MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on January 20, 1989, at 8:00 a.m.

ROLL CALL

Members Present: All members were present with the following exceptions:

Members Excused: Rep. Gould, Rep. Hannah

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

HEARING ON HOUSE BILL 177

Presentation and Opening Statement by Sponsor:

Rep. Jan Brown, House District 46 stated that HB 177 will create a Montana chiropractic legal panel. This bill was requested by the Chiropractic Association and it is based on the current Medical Legal Panel Act. The purpose of this bill is simply to reduce the number of lawsuits against chiropractors that wind up in District Court.

Testifying Proponents and Who They Represent:

Gerald Neely, Montana Medical Legal Panel
Mike Pardis, President, Montana Chiropractic Assoc. and Pardis Chiropractic Center
Jacqueline Terrell, American Insurance Association
Dr. Gary Blom, Chiropractor in Clancy, Montana
Dr. Lee Hudson, President, Montana Chiropractic Association and Great Falls Chiropractor
Dr. Lou Sage, Vice-President, Board of Chiropractors and Chiropractor in Victor, Montana
Bonnie Tippy, Montana Chiropractic Association

Proponent Testimony:

Gerald Neely stated that the proposed bill is patterned after the Montana Medical Legal Plan Act which applies to physicians and hospitals. The medical profession, first with the cooperation of the Montana Bar Association, jointly sponsored the legislation as it currently is on the books

with regard to doctors. This type of legislation is designed to reduce the number of cases that go to trial and to reduce the number of law suits and to cause settlement to take place as a means of the resolution of controversies involving malpractice. Mr. Neely stated that its purpose is not related to reducing premiums of insurance, or reducing the amount of recovery that individuals have that have valid claims against practitioners. In 1977 when this legislation was first put into effect, there were approximately 30 physicians per year that had medical malpractice claims against them. Approximately 23 suits per year filed against them and approximately 8 trials per year. Since 1977 and the utilization of the Montana Medical Legal Plan, there has been a 75% reduction of the number of cases that have gone to trial and a 50% reduction of the number of cases that have gone to suit. This is directly a result of using the persuasive powers of the panel, a group of experts that review a claim to determine whether or not a claim ought to proceed. Mr. Neely explained to the committee that there are three types of cases that tend to come up. 1.) Those in which there is very clear negligence on the part of the practioner and there is cause for settlement. 2.) Those cases in which there is very clearly no evidence of any malpractice and the case ought not to be further pursued. 3.) Those types of claims that should go into the regular court system and the purpose for it is the inducement of settlement and the reduction of litigation. As a consequence, over the years for the State of Montana there has been a dramatic reduction in the number of cases that would otherwise go to trial, hence saving money for the State of Montana and the communities where those cases would be tried. Mr. Neely submitted before the committee illustrations from the Montana Medical Legal Panel listing the percentages of malpractice claims against physicians (EXHIBITS 1, 2, and 3). EXHIBIT 1 shows the number of cases that have been settled or withdrawn before they went to a panel hearing, that rate is about 25% of the claims filed. EXHIBIT 2 contains information that will provide some of the other areas of importance for the utilization of the panel. One of the most important reasons for the existence of the screening mechanism is not just for a resolution of claims, it is also for the gathering of data. It allows a group to determine the who, what, when and the where of the malpractice associated with their profession. This is important for a number of reasons. It gives advanced warning of what is likely to happen in the area of insurance because as the number of claims increase or decrease, they can determine whether or not in the near future there will be, or ought to be increases or decreases in insurance. The other important statistical gathering is that they can determine which practitioners are repeat offenders for purposes of discipline. It is very important in this time and age to know whether or not there is a practioner that has multiple incidents of malpractice against them so steps can be taken to make sure the practioner no longer

practices. In summary, the Medical Legal Panel is a method of screening claims. It is both efficient in terms of reducing the number of trials and lawsuits and it is also widely accepted as a method of doing so. It has been very beneficial to the medical community in determining what the statistics are with regard to medical malpractice and what the impact of these problems associated with injuring parties are. The Medical Legal Panel in Montana has been copied by a number of other states, there are currently some 22 states in the U.S. that have this type of screening panels. Mr. Neely stated that the proposed bill is nearly identical to the current legislation with the exception of two provisions. One, having to do with audits and one having to do with the utilization of the state and its accounting system. With the exception of a financial detail and an auditing detail, the legislation is nearly identical replacing physicians with chiropractors.

Dr. Mike Pardis, President of the Montana Chiropractors Association as well as a practicing chiropractor in Helena, stated that the proposal before the committee is two-fold. The first idea is to eliminate or reduce the number of malpractice claims against chiropractic professionals that come before the court systems. Additionally, he hoped in some small way that this legislation could help reduce the virgin claims before the district court system. According to the largest national chiropractic professional liability carrier, the National Chiropractic Mutual Insurance company, this is a problem that 60% of the claims brought before the court, or before the claims filed against chiropractors, are nuisance claims. Dr. Pardis stated that there are many reasons for claims to be filed. Misunderstandings between the doctors and patient, personality conflicts, or perhaps a bill that has been taken to collection. However, the purpose of this bill is not to place blame, but to hopefully find a solution to the problem.

Jacqueline Terrell stated that the American Insurance Association supports HB 177. It has been found that panels of this nature tend to reduce frivolous claims, and for that reason they support the proposed legislation.

Dr. Gary Blom, a practicing chiropractor in Helena and Butte stated that HB 177 can be a win-win situation for all involved. It would significantly reduce the legal costs not to mention the stress and anxiety that goes along with a malpractice claim.

Dr. Lee Hudson commented that not only is the proposition before the committee of benefit to the doctors involved, it is equally important and beneficial to all parties involved. First, it has been stated that it will expedite the action of the complaints for both the doctor and the complainant to decrease the length of time involved as well as decrease the amount of stress and concern to all parties. It will help

the claimant by expediting any settlement that is just and due to him in a case that has just merit, and it will help the doctor, once again, by decreasing the amount of time and concerns and time out of his office. This is not a new problem and much has been said about the problem of rising liability costs throughout all health professions. Probably the most notable is the obstetrical profession where they know they have a real problem in the rural areas with lack of practitioners due to the high cost of malpractice insurance. This trend is also going that way for all health care professions. As it has been stated, other health care practitioners have seen this coming and have instituted such a panel as is being proposed today. Although this panel won't directly reduce their malpractice premiums, the companies figure them on claims made and supplements paid out. It will, therefore, in the long run have an indirect relationship decrease in malpractice claims and also decrease in premiums so that they will not be jeopardizing the public from having a good quality chiropractic care because practitioners choose to go elsewhere or choose not to practice because of high costs of insurance, etc.

Dr. Lou Sage, Vice President of the Board of Chiropractors of the State of Montana, stressed to the committee that the Board strongly endorses this bill. They believe that it is a bill that would make things more equal, the settlements would be more fair and it would mainly expedite the process. In doing so, the Board also believes that it would be something that would give more creditability to their profession and would generally benefit the people of the State of Montana.

Bonnie Tippy commented that HB 177 is basically a mandatory arbitration where a total of six panelists are chosen. Three attorneys will be on the panel as well as three chiropractors. The panel is administered through the Montana Chiropractors Association. The cost to the State of Montana is zero. This program will be paid through an assessment on chiropractors licenses who are doing business in the State of Montana. Mrs. Tippy submitted before the committee a full explanation of how the Chiropractic Legal Panel would work (EXHIBIT 4).

Testifying Opponents and Who They Represent:

Michael Sherwood, Montana Trial Lawyers Association

Opponent Testimony:

Michael Sherwood stated that in 1977 the doctors in the State of Montana addressed the legislature with a severe problem that they were being faced with. Their malpractice premiums were rising and getting worse by the day. Because of that, the legislature and the Judiciary Committee, at that time, passed the Montana Medical Malpractice Act, which is now the Montana Legal Panel Act. There was testimony given at the

time that the purpose for this panel was to lower malpractice premiums, and because of that, the Montana Supreme Court agreed to allow special protection legislation for doctors. Mr. Sherwood referred to Mr. Neely as stating that the panel is not designed, however, for purposes of lower malpractice premiums, but merely for purposes of screening various suits. They have heard no testimony that there are a rash of suits, or that there is a virgining problem in medical malpractice or chiropractors. Mr. Sherwood presented to the committee written testimony in opposition to HB 177 as well as a copy of the court decision of Bruce Linder vs. the Montana Medical Association (EXHIBITS 5 and 6).

Questions From Committee Members: Rep. Boharski addressed the situation that Mr. Sherwood mentioned about the fact that this takes away court authority or the authority the person has to file a malpractice claim in a court. From what he understands, this is a non-binding court, merely expediting the process. Mr. Sherwood responded that if he stated or impressed upon the committee that this takes access away from the courts, it does not. It simply delays it and makes it more expensive. However, Rep. Boharski is correct in assuming that it is non-binding.

Rep. Boharski then stated to Mr. Sherwood that it would be his contention that it takes away the right to a speedy trial. Mr. Sherwood commented that it would not. All he is saying is that it hinders the process and all of the courts that have reviewed this kind of legislation recognize that it hinders the process. His argument is that they have not heard any testimony saying that there is a serious problem out there that should be addressed. They don't have any statistics showing a series of various claims. Representations were made to him that this is an innocuous bill because only four claims are filed a year against chiropractors.

Rep. Boharski requested Mr. Neely to address the question regarding funding for the panel. The funding for the medical malpractice panel is done solely by the panel and they are asking for statutory appropriation of money so the state is now becoming involved collecting the fees for it. Why has that been changed? Mr. Neely commented that he did not help with the drafting of the bill, but stated that the Medical Association appears to be in support of the concept of the panel approach. The history of the Medical Legal Panel for the doctors and physicians was set up through the Medical Legal Panel and the use of trust accounts that do not go through the state budgeting system. There has been some concern over that type of an approach to not channel the funds through a state agency.

Rep. Eudaily stated that it appears to him that they are setting up a whole new entity which as to have its own set of rules.

Mr. Neely commented that his presumption is correct. The intent of the bill is to have a separate distinct entity with its own set of rules, its own administration, its own system of panel hearings and its own office. That is very clearly the intent.

