MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 28, 1977

The meeting of this committee was called to order on the above date by Senator Turnage, Chairman, at 9:35 a.m. in Room 415 of the State Capitol Building.

ROLL CALL:

All committee members were present with the exception of Senator Murray who was excused.

WITNESSES PRESENT TO TESTIFY:

Gerald Neely - Montana Medical Assn.
Tom Dowling - Helena attorney
Glen Drake - American Insurance Assn.
Rep. Ramirez - Billings
Roland V. Colgrove - Miles City attorney representing the Custer County Bar and Southeastern Montana Bar Assn.
Jerry T. Loendorf - Montana Medical Assn.
Chad Smith - Montana Hospital Assn. and American Mutual Alliance
Bill Leaphart - Trial Lawyers Assn.

CONSIDERATION OF HOUSE BILL 647:

Gerald Neely, Montana Medical Assn. representative, said that, after lengthy consultation with the Montana Bar Assn. regarding the pretrial panel review approach, the two associations ask that S.B. 402 be substituted for HB 647, with amendments included in S.B. 402, after the enacting clause of HB 647. He explained the proposed amendments to SB 402. (See Exhibit 1)

Next, Senator Towe moved the adoption of the proposed amendments to SB 402 and the amendment of HB 647 by inserting SB 402 following the enacting clause. The motion carried unanimously.

The memorandum written by Colvin H. Agnew, president of the Montana Medical Assn. was presented to the committee for him as he had been detained by a snow storm on the other side of Bozeman Hill and would not be able to get here for this hearing. (See Exhibit 2

Tom Dowling, an opponent, said that the Montana Bar Assn. put in SB 402, but it has been amended here this morning and made the body of HB 647. The insurance carriers will not participate in this part of insurance coverage. They will withdraw from Montana. There is a joint underwriting association bill to form an association being considered this session. He said that he feared that Aetna would pull out. Therefore, he opposed HB 647 and supports SB 402 as first considered.

Glen Drake, representing the American Insurance Assn. and an opponent to HB 647, said that basically they are in favor of a mandatory review panel. However, they do not believe that this bill makes the decision of the review panel final and binding. He also said that Aetna is a member of the AIA and has no intention of withdrawing from Montana but will try to live with the bill.

Gerald Neely, representing the Montana Medical Assn. and a proponent of HB 647, said that it is very clear that Aetna does not want a bill that is not binding and that, in speaking with the American Insurance Assn. on a number of occasions, they said they would take a long hard look at this legislation if it passed. In terms of time and cost of all available evidence, it would save time for insurance companies.

DISPOSITION OF HOUSE BILL 647:

Sen. Warden moved that HB 647 as amended BE CONCURRED IN. The motion carried unanimously.

CONSIDERATION OF HOUSE BILL 200:

Gerald Neely, representing the Montana Medical Assn., asked that action be deferred on this bill if the other bill goes through putting SB 402 into HB 647.

Tom Dowling, a Helena attorney, opposed this bill because a long list of people are left out in HB 200. All people should be treated equitably. If SB 402 is passed, he said that HB 200 is unnecessary. (SB 402 was amended and made the body of HB 647)

Greg Morgan, representing the Montana Bar Assn., said that HB 200 is unnecessary if HB 647 as amended is passed. Otherwise they do support HB 200. He asked that HB 200 be held in committee until they see if HB 647 as amended is accepted.

CONSIDERATION OF HOUSE BILL 782:

Rep. Ramirez of Billings, one of the sponsors of this bill, told the committee that it originated with the Montana Medical Assn. and is a collateral source rule. Right now, if a particular suit is brought against a defendant, the complaint can contain loss from bodily injury and elements of damages. The complainant is entitled to recover actual damages. From his own medical insurance or other, he may have received part of his loss, but in this suit he can recover all of his damage. This is a double recovery. The question is whether society can stand this double recovery. He said that section 3 would allow evidence of remarriage to be shown so that a jury would know if the widow of a person who has been killed remarries.

Gerald Neely, representing the Montana Medical Assn., said a repeal of the collateral source rule would bring about considerable impact on rates. They recommend this type of bill.

