

MINUTES

MONTANA SENATE  
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Bruce Crippen, on March 2, 1989,  
at 10:00 a.m. in Room 325.

ROLL CALL

Members Present: Chairman Bruce Crippen, V. Chairman Al  
Bishop, Senators Tom Beck, Bob Brown, John Harp, Mike  
Halligan, Loren Jenkins, Joe Mazurek, R. K. Pinsoneault  
and Bill Yellowtail.

Members Excused: None

Members Absent: None

Staff Present: Staff Attorney Valencia Lane and Committee  
Secretary Rosemary Jacoby

Announcements/Discussion: There were none.

HEARING ON HOUSE BILL 179

Presentation and Opening Statement by Sponsor:

Representative Tom Lee of Bigfork, District 49, opened  
the hearing. He said the purpose of the bill was to  
remove the two-year limit on modification of a decree  
of dissolution of marriage or legal separation that  
does not contain provisions relating to maintenance or  
support.

List of Testifying Proponents and What Group they Represent:

There were none.

List of Testifying Opponents and What Group They Represent:

There were none.

Testimony:

There was none.

Questions From Committee Members: Senator Halligan asked if

a maintenance and support change would be allowed within the two year period. Rep. Lee answered yes. He said the bill just deletes the two-year exemption so that modification can be made. The change this bill makes in present law is only concerning decrees in which no support provisions have been made. If circumstances change sufficiently, the judge may made an award for support and maintenance at a future date, he said.

Senator Jenkins asked about a case where an inheritance might be received by one of the spouses. Rep. Lee didn't know whether that would change the maintenance or support award. Senator Halligan said that the judge would take into consideration the standard of living. If a spouse were living under poor circumstances and the other spouse received a winning in a lottery, for instance, the judge might take that into consideration.

Senator Jenkins asked if a man's business started to flourish 10 years after a divorce, could the judge change the maintenance or support. Senator Halligan said the judge could consider a change until children reach the age of 18. Many factors are considered, he said, not just money. Inflation might also be taken into consideration. A \$100 award made in 1980 might be reconsidered in 1989, he thought.

Senator Pinsonneault asked who requested the legislation. Representative Lee said this arose after a case in Kalispell appeared before the court. A pre-session meeting attended by district court judges, and other legal people felt this would be an appropriate subject for legislation.

Closing by Sponsor: Rep. Lee closed the hearing.

#### DISPOSITION OF HOUSE BILL 179

Discussion: None.

Amendments and Votes: None.

Recommendation and Vote: Senator Bishop MOVED that House Bill 179 BE NOT CONCURRED IN. The MOTION CARRIED on a vote of 7 to 2 with Senators Brown and Harp voting NO.

HEARING ON HOUSE BILL 286

Presentation and Opening Statement by Sponsor:

Representative Thomas Lee of Bigfork, District 49, opened the hearing. He said the bill was to provide that a judge in a justice's, city or municipal court may impose on a sentence the condition that the defendant may not use or carry a dangerous weapon. It extends to justice and magistrates court the authority to forbid an offender to carry or use a dangerous weapon as a condition of a sentence. The primary focus is the area of family disputes that are first heard in local courts, he said. He said that Gary Marbut had proposed some amendments to the bill. (See Exhibit 1) Rep. Lee said he did not oppose the amendments.

List of Testifying Proponents and What Group they Represent:

Wally Jewell, Montana Magistrates Association  
John Connor, Montana County Attorneys Association

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Wally Jewell read written testimony into the record. (Exhibit 2) He had no problem with the first part of the amendments, but pointed out that limited courts do not have the authority to send a person to prison.

John Connor said he supported the bill and had no objection to the first part of the amendments regarding, but did oppose the second part of them.

Questions From Committee Members: Senator Halligan said that the justice of peace can prescript an individual's rights from carrying a weapon right now while on bail. He wondered what the difference would be under this bill. John Connor said the problem that the bill attempts to correct is that, under present statute, the justice's court does not feel comfortable imposing sanctions such as these on sentences unless there is specific authority which can be pointed to in law. This bill seems to give that authority.

Senator Crippen asked if John Connor objected to amendment 2 (a) and he answered no. But he did object to (b) (i) and (ii).

Senator Crippen asked if he objected to 2 (b) (iii) which seemed to him much more specific. John said a person might claim to be using the excuse of a personal weapon for defense at any time. But, he said, when a person has been convicted of a violent offense related to a firearm, then he ought not to be in possession of a firearm.

Wally Jewell said there was a case in Havre where a man was convicted of domestic abuse. He drove around the block about 30 times before going hunting with a rifle in the back of a pickup causing his wife a lot of concern.

Senator Jenkins asked if there was a definition of a dangerous weapon on the books. He thought it could include a stick of dynamite or many other things. John said there was a code definition in 45-2-101 as "any instrument, article or substance which regardless of its primary function which is readily capable of being used to produce death or serious bodily injury". He said he thought the House had amended the bill to define firearms.

Closing by Sponsor: Rep. Lee closed the hearing.

#### DISPOSITION OF HOUSE BILL 286

Discussion: There was discussion on the amendments and Senator Pinsoneault said they were not necessary as the intent of the bill was to open up an area of appeal.

Amendments and Votes: Senator Jenkins MOVED the 2 (a) part of the proposed amendments. He WITHDREW his motion.

Recommendation and Vote: Senator Jenkins MOVED that House Bill 286 BE NOT CONCURRED IN. The MOTION FAILED on a vote of 3 to 6 with Senators Bishop, Jenkins and Crippen voting YES.