Rep. Mercer questioned Gary Neely as to why they don't have a panel simply to review law suits. It appears to him what they are doing is trying to force people to come together for mediation type meetings as well as placing up a hurdle prior to lawsuits. Are they just headed towards a trend of saying that their court system doesn't work? They need to set up some kind of mediation panel prior to every lawsuit because the benefits that the chiropractors are seeking are the same concerns that every business and non-business person has with respect to law suits. Why are they drawing the line here? Mr. Neely stated that it doesn't end. In his opinion, the alternative dispute resolution mechanism is the way to go and agrees with Rep. Mercer. There is a problem with the legal system and this is a means of solving that problem. Most definitely the court system isn't working to its best potential and in his opinion the expansion of a proper screening mechanism prior to trial that is cognizant of the rights of the individual that has a claim is in fact, the way to go.

Rep. Eudaily asked why there has to be a separate panel for each of the health care providers as they come to the legislature and ask for this right? Why can't they have one health care provider panel and have panelists from each one of those various areas that could be drawn to that panel when a case came up. Three of those could sit with and use the same people that they are using now on the medical panel. Why do they want to set up all these different panels for each one of the different groups that come before them? Mr. Neely stated that no one has truly sat down and thought that question through before. The rationale for the separate panel would be that a particular group might incur hundreds of thousands of dollars of start up costs and research.

Rep. Brown questioned Bonnie Tippy as to what objection she might have if it were the committee's decision that the Medical Malpractice Board did not belong to the doctor's, but was in fact a state agency and they determined to mend the bill and place the chiropractors on that board. Mrs. Tippy commented that she would have only one objection. While they are growing in their ability to have a good rapport with the Montana Medical Association, it is still not where they would like it to be. They would have perhaps some fear that chiropractors would be resented as a part of that panel and perhaps not treated the same as they would, should they be a part of their own panel.

Closing by Sponsor: Rep. J. Brown closed.

HEARING ON HOUSE BILL 98

Presentation and Opening Statement by Sponsor:

Rep. Orval Ellison, House District 81 stated that HB 98 is simply a house cleaning bill. The substance of HB 98 is on the bottom of the bill on page 4.

Testifying Proponents and Who They Represent:

Jack Whitaker, Cascade County Commissioner
Carlo Cieri, Park County Commissioner
Bill Verwolf, Helena City Manager
Steve Browning, State Farm Insurance
Gordon Morris, Montana Association of Counties

Proponent Testimony:

Jack Whitaker commented that HB 98 is a bill that could aid and help their district courts. Cascade County generates about $540,000 and their court costs are right around a million dollars. The last nine years their court deficit has reached some $600,000; therefore, they are in desperate need of help for their courts. He stated that he did some research on just four cases and the jury cost alone for those four cases was $8,552.50. That amount does not include the cost of the judges, the courtrooms, the clerks or the court reporters.

Carlo Cieri stated that as the committee is most likely aware, in recent years district courts are running out of funding. They have levied a maximum of mills in order to take care of their district court, and they still run short having to look to the taxpayers for emergency budgets. With this bill they can hopefully come up with enough money to alleviate the situation. It is not fair that the taxpayers should have to pick up the burden for the district courts. Everybody is entitled to a day in court, but it seems like the good guys are paying too much for the bad guy. Through punitive damage awards, generally called wind-fall awards, this bill has to ability to go some place and help everyone involved.

Bill Verwolf, speaking as Helena's City Manager stated that this is a very good concept of using the punitive damages to fund the cost of society, as punitive damages are for offenses which are essentially against society. The only concern he has about the bill is that depositing the money directly into the court establishes a fair amount of distance between the person setting the punitive damages and the use of those punitive damages. He suggested to insert into section 9B the deposit of the money should be made to the county general fund and the county commissioners allow the discretion of funding the district court as they do

currently, rather than having the district court budget be determined by how much punitive damages they collect. With putting that removal into the county general fund, the concept of HB 98 is extremely good.

Steve Browning, appearing on behalf of State Farm Insurance agreed with the comments made by Mr. Verwolf and adhered to his testimony.

Gordon Morris began by pointing out the HB 98 is a direct reflection of a resolution that was adopted by the Montana Association of Counties last June at their annual convention, resolution 88-2. The resolution called for punitive damages to be made and awarded to the district court. That resolution was given a high priority by the member counties, all 156 county commissioners in attendance, and passed unanimously. They feel, therefore, that the bill is a reflection of commissioners desires in regard to the district court problems. Mr. Morris submitted to the committee an excerpt from an article entitled "Reforming Punitive Damages, The Judicial bargaining Concept" (Exhibit 7). He stated the main purpose of punitive damages, as Bill Verwolf indicated, is to benefit society. Punitive damages are not awarded to compensate a particular plaintiff, but to serve society by enforcing the established rules of conduct. The legislature and special session of March 1986 earlier addressed this punitive damage issue; however, the difference being that they are now looking at having the revenue dedicated to state district courts. These are not county courts, they are courts of the State of Montana. They suggest that punitive damages go somewhere other than to the plaintiff. Mr. Morris stated that they are not doing something that is totally novel, they are doing something that could represent breaking ground in Montana and is worth serious consideration and examination. One thing, however, that needs to be addressed would be the notion of the court being the recipient of the money. That would potentially be in conflict of interest by virtue of having control as it is over a revenue source by virtue of court awards.

Testifying Opponents and Who They Represent:

Bonnie Tippy, Alliance of American Insurers and the American Insurance Association
Jeffrey Renz, President, Yellowstone Valley Claimants Attorneys Association
Michael Sherwood, Montana Trial Lawyers Association

Opponent Testimony:

Bonnie Tippy argued that all the reasons the committee heard for why HB 98 should be passed are the same reasons for why it should not be passed. The problem is that people who have invested interest in the money are going to be more likely to assess punitive damages as well as how much those

punitive damages will be. There is just too much of an invested interest there and in assessing that money. She recommended the committee give HB 98 a do not pass recommendation.

Jeffrey Renz, an attorney from Billings stated that this bill will not work. The first problem is in bringing a claim for punitive damages. The victim is the one who bears all the risk under this bill, and the risk is substantial. Additionally, there has been some discussion about the conflict of interest. He feels the bottom line is that no punitive damages are ever going to be awarded except by accident. The victim is going to bear the risk and is not going to take that risk if he realizes there is no benefit. In cases where there is a real serious risk of punitive damages to be awarded where the defendant feels he is at risk from getting hit with punitive damages, the smart defendant is going to settle out of court. He is going to make an offer to the plaintiff that takes care of his actual damage. The end result is that this bill is going to set the wrong example. Mr. Renz commented that punitive damages have a real complete function in society and are there to enrich the plaintiff. There are there to insure that the wrong doer and people who look at the wrong doer change the conduct of the future. Additionally, if the monies go to the government there is going to be a real serious constitutional question. With the change in the law that they made two years ago, they have to prove certain elements of punitive damages. In order to find someone in the criminal setting the elements of proof must be proven beyond a reasonable doubt. The entire punitive damage system in Montana would probably go down as being held unconstitutional. Mr. Renz submitted a brief testimony outlining his opposition to HB 98 (EXHIBIT 8).

Michael Sherwood stated that this bill has all kinds of problems. This bill effectively eliminates punitive damages in the judicial system in the State of Montana. Punitive damages have served a very good purpose in this state. Among other things, they have worked together with the criminal laws to reduce drunk driving, they have stopped SAFECO from entering into a practice of suing their own insurer over a period of ten years, and they have worked for the public benefit. There are very strong arguments to say that punitive damages should indeed be awarded perhaps to some sort of governmental interest; however, this bill simply and effectively eliminates punitive damages. It gets rid of any incentive on behalf of the injured person or the attorney that represents him. Mr. Sherwood presented written testimony in opposition to HB 98 and submitted a series of cases for the committees review (EXHIBITS 9-15).

Questions From Committee Members: Rep. Addy questioned Rep. Ellison as to data indicating how many awards and in what amount of punitive damages were made statewide. Rep. Ellison deferred the question to Mr. Morris who stated that MACO was also concerned with that same question. Unfortunately, those records are not in one central place and they have not had the chance to actually go out and survey on the basis of separate judicial districts.

Rep. Addy asked Mr. Sherwood if he was aware of any surveys that have been conducted concerning awards of punitive damages. Mr. Sherwood stated that the only statewide jury survey of which he was aware of was the State Bar jury survey which was on medical malpractice premiums. It is difficult at this point because they do not have a computerized court system to get that information.

Rep. Knapp asked what role do lawyers have financially in punitive damages? When a punitive damage is awarded, what percentage, if any, do lawyers get? Mr. Sherwood responded that it depends upon the nature of the case. Some lawyers are paid by the hour, in which he has no interest in the punitive damages, and some may get a percentage. Additionally, costs are not necessarily always recovered.

Closing by Sponsor: Rep. Ellison stated that he has met with his constituents and they tell him that there is clearly a problem in the area of punitive damages. By introducing this bill he has merely brought the problem to the attention of the committee. He feels the bill can be amended to take care of the concerns of the opponents and that maybe the committee would see it fit to assign a subcommittee.

HEARING ON HOUSE BILL 178

Presentation and Opening Statement by Sponsor:

Rep. Dorothy Cody, House District 20 submitted to the committee proposed amendments to HB 178 (EXHIBIT 16). She addressed the amendments and then presented her testimony (EXHIBIT 17) and pointed out that Section 41-32-03, which is not provided in this bill provides immunity only if the person or professional who is making the report is not acting in bad faith or with malicious purpose.

Testifying Proponents and Who They Represent:

John Madsen, Department of Family Services
Steve Waldron, Montana Council of Mental Health Centers
Kathleen Hayden, Montana National Association of Social Workers
Fay Dozier, Reed Point, Montana

Proponent Testimony:

John Madsen stated that the Dept. of Family Services is in support of this bill with Rep. Cody's proposed amendments.

