MINUTES OF THE JUDICIARY COMMITTEE
February 21, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown in room 224A of the Capitol building at 7:03 a.m. All members were present as was Ms. Brenda Desmond, Staff Attorney for the Legislative Council.

HOUSE BILL 854

REPRESENTATIVE PAVLOVICH, District 86, Butte, explained that this was a bill to authorize the use of certain mechanical or electronic machines for playing poker and he asked that the committee table this bill at the request of the county attorneys.

KATHY CAMPBELL, representing the Montana Association of Churches, stated that they opposed this bill. See EXHIBITS A and B.

SHIRLEY SHEETS, representing herself, also testified that she opposed this bill.

REPRESENTATIVE DAILY made a motion to TABLE this bill. The motion was seconded by REPRESENTATIVE KEYSER. The motion carried unanimously.

HOUSE BILL 816

CHAIRMAN BROWN explained this action was per previous agreement when Representative Curtiss' bill was tabled as the committee wanted to wait until the Supreme Court's decision impending gambling cases.

REPRESENTATIVE KEMMIS testified that this bill restricts the application of the exclusionary rule and replaces the exclusionary rule with other mechanisms. He explained that the bill contains provisions for civil liability for violations of search and seizure law. He stated that he is convinced that if we are to replace the exclusionary rule with anything, that what we need is an effective deterrent to illegal police action; and the best way would be to involve the cities and counties. He felt that if cities and counties know that they may be subject to extensive damages, including damages for emotional distress and invasion of constitutional rights, then they will be motivated to involve themselves in this kind of police action that is the best protection of individual rights. He advised that the list of damages were on the bottom of page 2 and the top of page 3.

JIM RANNEY, who is on the faculty of the University of Montana Law School, said that he did not have to tell the committee why the exclusionary rule is a bad idea. He offered his views. See EXHIBIT C. He also commented that he would like to offer some amendments, but felt that he could do this at the Senate level.

KARLA GRAY, representing the Montana Trial Lawyers' Association testified that she felt this bill was unrealistic and unwise; that the remedies provided in this bill would only be used by people like those on the committee and herself whenever the arm of the government over-reaches for they will seek a way to protect themselves. She did not feel civil remedies would be used by the people who are most likely to suffer from illegal searches and those who are most likely to become criminal defendants - the poor, the minorities, etc. She felt that the idea of recovering damages for injuries to reputations or for mental or emotional distress is ridiculous in the case of a convicted criminal; that exemplary and punitive damages are unlikely, and as far as disciplinary action, she said that she had a hard time believing in this concept.

BOB REUE, representing the Missoula Chapter of the American Civil Liberties Union, stated that this is the most intelligent bill of all the exclusionary bills that are being considered but he still felt this was a radical bill. He wondered about the social costs involved, the county attorneys being in charge of enforcing disciplinary procedures, the reasonable good faith defense and he stated that the exclusionary rule exists to preserve the integrity of the courts and to protect the constitutional rights of each person.

There were no further opponents.

REPRESENTATIVE KEMMIS agreed that the conflict of the county attorney is a very real difficulty, but that could be overcome by instituting something like the concept of a private attorney general - that where such a conflict exists the criminal defendant would have the option of hiring a private attorney and attorneys' fees would be made available. He stated that if the committee felt that this was going to be ineffective, then he would ask that they not pass the bill; but if this bill does not do it, they can be sure that the good faith exception bills do not do it.

REPRESENTATIVE KEYSER asked MR. REUE about a statement he made in regard to the U.S. Supreme Court and he wondered if we should ignore what the U.S. Supreme Court says if the Montana Supreme Court rules otherwise. MR. REUE answered that just

because the U.S. Supreme Court might cut back on the Fourth Amendment, that we, in Montana, have our own similar protections here and also a very specific protection to the right of privacy. He commented that the Montana Supreme Court has extended those rights farther than the U.S. Supreme Court.

REPRESENTATIVE KEYSER said that if the U.S. Supreme Court decision comes down, then we could assume that it was the final decision and the state Supreme Court does not have precedent over the U.S. Supreme Court. MR. REUE replied that there is nothing that would prevent Montana from requiring greater rights under its own laws.

REPRESENTATIVE KEYSER questioned if the U.S. Supreme Court overruled the Montana Supreme Court, who has the final say. MR. BEUE replied that obviously, the U.S. Supreme Court would have.

REPRESENTATIVE KEMMIS explained that this is a difficult concept but in this area the Montana Supreme Court has chosen to give a broader scope of individual rights under the Montana Constitution than the U.S. Supreme Court and this right will be final, will be binding and will prevail. He stated that it would not work the other way.

REPRESENTATIVE KEYSER wondered if there was a case where this had been decided. REPRESENTATIVE KEMMIS answered that it was not a question of overruling - the U.S. Supreme Court is not going to pass on the Montana Constitution - all it is going to talk about is the federal constitution and he stated that the Montana Constitution has two provisions that are special to Montana and one is the privacy provision and that our right to privacy is broader than what the U.S. Constitution provides.

REPRESENTATIVE SPAETH questioned MS. GRAY that if a person was found guilty, that then there would not be much chance of a civil remedy. MS. GRAY answered that she would agree to that. REPRESENTATIVE SPAETH asked if a civil remedy may be available to a person found guilty, if the rights of that person had been so horrendously violated. MS. GRAY answered that the remedy would always be available if this bill was passed. She stated that she would have to concede that the more blatant and intentional the violation had been, the more likelihood there would be of recovering something in the way of civil damages.

REPRESENTATIVE SPAETH said that you would have a civil remedy in almost all instances when the individual was not found guilty

on that search, but if it were the wrong house or the wrong neighborhood, civil remedies would be available. MS. GRAY replied that she thought he was right.

CHAIRMAN BROWN explained that they would hold the hearing open on this bill as it was scheduled to start at 8:00 instead of 7:00, in case there were other people who wanted to testify.

HOUSE BILL 857

REPRESENTATIVE ABRAMS, District 56, stated that this bill was at the request of the Department of Justice and is an act which authorizes mutual aid agreements among law enforcement agencies of this and other states and the United States.

COLONEL ROBERT LANDON, Chief Administrator of the Highway Patrol Division, testified that they need this bill because they need to assist each other in bordering states and sometimes need to have help from several agencies in Montana. He explained the situation in Cooke City where the road winds between Montana and Wyoming and where the officers in Wyoming could respond to problems in Cooke City.

STEVE JOHNSON, Assistant Attorney General, offered testimony in support of this bill. See EXHIBIT D.

There were no further proponents and no opponents.

REPRESENTATIVE ABRAMS closed.

CHAIRMAN BROWN questioned if it would be possible under this bill for the highway patrolmen to more stiffly enforce the 55-mile-an-hour speed limit. MR. JOHNSON replied that this was not in the agreement.

REPRESENTATIVE KEYSER asked if this provides for the state to enter into an agreement with the U.S. government. MR. JOHNSON replied that it did not.

REPRESENTATIVE KEYSER asked about an agreement with the Park Service and MR. JOHNSON replied that this would establish the general framework if both parties are willing to enter into it.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 875

REPRESENTATIVE STELLA JEAN HANSEN stated that this was an act to create a real estate recovery account for the payment of unsatisfied judgments against real estate salesmen and brokers.

JIM TILLOTSON, Administrative Officer and Attorney for the Board of Realtors, gave a summary of the bill and went over all the provisions contained therein.

DENNIS REHBERG, representing the Montana Association of Realtors offered testimony in favor of this bill. See EXHIBIT E.

WILLIAM SPILKER, representing himself, stated that he was in support of this bill, that he was a real estate broker and he explained his reasons for this support.

FRITZ GILLESPIE, representing the Western Surety Company, offered testimony opposing this bill. See EXHIBIT F.

GLEN DRAKE, representing the American Insurance Association, spoke in opposition to this bill. See EXHIBIT G. He also presented a copy of the bond that is provided. See EXHIBIT H.

REPRESENTATIVE HANSEN closed stating that from the standpoint of all the secretaries that work in real estate offices, they are all in favor of this bill, and she would encourage the committee to give this bill a do pass.

REPRESENTATIVE KEYSER asked MR. REHBERG if 37-51-321, which is revocation or suspension of licenses, had not been left intact. MR. REHBERG answered that that was correct, but unfortunately, it is their belief that there is no knowledge in the State of Montana as to whether there is a draw on an account with Western Surety out of South Dakota. He stated that this section is perhaps a better section.

REPRESENTATIVE KEYSER asked MR. DRAKE about a statement he made that this law gives the realtors more protection than the bonding requirements under present statutes do and yet, under the present statutes, it says that they cannot receive this $10,000.00 unless it is on a judgment. He wondered what was the difference. MR. DRAKE responded that you can see that the following types of things are prohibited practices - intentional misleading, untruthful or inaccurate advertising, making false promises. He said that under bond if you get a judgment against the realtor for violation of this provision, the bond covers; but under the proposed law, you would not be able to recover for

anything except fraudulent, deceptive or dishonest practices. He stated that the bond is going to cover for a far wider range of acts than does the recovery fund proposed.

REPRESENTATIVE KEYSER wondered if he would have any problem if that language there was stricken and then language put in there that would refer to 37-51-321. MR. DRAKE answered yes, because in addition in regard to the method of collection, the present law says you have to get a judgment, as a matter of practice that is not done, but under this law there are some procedural areas that he feels is going to stop people from even attempting it.

CHAIRMAN BROWN asked MR. TILLOTSON to respond to REPRESENTATIVE KEYSER's question. MR. TILLOTSON replied that the question of fraudulent deception and dishonest practices is very similar to the statutory language they see presently in the law, as far as suspension or revocation of license. He stated that the bonds clearly say that surety company is obligated only if the licensee fails to pay the judgment against him.

REPRESENTATIVE RAMIREZ said that they do not want to be bound by the judgment and he wondered what they were concerned about. MR. TILLOTSON replied that he wanted a mechanism whereby the board could defend in those situations and could get to the actual merits of the case. He said that in 90 percent of the cases, the board won't even appear.

REPRESENTATIVE EUDAILY wondered if they would be able to file claims against the state. MR. TILLOTSON replied that he had not looked at the statute that Mr. Gillespie referred to, but he doubted seriously if that would be the situation. He said that if at any time there is not money, they simply postpone the payment of these claims.

REPRESENTATIVE EUDAILY wondered where the fairness was if they have to wait if they have a legitimate claim. MR. TILLOTSON said that they are waiting now and that this is not a substitute for insurance - this is a fund of last resort - and without this fund they would be out of luck.

REPRESENTATIVE EUDAILY wondered about the initial $50,000.00. MR. TILLOTSON answered that the Board of Realtors' Regulation is a self-sustaining operation, funded by fees and there are adequate monies there now to temporarily fund this.

REPRESENTATIVE SEIFERT asked if they knew how many of these claims are filed every year and MR. REHBERG replied that they were never able to get this information.

REPRESENTATIVE SEIFERT asked the same question of MR. GILLESPIE. He stated that he did not know the number of claims, but in 1981, the information that he received was that Western Surety alone paid $24,500.00 and if the licensee demands an active defense, they will provide attorney's fees of about $2,200.00 to $2,400.00.

REPRESENTATIVE SEIFERT questioned what they charge for a $10,000.00 bond. MR. REHBERG answered that it was $50.00 a year, or you can buy a bond for a three-year period for $100.00.

REPRESENTATIVE JENSEN wondered under what situations would someone be unable to get satisfaction before coming to this fund and if the bond protection would be insufficient. MR. TILLOTSON said that it is not a situation where the bond protection would not cover, other than the fact that the recovery fund is a larger amount, but he thought that this was a simpler mechanism for injured parties than the present law at a substantial saving to everyone involved. He informed the committee that he had some information from Jim Baker of Western Surety that from June 30, 1981 to June 30, 1982, that Western Surety had paid $11,435.00 in judgments against Montana licensees, and during the immediate preceding period, they had paid a total of $32,500.00.

REPRESENTATIVE JENSEN explained that it occurred to him that if you have a realtor engaged in deceptive practices, those practices could be spread over more than one client and he felt that $10,000.00 is not very much money and probably $15,000.00 is not very much. MR. TILLOTSON replied that the individual assets of the licensee are at risk first, before either the present bonds or the recovery bonds.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 816 (Hearing reopened)

JOHN SCULLY, representing the Montana Sheriffs' and Peace Officers' Association, stated that if the committee passes this

bill, they better be sure that they pass a lot of money to county officials in the local government because, in order to go through the procedures of this bill, they are going to spend a lot of time in court dealing with specific issues that the bill raises. He advised the committee that this would amount to much more time than they do now and much more time than that resulting from good faith bills; they they would have to have extra district judges, extra prosecutors, extra hearings concerning disciplinary actions against different people at different times and at the same time, they are going to be involved in trying to convict the criminal. He told the committee that it is just not going to work. He gave the committee a scenario of how involved and confusing this could be.

MARC RACICOT, Prosecutor Coordinator for the Attorney General, advised the committee that to say that the county attorneys were vehemently opposed to this bill would be understating their position. He explained that the liaison between county attorneys and enforcement officers is very often a strained alliance most of the time and this bill will drive a deeper wedge. He felt that an offender could use the threat of a civil action as a plea-bargaining tool; and he stated that there is a lot of litigation involved and he wondered what would happen to the criminal case at that point. He also wondered when the civil case is supposed to be filed and how is it going to affect other procedures. He also contended that county attorneys are involved in the search-warrant action about 90 to 100 percent of the time and they are going to be subject to suit also; that this could make an adversary relationship between attorney general and the county attorneys and drive in a wedge; and he was concerned about pre-trial supression. He felt that the good faith exception was probably the best way to go because the people can understand that and so can the police. He felt this bill was entirely too speculative.

REPRESENTATIVE JENSEN questioned PROFESSOR RANNEY if he perceived the same situation with the judge disqualifications that Mr. Scully was arguing. MR. RANNEY replied that he did not think it would be quite as complicated as he described; they would be relying on private lawyers just like in any other lawsuit and the city attorney is going to be representing the city and there should be a number of judges that could be available. He contended that the testimony that this would somehow make the exclusionary rule more applicable is utterly preposterous and he felt that this would be more restrictive than the good faith test. He said that he was not opposed to the good faith exception, but he felt that this was better in regards to motifying the exclusionary rule.

REPRESENTATIVE RAMIREZ asked if they could plug the good faith exception into the exclusionary rule, but still have a disciplinary procedure and a civil action, would that be acceptable to law enforcement or are they just absolutely opposed to any kind of disciplinary action. MR. SCULLY said that they already have a civil action from the federal standpoint; if you look at police codes and those kind of things as an ongoing activity, there is already disciplinary action. He contended that the trouble with disciplinary and the civil actions is when you tie it to the criminal, you will have all three going on simultaneously; and you will be worse off in the criminal proceedings. He voiced concern that when that officer is acting in good faith as to what he thinks the law is, there is no one there to defend him.

REPRESENTATIVE RAMIREZ said that he recognized that there are some real problems in the mechanism in HB 816 as far as the disciplinary and civil actions are concerned, they had this type of bill before in two or three sessions; and he said that in at least one of the bills, it was a combined proceeding and was not brought by the county attorney - it was a proceeding brought by the injured person. He wondered if MR. SCULLY had any real strong feelings about that kind of a proceeding if you have the reasonable good faith exception to the exclusionary rule. JOHN SCULLY responded that if he were the sheriff, he would have to decide whether he could hire or fire an employee, over and above what the city commission says; and we are going to make findings as to whether or not good faith was acted on. He stated that he did not think this was a good idea. He also continued that the police officers' association has stood here alone ever since Burger's dissenting opinion, and he thinks people fail to realize how much of a deterrent there is. He felt that if the reason for the exclusionary rule is for discipline and for the civil suit, then he would say that we already have a civil suit, we already have discipline and if you are upset with the way the disciplinary procedures work, then action should be directed to that end rather than using the exclusionary rule.

REPRESENTATIVE RAMIREZ asked MR. RACICOT if he could support the civil liability concept if it eliminated the conflicts of interest if it had the good faith exception. MR. RACICOT replied that this could be mixing apples and oranges. He wondered if you have civil liability, why should you only allow the illegal evidence to be admissable whenever it is obtained in reasonable good faith.

