#28

HOUSE BUSINESS AND INDUSTRY COMMITTEE

February 16, 1981

SUMMARIES FOR

HOUSE BILL 597 -

Introduced by Rep. Ernst, requires that in addition to being managed by a person with 10 years experience as a barber, a barber school employ as instructors only persons licensed as instructors under the rules of the Board of Barbers.

HOUSE BILL 612 -

Introduced by Rep. Bardanouve, brings transactions between crop producers, crop sellers, and crop buyers under the definition of "between merchants" as understood in the Uniform Commercial Code with the assumption that all parties have the knowledge or skill of merchants. It provides a contract is enforceable if payment has been made for part of the goods and if the agreement is evidenced by an instrument or document received by the seller that indicates the buyer believes a contract exists.

HOUSE BILL 625 -

Introduced by Rep. Fabrega and others, permits a retailer of goods to impose an additional charge of 1-1/2% of the overdue balance on all credit accounts 30 days past due, provided a statement is rendered at the end of each month showing the transactions during the month, the balance due, the amount of late payment charge and its simple interest equivalent. This bill might need July 1 effective date.

HOUSE BILL 671 -

Introduced by Rep. Hurwitz by request of the Department of Professional and Occupational Licensing. Raises the osteopath's certificate renewal fee from $15 to $25 and for a person not in active practice from $7.50 to $17.50; removes the requirement that a podiatrist record his license with the county clerk and raises the podiatrist's license renewal fee from $35 to $50; requires an applicant for examination for licensing as a nursing home administrator to pay an additional fee above the $25 specified and provides for a late fee to be imposed for failure to pay license or registration fee or to complete education requirements; raises from $50 to $150 the fee for a person whose chiropractic license has been revoked and later restored; raises fee from $80 to $100 for renewal of licenses as a hearing aids fitter; raises fee from range of $20 to $50 to range of $40 to $100 for renewal of psychologist's license; authorizes the Board of Cosmetologists to require a separate, non-refundable application fee of $10 in addition to license fees; raises the water well contractor's license renewal fee from $25 to a figure to be set by the Board of Water Well Contractors but not more than $50. This bill coordinates with SB 412. If SB 412 passes, the only part of HB 671 that will remain valid is subsection (2) of Section 2 in regard to eliminating the requirement for podiatrists to file license with the county clerk.

HOUSE BILL 713 -

Introduced by Rep. Fabrega and Sen. Goodover, adopts the Uniform Arbitration Act and amends or repeals various sections of Montana law to conform.

HOUSE BUSINESS AND INDUSTRY COMMITTEE

The meeting was called to order by Vice Chairman William Ray Jensen, acting chairman, at 8:00 a.m., February 16, 1981, in room 129 of the Capitol Building, Helena. All members of the committee were present. Bills to be heard were HBs 597, 612, 625, 671, 713.

HOUSE BILL 597 -

REP. GENE ERNST, District #47, Judith Basin, sponsor, introduced HB 597 to require barber schools to employ as instructors only those persons licensed as instructors. He offered amendments to be added to the title to remove restrictions that barber schools and barber colleges may not charge customers.

DON ANDERSON, a barber for 23 years with three years on the Barber Board, started barber schools in Montana. He went through a long and expensive court proceedings with his first barber school. He thought he had the right to do all they were doing and were sued for $40,000 by an instructor because instructors were not mentioned in the barber law. He strongly supports HB 597 to put some rules and regulations to cover instructors into the law. An instructor in a barber school receives $1,000 or more. His qualification requirements are having had 10 years continuous service as a barber, a $2,000 bond, and his investment. He thinks the Board of Barbers should have the right to govern their trade and put the qualifications required on instructors to see that they qualify to be an instructor and to receive the $1,000. They have very good instructors in Montana. This is for the future. He strongly hopes HB 597 will have a Do Pass. See EXHIBITS A through L.

PAT GANDY, barber for 24 years, President of Montana Association of Barbers, supports HB 597. Have to put some teeth in the barber law.

JIM ALLEN, Secretary of the Montana Barber Board, supports HB 597. His reasons are concurrent with those already testifying. Being on the Barber Board he realizes the position they are in in not being able to control barber instructors in the schools. He disagrees with the qualifications of instructors now. He thinks the school owners have the qualifications, but the instructors don't. The longest time a barber instructor has is three years and some of these were hired directly out of school. He doesn't think that gives the students their money's worth.

HARRY M. OLSON, a retired barber, works for the State Association as state legislature lobbyist. He doesn't think this is putting an undue hardship on these people. In every state they have requirements for the qualifications of the instructors and owners. Would urgently urge passage of HB 597.

OPPONENTS:

GARY LUCHT, owner of a barber school in Great Falls, said they have all kinds of guidelines and restrictions as to whether students are given competent education or not. Many programs have qualification requirements. He

has never had one barber board member come in and monitor classes. They don't know what is going on, but they come to the legislature and ask for restrictions. They are not just barbers per se, but are engaged in the barber business. Instructors are college graduates. They are graduates of barber college and have attended numerous clinics. They are asking to be given blanket power to judge who is qualified to be an instructor. He thinks the board isn't competent to judge since they don't have the qualifications that they are requiring. They are accredited by the V.A. administration through the Office of Public Instruction. Haugen and I were not contacted before this bill was introduced to the legislature. He asked the committee for authority to set their own rules. EXHIBIT M.

LES HAUGEN, owner of a barber college in Great Falls, said they are putting an association together to work on this. He cannot go along with this legislation.

JIM PELLEGRINI, Legislative Auditor's Office, is present as a resource person regarding the sunset laws.

QUESTIONS -

In answer to questions from Rep. Ellerd regarding licenses, there are no separate licenses required besides a barber's license, and this would create a new license. The Barber Board would set up the rules. They do have a license as such right now. The only requirements right now are a $2,000 bond and 10 years continuous experience as a barber and that he is licensed as a barber. There are no adopted rules at the present time. They were all thrown out.

Rep. Metcalf was told there are no regulations under the Department of Occupational Licensing that would regulate.

Mr. Carney, Director of the Department of Professional and Occupational Licensing told Rep. Manning the Board now is under that department for administrative purposes only.

Mr. Lucht told Rep. Andreason there are no guidelines for an instructor. The National Association of Trade and Technical Schools have some tight rules. There are no schools for instructors. They can put Haugen and me out of business. A minimum of 2 years in your profession is required.

Mr. Lucht told Rep. Bergene there is a requirement of just two years experience by the National Association of Barber Schools which have certain qualifications. There is no way to set up a time factor.

Rep. Ernst closed by calling the committee's attention to the fact there is a philosophical decision as to whether instructors should be regulated. He took offense to the testimony that there was collaboration between himself and Anderson. Representatives are required to enter legislation requested by their area residents.

HOUSE BILL 612 -

REP. FRANCIS BARDANOUVE, House District #6, Blaine County, sponsor, said HB 612 concerns grain buyers and elevator operators. He has been on an elevator board for 27 years and knows their concerns. The problem is that an elevator operator makes a verbal contract with a farmer for, say 5,000 bushels of wheat at $5 a bushel; he then calls a commission house in Portland and sells the 5,000 bushels at a certain price. If you thought you bought 5,000 bushels and you sell 5,000 bushels, you could lose your shirt if the person from whom you bought the wheat failed to deliver it as promised over the phone.

The elevator operator may even sell this wheat for six months ahead - wheat goes up to $6.00 bu. and it hasn't been delivered, but has been bought and resold at $5 bushel, and it is now worth $6 bushel, so the farmer doesn't deliver as he promised. If the elevator operator has to replace that $5 wheat with $6 wheat, he will have lost $1 bushel. The Uniform Code requires that you fulfill your contract. If the elevator buys at $5 and it falls to $4, you can be sure that the farmers will have that amount of wheat and say "can't you buy a few more bushels on that contract?". This does not happen too often. Most farmers or grain producers will live up to their contract. They figure their word is worth more than any contract. A former speaker of the House thinks this bill will help.

CHRIS JOHANSEN, Montana Farmers Union, and Montana Grain Elevators Association, Great Falls, has been active in the grain business for 32 years and knows the problem being discussed. There are cases where farmers haven't lived up to their contracts. He wants farmers to be able to pick up a phone and make a binding contract. Unless something was done to make a verbal contract binding, they would not have a binding contract until it was signed.

OPPONENTS -

MIKE KOEHNKE, Montana Seed Potato Growers, Townsend, MT, opposes HB 612. Seed potato growers are flooded with orders which, if not returned and refused are considered binding because these seed growers are considered to be merchants by the buyers. The confirmation orders have to be returned within 10 days, in writing, or they are considered binding. Some orders have no price, no terms, but just says where to send the potatoes. If not returned because of being too busy harvesting the crop, and several contracts are received in the mail, he is oversold. This would exempt the farmers from the Uniform Commercial Code area. It is a one-sided approach. Amendment (d) on page 4 affects all crop producers and this wants to say you are all merchants. As a merchant I would be bound to all of these contracts.

QUESTIONS -

Rep. Ellerd asked if a down payment is made, and Rep. Bardanouve said none was made until the wheat is delivered on the date specified.

Rep. Bardanouve answered Rep. Jensen's question about the futures market by saying you are not dealing with futures here. This bill would allow them to make a contract over the phone. This is strictly a cash market deal. Rep. Schultz thought there would have to be an offer and an acceptance and money to make a valid contract. Mr. Koehnke said the Uniform Commercial Code says you don't have to have a written contract. The farmer receives a typed confirmation of sale that he has not agreed to through the mail. Rep. Schultz questioned whether you would be held to a contract that was unsigned and unaccepted.

Rep. Bergene asked if a grain elevator had agreed to buy grain from a producer over the phone whether that would be a binding contract. Mr. Johansen said that is the crux of this bill. They have had problems because it is not a written contract that he has, but he has to deliver to the wholesaler and has to pay the difference in price for that grain he has to replace. Any contract made over the phone with the commission house is a binding contract.

Rep. Bardanouve said a willing seller making a contract with a willing buyer is a binding contract. Rep. Metcalf thought the intent of (d) subsection on page 4 looks like it did not achieve what Rep. Bardanouve is saying. That section seems to be totally negating what you are trying to do. Rep. Ellerd thought this sale should require a down payment. Rep. Bardanouve advised almost no sales are made with a down payment.

Mr. Johansen said they consider any agreement made over the phone a binding contract because if they resell the grain over the phone that is a binding contract. Otherwise a producer would have to come in and sign a contract. Rep. Andreason asked if there would be any way to firm up in terms of a contract at a particular date other than bringing a farmer up to merchant status. Rep. Bardanouve said ranchers and farmers are very busy and don't go to town very often. Rep. Fabrega explained that a farmer calls you and sells an elevator 5,000 bushels of grain and the elevator has to call someone else and they are bound and have to produce that much grain. Apparently the problem is mainly with grain. Rep. Bardanouve said he didn't know about potato business. A deferred contract is accepted because a farmer might not want to take some money in a certain year. There is little margin and if you don't get paid, the interest will gobble up all your margin.

Rep. Ellerd said he would like to include livestock producers in subsection (d). Rep. Fabrega explained between merchants means that they are both responsible and there hasn't been a down payment, but they have a binding contract. If there is a down payment, it is enforceable. There is a need for enforcement of a contract made over the phone.

Rep. Robbins asked Mr. Koehnke if this were limited to grain crop producers, would it be acceptable. Mr. Koehnke said No, you have the impact of the entire Uniform Code, and its impact is tremendous. You are making the farmer a full fledged merchant. If you don't sign a contract within 10 days, there is no contract.

Rep. Bardanouve closed saying when you move into different areas, there may be something we are not aware of, and he didn't want to be unfair to any segment. They were caught in a serious loss 1-1/2 years ago and if this legislation has any merit, and you are concerned, Mr. Johansen can sit down with Mr. Blewett and try to answer any questions raised today. There may be more here than meets the eye, and he wouldn't want to support something that is harmful. He appreciated the questions and concerns.

HOUSE BILL 671 -

REP. HURWITZ, District 45, Meagher County, sponsor at the request of the Department of Professional and Occupational Licensing, said HB 671 would revise fees for various boards and for renewals. Podiatrists would be required to file with the Clerk and Recorder. Fees are all the money received for administrative expenses and this department functions on earmarked revenue and needs the money to take care of inflation.

ED CARNEY, Director of the Department of Professional and Occupational Licensing, explained this is basically what is called a department feed bill and usually there is one every session which provides for increased fees. HB 671 provides for increased fees for osteopathic physicians. The podiatrists would be set by the board and they would go to a maximum of $50 and set annually by the board according to what their financial needs are. The case of commercial nursing home administrators is the same. They were told they don't have the authority to set an examination fee. They were changing the rules and putting all the fees under one set fee schedule. It doesn't pay to update your fees because the board said you don't have the authority to set a fee and you should go to the legislature to have it set commensurate with cost. The sunset review people found the problem that many of the people were not paying their renewal fee on time and it was lapsing over, so they thought an additional fee for late payment would be in order.

It would provide that a suspended chiropractor license fee could be raised to $150. It is a rather steep increase - don't know if it needs to be that high. The board says that is to be the price.

Section 6 affects the psychologists renewal fee. Section 7 affects cosmetologists where the board may set up a separate application fee not to exceed $10 which would not be refundable. Water well contractors fee is set by the board at $25 and giving them the authority to not exceed $50. This board is in need of additional revenue and they will have to increase their fee. Section 9 talks about the coordination with SB 412. It is a broad grant of legislative authority to the various boards in the department. Whether it passes will depend upon your interpretation of that bill. He pointed out that section 8 should be exempt as well because there is no mention of water well fees in SB 412. Need to exempt section 8 even if SB 412 would pass. This is an effort to coordinate the bills, which he thinks is good but you do have the very real problem of whether this is going to fly or whether either one of them will.

OPPONENTS: None

QUESTIONS -

Rep. Andreason said fee increases are quite large - is there justification? Mr. Carney said if you ask for a $5 increase, the legislators say don't want to see you at every legislature. This would provide authority to set fees in order to match with expenses. Looking forward to the future. There wouldn't be any particular need to go to $50 if only $10 was needed. It is a discretionary thing with the board.

Rep. Metcalf asked the reason for raising the fee for a person not in practice. Mr. Carney answered this is at the request of the Office of Budget and Program Planning because this group is getting smaller and smaller. The Board of Osteopathic Physicians is being phased out in July when it will be combined with the physicians. He thought the increase in chiropractic license fee was a large increase. The raises requested came from the Office of Budget and Program Planning.