Steve Waldron commented that they too support the bill with the proposed amendments. Mental health professionals have indicated to him that they need to have some clear direction of what they are suppose to do, and the amendments will clarify that so they can report the abuse and be immune from suit because they have reached confidentiality. They should also understand that it is not a public declaration. The professional notifies the Dept. of Family Services and a social worker investigates and determines as to whether or not the allegation is accurate. It may or may not end up in the court system. The professionals have been emphasizing strongly that this law is designed to protect children. It is a civil matter as far as this law is concerned, although the individual who is the perforator may end up in a criminal proceeding. The intent of this is to insure that children who are abused get help and if necessary get them into some services or help in order to deal with that abuse.

Kathleen Hayden stated that with her practice she frequently hears about abuse with whom she is working with or other abuse outside of that family. With the proposed amendments and legislation it would allow her to report this information to the Dept. of Family Services. What they do know about offenders and about abuse, both sexual and physical, is that once they have abused it is very, very likely that they will continue to abuse without treatment. And treatment is long and extensive and perforators seldom turn themselves in. Ms. Hayden stated that 75-80% of the women on her caseload have been sexually abused and many of them physically and emotionally abused as well. The reason she is representing NASW as well as herself is because she feels very strongly about this bill. The scars and devastation that this leaves with the victim is life long and is not easily healed. It takes a tremendous amount of courage, patience and determination to recover from this kind of victimization. HB 178 offers a great deal of protection for abused children and gives them the opportunity to grow up without fearing the adults who are around them. Moreover, it will allow them to see themselves as respectable and loveable human beings.

Fay Dozier testified in strong support of HB 178 as a survivor of childhood sexual abuse. She was sexually molested from the time she was five years old until the time she ran away from home at the age of eighteen. Additionally, she was severely physically, emotionally, and verbally abused. Her childhood was filled with constant fear, pain and shame. She felt dirty and responsible as a result of the sexual abuse. She grew up being told that she was no good, a slut and a whore.

Basically, she lived emotionally isolated from the rest of the world because of the secret she had to keep. Her brothers and sisters were turned against her and she felt alone. Instinctively she knew that what was happening to her was wrong, but had no where to turn for help. She grew up in a time when the family unit was considered sacred and no one wanted to be involved in family matters. She told her mother when she was thirteen and was severely beaten for telling. She told a friend when she was fifteen and lost her friendship. She told a male family member when she was sixteen and was raped by him for her efforts. Finally, when she was eighteen she knew legally she could leave home and they couldn't force her to go back. She still had a year and a half of high school left and was placed in a foster home. She tried to get her molester prosecuted when she was eighteen because she knew he was molesting at least one of her four sisters. The authorities told her that because she was no longer a minor, there was nothing they could do. She spent from 18 to 30 years old living a very self destructive, very emotionally disturbed life. She abused alcohol, was suicidal, was very promiscuous, had two failed marriages, two miscarriages, two abortions and physically and emotionally abused her own son. Mrs. Dozier stated that she later learned that her behavior and her problems were common in sexually abused victims. She sought therapy throughout those years but the therapists were not willing to credit her emotional and mental problems to the sexual abuse. Of course, that was many years ago, and this crime has only recently been brought out of the closet. As a result of their denial, she started believing that she was crazy and that a normal life was hopeless. At age 30 she finally hit bottom and was encouraged by her husband to try one more time to get help. She was able to find a therapist who treated adult female sexual abuse victims. For the first time in her life she felt validated, that she was not so alone. Her recovery was a long painful and costly process. She still feels the pain and bears the scars, and she always will. She still struggles with depression and liking herself. She finds trusting people very difficult. Mrs. Dozier commented that her four sisters were all sexually molested, as well as a step sister and a two year old half-sister. Had society not been so ignorant regarding this devastating crime perhaps these individuals wouldn't be suffering today . . . and they are suffering. She feels that if there had been a law such as HB 178 at the time she was molested and later when she was seeking help, her abuser might have been stopped and maybe so many lives would not have been so destroyed. She stated that her abuser was finally prosecuted for molesting her step-sister, but he received a slap on the wrist and is still running loose. Mrs. Dozier expressed that if men like him knew there were severe consequences for their actions, perhaps they would think twice before they violated another innocent child.

Testifying Opponents and Who They Represent:

Bryan Asay, Montana Family Coalition
Doug Kelley, Pastor, Mt. Helena Community Church

Opponent Testimony:

Bryan Asay stated that the Montana Family Coalition initially stood in strong opposition to sub-section 3B. Since that section was amended out of the bill their opposition was dramatically decreased. They additionally have concern with the addition of sub-section 1 of the word "made". If there is going to be a report made, that report should be based on personal knowledge and not necessarily just hearsay, be it a strong or weak nature or innuendo or gossip or any other such form of information. A man and his family can be destroyed very quickly by the suggestion of sexual abuse. They are concerned with the possibilities that gossip or hearsay could be the foundation for an investigation on a criminal action for sexual or child abuse. He urged the committee to seriously consider that concept before taking action on the bill.

Pastor Doug Kelley, also appearing in opposition to sub-section 3B submitted written testimony (EXHIBIT 18) and expressed that his biggest concern is with the allegations that would effect the family.

Questions From Committee Members: Rep. Boharski questioned how the word "made" could change their professional capacity. Apparently, before this change someone, for example, a social worker or a mental health counselor who hears about an abuse case could not report it. Rep. Cody stated that if a social worker or a mental health counselor did in fact make a report, they could be subject to liability under the current law.

Rep. Boharski, referring to the way the bill is now phrased, understands that a counselor now has a statutory obligation to report any hearsay case. If they choose not to they are possibly open to a lawsuit for not making a report. Steve Waldron stated that inserting the word "made" into the bill clarifies what the intent of the law was meant to be. As far as there being a responsibility to report, mental health professionals don't have a problem with that. They don't want to have to make any sort of judgment calls and be open to liability. The child protective service worker doesn't go issue a press release whenever they get a report to do an investigation. Mr. Waldron submitted an abuse case of Gross vs. Myers (EXHIBIT 19) where the therapist happened to be treating the mother of the family and she disclosed that the father had abused the children. What they would like to do is insert into the statutes so that when mental health professionals are in a situation such as this they are

protected.

Rep. Addy stated that he has some problems with this bill because if it passes, no one who is an abuser would ever disclose that fact to someone who can treat them for their condition. Mr. Waldron replied that abusers, particularly sexual abusers don't go in for treatment willingly. It is extremely rare that they do. Sexual offenders generally do not go into treatment until they are caught. That is not to say that offenders cannot be treated. Often time they can, but it's almost always only after they have been caught and there has been some court action taken. They have been found guilty and they are forced into treatment. Mr. Waldron noted, however, that the problem is never cured.

Rep. Addy suggested they amend subsection 4, page 2 so that it reads "no person listed in sub-section 2 may refuse to make a report as required in this section on the grounds of physician/patient or similar privileges unless the person came into possession with such information as a result of his treatment of the alleged abuser". That would protect the confidentiality between the person who is in need of treatment and encourage them to seek treatment, and at the same time would allow or require the professional to report all other instances. Rep. Waldron asked for clarification. Rep. Addy stated that the therapist may refuse to file a report if the information comes from the offender as a result of the patient/physician privilege. Mr. Waldron commented that he would have some serious problems with that because most offenders have offended numerous times before they are caught, and does not see that they would be protecting the children. What good would this do if an offender admitted to child abuse and the therapist could not report it to the Dept. of Family Services?

Rep. Addy stated that he had an additional area of inquiry. He believes that there is an exception to all doctrines of privilege where the professional is made aware as a result of the communication of future criminal conduct by the person making the disclosure. If someone went to his therapist or mental health professional and talked of a crime that they were about to commit, that mental health professional would have a duty to maintain confidentiality of that information? Mr. Waldron replied that they have a duty to warn the law that specifically lays out the requirements of a mental health professional when that situation occurs. That is what they would like to have in this law. It specifically lays out what their duties are while continuing to insure the protection of the children.

Rep. Addy stated that the whole point of this bill then is to insure anybody who is in treatment and discloses the grounds for their need for treatment to the professional, that the professional will disclose it, therefore discouraging anybody else from ever going in for treatment and fully

stating their grounds. Rep. Cody commented that she hoped the committee would take into consideration the Supreme Court ruling of Gross vs. Myers. The reading in that particular ruling really addresses what they are trying to accomplish with this law. They are putting social workers in very precarious positions if they don't change the law because what they are saying is that they are mandated to report, but then on the other hand, part of the law is saying they can't report because of the client/patient confidentiality. The ambiguity is there and that is what needs to be addressed.

Rep. Addy commented that he wants to have it both ways. He wants to protect the rights of the offender as well as the abused. If the offender realizes that they need treatment, he wants them to feel like they can go in and tell someone that they have a problem and they need treatment. He doesn't want them to feel that they are isolated, that they are alone, that there is nothing that they can do about their problem. He feels that unless they adopt the amendment that he proposed in sub-section 4 they will be making it worse rather than better. Rep. Cody stated that in Rep. Addy's concern for the offender, they are also leaving the child continually open. Whether the offender is going to be rehabilitated or not is questionable because the statistics show that the records show the recovery rate is not real high. So what the amendment says, is that if the counselor feels that this action by the offender is going to continue then he can report it. If the offender enters treatment on a voluntary basis, then the counselor cannot file a report. That too is ambiguous and sets into place several different angles.

Rep. Aafedt asked if a false report was made and it came down to one party's word against the other, how would they resolve that matter and know what to believe. John Madsen stated that when the Dept. of Family Services receives a report of child abuse or child sexual abuse, it depends on the circumstances and the age of the child. For example, if a 13 year old girl reported to her school teacher that she was being sexually abused, in that particular case the general practice would to be to go and speak with the child. They would do an interview with the child in private. In the course of the interview they would want the child to be very specific in terms of when it happened, how it happened and what did the person do. Once they make the interview, they would then determine if they have reason to proceed with the investigation. In all cases, they would then contact the parent and a decision would be made.