Greg Morgan, the Montana Bar Assn. representative, said they support favorable consideration of HB 782.

Tom Dowling, representing the Montana Trial Lawyers Assn., an opponent, said that they oppose this bill.

Roland V. Colgrove of Miles City, representing Custer County Bar and Southeastern Montana Bar Assn., said they oppose HB 782. He said they say workers compensation is a collateral source. If a person recovers his damages, the board gets its workers compensation back. He showed pictures to the committee of a man severely injured on the job by a 14,000 volt of electricity. Therefore, workers compensation should not be in this bill. Also, a person who gratuitously takes care of a person who is injured should be able to recover from the insurance company. He felt that subrogation should be entirely eliminated because it is wrong. He also said that, because of the remarriage clause in section 3, he would not let a widow who was suing an insurance company, remarry until the lawsuit was over because she has the right to recover. That should not be in this bill either. All the grief and agony she has suffered would be for nothing if she remarried and this bill becomes law. That is not right.

Glen Drake, representing the American Insurance Assn., which is a group of 80 stock owner companies, was the next opponent. He said that they oppose this bill because it would allow the wrongdoer to obtain the benefits of the victim's recovery. He also opposed any modification of the collateral source rule.

Rep. Ramirez was allowed to close on the bill at this time. He said that first, workmens compensation is provided by statute here and it is 100%. This would not bond it. Here it is 50% and the subrogation right is only 50%. If the Veterans Administration attempts to get its money back, this rule would not come into play. He does not understand why the insurance companies oppose this bill except it will make them have to reduce their premiums. People are being compensated twice. He said that he thinks there is a sense of fairness in this type of bill.

After questions by committee members, the hearing on HB 782 was closed.

CONSIDERATION OF HOUSE BILL 334:

Jerry T. Loendorf, a representative of the Montana Medical Assn., explained the bill on behalf of Rep. Moore of Great Falls, the sponsor of the bill. He said that this bill provides for the pleading of damages in actions for personal injury or wrongful death. It has been amended to allow a permissive statement of damages. It is the practice of newspapers in Montana to write up cases involving doctors and professional people. This damages their reputations. This bill will remedy that. However, there is a question of constitutionality because the Constitutional Convention in 1972 provided that the Supreme Court may adopt rules. The statute of 1961 has not been amended. Since 1972, the legislature has enacted many laws affecting the Rules of Civil Procedure. Another argument made against this bill was how do you tell which court this will be in -- the justice court has cases up to $1,500 now. He said that he thinks that in this bill the defendant does have a reasonable way to estimate the amount of damages.

Greg Morgan of the Montana Bar Assn. said they were in support of this bill.

Tom Dowling appeared as an opponent to HB 334 and said that we are not addressing the medical malpractice and that he understands and sympathizes with anybody who is sued. He thinks the form is in the Insurance Commissioner's office and does not think it should be here in the legislature.

CONSIDERATION OF HOUSE BILL 374:

Rep. Ramirez of Billings, sponsor of the bill, explained it to the committee and said that it mainly deals with two questions: 1. Who is going to prepare the laws? 2. How is the claim going to be determined?

The doctors cannot offer a contract until the completion of the 1st day of treatment. With hospitals, it cannot be offered until dismissal from the hospital. The patient can revoke it within 90 days of signing the contract. The bill sets up a panel of arbitrators (See Exhibit 4) The reason for having this as an alternative to a court trial is basically that it saves money and time. It saves administrative expense on the insurance companies' side, which makes for lower premiums.

The first proponent of the bill, Gerald Neeley who represents the Montana Medical Assn., said that this type of legislation has been adopted in 35 states. It provides for arbitration. The problem here is we do have arbitration, but case law is that arbitration is excluded. He submitted a review of the law for the committee's consideration. (See Exhibit 5)

The next proponent, Chad Smith, who represents the Montana Hospital Assn. and the American Mutual Alliance, said that they feel that these two bills are compatible and could get the money to the claimant where he is entitled.