Senator Pinsoneault MOVED that House Bill 286 BE CONCURRED IN. The MOTION CARRIED by a vote of 6 to 3 with Senators Bishop, Jenkins and Crippen voting NO.

#### HEARING ON HOUSE BILL 454

Presentation and Opening Statement by Sponsor: The hearing was opened by Representative Mary Ellen Connelly of Kalispell, District 8, saying the bill was to prohibit

a defendant who voluntarily enters a guilty plea in a lower court from appealing to a district court. Under present law, a defendant is free to plead guilty but can change his plea to not guilty at a higher court appeal. It is a costly and time consuming procedure, she said. The bill is supported by the Attorney General, she added.

List of Testifying Proponents and What Group they Represent:

John Connor, Montana County Attorneys' Association  
Wally Jewell, Montana Magistrates Association

List of Testifying Opponents and What Group They Represent:

None

Testimony:

John Connor said the problem results from appeals in what may be relatively minor misdemeanor offenses at the local level. The issue of whether the plea was voluntary is being addressed. Often, the defendant chooses to expand it to all of the issues of the case. That presents problems for the prosecutor, he said, in terms of trying to locate witnesses and evidence after the fact. He suggested additional language in the bill to insert the word "voluntarily" on p. 15 to indicate in essence that the voluntariness must be witnessed by the court and signed off by the defendant, That would provide some record that the plea was voluntary and the defendant understood what was going on, he said.

Wally Jewell supported the bill and presented written testimony to the committee (Exhibit 3). He agreed with John Connor's suggested amendment of the bill.

Questions From Committee Members: Senator Mazurek wondered if it would be constitutional to ask a person to sign a form that their plea was voluntary. John Connor did not think it would be unconstitutional. He thought it was just a form of documentation for records. Justice courts have forms which are signed as a matter of form acknowledging their rights and waivers of examination etc. that are used when an information is filed, he stated.

Senator Jenkins said that, in a justice, city or other jurisdiction, few judges were lawyers. John agreed.

Senator Jenkins said when a person appears before a city

court justice, he wasn't often represented by a lawyer. John agreed.

Senator Jenkins asked how a person with a high school education could have enough knowledge of the law to be able to assure that the person would really know what he was signing and that he was signing away his rights. John said that all of the judges were trained in terms of what they have to do, if a plea is guilty or not guilty. All of the judges know that they have to obtain a plea of guilty on a voluntary basis. They have to explain the rights granted to a defendant, he told the committee. Some of the city judges do a better job of explaining those things than some district judges, he said. The court has to be assured that the defendant understands his plea before the plea can be accepted now -- a constitutional requirement. If the court "browbeats" the defendant and it is obvious that the plea is not voluntary there are ways of getting the district court to review the plea, he stated.

Senator Jenkins wondered if the bill would remove the judge's discretion regarding leniency. He wondered if there was any flexibility about whether or not an offense would be on a permanent record. John thought the courts would maintain their flexibility.

Senator Halligan stated that, if a person doesn't believe he is guilty, the judge wouldn't allow a guilty plea.

Senator Pinsoneault said the defendant is very well protected.

Closing by Sponsor: Rep. Connelly said that a suggestion of appeal of a sentence, rather than the appeal of the whole case had been discussed in the House hearing. She said she wouldn't object to an amendment of that sort. She closed the hearing.

#### DISPOSITION OF HOUSE BILL 454

Discussion: The committee discussed the amendments that had been proposed by John Connor on p. 2, lines 12 and 13. Senator Halligan said that it would not be particularly workable to require the court to make findings in each case. He said the "acknowledgement of rights forms" that are used in justice courts could be used. He thought it might be more appropriate to allow the court to draft its own form, which could be in the form of an

amendment saying "a form indicating . . ." Valencia Lane said she would draw up some amendments.

Amendments and Votes: None

Recommendation and Vote: None

HEARING ON HOUSE BILL 177

Presentation and Opening Statement by Sponsor:

Representative Jan Brown of Helena, District 46, opened the hearing. She stated the purpose of the bill which was to create a panel to review chiropractor malpractice claims prior to a court action. She said the bill had been suggested by the Montana Chiropractic Association based on the Medical-Legal Panel to reduce the number of cases that end up in court. The panel would be composed of 3 lawyers and 3 chiropractors. When a chiropractor is sued, both parties would have to make their arguments before the panel and the panel would make recommendations. The cost would be born by the chiropractors by an assessment on their license fees, she said.

List of Testifying Proponents and What Group they Represent:

Gary Neely, Attorney and Lobbyist for the Montana Medical Association  
Dr. Gary Blom, Doctor of Chiropractic  
Dr. Michael Pardis, Doctor of Chiropractic  
Bonnie Tippy, Lobbyist for the Montana Chiropractic Association  
Jim Aherns, President of the Montana Hospital Association

List of Testifying Opponents and What Group They Represent:

Michael Sherwood, Montana Trial Lawyers Association

Testimony:

Gary Neely said that, in 1977, the Montana Medical-Legal Panel was organized. This legislation is supported by the Medical Association. These panels are in existence in about half of the states, he said and have been very successful. He said that screening provided important data which is then is available to members and he distributed samples of that material (Exhibit 4). It is a monitoring device which showed who the "bad" practitioners were, he

stated. It is important to determine who the repeat offenders are, he said. Another aspect was risk prevention. Insurance settlement with or without negligence can be expedited through the panel's screening mechanism. He said the history of the panel has been a downward number of trials. A survey was made of attorneys in the state on their satisfaction with the panel. Of the 304 responding, 257 were very satisfied, 35 were somewhat satisfied and 6 were not satisfied, 1 had no opinion and 5 didn't respond. So only 2% were not satisfied with the administration of the panel, said Mr. Neely.

