MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
February 17, 1977

The meeting of this committee was called to order at 8:00 a.m. by Senator Turnage, Chairman, in Room 415 of the State Capitol Building.

ROLL CALL:

All members of the committee were present except Senator Regan who was excused until 9:30 a.m..

The first order of business before the committee was to act on Senate Bills.

EXECUTIVE SESSION

Senate bills were acted on as follows:

(Consideration of S.B. 33 was continued from 1/14/77)

S.B. 33 - Senator Olson moved to strike section 35, page 22, in its entirety; and to amend section 41, page 25, line 1, following "4", by striking "10 days before the election". The motion carried unanimously. Senator Roberts then moved that S.B. 33 as amended DO PASS. The motion carried unanimously.

S.B. 27 - Senator Towe moved to amend page 11, section 10, lines 23 and 24 by striking subsection (e) in its entirety and inserting "(e) whenever the incarceration of an elector in a penal institution for a felony conviction is legally established; or". The motion carried unanimously.

Senator Towe then moved to amend page 17, section 14, line 22, and page 26, section 19, line 11, following "than" by inserting "a legislator or a". The motion carried unanimously.

Senator Olson moved to amend page 34, section 27, line 14, by striking "marking by electors --". The motion carried unanimously.

Senator Towe moved to amend page 53, section 44, line 4, following "rejected" by striking "if they do not" and inserting in lieu thereof "because of failure to"; and to strike section 66 on page 79 in its entirety and renumber the subsequent sections. The motion carried unanimously.

Senator Towe then moved that S.B. 27 as amended DO PASS. The motion carried unanimously.

COMMITTEE HEARING

9:30 a.m. - At this time the committee commenced hearing the bills scheduled for this date. Senator Regan was present and Senator Murray was excused to attend another meeting.

CONSIDERATION OF SENATE BILL 385:

Senator Thomas of Great Falls, sponsor of this bill, explained it to the committee. He said that this bill raises the parole from 1/4 to 1/2 less good time, and that the persistent offender section will be repealed. Also, section 1 establishes a new section with non-dangerous offenders. These persons will still remain at 1/4 time as far as their stay in the execution and sentencing.

The first proponent to testify was Tom Dowling, representing the County Attorneys Association and the Sheriffs Association, who said that they support S.B. 385.

Judge Shanstrom of Livingston told the committee that the district judges support S.B. 385 because it takes care of dangerous offenders in that he is only eligible for 1/2 time.

Hank Burgess, a members of the State Board of Pardons, was the next proponent to testify, saying that he feels this bill is the answer to the present problems in the criminal justice system.

Tom Honzel, representing the County Attorneys Assn., said that they do support this bill for the reasons Mr. Burgess gave.

Jack Lynch, Chairman of the Parole Board, said that this legislation would give them the authority to deal with the habitual criminal and that this is a very workable piece of legislation.

Gary Broyles, an investigator for the Board of Pardons appeared in support of S.B. 385.

There were no opponents present, so the Chairman allowed the committee members to question the witnesses. He then thanked the witnesses for appearing and excused them.

CONSIDERATION OF SENATE BILL 393:

Senator Bob Brown, District 10, sponsor of this bill, said that the problem is that drainage from coal development in southern Canada is going into the Flathead Lake.

Jim Cumming of Flathead County was the first proponent to testify. He said that this does apply to Canada, and submitted a copy of a report prepared by Ronald J. Schleyer of the EQC concerning the transboundary effect safeguarding the Poplar River in Montana. (See Exhibit 1) He said that the state department has taken the attitude that they cannot do anything about requesting to stop the pollution, and that they have failed in a couple of other ways, especially in the area of international law on pollution. (See Exhibit 2) He further said that the international law on water and air pollution is far beyond state law. He then told the committee about the Ohio vs. BASF Wayandotte Corp. case which stemmed from pollution by the Wayandotte Corp. in southern Ontario. (See Exhibit 3)

There were no opponents to S.B. 393 present, so Senator Turnage, the committee Chairman, allowed the committee members to ask questions of the witnesses. He then thanked the witnesses and said that the committee would take the bill under consideration.