REPRESENTATIVE RAMIREZ questioned if this is a deterrent. MR. RACICOT replied that he was sure it was a deterrent if you have civil action and disciplinary action and he commented that he has no problems with this under certain conditions. He explained that he had submitted amendments to HB 382 and they had worked on these a long time and they felt they had come up with a bill that was acceptable - that did provide for civil liability and disciplinary action and they think that is a possibility along those lines, but they did not feel that there is such a great problem on such a daily basis, that you need to take such a radical step.

REPRESENTATIVE RAMIREZ questioned MR. RANNEY if he was opposed to the good faith exception. MR. RANNEY stated that he was not - that it was not his first choice but that it is preferable to what we have now.

REPRESENTATIVE RAMIREZ asked if he felt that a food faith standard coupled with disciplinary action would be a reasonable approach to the same problem. MR. RANNEY answered no, and he said the only substantial difference in other legislation that was drafted is that punitive damages and damages for mental distress are allowed in HB 816. He explained that the reason for that is unless you provide that kind of damages, you are not going to have lawsuits at all, because typically the average property damage may be $10.00. He said that the real loss is a type of mental distress.

REPRESENTATIVE RAMIREZ said that he had a copy of what used to be the A.L.I. standards and they seemed to be quite significantly different and he wondered if he had any opinion as to which is the better standard. MR. RANNEY replied that he felt the standards in this bill were better than the A.L.I. standards and there was a long history to them.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 855

REPRESENTATIVE RAMIREZ explained this bill, which was requested by the legislative committee of the Montana Bar Association, and which revises Montana's probate code with respect to renunciation of succession, to revise the alternate valuation for inheritance and estate taxes, to revise the status relating to deferred payment of inheritance and estate taxes and to revise the apportionment of estate and inheritance taxes.

DAVID NIKLAS, an attorney in private practice in Helena and a member of the State Bar of Montana, the bar's section on taxation and probate, and also a member of the legislative committee of that section, said that this bill contains about four different housecleaning provisions and explained these provisions.

There were no further proponents and no opponents.

There were no questions and the hearing on this bill was closed.

HOUSE BILL 848

REPRESENTATIVE MENAHAN said that he would have the people testify on this bill and then close. This is an act providing for prejudgment interest at the rate of 10 percent a year on a judgment greater than an offer of settlement refused by the defendant.

KARLA GRAY, representing the Montana Trial Lawyers' Association, testified that prejudgment interest is a concept whose time has come; that first it provides fairness to the plaintiff or claimant and prevents unjust enrichment to the defendant. She contended that the basic premise of the tort system is to make the injured person whole - that is to fully and fairly compensate him or her for his or her losses. She continued that to truly make an injured person whole, he should receive interest on his damages to reflect the period of time over which he has not had access to compensation to which he is entitled, and to alleviate additional loss, which results because of the inherent income-producing ability of money. She concluded that justice delayed is justice denied.

REPRESENTATIVE DAVE BROWN advised the committee that the following attorneys from Butte wished to be reocrded as in favor of this bill: Neil Lynch, R. Lewis Brown, Leonard Haxby, Dave Holland and Dan Sweeney.

WARD SHANAHAN, representing the Farmers' Insurance Group offered testimony in favor of this bill. See EXHIBIT I.

BOB JAMES, representing the State Farm Insurance Company and the National Association of Independent Insurers, said that if this law passes, there will be two things that happen: (1) there will be an increase in the number of lawsuits that are going to be filed and (2) the demand letter that is contained in this bill is going to be abused. He explained that the

interest starts when the lawsuit is filed and almost every law firm will adopt the policy that any time anyone comes to file a claim, they are going to immediately file suit - not to do so would probably be malpractice. He testified that there are only thirteen states that have prejudgment interest laws at the present time.

GLEN DRAKE, representing the American Insurance Association, offered testimony opposing this bill. See EXHIBIT J.

REPRESENTATIVE MENAHAN explained that this bill came about because of a friend of his, who had been injured, is unemployed and to this date, has not received any compensation from the insurance company. He wondered how many people have been involved in some kind of an action and have been treated unfairly by the insurance companies.

REPRESENTATIVE SPAETH commented that right now he does not see any real incentive for insurance companies to settle cases in any hurry and he wondered if there were any type of incentive other than this type of thing. MR. DRAKE replied that in the case of Klaudt vs. Flink and State Farm that this does exactly that because it says that under the Unfair Trade Practices section of the Montana Insurance Code, that any time that liability has become reasonably clear, from that point, the insurance company must come in and attempt settlement on a reasonable and fair basis. He said that this is the toughest tool that he has seen anywhere.

REPRESENTATIVE KEYSER questioned KARLA GRAY if the defending attorney would get an increase of fee. MS. GRAY replied that certainly not all settlements would be covered under the terms of this bill, but if he is speaking of a final judgment, she thought that might be true but she did not think it any more true than when the juries throw in some more damages.

REPRESENTATIVE RAMIREZ asked if she would agree that occasionally some of the delays in these lawsuits are directly accountable to delays of the plaintiff, and in those situations, would he still get interest under this bill. MS. GRAY answered that that is certainly true.

REPRESENTATIVE RAMIREZ queried if there were not many, many cases where they are not pushed because of problems on the plaintiff's side just as much as the defense. MS. GRAY replied that she would not agree heartily because she simply did not know.

There were no further questions and the hearing on this bill was closed.

HOUSE JOINT RESOLUTION 29

REPRESENTATIVE RAMIREZ testified that this bill was drafted at the request of the House Judiciary Committee and that it requests an interim study of the insurance laws of the state of Montana and requires a report of the findings of the study to the 49th Legislature. He said that he felt that we did not have adequate information and felt that it should be studied for a couple of years.

CHAIRMAN BROWN emphasized that he was strongly in support of this resolution.

REPRESENTATIVE KEYSER stated that he would like to be listed as a proponent.

LES LOBLE, representing the American Council of Life Insurers, made a short statement in support of this bill.

GLEN DRAKE, representing the American Insurance Association, stated they supported this bill.

BOB JAMES, representing the State Farm Insurance Company, rose in support of this bill.

ROGER McGLENN, representing the Independent Insurance Agents Association of Montana, appeared in support of this bill.

There were no further proponents and no opponents.

REPRESENTATIVE RAMIREZ closed saying that he hoped the womens' lobbyist group would be in favor of this bill and he hoped that this resolution will pass.

REPRESENTATIVE ADDY commented that it appeared to him that this resolution on page 1, line 19 through page 2, line 21 is laying the groundwork for an attack on HB 358. REPRESENTATIVE RAMIREZ replied that he did not think this was the intention and if he looked at page 2, lines 6 through 11, this would strongly favor HB 358. He said that this was not designed to

criticize or anything else and he would be favorable to changing some of the language. REPRESENTATIVE ADDY said that he might be interested in striking the 4th, 5th, 7th, 8th, and 9th "Whereas" changes.

REPRESENTATIVE RAMIREZ said that he did not think that anyone would question the fact that this could "result in a fundamental change" and would "merit careful consideration."

REPRESENTATIVE BERGENE asked BOB JAMES, if he would agree that they could share in a study like this and come to grips with sex discrimination and really address it. MR. JAMES replied that there would be no question about it.

REPRESENTATIVE SPAETH said that he looked at HB 848, which we just heard, and he felt it was flawed and wondered if this could be included in this resolution. REPRESENTATIVE RAMIREZ said that he thought it could and he did not have any problems with attacking other insurance problems.

REPRESENTATIVE JENSEN questioned if it would be in the best long-range interest of insurance companies to study these matters in the interim so that they have some further information for the passage of laws. GLEN DRAKE replied that certainly the industry is controlled by legislation and he stated that there are some bills similar to HB 358 before congress now that are being looked at.

REPRESENTATIVE JENSEN wondered if this would increase the passage of bills. MR. DRAKE said that one major problems is that they do not have factual actuarial information and they do not have alternatives at this time.

REPRESENTATIVE RAMIREZ asked CELINDA LAKE, who represents the Women's Lobbyist Fund, if they would strike on page 2, line 9, after "sex" the language "but does not have sufficient information available at this time" and insert "and wishes" and also struck the same language in the next paragraph, and also the language on line 18, "because of this lack of information, in enacting legislation on this issue," would that be acceptable to them to the point where they could support this bill. MS. LAKE said that she felt this would help a lot but she thought there was a lot of camouflage concerning this issue.

REPRESENTATIVE CURTISS questioned MS. LAKE wondering if they would object if they added another "Whereas", stating that the legislature does not have adequate information on the scope of potential impact on insurance rates for all parties. MS. LAKE replied that they fundamentally believe that the legislature does have the information they need to pass this kind of legislation.

There were no further questions and the hearing on this bill was closed.

EXECUTIVE SESSION

HOUSE BILL 857

REPRESENTATIVE HANNAH moved that this bill DO PASS, seconded by REPRESENTATIVE JENSEN.

CHAIRMAN BROWN asked REPRESENTATIVE KEYSER if he saw any problems with this bill beyond the scope of Cooke City. REPRESENTATIVE KEYSER replied that it will probably help Cooke City, it will probably help 191, where they have had some problems investigating accidents and he thought it would even help on the Idaho border. He stated that there were strong restrictions and if there was any expansion, he would be opposed to it.

REPRESENTATIVE CURTISS questioned on page 5, line 9, where it says "This state may maintain an action against any law enforcement agency" if this would cause any problems. REPRESENTATIVE KEYSER replied that he thought they were entering into an agreement with another state, but the state maintains the right to bring an action against that state agency for any failure that might be done.

REPRESENTATIVE EUDAILY wondered why they need to appropriate funds. REPRESENTATIVE IVERSON replied that that is not a state appropriation.

REPRESENTATIVE EUDAILY moved to delete Section 11 on this bill. REPRESENTATIVE IVERSON said that he did not think they should do that - that they only need to spend some money to hold up their half of the agreement. REPRESENTATIVE DAVE BROWN pointed out that all that does is authorize them to use appropriated funds to carry out the agreement authorized under this bill.

The motion to DO PASS carried with REPRESENTATIVE EUDAILY and REPRESENTATIVE DAVE BROWN voting no.

HOUSE BILL 381

REPRESENTATIVE HANNAH moved that this bill DO PASS. The motion was seconded by REPRESENTATIVE DAILY. REPRESENTATIVE ADDY made a substitute motion to TABLE this bill. REPRESENTATIVE FARRIS seconded. The motion carried with 10 voting for and 9 voting no. See ROLL CALL VOTE.

HOUSE BILL 816

REPRESENTATIVE ADDY moved DO PASS. REPRESENTATIVE KEYSER made a substitute motion that the bill be TABLED. The motion was seconded by REPRESENTATIVE IVERSON. The motion carried with REPRESENTATIVE ADDY, REPRESENTATIVE DARKO, REPRESENTATIVE RAMARIZ, and REPRESENTATIVE SPAETH voting no. See ROLL CALL VOTE.

HOUSE BILL 382

REPRESENTATIVE RAMIREZ moved that HB 382 be taken from the table and be reconsidered. He explained that he wanted an exclusionary bill to be debated on the floor and he thought that this bill was the best of the three bills. REPRESENTATIVE KEYSER seconded the motion.

REPRESENTATIVE RAMIREZ stated that not everyone would be happy with this bill, as the law enforcement people do not want disciplinary actions and they do not want the civil liability and he felt that this bill protects the rights of everyone involved and does it in a way that avoids all the procedural problems in HB 816.

REPRESENTATIVE ADDY indicated that he disagreed with virtually everything REPRESENTATIVE RAMIREZ had said, including the procedural problems, but he thought everyone had their mind made up already.

REPRESENTATIVE SCHYE exclaimed that he could not, in good faith, vote for any of the bills and he explained that what we have now does a good job - it protects the Fourth Amendment.

CHAIRMAN BROWN stated that the chair would concur in that expression.

REPRESENTATIVE BERGENE verified that she does support the exclusionary rule, but she does not mind getting it on the floor for debate.

The motion to take HB 382 off the table for further consideration was passed with a vote of 11 for and 8 against. See ROLL CALL VOTE.

REPRESENTATIVE RAMIREZ moved that the bill DO PASS. REPRESENTATIVE HANNAH seconded. REPRESENTATIVE RAMIREZ moved that the amendments that had been proposed previously for this bill be adopted. See EXHIBIT K. REPRESENTATIVE KEYSER seconded the motion. The motion carried with 10 voting for the amendments and 9 voting against. See ROLL CALL VOTE.

REPRESENTATIVE RAMIREZ moved that this bill DO PASS, AS AMENDED. REPRESENTATIVE CURTISS seconded the motion.

REPRESENTATIVE FARRIS explained that the reason she wants to table all these bills is because it is too late for them to be fully discussed on the floor; she felt this is an assault on our constitutional rights, and it deserved more consideration than it would get at this late date.

REPRESENTATIVE SCHYE made a substitute motion that this bill be TABLED. The motion was seconded by REPRESENTATIVE JENSEN.

REPRESENTATIVE RAMIREZ defended the bill, stating that this is the least objectionable - that it takes the provisions from the Bivens case which might justify the elimination of the exclusionary rule itself; and it also takes the bill that all the law enforcement people suggested with the reasonable good faith exception - and he thought there was a good balance now. He also expanded saying that he thought there were many smokescreens concerning reasonable good faith exceptions and noted that the Williams decision showed that this was not a subjective standard - that it is an objective standard based on what a reasonable police officer should know under the circumstances.

REPRESENTATIVE SCHYE wondered why they should put an objectionable bill out at all, just because it is the best of the bad.

REPRESENTATIVE ADDY contended that this is not the least objectionable - that this confuses the civil liability with reasonable good faith and muddies the water on both of them. He felt this was a hybrid concept and that this bill should not go to the floor. He stated that if you want to discuss exclusionary rule, you should send up at least two bills and just sending this one up would not do justice to the situation.

REPRESENTATIVE KEMMIS commented that if he understood what was being done here, he thought it was an odd combination that they are talking about and a very unwise decision to send this amalgamation to the floor. He noted that they have been dealing with two alternate approaches to the situation and he felt that they should be maintained as alternatives. He said that if it makes any sense to combine civil liability and good faith exception, then it makes the kind of sense that he has never come across.

The motion to TABLE this bill was voted on and the motion carried with a vote of 11 for and 8 against. The motion carried.

REPRESENTATIVE KEYSER rose on a point of privilege, stating that this is the first time in four sessions, when the committee is actually in session, that he has seen people lobbied on a vote during and after the vote was actually taken. He felt that if they want to do this before the vote, that is fine, but not during the vote.

REPRESENTATIVE CURTISS pointed out that it was through no fault of the proponents that these bills were held until it was too late for consideration on the floor because they wanted to get them out earlier.

HOUSE BILL 875

REPRESENTATIVE HANNAH moved that the bill DO PASS. The motion was seconded by REPRESENTATIVE DAILY.

REPRESENTATIVE KEYSER moved to amend the bill in section 6 by including the language of revocation and suspension contained in 37-51-321. He explained that there is a list of

things by which a realtor could lose his license and be suspended; and he wants to make sure that this covers at least what that covers. REPRESENTATIVE HANNAH seconded the motion.

A vote was taken on the motion and it passed unanimously.

REPRESENTATIVE KEYSER moved that this bill DO PASS, AS AMENDED. The motion was seconded by REPRESENTATIVE HANNAH. REPRESENTATIVE JENSEN made a substitute motion that this bill be TABLED. REPRESENTATIVE FARRIS seconded the motion.

REPRESENTATIVE HANNAH stated that he has been in the real estate business for a long time and nobody has ever lost a bond and he felt that this is about as enforceable as the bonding is.

CHAIRMAN BROWN explained that he had visited with a responsible insurance person and she felt that this was a good bill and he felt he would have to oppose the motion to table.

REPRESENTATIVE JENSEN commented that he thought Mr. Drake's testimony was persuasive and he did not feel that this was necessary or that they have demonstrated a problem.

REPRESENTATIVE RAMIREZ said that he did not have any problems with the concept but that there were a lot of details that were bizarre and explained his reasons.

REPRESENTATIVE HANNAH stated that it may be right from the real estate standpoint, but he did not think it was nearly the problem they perceived.

REPRESENTATIVE SPAETH explained that he was going to have to vote for the motion to table, although it was a good concept, but it was a special interest bill and he didn't feel he could support this bill.