Dr. Gary Blom related a case in which a patient of a chiropractor did not pay a substantial bill following settlement of a claim. The doctor of chiropractic turned the patient's records over to a collection agency which angered the man and he sued the chiropractor. The case was eventually dropped by the district court judge as an "unfounded claim." This kind of situation could be prevented by a panel, he said. He felt it would provide a service for the public as well as the chiropractors.

Dr. Michael Pardis said the purpose of the bill was two-fold: 1. Reduction of claims without merit and, 2. Relieving the court system. He said that between 1982 and 1986, the malpractice insurance had sky-rocketed 2,000%. The chiropractic insurance company has said that 1 out of 6 chiropractors will be sued this year, he told the committee, and 60% of those will be without merit or were a problem with a bill. He urged support of the bill.

Bonnie Tippy said the reason that the Montana Chiropractic Association wanted to set up their own panel was that the Montana Medical Association felt their panel was becoming quite large to encompass them. The M-L panel felt it would be difficult to live within the 120-day timeframe if the association grew even larger. Should other primary health care providers wish to go on the chiropractic panel, they would be welcomed, she said, until the panel becomes too large to handle. Last session, 400 dentists were added to the Montana-Legal Panel and that was not opposed. The University infirmaries were being added in this session, she said. For some unknown reason, she said, the Montana Trial Lawyers have decided to oppose this bill. She urged consistency. She urged passage of the bill.

Jim Aherns appeared as a proponent, but had an amendment he wanted to offer (Exhibit 5). Basically, the amendment asked that references to hospitals be stricken because chiropractors do not practice in hospitals at this time.



Michael Sherwood appeared as an opponent of the bill. He said the history of these panels went back to 1977. Aetna had raised its insurance rates and was paying out less than it was making on its reserves at that time. And malpractice rates have continued to rise in spite of the Medical-Legal panel, he said. The doctors submitted a bill and the lawyers, knowing that something was going to pass, submitted a bill that was ultimately enacted. In 1981, the law was tested because it was, indeed, special legislation and infringed on the rights of injured victims. The test case was Linder B. Smith, he told the committee. That was an original proceeding in the Supreme Court, which remanded that case down to a magistrate - Doug Drysdale in Bozeman - for a hearing. After the hearing, an attempt was made to justify the law, he said. In that case, the Supreme Court said that there cannot be a hindrance of access to court unless there is good reason for doing so. They found a malpractice crisis existed in the state of Montana and, based on that finding, they said the law was constitutional as it did have a rational, legitimate purpose, stated in the bill. Mr. Neely testified that there were many lawsuits in 1977. Mr. Sherwood felt that today's rates had very little to do with law suits.

Mike Sherwood said Mr. Neely had given data as one of the reasons that a panel helped the profession. Mike Sherwood said that he had never been able to obtain information from the panel as to the number of law suits filed against doctors. Secondly, data is available to chiropractors through their licensing bureau. He said he had called a lady named Mary Lou and had found out that there are 180 chiropractors in the state. He found out that there were 4 to 10 complaints filed per year, the majority of which were for billing problems. She said there were no lawsuits filed against chiropractors filed during 1988. He felt it was impossible to reduce zero law suits, hence felt there was no reason for the panel.

He said the bill does have some problems. If a person is hurt by a chiropractor and the claim is less than \$10,000, the patient will have to go to a panel. He won't be able to hire a lawyer, said Mike, because no lawyer would take a case for less than \$10,000. The plaintiff will have to come before the panel, not the doctor, so there are restrictions which he opposed.

He said the bill claimed to be similar to the Medical-Legal Panel, but there are key sections which are different. On page 9, Section 20, the help of an expert consultant, a

chiropractic physician, is offered. The Medical-Legal Panel offers that help at a cost. Another difference, he said was found on p. 15, Section 35, lines 20 through 22 which limits the time in which to file a claim following the panel's decision without a grace period. He urged a BE NOT CONCURRED IN.

Questions by the Committee: Senator Pineseault asked what Dr. Pardis what his malpractice rates were and Dr. Pardis said they had gone from \$400 in 1983 to \$4,500 in 1986. Now they are about \$4800, he said.

Senator Pineseault wondered how many chiropractors had been sued in 1987. Dr. Pardis said some of the 180 chiropractors licensed in the state are out-of-state holders of licenses. He believed there were 150 practicing in the state. If 1 out of 6 are going to be sued, he thought several would be sued. Bonnie Tippy said National Insurance would not give an exact figure but told her there were 6 to 10 malpractice cases pending at any one time. When chiropractors apply for licensure, they may choose to tell or not tell of any malpractice claims against them, she said.

Senator Mazurek asked why the Medical-Legal panel wasn't willing to accept the doctors of chiropractic since they have so few claims per year to process. Mr. Neely said there was nothing wrong with multiple panels. And the Medical-Legal panel has been busy handling obstetrical claims, which have gone from 13 in a 4-year period to 122 for the last 4 years, he said. He felt the chiropractors would also see an increase in their claims. If new types of health care professionals are continuously added, there would be a backlog, he said. He told of Pennsylvania having a backlog of 3,500 unprocessed claims and the Pennsylvania Supreme Court threw out their panel.