CONSIDERATION OF SENATE BILL 402:

The sponsor of this bill, Senator Murray, had to attend another meeting, so Greg Morgan of the Montana Bar Association presented S.B. 402 to the committee for him. He told the committee that the Bar Assn. is in favor of the bill and the medical malpractice review panel because they will decide if there is substantial evidence. He then explained how the bill was drafted and said that actually it has been in operation as a voluntary plan since 1969. He said it was originally drafted after the New Mexico voluntary plan, and he then presented some statistics on the Montana voluntary plan. Mr. Morgan offered an amendment to section 7, page 5, regarding funding of the act, and said that they feel the medical association should pay for it. (For the statistics, see Exhibit 1) (For the proposed amendment, see Exhibit 2)

Gerald Neely, representing the Montana Medical Association, was the next proponent of S.B. 402 to testify. He read and commented on an analysis of Senate Bill 402 which the Montana Medical Assn. had prepared. (See Exhibit 3) In the exhibit there are suggested amendments, and Mr. Neely said that the Montana Medical Association does support S.B. 402 with the amendments.

The next proponent was Chad Smith, representing the Montana Hospital Assn., who said they also support the bill with the suggested amendments of the Montana Medical Assn.. He further said that he thinks this bill can be made to work and that it will cut a lot of the administrative costs.

There were no opponents present, so the committee was allowed to question the witnesses.

CONSIDERATION OF SENATE BILLS 414 and 415:

Senator Roberts, sponsor of these two bills, simply submitted them to the committee as they are self-explanatory.

DISPOSITION OF SENATE BILL 414:

Senator Regan moved that S.B. 414 DO PASS. The motion carried unanimously.

DISPOSITION OF SENATE BILL 415:

Senator Towe moved that S.B. 415 DO PASS. The motion carried with Senator Regan abstaining.

DISPOSITION OF SENATE BILL 301:

Senator Roberts moved that S.B. 301 DO PASS. The motion carried unanimously.

DISPOSITION OF SENATE BILL 311:

Senator Roberts moved to amend page 7, line 22, by inserting "This section is not applicable if the father is a person whose consent to adoption is not required under 61-205." The motion carried unanimously.

There being no further business before the committee at this time, the committee adjourned at 11:10 a.m..

SEN. JEAN A. TURNAGE, Chairman

ROLL CALL

JUDICIARY COMMITTEE

Senate

45th LEGISLATIVE SESSION - - 1977 Date 2-17-77

NAME	PRESENT	ABSENT	EXCUSED
TURNAGE, Jean, Chairman	✓		
ROBERTS, Joe, Vice-Chairman	✓		
MURRAY, William	✓		
OLSON, Stuart	✓		
LENSINK, Everett	✓		
REGAN, Pat	✓		
TOWE, Tom	✓		
WARDEN, Margaret	✓		

SCHLEYER

THE TRANSBOUNDARY EFFECT

SAFEGUARDING THE POPLAR RIVER IN MONTANA

AN EQC STAFF REPORT

BY

RONALD J. SCHLEYER

OCTOBER 6, 1976

MONTANA STATE LEGISLATURE

ENVIRONMENTAL QUALITY COUNCIL

HELENA, MONTANA

Ex. 1
SB 393

CONTENTS:

393 (Ex. 2)

CHAPTER 331

Reciprocal Enforcement of Judgments Act

Title.

1. This Act may be cited as the *Reciprocal Enforcement of Judgments Act*. 1959, c. 70, s. 1.

Interpretation.

2. (1) In this Act,

"judgment" means a judgment or order of a Court in a civil proceeding, whether given or made before or after the commencement of this Act, whereby a sum of money is made payable, and includes an award in an arbitration proceeding if the award, under the law in force in the State where it was made, has become enforceable in the same manner as a judgment given by a Court in that State, but does not include an order for the periodical payment of money as alimony or as maintenance for a spouse or former spouse or reputed spouse or a child of any other dependent of the person against whom the order was made;

"judgment creditor" means the person by whom the judgment was obtained, and includes his executors, administrators, successors, and assigns;

"judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the State in which it was given;

"original Court" in relation to a judgment means the Court by which the judgment was given;

"registering Court" in relation to a judgment means the Court in which the judgment is registered under this Act.

(2) All references in this Act to personal service mean actual delivery of the process, notice, or other document, to be served, to the person to be served therewith personally; and service shall not be held not to be personal service merely because the service is effected outside the State of the original Court. 1959, c. 70, s. 2; 1975, c. 73, s. 22.