Rep. Robbins asked why water well drillers were included. Mr. Carney said he supposed sometime in the past it was thought we are going to be engaged in water well drilling, and it is primarily to insure protection of underground water. Wes Lindsay, Water Well Driller's Association, said this was to protect underground water and to protect people from drillers, and to upgrade construction of water systems. Rep. Ellison remarked that it takes quite a lot of expertise to drill a water well and some people had been defrauded.

Rep. Andreason asked why podiatrists have to register. Mr. Carney said this had just been on the law and they are recommended to be removed to the Board of Medical Examiners. All of them had to record their licenses where they practiced. It is widely violated and it is high time it is taken off the books.

Rep. Wallin said there are many more licenses involved. Are there going to be other bills that raise their fees, too? Mr. Carney answered the legislature wouldn't be bothered by boards that aren't having financial problems. The others have teen taken care of in some years past.

Rep. Fabrega said if SB 412 passes, it would still be necessary to keep section 8. SB 412 will set out that the legislature won't get involved with these things in the future.

Rep. Hurwitz saw no need for closing.

HOUSE BILL 713 -

Rep. Ray Jensen was acting chairman while Rep. Fabrega presented HB 713 which he sponsored along with Senator Goodover.

REP. JAY FABREGA, District #44, Great Falls, explained HB 713 is an act to adopt the Uniform Arbitration Act, repealing some of the sections, and replacing them with specific language in the new sections. This could also be called the Commercial Arbitration Act. Commercial arbitration is a way of settling disputes. A majority of the states have enacted the Uniform Arbitration Act. The courts continue to get more and more backlogged and so many of these arbitration suits are so complex. The people concerned would rather appear before an arbitration board. General arbitration cases are placed in there by an attorney and it is a way of relieving the courts of all the pressure of settling disputes between private parties. Courts should be there to enforce state law disputes.

The bill, as you go through specific sections, allows you to go back to the court to determine certain questions. In section 5, if you have an agreement to arbitrate, but there is a dispute about it, you can go to the court and they decide if there is an agreement to arbitrate.

JOHN McKAY, Legal Counsel for the National Conference with offices in Chicago, said modern arbitration law now exists in 31 states, and the rest of the states have adopted through other statutes. Development of such statutes in Montana is important in order to come into the context of modern law.

The most important language in section 4 is "or a provision in a written contract to submit to arbitration. The question in Montana is whether you can agree to arbitrate. This bill would validate every kind of agreement to arbitrate. The rest of the bill is fundamentally procedure. Procedures of enforcement of an agreement are in section 5. If acts are not acceptable, you have to have some procedures for the arbitrators themselves for providing notice to parties and evidence and which arbitrators to make their award to. Commercial arbitration largely benefits areas of our economy in which arbitration has become a custom because it is the most efficient way to resolve a dispute. Construction has been a major beneficiary. Any kind of building involves architects, contractors, developers; and financiers are involved. Any time you enter into a building contract, there are always problems in following the contract, and there has to be a means of resolving those disputes.

Arbitration methods are necessary. Most disputes are very technical and technical persons are needed to solve the problems.

TOM HARRISON, IFG Leasing Company in Great Falls, has had the largest one with a citation in Montana, in connection with the board of trustees of the Powell County School District on a contract for a gymnasium floor. All persons connected with contract for installation and the school district were involved. The school district and the taxpayers will have to pay thousands and thousands of dollars. Expert technical testimony will have to be

used. They are in a full fledged major lawsuit involving $30,000, and the end will not justify the means.

A memo written by Professor William L. Corbett outlining this act is EXHIBIT A. He has been very active in the drafting of this bill and a second more brief fact sheet on this act, EXHIBIT B, they would like to execute until it gets here. Sonny Hanson, Billings, said the Montana Technical Council asked him to represent to you that they basically represent architects and engineers and are in support of this bill.

Those apprehensive about arbitration wouldn't be bound by it. They will still have the privilege of traditional limitations, but they will be in effect for those wishing to use them. He suspects that since it has worked in many other states, they will be pleased with the results.

DON SMITH, Associate General Counsel, IFG Leasing Company, Great Falls, said engineers and architects have always been in favor of arbitration. Their business isn't as technical as architecture. They do business on a nationwide basis, and use arbitration in other states because it is efficient, practical, and speedy. They lease and furnish equipment for leasing; the average cost of equipment is $17,000. They have lots and lots of contracts and because of that, they have lots of disputes on contracts. If they have a problem with the warranty on their equipment, they have found that arbitration is a speedy method of handling it. They could spend three years in court if they are at fault. Both sides could lose as it could take a long time to get down to the end of the rope.

In their contracts they have an agreement that if there is a future dispute, it will be handled through arbitration. They will send out a list of arbitrators from which persons can be selected in your area. Each side gets to select. One to three arbitrators are selected, depending upon the complexity of the dispute. The arbitrators have a short hearing, very short and open for very broad admission of evidence - they will listen to all sorts of evidence. The hearings will last only a few hours and then the arbitrator has to hand down a decision in 30 days. If the award is not sufficient to enforce the suit, you can take that award to the district court. The court will make a summary examination and if correct, they will affirm the award. This kind of contract suits that don't involve criminal actions can be kept in a private process that resolves the problem and doesn't take court time. We are cutting down on the expense to the public because arbitration is handled independently and without public expense. Their company thinks it is beneficial. It allows you to work in interstate commerce also. If you have a transaction across state line it can be resolved through an arbitration provision. That decision is not enforceable in Montana, and if you disagree, you can only agree to disagree. See his EXHIBIT C.

GREG McCURDIE, Director of the Montana Arbitration Association, was present to answer any neutral questions. Is in support of HB 713.

CHAD SMITH, Montana School Board's Association, endorse the concept of arbitration in the commercial sector. In the construction of school buildings where disputes arise, and if it is hung up over a long period of time, you run into all kinds of extreme provisions which make it very difficult. This is a commercial arbitration act and he hoped there would be no

consideration of this bill to allow this to extend to the employer-employee arbitration. This legislature will have the chance to consider the labor part in another bill HB 778.

OPPONENTS: None

QUESTIONS -

Rep. Schultz asked Mr. McKay who makes up the organization of the National Conference of Commissioners. It is an organization of the legal profession and each state creates its own laws and the state commissioners composes the national commissioners. Their function is to look at state law that proposes where uniformity is part of the state law. Each state contributes something financially. James D. Harrison and Diana Dowling are Montana commissioners.

Rep. Fabrega closed saying Montana law is the impediment to the resolution of disputes. Arbitration law in Montana has changed little in the last 100 years. If the word of an arbitrator is debatable, you can take the award to the court, but full use of this method cannot be used until the legislature acts. Private settlement of disputes should be settled out of court.

HOUSE BILL 625 -

REP. JAY FABREGA, District #44, Cascade County, chief sponsor, explained HB 625 allows a merchant who does not intend to sell on credit, but who sells with the intention that he is going to be paid for in cash, but to be accommodating will agree to charge it. But the understood agreement is that when the bill is presented, it will be paid within 10 days after the first of the month when all bills are due and payable. By allowing charge accounts, you have become an unwilling lender and because you did not intend to become a lender, you did not intend to enter into an agreement with interest charges, etc. The person who does not intend to allow revolving accounts should be protected. HB 625 would clarify this procedure.

HB 625 is to be considered a late payment charge method by a seller who wants to be paid in a good faith contract. You buy something with the intention of paying for it after the first of the month.

REP. KEN ROBBINS mentioned a small merchant has to pay his bills on the strength of that money coming in and when it doesn't he is put into a very embarrassing spot. He is very much in favor of this bill.

REP. GLENN JACOBSEN is a proponent.

TOM WINSOR, Montana Insulating Contractors Association, said they provide goods and services to their customers at no interest, and they are paying 19.5% for their money. Customers are getting no-interest loans from the utilities and his attorney tells him he can't charge more than 10%. He needs relief to recover their cost of interest payment. They still are losing money.

CURTIS HANSEN, Executive Vice President of the Montana Retail Association, Helena, supports HB 625. See his testimony EXHIBIT N.

REP. KITSELMAN is a proponent.

OPPONENTS: None

QUESTIONS -

It was suggested that this be researched to see if you have to notify your accounts that you are going to establish a late payment charge. This would only apply to any charges made that were not intended to extend credit beyond 30 days and that any payment of the obligation was unintended. Subsection (3) provisions do not apply to money due for tangible services. This is for actual materials.

Rep. Wallin said section 2 requirements are met by what is written on an invoice sent each month to each account. Section (f) states a buyer may at any time pay the total unpaid balance and avoid late payment charges. The seller wants his money and not the interest.

Rep. Ellison mentioned this wouldn't add a late payment charge onto a doctor bill or retail sales contract. This is just making legal what most people have been doing for years.

Rep. Fabrega said this is just a matter of clarification of what has been going anyway. Rep. Meyer said if you don't have a signed invoice and you go to court the judge says you don't have a suit.

Rep. Fabrega resumed as chairman.

EXECUTIVE SESSION -

Rep. Ellerd moved to reconsider action previously taken on HOUSE BILL 262. Motion carried. This is relating to the Territorial Integrity Act.

Rep. Harper said you need "totally owned" in the proposed amendment. Montana Power Company is a consortium. Rep. Manning asked what reflection this would have on the bill. Mr. McKittrick said the power company will be owning less than total ownership in a particular plant, and without putting in anything else, they could own 1-10-30%. Rep. Manning asked if the power company is in support of this bill now, or are they going to fight the bill.

Mr. Gannon, Montana Power Company, said the situation in Colstrip is that Tongue River has some present interest in there. They would be excluded from some of the premises which are cooperatives. He feels the word "totally" would exclude facilities in Colstrip. They are still opposed to the bill. They would be precluded from that language. If they went through, the REA couldn't supply electricity to them. Mr. McKittrick said the Colstrip matter will be decided by law. He thought the electric suppliers could work out some kind of agreement.

Rep. Fabrega said the question is whether the word "totally" is to be stricken out of the proposed amendment. Motion to do so was adopted. Rep. Manning moved HOUSE BILL 262 DO PASS AS AMENDED. Reps. Meyer, Ellerd, Kitselman, O'Hara, Pavlovich voted no. Motion carried 14-5.

Rep. Jacobsen moved HOUSE BILL 105 DO PASS. Motion failed with a 2-15 vote. Two members were absent. So HB 105 leaves the committee as a DO NOT PASS.

HB 105 would put royalty owners under the same protection as the state is at the present time. The stub for state reports is much more complete than is the stub for royalty owners.

Rep. O'Hara moved HOUSE BILL 106 DO PASS. Rep. Harper made a substitute motion that HB 106 be amended. Amendment is shown on the standing committee report. Motion was adopted unanimously. Rep. O'Hara continued his motion that HOUSE BILL 106 DO PASS to HOUSE BILL 106 DO PASS AS AMENDED. Motion carried unanimously.

A motion was made to amend HB 188 on page 1, line 10, following "nuisance" to strike "to the state" and the motion was adopted. Rep. Ellerd moved that HOUSE BILL 188 DO PASS AS AMENDED. Motion carried with Rep. Pavlovich, Ellison, Andreason, Jensen, Manning voting no. Rep. Kessler was absent.

Rep. Jensen moved that HOUSE BILL 459 be tabled. Motion carried with Rep. Vincent voting No.

Rep. Fabrega moved HOUSE BILL 282 which he sponsored BE TABLED. Motion carried unanimously.

Rep. Kitselman moved HOUSE BILL 376 DO PASS. He further moved that proposed amendments be adopted, and they were unanimously accepted. Rep. Harper further moved that the title be amended, and this motion was adopted unanimously. Rep. Kitselman amended his original motion to HOUSE BILL 376 DO PASS AS AMENDED. It was unanimously adopted.

Rep. Kitselman moved HOUSE BILL 377 DO PASS. He further moved that the proposed amendments that had been agreed to be adopted. They were unanimously approved. Rep. Harper moved that the proper title adjustment be adopted which was unanimously accepted. Rep. Kitselman changed his motion to HOUSE BILL 377 DO PASS AS AMENDED. (The standing committee report shows the amendments for HB 376 and HB 377.)

Rep. Harper moved that HOUSE BILL 378 DO PASS. He further moved to change the title from Montana Securities Act to Securities Act of Montana. Motion was unanimously adopted. Motion was changed to HOUSE BILL 378 DO PASS AS AMENDED, which was unanimously adopted.

Rep. Harper moved HOUSE BILL 380 DO PASS. He further moved amendment to the title be adopted, which motion carried unanimously. He then moved HOUSE BILL 380 DO PASS AS AMENDED, and it was unanimously adopted.

HOUSE BILL 385 -

Rep. Manning moved HOUSE BILL 385 DO PASS. Rep. Harper moved section 1 be stricken in its entirety and the old language be reinserted, and this motion was unanimously adopted.

Rep. Harper moved the language on page 4, lines 8 and 9 "At least once every 3 years at any time" be stricken and "If" reinserted. This motion was withdrawn after further discussion.

Rep. Ellison moved "20" cents be stricken and "60" cents be inserted on page 2, line 16. Striking language on page 4, line 8 would allow the commissioner to audit at any time.

Rep. Vincent wants an effective, efficient audit that could point up inefficiences that, if corrected, might make for lower rates. Only one way to do that and make sure that it is done. Might be able to meet them obligations lesser figure if inefficiencies were corrected.

Rep. Andreason wants a performance audit.

Rep. Meyer suggested if someone has a problem, he can go to Sonny Omholt's office. However, the fees do not allow Sonny's office to handle such claims. The fees being raised and the 30-day requirement for forms to be filed before their use are basically the main changes.

Rep. Fabrega felt the audit should do more than just check on the financial stability of a company and would like to have them audited to determine that they are providing the best service for the money because they are carrying out the public trust. It would take a performance audit because a legislative audit can only audit state entities. Omholt's office could do the audit, or they could contract it out.

Rep. Meyer made a motion to have the researcher come up with language requiring a "performance" audit.

Rep. Andreason wants something inserted that would encourage and allow the early settlement of claims. A straw vote indicated the amendments should be put into proper language by the researcher. There was a unanimous consensus that no action be taken at the moment.

Meeting adjourned at 12:00 noon.

REP. W. J. FABREGA, Chairman

Jo Lahti

Jo Lahti, Secretary

EXHIBIT "B"

and the board's authority in this regard was questioned by the Montana Supreme Court. The court determined that it was not within specific statutory intent for the board to adopt such requirements.

Barber schools are also subject to the regulatory control of the Department of Business Regulation. The Proprietary School Act (section 20-30-101, MCA) requires that a trade school obtain appropriate certification and license from the Department of Business Regulation. The Department of Business Regulation has the authority to establish specific requirements for equipment, personnel, instruction materials, instructors, etc. as are necessary to provide adequate educational opportunities. However, the Department of Business Regulation does not license or regulate barber schools or instructors at the present time. In February of 1979, the Department of Business Regulation notified the barber schools that the schools fall under the jurisdiction of the Proprietary School Act. The department requested that the schools apply for licensure pursuant to the act. According to the department, the schools continue to be licensed by the board and have not applied for licensure through the department.