Closing by Sponsor: Rep. Brown said the bill made sense to her. She urged passage of the bill and said there would be no objection to amending the bill back to the original if the committee felt that would be desirable.

#### HEARING ON HOUSE BILL 459

Presentation and Opening Statement by Sponsor:

Representative Jan Brown of Helena, District 46, said the bill was requested by the Montana Association of Counties and, particularly, by former Senator Dave

Fuller. House Bill 459 would authorize 6-person juries in felony criminal actions, she said. It was drafted by retired District Court Judge Gordon Bennett. Six-man juries are allowed in codes now in criminal cases. Section 46-16-102 and 46-16-305 were cited by her as containing references to 6-person juries. House Judiciary Committee added the words "with the court's approval" and passed the bill. The House passed it by a vote of 86 to 7, she said, and urged concurrence.

List of Testifying Proponents and What Group they Represent:

Chad Stoinoff, Montana Association of Counties

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Chad Stoinoff said this was a resolution drawn up at the County Commissioners Convention. He urged support.

Questions From Committee Members: Senator Crippen asked if 46-16-102 related to felony prosecutions. Rep. Brown said 46-16-102 was under the criminal procedure. She read the code. 46-16-305 was under preemptory challenges, she said. Both refer to juries of less than 12, she said.

Senator Crippen asked if juries less than 12 were now allowed. Senator Pinsoneault said not to his knowledge. John Connor said that the sections named related to trial in district court, so they do relate to felony offenses. You can have juries with less than 12 for misdemeanors, he said. Six person juries are used in justice's courts, he said.

Senator Crippen felt the authority was already in the law and Rep. Brown said Judge Bennett and Dave Fuller didn't seem to be aware of the statute that allowed it. The House committee thought it could be placed in another section of statute so there would be some consistency.

Closing by Sponsor: Rep. Jan Brown closed the hearing.

DISPOSITION OF HOUSE BILL 459

Discussion: None

Amendments and Votes: None

Recommendation and Vote: Senator Pinsoneault MOVED that House Bill 459 BE CONCURRED IN. The MOTION CARRIED by a vote of 9 to 1 with Senator Crippen voting NO.

#### EXECUTIVE SESSION

#### DISCUSSION OF HOUSE BILL 409

Discussion: Chairman Crippen said he had a request from Mike Sherwood of the Montana Trial Lawyers Association requesting that the committee consider the reconsideration of HB 409. He asked Mr. Sherwood to speak to the bill.

Mr. Sherwood said he strongly opposed the bill in its present form. He referred to a memorandum he had sent to Committee Chairman Bruce Crippen (Exhibit 6) The memo told of his opinion that the bill, in effect, disagreed with decisions handed down by Judge Lovell and Haskill (Bergeson and Silva). He proposed an amendment to the bill in the form of a statement of intent including the language he suggested on page 2 of Exhibit 6. Mr. Sherwood said he thought he had come to an agreement with Mr. Conklin, but apparently hadn't as it became apparent during Mr. Conklin's testimony. He said the statute seemed so clear that the courts might not go further to look beyond the face of the statute. He said the MTLA feels this bill is a repeal of decisions made by the court. He wanted it clear that the attorney-client privilege protected the client as well as his attorney.

Dennis Lopach of U. S. West Communications said he had looked at the amendment and felt it was unnecessary and ineffective. He felt that the court would evolve whatever exceptions to the common law that it chooses to evolve. He felt it would not be necessary to send it back to the House for something that is "superfluous."

Senator Halligan said he had Greg Petesch copy some information and he saw some potential mischief if the language remains blatant about inability to testify. He felt the committee should reconsider the action.

Senator Mazurek said he thought the bill's sponsors simply were attempting to establish common law.

Senator Crippen thought a statement of intent might get across the point. Mr. Sherwood felt that the MTLA wanted the language in statute or they will be arguing the next time it comes up in court. This is a repealing exceptions law, he said.

Senator Jenkins said this case would not affect cases in court now. Also, he said, if he was an attorney, he would want a little protection under the attorney-client privilege. He said he was uncomfortable with the exceptions that were mentioned regarding criminal intent or fraud. He said he couldn't see a lawyer speaking freely to his client knowing that everything could be brought out later.

Mike Sherwood said he agreed with that, and he felt that was what Kuiper said. He said this bill cuts off those exceptions because Kuiper has said that you can't inquire into what your attorney said or what the other parties said.

Senator Crippen said the committee would have to decide how to proceed.

Recommendation and Vote: After discussion by the committee, Senator Yellowtail MOVED that House Bill 409 be RECONSIDERED by the committee. The MOTION CARRIED by a vote of 6 to 4, with Senators Beck, Mazurek and Pinsoneault voting NO.

Senator Crippen asked Valencia Lane, the staff attorney to draft a statement of intent reflecting Mr. Sherwood's suggested amendment. He said the bill would be reconsidered on Monday, March 6.

#### ADJOURNMENT

Adjournment At: 12 noon



SENATOR BRUCE D. CRIPPEN, Chairman

ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 3-2-89

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NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN	✓		
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

March 2, 1969

MR. PRESIDENT:

We, your committee on Judiciary, having had under consideration HR 179 (third reading copy -- blue), respectfully report that HR 179 be not concurred in.

Sponsor: Lee (Eck)

BE NOT CONCURRED IN

Signed: \_\_\_\_\_  
Bruce D. Clippard, Chairman

*Handwritten:*  
M.C.  
3/2/69  
B.D.C.