Application for registration of judgment

3. (1) Where a judgment has been given in a Court in a reciprocating State, the judgment creditor may apply to the Supreme Court within six years after the date of the judgment to have the judgment registered in that Court, and on any such application the Court may order the judgment to be registered.

Registration ex parte

(2) An order for registration under this Act may be made ex parte in any case in which the judgment debtor

(*a*) was personally served with process in the original action; or

(*b*) though not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original Court,

393

(Exhibit 3)

State of Ohio
Office of the Attorney General

William J. Brown
Attorney General

Michael R. Szolosi
First Assistant Attorney General
Richard S. Walinski
Chief Counsel
G. Duane Welsh
Executive Assistant Attorney General
P. Michael DeAngelo
Deputy Attorney General

December 30, 1976

Mr. James A. Cummings
Post Office Drawer B
Columbia Falls, Montana 59912

Dear Mr. Cummings:

Enclosed are copies of the unpublished trial court and appellate court opinions in the BASF Wyandotte litigation. The personal jurisdiction issue is discussed at page 9-16 of the opinion of the Court of Common Pleas and at pages 10-12 of the Court of Appeals' decision. I hope that these materials prove to be helpful.

Yours very truly,

TERRY M. MILLER
Assistant Attorney General
Court of Claims Section - Defense
State Office Tower - 17th Floor
Columbus, Ohio 43215
(614) 466-5610

TMM:elm

MONTANA MEDICAL ASSOCIATION
2021 Eleventh Avenue
Helena, Montana 59601

FOR YOUR INFORMATION

June 3, 1976
Thursday

M E M O R A N D U M

TO: RICHARD E. LAURITZEN, M.D., MEDICAL CHAIRMAN, RANDALL SWANBERG, ESQ., LEGAL CHAIRMAN, JOINT MEDICAL-LEGAL PANEL (EASTERN DISTRICT); AND JOHN F. FULTON, M.D., MEDICAL CHAIRMAN, WALTER S. MURFITT, ESQ., LEGAL CHAIRMAN, JOINT MEDICAL-LEGAL PANEL (WESTERN DISTRICT)

FROM: G. BRIAN ZINS, EXECUTIVE DIRECTOR

Gentlemen:

Enclosed for your information is a resume of all claims presented to the Joint Medical-Legal Panel from the inception of the Panel in 1969 to this date.

We are forwarding this material to you in that we do believe it provides beneficial information about the Panel as sponsored by this Association and by the State Bar of Montana.

All best wishes to you.

GBZ:vm
Enclosure

cc Each Member, MMA Executive Committee W/Encl.
Alfred M. Fulton, M.D. W/Encl.
John W. McMahon, M.D. W/Encl.
Kent M. Parcell, Executive Director,
State Bar of Montana W/Encl.

= = = =
C O P Y
= = = =

MONTANA MEDICAL ASSOCIATION
2021 Eleventh Avenue
Helena, Montana 59601

FOR YOUR INFORMATION

JOINT MEDICAL-LEGAL PANEL CLAIMS

	EASTERN DISTRICT	WESTERN DISTRICT
Claims Pending	4	4
Claims Disposed	33	45
Tie Vote	1	
Evidence of malpractice	8	7
Evidence of malpractice on basis of responsibility of acts of assistant	1	
Claimant injured thereby	8	6
Claimant injured thereby on basis of responsibility of acts of assistant	1	
No evidence of malpractice	14	8
Claim dropped by claimant's attorney	5	12
Claim dropped by defendant's attorney	5	14
Claim dropped due to lack of response from claimant's attorney for a period of one year after the medical specialist was chosen - closed upon request of defendant's attorney.		1
Unable to locate physician		1

Status from inception of plan to June 3, 1976

= = = =

COPY

~~Section 27 (payments of awards and funding of act)~~

Page ~~12~~ 5, line ~~23~~ 9, ~~change title of~~ Section 27 ~~to~~ "Funding of Act", delete entire section and replace with the following:

" (1) There is created a pretrial review panel fund to be collected and received by the secretary for exclusive use for the purposes stated in this act. The fund and any income from it shall be held in trust, deposited in an account, invested and reinvested by the secretary with the prior approval of the director of the Montana Medical Association, and shall not become a part of or revert to the general fund of this state, but shall be open to inspection and auditing by the legislative auditor.

