MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN RUSSELL FAGG,** on March 9, 1993, at 9:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chairman (R)
Rep. Randy Vogel, Vice Chairman (R)
Rep. Dave Brown, Vice Chairman (D)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Tim Whalen (D)
Rep. Diana Wyatt (D)

Members Excused: Rep. Karyl Winslow (R)

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 46, SB 68, SB 336, SB 397
Executive Action: SB 46, SB 397, SB 37

HEARING ON SB 46

Opening Statement by Sponsor:

SEN. MIKE HALLIGAN, Senate District 29, Missoula, said the 1947 Uniform Partnership Act (UPA) has been changed constantly since then by case law. This is extremely important legislation with

respect to economic development in Montana.

Proponents' Testimony:

The following proponents provided written testimony:

Steve Bahls, Law Professor, University of Montana EXHIBITS 1, 2, and 3

Garth Jacobson, Chief Counsel, Secretary of State EXHIBIT 4

Lance Hoskins, Attorney, Dorsey & Whitney, Billings EXHIBIT 5

David Owen, Montana Chamber of Commerce, commented that it is important for Montana laws to be modern and provide for small business owners.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. RICE asked **Professor Bahls** to explain the effective impact of his bill on section 63 of the bill. **Professor Bahls** explained that section 63 deals with the application to existing partnerships. Existing partnership agreements will continue, though standing partnerships will amend their partnership agreements prior to that time to take full advantage of this law.

REP. RICE said that the assumption in the fiscal note is that filings will increase by 25 percent and requests for information will increase 15 percent, which are pretty significant numbers. He wondered why those assumptions had been made. **Professor Bahls** said that **Mr. Jacobson** had convinced him that filings will increase by 25 percent. **Professor Bahls** said he is not sure there will a great impact on the general fund, but also noted that the bill directs the secretary of state to recoup additional costs through filing fees. The other reason for the increase in filing would be the statement of authority.

REP. GRIMES asked **Professor Bahls** what effect the UPA would have on small partnerships should a father and son own a partnership, and the father pass away. **Professor Bahls** responded that those will be affected in terms of the ease with which a business is transferred from one generation to another. It won't impact inheritance or estate taxes.

Existing law provides that when a parent dies, the partnership is dissolved. That means that any child can go into court, including those children who don't have any interest in the business. Under this law, the obligation of partnership is to buy out the interest of the parent.

REP. SAYLES asked **Professor Bahls** to clarify the language on page 33, subsection (b), lines 6-9. **Professor Bahls** agreed that this language is unclear but explained that it is dealing with the general standards of partnership. He said that the language is from the UPA, and **Professor Bahls** assured the committee there are no words missing.

Closing by Sponsor: None

HEARING ON SB 68

Opening Statement by Sponsor:

SEN. CHET BLAYLOCK, Senate District 43, Laurel, said that SB 68 removes the sunset provision on tort liability for the state of Montana. Before the 1972 constitution, the State of Montana could not be sued unless a person was able to get the Board of Examiners to read the lawsuit. Nor could a person sue any of the subdivisions of the State of Montana. The new constitution removed that prohibition and provided no limits on the amount that could be collected. Therefore, it was costing the state millions of dollars in lawsuits, and it became obvious that the state simply couldn't afford losing that kind of money. Lawmakers have been trying since 1983 to find language that would meet Supreme Court tests. The new liability limits include $750,000 per claim and $1,500,000 per accident.

SB 68 removes the sunset law to make this a permanent law of the state of Montana that does not have to be renewed in two years.

Proponents' Testimony:

Bill Gianoulias, Chief Defense Counsel, Department of Administration, discussed the Supreme Court cases which have led to this proposed legislation.

Stan Kaleczyc, Helena attorney in private practice, representing Montana Municipal Insurance Authority (MMIA), said that MMIA is the group self-insurance program for cities and towns. It has two programs: a group workers' compensation self-insurance program and a liability self-insurance program. Approximately 110 cities and towns participate in that liability program in which rates are determined annually by an actuary. The actuary responsible for setting those rates has relied upon the court limits to determine the liability. In anticipation of this bill, MMIA asked the risk manager and actuary to determine what impact there would be if there were no court payments on their program. The result is an estimate of a 34 percent increase in premiums paid by cities and towns if the court minutes were to be abolished. Obviously, these are fiscal impacts, not only for state government but for local governments as well.

Alec Hansen, League of Cities and Towns, said they support **Mr. Gianoulias'** and **Mr. Kaleczyc's** testimony. They encourages do pass on SB 68.

Opponents' Testimony:

Russell Hill, Executive Director, Montana Trial Lawyers Association, presented written testimony. **EXHIBITS 6** and **7.**

Questions From Committee Members and Responses:

REP. RICE asked **Mr. Gianoulias** to highlight the issue of the sunset provision and its relationship to the constitutionality of this legislation. **Mr. Hill** said that it was his understanding that the Montana Supreme Court said that, even if the state had applied a rational basis test in this case, the previous statute would be unconstitutional. The second thing is, a rational basis test is a fairly lenient test, and all the legislature has to do is show that there's a rational basis between a law that is passed and the effect it is trying to achieve.

Closing by Sponsor:

SEN. BLAYLOCK said that, if the legislature believes that constitutionality caps would be eroding because of inflation and the passage of time, there is nothing to stop the legislature from raising caps. He does not want to revisit the legislation every two years.

HEARING ON SB 336

Opening Statement by Sponsor:

SEN. BILL YELLOWTAIL, Senate District 50, Wyola, said that SB 336 addresses the matter of judicial salaries in Montana. In spite of the high regard and esteem in which we hold judicial government, Montana compensates its judges at the lowest (50th) rate of any state in the United States. Montana sets its salaries for the judicial branch in statute and places the judges in the position of coming on bended knee to the legislature each biennium to plead the case for their salaries. Base salary increases were legislated in the last two sessions to the District Court judges and Supreme Court justices that have not kept up with neighboring states much less the national average. In view of the state's financial situation in this biennium, the judges have come forth with a very humble and modest approach and have asked merely for salary increases that are the same as the average increase provided for state employees.

As the original bill was drafted, the judges proposed that the legislature tie judicial salaries to the cost of living index. The Senate decided that the legislature should not look beyond the present biennium and chose to delete subsection (b) of page 3. Although it was the Senate's intention to only address the present forthcoming biennium with this provision to match state employee's salaries, they neglected to correct the bill's language to delete the provision tieing them to state employee benefits. The Senate's intention was to have that provision end at the end of the present biennium, which would be June 30, 1995.

SEN. YELLOWTAIL stated that the committee should consider an amendment to the bill which would put a termination on that particular provision. He doesn't want to remove the base salary provision to this bill. In other words, the Senate does not want to sunset this particular section, but sunset only this particular provision of this bill.

Proponents' Testimony:

Patrick Chenovick, Administrator of the Supreme Court, provided a letter from **Chief Justice Jean A. Turnage. EXHIBIT 8**

Tom Hopgood, representing the State Bar Association, provided written testimony. **EXHIBIT 9**

Russell Hill, Executive Director, Montana Trial Lawyers Association, said that he and **MTLA** support SB 336.

John Conner, attorney representing Montana County Attorneys Association, said the **MCAA** supports SB 336.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. TASH asked **Mr. Chenovick** why there is a turnover in District Court judges and whether there is a provision to provide commensurate pay for travel and administrative help. **Mr. Chenovick** said that, in the past, the turnover rates were related to conditions, i.e., lack of administrative support and the travel required of a single judge serving several counties. The second problem is low pay. Any private attorney would vouch that the low salary in this job is not worth the time and effort.

REP. WYATT asked **District Judge Tom Honzel** what the increase of salary was in the past year and how he felt about a flat rate increase. **Judge Honzel** said it was a $1,500 increase. He is not opposed to a flat rate increase but prefers they be on the state employees' schedule during the biennium. He also said historically, after the 1972 constitution, there was a Salary

Commission which made recommendations to the legislature. When the Salary Commission was disbanded, partly due to the fact that the legislature did not accept any of its recommendations, the judges were on their own. If the judges had been on the same salary increases as state employees, judges would be up to the level they probably should be. Next they should be on some kind of index, and one of the indexes discussed was the state salary. As far as retirement goes, there's a difference in the years of service. Judges with 15 years of service must wait until they're 65 to draw on it. There are a few exceptions to that due to medical reasons.