SENATE STANDING COMMITTEE REPORT

March 2, 1989

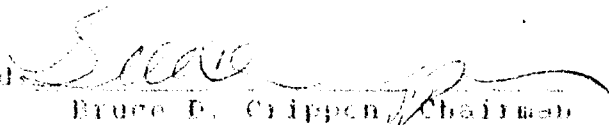
MR. PRESIDENT:

We, your committee on Judiciary, having had under consideration HB 286 (third reading copy -- blue), respectfully report that HB 286 be concurred in.

Sponsor: Lee (Rk)

BE CONCURRED IN

Signed

  
Bruce B. Crippen, Chairman



SENATE STANDING COMMITTEE REPORT

March 2, 1958

MR. PRESIDENT:

Re, your committee on Judiciary, having had under consideration HB 459 (third reading copy - blue), respectfully report that HB 459 be concurred in.

Sponsor: Brown, J. (Pineault)

BE CONCURRED IN

Signed:   
Bruce E. Crippen, Chairman

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P.M.

Amendments to House Bill No. 286  
Third Reading Copy (BLUE)

Requested by Representative Lee  
(for Gary Marbut)  
For the Committee on Judiciary

Prepared by Valencia Lane  
March 1, 1989

1. Page 2, line 14.  
Following: "(2)"  
Strike: "but"  
Insert: "; however, such judges"

2. Page 2, line 19.  
Following: "SENTENCE"  
Insert: "when:

- (a) such restriction has a rational basis and is directly related to conviction for domestic abuse or another crime of personal violence against another person where the use or threat of force or use of a weapon is documented; and
- (b) such restriction:
  - (i) meets the requirements of subsection (2);
  - (ii) allows exception for personal defense; and
  - (iii) allows for legitimate hunting and sporting use of firearms"

OR

Insert: "when:

- (a) such restriction has a rational basis and is directly related to conviction for domestic abuse or another crime of personal violence against another person where the use or threat of force or use of a weapon is documented; and
- (b) such restriction:
  - (i) meets the requirements of subsection (2);
  - (ii) allows exception for personal defense; and
  - (iii) requires automatic review of cause by the court every 60 days until the restriction is removed"

HB 286

SENATE JOURNAL

EXHIBIT NO. 2

DATE 3-2-89

BILL NO. HB 286

# Montana Magistrates Association

2 March 1989

Testimony offered in support of HB286, a bill for an act entitled: "An act to provide that a judge in a Justice's, City, or Municipal Court, may impose on a sentence the condition that the defendant not use or carry a dangerous weapon."

Given by Wallace A. Jewell on behalf of the Montana Magistrates Association representing the judges of courts of limited jurisdiction of Montana.

The Montana Magistrates Association favors this legislation because all too often when a misdemeanor offense, such as an assault or a domestic abuse has been committed, the lower court can not now restrict a defendants ability to use or carry a weapon, even in the interests of justice, when such a sentence would be in the best interests of society, or for the protection of the victim. Having the jurisdictional ability to impose such a condition when imposing sentence would greatly enhance the ability of the limited jurisdiction courts to protect victims and society when crimes against persons are committed.

We strongly urge you to support this legislation and to concur with the House in its passage.

*Wallace A. Jewell*

HB 454

SENATE JUDICIARY  
SENATE NO. 3  
DATE 3-2-89  
BILL NO. HB 454

# Montana Magistrates Association

2 March 1989

Testimony offered in support of HB454, a bill for an act entitled: "An act to prohibit a defendant who voluntarily enters a guilty plea in a lower court from appealing to a district court."

Given by Wallace A. Jewell on behalf of the Montana Magistrates Association representing the judges of courts of limited jurisdiction of Montana.

The judges of the limited jurisdiction courts favor the enactment of this legislation. If the plea of the defendant is voluntary and if the judge in the limited jurisdiction court does his or her job correctly and advises the defendant of the consequences of his plea; of his constitutional rights; of the maximum penalty that may be imposed for the offense charged; if these procedural steps are followed and the judge in the limited jurisdiction court determines that the plea is knowing and voluntary, then the defendant should have no reason to appeal.

The judges of the limited jurisdiction courts know that the appeals from their courts to district courts are costly and time-consuming both for the county attorneys and the counties. Any attempt to eliminate the frivolous and unneeded appeal should be considered. If the judges of courts of limited jurisdiction were not so well schooled by the Supreme Court's Commission on Courts of Limited Jurisdiction then we would not support this measure. However, we must pass a certification test every four years and go to two weeks of schooling every year. We feel we are qualified enough to determine a knowing and voluntary plea of guilty.

We urge this committee to support this measure and we hope you give it a do pass recommendation.

*Wallace A. Jewell*

HB 177

SENATE JUDICIARY

EXHIBIT NO. 4 P.1

DATE 3-2-89

BILL NO. HB 177

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.