(2) To create the fund, an annual surcharge shall be levied on all health care providers. The amount of the assessment shall be set by the secretary, who shall allocate a projected cost among health care providers on a per capita basis and such other relevant factors as the secretary shall designate by rule, and the secretary shall collect and receive the funds for the exclusive use for the purposes stated in this act. Surplus funds, if any, over and above the amount required for the annual administration of the act shall be retained by the secretary and used to finance the administration of this act in succeeding years, in which event the secretary shall reduce the annual assessment in subsequent years, commensurate with the proper administration of this act.

(3) The annual surcharge is due and payable on the same date as license fees payable to the state of Montana are due."

Reg. Morgan
Mont Dis Assn

AN ANALYSIS OF SENATE BILL 402: An Act to Establish a Mandatory Pretrial Review Panel For Medical Malpractice Claims

February, 1977
Prepared by the Montana
Medical Association

ANALYSIS OF SENATE BILL 402, The Bar Association Mandatory Pretrial Review Panel for Medical Malpractice Claims

1. INTRODUCTION. Pre-trial screening panels are a wide variety of administrative adjuncts to the judicial process, non-binding in effect, which are designed to encourage early settlement of meritorious claims and discourage frivolous litigation.

Since 1969, Montana has had in effect a voluntary screening panel, co-sponsored by the Montana Bar and Medical Association. It has been thought by most participating attorneys and physicians to have been productive with respect to those cases brought before it. However, while in full use, of those cases in which suit was filed, less than 12% first went before the panel, and there is now a general reluctance on the part of the major insurance carriers with insurance in force to use the panel. (See Attachment 1, The Montana Joint Medical-Legal Panel)

Prior to 1975, only New Hampshire had legislation requiring malpractice claims to first come before a panel. Since 1975, nineteen other states have enacted legislation providing for the mandatory presentation of a claim for malpractice to a screening panel as a precondition to a lawsuit.

Both the Montana Bar Association, through Senate Bill 402, and the Montana Medical Association, through House Bill 647, are committed to the concept of a mandatory pre-trial screening panel. The legislation differs in but a few and very critical particulars.

2. THE ORIGINS OF SENATE BILL 402. Senate Bill 402 is primarily taken from a portion of the New Mexico Medical Malpractice Act of 1976. In some instances, those portions taken from New Mexico are slightly modified. Additional provisions are added that are not present in the New Mexico legislation.

In general, those matters deleted are the benefits of the New Mexico legislation to the participating health care providers (with the corresponding detriments either left in or made more severe) and the matters added to SB 402 are additional detriments to the participating health care providers.

3. THE NEW MEXICO ACT AND OTHER STATE LEGISLATION. Generally, legislation in other states providing for a mandatory pre-trial review panel also includes a variety of tort reform measures involving such matters as the collateral source rule, statute of limitations, and the standard of care of health care providers. Many of these enactments also provide for limitations on liability with involvement of a patients' compensation fund paid for by the health care providers. Most provide for either government funding of the administration of the act or are silent on the costs of paying panel members other than expenses.

The New Mexico Medical Malpractice Act of 1976 provides for a screening panel for a variety of health care providers. Individual health care provider's liability is limited to $100,000 apart from punitive damages and medical care (DELETED FROM SB 402) and any amounts up to a maximum limit of $500,000 per occurrence apart from punitive damages and medical care are paid for by a compensation fund which is in turn funded by health care providers qualifying under the Act (DELETED FROM SB 402).

In the New Mexico enactment, future medical expense dollar determinations are taken from the jury in subsequent court actions, and are required to be paid by health care providers as incurred, so long as medically necessary, with provision for continuing medical examinations (DELETED FROM SB 402). Additional tort reforms are included, such as a provision with regard to the statute of limitations for minors (ALL TORT REFORM PROVISIONS DELETED FROM SB 402).

The only serious drawbacks in the New Mexico legislation are provisions forbidding monetary damages to be the subject of inquiry, a prohibition against the panel's settling or compromising any claim, and a prohibition in any form of the liability decision of the panel being considered in a subsequent court action, and additionally their being no bond or cost requirement as to a subsequent court action. Each of these drawbacks are likewise drawbacks to SB 402. A few additional problems, some minor, are created by the addition of language to SB 402 not found in the New Mexico legislation.