REP. RICE asked **SEN. YELLOWTAIL** what effect the sunset provision will have on the proposed increases and what the base salary in law would be. **SEN. YELLOWTAIL** discussed this with the judges, and it is their desire to be tied to state employee increases to preserve the base salary. To that extent, **SEN. YELLOWTAIL** has been trying to figure out a way to accomplish this, and proposed some language that may help achieve it. On line 21, page 1 and 2, insert: "Before the biennium, beginning July 1, 1993" and on line 23, after the word employees, insert: "during the biennium" and strike: "beginning July 1, 1993."

Closing by Sponsor:

SEN. YELLOWTAIL said the bottom line concept here is the pool of judges and lawyers in Montana and being able to recruit the best and brightest to be at the bench. **SEN. YELLOWTAIL'S** continuing interest is to see that, within reasonable limitations, the state provides a salary that's reasonable for the judicial branch. He requested that the committee restore the stricken language referring to cost of living index amended out in the Senate.

HEARING ON SB 397

Opening Statement by Sponsor:

SEN. STEVE DOHERTY, Senate District 20, Great Falls, said that SB 397 is the result of a January 1993 incident in which a judge was attacked. This bill is an act including causing or threatening bodily injury to a judge in the offense of felony assault.

Proponents' Testimony:

John Conner, Montana County Attorneys Association, stated that it has been a federal law for years that it is a felony to attack a federal judge. This bill would make it a felony offense to attack a state judge.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REPS. RUSSELL and **BERGMAN** asked **Mr. Conner** how different this is from any other law protecting groups/classes of people, i.e., HB 507 which protects referees. **Mr. Conner** said this is a threat of felony intimidation. An important aspect of this bill is the provision that makes it an offense to threaten as well as to cause bodily injury to a judge. This bill also protects the judge from being exposed to this kind of behavior over a long period of time without some type of opportunity to put this behavior under control.

Closing by Sponsor:

SEN. DOHERTY thinks this is a good bill that provides some protection to people who are attempting to "referee" some of the biggest decisions that we have. This bill will protect judges from threats because they are just doing their job.

EXECUTIVE ACTION ON SB 46

Motion/Vote: REP. VOGEL MOVED SB 46 BE CONCURRED IN. Motion carried unanimously.

EXECUTIVE ACTION ON SB 397

Motion: REP. WYATT MOVED SB 397 BE CONCURRED IN.

Discussion:

REP. CLARK opposes the bill from the standpoint that it protects a class, and he doesn't think there needs to be protection for people due to the nature of their job.

REP. VOGEL disagreed with **REP. CLARK'S** line of reasoning. **REP. VOGEL** asserted, as a police officer, it is not his job to be assaulted, harassed or threatened. There must be some means of protection for them as well.

Motion: REP. CLARK moved an amendment to add legislators to the title of the bill.

Discussion:

REP. WHALEN did not disagree with the amendment, but asked **Mr. MacMaster** if that should be added to the title of the bill. He said it would fit to put legislator in the title of the bill because a legislator is also a lawmaker.

REPS. RUSSELL and **MCCULLOCH** both agreed that this type of legislation has surfaced before, i.e., HB 507, protecting

referees. They commented that, if legislation is going to protect referees and judges, perhaps social workers and teachers should be added. **REP. VOGEL** clarified that different entities, whether a social worker or a teacher, are presently protected under statute if someone purposely or knowingly causes reasonable apprehension of bodily injury to another, that's misdemeanor assault. SB 397 says if a person assaults a judge, it's a felony assault.

REP. TASH is opposed to the amendment because this is an example of a laundry list.

Vote: **REP. CLARK'S** amendment to add legislators to the title of the bill failed on an 8-8 vote with **REPS. BROWN** and **WINSLOW** excused from voting.

Motion/Vote: **REP. CLARK** proposed an amendment to strike "or threatens" on page 1, line 24. Amendment failed on a 10-6 vote with **CHAIRMAN FAGG, REPS. VOGEL, BROWN, BIRD, BERGMAN, GRIMES, RICE, SAYLES, SMITH,** and **WYATT** voting no.

Motion/Vote: **REP. WYATT MOVED SB 397 BE CONCURRED IN AS AMENDED.** Motion carried 13-5 with **REPS. BROOKE, CLARK, MCCULLOCH, RUSSELL** and **WHALEN** voting no.

EXECUTIVE ACTION ON SB 37

Motion: **REP. WHALEN MOVED SB 37 BE CONCURRED IN.**

Motion: **REP. WHALEN** offered an amendment on page 2, line 3, to insert the following language: "This section does not apply to constitutionally protected activity, organized labor activity, or pro-life activities."

Discussion:

REP. WHALEN said it was his understanding that this bill was introduced was to get after pedophiles stalking young children, jealous boyfriends, etc. He said that, if that is the intention of the bill, this amendment will not affect those reasons.

REPS. WYATT, BROOKE and **TASH** oppose the amendment. They believe if any exemptions are allowed within this law, the legislature is allowing those people to break the law. Two particular groups, stipulated here, are given some cover to do what would be considered illegal if it were done by any normal citizen. They object to this amendment very strongly, and proposed to reinsert the language that was deleted by the Senate on lines 22-24 on page 2.

REPS. GRIMES, VOGEL and **BERGMAN** support the amendment. They believe these amendments shouldn't hurt the main body of the bill, which is to create the offense of stalking.

Motion: **REP. BROOKE** offered a substitute motion to reinsert lines 22 and 23 on page 2.

Discussion:

CHAIRMAN FAGG supported **REP. BROOKE'S** amendment. He said SB 37 has protections in it necessary to prevent **REP. WHALEN's** concerns. He said there are five elements that have to be proven in a court of law in order for the offense of stalking to take place. **CHAIRMAN FAGG** does not believe pro-life activists should be harassing or repeatedly stalking somebody because of these causes. If they do, then they should be arrested. He said the committee is turning this bill into a much larger issue than it really is, and it is not right to include constitutionally protected activities in this bill. He added there is a wealth of caselaw that shows what those activities are.

Vote: **REP. BROOKE'S** amendment to reinsert lines 22-23 on page 2 carried 9-8 with **REPS. VOGEL, BIRD, CLARK, GRIMES, RICE, SAYLES, TASH**, and **WHALEN** voting no. **REP. WINSLOW** was excused from voting.

Motion: **REP. WHALEN** moved an amendment on page 24 to strike the period after activity and insert: ", organized labor activities, or pro-life activities."

Discussion:

REP. WHALEN explained that the amendment adds language deleted by **REP. BROOKE'S** amendment. He takes strong exception to anybody saying that what is constitutionally protected activity is known, specifically with regard to the activities of pro-life activists.

MR. MACMASTER informed the committee that the term pro-life activity is not a legal term, and if the committee decides to use pro-life in the bill, it should be defined. He recommended, for legal purposes, using the terms legal anti-abortion activity and legal labor activity.

Vote: **REP. WHALEN'S** amendment to add language on page 24 failed on a voice vote of 9-8 vote with **REPS. VOGEL, BIRD, BERGMAN, GRIMES, RICE, SAYLES, SMITH**, and **WHALEN**.

Motion/Vote: **REP. WHALEN** offered an amendment to include the words live-birth advocates in the bill, which explains what the word pro-life means. Motion failed with a vote of 9-9 with **CHAIRMAN FAGG, REPS. BROWN, BROOKE, MCCULLOCH, RUSSELL, SAYLES, TOOLE, WINSLOW**, and **WYATT** voting no.

Motion: **REP. BIRD** proposed an amendment proposed by **SEN. TOWE** on page 9, subsection (3), line 17. The amendment reads: ", as soon as possible under the circumstances, make one and if necessary more reasonable attempts, by means that include but are not limited to certified mail, to"

Discussion:

REP. SMITH stated her belief that it is necessary to add to the amendment "and not limited to" and that reasonable contact be certified mail, etc. **Mr. MacMaster** will work that language into a conceptual amendment. **REP. BIRD** will include that language in her original amendment.