**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

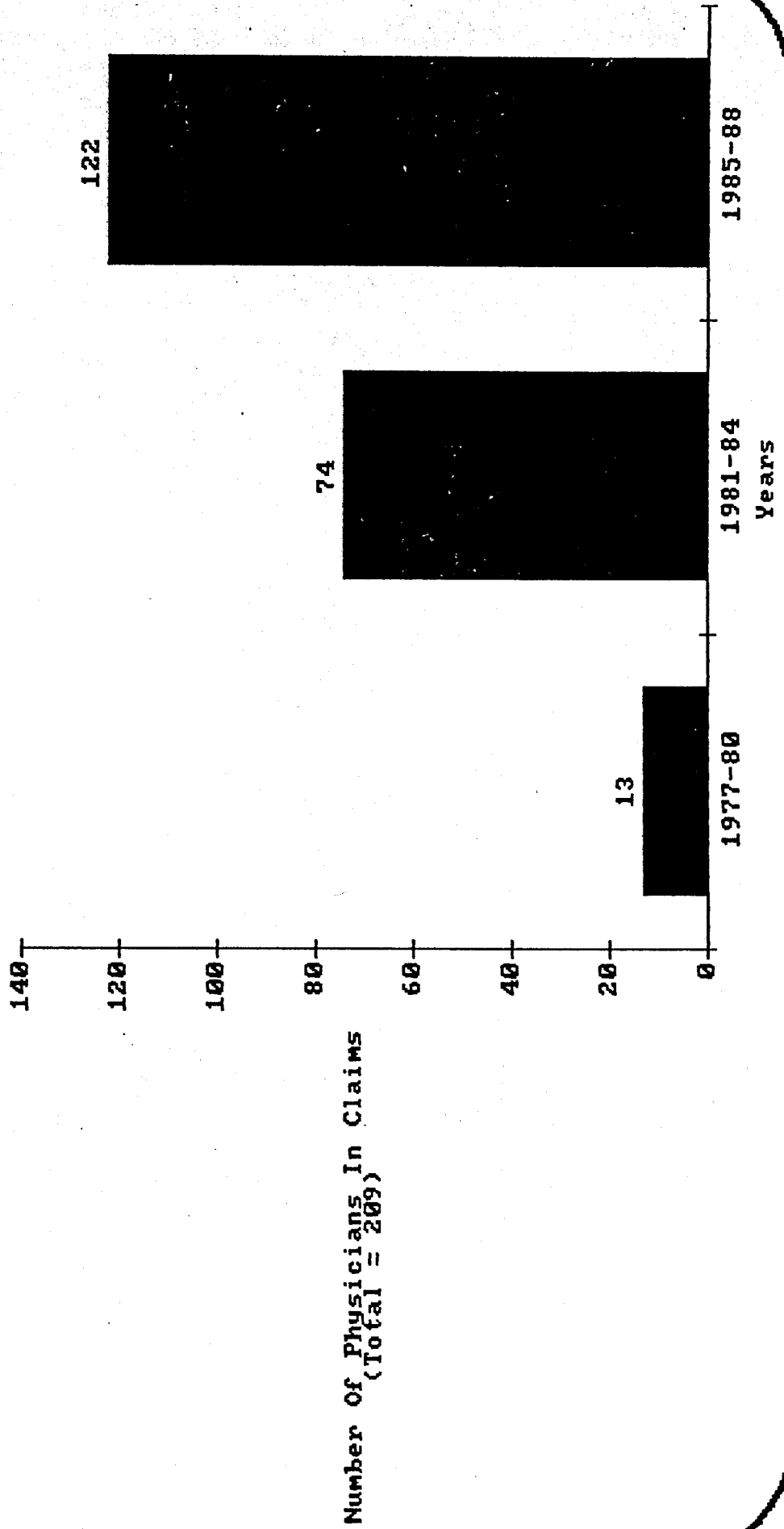
9. Overall Good vs. Bad Of Panel.

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

10. Future Status Of Panel.

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

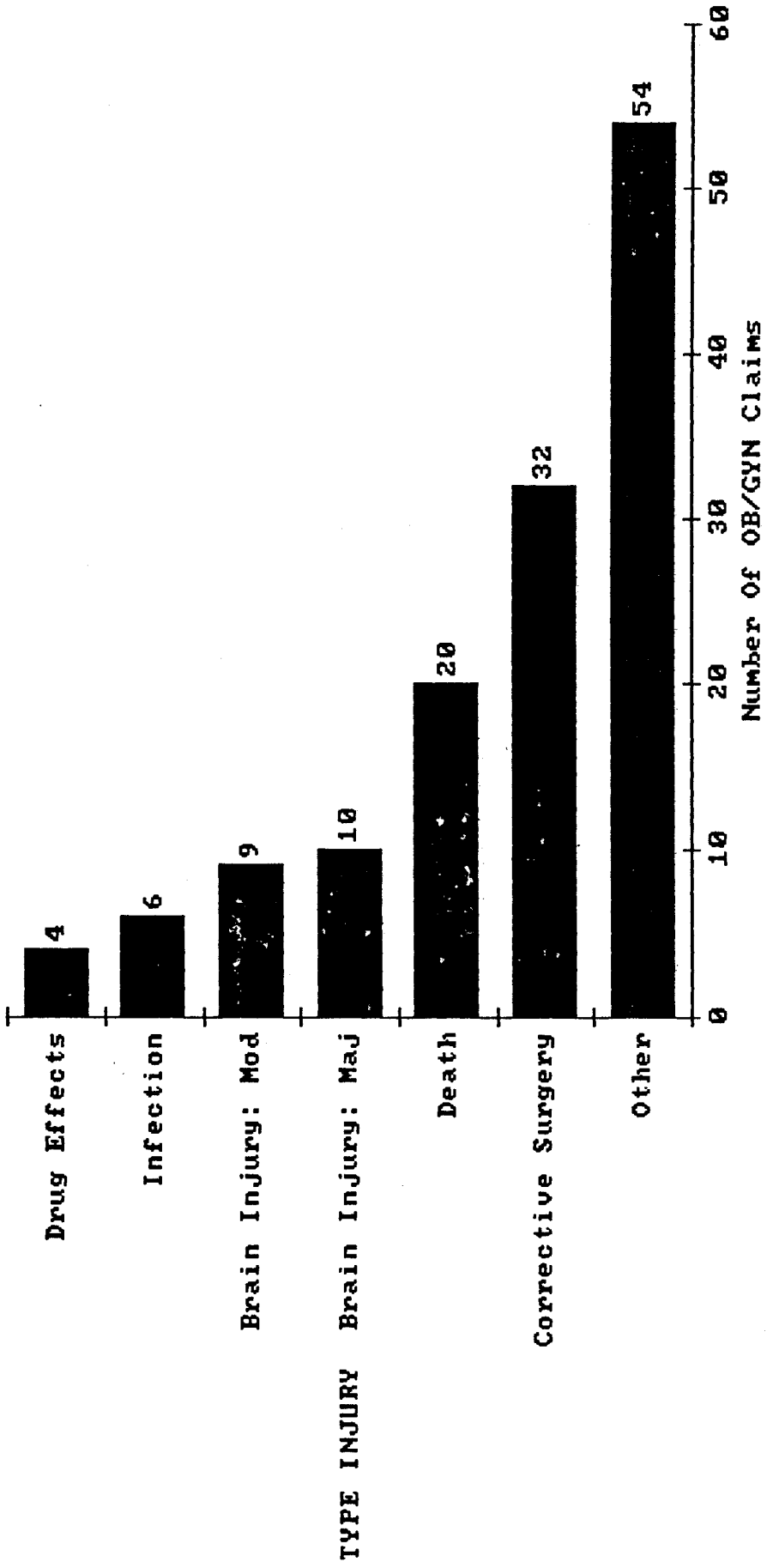
1977-1988: INCREASING RATES OF CLAIMS - Montana Physicians Mit. OBGIN CLAIMS