3. PERTINENT PROVISIONS OF SENTATE BILL 402 AND SUGGESTED AMENDMENTS

(a) Minor Discrepancies

1. Place of Hearing. Section 5(6) and Section 11 both provide for the place of hearing in differing manners. One should be deleted with the Medical Association expressing no preference.

2. Hearing Procedures. Section 12(3) provides that the hearing will be informal, and no official transcript may be made. The New Mexico act and most others provide additionally that this shall not preclude the taking of the testimony by the parties at their own expense. The language inadvertently deleted is: "Nothing contained in this paragraph shall preclude the taking of the testimony by the parties at their own expense."

3. Coverage of Act. The definition of "health care provider" in Section 3(1) is broad. In copying the available definition from the New Mexico legislation, no account was taken of the position of the differing interest groups in Montana. The language should read: "Health care provider" means any physician licensed to practice medicine in the state of Montana or a hospital, hospital-related facility, or long-term care facility.

4. Funding of Act. Section 7 provides for the collection of the funding surcharge by the director, the surcharge to be set by the insurance commissioner based on the experience rating of the various providers. For simplicity of computation and because the insurance commissioner does not have the staff or ability to determine the surcharge as provided in Section 7, the surcharge should be made on an equal per capita basis, and collected on the same basis as premiums by each insurer, and if the surcharge is collected but not paid within a specified time period, the certificate of authority of the insurer may be suspended.

5. Report by District Court Clerks. Section 17 of the SB 402 is taken out of context from the New Mexico Act, and is the detriment corresponding to the benefits of limitation of liability and the mandated payment of judgments within the limits of the Act. It has no place in the legislation before the Montana Senate.

6. Director of Panel. Section 4(5) provides that the director is appointed by the chief justice of the Supreme Court and serves at his pleasure. Section 5(4) provides for employment and fixing of compensation by the director with the approval of the chief justice. Section 4(6) provides that the director's salary is set by the supreme court. This should read that the director is appointed by and serves at the pleasure of the executive director of the Montana Medical Association, and the director, subject to the approval of the executive director of the Montana Medical Association may employ and fix the compensation for clerical and other assistants as he considers necessary. Likewise, the director's salary should be set by the executive director of the Montana Medical Association.

Section 10(6) provides that the director of the panel or his delegate shall sit on each panel and serve as chairman. The director should not be a member of the panel, nor need he be an attorney. A six-member panel, one-half physicians and one-half lawyers, with the chairperson being one of the attorney members and each of the six members casting a vote is preferable.

Funding Amendment: Section 7 should be changed to read

> Section 7. Funding of Act. (1) There is created a pretrial review panel fund to be collected and received by the director for exclusive use for the purposes stated in this act. The fund and any income from it shall be held in trust, deposited in an account, invested and reinvested by the director with the prior approval of the director of the Montana Medical Association, and shall not become a part of or revert to the general fund of this state, but shall be open to inspection and auditing by the legislative auditor.
>
> (2) To create the fund, an annual surcharge shall be levied on all health care providers. The amount of the assessment shall be set by the director, who shall allocate a projected cost among health care providers on a per capita basis and such other relevant factors as the director shall designate by rule, and the director shall collect and receive the funds for the exclusive use for the purposes stated in this act. Surplus funds, if any, over and above the amount required for the annual administration of the act shall be retained by the director and used to finance the administration of this act in succeeding years, in which event the director shall reduce the annual assessment in subsequent years, commensurate with the proper adminstration of this act.
>
> (3) The annual surcharge is due and payable on the same date as license fees payable to the state of Montana are due.

3. PERTINENT PROVISIONS OF SENATE BILL 402 AND SUGGESTED AMENDMENTS (cont)

(b) Suggested Amendments of Substance

1. Medical Witnesses. Section 9(4) requires the panel director to cooperate fully with the claimant in retaining a physician for consultation and preparation of the panel hearing. Virtually all voluntary panels and statutory panels provide for such a medical witness only AFTER an adverse determination for the physician, and in aid of trial preparation. To require the expense of finding a medical witness to be borne by the physician fund for work that should be done by the attorney before even filing the claim with the panel finds no parallel in other proceedings and has no basis in logic or fairness.