REP. BROOKE learned from another source that the recommendation is to delete the words "prosecuting attorney" and asked **Mr. MacMaster** why it is staying in the amendment. **Mr. MacMaster** said that is a policy matter, and the testimony went both ways at the hearing. Either the prosecutor should notify or the courts should notify, or it can be left as is. But, **Mr. MacMaster** said, it doesn't make much sense to take out prosecuting attorney because people will always need a prosecutor. It is **Mr. MacMaster's** personal choice to make the prosecutor do it because the courts don't like to be handed these chores by the legislature. **REP. BROOKE** said a lot of times the prosecuting attorney doesn't know anything or hasn't been informed about the case, and she feels it doesn't belong in the amendment. **CHAIRMAN FAGG** agreed with her, and further added, when **SEN. VAN VALKENBURG** was asked to come to the committee to testify on other bills, he also asked to take prosecuting attorney out of the loop because they sometimes don't know when someone has been released on bail.

From that information, **REP. BIRD** reversed that language to apply to the court rather than the prosecuting attorney. If that is accepted by the committee, **REP. SMITH** said, the language after bail must be changed from prosecuting attorney to "notification of court."

Motion/Vote: **CHAIRMAN FAGG** proposed a substitute motion to strike section 3, page 9 in its entirety because the legislature doesn't require anybody to inform the victims when folks are let out on mail in assaults and much more important criminal cases being tried. He doesn't see the stalking offense any more important than any other criminal offenses. Motion failed 5-10 with **REPS. BERGMAN, BROOKE, GRIMES, MCCULLOCH RICE, RUSSELL, SAYLES, SMITH, TASH,** and **WYATT** voting no. **REP. WINSLOW** was excused and **REP. BROWN** was absent.

Vote: **REP. BIRD'S** amendment carried unanimously.

Motion/Vote: **REP. WHALEN** proposed an amendment on page 2 to use the word anti-abortion activities as opposed to live-birth advocates. Motion failed on a 9-9 vote with **CHAIRMAN FAGG, REPS. BROWN, BROOKE, MCCULLOCH, RUSSELL, SAYLES, TOOLE, WINSLOW** and **WYATT** voting no.

Motion: **REP. VOGEL MOVED SB 37 BE CONCURRED IN AS AMENDED.**

Motion: **REP. WHALEN** proposed an amendment to strike page 2, line 14: "THE PERSON WILLINGLY OR KNOWINGLY" and insert: "reasonably"

prior to the word "causes." After the word "causes," insert: "A person engages in a course of conduct with specific and malicious contempt to cause another".

Discussion:

REP. WHALEN defended his amendment by saying unless that language is put in the bill, all a prosecutor is going to have to show is that a person intentionally engaged in that activity, and that the other person deemed that person's conduct constitutes substantial emotional distress. In essence, this amendment puts in an objective standard by using the word reasonable with regard to how substantial emotional distress is defined so that it's not the subjective opinion of the person supposedly being stalked.

REP. WHALEN'S amendment on page 2, section 1 will read as follows: "A person commits the offense of stalking if a person engages in a course of conduct with specific and malicious intent to reasonably cause another person substantial emotional distress, etc."

CHAIRMAN FAGG spoke against the amendment; currently, in all criminal laws, the mental requirement is purposely and knowingly. This amendment adds a new, undefined mental requirement of specific and malicious intent. Those words are not in any other criminal law in Montana, and it would cause major confusion for the courts and the judicial system to add another mental intent requirement.

Vote: **REP. WHALEN** withdrew his amendment.

Motion: **REP. WHALEN** proposed to offer, as an amendment, an objective standard with regard to what is substantial emotional distress or apprehension of bodily injury to be inserted in the bill.

Discussion:

REP. WHALEN said he noticed the word reasonable is before the word bodily injury but not before substantial emotional distress, and it concerns him that that might be applied in a subjective manner instead of an objective way.

Vote: **REP. WHALEN'S** amendment to offer an objective standard failed on a 9-9 vote with **CHAIRMAN FAGG, REPS. BROWN, BROOKE, CLARK, MCCULLOCH, RUSSELL, TOOLE, WINSLOW** and **WYATT** voting no.

Discussion:

REPS. RICE and **BIRD** said that, if the committee passes this bill the way it is now, this same discussion will be held on the House floor. **REP. RICE** recommended discussing compromise language with **SEN. TOWE** that is acceptable to him and the House.

REP. WHALEN affirmed that rather than voting on the bill now, as it is written, it is necessary that the committee discuss the language with **SEN. TOWE.** He further added, if the committee decides not to speak with **SEN. TOWE**, then the bill should be tabled.

REPS. VOGEL and **RUSSELL** would rather not vote on the bill now. They would rather have it pass on the House floor. They both stressed the importance and legitimate need for this bill.

Motion/Vote: REP. CLARK MOVED SB 37 BE TABLED. Motion to table failed on a 9-9 vote. Those voting no were **CHAIRMAN FAGG, REPS. VOGEL, BROWN, BROOKE, MCCULLOCH, RUSSELL, TOOLE, WINSLOW,** and **WYATT.**

REP. RICE said that, before this bill is taken to the House floor, he will discuss drafting language acceptable to all parties concerned with **SEN. TOWE. CHAIRMAN FAGG** recommended keeping the bill "in limbo" for now until compromise language is drafted.

FINAL EXECUTIVE ACTION ON SB 37 IS INCLUDED IN THE MARCH 17, 1993, MINUTES.

ADJOURNMENT

Adjournment: 1:00 p.m.

Russell Fagg
REP. RUSSELL FAGG, Chairman

Beth Miksche
BETH MIKSCHE, Secretary

RF/bcm

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL DATE 3-9-93

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Savles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow			✓
Rep. Diana Wyatt	✓		

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HOUSE STANDING COMMITTEE REPORT

March 9, 1993

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 46 (third reading copy -- blue) be concurred in .

Signed: _____
Russ Fagg, Chair

Carried by: Rep. Fagg

Committee Vote:
Yes ___, No X.

531419SC.Hpf

HOUSE STANDING COMMITTEE REPORT

March 9, 1993

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 397 (third reading copy -- blue) be concurred in .

Signed: _____
Russ Fagg, Chair

Carried by: Rep. Sayles

Committee Vote:
Yes 12, No 5.

531420SC.Hpf

fiduciary responsibilities of each partner to the other partners.

UPA (1992) is not so silent. It articulates duties of loyalty and care to which each partner is to be held. There are baseline standards of conduct, therefore, that a partner has to meet. No agreement can abrogate these baselines. In addition, there is an express good faith obligation to which each partner is subject.

The duty of loyalty includes the duty expressed in the 1914 Act, but adds to it. There is a duty not to do business on behalf of someone with an adverse interest to the partnership's. A partner must refrain from business in competition with the partnership.

The standard of care is gross negligence or reckless conduct. A partner would be liable for such conduct, but not for ordinary negligence. The good faith obligation simply requires honest and fair dealing.

A partner may be sued more broadly in UPA (1992) than is the case in the 1914 Act. The earlier Act limited legal action to an action for an accounting.

Dissolution

A partnership dissolves under the 1914 Act upon the happening of specific events, either the end of the prescribed term of the partnership, as agreed by the partners, or when a partner dissociates, rightfully or wrongfully, with the partnership. At dissolution, the business of the partnership has to be wound up and fruits of the enterprise distributed to the partners - after the creditors are paid, of course.

Automatic dissolution of the partnership after dissociation of a partner does not take place under UPA (1992). Only a partner who dissociates with notice of "express will to withdraw" causes the dissolution of the partnership. Thus, if a partner dies or is simply bought out, there is not automatic dissolution. Of the changes that UPA (1992) makes over the 1914 Act, this may be the most significant. The ordinary dissociation of a partner does not mean the dissolution of the entity.

Dissociation entitles the partner to have his or her interest purchased by the partnership, and terminates his or her authority to act for the partnership and to participate with the partners in running the business. Otherwise the entity continues to do business without the dissociating partner. No other characteristic of a partnership under UPA (1992) better illustrates the adoption of entity theory.

Conversion and Merger

UPA (1992) has absolutely new provisions on "conversion" and "merger." A partnership may convert to a limited partnership or a limited partnership may convert to a partnership under these new statutory rules. A partnership may merge with another partnership or limited partnership, forming an entirely new entity, under the new rules of UPA (1992).