An opponent to the bill, Tom Dowling, said that the bill addresses all provisions in just the medical malpractice. To make the arbitration work, you should have all lay people on the panel. This bill tries to modify the jury system. This is not right because the jury system works. The people handle cases fairly. We do have arbitration, and it is recognized. This bill does do away with the Rules of Evidence in Civil Procedure. He said that he does not like that because he does not like the fact that there is no limit on the cost of a suit to a claimant. The fiscal note will create a bureaucracy that won't quit.

At this time Rep. Ramirez closed on the bill by saying that, in respect to evidence, the Rules of Evidence must be followed. This bill provides all expenses of the arbitration panel are going to be on the respondents. The claimant can still get out within 90 days. In regard to the fiscal note, he said that he would like to submit an amendment that any additional costs in the insurance office will be provided for by the professions. There are grounds for reversal

in court if the defendant has acted wrongly.

FURTHER CONSIDERATION OF HOUSE BILL 320:

The comparative negligence bill is on 2nd Reading this day. However, the Chairman allowed Roland V. Colgrove of Miles City to testify on this bill as he apologized to the committee for not attending the original hearing on HB 320, but said that he did not know the bill was coming up so soon and did not have a chance to write a brief on it. He told the committee that this bill provides that the jury determine the total amount of the damages and the negligence percentagewise. It is very important that the jury should know that, if they find the plaintiff 50% negligent, the plaintiff gets nothing. The jury cannot be told of the Answers to the Interrogatories. Under Federal Jury Practices & Instructions, Section 606 -- Instructions by the Court, the jury should know the effect of its apportionment and how it is going to affect the parties. He said further that the judge has the discretion under Rule 49, and that there is no need for this type of legislation as it sets forth something that the jury can do as well as the judge. This bill says the jury shall not return a general verdict.

An opponent to the bill, Bill Leaphart, president of the Trial Lawyers Assn., said that they support the position of Mr. Colgrove.

Rep. Ramirez said that he had sent copies of the bill to lawyers in Billings and did not try to hide this bill. It was not intended to say what was to be told to the jury. He thinks that should be decided by the Supreme Court and does not see any reason why an instruction could not be offered saying how it is to be done on a case. He said that he does not think the objections to the bill are valid, and that Rule 49 is not sufficient because the judge should not have discretion and also because there is no way to review it. This bill was patterned after the Kansas statute.

There being no further business, the committee adjourned at 12:00 noon.

Jean A. Turnage

SENATOR JEAN A. TURNAGE, Chairman

ROLL CALL

JUDICIARY COMMITTEE

45th LEGISLATIVE SESSION - - 1977 Date 3-28-77

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

(Ex. 1)

Suggested Amendments to SB 402
Submitted by the Montana Medical
Association, House Judiciary Committee

Page 2, line 19, delete "function of the"; delete "is to" and insert "shall" in its place.

Page 2, line 21, delete period after word "act", replace with a comma, and insert the following:

> "except those claims subject to a valid arbitration agreement allowed by law or upon which suit has been filed prior to the effective date of this Act."

Page 2, line 25, section 4(3), delete entire subsection and renumber subsequent subsections of Section 4.

Page 3, Section 4(5), delete in its entirety (lines 9-16) and replace with:

> "(5) The director of the panel shall be appointed by the executive director of the Montana Medical Association, subject to the approval of the chief justice of the Montana supreme court. The director shall serve at the pleasure of, and the director's salary shall be set by, the executive director of the Montana Medical Association, with the approval of the C.J."

Page 6, line 25 and p. 7, line 1, delete: "There is a new R.C.M. section that reads as follows:".

Page 7, Section 6(3), delete entire subsection and replace with:

> "The annual surcharge for 1977 is due and payable on or before September 1, 1977, and annually thereafter on the same date as annual registration fees for physicians under 66-1042, and the director shall have with respect to health care providers, all powers and duties in connection with the collection of and failure to pay said annual surcharge as provided the department in 66-1042 with respect to the annual registration fees for physicians."

professional & occupational licensing

Page 16, line 8, delete "submission of a case for the consideration of the panel" and replace with "receipt by the director of the application for review."