It is submitted that section 9(4) should be stricken in its entirety and be replaced with the following language in a separate section:

> "Section ___. Provision of Expert Witness. In any malpractice claim where the panel has determined that the acts complained of were or reasonably might constitute malpractice and that the patient was or may have been injured by the act, the panel, its members, the director and the professional association or associations concerned will cooperate fully with the patient in retaining a physician qualified in the field of medicine involved, who will consult with, assist in trial preparation and testify on behalf of the patient, upon his payment of a reasonable fee to the same effect as if the physician had been engaged originally by the patient."

2. Monetary Damages and Settlement Authority. Section 12(2) provides that monetary damages may not be a subject of discussion or inquiry. Section 13(6) provides that the panel may not try to settle or compromise any claim or express any opinion on the monetary value of the claim. This is a severe limitation that defeats the stated purposes of screening panels and the major deficiency of voluntary panels and any statutory panels that contain them. (See major discussion in Attachment 2, Possible Findings and Settlement)

> It is submitted that the following amendments should be made:
> --strike last sentence of Section 12(2), p. 11, lines 5-6
> --strike last sentence of Section 13(6), p. 13, lines 14-16
> --strike word "only" from Section 13(1), p. 12, line 8.
> --add to Section 13(6) the following language: "Provided, that the panel shall have authority to recommend an award and to approve settlement agreements and discuss the same, all in a manner not inconsistent with this section, and all such approved settlement agreements shall be binding and of full force and effect."

ATTACHMENT ONE

THE MONTANA JOINT MEDICAL-LEGAL PANEL

The Montana Joint Medical-Legal Panel, adopted in 1969, consists of an equal number of physicians and attorneys, and is divided into a Western District and Eastern District Panel. The Panel determines: (1) whether there is any substantial evidence of malpractice; and (2) whether the facts tend to show reasonable medical probability that the claimant was injured thereby.

The Panel makes no findings as to damages, the conclusions of the Panel are not binding on either party, nor may any of the testimony or findings be used in subsequent court proceedings.

Under the rules of the Panel, if both questions are answered in the negative, the attorney bringing the matter for review is admonished by the rules to refrain from filing a subsequent court action unless personally satisfied that strong and overriding reasons compel him to do so in the interests of his client.

The following data is based upon cases opened before the Montana Panel between October 1969 and July 1975, before the Panel fell into relative disuse, primarily because of unwillingness of the insurance carriers to participate. The data was compiled by the Montana Medical Association.

1. NUMBER OF CLAIMS BEFORE THE PANEL. During the period of time studied, 5 3/4 years, a total of 67 claimants filed medical malpractice actions with the Panel. Some of the claims being against multiple physicians, a total of 81 physicians were named.

2. DISPOSITION OF CLAIMS BEFORE THE PANEL. The following disposition of the claims with respect to the 81 physicians was made:

Panel Determination	Number of Physicians	Percentage of Physicians
No substantial evidence of malpractice	28	34.6%
No panel determination (withdrawn by claimant, refusal to participate by carrier, or pending)	36	44.5%
Tie vote	1	1.2%
Substantial evidence of malpractice, but claimant not injured thereby	1	1.2%
Substantial evidence of malpractice and claimant injured thereby	15	18.5%
	81	100.0%

3. POST-PANEL ACTION AGAINST PHYSICIANS. The following post-panel action was taken against physicians with respect to claims submitted to the Panel:

Post-Panel Action	Number of Physicians	Percentage of Physicians
None	27	33.3%
Unknown	25	30.9%
Out of court Settlement	18	22.2%
Subsequent Suit Filed	11	13.6%
	81	100.0%

4. USE OF COURT SYSTEM AND PANEL. During the 5 3/4 years studied, as noted before, 81 physicians were brought before the panel, or 14 per year.

Of these, a minimum of 11 physicians were later sued in court (the information as to 25 physicians not being known), or 2 per year.

The only information available as to the number of cases filed in court in Montana for a comparable period is that 83 medical malpractice cases were filed between July 1967 and June 1972, a five-year period, or nearly 17 per year. (A. Fulton, "The Medico-Legal Screening Panel: An Evaluation, Rocky Mountain Medical Journal, May, 1973, p. 30)

Thus, from the best available evidence, it would appear that during the periods of time studied, 11.8% (2 out of every 17) of the cases filed in court were initially pursued through the Panel.

Not taken into account are those medical malpractice cases which were settled between the patient and the insurance carrier without either use of the panel or a court suit.