EXHIBIT #1
DATE 3-9-93
SB- 46

Since a partnership is really a matter of agreement of the partners, there is no absolute barrier to either conversion or merger for a partnership under the 1914 Act. It would require unanimous consent of the partners, and a winding down process for the prior partnership or partnerships. What the statutory provisions of UPA (1992) do is to provide a process, and to permit agreement to less than unanimous consent of all partners to accomplish either conversion or merger. Under UPA (1992), a partnership agreement can specify that either conversion or merger can be accomplished with less than unanimous consent. The agreement controls.

Conclusion

These are some of the principal advances of UPA (1992) over the 1914 Act. Partnership, as a fundamental form of business organization, needs to be updated for the next century. UPA (1992) provides the needed update.

EXHIBIT 4
DATE 3-9-93
SB 46

TESTIMONY OF
STEVEN C. BAHLS
in support of
Senate Bill 46
House Judiciary Committee
(Montana Uniform Partnership Act)

My name is Steven Bahls. I have the pleasure of serving as a Professor and the Associate Dean at the University of Montana School of Law. For the past eight years, I have taught the Agency and Partnership course at the School of Law. I also teach agricultural law. Prior to teaching, I practiced law for six years, primarily representing small businesses. I am the chair of the State Bar's Business Law Committee of the Tax, Probate and Business Section.

I am here today to support SB 46 (the Montana Uniform Partnership Act). SB 46 passed the Senate on a voice vote. The proposed bill was drafted and approved in 1992 by the National Conference of Commissioners on Uniform State Laws. I am here today at the request of the Montana Commissioners. The National Conference of Commissioners on Uniform State Laws has drafted numerous pieces of legislation already adopted in Montana, including the Uniform Probate Act and the Uniform Commercial Code. Its high quality, uniform legislation sets the standard for legislation in the United States. Please permit me to include in the record, the official comments to the Uniform Partnership Act as prepared by the National Conference of Commissioners on Uniform State Laws.

Montana partnerships are currently governed by Chapter 10 of Title 35. The current law was drafted 78 years ago by the Uniform Law Commissioners. It was adopted in Montana in 1947 and has remained relatively unchanged since then. The current law governs the definition of a partnership, the duties of partners to each other, the ability of partners to enter into contracts, the partners obligations to creditors and dissolution of a partnership. In short, the existing law governs the internal affairs of a partnership.

The new Uniform Partnership Act, as embodied in SB 46, does not greatly expand the scope or coverage of the existing law; instead it updates the law to reflect modern commercial realities. It also clarifies numerous ambiguities in the law. The distilled experience of 78 years since the promulgation of the original Uniform Partnership Law provides the basis for these changes.

Senate Bill 46, though drafted by the Uniform Law Commissioners, has been modified in one primary respect. Working with the attorney for the Office of the Secretary of State, I have drafted provisions for the optional filings that are consistent with the filing provisions of the Secretary of State for other business organizations. With this exception (and the exception of stylistic changes proposed by the Legislative Council) the Act remains a Uniform Act.

It is quite important for Montana to provide its businesses with an up-to-date partnership law. Partnerships and those dealing with partnerships should not be subjected to the uncertainty and ambiguity found in our existing out of date law. Partnerships exist when two or more persons carry on a business for profit as co-owners. People doing business together may be partners even if they do not have a written partnership agreement. It is one of the few types of business organization that the law permits to be formed without a required filing with the secretary of state. Partnerships are often formed without the aid of an attorney. Because many partnerships do not have the benefit of expert legal advise or a written partnership agreement, it is important that the law clearly and unambiguously provide for sensible governance of partnership affairs.

Though most of the proposed changes in the law could be described as in the nature of housekeeping (that is, clarification of ambiguities), several of the changes are more significant. I would like to describe these changes.

1. Nature of a Partnership. The current law does not clearly state whether a partnership is considered an aggregation of individuals or an entity. The provisions of the current law lead to inconsistent conclusions. The issue of whether a partnership is an entity or an aggregation of individuals is important in resolving several questions:

   - Can an individual partner bind the partnership even if his or her acts are not authorized by the partnership?

   - How is property to be held (e.g. by the partnership or in the joint names of the partners)?

   - Does a partnership continue when a partner dies?

   The new law clearly provides that a partnership is an entity. Section 11. As a result, under the new law:

   - Property can be held by the partnership. The cumbersome provision of the old law, that property is owned as tenants in partnership, no longer applies. It is the entity which conveys the property. Section 13 and 16(a)

   - The partnership, as an entity, can effectively designate which partners have authority to bind the partnership to a contract and can prohibit partners from binding the partnership to real estate contracts, unless the contracts are authorized. Section 17

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- A partnership is no longer dissolved when an individual partner dies or resigns from the partnership. The old rule that a partnership is dissolved upon the death or resignation of a partner was cumbersome and created substantial problems for partnerships (especially partnership not employing an attorney) wishing to continue after the death or dissolution of a partnership. Section 18

2. Statement of Authority. The new law continues the previous general rule that partners are agents of each other. Section 15. At times, in practice, this rule can lead to unintended results. Sometimes partners are able to bind a partnership to a contract, even though the contract was not authorized by the other partners. Section 15. The new law would provide a vehicle to protect the partnership from a partner, who without authority, sells partnership real estate or binds the partnership to a real estate contract. The new law permits the filing of a statement of partnership authority with the Secretary of State. This statement can be used to limit the power of certain partners. Section 17. The additional costs associated with filing these statements incurred by the Secretary of State must be recouped by the Secretary of State in the form of filing fees. Section 6(6).

The problem of partners entering into contracts without clear authority to do so is a significant problem. *See Walsh v. Ellingson Agency*, 188 Mont. 367, 613 P. 2d 1381 (1980) (dispute over whether one partner could convey property on the objection of another partner) and *Ditzel v. Kent*, 131 Mont. 129, 308 P. 2d 628 (1957) (dispute over whether partners agreement to pay a commission bound the partnership). Consider as an example the family farm partnership. Suppose the partners intend that only the first generation (not the second) partners have the authority to sign real estate contracts that bind the partnership. Under the current law, contracts signed by the second generation might nonetheless by enforceable if the second generation partners appear to be acting with apparent authority. MCA § 35-10-301. Under the new law, a filing could be made with the secretary of state, disclaiming the authority of the younger partners to enter into real estate transactions on behalf of the partnership. Section 17(1) and (2). If the younger generation attempts to transfer property in violation of the limits of their authority on record with the secretary of state, the transaction is ineffective.

The new law permits partners to effectively agree who has authority and, by filing a public notice with the secretary of state, to put creditors or others on notice who has authority. The result is increased certainty in commercial contracts. It will also reduce or eliminate the need for small businesses to provide banks and others with expensive attorneys opinions as to who has authority.

In addition, existing law provides that a partner retiring from a partnership (or a deceased partners estate) can be liable for the debts of the partnership even if those debts arise after the date of the partners death or retirement. See MCA § 35-10-607(b). The new law permits partners to eliminate their liability for debts incurred after their death or retirement by filing a notice of their disassociation with the partnership with the secretary of state. Section 42. The family farm partnership might again serve as a good example. Suppose Dad retires and moves off the farm, leaving the farm to his children with whom he operated the farm in partnership. Unless Dad notified each farm creditor of his retirement and published notice in the local newspaper of his retirement, under existing law, Dad could be liable for new debts incurred by his children after his retirement. Under the new law, Dad can protect himself from liability for most new debts by filing a simple notice with the secretary of state.

3. Fiduciary Responsibility. The current law is largely silent as to the partners duties toward each other. As a result, it is up to the courts to establish the extent of the duty owed from one partner to another. Courts in various jurisdictions have taken inconsistent approaches. Some courts are quick to second guess the actions of partners because they are "trustees." *See, e.g. Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), (the classic statement of partners' duties, adopted in Montana in *Murphy v. Redland*, 178 Mont. 296, 583 P.2d 1049 (1978)). Other courts are less eager to second guess the actions of partners, indicating that so long as the partner was acting in good faith the partner will be protected. *Johnson v. Weber*, 166 Ariz. 528, 803 P. 2d 439 (1990); *Duffy v. Piazza Construction, Inc.*, 62 Wash App. 19 815 P. 2d 267 (1991). Montana law is not clear about this issue. As such, to increase certainty, the new law provides

- Partners must act in good faith toward each other (Section 28(4));
- Individual partners may not make a profit at the expense of the partnership (Section 28(2)); and
- Courts may not second guess management decisions, unless the partner making the decision acted with gross negligence or acted recklessly (Section 28(3)).