A vote was taken and the motion carried with REPRESENTATIVE HANNAH, REPRESENTATIVE EUDAILY, REPRESENTATIVE SEIFERT, REPRESENTATIVE KEYSER AND REPRESENTATIVE DAVE BROWN voting no.

HOUSE BILL 278

MS. DESMOND, Staff Attorney for the Legislative Council, explained that she was not sure what the committee wanted on

the amendments on this bill. She explained the various problems with the amendments and stated that she understood that they wanted this bill to be consistent with Representative Kitselman's bill.

CHAIRMAN BROWN said that it was clear about the language which the committee intended, but where to put this language was the problem. He explained that six months and one year are clear, but he did now know where to put it; and he did not feel comfortable making that decision.

REPRESENTATIVE RAMIREZ wondered if they still want to reach the end result of an automatic 60-day revocation on the first offense and an automatic one-year revocation on every event thereafter. He stated he would like to see that and can this be accomplished.

CHAIRMAN BROWN stated that it was also a question of which statute would this refer to; and since the bill references 61-8-401 instead of 61-8-402, he felt that this should be in 401.

There was a suggestion that this might be best to amend on the floor.

HOUSE BILL 855

REPRESENTATIVE RAMIREZ moved that this bill DO PASS. The motion was seconded by REPRESENTATIVE IVERSON. The motion carried unanimously.

HOUSE BILL 848

REPRESENTATIVE SPAETH moved to TABLE this bill. REPRESENTATIVE IVERSON seconded the motion.

REPRESENTATIVE SPAETH explained that he agreed totally and completely with what this bill is trying to do, but he felt that it could open a Pandora's box.

A vote was taken and the motion carried with 10 voting yes and 9 voting no. See ROLL CALL VOTE.

HOUSE JOINT RESOLUTION 29

REPRESENTATIVE RAMIREZ moved that the bill DO PASS. REPRESENTATIVE DAILY seconded the motion.

REPRESENTATIVE RAMIREZ moved that the bill be amended on page 2, line 9, by striking "but does not have sufficient information available at this time" and by inserting "and wishes", and on lines 12 through 15 after "Legislature" strike everything to line 15 through "and", and on line 18, strike "because of this lack of information, in enacting legislation on this issue,".

He said that this takes out everything about lack of information and leaves in some very important points.

A vote was taken and the motion passed unanimously.

CHAIRMAN BROWN moved that the bill be amended on page 1, lines 19, through 25 and on page 2, line, by striking this in its entirety. The motion was seconded by REPRESENTATIVE RAMIREZ. The motion carried with REPRESENTATIVE CURTISS, REPRESENTATIVE KEYSER, REPRESENTATIVE EUDAILY and REPRESENTATIVE DAILY voting no.

REPRESENTATIVE RAMIREZ moved that the resolution DO PASS, AS AMENDED. REPRESENTATIVE ADDY seconded the motion. The motion carried with REPRESENTATIVE FARRIS AND REPRESENTATIVE JENSEN voting no.

CHAIRMAN BROWN notified the committee that there would be no further meetings until after the break.

The meeting adjourned at 11:30 a.m.

Dave Brown
DAVE BROWN, Chairman

Alice Omang
Alice Omang, Secretary

STANDING COMMITTEE REPORT

February 21 19 83

MR. SPEAKER

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 858

First reading copy (white)
Color

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING MUTUAL AID AGREEMENTS AMONG LAW ENFORCEMENT AGENCIES OF THIS AND OTHER STATES AND THE UNITED STATES; SPECIFYING AUTHORITY OF LAW ENFORCEMENT OFFICERS AND AGENCIES; CLARIFYING THE EFFECT OF AGREEMENTS ON LEGAL DUTIES OF LAW ENFORCEMENT AGENCIES; PROVIDING FOR APPROVAL AND FILING OF AGREEMENTS; AUTHORIZING AGENCY COMMITMENT OF FUNDS, PERSONNEL, AND EQUIPMENT FOR PURPOSES OF AGREEMENTS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Respectfully report as follows: That HOUSE Bill No. 857

DO PASS

Dave Brown, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 21, 19 83

MR. SPEAKER

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 855

First reading copy (white)
Color

A BILL FOR AN ACT ENTITLED: "AN ACT TO REVISE MONTANA'S PROBATE CODE WITH RESPECT TO RENUNCIATION OF SUCCESSION; TO REVISE THE ALTERNATE VALUATION FOR INHERITANCE AND ESTATE TAXES; TO REVISE THE STATUTES RELATING TO DEFERRED PAYMENT OF INHERITANCE AND ESTATE TAXES; AND TO REVISE THE APPORTIONMENT OF ESTATE AND INHERITANCE TAXES; AMENDING SECTIONS 72-2-101, 72-16-331 THROUGH 72-16-335, 72-16-337 THROUGH 72-16-339, 72-16-341, 72-16-342, 72-16-452, 72-16-456, 72-16-463, 72-16-464, 72-16-491, AND 72-16-603, MCA; AND PROBIDING AN APPLICABILITY DATE."

Respectfully report as follows: That HOUSE Bill No. 855

DO PASS

Dave Brown, Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

February 21, 19 83

MR. SPEAKER

We, your committee on JUDICIARY

having had under consideration HOUSE JOINT RESOLUTION No. 29

First reading copy (white)
color

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF THE INSURANCE LAWS OF THE STATE OF MONTANA AND REQUIRING A REPORT OF THE FINDINGS OF THE STUDY TO THE 49TH LEGISLATURE.

Respectfully report as follows: That HOUSE JOINT RESOLUTION No. 29

BE AMENDED AS FOLLOWS:

1. Page 1, line 19
Strike: "WHEREAS" through "and" on page 2, line 1.

2. Page 2, line 9.
Following: "sex"
Strike: "but" through "time" on line 10
Insert: "and wishes"

3. Page 2, line 12.
Following: "Legislature"
Strike: "does" through "and" on line 15.

4. Page 2, line 18.
Strike: "because" through "issue," on line 19.

AND AS AMENDED
DO PASS

Dave Brown, Chairman.

STATE PUB. CO.
Helena, Mont.

ROLL CALL VOTE ------ HOUSE JUDICIARY COMMITTEE

2/21/83

	Date: No: HB 381 To Table	Date: No: HB 816 To Table	Date: No: HB 382 Off Table	Date: No: HB 382 Ramirez Amendment	Date No: HB 382 To Table	Date No: HB 848 To Table	Date: No:
BROWN, Dave	yes	yes	no	no	yes	no	
ADDY, Kelly	yes	no	no	no	yes	no	
BERGENE, Toni	yes	yes	yes	no	no	no	
BROWN, Jan	yes	yes	yes	no	yes	yes	
CURTISS, Aubyn	no	yes	yes	yes	no	yes	
DAILY, Fritz	no	yes	no	yes	yes	no	
DARKO, Paula	yes	no	no	no	yes	no	
EUDAILY, Ralph	no	yes	yes	yes	no	yes	
FARRIS, Carol	yes	yes	no	no	yes	yes	
HANNAH, Tom	no	yes	yes	yes	no	yes	
IVERSON, Dennis	no	yes	yes	yes	no	yes	
JENSEN, James	yes	yes	no	no	yes	no	
KENNERLY, Roland	no	yes	yes	yes	yes	no	
KEYSER, Kerry	no	yes	yes	yes	no	yes	
RAMIREZ, Jack	no	no	yes	yes	no	yes	
SCHYE, Ted	yes	yes	no	no	yes	no	
SEIFERT, Carl	no	yes	yes	yes	no	yes	
SPAETH, Gary	yes	no	yes	yes	yes	yes	
VELEBER, Dennis	yes	yes	no	no	yes	no	
	10 - 9	15 - 4	11 - 8	10 - 9	11 - 8	10 - 9	

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

ILL HB 854 Date Feb. 21, 1983

NSOR ~~Rep. Pavlovich~~

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Cathy Campbell	Helena	Montana Assn of Churches		X
Shirley Stiltz	Helena	self		X
Lois K McMeekin	Helena	concerned citizens		X

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit A
HB 854
2/21/83

Montana Association of Churches

MONTANA RELIGIOUS LEGISLATIVE COALITION • P.O. Box 1708 • Helena, MT 59601

February 21, 1983

VORKING TOGETHER:

merican Baptist Churches of the Northwest

merican Lutheran Church Rocky Mountain District

Christian Church (Disciples of Christ) in Montana

Episcopal Church Diocese of Montana

Lutheran Church in America Pacific Northwest Synod

Roman Catholic Diocese of Great Falls

Roman Catholic Diocese of Helena

United Church of Christ Montana Conference

nited Presbyterian Church Glacier Presbytery

Jnited Methodist Church Yellowstone Conference

Jnited Presbyterian Church Yellowstone Presbytery

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

I am Cathy Campbell representing the Montana Association of Churches and testifying against House Bill 854.

I've testified before and stated our position. We are convinced that commercial gambling is non-productive in nature, creates no new resources and provides no seesntial services to a community. It undermines our economic and social order, places an added strain on the family structure, potentially corrupts government at all levels and sets up many related crime and law enforcement problems. Any expansion of authorized gambling would tend to make these problems worse.

I would remind you that the people of Montana have just voted against an expansion of gambling. Allowing the use of additional mechanical or electronic machines as proposed by HB 854 does represent an expansion. While it may seem an insignificant expansion to some, it is another example of attempts to nibble away at the position the voters took in November. To vote for this bill would be tantamount to saying that you don't think that the voters can decide for themselves what they want.

To pass this bill would be a step in expanding gambling activities. We oppose this and ask you to do the same.

Exhibit B
HB 854
2/21/83

Legislators:

As president of the local Helena-East Helena unit of Church Women United and a member of Sts. Cyril and Methodius Parish, I am writing to say how unhappy and displeased I am with your passing of these gambling bills.

We would like to think that as taxpayers and citizens of this state who take the time to go to the polls and vote you will listen to what we are saying. We turned down Initiative 92. Lets keep our state free of any type of gambling.

Sincerely,

Nancy Wetstein

Nancy Wetstein
President, Helena-East Helena CWU

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HB 816 DATE Feb. 21, 1983

SPONSOR Rep. Kemmis

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Chuck O'Reilly	Mt. Sheriffs & Peace Officers	Helena		X
Bill Ware	Helena	Chiefs of Police Assn		X
Robert Rowe	Missoula	ACLU		X
James T. Kenney	Msla	Self	X	
Joe Seifig	Mt. Sheriffs Peace Ofc Assn			X
Karla Gray	Butte	MTLA		X

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

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit C
HB 811
2/21/83

"Prepared Remarks" of
Professor James T. Ranney
University of Montana Law School
Before the House Judiciary Committee
February 21, 1983

THE EXCLUSIONARY RULE ATTACKED--WHY IT SHOULD BE ABOLISHED AND REPLACED WITH (1) LIMITED GOVERNMENTAL LIABILITY FOR WILFUL LAW ENFORCEMENT MISCONDUCT AND (2) POLICE DISCIPLINARY COMMISSIONS.

After some twelve years of seeing how "the" exclusionary rule (i.e., the Fourth Amendment exclusionary rule) works (or fails to work) in actual practice and after researching the issues surrounding it as a professor of criminal procedure, I have concluded that the exclusionary rule should be abolished. It hasn't been easy for a person who is opposed to about everything that Orrin Hatch and Strom Thurmond have done in other contexts to reach this conclusion, one that is no doubt contrary to the prevailing orthodoxy, at least amongst those of us who view ourselves as "liberals."

Before discussing the reasons for this view, I would note briefly that the first step in reaching this position is one that I have long been ready to take. That is, I have long believed that the exclusionary rule is not constitutionally required.[1] While my main purpose is not to discuss the constitutional question, leaving that to the Court, I would merely note that the basic reason for my position on the constitutional question is quite simple: if something (here, the exclusionary rule) is not even desirable as a matter of simple legislative policy, then how can it possibly somehow become a necessity of "due process"?[2] It seems to be forgotten by some courts and commen-

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[1] At least absent the extremely rare case where the police conduct "shocks the conscience." Cf. Rochin v. California, 342 U.S. 165 (1952) (the famous "stomach pump" case). I might note that I am not prepared to concede the continuing validity of even this case, and am "reserving judgment" on the result (if that is within my power).

[2] Of course, it will be argued that it's not a question of what we want to do , but what the constitution commands. While this argument would be com-

tators that the only way the exclusionary rule can be applicable to the states is if it is, indeed, a necessity of due process, and while the Warren Court did have a disturbing tendency to adopt what I have occasionally called a "Hey, that's a neat idea" concept of due process,[3] I doubt very much that the Burger Court will be inclined to continue this kind of judi-

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pelling if the Fourth Amendment explicitly said "P.S.: One remedy for violation of this Amendment is an exclusionary rule," such is not the case, and no amount of circumlocution or pretending to be following the dictates of the Fourth Amendment can hide this fact. Thus the inevitable "anti-majoritarian" argument which is usually trotted out about how the very purpose of the Bill of Rights is to protect helpless minorities against overbearing ("mad dog"/law-and-order) majorities wears rather thin here, the exclusionary rule having been only relatively recently "discovered" lurking within the confines of the Fourth Amendment.

The early origins of the exclusionary rule, in cases involving the question of the privacy of personal papers (and the right to their return) and mainly based upon the Fifth Amendment, are briefly discussed in Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L.J. 1361, 1363-64 (1981). Certainly, this unique historical context must go a long way toward explaining how the unusual remedy of exclusion of concededly reliable evidence could have ever been dreamed up.

The more immediate origins of the exclusionary rule, as applied to the states, are very thoughtfully and entertainingly detailed in F. Graham, The Due Process Revolution: The Warren Court's Impact on Criminal Law, at 37-49, 130-32 (1970) (noting, inter alia, that the author of the opinion in Mapp v. Ohio, Justice Clark, when a 23-year-old handling his first federal case, had unsuccessfully tried to free the son of his family's Negro maid by arguing for an exclusionary rule; also noting that the leading pre-Mapp decision, Weeks v. United States, in 1914, had "lulled [two generations of judges] by the feeling that no doctrine that received the unanimous blessing of the Supreme Court of 1914 could be dangerously generous to defendants," the "fallacy of that assumption" being that the Court in Weeks "fully appreciated what it was undertaking; for while its ruling was deceptively clear-cut, the Court's reason for making it was doctrinaire [based upon at least some doctrine later repudiated, cf. Schroeder, supra, 69 Geo. L.J. at 1363 n. 10] and unsupported by an analysis of where it would eventually lead."; also noting, elsewhere, the impact of the civil rights movement, law enforcement being viewed as part of "the problem" at this time, especially in the South).

[3] I.e., if some rule of law being urged upon the Court as being constitutionally-mandated struck a majority of the Court as being simply a "neat idea," then they would say sure, it must be required by the good old fudge-factor clause, the "due process" clause.

cial activism[4] (or, alternatively, will simply decide that this is not such a "neat idea" after all).

In short, although it may not occur soon (and we may play around for awhile with a "good faith" exception to the exclusionary rule), I suspect that the Fourth Amendment exclusionary rule will eventually be abandoned as a matter of constitutional law. Thus, the truly difficult question is what a state, which will then have relative freedom of action in this area, ought to do via its legislative power (or, what a state supreme court ought to do via its supervisory power) on this extremely complex question, which brings me to what I consider to be the advantages and disadvantages of our current exclusionary rule regime.

Advantages. I see five primary advantages of the exclusionary rule. First, the central argument for the exclusionary rule is that it is designed to protect the Fourth Amendment rights of all of us, that it serves to educate the police and deter them from improper and illegal conduct. And it does seem to me that "the rule" has in fact proven to have a significant impact on police search-and-seizure conduct. Most police are schooled in the law of search and seizure, and not inconsiderable efforts are made to follow the dictates of the Fourth Amendment in order to avoid the suppression of evidence, all of which apparently did not occur prior to Mapp v. Ohio. And while the abolition of

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[4] Those who object to the use of this term, at least in this instance, ought to reflect upon the fact that the Court in Mapp overruled prior law (Wolf v. Colorado) despite the fact that defense counsel had not even raised the issue of the continuing validity of Wolf, instead hoping he would win on the obscenity question in the case. Thus, the prosecution never had any real opportunity to brief or argue the question of the exclusionary rule. Cf. Mapp v. Ohio, 367 U.S. 643, 646 n. 3 (1961) (majority notes, somewhat disingenuously, that counsel "did not insist that Wolf be overruled," although one amicus had raised the question). Cf. id. at 673-75 (dissent more accurately notes that question was not in petitioner's jurisdictional statement nor was it briefed or argued; indeed, "when pressed by questioning from the bench whether he [defense counsel] was not in fact urging us to overrule Wolf, counsel expressly disavosed any such purpose"; the amicus' "request" for the Court to "reconsider" Wolf appeared in one lone sentence, without statement of reasons).

the exclusionary rule would not make me feel any less secure in my privacy rights (because the average WASP middle-class suburbanite will sue the pants off the police if they do something wrong), there would be some remaining concern about the lot of the typical minority or long-hair or whatever. In sum, the exclusionary rule is the best proven deterrent we have found thus far.