5. COMPARISON WITH ARIZONA. The extensive study of the federal government of medical malpractice indicated that of cases involving 110 defendant-physicians in Pima County, Arizona, of those cases in which suit was filed, 47.3% had first gone to the panel, compared with 11.8% in Montana. (Appendix, Report of the Secretary's Commission on Medical Malpractice, 1972, Dept of HEW, p. 270)

In Arizona, 17.3% of the cases before the panel subsequently were followed by court action, compared to 13.6% in Montana (with the post-panel action of 30.9% unknown). (Id., p. 270.)

ATTACHMENT TWO: POSSIBLE FINDINGS AND SETTLEMENT

1. Introduction. One of the most critical aspects of a statutory mandatory pre-trial screening panel is the area of possible findings, settlement, and their effect in a lawsuit subsequent to the panel hearing. The general purpose of a screening panel to achieve the settlement of an allegation of malpractice based on substantial merit and the discouragement of frivolous litigation must be kept in mind when considering the alternative methods available.

2. Findings as to Damages and Settlement Authority. Generally, the non-statutory and voluntary screening panels do not make any findings as to damages but rather limit themselves to a fundamental finding as to liability, that is whether the malpractice claim has some justification.

This limitation was cited by the extensive federal study on malpractice to be the second most significant limitation of the non-statutory screening panels (the first being the inability to include others such as hospitals in the hearing):

> "The second most significant limitation of (non-statutory) screening panels is that while the parties are advised about liability, no opinion or expert guidance as to damages is given to them." (Appendix, Report of the Secretary's Commission on Medical Malpractice, Dept HEW, 1973, p. 298)

At the time of the Commission's Report, only New Hampshire had a statutory mandatory panel, which the Commission commented favorably upon:

> "The New Hampshire plan differs materially and commendably from all other screening panels in that it not only determines the issue of liability but ascertains with particularity money damages as well. However, the finding of money damages is only advisory; the parties are free to accept or reject the finding of the panel and sue or settle. This unique facet of the New Hampshire plan, which provides a benchmark around which the parties may negotiate productively, is of noteworthy incidence and theoretically should lead to wider-spread settlement of medical malpractice claims in that jurisdiction." (Id., at p. 227)

Since that time, nineteen states have passed legislation requiring a malpractice claim to be heard by a screening panel before suit is instituted, and many of these include provisions regarding damages, and the ability to induce settlement.

Pennsylvania, for example, allows their panel to consider and approve offers of settlement and to also make determinations as to liability and an award of damages. In Idaho, if the panel is unanimous with respect to the amount of money in damages that in its opinion should fairly be offered or accepted in settlement, it may so advise the parties. In Arkansas, after conducting informal proceedings that require neither a transcript, expert testimony, nor compliance with rules of evidence, the panel files a written decision specifying a damage award. If both parties accept this decision, it is final. However, if either party rejects the panel's findings, the claimant may then initiate litigation.

In Florida, the question of damages may be addressed only with the consent of the parties. If the panel makes a finding of liability, it may with agreement of the parties continue mediation for the purpose of settlement, and make a recommendation as to a range of reasonable damages. This approach has been criticized by a writer in the Florida State University Law Review:

> "Another deficiency in the Act regarding mediation panels is that the initial decision by the panel does not include a finding of damages...A decision combining liability and damages gives the parties a reasonable and informed benchmark around which to negotiate. The usefulness of the panel's ability to propose equitable and sound decisions which obviate the necessity for other legal remedies is dimished when the panel's scope of review is limited to the issue of liability. The legislature should consider revising the law to provide that damages be determined along with liability." Florida State University Law Review, vol 4, p. 88, Fall, 1976.

2-17-?

? 385, ? 402

VISITOR'S REGISTER

NAME	REPRESENTING	Check One Support	Opp
[illegible]			
Tom Dowling 385	Mt. Co. Atty Assn Mt Sheriffs & Peace Officers	✓	
" 402	Mt. Trial Lawyers	✓	
Jack D Shanstrom 385	Dist. Judges Assoc	✓	
Greg Morgan 402	State Bar of Montana	✓	
Hank Burgess 385	State Board of Pardons	✓	
[illegible]			
[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]		✓
[illegible]	[illegible]		✓
[illegible]	[illegible]		
Tom [illegible]	County [illegible]	[illegible]	
Chad Smith	[illegible]	[illegible]	

(Please leave prepared statement with Secretary)