The impact of the rule may again be illustrated by again turning to the family farm partnership. Suppose Dad, as a partner, substantially expands the farm by buying additional acreage with borrowed money. Further, suppose Dad's motivation is to expand the farm so that the farm might also support his daughter, who just graduated from the ag school in Bozeman. Let's assume that shortly after buying

the land interest rates increase and land prices plummet. Suppose the farm is foreclosed and the children sue Dad for his alleged misjudgment in expanding the farm partnership for the benefit of his daughter. The new law would protect Dad from a court, with the benefit of 20/20 hindsight vision, second guessing his judgement unless Dad was grossly negligent or acted recklessly. By protecting Dad and other partners from second guessing, Dad and the other partners are freer to take calculated risks and make the judgements that entrepreneurs must make.

4. Dissolution. Under the existing law, a partnership dissolves when a partner dies or when a partner retires or quits the partnership. MCA § 35-10-603. When a partnership dissolves, any partner who has not wrongfully dissolved the partnership, may wind-up the partnership. MCA § 35-10-607(1), 609 and 610(1). Winding up usually consists of selling the assets of the partnership and applying the cash proceeds to pay the liabilities and the amounts due the partner MCA § 35-10-610(1).

This existing statutory scheme is often inappropriate. Very often the remaining partners in a partnership desire to continue its business and simply buy out the interest of the retiring or deceased partner. To accomplish the goal of having the partnership continue, under existing law, often requires complex legal documentation.

Under the proposed law, partnerships do not automatically dissolve when a partner dies, retires or otherwise disassociates. Section 38. Instead, the partnership may continue, if the partner's interest is purchased. The new law properly recognizes that a withdrawing partner, whose interest the partnership is willing to purchase, should not be allowed to force dissolution.

Allow me to once again return to the family farm partnership. For purposes of this illustration, assume the family farm partnership has no written agreement and the partners have not agreed on a specific date of dissolution. Suppose Junior, a partner in the family farm partnership, decides to go to law school. After taking a course in partnership law and learning of his rights, he decides to quit the partnership. Under existing law, by quitting the partnership, Junior has forced dissolution. MCA § 35-10-603. Assume that the remaining members of the family wish to continue. Under existing law, Junior (contrary to the other partners' wishes) may wind-up the partnership. MCA §§ 35-10-607(1)(a) and 35-10-609. In doing so, Junior may force the liquidation of the assets of the farm to pay the liabilities and amounts due to the partners. MCA § 35-10-610(1). The winding up process, under existing law, could result in the loss of the family farm. The new law eliminates this risk by permitting the partnership to buy Junior's interest

without dissolving the partnership. Section 38.

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The existing law is appropriate for partnerships operating in the first half of this century. It is no longer appropriate for partnerships operating in 1993. At the turn of the century most partnerships were relatively small partnerships with relatively few partners. Partners, perhaps, were more trusting of each other and less eager to ask a court to second guess decisions made by their co-partners. In today's increasingly complex world, it is not uncommon to have 20 or more partners in a partnership. Courts are asked with increasing frequency to resolve partnership disputes. Partners, and courts, need a clear law that recognizes today's commercial realities.

I recognize that this is a lengthy bill with many technical changes. Please remember, however, that the act is a Uniform Act, drafted by the many leading authorities in the nation. These experts, as have Montana attorneys, studied this bill line for line. Continued uniformity in the law is highly desirable. Failure to adopt this bill will mean that Montana will eventually be out of step as neighboring states adopt this Uniform Act. Montana businesses deserve the best, most modern, partnership law available. Adoption of SB 46 will cost the state nothing (any costs associated with additional filings are to be passed on as filing fees- Section 6(6)), but will provide added certainty for businesses operating as partnerships. This legislation, if adopted, will provide a quality partnership law serving partners well into the twenty-first century.

EXHIBIT #3
DATE 3-9-93
SB-46

March 9, 1993
Exhibit #3
Senate Bill No. 46

Exhibit #3 is a copy of the "Uniform Partnership Act (1992)" presented in support of SB 46. The original is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

EXHIBIT 4
DATE 3-9-93
SB 4

SECRETARY OF STATE
STATE OF MONTANA

Mike Cooney
Secretary of State

Montana State Capitol
Helena, MT 59620

Testimony in Support of SB 46

Before the House Judiciary Committee

Presented by Garth Jacobson

Representing the Office of the Secretary of State

March 8, 1993

Mr. Chairman and members of the House Judiciary Committee, for the record I am Garth Jacobson representing the Office of the Secretary of State. I am here testifying in support of SB 46, the Uniform Partnership Act. While the office supports this legislation because it will clarify and revise the law governing partnerships, I will not address those improvements. The focus of my testimony today is the affect SB 46 will have on the office of the Secretary of State.

SB 46 creates a new filing options for partnerships to make public disclosures as the authority or disassociation of a partner. This information is vital for creditors who need to know if a certain partner still is with the business or if that partner has the authority to enter into a binding agreement.

SB 46 make the filing of these disclosure statements connected to the filing of an assumed business name. Therefore a partnership would have to have an ABN on file with this office before it could file one of these disclosure states. This law will increase the work duties of the Secretary of State's office due to the increase in the amount of ABN and partnership disclosure filings. Based upon our estimates the office anticipates the need for one half an FTE to handle the increased filings. However the costs of the FTE and operational expenses will be covered by the filing fees which will generate a slight increase in revenue for the general fund.

In conclusion SB 46 is a good bill and needed in Montana. The Office of the Secretary of State is ready and willing to serve the business community with the increases filing duties provided it receives the resources to do the extra work. This bill will have a positive fiscal impact on the general fund. I therefore urge your favorable consideration of this legislation.

EXHIBIT 5
DATE 3-9-93
SB 46

March 9, 1993

Lance R. Hoskins
Dorsey & Whitney
1200 First Interstate
401 North 31st Street
P.O. Box 7188
Billings, Montana 59103
(406) 252-3800

OUTLINE OF
TESTIMONY IN SUPPORT OF SENATE
BILL 46 (Montana Uniform Partnership Act)

I. Introduction.

II. I support Senate Bill 46 ("SB 46"). As a Montana practicing attorney, I support SB 46 for the following reasons:

A. Revenue neutral,

B. Benefits of uniform legislation,

C. State of the art,

D. Clarify ambiguities of existing law,

E. Recognize partnership as "entity," and

F. Responsive to modern commercial needs and practices.

III. Conclusion.

EXHIBIT 6
DATE 3-9-93
SB 68

Montana Trial Lawyers Association

Executive Office
#1 Last Chance Gulch
Helena, Montana 59601
Tel: 443-3124

March 9, 1993

Rep. Russell Fagg, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59624

RE: SB 68

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to SB 68, which would eliminate the current sunset provision in Montana law regarding limits on governmental tort liability. MTLA opposes SB 68 because of several concerns:

1. Liability caps operate to disadvantage only the most seriously injured victims of wrongdoing. Only catastrophic injuries and damage will trigger the $750,000/$1.5 million caps contained in Sec. 2-9-108, MCA, and those are precisely the injuries and damages most likely to require public assistance from other sources (including other agencies of government) if they cannot recover from the negligent, even grossly negligent, governmental entities at fault.

2. Tort liability serves two purposes: it not only compensates victims, but it also deters wrongdoing, often far more effectively and efficiently than administrative bureaucracy. The liability caps contained in Sec. 2-9-108, MCA, pervert the essential cost-benefit analysis which government must perform to properly serve its citizens. Governmental operations involving the greatest potential for injury or damage also enjoy, under Sec. 2-9-108, MCA, the greatest insulation from incentives to perform their duties properly. Liability caps, in other words, don't remove economic risks--at best they transfer those risks, and at worst they substantially increase those risks. And if such caps, without reducing a single Montana award since their enactment, <u>have</u> weakened the deterrent effect of civil liability and contributed to additional accidents, then the legislation has resulted in a net loss to the state.