Closing by Sponsor: Rep. Cody stated that she has struggled with this bill herself over a period of time and the issue of child abuse is really difficult to understand. She feels, however, that in the overall perspective that what they have to look at here is the children, and they should be the

primary consideration. Truthfully speaking, families have their ups and downs, but a good cohesive loving family should have nothing to fear. Even if there is an inaccurate or false report made, this bill does not have anything to do with law enforcement, it just allows the report to be made and for the investigation to happen. If you come from a good loving family and are having a little bit of a tough time with one of the children and something comes out of that, she believes the truth will always prevail. Rep. Cody stated that the importance of this legislation is that it takes the children into consideration. The young lady who spoke on her past experiences told how many people what was happening to her and what was the result of that. That is where the inequity has been. HB 178 cleans that up and allows those mental health professionals to report their knowledge of abuse either directly or indirectly.

ADJOURNMENT

Adjournment At: 10:40 a.m.

REP. DAVE BROWN, Chairman

DB/je

1708.min

DAILY ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date JAN. 20, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN	X		
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD			X
REP. TOM HANNAH			X
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

EXHIBIT 1
DATE 1-20-89
HB 177 - Rep. J. Brown

Montana Medical-Legal Panel, 1977 - 1988

PRE-HEARING RESOLUTION OF CLAIMS

Panel Disposition Of Closed Claims, 1977 - 1988

Physicians With Medical Malpractice Claims Against Them

Method Of Disposition	Number Physicians With Claims	Percent Total Physicians With Claims
Withdrawn Before Panel Hearing		
Settlement To Injured Party	53	5.5 %
No Settlement To Injured Party	160	16.6 %
Claim Proceeded To Panel Hearing	752	77.9 %
TOTAL	965	100.0 %

Panel Disposition Of Closed Claims, 1977 - 1988

Hospitals With Medical Malpractice Claims Against Them

Method Of Disposition	Number Hospitals With Claims	% Total Hospitals With Claims
Withdrawn Before Panel Hearing		
Settlement To Injured Party	24	7.0 %
No Settlement To Injured Party	51	14.8 %
Claim Proceeded To Panel Hearing	269	78.2 %
TOTAL	344	100.0 %

EXHIBIT 2
DATE 1-20-89
HB 177 - Rep. J. Brow

MONTANA OB/GYN CLAIMS, 1977 - 1988

DISTRIBUTION OF CLAIMS - CONSIDERING PANEL DISPOSITION
Number Of Physicians And Number Of OB/GYN Claims Which They've Had - Whether An Expert Panel Found An Indication Of Negligence

Number Of Claims Where Indication Of Physician Negligence	Number Of Different Physicians	Number Of Physicians Not Now In Practice	Number Of Physicians Still In Practice
ONE OR MORE CLAIMS			
Zero Adverse Claims	102	23	79
One Adverse Claim	34	8	26
Two Adverse Claims	4	4	0
Three Or More Adverse Claims	0	0	0
	140	35	105

Source: Records Of Montana Medical-Legal Panel, Closed Claims From 1977 - 1988. Thirty-Seven physicians who were delivering babies in 1988 have not had any claims.

MONTANA OB/GYN CLAIMS, 1977 - 1988

The Rate Of Potential Negligence

Physicians With Claims Where Panel Holding Adverse To Physician

Period	Number Decisions For Claimant	Number Decisions For Physician	Percentage Findings Adverse To Physician
1977-1980	5	4	55.6 %
1981-1984	14	49	22.2 %
1985-1988	23	104	18.1 %
TOTAL	42	157	26.8 %

Records Of The Montana Medical Legal Panel. OB/GYN Claims (Allegations Only) Involving Family Practitioners and Obstetricians. Includes Physicians From Other Specialties Involved In OB/GYN Claims.

PHYSICIANS WITH OB/GYN CLAIMS - OB/GYN CLAIMS

MONTANA OB/GYN CLAIMS, 1977 - 1988

Total Physicians Involved In OB/GYN Claims: Rate Of Increase In Filings

Period	Number Of Phys W/ Claims	Annual Average # Phys	Percent Increase
1977-1980	13	3.25	-- %
1981-1984	74	18.50	469 %
1985-1988	122	30.50	65 %
Number Physicians With Claims	209		

Records Of The Montana Medical Legal Panel. OB/GYN Claims (Allegations Only) Involving Family Practitioners and Obstetricians. Includes Physicians From Other Specialties Involved In OB/GYN Claims.

MONTANA OB/GYN CLAIMS, 1977 - 1988

Total Claims: Rate Of Increase In Filings

Period	Number Of Claims Filed	Annual Average Filed	Percent Increase
1977-1980	11	2.75	-- %
1981-1984	52	13.00	373.0 %
1985-1988	72	18.00	38.0 %
Number Claims Filed	135		

Records Of The Montana Medical Legal Panel. OB/GYN Claims (Allegations Only) Involving Family Practitioners and Obstetricians

EXHIBIT 3
DATE 1-20-89
HB 177-Rep. J. Brown

THE MONTANA MEDICAL-LEGAL PANEL: A SURVEY OF ATTORNEYS AND HEALTH CARE PROVIDERS

Summary Of Survey

November 17, 1986

Gerald J. Neely, Esq.
Panel Counsel
Billings, Montana

A. INTRODUCTION

The Montana Medical-Legal Panel was established to hear malpractice claims against certain health care providers: physicians, hospitals, nursing homes, and other long-term care facilities.

The results of the Panel held for each claim is not binding on the participants, but any claim which is to be filed in court must first come before a Panel. Each Panel has 3 attorneys and 3 health care providers on it, who render an opinion as to whether there is a sufficient enough basis of malpractice to warrant a jury looking at the matter.

In January of 1986, the Montana Medical Legal Panel sent a mail survey to:

- Those responsible for the assessments and funding of the Panel: physicians, hospitals, and long-term care facilities in Montana.

- Attorneys who have either appeared before the panel as counsel for a party or who have served on a Panel as a Panelist.

A total of 1,257 responses were received.

The actual survey sent is included at the end of this Report. The results were tabulated on computer and the computer results and actual surveys are available for inspection.

The purpose of conducting the survey were two-fold:

- How do those involved with the Panel view its operation and effectiveness?

- What suggestions do those people have, either by way of improving the panel or eliminating it entirely?

A subsequent Report will more fully detail the recommendations of the survey respondents and changes which the writer of this Report urges be made in light of the recommendations from those involved in the Panel.

In the material which follows, a summary of results is provided. Thereafter, the survey results for the first nine questions are presented, followed by partial results of the open-ended tenth question, which elicited written responses regarding continuance or non-continuance of the Panel and suggestions for modifications.

Because more physicians responded than attorneys, care must be taken in interpreting the results. While all results can be cross-tabulated by occupation, not all such cross-tabulations have been completed, but will be presented in the subsequent report.

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B. SUMMARY OF SURVEY RESULTS

The following is a summary of the survey results. Where totals do not add up to 100%, the remaining percentages are "No Opinion" or "No Response" responses.

OVERALL RESULTS

A very small percentage of attorneys and health care providers who have had contact with the Panel believe that the:

- Administration Of The Panel Is Unsatisfactory - 2%
- Claimant's Attorney Or Defense Attorney Presentation Is Unsatisfactory - 5% to 19%
- Panelist Objectivity Is Unsatisfactory - 4% to 6%
- Overall Level Of Panel Operation Is Unsatisfactory - 7%
- Overall Bad Of Panel Outweighs Its Good - 9%
- Panel Should Be Abolished - 7%

A significant percentage of attorneys and health care providers who have had contact with the Panel believe that the:

- Panel Results Have Not Been Made Aware To Them - 40%
- Panel Should Be Modified In Some Regard - 31%

By item, a summary of the survey results are as follows:

1. Occupation Of Survey Respondents?

- 61% Physicians
- 31% Attorneys
- 8% Administrators Of Health Care Facilities

2. Whether Survey Respondents Have Served On A Panel?

- 55% - Yes
- 45% - No

3. Degree of Satisfaction With Panel Administrative Operations And Claims Administration?

- 2% Not Satisfied
- 96% Satisfied
  - 83% Very Satisfied
  - 13% Somewhat Satisfied

4. Degree Of Satisfaction With Presentation Of Attorneys?

- Claimant Attorney Presentation
  - 19% Not Satisfied
  - 69% Satisfied
    - 18% Very Satisfied
    - 51% Somewhat Satisfied
- Health Care Provider Attorney Presentation
  - 5% Not Satisfied
  - 82% Satisfied
    - 45% Very Satisfied
    - 37% Somewhat Satisfied

5. Degree Of Satisfaction With Objectivity Of Panelists

- Attorney Panelist Objectivity
  - 4% Not Satisfied
  - 86% Satisfied
    - 61% Very Satisfied
    - 25% Somewhat Satisfied
- Health Care Provider Panelist Objectivity
  - 6% Not Satisfied
  - 81% Satisfied
    - 57% Very Satisfied
    - 24% Somewhat Satisfied

6. Degree Of Overall Satisfaction With Administration, Presentation Of Attorneys, And Objectivity of Panelists

  - 7% Not Satisfied
  - 83% Satisfied
    - 53% Very Satisfied
    - 30% Somewhat Satisfied

7. Awareness Of Panel Results?

- 51% Aware
- 40% Not Aware

8. Good vs. Bad Of Panel With And Without Regard To Cost.

- Without Regard To Cost
  - 7% Bad Outweighs Good
  - 74% Good Outweighs Bad
- With Regard To Cost
  - 10% Bad Outweighs Good
  - 75% Good Outweighs Bad

9. Overall Good vs. Bad Of Panel.

- 9% Bad Outweighs Good
- 75% Good Outweighs Bad

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10. Future Status Of Panel.

- 84% Continued
  - 31% Continued With Modification
  - 53% Continued Without Modification
- 7% Abolish

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DATE 1-20-89
HB 177 - Rep. J. Brown

HB177

Montana Chiropractic/Legal Panel

Sponsored by Representative Jan Brown

The Montana Chiropractic Association is requesting legislation this session which will create a Montana Chiropractic/Legal Panel. If passed, this bill will provide a mandatory step in litigation prior to district court. It will work very similarly to the Montana Medical/Legal Panel, a law that has been in effect for several years. The Medical/Legal panel has sharply reduced the number of lawsuits that wind up in district court, and has thus reduced emotional distress to both patients and doctors.