Second, there is the so-called "judicial integrity" argument, something to the effect that the courts should not lend their support (or "sanction") to illegal police activity by admitting into evidence the results of illegal police conduct.[5]

Third, somewhat related to the first point, the argument has been made that the exclusionary rule permits the fine-tuned development of Fourth Amendment law (something which a "good faith" exception would presumably not do).[6]

Fourth, it is arguable that the United States, unlike a country such as Great Britain, which is more homogenous in population and has a very well-trained police force, simply has more need for an exclusionary rule in order to deter improper police conduct (especially in regard to the harassment of minorities and "undesirables").

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[5]It is a little hard to know what to make of this argument, for a long string of U.S. Supreme Court decisions have given it short shrift in post-Mapp cases, admitting Mapp-tainted evidence for impeachment purposes, or in grand jury proceedings, or in numerous other non-criminal-trial contexts (where the need for the evidence was found to outweigh the minimal incremental deterrent value of applying the exclusionary rule). Cf. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 664, 667-72 (1970). All this suggests that the "judicial integrity" argument is something of a "make-weight" argument. Certainly it has not been applied to totally preclude trial of a person illegally arrested, cf. Frisbie v. Collins, 342 U.S. 519 (1952) and United States v. Crews, 100 S.Ct. 1244 (1980), so one wonders if in the last analysis the argument consists of anything more than the substitution of high-sounding phrases for sound, careful legal analysis.

[6]But cf. the discussion infra as to how the exclusionary rule may, instead, be actually corrupting the development of Fourth Amendment law.

Fifth, and a somewhat important point, it can be argued that the exclusionary rule has an important "tone-setting" psychological effect. Total abolition of the exclusionary rule (unless very carefully explained) might give the police the erroneous impression that the Fourth Amendment had been abolished, that they were now free to do as they liked.[7] Those, briefly, are what I see as the primary advantages of the exclusionary rule.

Disadvantages. The first and most obvious disadvantage of the exclusionary rule is that it frees the guilty. Several points can be made by way of amelioration of this disadvantage. First, some studies indicate that only a very small percentage of defendants are actually freed by the exclusionary rule./ Cf. W. LaFave, Search and Seizure, § 1.2, p. 22 n. 9 (1978) (pocket part). But cf. the recent study by the National Institute of Justice (December 1982), which indicates that upwards of one-third of all defendants are freed due to the operation of the exclusionary rule, many cases not even being brought to trial because of Fourth Amendment violations. Another somewhat more subtle point could be made, which is that maybe it is not so terrible that some people are freed, given the state of our prison system (it may be that an individual who is unexpectedly freed due to the operation of the exclusionary rule may have a better chance of "rehabilitation" out of prison than he would in prison; it may be the first real break that he ever got in his entire life, which could itself have a beneficial impact). I make this comment to suggest what is perhaps a deeper point about the exclusionary rule and an explanation of how such a seemingly paradoxical rule could have been tolerated at all. In my opinion, at least part of the reason we adopted such an unusual "cut-off-your-nose-to-spite-your-face" kind of rule is that we are not really as serious about the importance of the goals of the criminal justice system (rehabilitation, incapacitation, etc.) as we sometimes say we are. For

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[7] Of course, as noted infra, this is not true for a variety of civil remedies already exist.

if we were truly serious about the importance of the goals of our criminal justice system would we deprive ourselves of information that was clearly relevant to deciding whether an individual should be subjected to the various sentencing dispositions? I submit that the answer is no. If, e.g., we were trying to decide the results of something truly important, such as a presidential election, would we deprive ourselves of information relevant to making that critical decision merely because the police have blundered (or to make the analogy more exact, a candidate had violated a technical rule)? No, we would not. Why the difference? I think that at least part of the answer is because of our secret suspicion that we are not really able to fully effectuate the goals of our criminal justice system, again, because of the generally dismal state of our so-called "correctional" system. The point is that this is literally a pretty "lousy excuse" for a rule of law. If we feel queasy about the state of our prisons (and I for one believe we should), the answer is not to sporadically release a few murderers and rapists into our midst, but to do something positive about this concern, by making our penitentiaries places where at least some pretense at rehabilitation occurs. But I digress.

The second disadvantage is really a subpoint under the first point but since it seems to have never been raised in any of the literature which I have seen, and since I view it as quite important, I separate it out for individual treatment. The point is that some of the individuals who are freed because of the exclusionary rule are going to commit serious crimes, including killing people. Thus, unless we are either naive or totally lacking in intelligence, there should be no doubt in any of our minds but that numerous (former) people throughout this country are now lying six feet under the cold earth because of the operation of the Fourth Amendment exclusionary rule. And who can put

a value on a human life?

Third, an obvious disadvantage of the exclusionary rule is that it does nothing for the innocent victim of an illegal search.

Fourth, and a fundamental point, is that the exclusionary rule violates our sense of justice. In talking, as an assistant district attorney, to police detectives, and to ordinary average citizens about the exclusionary rule, one gets the sense that the general public, despite all the efforts made to justify the exclusionary rule, just does not believe in it. While the law obviously should not depend upon what the "general masses" may "feel," nevertheless, it does seem that the public is on to something here. When the victim in a rape case sees the person who raped her walk free because of the operation of the exclusionary rule, it does little for one's sense of justice to see this occur. It simply violates the old homily that two wrongs don't make a right.

Fifth, and related to the above point is that the exclusionary rule can lead (and has, according to anecdotal stories) to private retribution. If the criminal justice system is seen as ineffective to achieve the goals of the criminal justice system, then we are in danger of encouraging vigilante justice and a disregard for law.

Sixth, and a truly critical point, is the cost (i.e., money) which is entailed by the exclusionary rule. We are talking about incredible amounts of litigation occasioned by the exclusionary rule, litigation at all stages, pretrial suppression motions, and up through appeals and various forms of state and federal collateral attack. My own experience as an assistant district attorney in the district attorney's office in Philadelphia was that we spent upwards of 70% of our time litigating issues that had absolutely nothing to do with the question of guilt or innocence. And, perhaps 50% of our total time was spent on nothing but Fourth Amendment exclusionary rule questions. Our office

alone consisted of 160 attorneys, with double that number in support staff; taking into consideration the cost of defense counsel, the judges, the courtrooms and their staff, this must come to absolutely billions and billions of dollars each year. To those who make the inevitable response that criminal "justice" (of course, begging the question as to what is "justice") is priceless and that the cost should be irrelevant, the answer is that this attitude simply overlooks the fact that there are only two sources of such funds: either (1) new taxes (unlikely in the extreme) or (2) less government expenditures for things such as hospitals, schools, prisons, etc.

Seventh, closely related to the above point, the exclusionary rule is obviously a substantial contributor to one of the important problems in our legal system today, that of court delay. The trial court and appellate court handling of Fourth Amendment exclusionary rule questions obviously crowds other things from the dockets. For instance, every year the U.S. Supreme Court feels obligated to decide another dozen 5 to 4 decisions supposedly trying to clarify the law in this difficult area, generally creating more confusion and still more litigation as to the meaning of the most recent cases.

Eighth. There are substantial questions as to the efficacy of the exclusionary rule in some areas of police activity. While the inefficacy of the exclusionary rule may not be any excuse for abolishing it, it is nevertheless a distinct disadvantage of the way it operates in practice. For instance, it is doubtful that the police understand what they did wrong or learn very much when five years after the action in question, after dozens of state and federal lower court judges have sustained the validity of their actions, the U.S. Supreme Court in a 5-4 decision, concludes that their search warrant was erroneous. More fundamentally, the police are not hurt in their pocketbook by a decision

to suppress evidence, and the prosecution has no direct control over them. Furthermore, the exclusionary rule now operates even where the police make a good faith error in judgment. For instance, what if the police had had Justice Fortas sign their search warrant in the Spinelli case? They would have discovered to their dismay, via a decision from a badly divided Supreme Court, that they had "screwed up again." Cf. Spinelli v. United States, 393 U.S. 410 (1969) (Fortas, J., amongst those dissenting).

Ninth. I submit (and there are some very interesting recent studies which abundantly support this opinion, cf., e.g., Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U. Ill. L.F. 405, 408-411 (1971)) that the exclusionary rule now leads to police perjury. For instance, there are dozens of decisions prior to the famous Miranda decision (to use an example from another context) where courts were faced with police testimony that they did in fact give the detailed four-part Miranda warning to suspects even before the Miranda decision came down. Cf. Graham, supra, at 136-38/ (also noting dramatic increase in "dropsy" cases after Mapp). Cf. also Sheer v. United States, 414 F.2d 122 (5th Cir. 1969) (held, without quoting the warnings given, that the testimony supported the conclusion that the defendant had received "substantially" the same warnings as later required by Miranda); Evans v. Swenson, 455 F.2d 291 (5th Cir. 1972) (held that the officer in May of 1966 had given the full Miranda warnings "in substance"); and State v. Travis, 231 A.2d 205 (N.J. 1967) (another pre-Miranda confession case where the court upheld the trial court's finding that the prosecution witnesses' testimony that they had given Miranda warnings was "vague, inconsistent and lacked candor."). Assuming, then, the truth of the studies, what happens to the rehabilitation of the defendant who believes, rightly or wrongly, that the only reason that he is in jail is because

some policeman lied at his suppression hearing?

Tenth. I submit that the exclusionary rule may in part account for even some instances of police corruption. For if the police feel (and they're right as to this part of it) that defendants can literally get away with murder, then they may also tend to feel why shouldn't they get away with a little petty larceny, etc.

Eleventh. I am even prepared to submit, as can be documented in part by dozens of U.S. Supreme Court decision and hundreds and even thousands of lower court decisions, that the exclusionary rule tends to make even our courts act dishonestly, stretching the law here, twisting it there, and doing whatever else is necessary in an effort to save a case. The result of such actions is that the courts end up diluting all of our Fourth Amendment rights. All one needs to do to find evidence for this point is to look at the hundreds of law review articles on much of the Court's handiwork in the area of search and seizure, each commentator vying with the other for the highest degree of invective and sarcasm. Even one of the U.S. Supreme Court's Justices, concurring in a recent decision, seemed to come close to admitting that there is an inevitable pressure on the courts to dilute Fourth Amendment rights:

> Having reached this decision on the facts of this case, I recognize--as the dissenting opinions find it easy to proclaim--that the law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided. Much of this difficulty comes form the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.

Robbins v. California, 101 S.Ct. 2841, 2848 (1981) (Powell J., conc.) (emphasis added).

Twelfth. Somewhat related to several of the earlier points, it is sub-

mitted (admittedly without any evidentiary basis other than a "hunch") that because police have been shown (by studies) to have a markedly negative attitude toward the Fourth Amendment exclusionary rule, the right of the average citizen (or even the average criminal) to be free of truly brutal police conduct is less safeguarded under our current regime than it would be without an exclusionary rule. The reason for this is police frustration arising out of cases where, e.g., through sheer inadvertence or inability to anticipate unusual case law, a conviction is thrown out. It is doubtful in such cases that the police learn anything, unless unfortunately, it is to do what led to a civil rights case in United States v. Delerme, 457 F.2d 156 (3d Cir. 1972) (officer chased a traffic offender through town and upon apprehending him summarily "punished" him with a beating).

Thirteenth. The whole exclusionary rule regime has tended, as noted above, to distort the criminal justice process in various unfortunate ways and to deflect it from its proper emphasis upon assuring a fair trial and a fair sentence. Especially since 1961, when Mapp v. Ohio was decided, we have seen a tremendous shift in emphasis in criminal litigation from what should be the truly ultimate questions of guilt or innocence and, on conviction, the proper sentence, to the "game-playing" associated with Fourth Amendment litigation. This is very unfortunate, for our court system has quite enough trouble in providing a fair trial without having an additional "encumbrance" diverting attention from this critical function. I am all for doing everything that we possibly can, even if it costs real money, to provide an accused a truly fair trial. I am all for providing all the procedural constitutional safeguards which go toward assuring the integrity of the truth-determining process. But I am opposed to spending vast sums of money

and great amounts of time on issues that have nothing whatever to do with assuring that an innocent person is not found guilty.

There is another way in which the deflection of the criminal justice process from its proper emphasis on assuring the accused a fair trial has been detrimental to the rights of the accused. I submit that, ironic as it may seem, the operation of the exclusionary rule, with the concomitant public outrage, has tended to create a situation where judicial or legislative measures which might help to provide a more fair trial on the vital question of guilt or innocence are less likely to be adopted due to the hostility engendered by the exclusionary rule. Further, at the sentencing stage, I wonder whether some of the general feeling of hostility to the exclusionary rule, the feeling that the courts are "too soft" on criminals, does not contribute very heavily to the lengthy sentences for which American courts are notorious. The upshot is that when one of the unfortunates who didn't get off because of the exclusionary rule comes up for sentencing, the public sentiment is to "get him" and "get him good." Query, also, whether some of the current movement toward mandatory sentencing, especially some of the more extreme and unreasonable forms of it, has not received a large part of its impetus from hostility to the exclusionary rule. In short, as one who has seen the operation of the exclusionary rule at first hand, I cannot help but feel that the exclusioanry rule has had a very detrimental impact upon the actual rights of the average defendant.[8]

While there may be other pros and cons that have not been sufficiently

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[8]But since, when push comes to shove, we basically seem to not "give a darn" about those unfortunate souls who drift through the darkened corridors of the criminal justice system, it is not surprising that the "limousine liberals" can go on comfortably repeating the hallowed shibboleths surrounding the Fourth Amendment exclusionary rule.

considered in this discussion, the above points seem to be the principal ones worth stressing, especially since some of the issues discussed have not been previously discussed in the literature.

Alternatives to the exclusionary rule: I believe that the exclusionary rule is not as necessary as when it was first adopted, due to a number of newly effective or newly created civil remedies. At the federal level there are civil rights actions under 42 U.S.C. § 1983 (available against state policemen), under the Federal Tort Claims Act, and under a Court-created remedy in the Bivens case. Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Cf. generally Schroeder, supra, 69 Geo. L. J. at 1386-92. Further in some states, a person whose Fourth Amendment rights have been violated may have a viable action against the state. Id. at 1386, 1390. I believe, from my own experience, that these federal remedies can be utilized more extensively than they have been, that the existence of the exclusionary rule has tended to shift the attention of lawyers away from such civil suits, and that they have simply been unduly neglected.

Although it is true that the possibility of a civil law suit against the individual officer is not a very effective remedy by itself (given the fact that the defendant is less likely to be believed unless he has other witnesses and due to the fact of the general financial insolvency of most law enforcement officers) it would seem that one answer here is to create municipal liability. This would not only give a financial incentive for ordinary lawsuits to protect our civil rights, it would create an incentive for the local officials (such as the county commissioners) to "shape up" and effectively regulate their police department. Further, abolition of the exclusionary rule would not prevent, and, hopefully, would be an appropriate occasion for

other alternative remedies, such as the use of police disciplinary commissions or better internal control mechanisms (such as a "demerit" system, perhaps run in conjunction with a civilian review board). Cf. generally Schroeder, supra, 69 Geo. L.J. at 1398-1401; Lenzi, Reviewing Civilian Complaints of Police Misconduct--Some Answers and More Questions, 48 Temp. L.Q. 89 (1974); and Note, The Administration of Complaints by Civilians Against the Police, 77 Harv. L. Rev. 499 (1964). The existence of municipal liability would create an incentive for any number of imaginative solutions which lawyers, in particular, as problem solvers, ought to be able to devise. It seems to still be the "received wisdom," since Mapp, that civilian review boards are inevitably ineffective or politically impossible, but I do not believe that it is impossible for the mind of man to create a system that will effectively control police conduct while at the same time not impinging upon their actions so heavily that proper law enforcement is hampered and people become simply afraid to be police officers.