3. Ironically, liability caps in the long run may actually increase the amount paid in claims. Indiana, for example, enacted caps in medical-negligence cases in 1975 and soon discovered that nearly 28 percent of Indiana claimants recovered the $500,000 maximum, while only 13 percent of claimants in neighboring Michigan and Ohio (neither with caps in place) recovered as much as $500,000. Why? Because the Indiana caps not only reduced exposure but also reduced incentives for defendants to vigorously defend claims.

4. The limits on governmental liability contained in Sec. 2-9-108, MCA, may be unconstitutional. The Montana Supreme Court declared similar caps unconstitutional in White v. State of Montana, 661 P.2d 1272 (1983) and Pfost v. State, 713 P.2d 495 (1985). MTLA believes that, when faced with an appropriate challenge, the Court will invalidate Sec. 2-9-108, MCA.

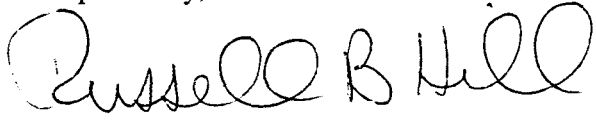
5. Even if the Montana Supreme Court, faced with an appropriate challenge to Sec. 2-9-108, MCA, applied a more lenient standard of review than it applied in White and Pfost, MTLA believes that it would invalidate caps on governmental tort liability which do not include a sunset provision. Such caps, regardless of whether they are rationally related to a legitimate government interest when enacted, impact victims more severely every year because of inflation, cost-of-living increases, and similar factors. Sunset provisions at least guarantee that the Legislature will re-evaluate and adjust, if necessary, the relationship between caps and the governmental interests served by those caps.

6. By repeatedly subjecting Sec. 2-9-108, MCA, to sunset provisions since its enactment in 1986, the Montana Legislature has continually evidenced its intention to remove governmental-liability caps unless advocates of those caps demonstrate that, in its application, the statute appropriately balances the interests of individual citizens and their government. Because so few claims for personal injury or property damage implicate the liability limits contained in Sec. 2-9-108, MCA, that statute has not yet been seriously tested either in court or in public.

Montanans and their Legislature have not yet directly confronted the injustice of such liability limits. MTLA respectfully urges this Committee to guarantee that they never have to. However, if this Committee determines to retain the governmental-liability limits contained in Sec. 2-9-108, MCA, MTLA respectfully suggests that it amend SB 68 to increase those limits and provide a new termination date of June 30, 1995.

Thank you for considering these comments. If I can provide additional information or assistance, please notify me.

Respectfully,



Russell B. Hill
Executive Director

EXHIBIT 7
DATE 3-9-93
SB 68

Amendments to Senate Bill No. 68
First Reading Copy (white)

Requested by Senator Yellowtail
For the Committee on Judiciary

Prepared by Valencia Lane
January 13, 1993

1. Title, line 5.
Strike: "ELIMINATING"
Insert: "EXTENDING"

2. Title, line 6.
Strike: "OF THE LIMITATION"
Insert: "DATE FOR LIMITATIONS"
Following: "GOVERNMENTAL"
Insert: "LIABILITY FOR DAMAGES IN"

3. Title, line 7.
Strike: "LIABILITY"
Insert: "ACTIONS"

4. Title, lines 9 and 10.
Following: "1991;" on line 9
Strike: "REPEALING SECTION 3, CHAPTER 22, SPECIAL LAWS OF JUNE 1986;"

5. Page 1, line 16.
Following: "~~date~~"
Insert: "-- termination date"

6. Page 1, line 18.
Following: "~~1987~~"
Insert: ", except that section 3 is effective July 1, 1995"

7. Page 1, line 19.
Following: "~~1987.~~"
Insert: "Sections 1 and 2 of this act terminate on June 30, 1995."

8. Page 1, line 24.
Following: "~~date~~"
Insert: "-- termination date"

9. Page 2, line 1.
Following: "~~1991~~"
Insert: ", except that section 3 is effective July 1, 1995"

10. Page 2, line 2.
Following: "~~1991.~~"
Insert: "Sections 1 and 2 of this act terminate on June 30, 1995."

11. Page 2, line 9.

EXHIBIT 8
DATE 3-9-93
SB 336

THE SUPREME COURT OF MONTANA

J. A. TURNAGE
CHIEF JUSTICE

JUSTICE BUILDING
215 NORTH SANDERS
HELENA, MONTANA 59620-3001
TELEPHONE (406) 444-2621

TO: Chairman Fagg and Members, House Judiciary Committee

FROM: J. A. Turnage, Chief Justice

DATE: March 9, 1993

Thank you for the opportunity to speak to members of this Committee in support of Senate Bill 336.

I strongly urge your support of this important legislation. It is a vital step that we must take if Montana is to maintain her fine judicial system.

The bill recognizes the tough economic times that face Montana. It ask during this biennium for only the same percentage increase for judges that other state employees are provide.

The fundamental reasons the Legislature must seriously consider a competitive salary for Montana's Judges are that:

- Montana deserves a first-rate judicial system.
- Inadequate pay undermines the judicial system by deterring the best qualified and experienced attorneys from seeking judicial careers.
- Montana is losing experienced judges. In the past eight years there has been more than a 50% turnover in district court judges. On the Supreme Court, only four justices have more than six years experience and we are losing a Justice this year.
- Judicial salaries in Montana are dead-last in the country, even behind the U.S. Territories.
- Montana judges, unlike any other public servant, are **prohibited** by the Constitution from having outside earned income. They are not allowed to supplement their judicial salaries with other employment -- and of course, they cannot practice law.
- In addition, in order to draw judicial retirement they

must be available to serve as a retired judge when called upon. Even when they do serve in this capacity, their pay for this service is reduced by the amount of their retirement benefit.

I hope that you will join me and other proponents here today in support of Senate Bill 336. We must maintain the good judges we have and assure that we are able to recruit the best candidates when vacancies occur.

Thank you for your time and your attention.

EXHIBIT 9
DATE 3-9-93
SB 336

A RECOMMENDATION TO THE 1993 MONTANA LEGISLATURE FOR ASSURING FAIR AND REASONABLE SALARIES FOR MONTANA'S SUPREME COURT JUSTICES AND DISTRICT COURT JUDGES

Prepared and funded by
the Judicial Relations Committee
of the State Bar of Montana

The State Bar of Montana is deeply concerned with assuring that the most qualified and competent Montana attorneys serve as Montana's judges and supreme court justices, and that experienced and qualified judges and justices remain on the bench as long as possible. The State Bar recognizes that financial renumeration is not and should not be the primary consideration in seeking or retaining a judicial position. However, the low judicial salaries currently in effect may discourage bright, competent and experienced attorneys from seeking judicial positions, and may also discourage competent and experienced judges and justices from remaining on the bench for long periods of time.

The pay for Montana's Supreme Court and District Court Judges ranks 50th when compared to all other States. Even when United States Territories like Puerto Rico, the Virgin Islands, and American Samoa and Guam are included in the comparison -- Montana Judicial salaries remain in last place.

In comparison to her neighbors, Montana Judicial salaries are lower than comparable salaries in bordering states. Regional comparison of salaries as of January 1, 1993 are:

State	Chief Justice	Associate Justice	District Court Judge
Wyoming	$85,000	$85,000	$77,000
Idaho	$76,276	$74,701	$70,014
North Dakota	$73,595	$71,555	$65,970
Montana	**$65,722**	**$64,452**	**$63,178**

For these reasons, and because it recognizes that Montana's

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judiciary continues to be paid at salaries lower than the judiciaries of any other state in the nation, the Judicial Relations Committee of the State Bar of Montana has prepared this position paper to urge the 1993 Montana Legislature to adopt Senate Bill 336, which would provide Montana's judiciary with incremental salary increases commensurate with those provided to other Montana public employees.

This position paper reflects upon and updates a 1991 judicial salary survey produced by the Supreme Court Administrator.[1] Since 1977, Montana judicial salaries have gradually slipped into last place. Montana Supreme Court Justices have fallen from 87% of the national average salary in 1977 to less than 70% of the national average. District Court Judges have gone from 100% of the national average salary in 1977 to 76% of the national average salary in July, 1992.