Currently, laws exist regarding the licensure of instructors for cosmetology schools by the Board of Cosmetologists. The law (section 20-30-102, MCA),

EXHIBIT "C"

Board of Barbers
(Sunset Review)

SUMMARY OF COMPLAINTS
FISCAL 1973-74 THROUGH 1978-79

Nature of Complaint	Total Number	Who Initiated		How Resolved	
Competence	1	Consumer	1	No Violation	1
Cosmetologist Cutting Hair	12	Barber	12	Letter Sent to Cease	11
				Referral	1*
Practicing Without a License	10	Barber	8	Letter Sent to Cease	9
		Board	1		
		Cosmetologist Board	1	Complainant Referred to County Attorney	1
Poor Sanitation	2	Consumer	2	Letter Sent to Clean Up	1
				No Violation	1
Discrimination Claims	2	Student	1	Board Assistance	2
		Apprentice	1		
Unfair Trade Practice Claims	2	Barber	2	Letter Sent to Cease	1
				No Action	1
Miscellaneous**	2	Board	1	Letter of Reprimand	2
		Cosmetologist	1		
Total	31	Consumer	3	Letter Sent	22
		Barber	22	Referral	2
		Board	3	Reprimand	2
		Cosmetologist	1	Assistance	2
		Student	1	No Violation	3
		Apprentice	1		

* Complaint was referred to the Board of Cosmetologists.

**One of the complaints was against a board member for "rude conduct," the other against a barber employing nonlicensees.

Source: Compiled by the Office of the Legislative Auditor, based on board records.

Illustration 5

EXHIBIT "D"

times per year. If a student fails the apprentice examination; the applicant is required to obtain an additional 250 hours of training within three months before being eligible to take the examinations again. An applicant for a barber license is allowed three attempts to pass the examination. If the applicant fails the examination three times, he or she must surrender the apprenticeship card and may not perform the acts which constitute barbering.

The following illustration indicates the pass/fail statistics of applicants taking the examinations over the past six fiscal years. Examinations are a combination of written and practical application, designed to determine the applicants knowledge of both theory and technique.

NUMBER OF APPLICANTS PASSING THE EXAMINATION

License Type:	Apprentice			Barber		
Fiscal Year	Taken	Passed	Percent	Taken	Passed	Percent
1978-79	35	34	97%	42	39	93%
1977-78	41	30	73%	23	16	70%
1976-77	32	29	91%	26	18	69%
1975-76	16	15	94%	24	19	79%
1974-75	25	23	92%	27	19	70%
1973-74	13	12	92%	43	28	65%

Source: Compiled by the Office of the Legislative Auditor, based on board records.

Illustration 3

A barber or barber apprentice must renew the respective license prior to July 1 of each year. An apprentice is required to renew the apprenticeship card if the individual does not take the barber's examination

EXHIBIT "B"

BEFORE THE BOARD OF BARBERS
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING OF
THE STATE OF MONTANA

In The Matter Of The Application of BIG SKY COLLEGE OF BARBER-STYLING, INC. For Approval Of An Alternative Apprenticeship Program	DECLARATORY RULING

On October 20, 1979, the Big Sky College of Barber-Styling, Inc. of Missoula, Montana, by Gary T. Lucht, its president, submitted a petition to the Board for a ruling that a certain apprentice barber could serve the balance of her required year of apprenticeship by working as an instructor in the school. The Board invited the petitioner and other parties known to be interested to attend a Board meeting on November 12, 1979, and discuss the request further.

At the meeting the Board proposed to treat the petition as a request for a declaratory ruling and to waive any technical differences between the form of this petition and meeting and the forms prescribed in the Department's procedural rules. This was accepted by the petitioner. Mr. Lucht and the apprentice, herein designated as C.D., then spoke in support of their petition. The relevant issue was defined as whether instructing in the Big Sky College of Barber-Styling, Inc. was the "equivalent" of a "normal work year" such that the Board in its discretion could approve the program as qualified apprenticeship under its rule ARM 40-3.18(6)-S1860(3).

Mr. Lucht stated that "equivalency" meant "of equal value" and that C.D. would gain experience instructing in the college of at least equal value to that gained by a typical apprentice barber in Missoula. C.D. stated that she had previous training or experience in teaching and office management and expected to cut or style more hair in a typical day at the school than she had in her three months as an apprentice in a Missoula barber shop. In response to questions from Board members, C.D. stated that she had little experience with the basic clipper cut in a shop setting but that she also had little interest in such. C.D. also stated that Mr. Lucht's schedule (he is the principal instructor in the school) was spread too thinly and that her teaching would enable him to teach more effectively. C.D. indicated that her business management experience had been in a dental office.

A year of apprenticeship is required by law (37-30-305, MCA) before a barber college graduate may take the examination for the barber's certificate. In adopting the above-mentioned rule as part of its administration of the apprenticeship process, the Board has stated a policy of supplementing a scholastic education with practical experience before a person can seek to be a fully licensed barber. Among those aspects of practical experience which the Board

(1) X

deems very important in any apprenticeship are the business management of a shop and the hands-on experience of cutting hair of real customers. A continuation of C.D.'s scholastic environment will not give her this experience. The Board is also not persuaded that the proposed division of the teaching load between Mr. Lucht and C.D. will involve the "immediate personal supervision" which the apprentice must receive from the licensed barber. On the other hand, the Board is inclined to give some recognition to C.D.'s past experience and to the current surplus of apprentices and barbers in Missoula relative to the demand. If C.D. will work at least half a normal work year in the commercial environment of a barber shop, the Board will recognize her instructional work--provided the requisite immediate personal supervision is shown--in a barber college as the equivalent of the other half. C.D. can fulfill her half-year in a shop with six months' full-time work, twelve months of half-days, or a combination of the two which amounts to the same time.

Lawrence Sandretto, Chairman
Board of Barbers

By: _____
Ed Carney, Director
Department of Professional and
Occupational Licensing

overturned in District Court.

Exhibit "F"

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

FILED JUL 1 8 1980

BY DEBORAH L. ETHRIDGE

No. 49366/7

BIG SKY COLLEGE OF BARBER-STYLING, INC., aMontana Corporation

Plaintiff,

vs

THE BOARD OF BARBERS OF THE DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING OF THE STATE OF MONTANA,

Defendant.

NOTICE OF ENTRY OF JUDGMENT

TO: The Board of Barbers of the Department of Professinal and Occupational Licensing of the State of Montana, and counsel, Roger Tippy

Notice is hereby given that on the 16 day of July, 19 80, the Court entered Judgment in the above-entitled action, which judgment is in favor of Plaintiff against Defendant, a true and correct copy of which is attached to this Notice and served upon you.

DATED this 18 day of July, 19 80.

LEA D. LaFRINIERE, Clerk of Court

By: Deborah L. Ethridge Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF TH
STATE OF MONTANA, IN AND FOR THE COUNTY OF MISSOULA

Cause No. 49366

BIG SKY COLLECE OF BARBER-STYLING, INC., a Montana Corporation,

Petitioner,

-vs-

THE BOARD OF BARBERS OF THE DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING OF THE STATE OF MONTANA,

Respondent.

J U D G M E N T

JUL

THIS MATTER came before the Court upon the Motion of the Petitioner for Summary Judgment. Briefs were submitted by the Parties. Based upon the pleadings on file herein and the record of the proceeding before the Board of Barbers of the Department of Professional and Occupational Licensing of the State of Montana, the following findings of fact and conclusions of law and Judgment are made:

I.

Findings of Fact

(1) On November 12, 1979, the Respondent, Board of Barbers, met as a Board to consider the application of the Petitioner for approval of an apprenticeship program for an employee of the Petitioner.

(2) Since graduating from the BIG SKY COLLEGE OF BARBER-STYLING, INC., in July, of 1979, the Petitioner's employee passed the apprentice examination and worked in a barber shop for a period of Three (3) months. Following that she commenced employment as an instructor with The Big Sky College of Barber-Styling, Inc. under the immediate supervision of Gary Fucht, a licensed barber, who is the owner and manager of the Petitioner corporation.

(3) On December 12, 1979, the Respondent Board issued a declaratory ruling regarding the apprenticeship of the Petitioner's employee. This ruling required that before the employee would be permitted to take her examination for a barber's certificate of registration, that she must work at least "half a normal work year in a commercial environment of a barber shop" in addition to the work she had performed and contemplated performing as instructor at the barber college.

(4) Petitioner's employee has worked continuously as an instructor with The Big Sky College of Barber-Styling, Inc., since she commenced employment with the college.

II.

Conclusions of Law

(1) Section 40-3.18(6)-S1860(3) of the Montana Adiministrative code which provides that "every apprentice must serve one (1) normal work year, or its equivalent at the discretion of the board, as an apprentice before he can take the barber examination engrafts additional requirements onto Section 37-30-305,MCA, which are in excess of the statutory authority granted to the board.

(2) The declaratory ruling of the Respondent which is at issue herein was in excess of the Respondent's statutory authority when it ruled that Petitioner's proposed apprenticeship program, consisting of three (3) months work at a barber shop and nine (9) months work as an instructor at The Big Sky College of Barber-Styling, Inc., under the immediate personal supervision of Gary Lucht, a licensed barber, would not meet the prerequisites for taking the examination for Barber's Certificate of Registration.

III.

Judgment

The Respondent's declaratory ruling of December 12, 1979 is hereby reversed. The apprenticeship program proposed by the

Petitioner for its apprentice, employee is hereby found to meet all the prerequisites for qualification to permit the employee to take the examination for a Barbers Certificate of Registration. Plaintiff is awarded its costs of suit.

DATED this 11th day of July, 1980.

DISTRICT COURT JUDGE

EXHIBIT "G"

BARBER BSC STYLING

BIG SKY COLLEGE OF BARBER-STYLING, INC.

600 Kensington Missoula, Montana 59801 Buttrey's Suburban Phone: (406) 721-5588

August 27, 1980

Bill Graves
Riverview Barbershop
Riverview Shopping Center
Great Falls, Montana 59494

Dear Bill:

I feel compelled to write this letter in hopes that we might be able to clear up some shared misunderstandings.

First, I would like to clarify that I did not testify to "knife you in the back" as rumor to that effect circulated after the meeting. If you really believe that the content of my testimony revealed that; then you as a board member are listening but not hearing what's going on in the profession. What I revealed to that meeting were factual actions that occurred between the Board and I over the last two years. They were not lies made up to make the Board look bad. They were factual actions that the Board implemented and the blame can only be shared by them.

I think the barbering profession in this State has become very fragmented because too many people on that Board have used it to satisfy vengance against some of their peer in the profession. Others have used it to extend or add to their own selfish egos. As a result, the Board is ineffective at best and our profession has suffered immensely. Quite a few barbers in the State of Montana think the Board is a joke. That is unfair. Some Board members by their own actions have made the Board appear that way, while other Board members, such as yourself, have in earnest tried to do a good job. You can't in all honesty police the profession if the Board does not police itself. We can't have one standard for the Board and one for the profession. Hopefully, "Watergate" taught us no one is above the law no matter what their position is or how they see it. This has existed and you know and I know it! This is what I am hopefully attempting to correct. I have mentioned this double standard to you as a Board and you ignore it. However, you have no reservations about imposing restrictions on me under the law. Am I supposed to have no right and no reason to question you? When we arrive at that point, it is no longer a democracy but only a dictatorship.

I feel we need a Board of Barbers but only when the Barbers have some control over the Board. Just because a person is a Barber for five years does not mean he is excellent material to become a public official on the Board. When we have reasonable control over the

Board, then no one barber or his ego will dominate policy that detracts from the Board. I realize that being on the Board is sometimes a thankless job at best, but one should not accept a position on it if they are unable to cope with the flak.

I am critically aware of the outdated laws the Board must operate under. A Board that is made up of wise and compassionate men should have laws that are reasonable and enforceable.

The Board does deserve respect, but only when they have earned it. It does not imply you must compromise your principals. It only means that when others have valid ideas, you should work toward the validation of those ideas. If all barbers do not count, then none in particular should.

I feel the same way about Barber School Owners. One should be qualified to run a school. A barber is not necessarily a teacher. I know that some barbers think that way. That is a very naive' approach on their part. Instructors should have proper credentials. This should be paramount. When a student invests $1,500.00 in an education, we should have qualified people who can produce the results of that investment. I can proudly say that my staff are teacher-barbers and they have credential proof of it. All of a sudden, there is a rush to open barber-schools, but not that they should represent and embody the high ideals of an institution of higher learning, but rather how much economic gain is there. Most barber-school owners and instructors are educated after the fact, rather than before. This hurts the credability of the profession and higher education as well, not to say how misleading it is for the student.

We should have some higher qualifications for the people entering barber schools. The day is long gone when an 8th grade education is sufficient. A curriculum that includes hair chemistry, product chemistry is way beyond the education of the eighth-grade educated individuals level of knowledge. The public at large has the mistaken idea when you fail at everything else you should go to barber school. When this type of individual is granted a license, the public is hurt, the profession is hurt, and higher education is hurt. The detriment of this unqualified individual in the profession has a very negative factor that far outweighs any benefits. We should look to progression and stop rewarding regression.

It's very difficult to update or merely keep abreast of what's new in our profession. Some established barbers have a closed-mind approach to further education, or they look at seminars and clinics as an excuse to get drunk. If very little united effort comes forth your accomplishments will be minimal. This has happened with frequency in the past.

The hope for the profession is in the schools. When we get more demanding on the quality of individual effort; we have a better chance of graduating people who add to, rather than detract from our profession. Nothing is guaranteed, but we must continue to strive toward that ideal, realizing progress is not inevitable but comes forth in slow measures, counted one at a time. Regardless of the time, we must try.

Putting aside past animosities and giving a burial to revenge, we can all strive in common effort and in a united goal toward that end.

My fellow barbers I hope we have the open-minded courage to work toward that goal, which is the best for our profession.

I pledge my sincere support, financial and time to the betterment of our profession. I know there may be some doubts as to the sincerity of my conviction. I leave that for closed minds. Their judgement is predictable. To the open-minded, let us come together for the salvation of our profession. We can do it. Thank you.

