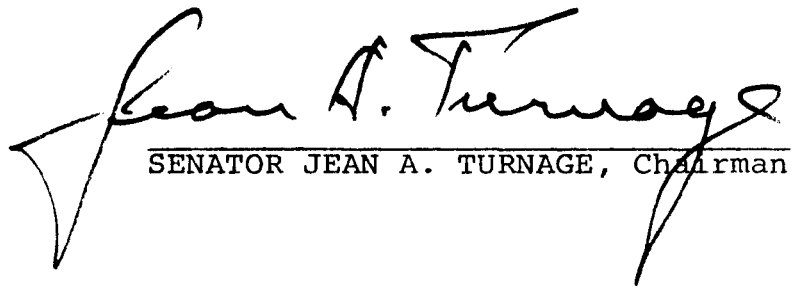
Mike Young, Attorney for the Montana Department of Administration, at this time said that his previous comments were only in regard to S.B. 43, 53 and 40.

At this time, Chairman Turnage explained S.B. 41, stating that it was the last bill worked up by the subcommittee, and that the committee should hear from the bill's originator, Rep. Herb Huennekens, on it.

Senator Towe told the committee that he definitely thanked the researchers who worked on this and that the study is a great credit to the Legislative Council and its staff.

The Chairman asked for questions of committee members.

There being no further business, the committee adjourned at 10:47 a.m. to reconvene January 13, 1977, at 9:30 a.m. in Room 442.

  
SENATOR JEAN A. TURNAGE, Chairman

ROLL CALL

JUDICIARY COMMITTEE

45th LEGISLATIVE SESSION - - 1977

Date 1/12/77

NAME	PRESENT	ABSENT	EXCUSED
TURNAGE, Jean, Chairman	✓		
ROBERTS, Joe, Vice-Chairman	<del>✓</del>		Ex 67
MURRAY, William	✓		
OLSON, Stuart	✓		
LENSINK, Everett	✓		
REGAN, Pat	✓		
TOWE, Tom	✓		
WARDEN, Margaret	✓		Ex 10:00

Each day attach to minutes.

service offices according to the fields of law in which he will accept referrals.

- (3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

**DR 2-106 Fees for Legal Services.**

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case, or a party in a divorce case.

**DR 2-107 Division of Fees Among Lawyers.**

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

- (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
- (2) The division is made in proportion to the services performed and responsibility assumed by each.
- (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

160 Mt Rpts  
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DATE 1/12

COMMITTEE ON \_\_\_\_\_

BILL NO. 20

## VISITOR'S REGISTER

NAME		REPRESENTING	Check One	
			Support	Oppose
Bill Givley		Gov. & Co. 13		
Gregg McCurdy	✓	Montana Assn. of Counties ✓	X	
Chas. B. Gierstadt	✓	MT Assn. of Conservation Districts		
	X	Land of the		20
John Bell	✓	self		X
John Drake	✓	American Ind. Assn. &		
		League of Cities & Towns	X	
William R. Rame	✓	self (S.B. 41)		X
Greg Morgan	✓	State Bar of Montana		
J. Guernsey	✓	Public Works Bd. of Montana	X	
James Lake	✓	Independent Business People's Assn.		
Edmund		State Bar of Montana		
John Young	✓	Dep. of Agriculture		
John Hansen	✓	Dep. of Administration		
Carson	✓	Dep. Rec.		
Frank H. Smith		Mont. Pub. Bds. Assn. + Y.A.I.A.		

(Please leave prepared statement with Secretary)

SENATE BILL NO. 40

COMMENT:

REPRESENTING INDEPENDENT INSURANCE AGENTS OF MONTANA, WE CONCUR WITH  
FINDINGS OF THE SUB-COMMITTEE AND RECOMMEND PASSAGE.

A handwritten signature in dark ink, appearing to read "W. Boyce Clarke", is written over a horizontal line.

W. BOYCE CLARKE, LEGISLATIVE COUNSEL  
INDEPENDENT INSURANCE AGENTS OF MONTANA

SENATE BILL NO. 42

COMMENTS:

FIRST OF ALL, I SHOULD LIKE TO COMMENT ON THE SCOPE OF EFFORT EXPENDED BY THE SUB-COMMITTEE ON JUDICIARY AND THEIR STAFF IN RESEARCHING THE SUBJECTS EMBRACED BY THE SERIES OF BILLS TO BE CONSIDERED HERE TODAY. IT IS EVIDENT FROM THE SUB-COMMITTEE REPORT THAT THE VARIOUS AVENUES HAVE BEEN DEEPLY RESEARCHED, THOROUGHLY AND SERIOUSLY CONSIDERED AND SPECIFIC CONCLUSIONS REACHED TO WHAT APPEARS GENERALLY TO US VERY WORTH WHILE LEGISLATION. THE SUB-COMMITTEE AND ITS STAFF IS TO BE COMMENDED.