Inflation has destroyed the buying power of judicial salaries. To buy the same goods and services that $35,000 bought in fiscal year 1977 -- now takes more than $83,000. If 1977 Judicial salaries were adjusted for the intervening years of inflation, they would be as follows:

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[1]1. "A Judicial Salary Study and Recommendations to the Montana Supreme Court," prepared by the Office of the Court Administrator, Montana Supreme Court, January 1, 1991. copies of this study, which was not prepared or distributed at public expense, are available from either the State Bar of Montana, 442-7660, or the Office of the Court Administrator, 444-2621.

	FY 1977 Actual Salary	FY 1993 Actual Salary	FY 1993 Salary Adjusted for Inflation
Chief Justice	$37,000	$65,722	$88,592
Justice	$36,000	$64,452	$86,198
District Judge	$35,000	$63,198	$83,804

Regardless of the manner in which Montana Judicial salaries are evaluated, all comparisons of the pay for judges in Montana comes back to the fact that Montana's compensation of judges is significantly below the compensation paid similar judges or private attorneys. The salaries of Montana's Supreme Court Justices have fallen far behind the rate of pay increases enjoyed by the rest of Montana's work force.

In the last two regular sessions the legislature has attempted to address the salary crisis. It has done so with courage and foresight. However, no mechanism was put in place to keep salaries from falling behind. The 1993 session must not waste the efforts of the previous two sessions, a provision needs to be in place to provide for salary increases.

The 1991 Legislature's efforts were greatly appreciated by Montana's judiciary and also by the Montana attorneys who desire a qualified and experienced judiciary. Those efforts, however, failed to alleviate the dire circumstances facing Montana's judiciary. Today, as in 1991, Montana ranks 50th in the salaries that it pays to its judiciary. Today, as in 1991, the rate of

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SB-336

salary increases for the judiciary lags far behind the rate of income growth for other Montanans or other United States citizens.

The 1993 Montana Legislature has the opportunity to finally resolve this salary crisis by adopting Senate Bill 336. The provisions of the Bill that allows indexing the salaries to an independant reflector of cost of living increases, such as the application of the Consumer Price Index currently applied to County Attorney salaries under 7-4-2503(3)(c), M.C.A., will ensure that judicial salaries do not regress.

Because Montana must do everything it can to assure a qualified and experienced judiciary, the State Bar of Montana urges the 1993 Legislature to adopt Senate Bill 336.

DATE 3-9-93
SB 46

UNIFORM PARTNERSHIP ACT (1992)

Introduction

Partnership law in the United States has been derived from one source, the Uniform Partnership Act, since it was originally promulgated by the Uniform Law Commissioners in 1914. The Uniform Act is the law of partnership in the United States.

But 78 years is a long time in the reckonings of the law, and in 1992 the Uniform Law Commissioners have promulgated the first revision of the Uniform Partnership Act. The new Act reflects both continuity and change. On the one hand, it refurbishes a venerable form. Partnership as a form of business organization precedes corporations, limited partnerships, business trusts, and just about everything else except the most basic business organization of all, the sole proprietorship. And in UPA (1992), a partnership retains its basic, historic character.

But at the same time, the partnership form has to be adapted to the changes in the way business is done and the way it is expected to be done far into the next century. The change reflected in UPA (1992) is of an evolutionary sort. The distilled experience of the past 78 years is the basis for the new text.

A partnership is a form of business organization. It exists whenever more than one person associates for the purpose of doing business for profit. The notion is that the partners join their capital and share accordingly in profits and losses. They, also, share control over the enterprise and subsequent liabilities. Historically, every partner is equally able to transact business on behalf of the partnership. Creditors of the partnership are entitled to rely upon the assets of the partnership and those of every partner in the satisfaction of the partnership's debts. The character of any partnership depends upon the agreement of the partners.

A partnership may be as simple as two people meeting on a street corner and deciding to conduct some business together, arising from no more than verbal agreement and a handshake. A partnership may, also, be as complex as a large law firm, with tiers of partners and varying rights and obligations, memorialized in extensive written agreements. Partnership law must accommodate them all.

The Uniform Partnership Act governs the creation of a partnership, establishes what the nature of this business organization is, and provides some rules respecting the rights and obligations of partners among themselves, and those between partners and other parties that do business with the partnership and the partners. It provides the rules that govern the dissolution of a partnership when the appropriate time comes to dissolve it. The original Act did this, and the UPA (1992) is

designed to do the essential task much better. UPA (1992) adds, as well, concepts not ever contemplated in the 1914 Act - the concepts of merger and conversion.

This summary is an effort to highlight the essential differences between the 1914 Act and UPA (1992). It cannot be a comprehensive review, but is designed to point out to the reader the progress of 1992 over 1914.

Nature of a Partnership

The first essential change in UPA (1992) over the 1914 Act that must be discussed as a prelude to the rest of the revision, concerns the nature of a partnership. There is age-long conflict in partnership law, over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories.

It is not necessary to go into the dispute with much detail here, because UPA (1992) makes a very clear choice that settles the controversy. To quote Section 201, "A partnership is an entity." All outcomes in UPA (1992) must be evaluated in light of that clearly articulated language.

What are some of the outcomes of this decision to treat a partnership as an entity in UPA (1992) that are not part of the hybrid 1914 Act? The 1914 Act expressly permits a partnership to hold property as a partnership. The difference is the interest that each partner holds. In the 1914 Act, a partner was treated "as a co-owner with his partners of specific partnership property holding as a tenant in partnership." In UPA (1992), a partner has his or her partnership interest, but is not a co-owner of specific partnership property. The entity holds the specific property. The partners have their interest in the entity.

The 1914 Act approach, which reflects the retention of aggregate theory in that hybrid Act, constitutes a serious impediment to transferring property to and from the partnership. The 1914 Act, because of adopting aggregate theory in so far as ownership of property goes, has to provide rules that carefully limit and restrict the transfer powers of partners, so that individual partners cannot convey their ownership rights in ways to injure and inevitably defeat the partnership. Even so, subsequent cases have revealed the co-ownership aspect of partnership to be a serious weakness in partnership structure. That serious weakness is not continued into UPA (1992).

Dissolution of the partnership is another area in which selection of entity versus aggregate theory. Dissolution will be discussed a little later, but dissolution

occurs whenever a partner disaggregates under the 1914 Act, but not necessarily every time he or she dissociates from the entity under UPA(1992). Partnerships based upon aggregate theory are simply more fragile than partnerships based upon entity theory.

Creation of a Partnership

Creation of a partnership requires association of two or more persons to do business for profit. The concept is not materially different between the 1914 Act and UPA (1992). What UPA (1992) does is to put expressly what has been regarded as implied in the 1914 Act. By and large the rules of the 1914 Act have been regarded as default rules, rules that apply in the event that there is no express provision in the partnership agreement. The reliance upon implication leaves certain gray areas that have caused problems. How far can a partnership agreement go in abrogating the fiduciary responsibilities of a partner to other partners, for example?

UPA (1992) clearly expresses the primacy of the partnership agreement. The agreement applies, and the rules of UPA (1992) are regarded as default rules, with the exception of certain rules that protect partners. For example, a partner's duties of loyalty and good faith cannot be abrogated by agreement. The agreement cannot take away a partner's right of access to the partnership books. In general, however, the partnership agreement expressly controls over the language of the statute in UPA (1992).

Statement of Authority

A partnership is created anytime individuals associate together to do business. Under UPA (1992) the partnership formed is an entity, not an aggregation of individuals. UPA (1992) makes it clear the partnership is controlled by the agreement of the partners. But the partnership must function to do business, and the 1914 Act treats partners as co-equal in the conduct of that business. Any partner is an agent of the partnership. Any partner has the capacity to transfer property on the partnership's behalf. Any person doing business with a partnership is entitled to rely upon these basic rules to bind the partnership. To a large extent, these rules continue to apply in UPA (1992).

But UPA (1992) adds a new partnership capacity to the rules of the 1914 Act. The adoption of entity theory, again, provides some different perspective. Entities such as corporations and limited partnerships are founded upon the filing of a certificate in the appropriate state office. UPA (1992) does not require filing a certificate to found a partnership, preserving the availability of the partnership form of organization to both large and the small entities. It, however, permits the filing of a statement of partnership authority. The statement can be used to limit the capacity of a partner to act as an agent of the partnership, and limit a partner's capacity to transfer property on behalf of the partnership. The statement is voluntary. No partnership need file such a statement, nor is the existence of the partnership dependent

upon the filing of any statement. But the statement, if filed, has an impact upon third party dealing with the partnership.