Respectfully,

Gary T. Lucht

Gary T. Lucht, President

EXHIBIT "H"

University of Montana
Missoula, Montana 59812

SCHOOL OF PHARMACY AND ALLIED HEALTH SCIENCES

School of Pharmacy (406) 243-4621
Department of Microbiology (406) 243-4582
Medical Technology (406) 243-4582
Physical Therapy (406) 243-4753

February 6, 1979

Mr. Gary Lucht
Big Sky College
of Barber/Styling, Inc.
600 Kensington
Missoula, Montana 59801

Dear Mr. Lucht:

This letter is to commend you for the way in which you have dealt with our son, Don, as a student at Big Sky. Marge and I can't think of any other person (friend or educator) who has been able to criticize Don constructively but at the same time preserve enough of his own self-image so that he would try to improve his attitude and his performance. In the past it has seemed that if Don couldn't succeed at a task immediately and with very little effort he would consider that task to be hopeless and refuse to keep trying. Somehow you found the key that reversed this negative pattern. To influence another person in this way takes a great deal of patience, understanding, energy and courage. Because you have these characteristics, we feel you are unique among educators of our acquaintance. You have our respect as well as our deep personal gratitude.

We wish you the very best of success not only because we wish you well personally, but because the young people who are interested in the field of barber styling need you. Please count us among the wholehearted supporters of your school and program.

Sincerely,

Frank A. Pettinato

Frank A. Pettinato, Ph.D.
Professor

FAP:mp

EXHIBIT H

University of Montana
Missoula, Montana 59812

SCHOOL OF PHARMACY AND ALLIED HEALTH SCIENCES

School of Pharmacy (406) 243-4621
Department of Microbiology (406) 243-4582
Medical Technology (406) 243-4582
Physical Therapy (406) 243-4753

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Big Sky College
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600 Kensington
Missoula, Montana 59801

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Sincerely,

Frank A. Pettinato

Frank A. Pettinato, Ph.D.
Professor

FAP:mp

EXHIBIT "I"

No. 14026

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

DAVID LEE BELL, d/b/a THE MONTANA BARBER COLLEGE,

Petitioner and Respondent,

-vs-

STATE OF MONTANA, DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING et al.,

Respondents and Appellants.

Appeal from: District Court of the First Judicial District, Honorable Gordon R. Bennett, Judge presiding.

Counsel of Record:

For Appellants:

Alan Joscelyn argued, Helena, Montana

For Respondent:

Dennis Lind argued, Missoula, Montana

Submitted: February 7, 1979

Decided: 4/30/79

Filed:

Thomas J. Kearney
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The Montana Board of Barbers and the Department of Professional and Occupational Licensing appeal from an adverse decision entered August 15, 1977, in the District Court, Lewis and Clark County by the Hon. Gordon R. Bennett sitting without a jury. Judge Bennett's decision invalidated section 40-3.18(6)-S18030(2)(e) of the Montana Administrative Code on the grounds that it was in excess of the Board's power and was therefore void and unenforceable.

The administrative rule under attack, section 40-3.18(6)-S18030(2)(e), provides in pertinent part:

> "No barber college shall be approved by the Board unless a full time instructor is employed. There must be an instructor or an assistant in charge of each daily class. . . ." (Emphasis added.)

Section 40-3.18(6)-S18030(2)(c) of the Montana Administrative Code complements section 40-3.18(6)-S18030(2)(e) by establishing that a person may qualify as an "instructor" by obtaining a score of 75% on an examination given by the Montana Board of Barbers.

The appellants argue that the instructor requirement and the examination requirement should be upheld because the Board of Barbers has been given the power to promulgate rules for the regulation of Montana barber colleges. Relying on this power to regulate, the appellants urge this Court to reverse the District Court and reinstate the stricken regulation.

After careful review, we find that appellants' position cannot be sustained and the District Court decision must be affirmed.

"Administrative agencies have only those powers specifically conferred upon them by the legislature." Anaconda Co. v. Dept. of Revenue (1978), _____ Mont. _____, _____ P.2d _____, 35 St.Rep. 1289, 1291; See also: Polson v. Public Service Commission (1970), 155 Mont. 464, 473 P.2d 508. In the present

case, section 66-409(5), R.C.M. 1947, now section 37-30-203(2) MCA, allows the Board of Barbers to adopt "rules for the administration" of the chapters dealing with barbers, barber shops and barber colleges. However, section 66-409, does not give the Board any power to change the impact of a legislative enactment. The Arizona Court has held:

> "It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government." Smith v. Industrial Commission (1976), 113 Ariz. 304, 552 P.2d 1198, 1200; Swift and Co. v. State Tax Commission (1969), 105 Ariz. 226, 462 P.2d 775, 779.

The courts have uniformly held that administrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute"; State of Montana ex rel. Charles W. Swart v. Edward W. Casne (1977), ____ Mont. _____, 564 P.2d 983, 34 St.Rep. 394, 399; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; Arizona State Board of Funeral Directors v. Perlman (1972), 108 Ariz. 33, 492 P.2d 694.

In the present case, sections 40-3.18(6)-S18030(2)(c) and (e) of the Montana Administrative Code clearly do not contradict any specific legislation, however, they do engraft additional requirements which were not envisioned by the legislature. The legislative enactments dealing with barber colleges do not make any mention of an instructor's examination, nor do they intimate that a barber must pass an examination before he may teach at a barber college. The statutes merely require that a barber college operator satisfy <u>two</u> personal requirements: (1) he must have ten

years of experience as a barber (section 66-403(8), R.C.M. 1947, now section 37-30-404(1) MCA); and (2) he must be able to withstand an investigation by the Board as to his character (section 66-403(9), R.C.M. 1947, now section 37-30-402 MCA). Compliance with these rules established by the legislature entitle a barber to operate a properly furnished barber college. Any additional administrative requirements, such as those found in sections 40-3.18(6)-S18030(2)(c) and (e), are beyond the scope of the Board's power, and are therefore void and unenforceable.

For the foregoing reasons, the judgment of the District Court is affirmed.

John C. Sheehy
Justice

We Concur:

Frank I. Haswell
Chief Justice

Gene B. Daly

John Conway Harrison

Daniel J. Shea
Justices

EXHIBIT "J"

EVALUATION FORM
GRADUATE SCHOOL
UNIVERSITY OF MONTANA
Missoula, Montana 59801

INSTRUCTIONS:

To Prospective Student: You have received three of these blank forms. Please fill in your name and field on each of them and ask three people who are qualified to judge your academic potential to evaluate you. Give each of them one of these forms and a stamped and addressed envelope; ask them to forward their form to the department concerned University of Montana, Missoula, Montana 59801.

To the Evaluator: Gary T. Lucht has applied for admission to graduate work at the University of Montana in the field of Public Administration. We would appreciate receiving your evaluation of the applicant's scholastic ability and potential contribution to his field. Thank you.

Gary Lucht worked for the Coordinator, Extension and Continuing Education, as a Research Assistant during July and August, 1971. His primary responsibility was writing the report to the Governor, "Montana White House Conference on Aging". This was quite a task requiring many hours of research through aquired data to formulate a document that would be meaningful to the needs of Montana Senior Citizens, and also reflect credit on the University of Montana. Gary accepted this responsibility with enthusiasm and did an outstanding job. He is a meticulous writer and will not accept the average. His work is accomplished without supervision displaying excellent common sense judgement. Although he worked primarily alone, definite qualities of leadership and managerial abilities were evident. He would be an asset to the Graduate School and a natural in the field of Public Administration.

Signature Raynor H. Roberts

Name Raynor H. Roberts
(Please type or print)

Position Asst. Coord., Extension and Continuing Education

Institution University of Montana

Date November 19, 1971

GS-3

EXHIBIT "K"

STATE OF MONTANA

DEPARTMENT OF BUSINESS REGULATION

805 NORTH MAIN, HELENA, MONTANA 59601
PHONE (406) 449-3163

Ted Schwinden
GOVERNOR

Gary Buchanan
DIRECTOR

January 23, 1981

Gary Lucht, President
Big Sky College of Barber-Styling, Inc.
600 Kensington
Missoula, MT 59801

Dear Gary:

I am writing to tell you how much I enjoyed our visit last week. I am happy you stopped by the office as you enlightened me a great deal on some of the problems that can arise by having schools under the auspices of the Board of Barbers. I certainly hope the legislature makes some changes.

In reviewing the file Mr. Burns maintained on your school I never did find any correspondence from your attorney. As I mentioned, I am sure he would have responded had that letter been received.

In any event, I hope you will keep me posted as to any action that might be taking place relative to this situation.

Sincerely,

John J. Maloney, Chief
Proprietary School Bureau

JJM:dm

EXHIBIT "L"

March 2, 1979

Mr. James E. Burns, Chief
Proprietary School Bureau
Dept. of Business Regulations
State of Montana
805 North Main
Helena, MT 59601

Re: Big Sky College of Barber-Sty[illegible]

Dear Mr. Burns;

I represent the Big Sky College of Barber-Styling and am in receipt of your letter dated February 14, 1979 to Mr. Gary Lucht. I will appreciate receiving a copy of the Attorney General's opinion which deals with the question of regulation of the Big Sky College of Barber-Styling by your agency. You are undoubtedly aware that the Big Sky College of Barber-Styling has already met the stringent standards imposed by the Board of Barber Examiners of the State.

After I have had an opportunity to review the Attorney General's opinion we will respond to your request.

Thank you.

Yours truly,

JON E. ELLINGSON

JEE:tpm

cc to Gary Lucht

NAME Marjorie Allen BILL No. HB 5700

ADDRESS [illegible] DATE [illegible]

WHOM DO YOU REPRESENT Baker Concrete

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81

Meet the Instructors at the Big Sky College of Barber-Styling, Inc.

CLARE DELANEY
Graduate of University of Montana, Big Sky College of Barber-Styling and Redken Academy.

All Services Performed By Students

GARY LUCHT
President-Owner. 23 years of experience as a barber-stylist in Utah and Montana. Graduate of: The Salt Lake Barber College, Academy of Men's Hairstyling, R-K Permanent Clinic, Universal Schools, University of Montana. Also attended: University of Montana Law School and Graduate School at the University of Montana.

600 Kensington, 721-5588 Tuesday-Saturday 9-6 p.m.

Exhibit M

BARBER BSC STYLING

BIG SKY COLLEGE OF BARBER-STYLING, INC.

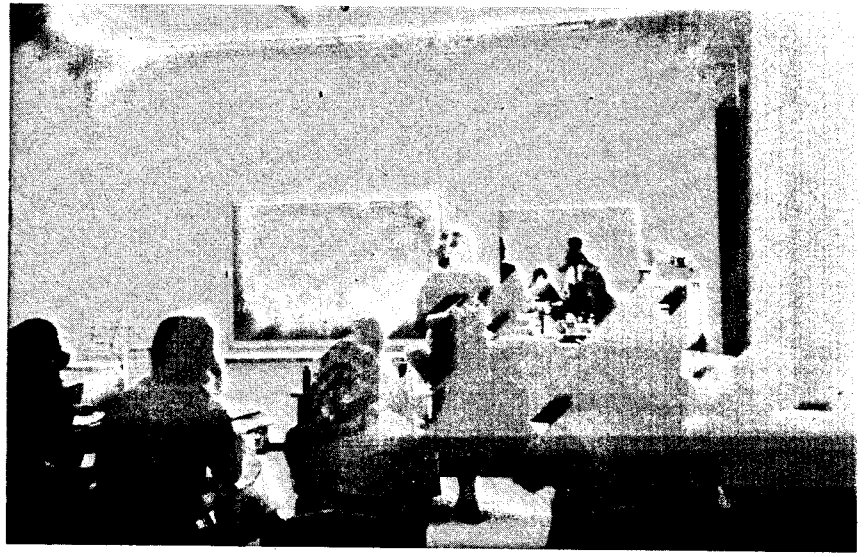
CURRICULUM GUIDE

GARY LUCHT — PRESIDENT

Gary Lucht - President - Owner
21 years of experience as a barber-stylist in Utah and Montana. Graduate of: The Salt Lake Barber College, Academy of Men's Hairstyling, R-K Permanent Clinic, Universal Schools, University of Montana. Also attended: University of Montana Law School and Graduate School at the University of Montana.

GUEST ARTISTS

From time to time guest artists instruct in our classroom on "What's New" in the profession. Guest artists from Pennsylvania, California, Colorado and Illinois have already visited our classroom with many more scheduled.



Teaching Staff

Our college has brought together one of the finest group of instructors available. Their personal history is as follows:

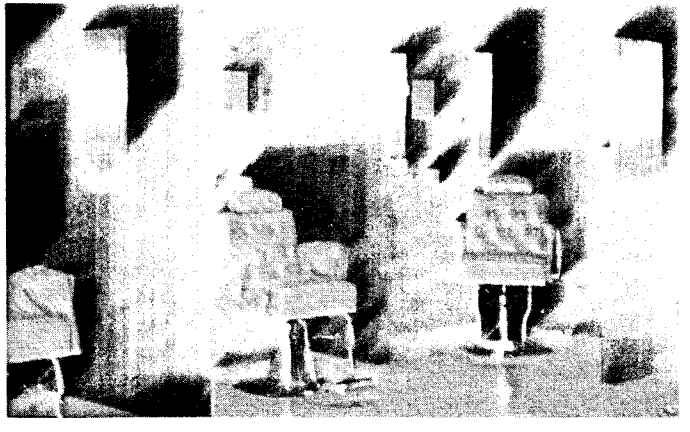
Gary Lucht - Instructor - Owner
21 years of experience as a barber-stylist in Utah and Montana. Graduate of: The Salt Lake Barber College, Academy of Men's Hairstyling, R-K Permanent Clinic, Universal Schools, University of Montana. Also attended: University of Montana Law School and Graduate School at the University of Montana.

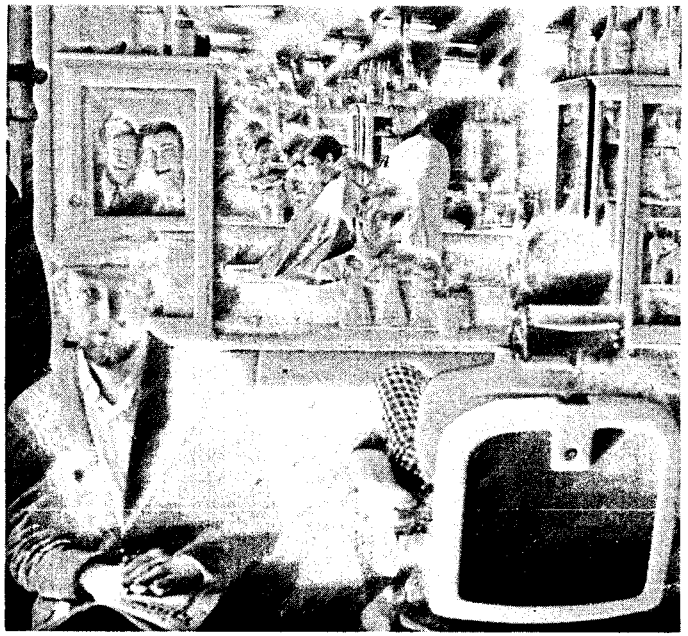
Joannie Lucht - Office Manager - Owner
11 years experience in insurance, bookkeeping, accounting, former office supervisor for one of the largest C.P.A. firms in Western Montana. Joannie loans her experience to the students in teaching bookkeeping methods.