The Chiropractic/Legal Panel will work like this: When a D.C. is sued, it will be mandatory that both parties make their arguments before a panel comprised of three lawyers and three chiropractors. This panel wil then make recommendations regarding settlement. The lawyers are chosen through the Montana Bar in rotation, and chiropractors are chosen through the Montana Chiropractic Association should the doctor being sued be a member of MCA. If the doctor being sued is not a member, then chiropractic panelists wil be chosen by the state board. Both parties attorneys in the lawsuit have an opportunity to reject some panelists, similar to jury selection. This allows both parties to feel that they have drawn a fair panel. If a D.C. and a hospital are sued in the event that the D.C. has hospital access privileges, then a hospital administrator will be a panelist along with two doctors.

The Panel will be administered by the MCA, with rules being implemented throught the State Bar and State Board of Chiropractors.

The major benefits will be reduction of suits going to district courts, thus lightening the load on an already overloaded system, much faster settlements (statute will call for a maximum of 120 days before hearing), and a reduction of attornies fees for the suits not going to court.

This bill should not require a fiscal note. There will be costs for administration, panelists, and other items associated with instituting the Panel, but those costs will be borne by the licensees themselves. They will be assessed and added to licensure fees. Because of the low number of suits, we estimate these costs at between $50 and $75 per licensee per year.

Statistics show us that virually every medical doctor and chiropractor will be sued at some point in his or her career. 60% of those suits will be frivolous, 20% wil be in a gray area, and 20% will have some merit. The future of chiropractic, as well as all other health care providers, lies in better handling of litigation. The Montana Chiropractic Association feels strongly that the Chiropractic/Legal Panel will help greatly in this area.

We respectfully request that the 1989 Montana State Legislature give due consideration to this legislation. It is a positive step towards better handling of litigation, both for patients and doctors.

Submitted by Bonnie Tippy

EXHIBIT 5
DATE 1-20-89
HB 177- Rep. J. Brown

HOUSE BILL NO. 177-- Testimony of Mike Sherwood, MTLA

This bill attempts to establish a medical legal panel for purpose of reviewing claims against chiropractors. The bill is deceptively similar to that of the current language found in the Montana Medical Legal Panel Act. It does, however, have certain critical differences.

First; Section 10 allows the director to adopt rules including a rule requiring a party to make a monetary payment as a condition of bringing a malpractice claim before the panel while the current law regarding physicians and health care providers does not.

Second, Section 35 allows the statute of limitations to toll only until such time as a panel's final decision rather than until 30 days thereafter as prescribed in the statutes pertaining to physicians and health care providers.

The Montana Supreme Court has upheld the consitutitonality of the Montana ;Medical Legal Panel Act on the grounds that the act has a reasonable relation to a proper legislative purpose, that purpose being the screening of malpractice claims in order to prevent a filing of action which do not permit at least a reasonable inference of malpractice and to promote settlement of meritorious claims . While that purpose might also be aptly stated in this piece of legislation the problem with this legislation is that a certain threshold test has not been met. When looking at the current law the Supreme Court recognized that a medical malpractice crisis

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existed. There has been no showing by the proponents of this bill that such a crisis exists regarding the chiropractic profession within this state. For that reason the bill must fail constitutionally as an infringement upon the right of injured persons to legal redress and as protectionist and preferential legislation.

Rocky:

EXHIBIT 6
DATE 1-20-89
HB 177 - Rep. J. Brown

S T A T E R E P O R T E R
Box 749
Helena, Montana

VOLUME 38

NO. 80-19

BRUCE LINDER,

Plaintiff,

v.

Submitted: Mar. 23, 1981
Decided: June 10, 1981

C.W. SMITH, M.D.; ROGER MURRAY, M.D.; and the MONTANA MEDICAL ASSOCIATION, a Montana Corporation,

Defendant.

CONSTITUTIONAL LAW, Seeking Determination of Constitutionality of the Montana Medical Malpractice Panel Act, Whether the Act Violates the Right to a Jury Trial, Whether the Act Violates the Right to Acess to the Courts, Whether the Act Violates Substantive and Procedural Due Process, Whether the Act Violates the Prohibition Against Special Legislation, Whether the Act Violates Equal Protection of the Laws, Whether the Act Violates the Principle of Separation of Powers, Whether the Act Violates the Taxing Powers, Whether the Act Violates the right of Public Participation and the Right to Know, Whether the Act Violates the Freedom of Speech and Freedom From Libel

Original Proceeding.

For Plaintiff: Mike Greely, Attorney General, Helena
Douglas R. Drysdale, Bozeman
R.P. Ryan, Billings

For Defendants: Gerald Neely, Billings
Bruce Toole, Billings

For Amicus Curiae: Luxan and Murfitt Law Firm, Helena

Mr. Ryan argued the case orally for Plaintiff; Mr. Neely for Defendants.

Opinion by Chief Justice Haswell; Justices Daly, Harrison, Shea, Sheehy, Morrison and Weber concurred.

EXHIBIT 7
DATE 1-20-89
HB 98- Rep. Ellison

MONTANA ASSOCIATION OF COUNTIES

1802 11th Avenue
Helena, Montana 59601
(406) 442-5209

HOUSE BILL 98

HOUSE JUDICIARY COMMITTEE
FRIDAY, JANUARY 20, 1989

An Excerpt from: "Reforming Punitive Damages, the Judicial Bargaining Concept," by Robert A. Prentice The Review of Litigation, Vol 7:113, pp. 127-128

"The Main Purpose of Punitive Damages is to Benefit Society

Generally - Punitive damages are not awarded to compensate a particular plaintiff, but to serve society by enforcing established rules of conduct. The twin purposes of punishment and deterrence are not well served by awarding a huge sum of punitive damages to an individual plaintiff who already has been made whole by an award of compensatory damages. A plaintiff's recovery of punitive damages is largely a windfall. Great Britain has virtually eliminated punitive damages for this reason. Discontent over the windfall effect of punitive damages has festered in this country for more than a century. As one court stated in 1877:

> It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.

Not only is the public interest not directly served by the payment of punitive damages to a single individual, but the public may well bear the burden as defendants pass the cost of a punitive damages awarded on to customers, employees, insurers, and other insureds.

To improve this situation, many commentators have suggested that the windfall could be avoided by having punitive damages paid not to the plaintiff but to the state treasury or some special fund for a public purpose. Several states have acted legislatively to put these suggestions into effect. Florida, for example, now mandates that sixty percent of each punitive damages judgement should go into either the Public Medical Assistance Trust Fund or the General Revenue Fund, depending upon the type of case. Colorado requires that one-third of punitive damages be paid into the general state fund. As noted earlier, Illinois gives the trial judge discretion to allocate the punitive damage award, if any, among the plaintiff, the plaintiff's attorney, and the Department of Rehabilitation. Iowa requires that seventy-five percent of punitive damages judgments be paid to the state unless the defendant acted with specific intent to injure the plaintiff. George requires seventy-five percent of punitive damages awarded in products liability cases be paid to the state."

EXHIBIT 8
DATE 1-20-89
HB 98- Rep. Ellison

SUMMARY OF TESTIMONY OF JEFFREY T. RENZ
PRESIDENT, YELLOWSTONE VALLEY CLAIMANTS' ATTORNEYS ASSOCIATION

HB 98 (PUNITIVE DAMAGE AWARDS TO BE PAID TO COUNTY)

I. THE VICTIM BEARS ALL OF THE RISK

A. PROVING PUNITIVE DAMAGES COSTS MONEY. THE VICTIM IS DIRECTLY RESPONSIBLE FOR THE COSTS (AND I DON'T MEAN LAWYERS' FEES) OF THE CASE, WIN OR LOSE. THE COUNTY GETS A FREE RIDE, AT THE VICTIM'S EXPENSE.

1. NO VICTIM IN HIS OR HER RIGHT MIND WILL BEAR THAT RISK.

2. NO LAWYER WORTH HER SALT WILL TELL HER CLIENT TO TAKE THAT RISK.

B. IF THE VICTIM HIRES HER ATTORNEY BY THE HOUR, SHE BEARS AN ADDITIONAL RISK.

II. HB 98 CREATES A CONFLICT OF INTEREST

A. THE MONEYS PAID TO THE COUNTY GO IN PART TO PAY DISTRICT COURT COSTS. THE DISTRICT COURT JUDGE BENEFITS, WHETHER DIRECTLY OR INDIRECTLY.

B. THE BENEFIT TO THE JUDGE CREATES A CONFLICT OF INTEREST.

III. NO PUNITIVE DAMAGES WILL EVER BE AWARDED, EXCEPT AS A SURPRISE TO ALL.

A. BECAUSE THE VICTIM BEARS THE RISK, HE WON'T SET OUT TO PROVE PUNITIVE DAMAGES.

B. IN CASES WHERE THERE IS A <u>SERIOUS</u> RISK OF PUNITIVE DAMAGES, ASSUMING THE VICTIM IS DUMB ENOUGH OR CHARITABLE ENOUGH TO PURSUE THEM, THE DEFENDANT IS LIKELY TO OFFER

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TO SETTLE AT A SUM NEAR THE ACTUAL DAMAGES. WE ATTORNEYS WOULD COMMIT MALPRACTICE IF WE DID NOT ADVISE OUR CLIENTS TO ACCEPT SUCH AN OFFER. (DON'T JUMP TO THE CONCLUSION THAT THIS BILL WILL AID IN SETTLEMENT. IT WON'T. IT WILL ONLY REDUCE THE VALUE OF SETTLEMENT.

IV. HB 98 SETS THE WRONGDOER FREE.

A. IMAGINE THE YOUNG VICTIM OF A DRUNK DRIVER, CRIPPLED FOR THE REST OF HER LIFE.

1. THE DRUNK'S PUNISHMENT--$500 AND 60 DAYS.

V. DON'T THE PROPONENTS OF THIS BILL CARE ABOUT THE VICTIM ANYMORE?

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DATE 1-20-89
HB 98- Rep. Ellison

Testimony regarding HB 98:
Mike Sherwood--MTLA

This bill has multiple problems:

1. It charges a private attorney with the responsibility of attemtping to collect punitive damages for the benefit of the county

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HB 98- Rep. Ellison

judicial fund, but makes not provision for the attorney to be paid the advance costs of preparing and trying a case. Most often, the discovery and pretrial work regarding punitive damages is as much or more time consuming and expensive as that of the compensatory aspect of the case.