The main effect is to assure any third party that the business of the partnership can be conducted and the partnership will be bound, if the third party deals with a partner with authority provided in a statement. Any limitation upon a partner's authority, however, does not affect any third party who does not know about the statement, except as to real estate transactions. If there is a limitation in a filed statement, that is also filed in the real property records of the locale, then a third party dealing with that partner in a real estate transaction is held to know of the limitation.

Other Statements Available

UPA (1992) provides for other statements that may be filed, as well, pertaining to the partnership. A partner may file a statement of denial respecting facts, including limitation upon partnership authority, found in a statement of partnership authority. A partner or the partnership may file a statement of dissociation for the partner. And there is a statement of dissolution that may be filed when a partnership is dissolving. Each of these statements has a notice function, Third parties are held to have knowledge of these last two statements 90 days after they are filed.

If there is a merger, a statement also may be filed. A merger statement establishes the property relationships of the new entity with respect to property of the merged entities.

Although these statements are not essential to either the creation or dissolution of a partnership, they have impact upon third parties transacting business with a partnership. They give necessary flexibility to the partnership in the conduct of business, and are important advances over the 1914 Act for that reason. They are also artifacts of the overall shift to entity theory in partnership law, the essential underlying shift in UPA (1992) over the 1914 Act.

Fiduciary Responsibilities

When a partnership is viewed as an aggregate of interests and an organization in which every partner is absolutely able to conduct the business of the partnership with third parties, and is able to conclude the partnership by any act of withdrawal, express treatment of partners' responsibilities to each other in the conduct of business may not be so important. All partners are assumed to be participating in the conduct of the business with knowledge of what other partners are doing on a daily basis.

The 1914 Act has very little to say about a partner's responsibilities to the other partners. A partner is a fiduciary who "must account to the partnership for any benefit, and hold as a trustee for it any profit derived by him without the consent of the other partners..." There is a full duty of disclosure between partners, but the 1914 Act is, otherwise silent on the

fiduciary responsibilities of each partner to the other partners.

UPA (1992) is not so silent. It articulates duties of loyalty and care to which each partner is to be held. There are baseline standards of conduct, therefore, that a partner has to meet. No agreement can abrogate these baselines. In addition, there is an express good faith obligation to which each partner is subject.

The duty of loyalty includes the duty expressed in the 1914 Act, but adds to it. There is a duty not to do business on behalf of someone with an adverse interest to the partnership's. A partner must refrain from business in competition with the partnership.

The standard of care is gross negligence or reckless conduct. A partner would be liable for such conduct, but not for ordinary negligence. The good faith obligation simply requires honest and fair dealing.

A partner may be sued more broadly in UPA (1992) than is the case in the 1914 Act. The earlier Act limited legal action to an action for an accounting.

Dissolution

A partnership dissolves under the 1914 Act upon the happening of specific events, either the end of the prescribed term of the partnership, as agreed by the partners, or when a partner dissociates, rightfully or wrongfully, with the partnership. At dissolution, the business of the partnership has to be wound up and fruits of the enterprise distributed to the partners - after the creditors are paid, of course.

Automatic dissolution of the partnership after dissociation of a partner does not take place under UPA (1992). Only a partner who dissociates with notice of "express will to withdraw" causes the dissolution of the partnership. Thus, if a partner dies or is simply bought out, there is not automatic dissolution. Of the changes that UPA (1992) makes over the 1914 Act, this may be the most significant. The ordinary dissociation of a partner does not mean the dissolution of the entity.

Dissociation entitles the partner to have his or her interest purchased by the partnership, and terminates his or her authority to act for the partnership and to participate with the partners in running the business. Otherwise the entity continues to do business without the dissociating partner. No other characteristic of a partnership under UPA (1992) better illustrates the adoption of entity theory.

Conversion and Merger

UPA (1992) has absolutely new provisions on "conversion" and "merger." A partnership may convert to a limited partnership or a limited partnership may convert to a partnership under these new statutory rules. A partnership may merge with another partnership or limited partnership, forming an entirely new entity, under the new rules of UPA (1992).

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. SB 336

DATE March 9, 1993 SPONSOR(S) Wm. Yellowtail

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
PATRICK CHENCICK	SUPREME COURT	X	
Tim Hosel	District Judges	X	
John Connor	MT County Attys Assn	X	
Tom Hopgood	State Bar Assn.	✓	
Russell B Hill	MT Trial Lawyers	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. SB 68

DATE March 9, 1993 SPONSOR(S) C. Boylock

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Bill Gianoulias	Dept of Admin	X	
STAN KALCZYC	MT MUNICIPAL INSURANCE AUTHORITY	X	
Russell B Hill	MT Trial Lawyers		✓
DENNIS FLICK	City of BILLINGS	X	

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HOUSE OF REPRESENTATIVES
VISITOR REGISTER

Judiciary COMMITTEE BILL NO. SB 46

DATE March 9, 1993 SPONSOR(S) M. Halligan

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Steven C Bahls Missoula, MT	Self	✓	
Lance R. Hoskins Billings MT	Self	✓	

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HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-9-93 BILL NO. SB 397 NUMBER 16

MOTION: Rep. Clark's Amendment #2 "Strikes or threatens" failed 10-6

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair		✓
Rep. Dave Brown, Vice-Chair		✓
Rep. Jodi Bird		✓
Rep. Ellen Bergman		✓
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes		✓
Rep. Scott McCulloch	✓	
Rep. Jim Rice		✓
Rep. Angela Russell	✓	
Rep. Tim Sayles		✓
Rep. Liz Smith		✓
Rep. Bill Tash	✓	
Rep. Howard Toole	NO VOTE	
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	NO VOTE	
Rep. Diana Wyatt		✓

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-9-93 BILL NO. SB397 NUMBER 18

MOTION: SB 397 Be Concurred 13-5

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke		✓
Rep. Bob Clark		✓
Rep. Duane Grimes	✓	
Rep. Scott McCulloch		✓
Rep. Jim Rice	✓	
Rep. Angela Russell		✓
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen		✓
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt	✓	
	13	5

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-9-93 BILL NO. SB 37 NUMBER 17

MOTION: Rep. Brooke's amendment concurs 9-8

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair		✓
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird		✓
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark		✓
Rep. Duane Grimes		✓
Rep. Scott McCulloch	✓	
Rep. Jim Rice		✓
Rep. Angela Russell	✓	
Rep. Tim Sayles		✓
Rep. Liz Smith	✓	
Rep. Bill Tash		✓
Rep. Howard Toole	✓	
Rep. Tim Whalen		✓
Rep. Karyl Winslow	NO VOTE	
Rep. Diana Wyatt	✓	

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-3-93 BILL NO. SB 37 NUMBER 18

MOTION: Rep. Whalen's amendment "Live Birth" failed 9-9

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair		✓
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke		✓
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch		✓
Rep. Jim Rice	✓	
Rep. Angela Russell		✓
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash		✓
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow		✓
Rep. Diana Wyatt		✓

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-9-93 BILL NO. SB 37 NUMBER 18

MOTION: Rep. Bird's amendment to strike out "prosecuting attorney" carried unanimously

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch	✓	
Rep. Jim Rice	✓	
Rep. Angela Russell	✓	
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt	✓	

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-9-93 BILL NO. SB 37 NUMBER 18

MOTION: Rep. Whalen's amendment #1 to insert "objective standard" failed 9-9

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair		✓
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke		✓
Rep. Bob Clark		✓
Rep. Duane Grimes	✓	
Rep. Scott McCulloch		✓
Rep. Jim Rice	✓	
Rep. Angela Russell		✓
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow		✓
Rep. Diana Wyatt		✓

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL VOTE

DATE 3-9-93 BILL NO. SB 37 NUMBER 18

MOTION: SB37 Be Tabled failed 9-9

NAME	AYE	NO
Rep. Russ Fagg, Chairman		✓
Rep. Randy Vogel, Vice-Chair		✓
Rep. Dave Brown, Vice-Chair		✓
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke		✓
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch		✓
Rep. Jim Rice	✓	
Rep. Angela Russell		✓
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole		✓
Rep. Tim Whalen	✓	
Rep. Karyl Winslow		✓
Rep. Diana Wyatt		✓