THE COLLEGE

The Big Sky College of Barber-Styling, Inc. is located on the "93" Strip in the heart of the Southside Business District of Missoula, Montana.

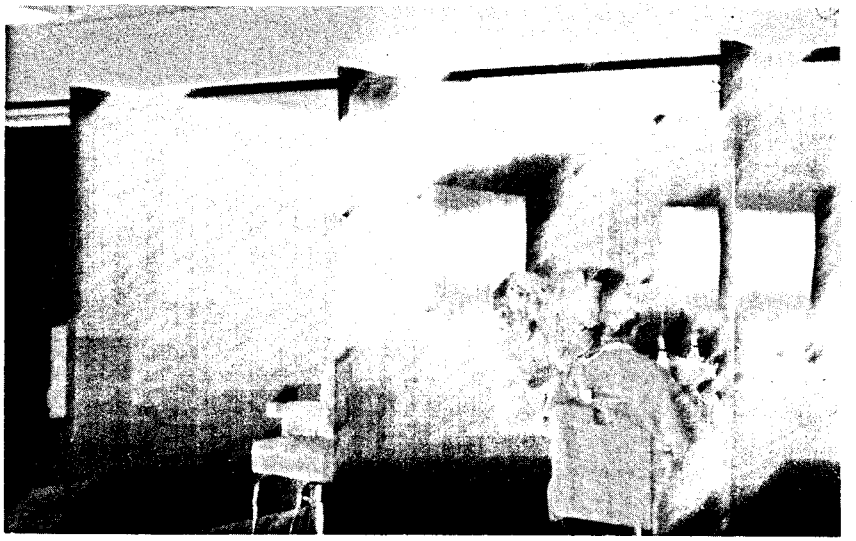
The college has 4,000 square feet of floor space on the upper floor of the Buttrey's Suburban Building. It is easily accessible by carpeted stairway or elevator. Within the college there is our modern office, classroom for 40 students, student-study lounge and the 20-booth clinic-practicum area. These facilities have all the latest modern equipment to facilitate teaching all the modern techniques within the profession.





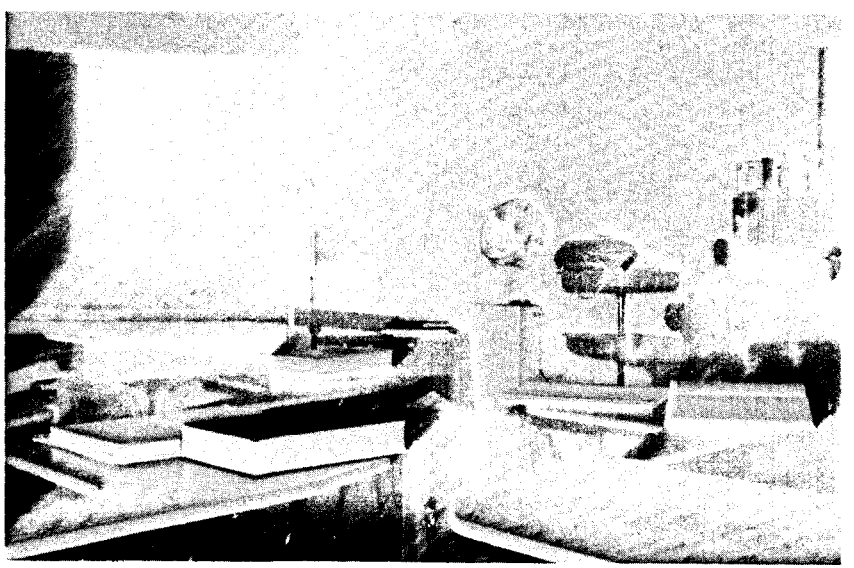
BARBER VS. BARBER-STYLISTS

The day is long past when a barber just "clipper cuts" hair all day. Modern day consumers demand full professional services. The modern day barber-stylist not only creates new hair designs, but they must be well versed in hair trichology, product knowledge, patron counseling, and a complete hair-care method. The barber of yesteryear has not disappeared. Many of them have gone back to school and with added education, have become barber-stylists. There is still a demand for barber services, but there is also a demand for stylists. The Big Sky College of Barber-Styling combines training for the two. The graduate is well prepared to offer all services and as a result, will be economically rewarded.



BUSINESS PEOPLE

Today's barber-stylists must be well trained business people. The day of the barber running their business out of their hip pocket is gone. Present day inflationary trends, tax laws, insurance demands, product sales all require a person with business orientation. The Big Sky College of Barber-Styling, Inc. is critically aware of these needs and have included in their curriculum courses designed to meet these needs.



STATE REQUIREMENT FOR APPLICANTS

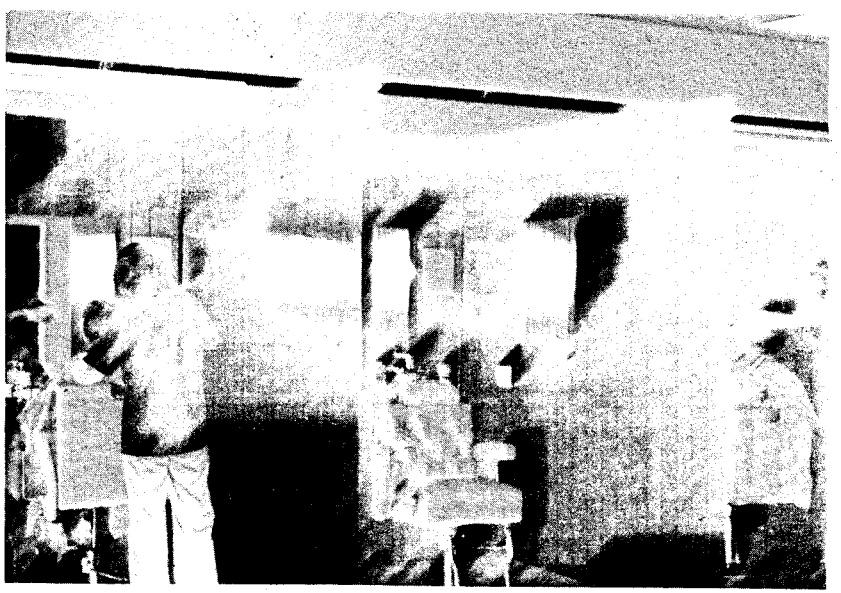
An applicant must be 17 years of age and have graduated from the eighth grade or an equivalent G.E.D. The applicant must be of good moral character and must submit to a health examination prescribed by the Board of Barbers and signed by a practicing licensed physician.

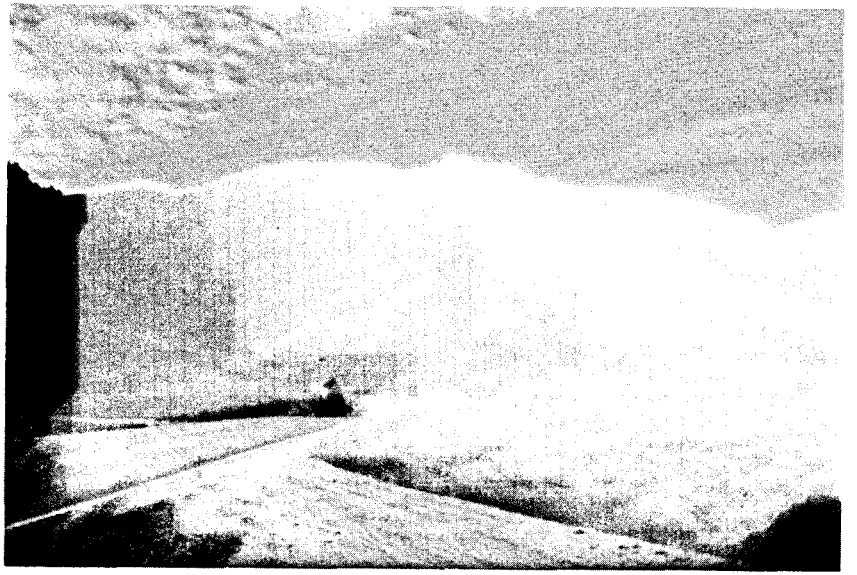
REQUIREMENTS FOR GRADUATION AND ELIGIBILITY FOR STATE EXAM

Must complete 1,500 hours of practical, theoretical and scientific training in an accredited barber college. Must graduate from the Big Sky College of Barber-Styling with an overall grade of 75% or better.

NEEDS IN THE PROFESSION

Within the barber-styling profession, there is a factual need for barber-stylists. Montana in 1968 had 1,500 registered barbers and in 1978 there are only 600. Of those 600, the average age is 55 years old. Montana needs barber-stylists. Needless to say, the opportunity for barber-stylists is unlimited.





THE AREA

Missoula, itself, lends a great deal of attractiveness to the college. Young people abound here. Within a few minutes of the city, there are two modern ski resorts; two large rivers (Clark Fork & Bitterroot) converge here; fishing, picnicing, river floating are enjoyed most of the year; backpacking, hiking, bicycle tours are continuous.

CURRICULUM

Subjects Required	Classroom Hours
Fundamental haircutting, shaving and tool introduction and terminology.	40
Sanitation, antiseptics, sterilization, hygiene and bacteria.	8
History of barbering.	2
Facials and scalp massages or treatments with creams, lotions oil or other cosmetic preparation.	30
Common skin diseases of the scalp, face and neck.	10
Structures and functions of the skin and hair of the scalp, face and neck. Hair trichology.	10
Fundamentals of hair straightening, coloring and bleaching.	80
Fundamentals of permanents; body, curly, afro, etc.	120
Hair styling all textures. Foundation cutting, composite hairstyling, design lines, angle cutting, etc.	80
Shop management, ethics, community assimilation and adaptation, consumer protection.	12
Record management, bookkeeping, business and personal tax laws, insurance, use of computer projections, etc.	12
Interpersonal relations, speech communications, shared solutions to shared misunderstandings.	12
Laws and regulations governing barbering.	4
Product orientation, hair analysis, broadened view, right product - right problem, sales and marketing.	20
Continuing education, new methods vs. old education vs. ignorance.	8
Hairpieces, measuring, fitting and servicing.	4

Exhibit M

BARBER STYLING

BIG SKY COLLEGE OF BARBER-STYLING, INC.

600 Kensington Missoula, Montana 59801 Buttrey's Suburban Phone: (406) 721-5588

February 16, 1981

REASONS FOR OPPOSITION TO HOUSE BILL #597:

Questions that should be answered:

A. What evidence in the present and foreseeable future indicates a compelling need for a broadened base of authority for the Board of Barbers to test Barber School Instructors?

B. Past actions by the Board have shown their actions to be restrictive, arbitrary and capricious to some of their peers engaged in the profession, especially toward Barber Schools in particular. This has culminated in lengthy and expensive law suits to barbers who oppose the Board since the only remedy available to any Board decision is through the courts. Past legislators have sensed the inherent danger in granting this broadened power to the Board because there was no evidence to support any public outcry that demanded tighter controls. What if any factual or statistical evidence supports it now?

C. The Attorney General's office has ruled that the Proprietary School Bureau and the Board of Barbers have joint jurisdiction over Barber Schools in Montana; therefore, a guideline is already in effect regulating Instructors through that Bureau. Duplicity of that authority granted to the Board would only set up an inconsistent policy that would leave an average man of common intelligence confused. Is a Board of working barbers always going to act in the best interests of the public, or will a conflict of interest interfere which shows a blatant restriction by one segment of the profession against the other? The Proprietary School Bureau does not contain the seeds of interference by conflict of interest.

D. How many consumer complaints have been registered and investigated by the Board as to the competency of Instructors at Barber Colleges in the last few years? Has the V. A. complained that Barber Schools in Montana have not properly prepared graduates for their chosen career field? Has the Superintendent of Public Instruction Office, or the U. S. Office of Education, the National Association of Barber

Schools or any other agency complained that Barber Schools in Montana are not meeting their responsibility? The record shows that in 1978, 1979, 1980 only one barber school graduate did not pass the exam; however, the record does not indicate whether that one person was an in-state or out-of-state graduate. Graduates passing the exams should be some measure as to the worth of instruction in barber colleges within the State.

E. If broadened authority is going to be granted to the Board, there should be a sampling of imput from all segments of society that that granted authority will govern. In other words, where did the imput come from on this ligislation? Bill Graves, Vice-President of the Board of Barbers knew nothing of this introduced legislation. Les Haugen and myself, two Barber College owners, were not notified nor asked to contribute our knowledge or experinece to this legislation. Where did it come from? Gene Ernst, House Representative from Stanford, Montana, introduced the legislation. One of the barbers in Stanford is Donald Anderson, former Board of Barbers member, who was involved in the lawsuit in 1977 regarding an illegal exam given to a Barber College owner. This exam when tested in a Court of Law was not only found to be illegal, but was tainted with bias and prejudice. There appears to be a linkage here between Mr. Ernst and Don Anderson. The highest Court in Montana did not grant Mr. Anderson that power and now he is asking this committee and legislature to give it to him. Is this legislation of paramount necessity for the protection of the public or is it a one-man crusade for power? By the way, one of the Board's memberships is up in July and word has it that Mr. Anderson is trying to get reappointed. The linkages in this proposed legislation are self-evident.

F. What is the historical perspective surrounding existing Barber Laws? Some would say the Laws are outdated and that in essence is what House Bill #597 says. Existing laws initiated in the past stated that "A Barber College owner had to have ten (10) years experience" and to serve on the Board of Barbers you "must have at least five (5) years experience". This seemed adequate and fair. As a result, you didn't have someone with five years experience testing someone with ten years experience. Just as it was assumed someone with five (5) years experience was qualified enough to serve on the Board, it also assumed someone with ten (10) years experience was qualified to own and instruct in a Barber College. Now in a complete turnabout, H. B. #597 states that someone with ten (10) years experience is presently not qualified to own and instruct in a Barber College, but it says nothing about five (5) years not being enough experience to be qualified to test Instructors. This type of analogy sets up an

imbalance that past legislatures would not lend support to. It sets in motion an imbalance and takes away the checks and balances that good laws should exemplify.

In summation, the justification of House Bill #597 does not exist in light of the fact no compelling need is evident. If the future dictates its' need, there is joint jurisdiction by a Bureau, not a Board, to handle the matter. Without a cross sampling of imput from the consumer and the profession itself, this bill represents back-door type of legislation.