While I will not try to specify the details of what a good police disciplinary board ought to look like (and I probably should not do so because it is preferable in many ways to let different communities develop their own solutions, any differences serving as valuable experimentation, something which Mapp v. Ohio has probably inhibited, cf. Schroeder, supra, 69 Geo. L.J. at 1385 n. 196), but a rough outline may be spelled out. Although the matter of police disciplinary boards could be dealt with in each locality, at the state level the law could be changed to provide, initially, that local trial court judges would be immediately available as a forum for police disciplinary proceedings. This would be an interim measure until individual localities could create their own civilian review boards, the boards being required to fit within certain guidelines (and be approved by the state attorney general as fitting

within these guidelines). As to the guidelines, the following come readily to mind: (1) Complaint forms must be readily available at the following locations: in police stations, in city and county attorney offices, and at any local police disciplinary board. Further, in this same connection, some mechanisms should be created to assure that these forms get to the chief responsible officers (or their designated agent) in each of these locations. (2) Some provisions should be made in regard to screening and investigation powers. In regard to the former, some provision would be needed to permit somebody, perhaps the county attorney, to screen out clearly frivolous complaints. As to investigative powers, the lack of which has been the downfall of many past civilian review boards, it would seem that these commissions should have the power to ask the local prosecutor to issue a subpoena. (3) The Commission or Board should obviously be an objective and impartial tribunal (i.e., not controlled by the police), with broad representation of various interests or geographic groups (assuming that it is made up of more than one person; it would seem preferable to have three people on such a board). Further, in regard to the composition of the tribunal, I would think it would be appropriate to have a representative of the police as an ex officio member of the board, the reason for his non-voting status being almost entirely for his own protection to avoid placing him in an embarrassing position; his presence on the board, however, could be invaluable to provide certain expertise as to the nature of police work. (4) There should be a full opportunity for the complainant to present evidence. (5) There should be transcription of the proceedings, if only by tape recorder. (6) There should be procedural safeguards for the person complained against, necessary to afford that person procedural due process (notice, counsel, adequate time to prepare, etc.). (7) There should be disclosure

of the outcome to the complainant, with findings and reasons (although this may be difficult with a multi-member board, I think that it can be done and is important). (8) There should be review by a court of record (on the record, not de novo). Alternatively, or perhaps in addition, provision could be made for a state-wide review board. (9) The ultimate disposition (or recommendation to the mayor) should be within the discretion of the board, although it should consider primarily the seriousness of the infraction and any record of prior infractions. Because I think it is impossible to specify in detail what the exact disposition should be in advance, the guidelines might merely note that for minor infractions a mere reprimand may be sufficient, while as to more serious infractions a temporary suspension or a delay in promotion, or a demotion or, for the most serious infractions, actual dismissal would be appropriate. And finally, in this same connection, it would seem appropriate to provide that an officer's reasonable good faith belief that he was acting in accordance with the law should provide a defense to this kind of disciplinary proceeding.

The above guidelines, while providing minimum criteria to assure an effective disciplinary proceeding, would allow sufficient leeway to individual localities to permit some valuable individualization.

Conclusion. I would abolish the exclusionary rule, regardless of whether new alternative remedies are created or not.

In regard to the good faith exception, while this would be preferable to what we now have, I view this approach as merely an indirect and uncourageous way of in effect abolishing the exclusionary rule (it is, it seems to me, extremely likely that the U.S. Supreme Court, in Illinois v. Gates, cert. granted December 1982, will adopt some such exception, so that this would have the

advantage of being "safer" than outright abolition, almost certainly avoiding constitutional attack after Gates is decided). One problem with a "good faith" exception is that it would not eliminate entirely the wasteful suppression hearings and concomitant appellate litigation. Nevertheless, after several years of unsuccessful efforts to obtain suppression under such an exception, there would no doubt be fewer such hearings held (although defense counsel, in order not to be found "ineffective," may still feel forced to file such motions in a pro forma, prefunctory, fashion). One other problem with the "good faith" exception is that it arguably puts a premium on the use of "ignorant police officers." On the other hand, it is true that a "good faith" rule would cover the extremely rare case where the police conduct was "shocking to the conscience." Cf. footnote 1, supra.

Another alternative to our current exclusionary rule regime would be to exclude evidence only where doing so is necessary (in view of continued police violations of rights, despite the existence of other civil remedies) and would substantially further the purpose of deterring improper police conduct, while weighing this deterrence against the potential loss to society in the individual case from suppression. While such a rule would have the distinct advantage of effectually abolishing the exclusionary rule in precisely those cases where it was no longer necessary while at the same time avoiding the conceptual and practical difficulties surrounding the "good faith" exception, it is true that this type of provision would be a bit vague and possibly difficult to administer in an even-handed fashion. Cf. Schroeder, supra, 69 Geo. L.J. at 1422-23 (discussing a similar proposal) and Pattenden, The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia, 29 Int'l & Comp. L.Q. 664, 671-75 (1980) (similar rule utilized in Australia). Nevertheless, at least as an

interim solution, and in conjunction with better civil alternatives, this could well be the best legislative strategy at this time.

In the long run, it seems to me that the real answer is to abolish the exclusionary rule while at the same time providing an effective, but not oppressive, remedy for violations of Fourth Amendment rights. One remedy which would help to do this is municipal liability, with recovery allowed for both mental distress and punitive damages (albeit possibly with reasonable limitations on both). If recovery were limited to merely physical damages, there would almost never be any recovery, and hence no incentive for a lawsuit. As to the standard for liability, however, it would seem that recovery should not be permitted for every minor mistake in filling out a search warrant but should only be allowed for "bad faith" or, perhaps, "reckless" violations, i.e., the kind of harassing, wilful misconduct that we really want to control the most. For any lesser civil rights violations it seems to me that the existing civil remedies are sufficient. Finally, it would seem clear that no recovery should be permitted for damages incurred merely as a result of the individual's being convicted of a crime, such damage being properly viewed as attributable to the offender's criminal conduct. The second remedy, and one that may in the long run prove most effective, would be local disciplinary commissions, which could build upon the existing state law providing for such commissions, cf. M.C.A. § 7-32-4151 et seq., but which could be retooled in relatively minor ways to make them more effective while at the same time providing procedural safeguards such as appellate review which would help to assure that they did not become unduly intrusive or oppressive. This, it seems to me, is the way to achieve the obviously desirable goal of protecting our Fourth Amendment rights and at the same time avoiding the very negative consequences of the exclusionary rule.

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HB 857 Date Feb. 21, 1983

SPONSOR Rep. Abrams

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Sgt. R.W. Landon	Highway Patrol	→	X	
John Maynard	Attorney General		X	
Steve Johnson	Atty Gen's Office		X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit D
HB 857
2/21/83

TESTIMONY OF STEVE JOHNSON

ASSISTANT ATTORNEY GENERAL

RE: H.B.857

House Bill 857 authorizes Montana law enforcement agencies to enter into cooperative agreements with law enforcement agencies in other states to solve common enforcement problems. It is enabling legislation which allows a flexible approach to enforcement problems transcending jurisdictional boundaries.

A major benefit of this legislation is to be found in the authority it would grant to regional or state law enforcement agencies such as county sheriffs' offices and the Highway Patrol to cooperate with law enforcement agencies of bordering states to provide a coordinated, efficient plan for responding to enforcement emergecies in remote border areas of the state.

Montana law currently allows state and local law enforcement agencies within the State of Montana to assist other Montana law enforcement agencies. Title 44,ch. 11, pts. 1 and 2, MONTANA CODE ANNOTATED (MCA). It does not, however, authorize cooperative agreements with, assistance to, or assistance from lawenforcement

agencies of other states. H.B. 857 would supply that authorization.

The bill does not itself spell out specific provisions to be incorporated into every mutual aid agreement. It does, however, spell out the specific general areas of agreement upon which participating law enforcement agencies must negotiate and which they must provide for. Section 5 of the bill requires that the parties bargain with each other and make specific provision for the duration, organization, chain of command, and scope and termination of joint operations as well as for the enforcement authority and qualification level of participating law enforcement officers, responsibility for expenses, and the respective liability of each agency for damages or injury caused by joint operations.

In allowing the parties to negotiate the specifics of a cooperative agreement rather than imposing specific provisions on the parties, the bill attempts to guarantee flexibility to various state and local law enforcement agencies to tailor agreements to local needs and to situations that cannot be easily anticipated today. In this regard, H.B. 857 follows the model of Montana's State-Tribal Cooperative Agreements Act (Title 18, ch. 11, pt. 1, MCA) and the state Interlocal Cooperation Act (Title 7, ch. 11, pt. 1, MCA). Like

those two acts H.B. 857 requires contracting agencies to set forth fully in writing the powers, rights, obligations, and responsibilities of each party to the agreement. It provides for review and approval of agreements by local governing bodies and by the attorney general. In addition, it directs that all such agreements be filed with the secretary of state and, in the case of an agreement entered into by a local law enforcement agency, with the clerk and recorder of each affected county.

H.B. 857 would allow the Montana Highway Patrol to enter into an agreement with the highway patrol forces of bordering states whereby a patrol officer of one state would be authorized to respond to a traffice emergency across the border in a neighboring state if that officer could respond more quickly than officers of the neighboring state. Reciprocal ageements of that type would decrease response time and make efficient use of resources without increasing the operating budgets of the law enforcement agencies involved.

Section 8 of the bill prohibits law enforcement agencies from exercising any powers under a mutual aid agreement that they are not otherwise authorized by law to exercise. The Montana Highway Patrol is, by statute, limited to traffic control. Under H.B. 857 it could not expand its powers beyond the area of traffic enforcement.

In explicit terms the "Compact Clause" (art. I, §10, cl. 3, U.S. CONST.) of the Federal Constitution forbids any state of the Union, without the consent of Congress, to enter into any agreement or compact with another state. Congress has given its advance consent by statute to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and the enforcement of their respective criminal laws and policies. 4 U.S.C. §112.

Under cases decided by the United States Supreme Court, the meaning of interstate compacts is a question of federal law. It cannot be unilaterally nullified nor be given its final meaning by a court or other organ of the contracting states. West Virginia ex. rel.Dyer v.Sims, 341 U.S. 22 (1951). Final power to pass on the meaning and validity of an interstate compact is the United States Supreme Court.

Similarly, a state and the United States may enter into compacts. The authority for a state to enter into a contract with the United States is derived from the Constitution of the United States. ANTLE v. TUCHBREITER, 414 Ill. 571, 111 NE2d 836 (1953).

Section 6 of the bill provides for the state to be indemnified if it incurs liability due to the conduct of a local law enforcement agency that has entered into a mutual aid agreement with an out-of-state agency.

WITNESS STATEMENT

Name Jim Tillotson Committee On Judiciary

Address 1424 9th Ave., Helena, Montana Date 2/21/83

Representing Board of Realty Regulation Support X

Bill No. 875 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Brief explanation of bill.

2. Explanation of benefits to public, licensees and board

3. Refutation of Western Surety arguments in opposition.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

e Roy M. BULGER Committee On Judiary

ress HELENA Date 2-21-83

resenting Bd Realty Regulation. Support X

ll No. 875 Oppose

Amend

TE TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

mments:

emize the main argument or points of your testimony. This will sist the committee secretary with her minutes.

ORM CS-34

WITNESS STATEMENT

Name Fritz Gillespie Committee On Judiciary

Address 38 So. Last Chance Gulch Date 2/21/83

Representing Western Surety Co Support

Bill No. HB875 Oppose ✓

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Meriwynn Foss Committee On Judiciary

Address 501 Brooks Missoula Date 2-21-83

Representing Missoula Co. Bd. of Realtors Support X

Bill No. 875 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITORS' REGISTER

HOUSE Judiciary COMMITTEE

BILL HB 875 Date 2/21/83

SPONSOR

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Fritz Gillespie	Helena	Western Surety		✓
Glenn Drake	Helena	American Ins Assoc		✓
Merilynn Foss	Missoula	Mt & Co Bd of Realtors	✓	
Ray M Bulger	Helena	Bd Realty Regulation	✓	
Tim Tillotson	Helena	Bd Realty Regulation	✓	
Bill Strahl	"	Self	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit E
HB 875
2/21/83

SUMMARY SHEET

REAL ESTATE RECOVERY FUND BILL

I. Summary of bill provisions

A. A real estate recovery fund with a minimum balance of $50,000 is established. There is no maximum amount for the fund. Excess monies, not necessary to pay claims against the fund may be used, at the discretion of the Board of Realty Regulation, for educational purposes as specified in Section 37-51-204, M.C.A.

B. The purpose of the fund will be to provide a source of money whereby members of the public who have been injured through the actions of licensed real estate brokers and salespersons may receive compensation. The damages covered are only those resulting from fraudulent, deceptive or dishonest practices or conversion of trust funds by the licensee. The fund is not intended to serve as a substitute for any errors and omissions insurance which should be carried by the individual licensee.

C. This fund is strictly a source of last resort. Before seeking compensation from the fund, the injured party must have first obtained a court judgment for damages and must have done everything reasonably possible to collect that judgment from the assets of the licensee involved.

D. Recovery from the fund will be granted only upon order of the court which granted the original judgment and only after a hearing by that court. Both the judgment debtor and the Board of Realty Regulation have the opportunity to appear at that hearing.

E. Recovery against any one licensee or involving any single transaction is limited to $15,000.

F. Initial funding will be provided by the Board, but will be recovered through assessments levied against the licensees. Beginning with the 1984 renewals, every licensee who renews, including inactives, will pay a one-time assessment of $20. Thereafter, only new licensees will pay the $20 fee which will be submitted at the time of issuance of their license. The bill is designed to assess every licensed individual only once except in the event that the balance in the fund drops below $50,000. In that case, all active licensees would be assessed as necessary (up to a maximum of $20 for any one calendar year) to restore the minimum balance of the fund.

G. Section 37-51-304, M.C.A., which requires that all licensees provide a surety bond in the amount of $10,000, will be deleted. The present bond will pay only upon a judgment against the licensee for damages caused by actions of the licensee which were in violation of the "Real Estate License Act of 1963" (as

amended) or of the rules and regulations of the Board of Realty Regulation.

II. Comparable statues in neighboring states

A. Idaho

1. Established 1971
2. Fund also includes education
3. Fee is $20 per licensee per year
4. Minimum balance of recovery fund is $20,000
5. Recovery limit is $2,000 per licensee per year

B. Utah

1. Established 1976
2. Fund also includes education and research
3. Fee is $15 per year for brokers and $10 per year for salesmen
4. Minimum balance of recovery fund is $60,000
5. Recovery limit is $6,000 per licensee

C. South Dakota

1. Established 1977
2. Fee is as established to maintain minimum balance in fund
3. Minimum balance of recovery fund is $50,000
4. Recovery limit is $15,000 per claimant and per licensee

D. Oklahoma

1. Fund also includes education
2. Fee is $5 per year per licensee
3. Minimum balance of recovery fund is $250,000
4. Recovery limit is $15,000 per claimant and $50,000 per licensee or per transaction

E. Colorado

1. Established 1972
2. Fee is $10 per licensee per year for three years from 1981 through 1983

3. Although there is no minimum balance for the recovery fund, fees for 1981 through 1983 generated over 1.5 million dollars (50,000 + licensees)

4. Recovery limit is $50,000 per licensee and per transaction if more than one licensee is involved

F. North Dakota

1. Established 1977
2. Fund also includes education and research
3. Fee of $20 per licensee per year for two years to establish fund - thereafter $20 one-time for new licensees except for assessments to maintain minimum balance of the fund.

4. Minimum balance of recovery fund is $60,000
5. Recovery limit is $15,000 per transaction regardless of number of injured parties or licensees involved

III. Financial Projections

A. Initial one time assessment for all licensees should generate approximately $103,000. After reimbursement of the initial $50,000 to the Board's earmarked revenue fund, the balance of the recovery fund will be approximately $53,000.