SENATE JUDICIARY

NO. HB 4 p.4  
DATE 3-2-89  
BILL NO. HB 177

1977-1988: Montana OB/GYN Malpractice Claims By Type Of Injury



SENATE JUDICIARY  
 EXHIBIT NO. 4 P. 5  
 DATE 3-2-89  
 BILL NO. HB 177

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

<u>Number Of Claims Where Indication Of Physician Negligence</u>	<u>Number Of Different Physicians</u>	<u>Number Of Physicians Not Now In Practice</u>	<u>Number Of Physicians Still In Practice</u>
<u>ONE OR MORE CLAIMS</u>			
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
	<u>140</u>	<u>35</u>	<u>105</u>

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 Medical-Legal Panel, 1977 - 1988

## PRE-HEARING RESOLUTION OF CLAIMS

## Panel Disposition Of Closed Claims, 1977 - 1988

Physicians With Medical  
Malpractice Claims Against Them

<u>Method Of Disposition</u>	<u>Number Physicians With Claims</u>	<u>Percent Total Physicians With Claims</u>
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

<u>Method Of Disposition</u>	<u>Number Hospitals With Claims</u>	<u>% Total Hospitals With Claims</u>
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 %

*neeby* SENATE JUDICIARY  
 EXHIBIT NO. 4 p.8  
 DATE 3-2-89  
 BILL NO. HB 177

**Attorneys Who Have Served On Panel**

**Question 3: Satisfied With Administration Of Panel?**

<u>Satisf</u> <u>Level</u>	<u>#</u>	<u>Respond</u>	<u>%</u>	<u>Respond</u>	
VERY SAT	257	84.5%			Combined Summary <hr/> SATISFIED 292 96.1% NOT SATISF 6 2.0% NO OPIN 1 0.3% NO RESP 5 1.6% Total 304 100.0%
SOME SAT	35	11.5%			
NOT SAT	6	2.0%			
NO OPIN	1	0.3%			
NO RESP	5	1.6%			
Total Resp	304	100.0%			

*Jim Ahrens*  
*MHA*

*HB 177*

MONTANA HOSPITAL ASSOCIATION

SENATE JUDICIARY

EXHIBIT NO. 5

DATE 3-2-89

BILL NO. HB 177

AMENDMENTS TO HOUSE BILL 177

MARCH 2, 1989

- (1) Page 3, line 4 - after "physician" - add "."
  - (2) Page 3, line 4 - delete remainder of sentence
  - (3) Page 3, line 6 - delete subsection (4)
- Renumber <sup>*Subsections*</sup> ~~sections~~
- (4) Page 10, line 3 - delete "(1)"
  - (5) Page 10, line 7 - delete subsection "(2)"

HB 409

SENATE JUDICIARY  
EXHIBIT NO 6 p.1  
DATE 3-28-89  
BILL NO HB 409

Memorandum

To: Senator Bruce Crippen, Chairman  
Senate Judiciary Committee  
From: Michael Sherwood, MTLA  
Re: House Bill No. 409  
Date: March 2, 1989

I am writing this memorandum in light of the committee's recommendation that the above bill do pass. My concern lies with the current status of the law in Montana.

I provided to you yesterday with a copy of the pertinent excerpts from the Kuiper decision. In that decision the supreme court ruled that generally the attorney-client privilege is applicable to a situation in which a client is being asked to reveal the content of communications from his attorney. Mr. Conklin indicated during the hearing that the Kuiper case involved only the request for production of documents. The protective order in that case pertained to the oral examination of employees of the defendant company regarding communications from the company's attorney, as well. Page one of the excerpt notes this.