Most of all, House Bill #597 asks for a rejection of past legislation and asks for broadened powers for the Board. It does not ask for guidelines from the legislator. It asks for the power to set their own rules. The Board of Barbers is composed of working Barbers who are appointed and they come and go and as they change, so will their rules. Rules are laws to those they govern and inconsistency in rules is inconsistency in law. An inconsistent law is a bad law and a bad law is no law at all. To pass this legislation giving the Board broadened powers with no remedy for injustice in applying those rules will only result in many more lawsuits.

Past legislatures have acted wisely in not granting this broadened power. The Montana District Court and The Montana Supreme Court did not approve of these broadened powers. I trust that this committee will act in wisdom and reject House Bill #597.

Big Sky College of Barber-Styling, Inc.

Gary T. Lucht

Gary T. Lucht, President and Owner

NAME Chris Johansen BILL No. HB612

ADDRESS Great Falls DATE 2-16-81

WHOM DO YOU REPRESENT Montana Farmers Union

SUPPORT X OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81

NAME Mike Koehnke BILL No. 612

ADDRESS Townsend, MT DATE 2-16-91

WHOM DO YOU REPRESENT Montana Seed Potato Growers

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81

NAME [illegible] BILL No. HB 671

ADDRESS [illegible] DATE 2-16-81

WHOM DO YOU REPRESENT Dept of P.O.L.

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81

NAME Wesley Lindsay BILL No. 671

ADDRESS Cheney Mont DATE 1-16-81

WHOM DO YOU REPRESENT Water users Assoc

SUPPORT ✓ OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81

VISITORS' REGISTER

HOUSE Business & Industry COMMITTEE

BILL 625 Date 2-16-91

SPONSOR Fabrega

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
C.B. Hansen	Helena, MT	MT Retail Association	✓	
Tom Wilson	" "	MT Petroleum Marketers	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

Exhibit N

Montana Retail Association

Executive Office
P.O. Box 440
34 West Sixth
Helena, MT 59624
Phone (406) 442-3388

BEFORE THE HOUSE BUSINESS AND INDUSTRY COMMITTEE

IN SUPPORT OF - - - HOUSE BILL 625

MR. CHAIRMAN AND MEMBERS OF THIS COMMITTEE. FOR THE RECORD, MY NAME IS CURTIS HANSEN, I AM THE EXECUTIVE VICE PRESIDENT OF THE MONTANA RETAIL ASSOCIATION.

I APPEAR HERE TODAY IN SUPPORT OF HOUSE BILL 625.

HOUSE BILL 625 IS QUITE UNIQUE IN THAT IT IS A NEW LAW AND YET IS REALLY A HOUSE CLEANING MEASURE IN A WAY.

PLACE YOURSELF, FOR A MINUTE, IN THE SITUATION THAT MANY RETAILERS FIND THEMSELVES. A GOOD CUSTOMER, WHO IS ALSO A GOOD FRIEND, WALKS INTO YOUR STORE. HE SELECTS MERCHANDISE, HE LAYS THE MERCHANDISE ON THE CHECK-OUT COUNTER, YOU WRITE IT UP ON A SALES SLIP, AND PLACE THE MERCHANDISE IN A SACK. HE PICKS UP THE SACK AND WALKS TOWARD THE FRONT DOOR SAYING, HAY, FRANK!, SEND ME A BILL ON THIS, O.K.? - - NOW WHAT DO YOU DO? YOU ARE SURE THAT HIS CREDIT IS GOOD. - - HE BUYS A LOT OF MERCHANDISE FROM YOU.- - HE IS IN A SERVICE CLUB WITH YOU. - - YOU HAVE KNOWN HIM FOR YEARS. - - YOU SEE HIM ALMOST EVERY DAY. - - <u>BUT</u>, - - YOU NEVER INTENDED THAT CREDIT WOULD BE EXTENDED TO ANYONE UNDER THESE CIRCUMSTANCES, - - YOU DON'T WANT TO CALL HIM BACK AND TELL HIM HE MUST COMPLETE A LOT OF FORMS, AND ENTER INTO A FORMAL "RETAIL CHARGE ACCOUNT AGREEMENT".

BEFORE YOU CAN EXTEND CREDIT TO HIM. WHAT DO YOU DO ?

I AM SURE THAT YOU WOULD DO AS MOST RETAILERS DO - - YOU WOULD SAY "O.K." - AND - JUST OPEN A SEMI-FORMAL CHARGE ACCOUNT AND SEND HIM A BILL AT THE END OF THAT MONTH.

THIS IS FINE - - THIS IS THE WAY BUSINESS SOMETIMES WORKS - - BUT - NOW WHAT DO YOU DO IF WHEN YOU SEND HIM THE BILL AT THE END OF THE MONTH - - YOU DON'T HEAR ANYTHING FROM HIM - - YOU DON'T RECEIVE ANY PAYMENT - - !

YOU ANALYZE YOUR ALTERNATIVES. - - YOU HAVE NO SIGNED AGREEMENT, - - YOU CAN'T GET TO PUSHY, - - YOU DON'T WANT TO LOSE A FRIEND AND A GOOD CUSTOMER, - - WHAT DO YOU DO ?

YOU CAN WAIT ANOTHER MONTH - - SEND ANOTHER BILL AND HOPE THAT THIS TIME HE WILL PAY IT - - YOU CAN SEND HIM A NICE FRIENDLY, POLITE NOTE ASKING FOR PAYMENT - - (HAVE YOU EVER TRIED TO DEVISE A FRIENDLY, POLITE NOTE THAT ASKS FOR MONEY DUE TO YOU ?)

MOST RETAILERS HAVE COME TO THE CONCLUSION THAT ANOTHER BILLING - INDICATING A MONTHLY INTEREST CHARGE, IF NOT PAID WITHIN 30 DAYS, AS AN INCENTIVE TO PAY, WORKS BEST.

THIS IS WHAT THEY DO, THIS IS WHAT IS BEING DONE, I WOULD VENTURE A GUESS, THAT EVERY MEMBER OF THIS COMMITTEE HAS AT ONE TIME OR ANOTHER, RECEIVED A BILLING THAT INDICATED THERE WOULD BE AN INTEREST CHARGE OF 1 ½ % PER MONTH IMPOSED, IF THE BILLING IS NOT PAID WITHIN 30 DAYS, AND THAT YOU HAD NEVER SUBSCRIBED YOUR SIGNATURE TO ANY "LEGALLY PROPER AND ENFORCEABLE" CONTRACT OR AGREEMENT OF ANY KIND.

IN THE VAST MAJORITY OF CASES THIS HAS WORKED WELL. MOST EVEN PAY THE INTEREST CHARGE WITH NO OBJECTION OR COMPLAINT.

MOST, IN FACT, BELIEVE THAT THEY HAVE A LEGAL OBLIGATION TO PAY THAT BILL AND THE INTEREST THAT IS CHARGED.

IN SOME JURISDICTIONS (BASED ON PROVISIONS OF THE FEDERAL TRUTH-IN-LENDING DISCLOSURE REQUIREMENTS AND THE PENALTIES FOR FAILURE TO MAKE THE DISCLOSURES) IT HAS BEEN HELD THAT BY THE ATTEMPT TO COLLECT THIS INTEREST OR LATE PAYMENT CHARGE, WITHOUT LEGAL AUTHORITY, THE MERCHANT FORFEITS HIS RIGHTS TO COLLECT THE INTEREST AND THE PRINCIPAL.

I DO NOT KNOW OF ANY SUCH LEGAL CHALLENGES THAT HAVE BEEN TRIED IN A COURT OF LAW WITHIN THE STATE OF MONTANA. HOWEVER, I DO KNOW OF SOME CASES WHERE THE THREAT OF SUCH LEGAL ACTION HAS PROMPTED THE MERCHANT TO CHECK WITH HIS ATTORNEY, AND THE RESULTS HAVE EITHER BEEN, WRITING OFF THAT ACCOUNT IN ITS ENTIRETY OR THE ACCEPTANCE OF A COMPROMISE AMOUNT AS FULL PAYMENT.

THE INTENT OF HOUSE BILL 625 IS TO LEGALIZE WHAT HAS BEEN A COMMON PRACTICE.

THE MERCHANTS ARE CORRECT IN SEVERAL OF THE THEORIES BEHIND THIS APPROACH;

1) THERE WAS NO INTENT ON THE PART OF EITHER PARTY THAT CREDIT WOULD BE EXTENDED BEYOND THE TIME THAT THE PRESENTATION OF THE BILL THEREFOR WAS RECEIVED BY THE PURCHASER.

2) THE INCLUSION OF A "LATE PAYMENT CHARGE" IS THE MOST UNOBTRUSIVE INCENTIVE THAT SUCH PAYMENT BE MADE AS INTENDED.

HOUSE BILL 625, WOULD ALLOW THE RETAIL SELLER TO PROPERLY IMPOSE SUCH A "LATE PAYMENT" CHARGE IF THE PURCHASER DID NOT PAY FOR THE MERCHANDISE AFTER BEING PROPERLY BILLED AT THE END OF THE FIRST BILLING PERIOD AFTER THE OBLIGATION IS INCURRED.

HOUSE BILL 625, WAS VERY CAREFULLY DRAFTED, WITH SAFEGUARDS AGAINST ABUSE, THROUGH REQUIREMENTS OF DISCLOSURE AS CONTAINED IN SECTION 2. SECTION 3., PROVIDES THAT; "THE LATE PAYMENT CHARGE ALLOWED IN SECTION 1 MAY BE ALLOWED TO A SELLER ONLY ON OBLIGATIONS INCURRED AFTER JULY 1, 1981."

I REQUEST, ON BEHALF OF THE RETAILERS OF MONTANA, THAT THIS COMMITTEE GIVE ITS CAREFUL CONSIDERATION TO THIS BILL AND MOVE IT TO THE FLOOR OF THE HOUSE WITH A UNANIMOUE "DO PASS" RECOMMENDATION.

THANK YOU.

#28 Exhibit A

pus MEMORANDUM

UNIVERSITY OF MONTANA

February 3, 1978

Dean Robert E. Sullivan

Professor William L. Corbett

Arbitration Law in Montana and the Uniform Arbitration Act

Conclusion:

Montana law is an impediment to the successful resolution of disputes through arbitration. Legislative enactment of the Model Act or other similar legislation is necessary to enable Montana to join with the vast majority of states that permit and encourage effective private dispute settlement through arbitration.

I. Arbitration at Common Law.

To clearly understand the current Montana law on arbitration it is necessary to understand arbitration at common law. This is due to the fact that arbitration law in Montana has changed little in the last one hundred years.

At common law arbitration was viewed with much disfavor by the courts. The courts believed that they should not be ousted of their traditional role in dispute settlement by private tribunals, nor should parties to a contract be deprived of access to the courts. As a consequence, arbitration clauses were almost universally held to be void and unenforceable. School Dist. No. 1 v. Globe and Republic Ins. Co., 146 Mont. 208, 212 (1965). See Note, Contract Clause Providing For Arbitration Of Future Disputes Is Not Enforceable In Montana, 24 Mont. L. Rev. 77 (1963).

At common law, the courts generally recognized but did not necessarily enforce three distinct types of arbitration clauses:

(1) An agreement to arbitrate a dispute existing at the time the agreement is entered. These provisions were valid and enforceable only after the subject was actually arbitrated, but a party would be denied a court order enforcing the contractual duty to arbitrate.

(2) An agreement to arbitrate a future factual dispute (a factual dispute not in existence at the time of the agreement was entered but which might arise in the future). These provisions were considered valid because the courts were not ousted of their jurisdiction over issues of law.

(3) An agreement to arbitrate any future dispute (fact or law). These agreements were uniformly held to be

void and unenforceable because the courts were ousted of their jurisdiction over legal issues and it was believed that the parties should not be deprived of their access to the courts.

II. Arbitration in Montana.

A. Arbitration in commercial disputes.

In 1867 the Montana legislature enacted a statute which upon first reading appears to have reversed the common law bias against arbitration. The statute provides that "persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them . . . . R.C.M. 1947, § 93-201-1.[1] Despite the potentially broad reading this statute might be given, the Montana Court, in conformity with jurisdictions with similar legislation, interpreted the statute to provide for judicial enforcement of an arbitration provision only when the dispute is in existence at the time the agreement is entered. Green v. Wolff, 140 Mont. 413, 423 (1962). Thus, under the statute, an agreement to arbitrate only an existing dispute is valid and enforceable.[2] In addition to the statute, the Montana Court continued the common law notion that an agreement to arbitrate any future factual dispute was valid and enforceable (category #2 discussed above). Moreover, the Court recognized that an arbitration award under a valid and enforceable arbitration agreement is binding on the parties.[3]

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[1] See Appendix, p. i.

[2] The statute did have the positive effect of eliminating the common law obstacle to existing dispute arbitration mentioned in category #1 discussed above.

[3] A party could, of course, receive judicial review of the award and upon an appropriate showing have the award vacated, corrected or modified. This will be discussed infra. pp. 9-10.

However, the major obstacle to arbitration remained. The Montana Court continued to follow the common law rationale that an agreement providing for the arbitration of a future dispute involving an issue of law was unenforceable (category #3). Smith v. Zepp, _____ Mont. _____, 567 P.2d 923, 929 (1977).

Unlike Montana, many jurisdictions early came to the realization that if an agreement providing for arbitration of existing disputes involving issues of law were enforceable, it would not violate public policy to make enforceable an agreement to arbitrate a future dispute involving an issue of law. These courts realized that even if the award of an arbitrator were to be based on an issue of law, the award was not enforceable until a court, with an opportunity to review the legal rationale, enforced the award. See Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 Pac. 680 (1925). However, these jurisdictions, unlike Montana, were not faced with a legislative mandate prohibiting the development of arbitration away from its common law limitations.

In 1895 the Montana legislature enacted a statute that codified the existing common law notion that courts cannot be denied their traditional jurisdiction over dispute settlement by agreements of the parties. School Dist. No. 1 v. Globe & Republic Ins. Co., supra 146 Mont. at 212.[4] This 1895 statute has been consistently interpreted by the Montana Court to make unenforceable an agreement to arbitrate future disputes unless the arbitration provision is limited to the determination of solely factual issues. Smith v. Zepp, supra 567 P.2d at 929; Green v. Wolf, supra 140

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[4] The statute provides: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract, by the usual proceedings in ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void. R.C.M. 1947 § 13-806.