AS TO SB-42 NOW UNDER CONSIDERATION, WE ENDORSE AND RECOMMEND PASSAGE.

  
W. BOYCE CLARKE, LEGISLATIVE COUNSEL  
INDEPENDENT INSURANCE AGENTS OF MONTANA



SENATE BILL NO. 43

COMMENT:

AGAIN, REPRESENTING MEMBERS OF THE INDEPENDENT INSURANCE AGENTS  
OF MONTANA, WE CONCUR WITH THE FINDINGS OF THE SUB-COMMITTEE AND RECOMMEND  
PASSAGE.

  
W. BOYCE CLARKE, LEGISLATIVE COUNSEL  
INDEPENDENT INSURANCE AGENTS OF MONTANA

SENATE BILL NO. 53

COMMENT:

I DON'T SUPPOSE THERE IS ANY GROUP ANYWHERE WHO IS AS AWARE OF THE CONFUSION AND FRUSTRATION SUFFERED BY PEOPLE IN GOVERNMENT WHO HAVE TO MAKE DECISIONS ABOUT LIABILITY INSURANCE TODAY AS ARE MONTANA INDEPENDENT AGENTS. MOST OF US ARE DEEPLY INVOLVED. RIGHTFULLY SO AS COMMISSIONS FOR THIS FORM OF COVERAGE MAKE UP A PART OF OUR LIVLIHOOD. WE HAVE WORKED HARD TO OBTAIN COVERAGES IN LIMITS TO SATISFY OUR NEW CONSTITUTION AND AFFECTED STATUTES. BY AND LARGE, IN THE COMMUNITIES, COVERAGES ARE AVAILABLE BUT THE MARKET IS TIGHT. FOR THE STATE, THERE ARE COMPOUNDED AND COMPLEX PROBLEMS. THE EFFORT TO OBTAIN FLEXIBILITY ON BEHALF OF THE STATE EVIDENCED THROUGH CLARIFICATION OF EXISTING LAW, AMENDMENT AND REPEAL UNDER SB-53 APPEAR ENTIRELY JUSTIFIED AT THIS TIME.

THERE ARE JUST A COUPLE OF COMMENTS I WOULD LIKE TO MAKE ON BEHALF OF OUR PEOPLE:

FIRST, EVEN THOUGH THIS PACKAGE OF BILLS IS FAVORABLY ENACTED, I WOULD LIKE TO POINT TO SOME EXTENT, THE FINAL PARAGRAPH ON PAGE 28 OF THAT SECTION OF THE STUDY ENTITLED "INSURANCE OF GOVERNMENT LIABILITY RISKS", WHICH READS:

"WHATEVER THE ULTIMATE SOLUTION, THE INSURANCE OF GOVERNMENT LIABILITY RISKS IS LIKELY TO BE AS FRAUGHT WITH DIFFICULTY IN THE FUTURE AS WILL BE THE INSURANCE OF OTHER LIABILITY RISKS. THE LACK OF IMMUNITY OR LIMITS ON LIABILITY WILL PROBABLY HAVE LITTLE EFFECT ON THE TOTAL INSURANCE MARKET PRICE."

FRANKLY, I AM SOMEWHAT MORE OPTOMISTIC ON THE SUBJECT BECAUSE, BY ESTABLISHING SOME LIMITATIONS, SOME OPEN ENDS ARE CLOSED AND THIS SHOULD, IN DUE COURSE, HAVE A GOOD EFFECT ON PRICING AND AVAILABILITY, - OTHER FACTORS BEING EQUAL. IT WILL TAKE TIME.

SECOND, THE ESTABLISHING OF SPECIAL FUNDS IN GOVERNMENT HAS ALWAYS BEEN A WORRY TO ME. HISTORY, MORE OFTEN THAN NOT, HAS PROVEN THESE FUNDS HAVE A WAY OF NOT BEING THERE WHEN SORELY NEEDED.