2. It makes no provision for compensating the attorney for his work although both the state and federal courts have said that this must be done when an attorney is responsible for bringing a common or public fund into the court. (case law provided to secretary)

3. It provides for the fund to go toward the county judicial fund. Most jurisdictions have found that this sort of arrangement violates due process requirements that the judge be a separate and detached majistrate. (Case law provided to secretary) Montana statute also provides for the disqualification of a judge when he has a financial interest in the outcome of the case. (Copy provided to secretary)

4. It does not provide for an instruction to the jury that the funds will be paid over to the county judicial fund. Recent Montana case law provides that a jury should be instructed as to the consequences of it s verdict. (Case authority provided to secretary)

5. Finally, it eliminates punitive damages as a remedy because:

a) Offers of settlement including no punitive damages will be accepted by injured plaintiffs when they have no interest or incentive for requesting punitive damages.

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b) Plaintiffs attorneys will have no incentive to seek punitive damages and no one to fund the litigation expenses for doing so.

HASWELL, C. J., and DALY and SHEEHY, JJ., concur.

SHEA, J., will file a separate opinion later.

John R. MEANS and Mary Means, Montana Department of Natural Resources and Conservation, an agency of the State, Plaintiffs and Appellants,

v.

The MONTANA POWER COMPANY, A Montana Corporation, Defendant and Respondent.

No. 80-266.

Supreme Court of Montana.

Submitted Jan. 13, 1981.

Decided March 4, 1981.

Department of Natural Resources and Conservation appealed orders of the District Court, Fourth Judicial District, County of Missoula, John Henson, J., appointing lead counsel and determining compensation for lead counsel in consolidated actions against power company for damages arising out of single disaster. The Supreme Court, Daly, J., held that: (1) trial court did not err in failing to hold evidentiary hearing prior to entering its findings of fact, conclusions of law and order appointing lead counsel; (2) trial court did not err in appointing lead counsel; (3) trial court did not error in ordering Department to pay compensation to lead counsel; and (4) trial court did not abuse discretion in awarding lead counsel compensation in the amount of $47,222.22.

Affirmed.

Shea, J., dissented.

1. Trial ⇐2

Department of Natural Resources and Conservation was not entitled to evidentiary hearing prior to entering of trial court's findings of fact, conclusions of law and order appointing attorney for landowners lead counsel in consolidated actions of landowners and the DNRC against electric utility company for damages from destructive fire since findings of fact and conclusions of law were unnecessary for decisions involving motions and since district court file and hearings in regard to the order setting compensation for the lead counsel provided sufficient basis for review. MCA 3-2-204(5); Rules of Civil Procedure, Rules 42(a), 52(a).

2. Appeal and Error ⇐989

When Supreme Court is presented with an order for examination after district court, though not obliged to do so, has made findings of fact, it is incumbent upon it to review the findings of fact as well as the applicable law. MCA 3-2-204(5).

3. Trial ⇐2

Where 31 separate plaintiffs brought suit against power company claiming damages occasioned by single fire disaster and the 31 plaintiffs were represented by ten different attorneys, trial court did not abuse discretion in exercising its managerial power over the proceeding in appointing a lead counsel.

4. Trial ⇐2

Purpose of consolidation and appointment of lead counsel is to permit trial convenience and economy in administration by avoiding unnecessary costs or delay. Rules of Civil Procedure, Rule 42(a).

5. Trial ⇐2

Where after order was entered appointing lead counsel in consolidated actions against power company, Department of Natural Resources and Conservation, which was a party, did not move for reconsideration, did not seek appeal or writ to have order reviewed by Supreme Court prior to scheduled trial date, did not accept proposal made by power company to segregate its claims which would have allowed Department to proceed on its own, but allowed

CARTER COUNTY, a Body Politic, Plaintiff and Respondent,

v.

CAMBRIAN CORPORATION, dba Western Crude Marketers, Inc., Timberman Truck Rentals, Inc., Equipment Rentals, Inc., and Ted Braun, Jr., Defendants and Appellants.

No. 10598.

Supreme Court of Montana.

Dec. 31, 1963.

County brought action against several defendants to recover $50,000 for damage to bridge struck by tractor and trailer. Two of the defendants filed a motion for change of venue on ground that there was reason to believe that an impartial trial could not be had within county, and on ground that jurors, because necessarily taxpayers, would be disqualified. The Sixteenth District Court, Carter County, W. R. Flachsenhar, J., entered an order denying the motion, and the moving defendants appealed. The Supreme Court, Doyle, J., held that the District Court did not abuse its discretion in denying the motion.

Order affirmed.

Venue ⇐45, 50

Trial court did not abuse its discretion in denying motion of certain defendants for change of venue of action against them by county to recover $50,000 for damage to bridge, on ground that there was reason to believe that impartial trial could not be had within county, and on ground that jurors, because necessarily taxpayers, would be disqualified. R.C.M.1947, §§ 16-810, 93-2903, 93-2906, 93-5011.

Lamey, Crowley, Kilbourne, Haughey & Hanson, George C. Dalthorp (argued orally), Billings, for appellant.

Colgrove & Brown, Miles City, Otis L. Packwood, Billings, Roland V. Colgrove, Miles City (argued), for respondent.

DOYLE, Justice.

This is an appeal from an order denying a motion for a change of venue.

The plaintiff, respondent here, is Carter County, a body politic or a political subdivision, State of Montana.

The defendants, appellants here, are the Cambrian Corporation, doing business as the Western Crude Marketers, Inc., Timberman Truck Rentals, Inc., The Equipment Rentals, Inc., and Ted Braun, Jr. Carter County brought suit alleging that on April 25, 1962, at about the hour of 12:30 P.M. on a public highway called the Mill Iron Camp Crook Road in Carter County, Montana, the defendant, Ted Braun, Jr., was operating and driving a tractor-trailer in the business of and for the defendant Cambrian Corporation, Inc., or Timberman Truck Rentals, Inc., or Equipment Rentals or all three of the defendants, and that the said Ted Braun, Jr., negligently and carelessly drove the tractor and trailer against parts of the bridge owned by the plaintiff damaging the bridge and causing it to buckle and collapse.

That as the result of the negligence the bridge was damaged and destroyed to plaintiff's damage in the sum of $50,000. The Cambrian Corporation and Ted Braun, Jr. filed a motion to dismiss and a motion for a change of venue. Change of venue was denied.

The only question posed by appellants is that the district court erred in denying the motion for a change of venue.

The appellants contend that a change of venue should have been granted because (1) There is reason to believe an impartial trial cannot be had within Carter County. (2) All members of any jury which might be impanelled in the cause in Carter County must necessarily be taxpayers of Carter County, and are therefore disqualified under the provisions of section 93-5011, R.C.M. 1947.

The appellants argue the above two propositions together. First, by uncontradicted affidavits, it was shown that there were a

expense." In *Miller*, we defined such expenses as:

> Any expense which recurs from time to time and is to be reasonably anticipated as likely to occur in order for the proper operation and maintenance of the departments of the state government is an ordinary expense.

93 Mont. at 571, 20 P.2d at 645. We find the citation inapplicable here, however, because under the terms of the lease, the expense of purchase is certain to occur during the biennium and none can doubt the power of the legislature to make provision for biennial expenses through appropriations, whether those expenses are incurred through purchase or by lease.

We also determine that the budgetary direction of 1987 does not offend Art. V, § 12, of the Montana Constitution. As a part of the General Appropriation Act pertaining to the operation of state governments, the direction to purchase was regarded by the legislature as an expense to be incurred in the coming biennium. The legislature could have set out the budgetary direction in a separate statute or law instead of including it in the general law, but that problem is "broadly speaking for the legislative assembly alone." *Arps v. State Highway Commission* (1931), 90 Mont. 152, 165, 300 P. 549, 554; and *State ex rel. Fisher v. School District No. 1* (1934), 97 Mont. 358, 367, 34 P.2d 522, 526 "if the applicability of a general law depends upon extrinsic facts and circumstances, the question of applicability is referable to the legislature and with its determination the courts will not interfere."

We determine, therefore that the 1987 budgetary direction does not offend the state constitution as either a special or local act or as an appropriation beyond an ordinary expense.

We therefore determine that the Committee has failed to meet the standards required for the issuance of a preliminary injunction under § 27-19-201, MCA. Accordingly, we reverse the District Court in the issuance of a preliminary injunction, and order that the said preliminary injunction be and the same is hereby dissolved. Remittitur in this cause shall issue forthwith. The Clerk of this Court is instructed to notify counsel of record forthwith by telephonic notice and to serve copies on said counsel by ordinary mail in due course of this opinion, which shall have the force and effect, without further order, of the office of such an order dissolving the preliminary injunction. The cause is remanded to the District Court with instructions to dismiss the same.

TURNAGE, C.J., and HARRISON, WEBER, GULBRANDSON, HUNT and McDONOUGH, JJ., concur.

Terry Hawthorne MARTEL, Plaintiff and Appellant,

v.

MONTANA POWER COMPANY, Defendant and Respondent.

No. 85-251.

Supreme Court of Montana.

Submitted on Briefs Jan. 19, 1988.

Decided March 10, 1988.

Rehearing Denied April 5, 1988.