Mont. at 423; State ex rel. Cave Const. Co. v. Dist. Ct., 150 Mont. 18, 22 (1967).[5] The Montana Court has indicated that such a narrow conception of arbitration is not truly arbitration but merely judicial recognition of commercial appraisal. School Dist. No. 1 v. Globe & Republic Ins. Co., supra 146 Mont. at 213. Thus, what is often referred to as arbitration in Montana is nothing more than legal recognition and enforcement of appraisal agreements in a commercial setting.

B. Arbitration in Labor Disputes.

Frequently a collectively bargained contract between an employer and a union will include a provision for dispute settlement ending in arbitration.[6] In view of the limited scope of arbitration in the commercial setting, the question arises whether the agreed method of labor dispute settlement will fare any better. Because the arbitration machinery in the labor agreement anticipates the resolution of all (factual and legal) future disputes, it could be argued that these arbitration agreements will meet with the same fate as found in commercial contracts. However, this is not the case.

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[5] The Montana Court has held that a provision requiring the arbitration of a future dispute involving an issue of "value or quality" is valid and enforceable. However, the court has consistently held that an arbitration award in a dispute involving an issue of "value or quantity" must be based solely on a question of fact, and that once the arbitrator relies on the "intent and meaning" of the contract in reaching his decision, he is involved in an issue of law and the award is void and unenforceable. State ex rel. Cave Co. v. Dist. Ct., supra 150 Mont. at 22.

[6] Most frequently the contract will provide for a grievance procedure which establishes an agreed method of dispute settlement. Often the grievance procedure will provide that unresolved grievances are to be submitted to arbitration, e.g. "grievance arbitration." A second method of arbitration occasionally provided for in a collective agreement calls for arbitration in the event the parties are unable to reach agreement on the specific provisions to be included in a subsequent contract. This method of labor dispute settlement is referred to as "interest arbitration."

suit for violation of a labor contract involving an employer engaged in interstate commerce may be brought in a Federal District Court without regard to the amount in controversy or diversity. 29 USCA 185(a). The great majority of cases brought under § 301 are actions to enforce promises to arbitrate and actions to enforce (or set aside) arbitration awards already rendered. Additionally, under § 301 a federal court can by declaratory relief rule that an employer is not required to arbitrate under the specific contract provisions. Gorman, Robert A., Basic Text on Labor Law Unionization and Collective Bargaining, 547 (1976).

Accordingly, if a Montana employer engaged in interstate commerce agrees to the arbitration of labor disputes, federal law provides for the enforcement of the agreement. The federal law, unlike Montana, does not limit arbitation of future disputes to solely the resolution of factual disputes.

If the arbitration clause is included in a labor agreement involving a Montana public employer (not subject to the federal legislation), it also appears that the clause will be enforced without regard to the limitations found in commercial arbitration. The Montana Collective Bargaining For Public Employees Act provides that nothing "prohibits the parties from voluntarily agreeing to submit any and all of the issues to final and binding arbitration," and any "agreement to arbitrate, and the award issued . . . shall be enforceable in the same manner as is provided in the act for enforcement of collective bargaining agreements." (Emphasis added.) R.C.M. 1947 § 59-1614(9). Thus, the legislature provided for enforcement of public employment arbitration provisions in the same manner as the enforcement of the collective bargaining agreement in which the provision is included. The problem is that the legislature did not (forgot to?) include a provision in the Act concerning the enforcement of the collective bargaining agreement.

However, this is not a significant problem. Collective bargaining agreements are universally enforced in the same manner as any other contract.[7] It is not reasonable to assume the Montana legislature intended any other procedure. If the legislature intended that "any and all" arbitration clauses would be enforced as collective bargaining agreements, and collective bargaining agreements are traditionally enforced as any other contract, then the only reasonable conclusion is that the legislature intended arbitration provisions to be fully enforced without the limitations found in commercial law.

The need to treat labor arbitration differently than commercial arbitration has long been recognized.[8] It appears that the Montana legislature recognized this distinction and clearly intended that public employee labor arbitration be fully enforceable. While the Montana Court has not spoken directly on this issue,[9] any such decision would certainly place much weight on the expressed legislative intent, especially in light of the universally recognized distinction between labor and commercial arbitration.

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[7] The National Labor Relations Act after which most state public employment acts are patterned, including the Montana Act, provides for judicial enforcement of collective bargaining agreements in a manner not unlike the enforcement of any other contract. 27 USCA 185(a).

[8] The Supreme Court has noted that in the commercial setting arbitration is the substitute for litigation, whereas in the labor setting arbitration is the substitute for industrial strife. United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 (1960). Given this distinction, the Court stated since "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. Id.

[9] In Butte Teachers Union v. Bd. of Ed., _____ Mont._____, 567 P.2d 51, 53 (1977). The Montana Court, without discussing any conflict, upheld a District Court order requiring the employer to arbitrate what appears to be clearly an issue of law under an arbitration clause requiring the arbitration of future disputes.

Accordingly, with labor arbitration provisions involving a Montana employer engaged in interstate commerce fully enforceable under federal law, and such provisions involving a Montana public employer enforceable under the Montana Public Employee Bargaining Act, the vast majority of labor arbitration provisions will be enforceable without regard to the limitations applied to commercial arbitration. For those few Montana solely intrastate employers who have a labor agreement providing for arbitration, it can be argued that the arbitration provision should be fully enforceable without regard to the limitations imposed on commercial arbitration, based upon the universally recognized distinction between labor and commercial arbitration. However, given the fact that Montana, unlike most jurisdictions, has a specific statutory limitation on arbitration, this argument might very well be rejected. See Smith v. Zepp, supra 567 P.2d at 929. Thus, an arbitration agreement involving a solely intrastate private employer might very well be subject to the limitations found in commercial arbitration while no such limitation would be applied to a similar agreement involving an interstate or public employer.

II. Comparison Between the Uniform Arbitration Act and Montana Law.

A summary analysis of the Uniform Arbitration Act and a comparison with current Montana law can conveniently be presented under three headings: (1) which agreements to arbitrate would the model act apply; (2) the judicial procedure applicable in the enforcement of arbitration agreements and arbitration awards; and (3) the hearing procedure used by arbitrators.

1. Agreements Covered.

As previously discussed, current Montana law provides that agreements to arbitrate future disputes involving legal issues are unenforceable. The Model Act eliminates this limitation. The Model Act provides for

the enforcement of a written agreement to submit any existing controversy, or a written contract provision to submit any controversy thereafter arising between the parties regardless whether the issue is legal or factual. Uniform Arbitration Act § 1. (Hereafter cited as U.A.A., see Appendix p. v.)[10] The Model Act also specifically applies to labor arbitration agreements, unless the parties specify otherwise. The equal treatment for both commercial and labor arbitration under the Model Act eliminates the present confusion in Montana law on this subject. See U.A.A. § 31.

2. Enforcement Procedure.

The Model Act provides that upon motion to the court (a court of competent jurisdiction in the state, e.g., a Montana District Court), a party may seek an order directing arbitration. The order must be granted if the court finds that there is an agreement to arbitrate covering the dispute in question and that the opposing party refuses to arbitrate. U.A.A. § 2(a). In the event there is an action or proceeding involving the issue pending before the court, the court must stay that action or proceeding, or sever the arbitrable issue from that action or proceeding. U.A.A. § 2(c) and (d). The purpose of staying the action or proceeding or severing the arbitrable issue from the action or proceeding is to prevent the court from preempting the arbitration process. The Model Act also provides that a court may not refuse an order for arbitration because the court believes the issue lacks merit. U.A.A. § 2(e). Whether the party seeking arbitration raises a meritorious issue is to be left to the decision of the arbitrator and the arbitration

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10 The Montana statute which provides for the enforcement of agreements to arbitrate existing disputes specifically exempts disputes involving title to real property. R.C.M. § 93-201-1. The Model Act has no such exemption. However, like the Model Act, the Montana statute makes enforceable only written agreements to arbitrate. R.C.M. § 93-201-2.

process must not be preempted by the court. Thus, when a party seeks a court order enforcing an arbitration provision, the court need only concern itself with whether there is a valid arbitration agreement and whether the agreement covers the dispute in question. Whether the issue raised has merit is left to the arbitrator. Current Montana law is in substantial agreement with these provisions of the Model Act.[11]

The other major area of judicial intervention concerns the enforcement of the award. The Model Act follows the traditional motions to confirm, vacate, correct or modify the award of the arbitrator. U.A.A. §§ 11, 12, 13. This corresponds to the method used in Montana. Compare R.C.M. §§ 93-201-6 through 93-201-8 with §§ 11, 12 and 13 of the Model Act.[12]

The Model Act provides that the court shall vacate an award on five separate grounds.[13] The Montana statute provides that a court may vacate

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[11] The Montana statute that authorizes arbitration on matters currently in dispute provides that the parties may stipulate that their agreement to arbitrate may be entered as an order of the district court. R.C.M. 1947 § 93-201-3. For arbitration awards not covered by the statute but authorized by common law, the Montana Court will enter an order enforcing a contract duty to arbitrate. School Dist. No. 1 v. Globe and Republic Ins. Co., supra 146 Mont. at 212-213. Where a party seeks to litigate an issue subject to arbitration, the Court had held that the action or proceeding must give way to the agreed upon arbitration settlement procedure. Id. Additionally, the Court has recognized that under a valid arbitration agreement, it is the function of the arbitrator, not the court, to evaluate the issue in dispute. Id.

[12] The Model Act does, however, integrate these motions. Thus, on motion to confirm the award, any grounds for vacating, correcting or modifying the award must be asserted by opposing party. U.A.A. § 13. Similarly, upon an unsuccessful motion to vacate, correct or modify, the Court will confirm the award. U.A.A. § 5 12(d) and 13(b).

[13] (1) the award was procured by corruption, fraud or other undue means;
(2) there was evident partiality by the arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
(3) the arbitrators exceeded their powers;
(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy or otherwise so conducted the

an award under similar circumstances. Compare R.C.M. 1947 § 93-201-7 with U.A.A. § 12. Other than the compulsory language in the Model Act requiring the Court to vacate and the permissive language of the Montana Act, there is little substantive difference between the two provisions.[14] Moreover, the Montana Court has recognized that its scope of review under common law arbitration is narrow, and its authority to vacate an award is limited to situations similar to those set forth in the Montana statute and the Model Act. McIntosh et al. v. Hartford Fire Ins. Co., 106 Mont. 434, 439-440 (1930). See also Lee v. Providence Washington Ins. Co., 82 Mont. 264, 274-275 (1928); Clifton Applegate - Toole v. Drain Dist. No. 1, 82 Mont. 312, 328-9 (1928). Accordingly, the Model Act does not represent a sharp departure from current Montana law on this subject.[15]

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hearing, contrary to the provisions of . . . (the Act concerning the hearing procedure), as to prejudice substantially the rights of a party; or

(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under . . . . (the provisions of the Act concerning judicial enforcement of the duty to arbitrate) and the party did not participate in the arbitration hearing without raising the objection. U.A.A. § 12.

[14] There are, however, differences, e.g., Montana provides that the Court may vacate an award if it is indefinite or cannot be performed, while it does not provide for vacating an award where the arbitrator was in fact not neutral. See R.C.M. 1947 § 93-201-7.

[15] The Model Act does provide that a Court may not vacate or refuse to confirm an award because the relief granted was such that could not be granted by a court of law or equity. U.A.A. § 12(a). The leading draftsman of the Model Act has indicated that the necessity for this provision is based on situations where corporate stock is evenly held by stockholders who cannot agree on a question of corporate policy. "It is an increasingly frequent practice to submit such disputes to arbitration and avoid dissolution." Pirsig, Maynard E., Toward a Uniform Arbitration Act. 9 Arb. Journal 115, 118 (1954). Of course, there is no applicable treatment under Montana common law, Montana will not even enforce arbitration awards involving legal issues.

3. Arbitration Hearings.

Dean Pirsig, the leading draftsman of the Model Act, has indicated that the goal of the arbitration hearing procedure in the Model Act "was to safeguard the essentials of a fair hearing without detracting from the informality, the freedom from technicality, and the dispatch which characterize arbitration hearings and which are commonly important reasons why the parties have agreed to resort to arbitration," Pirsig, supra note 15 at 118. The hearing procedure set forth in the Model Act meets this important goal. While, in comparison with the Montana Act, the Model Act specifically provides for more procedural options[16] and procedural safeguards,[17] these provisions are not consistent with the Montana Act or the decisions of the Montana Court. The Model Act merely goes further to assure that the arbitration process will be workable and fair.

IV. Conclusion.

Twenty states and the District of Columbia have adopted the Model Act. Most other states have statutes similar to the Model Act or judicial decisions affording full use of the arbitration process as a method of private dispute settlement. Given the present Montana statutory framework that locks in the out of date, universally rejected common law view of arbitration, the Montana legislature must act if Montana is to have a truly effective method of extra-judicial dispute settlement. The Montana

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16 The Court may appoint the arbitrator or arbitrators in the absence of an agreement between the parties, or if the agreed method fails, U.A.A. § 33; arbitrators may subpeona witnesses, records, etc. with court enforcement, and take depositions, U.A.A. § 37.

17 In the absence of an agreement to the contrary, and upon application by a party, the Court may fix the period of time after the hearing for the award, U.A.A. § 8(b); final awards are to be based on majority vote of arbitrators, U.A.A. § 5(c).

Court has similarly recognized that although "arbitration may be the most speedy and economical means available to parties for a binding resolution of their disputes," full utilization of this method cannot be made until the legislature acts. Smith v. Zepp, supra 567 P.2d at 923. In an era of crowded dockets and lengthy and expensive litigation, methods supporting private settlement of disputes should be encouraged. The Model Act or some tailored form of the Model Act is the best method to achieve this goal.

APPENDIX

CHAPTER 201

ARBITRATION—SUBMISSION TO

93-201-1. (9972) What may be submitted to arbitration, and when. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question relating to real property in fee or for life. This qualification does not include actions relating merely to the partition or boundaries of real property.

History: En. Sec. 302, p. 106, Bannack Stat.; re-en. Sec. 358, p. 207, L. 1867; re-en. Sec. 422, p. 122, Cod. Stat. 1871; re-en. Sec. 459, p. 163, L. 1877; re-en. Sec. 459, 2nd Div. Rev. Stat. 1879; re-en. Sec. 472, Code Civ. Proc. 1887; re-en. Sec. 2270, Code Civ. Proc. 1895; re-en. Sec. 7365, Rev. Stat. 1907; re-en. Sec. 9972, R. C. M. 1921. Cal. Code Civ. Proc. Sec. 1281.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, M. R. Civ. P., Rule 81(a) and Table A.