B. Thereafter, assessments of new licensees should generate approximately $11,500 per year.

C. Very sketchy information received from companies issuing the present bonds indicates that total claims paid from the recovery fund should average around $20,000 per year. This average would mean that an assessment of $5 per active licensee every other year would be adequate to maintain the minimum balance of the fund.

IV. Benefits of replacing present bonds with recovery fund.

A. Time savings for Board staff - The staff for the Board of Realty Regulation presently processes over 600 bonds per year. A significant amount of time is spent each year for administration of the present bonding requirement. This time is spent in the following fashion: 1) Insuring that the bond accompanies all applications for original licensure and handling follow up correspondence when the bond is not properly submitted; 2) Handling follow up correspondence with the licensee when a bond is cancelled or expires; 3) Reviewing bonds received to insure that they are valid which involves sending all bonds received to the Office of the State Insurance Commissioner.

B. Time savings for staff of State Insurance Commissioner - Presently all bonds received by the Board must be reviewed for proper format and signatures. Again, a significant amount of time is spent in reviewing over 600 bonds per year.

C. Cost reduction for licensees - The licensees presently pay approximately $33 per year for the bonds. Under the bill as drafted they would pay a one-time assessment of $20 and approximately $2.50 every year thereafter. Although companies now issuing bonds will experience a total gross revenue loss of approximately $122,000 per year, passage of the recovery fund bill will not put the state into the insurance business competing with private suppliers. It simply provides a means whereby the licensees will, in essence, be self insured thereby escaping that portion of their bond premium representing profit and overhead for the insurers. In addition, the licensees will save a considerable amount of time presently spent in complying with the bonding requirement. Specifically, the turn around time in getting the bonds reviewed by the Insurance Commissioner will be eliminated.

D. Additional protection for the public - Recovery under the present bonds is limited to $10,000 per licensee. Under the proposed bill, an injured party could recover up to $15,000 on a single transaction.

HB 875
2/21/83

WRITTEN TESTIMONY OF WESTERN SURETY COMPANY BY FRITZ GILLESPIE (Tel. No. 442-0230) IN OPPOSITION TO HOUSE BILL 875

CONCLUSION

HOUSE BILL 875 SHOULD NOT BE ENACTED. The vexatious requirements of this bill will discourage even the most stout-hearted from trying to recover from the account. The intent of House Bill 875 is to hinder instead of help people in recovering on their judgments. If House Bill 875 was really designed to protect the public, it would provide for prompt payment of a claim from the account, without limitation on the grounds for recovery or on exclusions of the nature of the award in the judgment, and would leave collection from the licensee to the board of realty regulation.

SUMMARY

The reasons why House Bill 875 should not be enacted are explained after this summary in the narrative. The reasons summarized here are cross-referenced to the narrative. In summary, the reasons why House Bill 875 should not be enacted are:

1. The basis for recovery from the account will be MORE RESTRICTIVE than those for recovery on licensee bonds. (Sections 6(1) (p. 6, l. 13-24); 9(2) and 9(3) (p. 9, l. 5-15) HB 875; sections 37-51-304 and 37-51-321, M.C.A., attached hereto.)

(a) The grounds for recovery from the account are limited to fraudulent, deceptive or dishonest practices or conversion of trust funds as opposed to recovery on a bond for loss or damage arising in the course of the licensee's practice. (See narrative, p. 4, l. 3 - p. 5, l. 6).

(b) The loss or damage must be actual and direct. (See narrative, p. 5, l. 6-15).

(c) A claimant must obtain a judgment. (See narrative, p. 5, l. 16 - p. 6, l. 3).

2. Recovery from the account will be MORE DIFFICULT than recovery on a licensee bond. (Sections 2 (p. 4, l. 3-16), 3 (p. 4, l. 17; p. 5, l. 5), 6 (p. 6, l. 13; p. 7, l. 15), 7 (p. 7, l. 19; p. 8, l. 13), 9 (p. 8, l. 24; p. 9, l. 15), 11 (p. 10, l. 1; p. 11, l. 2), 12 (p. 11, l. 3-13); 13 (p. 11, l. 14-23), and 15 (p. 12, l. 3-11); Title 17, Chapter 8, Part 2, M.C.A.; Title 25, Chapter 13 and 14, M.C.A.; and section 37-51-323, M.C.A., attached).

(a) Recovery from the account will be more restrictive than on licensee bonds. (See section 6(1) and 7(2) HB 875, and narrative, p. 6, l. 4-22).

(b) Recovery from the account cannot be for "interest on the judgment, interest on the trust funds converted, costs and attorney's fees or punitive or exemplary damages." (See section 6(2) HB 875, and narrative, p. 6, l. 23 - p. 7, l. 14).

(c) The board of realty regulation AND the licensee and any other party to the transaction must be served. (See section 6(3) HB 875, and narrative, p. 7, l. 14-21).

(d) There cannot be any recovery from the account until a court orders payment after a hearing. (See sections 6(1), 7 and 9(1) and (2) HB 875, and narrative, p. 7, l. 21-25).

(e) HB 875 REQUIRES the exhaustion of the PROCEDURES FOR EXECUTION ON THE JUDGMENT and THE PROCEDURES IN AID OF EXECUTION against EVERYONE LIABLE ON THE JUDGMENT BEFORE A CLAIMANT CAN RECOVER FROM THE ACCOUNT. (See sections 7(3), (4) and (5), and 15 HB 875, and narrative, p. 8, l. 1 - p. 9, l. 5).

(f) A claimant might not recover from the account even after getting an order for payment. (See sections

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6(2)(b), 11(1) and (3), 12, and 13 HB 875, and narrative, p. 9, l. 6-24)..

(g) In addition to the limitations in subparagraph (f), the acount may not be able to satisfy payments ordered. (See section 3 and 13 HB 875, and narrative, p. 9, l. 24 - p. 10, l. 14).

(h) Claimants may FILE CLAIMS AGAINST THE STATE FOR REIMBURSEMENT FROM THE GENERAL FUND pursuant to Title 17, Chapter 8, Part 2. (See sections 2 and 13 HB 875, and narrative, p. 10, l. 14-21).

3. THE JUDGMENT HOLDER WILL NOT HAVE EQUAL RIGHTS with the board of realty regulation. (Sections 6(1) (p. 6, l. 13-17), 7(2) (p. 7, l. 24-25), 8 (p. 8, l. 14-22), 9(1) (p. 8, l. 23; p. 9, l. 4), 9(3) (p. 9. l. 9-15).

(a) Only the board of realty regulation has the right to continue the hearing on the application. (See narrative, p. 10, l. 23 - p. 11, l. 9).

(b) THE CLAIMANT IS BOUND BY THE FINAL JUDGMENT BUT THE BOARD OF REALTY REGULATION IS NOT. (See narrative, p. 11, l. 10-22).

(c) Claimants do not necessarily have the right to examine witnesses but the board of realty regulation does. (See narrative, p. 11, l. 22 - p. 12, l. 4).

4. The real estate recovery account puts the State of Montana into the insurance and surety business. [Section 2 (p. 4, l. 3-16)]. Creation of this account will require the State of Montana to employ and train attorneys and other claims personnel to promptly and fairly handle claims in order to insure the continued protection of real estate consumers in Montana. A FISCAL NOTE ACCOUNTING FOR THE COST DOES NOT ACCOMPANY HB 875.

NARRATIVE

The basis for recovery from the account will be MORE RESTRICTIVE than those for recovery on licensee bonds.

First, section 6(1) (p. 6, l. 13-17) allows a person to make an application to the court for recovery from the account ONLY AFTER that person has

(1) obtained a final judgment in court, and,

(2) that judgment was obtained "on grounds of fraudulent, deceptive, or dishonest practices, or conversion of trust funds . . ."

While it looks like there are four grounds for recovery from the account, there are really only two grounds. "Fraudulent," "deceptive" and "dishonest" are essentially synonymous words which describe "deceit." So, there are two grounds for recovery from the account: (1) deceitful practices, and (2) conversion (civil theft) of trust funds.

By comparison, section 37-51-304, M.C.A., [proposed for repeal in Sec. 17 (p. 12, l. 21-22)] requires that the bond filed by a licensee must,

". . . pay to the extent of $10,000, judgments recovered against him for loss or damage to a person ARISING IN THE COURSE OF THE APPLICANT'S [LICENSEE'S] PRACTICE as a real estate broker or salesman."

"Arising in the course of the applicant's [licensee's] practice" provides broader relief for a person than "on grounds of fraudulent, deceptive, or dishonest practices, or conversion of trust funds." On a bond, a claimant may recover for loss or damage arising in the course of the licensee's practice. This recovery could include losses or damage arising from the licensee's BREACH OF CONTRACT, INTERFERENCE WITH OTHER CONTRACTS, INADVERTENCE, LOST SALES, ERRORS, OMISSIONS, INCOMPETENCE, AND OTHER BASIS, as well as fraudulent, deceptive or dishonest practices, or conversion of trust

funds. A broker's or salesperson's license may be revoked or suspended for interference with other contracts (section 37-51-321(10), M.C.A.) or for unworthiness or incompetence (section 37-51-321(19), M.C.A.), but a person damaged thereby could not recover from the account. Recovery from the account is restricted to fraudulent, deceptive, or dishonest practices, or conversion of trust funds by the licensee.

Second, the language in section 6(1) (p. 6, l. 23) further limits recovery from the account to "actual and direct" loss or damage arising out of fraudulent, deceptive or dishonest practice or conversion of trust funds. Does the direct loss requirement prevent recovery from the account by persons who were not related, first hand, to the act or transaction, but who suffered loss or damage nonetheless? For example, is an adjoining property owner prevented from recovering expenses incurred in correcting an intentional or unintentional wrong of a licensee in a transaction between other persons? Apparently not from the account. However, recovery could be had on the bond because the loss or damage would arise in the course of the licensee's practice.

Third, a person must obtain a judgment in court before making an application for recovery from the account. The language in sections 6(1) (p. 6, l. 13-14) and 9(2) (p. 7, l. 24) is mandatory on this point. The board of realty regulation will defend against recovery from the account if the aggrieved person has not obtained a final judgment (sec. 9(3), p. 9, l. 12-15).

The language of section 37-51-304, M.C.A., contemplates a final judgment being obtained before payment on a bond is required. However, in practice, surety companies pay claimants on a bond before final judgment when liability of the licensee is reasonably clear, unless the licensee demands an active defense. Even when liability is not reasonably clear,

or the licensee demands an active defense, surety companies pay shortly after a final judgment, without requiring application to a court, unless an infrequent question arises about the licensee being in the course of practice.

Recovery from the account will be MORE DIFFICULT than recovery on a licensee bond.

Section 35-51-304, M.C.A., (proposed for repeal by section 17, p. 12, l. 21-22) contemplates a final judgment being obtained before payment on a bond is required. However, in practice, surety companies pay claimants on a bond before judgment when liability of the licensee is reasonably clear, unless the licensee demands an active defense. Even when liability is not reasonably clear, or the licensee demands an active defense, surety companies pay shortly after a final judgment, without requiring application to a court, unless an infrequent question arises about the licensee being in the course of practice.

Recovery from the real estate recovery account will not be as quick and it will be MORE DIFFICULT for the aggrieved person.

First, sections 6(1) (p. 6, l. 13-14) and 7(2) (p. 7, l. 24) require a person to recover a final judgment. Recovery can be given only if the basis of the judgment was fraud, deception, dishonesty, or conversion (civil theft) by the licensee. Judgments for loss and damage can result from other kinds of wrongdoing by the licensee. The loss or damage must be direct. (See the narrative, p.p. 4-6, about why recovery from the account will be more restrictive than on licensee bonds.)

Second, recovery from the account cannot be for "interest on the judgment, interest on trust funds converted, costs and attorney's fees or punitive or exemplary damages." (Section 6(2)(c)(d) and (e), p. 7, l. 7-10). Bonds currently required

from licensees do not and cannot contain these exclusions from recovery. (See the specimen bond attached which is currently required by the board of realty regulation).

Section 6(2)(e) (p. 7, l. 9-10) means that a person cannot recover the mandatory statutory penalty required by Section 37-51-323(2), M.C.A., if the licensee violates any provision of Title 37, Chapter 51, M.C.A., since punitive or exemplary damages are in the nature of a penalty.

Also, what happens if a person collects some, but not all, of a judgment which includes an award of costs, attorney fees, interest and/or punitive damages in addition to actual and direct loss? Does the person get to first deduct the amount collected against the excluded awards in the judgment before deducting from the actual and direct loss; or, does the board of realty regulation get to deduct all of the amount collected by the person against the actual and direct loss? It is pretty clear from the language of section 6(2) (p. 6, l. 25 - p. 7, l. 10) that the board would prevail.

Third, not only does the board of realty regulation have to be served with the application, the licensee and any other party to the transaction must be served, too (section 6(3)(a), p. 7, l. 13-16). What happens if these people can't be found or served? According to section 6(3)(a) (p. 7, l. 13-16), the person cannot recover from the account until the licensee and the other parties to the transaction are served. A licensee does not have to be served before collection can be made on the licensee's bond.

Fourth, a person may not recover from the account until an application has been made in court and the court orders the board of realty regulation to pay after a hearing. (Sections 6(1) (p. 6, l. 13-24); 7 (p. 7, l. 19-21); and 9(1) and (2) (p. 8, l. 23; p. 9, l. 15)). Claimants infrequently have to go to court to recover on a bond.

Fifth, sections 7(3)(4) and (5) (p. 8, l. 3-13) REQUIRES the exhaustion of the PROCEDURES FOR EXECUTION ON THE JUDGMENT (Title 25, Chapter 13, M.C.A.) and THE PROCEDURES IN AID OF EXECUTION (Title 25, Chapter 14, M.C.A.) against EVERYONE LIABLE ON THE JUDGMENT before the person can recover from the account. Other people liable could be in-state or out-of-state parties to the transaction. Assets could be in other counties or other states. What this means is that a person cannot recover from the account until that person has exhausted every possible way of discovering and selling or applying not only the licensee's assets, but also the assets of everyone else liable under the judgment. Those actions and proceedings are numerous, expensive and time consuming, and often times, obviously futile. Yet, the person must exhaust those actions and procedures and still make the application within two years after the judgment becomes final. [Sections 6(2)(f) (p. 7, l. 12)]. It may not be possible for a person to exhaust all searches and inquiries, take all necessary actions and proceedings, and sell or apply the assets within two years, particularly in hotly disputed cases and/or cases involving multiple parties liable on the judgment.

And, for what good reason must a person pursue these arduous, difficult, troublesome, and perhaps futile procedures required by sections 7(3)(4) and (5) (p. 8, l. 3-13)? To the extent of the amount paid from the account, Section 15 (p. 12, l. 3-11) gives the board of realty regulation all the rights the judgment creditor has for collecting on the judgment. People don't have to exhaust the procedures required in House Bill 875 before they can recover on licensee bonds. Payment is made on the bond. It then becomes the duty of the surety company, with the same rights acquired by the board of realty regulation under Section 15 of House Bill 875, to collect from the licensee using the same remedies and procedures referred

to in Section 7(3) (p. 8, l. 3-6).

If House Bill 875 was really designed to protect the public, it would provide for prompt payment of a claim on a judgment against a licensee without limitation on the grounds for recovery or exclusions on the nature of the award in the judgment, and would leave collection from the licensee to the board of realty regulation.

Sixth, a person might not recover from the account after the arduous task of getting an order for payment. Sections 6(2)(b) (p. 7, l. 3-6), 11(1) (p. 10, l. 2-4), 11(3) (p. 10, l. 23; p. 11, l. 2), and 13 (p. 11, l. 17-18), read together, particularly sections 11(1) and 11(3), limits the liability of the account to "not exceed $15,000 for any one licensee until that licensee has repaid the account . . ." (Section 11(1), p. 10, l. 3-4). And a court must deny an application if it is filed between the time $15,000 is distributed from the account on behalf of the licensee and the licensee FULLY repays the account (section 11(3), p. 10, l. 23; p. 11, l. 2). REPAYMENT into the account MAY BE NEVER, particularly since the licensee is automatically suspended from the date of the first order for payment form the account until full repayment plus 7% interest (section 12, p. 11, l. 4-11). In other words, a licensee gets a $15,000 credit in the account, and when that is paid, no more will ever be paid to people damaged by the licensee no matter how many people are damaged, no matter how many transactions are involved, and no matter how remote in time the transactions are. By comparison, bonds are annual, so $10,000 is available to claimants each year. THE PEOPLE WHO WILL MOST NEED HELP FROM THE ACCOUNT WILL BE THOSE WHO ARE DENIED. Claimants before them will have consumed the licensee's assets and the $15,000 from the account.