(EX. 2)

MONTANA MEDICAL ASSOCIATION

2021 Eleventh Avenue • Suite 12 • Helena, Montana 59601

March 28, 1977
Monday

M E M O R A N D U M

TO: EACH MEMBER, SENATE JUDICIARY COMMITTEE

FROM: COLVIN H. AGNEW, M.D., PRESIDENT

RE: HOUSE BILL 647

Dear Senator:

On behalf of the Montana Medical Association, we wish to express our appreciation for the opportunity to comment and offer support for the mandatory pre-trial review panel for medical liability claims by offering amendments to SB 402, approved by the State Bar of Montana and the Montana Medical Association, and substituting the terms of SB 402 for those of HB 647.

SCOPE

By mutual agreement, it is limited to physicians licensed to practice medicine in Montana, hospitals, hospital-related facilities, or long-term care facilities.

For administrative purposes, the panel is attached to the Supreme Court.

FUNDING

The fund will be created by an assessment levied on health care providers as defined in the bill. If the professional liability is that of physicians, then physicians should bear the funding of the panel. As other providers are ultimately involved, the allocation of funding would be properly assessed to them. We wish to make it clear that we are not seeking legal defense funds levied against an institution which is not a substantial party to the claim. It is our impression that, at times, it has been difficult for the injured party to determine who might be the responsible party.

PANEL HISTORY

The basis for HB 647 is the track record of the Joint Medical-Legal Screening Panel created jointly by the State Bar of Montana and the Montana Medical Association in 1969. This voluntary panel, composed of equal numbers of attorneys and physicians, was chaired by an attorney and all members served without remuneration.

During the period 1970 through 1975 the Panel ruled on 34 cases of alleged malpractice, finding evidence in 14 cases and none in 20. Attorneys for the 20 cases accepted the Panel finding on 17 and negotiated settlement on only 3 cases. A study of insurance company reports showed that the number of cases of malpractice filed in the courts dropped 54% following the use of the Panel. However, since the Panel was voluntary, only 11.8% of the known cases filed in court were initially pursued through the Panel.

FUTURE

As you well know, the problem of professional liability is very complex. Like a contagious disease, it appears now to be spreading into other professions that previously have been relatively immune.

There are a number of other bills upon professional liability before the legislature. As we gain experience with those which are enacted, we may have a clearer understanding of the elements and may approach future legislative sessions for different remedies.

COMMENDATION

We believe that the House and Senate Judiciary Committees have done a monumental amount of work in drafting this bill and commend them for the end result. This single piece of legislation will do more to stabilize the insurance market and minimize the unfortunate impact of litigation on patients and providers alike.

RECOMMENDATION

We strongly urge the adoption of HB 647 as amended.

CHA:vm

(EX 3)

AD DAMNUM DAMAGE CLAUSE

For Insertion in Your
Legislative Packet

HOUSE BILL 334 (Moore)

Effect of Proposed Legislation: Prohibits stating the amount of damages in a lawsuit involving personal injury or wrongful death, and provides for a method of determining those damages.

Other States: Since 1975, 24 states have enacted legislation similar to the proposed bill: Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, New Mexico, North Carolina, Ohio, Rhode Island, Tennessee, Utah, Wisconsin, and Wyoming.

National Recommendations:

1. Department of H.E.W.

> "The commission recommends that the states enact legislation eliminating inclusion of dollar amounts in ad damnum clauses in malpractice suits." Medical Malpractice, Report of the Secretary's Commission on Medical Malpractice, 1973 Department of H.E.W., Washington, D.C.

2. American Bar Association

> "Except for allegations necessary to establish jurisdictional limits, a plaintiff's pleadings should not be permitted to allege a total dollar amount claimed; provided, that the defendant has a reasonable way of ascertaining the amount the plaintiff is claiming as damages." Interim Report of the Commission on Medical Professional Liability, American Bar Association, September, 1976.

Discussion: As the "Ad Damnum" amount is often an inflated guess at the plaintiff's damages, particularly in a serious case, there is risk that its inclusion will create inflammatory publicity and decrease the likelihood of settlement.

Prepared and distributed by
the Montana Medical
Association 3/28/77

(Ex 4)

For Insertion in Your
Legislative Packet

HOUSE BILL 374 (Ramirez, Porter, Fagg, Moore, Conroy, Johnston), An Act Authorizing Voluntary, Contractual Arbitration of Disputes Arising from Injury or Death Caused by Professional Negligence of a Health Care Provider or other Professional or Hospital and Providing for a "Positive Option" on the Part of the Patient or Client, Whereby the Patient or Client May Subsequently Withdraw From the Agreement.