Fire Insurance Loss

Where the parties to a contract of fire insurance, upon destruction of the property, agree to submit the amount of loss to arbitration, the award fixes the amount of loss sustained, and is binding upon the parties, so that the insured cannot maintain an action upon the policy and have a readjustment of the loss, without first having the award set aside. Solem v. Connecticut Fire Ins. Co., 41 M 351, 109 P 432. See also Aetna Ins. Co. v. Fetterlin, 260 F 695, 700.

Legislative Power

The legislature has power to provide a method by which the parties to a controversy may waive a trial by a court and submit the matter to arbitrators selected by themselves, by whose award they are bound concluded in the absence of fraud, mistake, error, excess of power, and the like. Hall v. North-Butte Min. Co., 55 M 522, 179 P 499.

Present Existence of Dispute

This section contemplates voluntary submission of disputes in existence at the time of the submission, not to a contractual provision requiring arbitration of future disputes. Green v. Wolff, 140 M 413, 372 P 2d 427, 433.

Collateral References

Arbitration and Award⊂3.

6 C.J.S. Arbitration and Award §§ 10-13.

5 Am. Jur. 2d 559, Arbitration and Award, § 54 et seq.

Validity of agreements to arbitrate disputes generally as a condition precedent to the bringing of an action. 26 ALR 1077.

Power of municipal corporation to submit to arbitration. 40 ALR 1370.

Extraterritorial enforcement of arbitral award. 73 ALR 1460.

Arbitration of issues or questions pertaining to probate matters. 104 ALR 359.

Retention of jurisdiction in suit in equity to determine whole controversy, including amount of loss or damage, after setting aside an award or finding by arbitrators or appraisers. 112 ALR 9.

Dispute as to amount husband or father should pay for support of wife or child as subject of arbitration. 133 ALR 1334.

Validity of agreement to submit all future questions to arbitration. 135 ALR 79.

Construction of arbitration provisions of sales contracts as regards questions to be submitted to arbitrators. 136 ALR 264.

Violation or repudiation of contract as affecting right to enforce arbitration clause therein. 3 ALR 2d 383.

Constitutionality of arbitration statutes. 65 ALR 2d 432.

Arbitration of disputes within close corporation. 64 ALR 2d 643

93-201-2. (9973) Submission to arbitration to be in writing. The submission to arbitration must be in writing, and may be to one or more persons.

History: En. Sec. 303, p. 106, Bannack Stat.; re-en. Sec. 359, p. 207, L. 1867; re-en. Sec. 433, p. 122, Cod. Stat. 1871; re-en. Sec. 460, p. 163, L. 1877; re-en. Sec. 460, 1st Div. Rev. Stat. 1879; re-en. Sec. 473, 1st Div. Comp. Stat. 1887; re-en. Sec. 2271, C. Civ. Proc. 1895; re-en. Sec. 7366, Rev. C. 1907; re-en. Sec. 9973, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1282.

Collateral References

Arbitration and Award⇨6.

6 C.J.S. Arbitration and Award §§ 14, 17, 25.

93-201-3. (9974) Submission may be entered as an order of the court—revocation. It may be stipulated in the submission that it be entered as an order of the district court, for which purpose it must be filed with the clerk of the district court of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court or judge to make an award, and the award may be enforced by the court or judge in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

History: En. Sec. 304, p. 107, Bannack Stat.; re-en. Sec. 360, p. 207, L. 1867; re-en. Sec. 434, p. 122, Cod. Stat. 1871; re-en. Sec. 461, p. 163, L. 1877; re-en. Sec. 461, 1st Div. Rev. Stat. 1879; re-en. Sec. 474, 1st Div. Comp. Stat. 1887; re-en. Sec. 2272, C. Civ. Proc. 1895; re-en. Sec. 7367, Rev. C. 1907; re-en. Sec. 9974, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1283.

Collateral References

Arbitration and Award⇨13, 16.

6 C.J.S. Arbitration and Award §§ 26, 32 et seq.

93-201-4. (9975) Powers of arbitrators. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

History: En. Sec. 305, p. 107, Bannack Stat.; re-en. Sec. 361, p. 208, L. 1867; re-en. Sec. 435, p. 122, Cod. Stat. 1871; re-en. Sec. 462, p. 164, L. 1877; re-en. Sec. 462, 1st Div. Rev. Stat. 1879; re-en. Sec. 475, 1st Div. Comp. Stat. 1887; re-en. Sec. 2273, C. Civ. Proc. 1895; re-en. Sec. 7368, Rev. C. 1907; re-en. Sec. 9975, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1284.

Collateral References

Arbitration and Award⇨29-40.

6 C.J.S. Arbitration and Award § 48 et seq.

5 Am. Jur. 2d 587, Arbitration and Award, § 90 et seq.

Death of party to arbitration agreement before award as revocation of submission. 63 ALR 2d 754.

93-201-5. (9976) Majority of arbitrators may determine any question—oath of arbitrators. All the arbitrators must meet and act together during the investigation, but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

History: En. Sec. 306, p. 107, Bannack Stat.; re-en. Sec. 362, p. 208, L. 1867; re-en. Sec. 436, p. 122, Cod. Stat. 1871; re-en. Sec. 463, p. 164, L. 1877; re-en. Sec. 463, 1st Div. Rev. Stat. 1879; re-en. Sec. 476, 1st Div. Comp. Stat. 1887; re-en. Sec. 2274, C. Civ. Proc. 1895; re-en. Sec. 7369, Rev. C. 1907; re-en. Sec. 9976, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1285.

Absence of Arbitrator from Investigation

Where one of the arbitrators was absent during part of the investigation, though he may have authorized one of the other arbitrators to sign his name to the award, the investigation could not lawfully proceed, the award was null and void, and no valid judgment could be entered thereon. Quigley v. Ford, 2 M 330.

Collateral References

3 Am. Jur. 2d 616, Arbitration and Award, § 131 et seq.

Concurrence of all arbitrators as condition of binding award under submission to arbitration. 77 ALR 838.

Award or decision by arbitrators as precluding return of case to or its reconsideration by them. 104 ALR 710.

Right of arbitrator to consider or to base his decision upon matters other than those involved in the legal principles applicable to the questions at issue between the parties. 112 ALR 873.

93-201-6. (9977) Award to be in writing—when judgment to be entered. The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

History: En. Sec. 307, p. 108, Bannack Stat.; re-en. Sec. 364, p. 208, L. 1867; re-en. Sec. 123, Cod. Stat. 1871; re-en. Sec. 164, L. 1877; re-en. Sec. 464, Rev. Stat. 1879; re-en. Sec. 477, Comp. Stat. 1887; re-en. Sec. 2275, Pol. Code 1895; re-en. Sec. 7370, Rev. Codes 1907; re-en. Sec. 9977, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1286.

References

Hufline v. Lincoln, 53 M 474, 476, 164 P 883.

Collateral References

Arbitration and Award⇨48-84.

6 C.J.S. Arbitration and Award § 71 et seq.

Quotient arbitration award or appraisal. 20 ALR 2d 958.

93-201-7. (9978) Award may be vacated in certain cases. The court or judge, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in the discretion:

1. That it was procured by corruption or fraud.

2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3. That the arbitrators exceeded their powers in making the award; or that they refused, or improperly omitted, to consider a part of the matter submitted to them; or that the award is indefinite, or cannot be executed.

History: En. Sec. 308, p. 108, Bannack Stat.; re-en. Sec. 361, p. 208, L. 1867; re-en. Sec. 123, Cod. Stat. 1871; re-en. Sec. 165, L. 1877; re-en. Sec. 465, Rev. Stat. 1879; re-en. Sec. 478, Comp. Stat. 1887; re-en. Sec. 2276, Pol. Code 1895; re-en. Sec. 7371, Rev. Codes 1907; re-en. Sec. 9978, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1287.

Honest Effort by Arbitrators

Heating and plumbing contractor was entitled to enforcement of report of arbitrators against school district where ar-

arbitrators made a sincere, honest and intelligent effort to render a fair and just award. Hopkins v. School District No. 40, 133 M 530, 327 P 2d 395, 398.

Collateral References

Arbitration and Award⇨76-78.

6 C.J.S. Arbitration and Award §§ 103, 104.

5 Am. Jur. 2d 643, Arbitration and Award, § 167 et seq.

Improper attempt by influencing or by attempting to influence decision as ground for revocation of arbitration, or for avoidance of award thereunder. 8 ALR 1082.

Abandonment by mutual consent of award under arbitration. 32 ALR 1365.

Perjury as ground of attack on judgment entered upon an award in arbitration. 99 ALR 1202.

Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 ALR 2d 1160.

Loss of right to arbitration through laches. 37 ALR 2d 1125.

Arbitrator's consultation with outsider as justifying vacation of award. 47 ALR 2d 1362.

Vacation of award of arbitrators as to dispute within close corporation. 64 ALR 2d 662.

Time for modification or vacation of arbitration award. 85 ALR 2d 779.

§3-201-8. (9979) Court may, on motion, modify or correct the award. The court or judge may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some persons or property therein;

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

History: En. Sec. 309, p. 108, Bannack Stat.; re-en. Sec. 365, p. 209, L. 1867; re-en. Sec. 439, p. 123, Cod. Stat. 1871; re-en. Sec. 466, p. 165, L. 1877; re-en. Sec. 486, 1st Div. Rev. Stat. 1879; re-en. Sec. 477, 1st Div. Comp. Stat. 1887; re-en. Sec. 2277, C. Civ. Proc. 1895; re-en. Sec. 7372, Rev. C. 1907; re-en. Sec. 9979, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1288.

Collateral References

Arbitration and Award⇨69, 76.

6 C.J.S. Arbitration and Award §§ 91, 103, 110.

5 Am. Jur. 2d 624, Arbitration and Award, § 143.

Time for modification or vacation of arbitration award. 85 ALR 2d 779.

References

Hopkins v. School District No. 40, 133 M 530, 327 P 2d 395, 399.

§3-201-9. (9980) Decision on motion subject to appeal, but not the judgment entered before motion. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before motion made cannot be subject to appeal.

History: En. Sec. 310, p. 109, Bannack Stat.; re-en. Sec. 366, p. 209, L. 1867; re-en. Sec. 440, p. 123, Cod. Stat. 1871; re-en. Sec. 467, p. 165, L. 1877; re-en. Sec. 487, 1st Div. Rev. Stat. 1879; re-en. Sec. 480, 1st Div. Comp. Stat. 1887; re-en. Sec. 2278, C. Civ. Proc. 1895; re-en. Sec. 7373, Rev. C. 1907; re-en. Sec. 9980, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1289.

§3-201-10. (9981) If submission be revoked and an action brought, what to be recovered. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

Exhibit B

LEGISLATIVE FACT SHEET

Premium Finance Act

The proposed Insurance Premium Financing Act would provide for the licensing of finance companies who help insured parties pay their insurance premiums. The Insurance Premium Financing Company pays the insurance premium to the insurer on behalf of the insured. The insured then pays the premium plus a finance charge in periodic installments to the financing company.

Current Montana law does not provide for the licensing and regulation of these companies. The Act would enpower the Insurance Commissioner to grant licenses to finance companies meeting the qualifications set forth in the Act and to regulate the companies. The Act also provides penalties for those who fail to abide by its terms. Several other regulations in the act provide for uniform services by premium financing companies and regulate interest rates charged.

This Act is supported by E. V. "Sonny" Omholt, State Auditor and Commissioner of Insurance.

Uniform Arbitration Act

Although Montana does not prohibit agreements to arbitrate existing disputes, Montana and a handful of other states following the old common-law rule do not recognize agreements to arbitrate future disputes. Hence, although every other provision of a contract may be enforced by Montana courts, voluntary agreements to arbitrate disputes that arise in the future can be revoked by any party, and the other party has no recourse through court enforcement. Consequently, the beneficial features of arbitration are not available to Montanans. By contrast, 36 states, Puerto Rico and the United States Government have enacted the Uniform Arbitration Act making agreements to arbitrate future disputes binding, irrevocable and enforceable.

The net result is that Montana attorneys and businessmen do not have the same freedom to choose an arbitration forum in Montana as they have in most other states. Montanans are forced to congest court calendars by litigating all contractual disputes in district court.

The support for arbitration by business, construction and professional communities is attributable to many factors.

(over)

First, parties can select arbitrators who are familiar with the practices and customs of the trade and with such matters as current prices, merchantable quality, the terms of sale and similar considerations.

Second, arbitration makes possible speedy and less-expensive settlement of disputes. The United States Supreme Court has on numerous occasions cited commercial arbitration as a desirable method of resolving private disputes and taking a large volume of private conflicts out of the courts.

Although the Uniform Act does allow laymen to appear before the arbitrator, it should be made clear that lawyers are in no way displaced by arbitration. Most businessmen do not use arbitration today except with the advice and consent of their attorneys. Indeed, it is usually an attorney who drafts a contract containing the arbitration clause. He also presents or defends claims in arbitration. And, attorneys are frequently asked to serve as arbitrators.

The Uniform Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1955 and approved by the House of Delegates of the American Bar Association in 1956. In 1976 the House of Delegates reiterated its endorsement of the Uniform Act by recommending that states enact it for use in medical professional liability disputes.

Exhibit C 7/13

SUMMARY OF TESTIMONY TO HOUSE BUSINESS AND INDUSTRY COMMITTEE

submitted by

DONALD S. SMITH
Associate General Counsel
IFG Leasing Company
February 16, 1981

My company is in favor of the adoption of the Uniform Arbitration Act because it allows agreements to arbitrate future disputes. Current Montana law prohibits contractual agreements to arbitrate future disputes.

We became aware of the advantages of the Uniform Arbitration Act through the course of business dealings in other states. Our contracts provide for the arbitration of future disputes in those states where it is permissible.

Quicker Resolution of Disputes

Attorneys representing us in Oregon and Washington report that a normal legal action within the judicial system will take from one and one-half to three years for a decision. The time length will vary depending on the case load of the particular forum.

In contrast, they report that arbitration normally resolves a similar dispute within two to three months.

Lower Overall Legal Expenses

Local office personnel often represent our company in smaller or uncomplicated disputes. The attorneys concentrate their time on the larger more complex cases. Arbitration has fewer time delays during the prosecution of a case, which saves time as well as allowing attorneys to use their time more productively.

Expert Arbitrators

Arbitrators are generally experts in the field and have a grasp of the technical aspects and relevant issues at hand. Informal arbitration hearings conducted by expert arbitrators usually require less than four hours to complete.

Uniformity of the Act

Adoption of the Uniform Act will bring Montana into conformity with the modern arbitration law of the United States Government and 36 of its sister states.

NAME Gregg L. McCurdy BILL No. HB713

ADDRESS Box 234 Avon, MT. DATE 2/16/81

WHOM DO YOU REPRESENT MT. Arbitrators Assn.

SUPPORT X OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

FORM CS-34
1-81