Seventh, on top of the risk that the licensee's $15,000 credit will be spent, House Bill 875 recognizes in section 13

(p. 11, l. 14-23) that the account may not be able to satisfy claims even if the licensee still has some credit in the account. If the claims deplete the account, claimants must wait an indeterminate amount of time until the account has been replenished. The only way House Bill 875 provides for replenishing the account is by a $20 fee the first time a licensee is licensed and a fee of not more than $25 is assessed when a licensee renews a license. (Section 3(1), p. 4, l. 18-23 and (2), p. 4, l. 24; p. 5, l. 5). Currently, there are about 3,600 licensees. If all of them renew their licenses in December, 1983, the account will receive about $72,000. During 1984, the account should receive a few thousand dollars from new licensees. The account will be virtually depleted if five or more $15,000 payments are ordered during 1984. If ten $15,000 payments are ordered, the money collected in 1985 will be used to satisfy 1984 claims. A large amount of unsatisfied claims in 1985 will keep the account depleted for years to come.

Eighth, relief may be available to claimants if they FILE CLAIMS AGAINST THE STATE for reimbursement from the general fund pursuant to Title 17, Chapter 8, Part 2. The board of realty regulation is a part of the Department of Commerce. This state department has a duty to maintain a minimum balance of $50,000 in the account (section 2, p. 4, l. 10-11). Even though it is recognized this may not be done in section 13 (p. 11, l. 14-23). Failure to perform the duty opens the state to claims which would be paid from the general fund.

JUDGMENT HOLDERS WILL NOT HAVE EQUAL RIGHTS with the board of realty regulation.

First, delay of the hearing on the application (Sec. 9(1); p. 8, l. 25; p. 9, l. 4). The court must conduct a hearing on the application within thirty (30) days after it is served on the board of realty regulation. However, as a

matter of right, the board, and the board only, can have the hearing continued for any amount of time it desires up to sixty (60) days. The court must grant the board's request, even if there is not good cause, because the word "shall" at page 9, l. 1, of section 9(1) is mandatory on the court in favor of the board. Only after the board has exercised its right to continue the hearing for sixty (60) days may the court require the board to give good reasons for continuing the hearing further (Sec. 9(1), p. 9, l. 2-4). The claimants aren't given the same rights. If it is so important that one party to the hearing have these rights, then those rights should be given to all parties.

Second, in making an application for, and in recovering from the account, the claimant is bound by the reasons given by the court as to why the final judgment was entered. [Sections 6(1) (p. 6. l. 13-17) and 7(2) (p. 7, l. 24-25)]. If final judgment wasn't entered because of the licensee's fraudulent, deceptive, or dishonest practices, or because of the licensee converted trust funds, the person cannot recover from the account. On the other hand, the board of realty regulation is not bound by the reasons given in the judgment. (Sec. 9(3), p. 9, l. 9-12). The board may defend against recovery from the account by arguing the judgment was really based on reasons other than fraud, deception, dishonesty or conversion regardless of what the judgment or other court documents say. (Section 9(3), p. 9, l. 12-15). If the claimant is bound by the reasons for the judgment, the board should be, too.

Third, the board of realty regulation is given the right to examine witnesses. (Section 9(3), p. 9, l. 12-15). The claimant won't necessarily have that right because the board can ask that the application for recovery be dismissed on the basis of affidavits only. (Section 8, p. 8, l. 14-22). The

claimant may not get to ask questions in court of the people making affidavits. If the right to examine witnesses is necessary for one party to get a fair hearing, then the right should be extended to all parties.

Respectfully submitted,

Richard E. Gillespie

(3) The examination for a broker's license shall be of a more exacting nature and scope and more stringent than the examination for a salesman's license.

History: En. Sec. 7, Ch. 250, L. 1963; amd. Sec. 181, Ch. 350, L. 1974; R.C.M. 1947, 66-1930; amd. Sec. 1, Ch. 595, L. 1981.

Compiler's Comments

1981 Amendment: Deleted former subsection (4) requiring an applicant, following two failures, to wait 6 months before another reexamination.

Effective Date: Section 2, Ch. 595, L. 1981, provided: "This act is effective on passage and approval." Approved May 1, 1981.

37-51-304. Bond required for licensure of broker or salesman. No license may be issued or renewed until the applicant for a broker's license or salesman's license has filed a bond with the department in the sum of $10,000 executed by a surety company authorized to do business in this state in a form approved by the board and conditioned that the applicant, if and when licensed, shall conduct his business and himself in accordance with this chapter and shall pay, to the extent of $10,000, judgments recovered against him for loss or damage to a person arising in the course of the applicant's practice as a real estate broker or salesman. Bonds given by licensees under this chapter, after approval, shall be filed and held in the office of the department. If, for any reason, the bond of a broker or salesman is canceled or voided, the license of the broker or salesman is automatically suspended until the broker or salesman is again fully bonded and the bond has been approved by the board. If the suspension is not terminated by rebonding and approval within 30 days from the date of suspension, the license of the broker or salesman is automatically revoked.

History: En. Sec. 10, Ch. 250, L. 1963; amd. Sec. 4, Ch. 261, L. 1969; amd. Sec. 184, Ch. 350, L. 1974; amd. Sec. 15, Ch. 101, L. 1977; R.C.M. 1947, 66-1933.

37-51-305. License — form — delivery — display — pocket card. (1) The board shall prescribe the form of license. A license shall bear the seal of the board.

(2) The license of a real estate salesman shall be delivered or mailed to the real estate broker with whom the real estate salesman is associated and shall be kept in the custody and control of the broker.

(3) A broker shall display his own license conspicuously in his place of business.

(4) The department shall annually prepare and deliver a pocket card certifying that the person whose name appears is a registered real estate broker or a registered real estate salesman, stating the period for which fees have been paid and, on real estate salesman's cards only, the name and address of the broker with whom he is associated.

History: En. Sec. 9, Ch. 250, L. 1963; amd. Sec. 183, Ch. 350, L. 1974; R.C.M. 1947, 66-1932; amd. Sec. 3, Ch. 306, L. 1979.

37-51-306. Transactions with nonresidents and with nonlicensed brokers or salesmen — reciprocity — consent to legal process. (1) It is unlawful for a licensed broker to employ or compensate, directly or indirectly, a person for performing the acts regulated by this chapter who is not a licensed broker or licensed salesman. However, a licensed broker may pay a commission to a licensed broker of another state

37-51-313 through 37-51-320 reserved.

37-51-321. Revocation or suspension of license — initiation of proceedings — grounds. The board may on its own motion and shall on the sworn complaint in writing of a person investigate the actions of a real estate broker or a real estate salesman, subject to 37-1-101 and 37-1-121, and may revoke or suspend a license issued under this chapter when the broker or salesman has been found guilty by a majority of the board of any of the following practices:

(1) intentionally misleading, untruthful, or inaccurate advertising, whether printed or by radio, display, or other nature, which advertising in any material particular or in any material way misrepresents any property, terms, values, policies, or services of the business conducted. A broker who operates under a franchise agreement engages in misleading, untruthful, or inaccurate advertising if in using the franchise name he does not incorporate his own name in the franchise name or logotype or does not conspicuously display, on his letterhead and other printed materials available to the public, a statement that his office is independently owned and operated. The board may not adopt advertising standards more stringent than those set forth in this subsection.

(2) making any false promises of a character likely to influence, persuade, or induce;

(3) pursuing a continued and flagrant course of misrepresentation or making false promises through agents or salesmen or any medium of advertising or otherwise;

(4) use of the term "realtor" by a person not authorized to do so or using another trade name or insignia of membership in a real estate organization of which the licensee is not a member;

(5) failing to account for or to remit money coming into his possession belonging to others;

(6) accepting, giving, or charging an undisclosed commission, rebate, or profit on expenditures made for a principal;

(7) acting in a dual capacity of broker and undisclosed principal in a transaction;

(8) guaranteeing, authorizing, or permitting a person to guarantee future profits which may result from the resale of real property;

(9) offering real property for sale or lease without the knowledge and consent of the owner or his authorized agent or on terms other than those authorized by the owner or his authorized agent;

(10) inducing a party to a contract of sale or lease to break the contract for the purpose of substituting a new contract with another principal;

(11) accepting employment or compensation for appraising real property contingent on the reporting of a predetermined value or issuing an appraisal report on real property in which he has an undisclosed interest;

(12) negotiating a sale, exchange, or lease of real property directly with an owner or lessee if he knows that the owner has a written, outstanding contract in connection with the property granting an exclusive agency to another broker;

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(13) soliciting, selling, or offering for sale real property by conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property;

(14) representing or attempting to represent a real estate broker other than the employer without the express knowledge or consent of the employer;

(15) failing voluntarily to furnish a copy of a written instrument to a party executing it at the time of its execution;

(16) paying a commission in connection with a real estate sale or transaction to a person who is not licensed as a real estate broker or real estate salesman under this chapter;

(17) intentionally violating a rule adopted by the board in the interests of the public and in conformity with this chapter;

(18) failing, if a salesman, to place, as soon after receipt as is practicably possible, in the custody of his registered broker, deposit money or other money entrusted to him as salesman by a person;

(19) demonstrating his unworthiness or incompetency to act as a broker or salesman; or

(20) conviction of a felony.

History: En. Sec. 14, Ch. 250, L. 1963; amd. Sec. 5, Ch. 261, L. 1969; amd. Sec. 188, Ch. 350, L. 1974; R.C.M. 1947, 66-1937; amd. Sec. 2, Ch. 188, L. 1979.

37-51-322. Right to notice and hearing. When the board has investigated an application for a real estate broker's or salesman's license or, subject to 37-1-101 and 37-1-121, investigated the actions of a real estate broker or salesman on the sworn complaint in writing of a person or on its own motion and the investigation has revealed reasonable grounds for denying the application or reasonable indication of a violation of this chapter as cause for revoking or suspending a license issued to a real estate broker or salesman, the board shall, before denying the application or revoking or suspending the license, give notice and set the matter for hearing.

History: En. Sec. 8, Ch. 261, L. 1969; amd. Sec. 189, Ch. 350, L. 1974; R.C.M. 1947, 66-1938.1.

37-51-323. Penalties — criminal — civil. (1) Any individual acting as a broker or salesman without a license or while his license is suspended or revoked or any person who violates any provision of this chapter shall be guilty of a misdemeanor and upon conviction thereof by a district court of this state shall be punishable by a fine of not less than $100 or more than $500 or by imprisonment for a term not to exceed 90 days, or both. Upon conviction of a second or subsequent violation, the person shall be punishable by a fine of not less than $500 or more than $2,000 or by imprisonment for a term not to exceed 6 months, or both.

(2) In case any person in a civil action is found guilty of having received any money or the equivalent thereof as a fee, commission, compensation, or profit by or in consequence of a violation of any provision of this chapter, he shall in addition be liable to a penalty of not less than the amount of the sum of money so received and not more than three times the sum so received, as may be determined by the court, which penalty may be recovered in any court of competent jurisdiction by any person aggrieved.

History: En. Sec. 17, Ch. 250, L. 1963; amd. Sec. 6, Ch. 261, L. 1969; amd. Sec. 1, Ch. 541, L. 1977; R.C.M. 1947, 66-1940.

BOND FOR REAL ESTATE BROKER AND/OR REAL ESTATE BROKER'S SALESMAN

Montana Real Estate Board

KNOW ALL MEN BY THESE PRESENTS: BOND NO._____

That we _____ of _____, in the County of _____, State of Montana, as Principal, and_____, a corporation, duly organized under the laws of the State of _____, having its principal place of business in the City of_____, State of _____, and licensed to do business under the laws of the State of Montana, as Surety, are held and firmly bound unto the Montana Real Estate Board in the full penal sum of TEN THOUSAND DOLLARS ($10,000.00), truly to be made, we bind ourselves and our legal representatives, jointly and severally, by these presents.

Sealed with our Seals and dated this _____ day of _____, 19____.

WHEREAS, the above bound principal in compliance with the provisions of Title 66, Chapter 19, Revised Codes of Montana, 1947, as amended, and the rules and regulations promulgated by the Montana Real Estate Board, is about to engage or continue in the business of a real estate broker and/or real estate broker's salesman.

NOW, THEREFORE, if the said principal, if and when licensed, in accordance with the provisions of the "Real Estate License Act of 1963" of the State of Montana and as amended, shall conduct his business and himself in accordance with the provisions of said act and shall pay to the extent of TEN THOUSAND DOLLARS ($10,000.00) all Judgments recovered against him for loss or damage to any individual, partnership, association or corporation arising in the course of the principal's practice as a licensed real estate broker or salesman, then this obligation to be void, otherwise to remain in full force and effect.

The aggregate liability of the surety hereunder, whether to one or more persons, shall in no event exceed the total sum of TEN THOUSAND DOLLARS ($10,000.00).

This bond shall be in full force and effect from the_____ day of _____, 19____, and continously thereafter for each successive licensed year until cancelled as provided herein.

The surety's liability under this bond shall not be cumulative, regardless of the number of years this bond is continued in force and the surety's aggregate liability during effective period of this bond shall not in any event exceed the penal sum of TEN THOUSAND DOLLARS ($10,000.00).

The surety may cancel this bond as to future liability by giving thirty (30) days' written notice by registered mail addressed to the principal at the address in this bond stated, and to the Montana Real Estate Board. If the principal does not execute and have approved a new bond prior to the effective date of such cancellation by the surety, his license will be automatically suspended by operation of law and principal shall immediately return his license and identification card to the Montana Real Estate Board. If at any time during the term hereof the principal furnishes a new bond accepted by the Board this bond shall be cancelled as of the date of said approval. The surety shall remain liable, however, subject to all the terms, conditions and provisions of this bond, for any and all acts covered by this bond up to the date of such cancellation.

IN WITNESS WHEREOF, The said principal has hereunto set his hand and seal, and the said surety has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereunto affixed the day and year first above written.

COUNTERSIGNED

_____
Principal

_____
Resident Agent

_____
Surety

_____
Address

_____
Attorney-in-Fact

16

Exhibit G
2/21/83
HB 875

STATEMENT OF GLEN L. DRAKE, ON BEHALF OF THE AMERICAN INSURANCE ASSOCIATION IN OPPOSITION TO HB 875

House Bill 875 is a bill which proposes to delete the requirement that all real estate brokers and salesmen purchase Surety Bonds, and substitute instead a fund administered by the Board of Realty regulation.

We feel that the bill has many glaring weaknesses that require its death.

One of the initial questions is whether or not it is proper to put the State in the Bond business. We believe it is not. We believe that the insurance industry is better able to provide bond services than the State. We also believe that government should not compete with private industry.

Assuming however, that you reject these basic principles, we believe that an examination of the bill will compel you to oppose it for many other reasons, some of which are:

1. RECOVERY UNDER THIS ACT IS MORE LIMITED THAN UNDER A BOND.

Surety bonds are now required of realtors under Section 37-51-304, M.C.A. If a realtor is guilty of fraud or deceit or other improper act, an injured person can sue the realtor and can collect on the Bond.

Under the proposed bill, an injured person's right and ability to collect is greatly impaired, if not defeated altogether. The following are a few examples:

a. Recovery can only be made for fraudulent, deceptive or dishonest practices (Sec. 6, p. 6, l. 16 and 17).

b. Injured parties can only collect <u>once</u> against a licensee, no matter how many separate claims (Sec. 6, p. 7, l. 3-6; also Sec. 11, p. 10, l. 4-17).

c. Cannot collect for interest, costs, attorney's fees, exemplary or punitive damages - or amounts of judgments remaining unpaid for more than two years (Sec. 6, p. 7, l. 7-12).

d. Recovery may be defeated altogether if no money is in the fund (Sec. 13, p. 11).