AND LAST, MY PEOPLE ARE INDEPENDENT TAX PAYING, COMMUNITY ORIENTED  
BUSINESSMEN. WE WOULD HOPE THAT IN ANY WAY POSSIBLE, CONSIDERATION OF  
TAX SUPPORTED SELF INSURANCE FUNDS BE LIMITED TO THE EXIGENCIES OF THE  
PROBLEMS AT HAND. THAT WHEREVER POSSIBLE, INDEPENDENT AGENTS BE ENCOURAGED  
TO PROVIDE NEEDED COVERAGES THROUGH THEIR MARKETS.

  
\_\_\_\_\_  
W. BOYCE CLARKE, LEGISLATIVE COUNSEL  
INDEPENDENT INSURANCE AGENTS OF MONTANA

Statement of Arnold Kuenning, licensed Insurance Consultant engaged by the Independent Insurance Agents of Montana and also the Mutual Agents of Montana, to service the insurance programs of the State:

We support the governmental immunity legislation being proposed, namely Senate Bills 40 through 43. No other state has taken quite the same approach to "sovereign" immunity as Montana, and this fact leaves our legislature almost without guidelines in making needed modifications. Therefore, it has seemed wise to use caution and careful study in setting new standards. It is quite evident that the Sovereign Immunity study committee created by the 1975 legislature has done just that during the past two years in developing these bills, particularly Senate Bill 43, and we commend them for their efforts.

We hope that these will alleviate some of the potential dangers of unlimited and unrestricted immunity, so that the State and its subdivisions can deal more effectively with tort claims. This is true whether they are assuming the risks of liability themselves or transferring them to others through the medium of insurance.

Our experience of recent years in attempting to find markets for insurance of all kinds makes us quite hesitant to predict whether any given risk will be easier or harder to insure tomorrow. There are still no clear answers for Montana or for any other state on what will make public lines attractive to insurance carriers, as there are many factors which influence insurance marketing. However, we are hopeful that this legislation will be a step toward easing the problem.

\* \* \* \* \*

Although we have not had time to thoroughly consider Senate Bill 53, which is related to the immunity amendments, we agree that some action of this nature is required to give the State the flexibility needed to maintain a realistic balance between assumed risk and insured risk.

*January 12, 1976*

Mr. Chairman, and members of the Committee, my name is William L. Romine. Although I am a Registered Lobbyist, I do not appear here today on behalf of any principal, but instead, on my own behalf as a licensed and practicing Montana Attorney. I oppose passage of Senate Bill 41.

I personally resent the implication of this Bill, which appears to be that attorneys are over charging their clients, and receiving compensation over and above the amount that should be actually due them for their skills and services.

As we all know, most personal injury actions are brought on behalf of the Plaintiff based upon a contingent fee with the attorney. This is because most injured Plaintiffs cannot afford to pay the attorney on a time and expense, or flat fee, basis. The contingent fee is relatively large primarily because the attorney takes the risk of either a small recovery or no recovery at all. The attorney may have many many hours involved in a claim, but be unsuccessful for one reason or another, and therefore be paid nothing for his extensive services.

I also do not believe that the State should be involved in private contracts between attorneys and their clients. These contracts are negotiated and entered into between the attorney and the injured Plaintiff, and are negotiated prior to the time a settlement is awarded or a judgment is secured. They are based upon the uncertainty of any award or settlement, and all parties are taking a certain amount of risk in entering into contingent fee contracts.

In those cases where a claim is made against the State or a County, which do not involve personal injuries, for instance, a breach of contract claimed by a highway contractor against the Highway Department, the attorney is most often paid on a time and expense basis, and not on a contingent fee basis. The client is generally financially able to pay the attorney for his time and effort, and this is how it should be. On the other hand, the contingent fee is a boon to the injured Plaintiff who generally is financially unable to pay for the services rendered.

I am also troubled by the fact that this Bill would allow the revision of the attorney fee arrangement after services have been performed. If this Bill were aimed at Doctors, and provided that the Doctor's fee would be determined after the services has been performed, and was to be based upon the amount of time the Doctor spent, the complexity of the medical problem and the skill of the Doctor, I am sure this Bill would be highly controversial.

Finally, if one of the intents of Senate Bill 41 is to attempt to get more of the insurance premium dollar into the hands of the injured party, since it is the claim of many insurance companies that large amounts of premium dollars go to the attorney, then it would appear to me that the Bill should also provide that the attorney representing the State, which most probably is an insurance attorney, will also have his fee determined by the court.

I urge, therefore, that the Committee report unfavorably on Senate Bill 41.

*William L. Romine*