Effect of Proposed Legislation: Authorizes, but does not require, the professional and the patient or client to voluntarily contract to submit subsequent claims for professional negligence to binding arbitration. The contract cannot be offered as a condition of the rendering of professional services nor can it be offered before the initial rendering of those services. The patient or client, but not the professional, may withdraw from the contract during a stated period of time.

Other State Activity: Statutes which simply authorize arbitration in advance of the claim is currently available in 35 states not including Montana. Eight states have, since 1975, enacted legislation similar to the proposed legislation: South Dakota, Alabama, California, Louisiana, Michigan, Ohio, Vermont and Virginia. A Federal Arbitration Act, limited to contracts involved in interstate commerce has been in effect for some time. And, as a prerequisite to participation in a national plan of health insurance, it might be required of subscribers that they agree to submit to binding arbitration any malpractice claims arising out of treatment subsidized by the plan. Such indeed is an element of the "Kennedy Health Care Bill" recently under consideration in Congress.

National Recommendations: 1) National Conference on State Legislatures: An October, 1975 policy statement recommended consideration of arbitration as an alternative mode of resolving medical malpractice. They recommended that all states should adopt legislation to making binding arbitration awards possible. 2) Chief Justice Warren E. Burger, US Supreme Court: In an address in St. Paul Minnesota, on April 7, 1976, the Chief Justice stated: "As the work of the courts increases, delays and costs will rise and the well-developed forms of arbitration should have wider use."

Administrative Savings: Michigan, which currently has contractual arbitration, in drawing upon data available from the extensive HEW study of medical malpractice, concluded in a study that there would be in that state an estimated reduction of between 15% and 45% in administrative costs (investigation, overhead, and legal fees for the physician side). Recent figures from the National Association of Insurance Commissioners is even more impressive: the average months from report of an incident to its disposition was 10 months shorter for binding arbitration than by trial, and the average expense per defendant (apart from what was paid the patient) was $5,328 per claim, primarily in defense attorney fees. "Malpractice Claims", National Association of Insurance Commissioners, Vol 1, No 3, Sept 1976, p. 58.

Prepared and distributed by
the Montana Medical
Association 2/23/77

(Ex. 5)

THE CONSTITUTIONALITY OF BINDING, CONTRACTUAL ARBITRATION OF FUTURE PROFESSIONAL LIABILITY DISPUTES UNDER HOUSE BILL 374

1. Common Law and Statutory Arbitration in Montana. Montana currently has in effect an arbitration statute. R.C.M. 1947, sections 93-201-1 to 93-201-10. This statute has been interpreted as contemplating only the submission of pre-existing disputes to arbitration. Green v Wolff, 140 Mont. 413, 372 P.2d 427. No provision of the statute makes it inapplicable to the settlement of personal injury claims, but a review of the case law construing the arbitration provisions does not reveal any reported appellate court case where arbitration was used to settle a personal injury claim.

In addition to statutory arbitration, common law arbitration is recognized in Montana. Carlston v. St. Paul Fire and Marine Ins. Co., 37 Mont. 118, 94 P. 756 (1908).

2. Recent Legislation Sanctions the Use of Arbitration as to Future Disputes. The principle effect of "modern arbitration" legislation was to reverse the traditional common law view that agreements to arbitrate disputes arising subsequent to the making of the agreement are contrary to public policy and unenforceable.

Six states now specifically provide voluntary, binding arbitration for medical malpractice claims, existing and future: California, Louisiana, Michigan, Ohio, South Dakota, and Virginia.

Claims, existing and future, may be arbitrated in some 35 states under general arbitration laws generally patterned after the Uniform Arbitration Act. 9 Uniform Laws Ann. 78-85 (1957). This modern legislation first appeared in the form of the New York Arbitration Act of 1920, which served as the model for the uniform act, first drafted in 1924, and for the federal government.