Person injured in power line accident brought suit against power company. The District Court, Jefferson County, Frank Davis, J., entered judgment finding power company 25% negligent, and appeal was taken. The Supreme Court, Hunt, J., held that: (1) a plaintiff's contributory negligence may be used, pursuant to scheme of comparative negligence, to offset plaintiff's recovery, even when defendant's conduct is willful and wanton; (2) violations of nonconstruction of National Electrical Safety Code standards are not merely evidence of negligence but are negligence as a matter of law; (3) upon request of party, trial

EXHIBIT 13
DATE 1-20-89
HB 98: Rep. Ellison

ANNOTATION

DISQUALIFICATION OF JUDGE, JUSTICE OF THE PEACE, OR SIMILAR JUDICIAL OFFICER FOR PECUNIARY INTEREST IN FINES, FORFEITURES, OR FEES PAYABLE BY LITIGANTS

by

Herbert B. Chermside, Jr., J.D.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

16 AM JUR 2d, Constitutional Law § 582; 21 AM JUR 2d, Criminal Law § 221; 46 AM JUR 2d, Judges § 106; 47 AM JUR 2d, Justices of the Peace § 8

15 AM JUR PL & PR FORMS (Rev ed), Judges, Forms 11–15, 81, 82

US L ED DIGEST, Constitutional Law § 843

ALR DIGESTS, Constitutional Law § 626.5; Judges §§ 19, 20, 24; Justices of the Peace § 1

L ED INDEX TO ANNOS, Due Process of Law; Judges; Justices of the Peace

ALR QUICK INDEX, Due Process of Law; Judges; Justices of the Peace

FEDERAL QUICK INDEX, Due Process of Law; Judges

nomic pressure to favor the arresting officer in order to encourage him to bring more cases into the justice's court, thus disqualifying the justice for pecuniary interest in fines, fees, and forfeitures payable by litigants. Because the proof adduced did not support the allegations of favoritism, the court did consider the merits of the argument.

In State ex rel. Moats v Janco (1971) 154 W Va 887, 180 SE2d 74, it was contended for one who had been convicted of a misdemeanor by a justice of the peace that the conviction deprived the defendant of due process of law because the justice of the peace was under pressure to convict defendant in order to favor the arresting officer, because the failure of the justice to convict persons arrested and brought before him by the arresting officer would induce such officer to take an accused before another justice and in that way decrease the income of the justice and cause him to lose this potential source of income, all of which produced a pecuniary interest in the justice and disqualified him from trying the defendant. Because there was no evidence in the record to indicate that the justice or the arresting officer, in the trial of the offense charged, engaged in any such practice or conduct, the question, not being properly presented for decision, was not considered or determined by the appellate court.

B. Civil matters

§ 14. Compensation related to judgment for a particular party

Some courts have held that a judge, justice of the peace, or similar judicial officer whose compensation in a civil matter depends upon, or is increased by, rendering a judgment in favor of one party, is thereby disqualified for pecuniary interest in fees payable by litigants.

An agreement whereby a plaintiff placed a group of notes with a justice of the peace for collection upon the understanding that if the justice could secure his costs from the defendants, he might do so, but if he should be unable to collect his costs from the defendants, then he would receive no costs, created an interest in the justice of the peace which disqualified him, it was held in Limerick v Murlatt (1890) 43 Kan 318, 23 P 567. Declaring that the agreement was an inducement for the justice to render judgment against a defendant in order to obtain his costs, whether the defendant was liable or not upon the note sued upon, the court declared that in one sense the agreement was in the nature of bribery, in that it was very much as if the justice was to receive money from the plaintiff if he would render a judgment against the defendant, and declaring that it is the right of every citizen of the state to have a fair and impartial trial, the court approved the action of the court below dismissing the cause because of the disqualification of the justice of the peace.

Under a statutory scheme of fees where a justice of the peace would receive an initial fee of $5 in a civil case, payable by the plaintiff, but would receive an additional fee of $2.50 for issuing an execution on the judgment should he find in favor of the plaintiff, and also would receive a fee of 35 cents for mailing each suggestee execution by registered or certified mail, which additional fees were payable only if judgment was rendered for the plaintiff, it clearly appeared that such justice of the peace had a financial interest in finding a judgment for the plaintiff, it was held in State ex rel. Reece v Gies (1973, W

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Va) 198 SE2d 211, an action filed by residents of a federally funded low-income housing project seeking a writ of prohibition against a justice of the peace and the housing authority from proceeding to evict such residents from their apartment pursuant to a judgment for unlawful entry and detainer entered against them by the justice of the peace. Following the rule previously announced by the court in State ex rel. Osborne v Chinn (1961) 146 W Va 610, 121 SE2d 610, to the effect that where a justice of the peace has any pecuniary interest in any case to be tried by him, however remote, he is disqualified from trying such case, the court declared that it was clear that the justice of the peace in the trial of the instant action had a pecuniary interest in receiving an additional fee of $2.50 if he found a judgment against the defendants, that this constituted a violation of the due process clauses of the federal and state constitutions, that the justice of the peace accordingly was disqualified from trying such case, and that the judgment entered by the justice of the peace therein was void; and the court accordingly granted the writ of prohibition which was sought in the instant action.

§ 15. Favoring plaintiffs to promote business of court

One court has held that a system of paying a justice of the peace a fee for each civil suit entered and tried affords an inducement for the justice to favor plaintiffs in order to increase the business of his court, thus disqualifying him for pecuniary interest in fees payable by litigants.

A statute providing with respect to civil cases that a justice of the peace shall be entitled to a fee of $5 for every civil suit entered and tried whether the same be contested or not, and whether or not the suit be completed or discontinued, resulted in giving such justice a pecuniary interest in promoting the institution of civil actions in his court, with a consequent denial of the fair and impartial tribunal guaranteed by the due process requirements of state and federal constitutions, and further violated a state constitutional mandate that justice shall be administered without sale, it was held in State ex rel. Shrewsbury v Poteet (1974, W Va) 202 SE2d 628, 72 ALR3d 368. In this case, which was an original proceeding in prohibition seeking to restrain a justice of the peace from further proceeding to attempt to collect a civil judgment rendered by him against petitioners, the evidence indicated that in the preceding 4 years 874 civil cases had been instituted by the principal creditors of the area in the court of one justice of the peace, whereas in the same period of time a total of 49 cases had been instituted in the courts of the other five justices of the peace in the same county; that of the 874 cases instituted before the justice whose actions were sought to be restrained, all had resulted in judgments for the plaintiffs; that plaintiffs were not required to appear at hearings held for the collection of delinquent accounts in actions instituted before this justice; and that creditor plaintiffs brought their business to the justice because he was successful in collecting the debts sued upon. These facts indicated, said the court, that the respondent justice of the peace was engaged in the collection business rather than in the administration of justice, and conclusively demonstrated that so long as the justice would favor creditors, he would continue to receive more business. Noting that the fees receivable

by the justice were authorized by statute, the court was of opinion that the statute created a pecuniary interest in justices of the peace in violation of the due process of law requirements of state and federal constitutions, and that such statute further encouraged justice for sale in violation of a state constitutional provision, and accordingly granted a writ of prohibition against a justice of the peace to restrain further proceedings to enforce or collect the void judgments.

However, in a case where the defendant in a civil proceeding alleged that he had been denied due process of law as guaranteed by the Federal Constitution by reason of a default judgment entered against him by a justice of the peace, the contention being that the justice was allowed a fee to be paid by the losing party, that venue of the action might be laid in more than one court, and that justices of the peace accordingly favored plaintiffs who might thus be encouraged to enter more civil actions before the favoring justice, thereby giving such justices a disqualifying pecuniary interest in civil actions in their courts, the court in Melikian v Avent (1969, DC Miss) 300 F Supp 516, gave little weight to this argument, and declared that if it had any merit it was dissipated by the right of the defendant to have demanded a jury trial before the justice of the peace, which adequately provided due process.

Consult POCKET PART in this volume for later cases

(3) recommend to the supreme court improvements in the judiciary; and
(4) perform such other duties as the supreme court may assign.

History: En. 82-512 by Sec. 3, Ch. 396, L. 1977; R.C.M. 1947, 82-512.

3-1-703. Cooperation of court officers. All court officers, including clerks of district courts, shall comply with requests made by the court administrator for information and statistical and financial data bearing on the business transacted by the courts.

History: En. 82-513 by Sec. 4, Ch. 396, L. 1977; R.C.M. 1947, 82-513.

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Part 8

Disqualification and Substitution of Judges Supreme Court Rule

Part Compiler's Comments

Former Rules Superseded — Effective Date: Supreme Court Order dated June 29, 1981, provided, in part, as follows:

"By the authority of Article VII, Section 2, of the 1972 Montana Constitution, this rule supersedes and is to be used to the exclusion of the rule on disqualification and substitution of judges adopted by Supreme Court Order dated December 29, 1976, and published as section 3-1-801, MCA.

This rule shall take effect on July 1, 1981."

Supreme Court Order dated June 17, 1987, provided, in part, as follows:

"By the authority of Article VII, Section 2, of the 1972 Montana Constitution, this rule supersedes and is to be used to the exclusion of the rule on disqualification and substitution of judges adopted by Supreme Court Order dated June 29, 1981, and published as sections 3-1-801 and 3-1-802, MCA.

This rule shall take effect on September 1, 1987."

Effect of Publication: Section 2, Ch. 1, L. 1979, which adopted the MCA, provided that publication of a Supreme Court Rule is done for the benefit of code users. The publication of this section should not be construed as a legislative attempt to readopt or promulgate the rule.

Part Cross-References

District Court presided over by Judge of other district, 3-5-111.

Multijudge districts, 3-5-403.

Municipal Court Judge pro tem, 3-6-204.

Disqualification of Water Judge or master, 3-7-402.

When Acting Justice called in, 3-10-231.

Expenses of Acting Justice, 3-10-234.

When substitute for City Judge called in, 3-11-203.

Procedure, Rule 12(b), M.R.Civ.P. (see Title 25, ch. 20).

3-1-801. Superseded. Sup. Ct. Ord. June 29, 1981.

History: En. Sup. Ct. Ord. dated Dec. 29, 1976; 34 St. Rep. 26; superseded, Sup. Ct. Ord. dated June 29, 1981.

3-1-802. Superseded. Sup. Ct. Order June 17, 1987.

History: En. Sup. Ct. Ord. dated June 29, 1981; superseded, Sup. Ct. Ord. dated June 17, 1987.

3-1-803. Disqualification of judges — all courts.

DISQUALIFICATION OF JUDGES

This section shall, in its application, apply to all courts.