Mr. Conklin also indicated that the court did not really address the issue of the extent of attorney client privilege. To the contrary the court ruled on multiple pieces of documentation in possession of the client and determined that those documents which could be considered legal advice from the company attorney to the client company or its representatives were protected by the attorney-client privilege even though the request for documentation was directed to the defendant tire company and not its attorney.

At page 1298 of that decision (not provided) the court also ruled regarding the application of the attorney-client privilege to questions to be asked at the depositions of the employees of the tire company, saying:

"If a particular document is not protected by either the attorney-client privilege or the work product rule then inquiry may be made about that documents during the taking of depositions from Good year executives. If a document is privileged, such inquiry may not be made. "



The MTLA feels that this language makes it clear that the supreme court has already adopted a position that the current statute should be applied not only to inquiries made to the attorney, but also the client. If a court were to be convinced of this position in the future, then the court might rule that the reason the legislature chose to enact the common language after the Kuiper ruling was to eliminate the exceptions to the common law rule carved out by the courts prior to the enactment of this legislation.

Mr. Conklin does not agree and sees a need for the statute. I spoke with Mr. Conklin last night and we agreed that it might be best to include in the bill the legislative intent regarding the effect of this legislation upon exceptions, past and future, to the general common law rule. We then agreed to recommend that the following language be added to the bill:

" (3) Nothing herein shall be construed as a legislative intent to adopt a position regarding the judicial development of exceptions to the general common law rule of attorney-client privilege."

I respectfully request that the committee add the foregoing amendment.

*After speaking w/  
members of MDTL*

*Mr. Conklin no*

*longer agrees. He will  
agree to this language  
being placed in the  
legislative record.*

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. \_\_\_\_\_

DATE 3-2-89

SPONSOR \_\_\_\_\_

Bill #

169  
174  
175  
186  
454  
159  
177  
3177  
14177  
2177

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Thomas Lee	Bygones	✓	
Thomas Lee	"	✓	
John Connor	Dept of Justice, Mt County Atty Assn	✓	
John Connor	"	✓	
WALLY Jewell	MT. MAGIS. ASSOC	✓	
Wally Jewell	- - -	✓	
CHAD STORANOFF	MT Assoc. of Counties	X	
Mike Sherwood	MT LA		X
Mike Parris, D.C.	Helena	X	
Bonnie Lippin	MT chro. Assn	-	
Gary P. Blom DC	Helena	X	
Tom Adams	Helena	Korunmaded	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3-2-89 House Bill No. 179 Time \_\_\_\_\_

NAME	YES	NO
SEN. BISHOP	✓	
SEN. BECK	✓	
SEN. BROWN		✓
SEN. HALLIGAN	<i>absent</i>	
SEN. HARP		✓
SEN. JENKINS	✓	
SEN. MAZUREK	✓	
SEN. PINSONEAULT	✓	
SEN. YELLOWTAIL	✓	
SEN. CRIPPEN	✓	

7. 2

Rosemary Jacoby  
Secretary

Sen. Bruce Crippen  
Chairman

Motion: Bishop DNP

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3-2-89 House Bill No. 286 Time \_\_\_\_\_

NAME	YES	NO
SEN. BISHOP		✓
SEN. BECK	✓	
SEN. BROWN	✓	
SEN. HALLIGAN	<i>absent</i>	
SEN. HARP	✓	
SEN. JENKINS		✓
SEN. MAZUREK	✓	
SEN. PINSONEAULT	✓	
SEN. YELLOWTAIL	✓	
SEN. CRIPPEN		✓

*6 to 3*

Rosemary Jacoby  
Secretary

Sen. Bruce Crippen  
Chairman

Motion: *J moved 2(a) Withdrawn*  
*J. " DNP. Failed 3-6*  
*P. BCF Passed 6-3*

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3-2-89 Sen House Bill No. 454 Time \_\_\_\_\_

NAME	YES	NO
SEN. BISHOP		
SEN. BECK		
SEN. BROWN		
SEN. HALLIGAN		
SEN. HARP		
SEN. JENKINS		
SEN. MAZUREK		
SEN PINSONEAULT		
SEN. YELLOWTAIL		
SEN. CRIPPEN		

Rosemary Jacoby  
Secretary

Sen. Bruce Crippen  
Chairman

Motion: hold for Valencia  
to draw up amend.

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3-2-89 House Bill No. 459 Time \_\_\_\_\_

NAME	YES	NO
SEN. BISHOP	✓	
SEN. BECK	✓	
SEN. BROWN	✓	
SEN. HALLIGAN	<i>absent</i>	
SEN. HARP	✓	
SEN. JENKINS	✓	
SEN. MAZUREK	✓	
SEN. PINSONEAULT	✓	
SEN. YELLOWTAIL	✓	
SEN. CRIPPEN		✓

8 . . . 1

Rosemary Jacoby  
Secretary

Sen. Bruce Crippen  
Chairman

Motion: Pinsonneault BCT passed.

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date March 2, 1989 House Bill No. 409 Time \_\_\_\_\_

NAME	YES	NO
SEN. BISHOP	✓	
SEN. BECK		✓
SEN. BROWN	✓	
SEN. HALLIGAN	✓	✓
SEN. HARP	✓	
SEN. JENKINS	✓	
SEN. MAZUREK		✓
SEN. PINSONEAULT		✓
SEN. YELLOWTAIL	✓	
SEN. CRIPPEN	✓	

6 to 4

Rosemary Jacoby  
Secretary

Sen. Bruce Crippen  
Chairman

Motion: Sen. Yellowtail - Reconsider