The United States Arbitration Act (1925) provides for arbitration in contracts involving maritime transactions and contracts evidencing transactions involving interstate or foreign commerce. (See 9 USC section 1-14 (1970)).

And, as a prerequisite to participation in a national plan of health insurance, it may be required of subscribers that they agree to submit to binding arbitration any malpractice claims arising out of treatment subsidized by the plan. Such indeed is an element of the "Kennedy Health Care Bill" recently under consideration in Congress.

Some state courts, in the absence of a modern statutory provision, have declared valid and enforceable a future arbitration clause. Exell v. Rocky Mt Bean & Elevator Co., 76 Colo. 409, 232 P. 680 (1925); United Ass'n of Journeymen Union v Stine, 76 Nev. 189, 351 P. 2d 965 (1960).

3. Case Law Supports the Constitutionality of Such Legislation.

A review of the case law in the United States finds no successful challenge to the constitutionality of voluntary, contractual arbitration as to current and future disputes under modern arbitration statutes.

There exists no doctrine of public policy or rule of law which precludes employment of arbitration in the area of medical services. Today judges are not reluctant to find in arbitration statutes a compelling expression of policy favoring arbitration of such disputes.

In Gregg Kendall & Associates, Inc. v. Kauhi, 488 P.2d 136, 140 (Hawaii 1971) the Court stated: "...the proclaimed public policy of our legislature is to encourage arbitration as a means of settling differences and thereby avoid litigation."

With respect to contracts for medical services, a prestigious California decision, Doyle v Guilucci, 62 Cal 2d 606, 401 P. 2d 1 (1965), announces without qualification that arbitration is an acceptable forum for the settlement of disputes.

In Gunderson v Superior Court, 46 Cal App. 3d 138, 120 Cal Rptr 35 (1975), where the court had the opportunity to declare a medical arbitration contract unconstitutional and to otherwise hold it void and invalid, failed to do so, and generally affirmed the public policy in favor of arbitration, saying:

> "Arbitration is a recognized and favored means by which parties expeditiously and efficiently may settle disputes which might otherwise take years to resolve."

Generally, no case has been found in which an arbitration award was overturned because of denial of procedural due process. Many courts have limited themselves to curt rejections of generalized procedural due process assaults on the legitimacy of arbitration panels. Division 85, Amalgamated Transit Union v Port Authority of Allegheny County, 417 Pa. 299, 208 A.2d 271 (due process argument "totally lacking in merit"); Finsilver, Still & Moss v Goldberg & Co., 253 N.Y. 382, 171 N.E. 382, 171 N.E. 579 (1930).

As to any denial of equal protection of the laws, those laws will generally be upheld if the classifications they establish are founded on a "rational basis". See Day Brite Lighting, Inc. v Missouri, 342 US 421 (1952); Pacific Idem. Co v Ins Co of North America, 25 F2d 930 (9th Cir, 1928 (arbitration statute limited to labor contracts reflects "permissible classification"). The proposed legislation is not just limited to physicians, but also includes hospitals and other professionals

Any number of jusitifications might be put forward to explain the requirement of arbitration being limited to such parties. One might cite in this connection the volume of malpractice litigation, the special burdens of delay, especially on patients and health care providers alike, and in a medical context, the requirement of uniformity in the size of damage awards in the context of a governmental scheme of health insurance.

As to the right to jury trial, it is now generally recognized that the role of arbitration boards is supplementary to, rather than pre-emptive of, the jurisdiction of the courts. As indicated, there are no reported cases successfully challenging modern arbitration statutes on this basis. The right to trial by jury is deemed to have been waived by consent to the arbitration.

One's confidence in the immunity of arbitration statutes to the jury trial challenege is reinforced by the fact that both state and federal statutes whose inraod on the right to jury tiral is most obvious--compulsory workmen's compensation acts--have consistently been upheld by the courts. While these statutes are readily distinguishable because the conflicts which they undertake to regulate would not necessarily be cognizable in any civil court, they are symptomatic of the increasing realization of the sheer administrative necessity for some form to handle disputes which do not ultimately reach the courts.