Any justice, judge, or justice of the peace must not sit or act in any action or proceeding:

1. To which he is a party, or in which he is interested;

2. When he is related to either party by consanguinity or affinity within the sixth degree, computed according to the rules of law;

3. When he has been attorney or counsel in the action or proceeding for any party or when he rendered or made the judgment, order or decision appealed from.

History: En. Sup. Ct. Ord. dated June 17, 1987; amd. July 29, 1987.

ent rollers and inadequate dunnage. The witnesses for M. P. Howlett, Inc., testified that in moving the ingots under the decks three, four or five rollers would be used. There must necessarily have been a large concentration of the weight of the ingots upon a small space under this method. There was also testimony that the dunnage used to distribute the weight of the cargo was too short to properly fulfill its function.

[1] The respondent and the respondent-impleaded disagree as to who owed the duty of furnishing the dunnage. The bill of lading required the Tampico to deliver the cargo to the Republic Steel Corporation in New York, or to its assignee. The Tampico would have to make this delivery in a manner which would not injure the cargo or the place where the cargo was delivered. I think therefore that the Tampico owed the duty of furnishing the dunnage.

[2] This does not relieve M. P. Howlett, Inc., from liability. Stevedores owe the duty of properly loading the boat. If they knew or should have known that the method of loading was causing damage they should have stopped work. They were not given the right to use improper rollers or dunnage merely because they were furnished by a third person. The men should have realized that damage was being done as the loading continued. They should have stopped their operations until the boat furnished proper dunnage.

[3, 4] The respondents introduced testimony that no complaints were made to them concerning the loading of the barge. The master of the barges on the other hand testified that he complained not only to the representative of M. P. Howlett, Inc., in charge of operations but also to the officer in charge of the Tampico. Whether such complaints were made or not is immaterial in this case. The case of Hasroof Contracting Co. v. Ocean Transportation Corp., D.C., 4 F.2d 583, holds that the bargee is not required to give instructions on the proper method of loading the cargo when he might fairly rely upon the belief that those undertaking to load the barge knew the proper method of loading. In this case the master could have reasonably believed that M. P. Howlett, Inc., could load his barge without instructions. The damage was not caused because the master neglected to tell the stevedores about the peculiarities of the barge. Whether the Master complained or not makes no difference.

[5-7] Where, as here, two parties are responsible for injury to a third, each is primarily liable for one-half the damages. The respondent and the respondent-impleaded should each pay one-half the damages, and if any part of the damages assessed against one of the respondents can not be collected from that respondent the balance may be assessed against the other respondent in addition to the one-half which that respondent is compelled to pay in the first instance. Benedict on Admiralty, Fifth Ed., Vol. I, section 416; The Atlas, 93 U.S. 302, 23 L.Ed. 863; The North Star, 106 U.S. 17, 1 S.Ct. 41, 27 L.Ed. 91; The Sterling, 106 U.S. 647, 1 S.Ct. 89, 27 L.Ed. 98; Great Lakes Towing Co. v. Masaba S. S. Co., 6 Cir., 237 F. 577.

Decree for the libellants is granted, and the usual order of reference will be made.

UNITED STATES v. HUDSON et al.

No. 1489.

District Court, D. Montana.

May 21, 1941.

1. Attorney and client ⇐141

$250 *held* a reasonable charge for services of experienced lawyers in representing landowner in condemnation suit by the United States up until landowner's decision to settle with the government at appraised value.

2. Attorney and client ⇐190(4)

In condemnation suit by the United States, wherein attorneys for landowner claimed lien on proceeds of settlement for services rendered prior to the settlement, evidence *held* to authorize deduction that landowner and attorneys agreed that attorneys would withdraw and would be paid specified sum out of the award for services already rendered.

3. Attorney and client ⇐155

As affecting attorney's right to compensation, one is entitled to be paid out of a fund when his skill and ability produced it.

EXHIBIT 16
DATE 1-20-89
HB 178- Rep. CODY

AMENDMENTS TO HB 178

1. Page 2, line 13.
   Following: "(3)"
   Strike: "(a)"

2. Page 2, line 16.
   Strike: subsection (b) in its entirety

3. Page 2, lines 22 through 24.
   Following: "privilege" on line 22
   Strike: remainder of line 22 through line 24

EXHIBIT 17
DATE 1-20-89
HB178 - Rep. Cody

Mr. Chairman and Members of the Committee, for the record, my name is Dorothy Cody, Representative of House District 20, Wolf Point and Poplar,

I am bringing to you today HB 178 and before I begin, I would like to include some simple amendments that are needed in the Bill. (Go over amendments)

Section 1, Sub 2, lists all those Professionals who are required to report suspected Child Abuse or neglect.

There has been confusion, particularly among Mental Health Professionals, over the interpretation of this Statute. First there is the question of whether a "Child known to them in their Professional or official capacity" means a direct or an indirect knowledge of the allegedly abused or neglected child. Inserting the word "made" on PAGE !, Line 14 clarifies this issue.

On page 2, Sub 4, lines 20 through 24, seems to contradict the intention of Page 1, Sub 1, lines 14 and 15 that a child known to the Professional in their official capacity must be reported if there is suspected abuse. Sub 4 contradicts that section by stating that a Mental Health Professional must breach confidentiality only if the information comes from the child in treatment. Mental Health Professionals often gain knowledge of child abuse, particularly child sexual abuse, from another family member who is in therapy. The question is "Do they have to report and are they required to breach confidentiality law when the information comes from another person?"

EXHIBIT 17
DATE 1-20-89
HB 178 - Rep. Cody

The Montana Supreme Court partially answered the question in a ruling on December 30, 1987 in Gross vs. Meyers which indicated that there should be a broad interpretation of this statute in providing immunity to mental health professionals who report under this statute.

Mental health professionals, in turn, want the statute written clearly so that their duties under this law are obvious. However, the bill as written does not provide this intended clarity. In addition, the permissive language on page 2, lines 16 through 19 places federal child abuse grant funds in jeopardy.

I have had prepared some amendments which clearly delineate the duties of the professionals under this statute. Please consider adopting the amendments.

These amendments take into account the Gross vs. Meyers decision. In addition, the amendments clearly denote the responsibilities of the professionals who are required to report and clearly note that other confidentiality statutes do not apply for those with a physician-patient or similar privilege such as mental health professionals.

In closing, I would like to point out that section 41-3-203, which is not included in this bill, provides immunity only if the person or professional who is making the report is not acting in bad faith or with malicious purpose.

Thank you for your consideration of this legislation.

EXHIBIT 18
DATE 1-20-89
HB 178 - Rep. Cody

Mt Helena Community Church

710 Linden • Helena, MT 59601

Douglas B. Kelley
Pastor

406/449-7771 (o)
406/443-3738 (r)

Home of:

Mt. Helena Christian Academy

Tree of Life Training Institute

King's Kids Children's Church

The Tappan's Missionaries

Charismatic Worship & Drama

January 19, 1989

Representative Dave Brown
Chairman, House Judiciary Committee
Capitol Building
Helena, Montana 59620

Re: House Bill 178

Dear Chairman Brown:

I recently had an opportunity to review HB 178, which is entitled "An Act Clarifying the Law Mandating the Reporting of Suspected Child Abuse or Neglect." As a representative of a great many evangelical pastors and churches across the State of Montana, I urge the Judiciary Committee to either vote against the bill as presently written or amend the bill to delete the words, "or similar relationship."

As the bill presently reads, it seems to take away the confidential nature of the relationship presently enjoyed by pastors, lawyers, doctors and other professionals. It would cause people to be extremely reluctant in receiving the help that they need to receive.

I believe that one of the oldest and most important relationships is the relationship between a parishioner and his priest. This bill attempts to come between the parishioner and the priest and encourage the propagation of hearsay and gossip. While the climb of child abuse cannot and should not be tolerated, we cannot see a total breakdown of the trust, peace and harmony of the Montana family.

Thank you for your consideration in this matter.

Sincerely yours,

Douglas B. Kelley
DBK:ck

EXHIBIT 19
DATE 1-20-89
HB 178-Rep. Cody

No. 87-107

IN THE SUPREME COURT OF THE STATE OF MONTANA

1987

JOYCE GROSS,

Plaintiff and Appellant,

-vs-

BARBARA MYERS,

Defendant and Respondent.

APPEAL FROM: District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Michael Keedy, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Don Vernay argued, Big Fork, Montana

For Respondent:

Warden, Christiansen, Johnson & Berg; Thomas R. Bostock argued, Kalispell, Montana

---

Submitted: October 6, 1987

Decided: December 30, 1987

Filed:

Ethel M. Harrison

Clerk

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HOUSE BILL 177 DATE JAN. 20, 1989

SPONSOR REP. JAN BROWN

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
GARY BLOOM	CLANCY	✓	
Lee Hudson	Great Falls	✓	
Michael H. Pardis M.D.	Helena	✓	
Michael Sherwood	MTCA		X
Jacqueline M Terrell	Amer Ins. Assoc.	X	
[illegible]	Victor	X	
Dennis [illegible]	Helena MCA	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HOUSE BILL 98 DATE JAN. 20, 1989

SPONSOR REP. ELLISON

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
M. J. Sherwood	MTLA		X
Bill Verwolf	Helena	X	
Jacqueline Terrell	American Ins. Assoc.		X
Carlo Ciervi	Livingston MT	X	
Harry Mitchell	GTE Cascade Co.	X	
Jack T. Whitaker	Cascade + Falls Counties	X	
Gordon Morris	MTA Cos	✓	
Steve Browning	State Farm Mutual	✓	
Lyle E. Stark	Mont. Co. Comm	✓	
Denise Lippy	Alliance of Am Ins		X
Jeffrey Ellis	Billings		X

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HOUSE BILL 178 DATE JAN. 20, 1989

SPONSOR REP. CODY

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
John Madsen	Family Services	X	
Doug Kelley	1330 Le Grande Helena		X
Bryan Hsiung	720 Laurel Helena		X
Marc Cramer	HELENA, MT		X
JUDITH CARLSON	HELENA	X	
Steve Waldron	Helena	X	
Kathleen Hayden	Helena	X	
Tom Nikles	Helena	X	
Jay Dozier	Reedpoint	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.