2. PROCEDURES MAKE RECOVERY UNDER THE BILL FAR MORE DIFFICULT THAN RECOVERY UNDER A BOND.

a. Recovery can only be made after judgment recovered and after exhaustion of other post-judgment remedies (Sec. 7, p. 7, l. 24 and 25; Sec. 7, p. 8, l. 1-6).

b. Judgment against realtor not binding and not res judicata against the Board (Sec. 9, p. 9, l. 9-15).

c. Requires filing of an action in District Court to make collection (Sec. 6, p. 6, l. 12-24).

d. Board is not bound by any admission, compromise or agreement entered into by wrongdoing realtor (Sec. 10, p. 9, l. 24 and 25).

3. THE BILL OFFENDS ONE'S SENSE OF JUSTICE, AS WELL AS THE DUE PROCESS CLAUSE AND OTHER CONSTITUTIONAL PROVISIONS.

a. The bill requires that all claims paid under the act, although only partially paid, are deemed to be "satisfied" (Sec. 11, p. 10, l. 7-13). A clear violation of the Due Process and equal protection clause.

b. Requires service of petition upon the licensee (realtor) as a matter of jurisdiction before relief from Board can be had even though the licensee (realtor) may not be available for service, and although a judgment has already been obtained against him (Sec. 6, p. 7, l. 14-18).

c. Judgment against the licensee is not res judicata (Sec. 9, p. 9, l. 9-15).

d. Allows Board unfair procedural advantages by giving only to the Board the right to ask the court for

continuance, with no such right to the applicant (Sec. 9, p. 8, l. 23-25; Sec. 9, p. 9, l. 1-4).

e. Discriminates against the licensee's spouse (Sec. 7, p. 7, l. 22-23).

The foregoing are by no means all of the problems with this bill. There are several problems with drafting and conflicts within the bill, such as Sec. 13 and Sec. 11 which have conflicting provisions. What I have attempted to do here is point out only some of the problems.

CONCLUSION: This bill was written for the sole protection of the real estate industry at the expense of the general public. Every effort has been made to inhibit partially or completely a victim's right to recover. Passage of this act will be tantamount to a license to steal. Although the public is not now adequately protected by the $10,000 bond requirement, it is far better protected than it would be if this act were passed. Cost of a $10,000 bond is $50.00 per year or $100.00 for three years. Therefore, it is obvious that cost is not a major factor. This bill appears to be a power grab by a bureaucracy - to the detriment of the public.

Respectfully submitted,

Glen L. Drake

Exhibit H
HB 875
2/21/83

STATE OF MONTANA

BOND FOR REAL ESTATE BROKER AND/OR REAL ESTATE SALESPERSON

BOARD OF REALTY REGULATION
DEPARTMENT OF COMMERCE
1424 9TH AVENUE
HELENA, MONTANA 59620-0407

KNOW ALL MEN BY THESE PRESENTS: BOND NO._____

That we_____of_____, in the County of

_____,State of Montana, as Principal, and_____

a corporation, duly organized under the laws of the State of_____

having its principal place of business in the City of_____,State of

_____,and licensed to do business under the laws of the State of Montana, as Surety, are held and firmly bound unto the Board of Realty Regulation in the full penal sum of TEN THOUSAND DOLLARS ($10,000), truly to be made, we bind ourselves and our legal representatives, jointly and severally, by these presents.

Sealed with our Seals and dated this_____ day of _____, 19_____

WHEREAS, the above bound principal in compliance with the provisions of Section 37-51-304 MCA 1978, as amended, and the rules and regulations promulgated by the Board of Realty Regulation is about to engage or continue in the business of a real estate broker and/or real estate salesperson.

NOW, THEREFORE, if the said principal, if and when licensed, in accordance with the provisions of the "Real Estate License Act of 1963" of the State of Montana and as amended, shall conduct his business and himself in accordance with the provisions of said act and shall pay to the extent of TEN THOUSAND DOLLARS ($10,000) all Judgments recovered against him for loss or damage to any individual, partnership, association or corporation arising in the course of the principal's practice as a licensed real estate broker or salesperson, then this obligation to be void, otherwise to remain in full force and effect.

The aggregate liability of the surety hereunder, whether to one or more persons, shall in no event exceed the total sum of TEN THOUSAND DOLLARS ($10,000).

This bond shall be in full force and effect from the _____day of _____, 19__ and continously thereafter for each successive licensed year until cancelled as provided herein.

The surety's liability under this bond shall not be cumulative, regardless of the number of years this bond is continued in force and the surety's aggregate liability during effective period of this bond shall not in any event exceed the penal sum of TEN THOUSAND DOLLARS ($10,000).

The surety may cancel this bond as to future liability by giving thirty (30) days' written notice by registered mail addressed to the principal at the address in this bond stated, and to the Board of Realty Regulation. If the principal does not execute and have approved a new bond prior to the effective date of such cancellation by the surety, his license will be automatically suspended by operation of law and principal shall immediately return his license and identification card to the Board of Realty Regulation. If at any time during the term hereof the principal furnishes a new bond accepted by the Board this bond shall be cancelled as of the date of said approval. The surety shall remain liable, however, subject to all the terms, conditions and provisions of this bond, for any and all acts covered by this bond up to the date of such cancellation.

IN WITNESS WHEREOF, The said principal has hereunto set his hand and seal, and the said surety has caused these presents to be signed by its duly authorized officers and its corporate seal to be hereunto affixed the day and year first above written.

COUNTERSIGNED

(Please sign exactly as licensed) Principal

Resident Agent Surety

Address Attorney-in-Fact

H F

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HB 855 Date Feb. 21, 1983

SPONSOR Rep. Ramirez

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
David M. Nikolas	Helena, Mont.	State Bar of Mont.	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

WITNESS STATEMENT

Name Bob James Committee On Judiciary

Address G. Falls Date 2/21/83

Representing State Farm; NAIT Support

Bill No. HB 848 Oppose ✓

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Glen L Oak Committee On Judiciary

Address Kilgore Date 2/21

Representing American Lung Assn Support

Bill No. 848 + 875 Oppose ✓

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITORS' REGISTER

HOUSE _____ COMMITTEE

LL HB 848 Date 2/21/83

ISOR Menahan

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Bob James	G. Falls	State Farm; NAII		✓
Carla Gray	Butte	MTLA	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HB 848 Date February 21,1983

SPONSOR Representative Menahan

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Ward Menahan	Helena	Farmers Insurance		X
Jason Nobles	Helena	Mont Cons Dept		
Karla Gray	Butte	MTLA	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit I
HB 848
2/21/83

NAME Ward A. Shanahan BILL NO. HB 848

ADDRESS Box 1715 Helena, Montana DATE 2-21-83

WHOM DO YOU REPRESENT I am an attorney for Farmers Insurance Group

SUPPORT _____ OPPOSE X X X X X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. This bill is objectionable because it will increase the number of claims which result in filed lawsuits. It must do this because a penalty is now added to the insurers burden. This WILL INCREASE THE NUMBER OF CASES FILED IN THE ALREADY CROWDED COURT DOCKETS. You don't get the prize if you don't file.

2. The 10% is a penalty for everybody regardless of the justice of the claim.

3. Justice would require that the Defendant be given an equal benefit- -if he or she prevails or if the Defendants offer is greater than the amount recovered by the Plaintiff. How about 10% on the costs recovered in the event the Defendant wins? How about a 10% reduction in the award if the Plaintiff fails to recover more than was offered?

4. What happens under this bill if there is more than one offer? A series of offers is usually made in a real "negotiation- -does the plaintiff get the highest, or the lowest? Who decides?

5. The law already favors the plaintiff in Montana in negligence cases.We operate under the doctrine of "comparative negligence" the Plaintiff's chances of prevailing in some amount are much greater when his own negligence only reduces the award but does not completely bar it. This bill now asks you to "penalize" one side when it may honestly believe that the Plaintiff should not recover.

6. A negligence complaint isn't like a contract or a debt due. It's only fixed in amount when a judge or jury determines that in fact the Plaintiff should recover. Its a contingent liability, contingent upon a determination of fact.

7. The statute of limitations in Tort cases is 3 years in Montana. Why should you reward someone who waits until the last week of the three years to file their claim in court? Yet, many cases are handled in just this way, and this is simply the Plaintiff's choice. A voluntary delay like this usually indicates that the claim is "shaky" or that serious negotiations have been underway.

THIS BILL SHOULD BE GIVEN A "DO NOT PASS".

HB 848
2/21/83

STATEMENT OF GLEN L. DRAKE, FOR THE
AMERICAN INSURANCE ASSOCIATION,
IN OPPOSITION TO HB 848

You have heard the proponents of HB 848 expound upon the object of the bill. A close examination of it is necessary to determine whether or not the stated objectives are met or not. You have heard that the bill will lessen court congestion and lead to early settlement. Examination shows both claims to be false.

A. Bill will cause court congestion and delay settlement.

1. The bill allows for interest to be given only if an action has been filed.

Thus, it will force claimants to attorneys in order to obtain interest on their demands and cause court congestion by requiring the filing of actions.

2. Interest is available only if a judgment is obtained, thus causing and forcing continued litigation and trial of cases, rather than early settlement.

3. Interest will run from the date of filing of action, thus causing early filing of cases without resort to settlement negotiations.

4. The bill offers plaintiffs an incentive not to negotiate in good faith until they are at the courthouse steps by triggering the effect of the settlement offer from "30 days of its receipt or before the commencement of trial, whichever occurs first." The interest then runs from the date of filing. Thus, the plaintiff has nothing to lose and everything to gain by making unrealistic settlement offers up until the time of trial.

Thus, it is apparent that the bill does not achieve the purposes stated by proponents.

B. Is there a need for the bill?

1. A further question, however, arises - "Is there a need for this kind of legislation?"

Assuming that there was in the past a need to have legislation forcing insurance companies to negotiate in good faith, I submit that the case of Klaudt v. Flink and State Farm Insurance, decided January 28, 1983, has completely swung the pendulum to the other extreme. Klaudt says that a first party or third party claimant can sue an insurance company directly for alleged failure to promptly and fairly settle claims once liability has become reasonably clear. This suit can be brought at any time. This decision was based upon the Unfair Claims Settlement Act. If a company is found to have violated that section, it is liable for punitive or exemplary damages. Thus, the entire burden to quickly settle has been placed upon the insurance company with no corresponding burden on the plaintiff.

C. Interest rate is excessive.

1. The bill, as written, calls for 10% interest - yet the legal rate of interest for most other pre-judgment matters is only 6%. (See Section 31-1-106, M.C.A., attached hereto.)

D. Who pays the cost and benefits from the bill?

1. The question then arises as to who pays and who benefits from this bill.

Obviously, the bill's chief proponents are the trial lawyers association. They also will be the chief beneficiaries of the bill. If each case averages three years of age before

trial, it will mean an automatic pay raise to the trial lawyers of 30% - not bad in a depression year when union employees and others are facing a no-raise budget.

Next question - "Who pays?" Again, an obvious answer - the premium paying public. Every dollar paid out by an insurance company means another dollar paid in by the consuming public. I submit that blue collar and white collar workers with little or no raises - or no jobs at all, will take unkindly to paying the cost of the necessary premium increase caused by this poorly conceived bill.

I trust you will vote "do not pass" on HB 848.

31-1-105. Annual rate. When a rate of interest is prescribed by a law or contract without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate.

History: En. Sec. 2584, Civ. C. 1895; re-en. Sec. 5210, Rev. C. 1907; re-en. Sec. 7724, R.C.M. 1921; Cal. Civ. C. Sec. 1916; Field Civ. C. Sec. 970; re-en. Sec. 7724, R.C.M. 1935; R.C.M. 1947, 47-123.

31-1-106. *(Temporary)* **Legal interest.** (1) Except as otherwise provided by the Uniform Commercial Code or 31-1-111 and 31-1-112, unless there is an express contract in writing fixing a different rate or a law or ordinance or resolution of a public body fixing a different rate on its obligations, interest is payable on all moneys at the rate of 6% a year after they become due on:

(a) any instrument of writing, except a judgment;

(b) an account stated;

(c) moneys lent or due on any settlement of accounts from the date on which the balance is ascertained; and

(d) moneys received for the use of another and detained from him.

(2) In the computation of interest for a period of less than 1 year, 365 days constitute a year.

Compiler's Comments

1981 Amendment: Inserted "or 31-1-111 and 31-1-112" following "Uniform Commercial Code" near the beginning of (1). (Amendment terminates July 1, 1983—sec. 7, Ch. 275, L. 1981.)

Effective Date — Termination: Section 8, Ch. 275, L. 1981, provided: "This act is effective on passage and approval and terminates on July 1, 1983." Approved April 6, 1981.

31-1-106. *(Revived, July 1, 1983)* **Legal interest.** (1) Except as otherwise provided by the Uniform Commercial Code, unless there is an express contract in writing fixing a different rate or a law or ordinance or resolution of a public body fixing a different rate on its obligations, interest is payable on all moneys at the rate of 6% a year after they become due on:

(a) any instrument of writing, except a judgment;

(b) an account stated;

(c) moneys lent or due on any settlement of accounts from the date on which the balance is ascertained; and

(d) moneys received for the use of another and detained from him.

(2) In the computation of interest for a period of less than 1 year, 365 days constitute a year.

Compiler's Comments

~~*Revival:* Chapter 275, L. 1981, amended this section temporarily. See temporary version above. The amendments terminate on July 1, 1983, as provided by sec. 8, Ch. 275, L. 1981. Therefore, the text of the revived version of this section does not reflect the Ch. 275, L. 1981, amendments.~~

History: En. Sec. 2585, Civ. C. 1895; amd. Sec. 1, p. 125, L. 1899; re-en. Sec. 5211, Rev. C. 1907; re-en. Sec. 7725, R.C.M. 1921; Cal. Civ. C. Sec. 1917; amd. Sec. 1, Ch. 144, L. 1933; re-en. Sec. 7725, R.C.M. 1935; amd. Sec. 11-130, Ch. 264, L. 1963; amd. Sec. 38, Ch. 234, L. 1971; amd. Sec. 11, Ch. 315, L. 1977; R.C.M. 1947, 47-124; amd. Sec. 3, Ch. 275, L. 1981.

31-1-107. *(Temporary)* **Interest rate allowed by agreement.** (1) On amounts up to $150,000, parties may agree in writing for the payment of any rate of interest not more than 10% per annum or more than 4 percentage points in excess of the discount rate on 90-day commercial paper in

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HJR 29 DATE Feb. 21, 1983

SPONSOR Ramirez

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Roger McGlenn	HELENA	INDEPENDENT INSURANCE AGENTS ASSOC. of MT.	✓	
Jayne Mitchell	Helena	Mont Ins Dept		
Mary Roberts	Helena	MT Magistrate Fund		
Bob James	G. Falls	State Farm; NAII	✓	

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

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE Judiciary COMMITTEE

BILL HJR 29 Date 2-21-83

SPONSOR

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
LES LOBLE II	HELENA	AM. COUNCIL OF LIFE INS	✓	
Ben Cook	Helena	American Insurance Assn.	✓	
Nancy A. Haberly	Helena	Montana Trial Lawyers Assn		

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit K
HB382
2/21/83

Proposed amendments to HB382

1. Title, line 4.
   Strike: "REPEAL"
   Insert: "PROVIDE A REASONABLE GOOD FAITH EXCEPTION TO"

2. Page 2, line 9.
   Strike: subsection (2) in its entirety.
   Insert: "(2) Evidence obtained as a result of a search or seizure if otherwise admissible, may not be excluded if the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the fourth amendment to the United States Constitution, Article II, sections 10 and 11 of the Montana constitution, and Montana statutory law relating to search and seizure."

3. Page 2, line 18.
   Following : "was"
   Strike: "a"
   Insert: "an intentional or negligent"

4. Page 4, line 7.
   Following: "was"
   Strike "a"
   Insert: "an intentional or negligent"

5. Page 4, line 11.
   Following: "injury"
   Strike: "and"
   Insert: (c) mental anguish;
   (d) damage to reputation; and"

   Renumber subsequent subsections.

6. Page 4, following line 13.
   Insert: "(2) If it was determined that there was an intentional violation of a constitutional or statutory right under [Sections 1 through 14] a claimant may be awarded punitive damages not to exceed $25,000."

   (3) No damages may be recovered for injuries proximately caused by a plea of guilty to or conviction of an offense directly or indirectly related to the illegal search or seizure."

Renumber subsequent subsections.

7. Page 8, following line 19
   Insert: Section 19. "Effective date. This act is effective on passage and approval."