4. Other Activity Supports the Constitutionality of Such Legislation.

Presitgious studies have concluded that such arbitration statutes if properly drafted, would survive the test of constitutionality. See, for example, Adams and Bell, Alternatives to Litigation: Constitutionality of Arbitration Statutes, Appendix: Report of the Secretary's Commission on Medical Malpractice, 315 at 319, Dept of HEW, 1973.

And recent activities of the American Arbitration Association make clear that that professional body views the arbitral technique as indispensable to the effective delivery of medical care and health services. In April of 1972, the AAA sponsored in New York a Conference on Dispute Settlement in the Health Field, a major portion of which focused upon innovations in the application of arbitration. Arbitration News, No 5, June 1972, at 1, 4. Cf., Holley and Carlson, The Legal Context for the Development of Health Maintenance Organizations, 24 Stan. L. Rev. 644 (1972).

5. Conclusion. The above sequence of authorities leads to the conclusion that professional liability arbitration contracts properly drafted would be held constitutional, as would the underlying legislation authorizing the same, and would be deemed legally binding in the state of Montana.

Gerald J. Neely
Special Counsel
Montana Medical Assoc

(Ex. 6)

COMPARATIVE NEGLIGENCE--Taken from Boulder case in Colorado.

"If you find that both the railroad and Mr. Maxwell were negligent and that negligence of both contributed to causing the collision, then, you should consider the following instruction:

If Mr. Maxwell's negligence contributed less than 50% to the cause of the collision, the Plaintiff may still recover damages in the amount determined by multiplying the total damages which you find the Plaintiff has suffered by the percentage of negligence on the part of the railroad which contributed to the causing of the collision.

The Court will perform this multiplication after you have made your determination of the total amount of damages, and the percentages of negligence causally related to the collision.

If Mr. Maxwell's negligence contributed 50 per cent or more of the total negligence, then the plaintiff shall recover nothing from the defendant railroad."

TAKEN FROM AMERICAN JURISPRUDENCE--TRIALS--VOL. 21

Page 727 chapter 5 Discretionary versus Mandatory Special Verdicts.

In Arkansas, the matter of submitting interrogatories to the jury for rendition of a special verdict is within the discretion of the trial Court, and the vast majority of cases are submitted on a general verdict.

Page 749 Chapter 17.

**The jury cannot be told the effect of answers to the interrogatories submitted in connection with a special verdict. On some occasions, in answering interrogatories, juries will divide the negligence equally and then be horrified to discover that they have decided the cause completely in favor of the defendant--a result often completely unintended.

(Ex. 1)

interim report of the commission on medical professional liability

The Commission's recommendations set out in Appendix C of this interim report with respect to certain law and procedure, and this report insofar as it relates to such recommendations, have not been acted upon in any way by the House of Delegates of the American Bar Association and therefore, while they do reflect the views of the Commission, do not represent the policy of the Association unless and until approved by the House of Delegates. The other recommendations of the Commission contained in this interim report have been approved by the House of Delegates and do represent the policy of the Association.

AMERICAN BAR ASSOCIATION

NCHSR

RESEARCH REPORT SERIES

Statutory Provisions for Binding Arbitration of Medical Malpractice Claims

Prepared by the
American Arbitration Association
for the
National Center for Health Services Research
under Grant No. HS 04137

October 1976

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Health Service
Health Resources Administration
National Center for Health Services Research
DHEW Publication No. (HRA) 77-3165

SENATE Judiciary COMMITTEE

BILLS 200, 334, 374, 647 & 782

VISITORS' REGISTER

DATE 3/25/77

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPOSE
[illegible]	Mont Bar Assn	200, 374, 647, 782	✓	
[illegible]	Mont MD Assoc	"	✓	
[illegible]	Mont Nurses Assn	"	✓	
[illegible]	Mt. Med. Assoc	"	✓	
[illegible]	America for Access	647, 782		✓ ✓
[illegible]	Mont Trial Lawyers	200		✓
		647		✓
		374		✓
		334		✓
	"	782		✓
Greg Morgan	State Bar of Mont	200 334 374 647 782	✓	
[illegible]	Cusick Co. Bar	334 782		✓
[illegible]	Mont Hosp Assn & Amer. Mutual Ins Assn	200 374 334, 647, 782	✓	
[illegible]	Mont Dental Assn	200 647		