MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on January 3, 1995, at 8:10 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: None

Members Absent: None

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: HB 46, HB 26 AND HB 41
Executive Action: None

CHAIRMAN BOB CLARK opened with a welcome and a reminder to visitors who are to testify on bills to please print names on the registry.

HEARING ON HB 46

Opening Statement by Sponsor:

REP. BRUCE T. SIMON, House District 18, Billings, brought before the committee HB 46 which is a bill to make some changes in the arson statutes. He stated that he was surprised to find out that if he were to go into the parking lot and pour gasoline on a car and set it on fire, he would not be committing the act of arson. Most assume automatically that if you set fire to someone else's property, it would the act of arson, but that is not the case.

Proponents' Testimony:

Lonnie Larson, Deputy Fire Marshall, City of Billings, is currently involved with the arson task formed throughout the county. He gave a brief history of fires in that county. He cited statistics on the number of fires responded to including occupied structures which the current language addresses as well as car fires, grass fires and trash fires. He addressed the last three categories which are not classified as occupied structures by current language. In 1993, there were 97 vehicle fires and of those 10% were found to be intentionally set fires. He further cited specific examples of incendiary fire incidents which resulted in difficulty to bring prosecution for arson because of the wording of the present law.

Paul Gerber, Fire Marshall of Billings, also gave testimony in support of this House Bill. He cited statistics concerning fires responded to by the Billings Fire Department and 25% were listed as either incendiary or suspicious. For the past several years over 1/3 of dollar loss is attributed to incendiary or suspicious fires in Billings. In many cases, the investigators know who started the fires, but they are difficult to prosecute; many being built upon circumstantial evidence. The crime takes more out of communities financially than any other crime through various types of monetary losses as well as loss of life and injuries. The current Montana law presents obstacles to the effective prosecution of arson. He proceeded to point out the specific changes in the current law as noted on the bill at section 45-6-103(a), MCA, by eliminating the word, "occupied." He stated that there are differing opinions as to the definition of an occupied structure even though it is defined in state law. He continued to point out the specific changes and gave examples to defend the proposed changes. He illustrated the need for the changes to further sections in the current law. He stated that input was sought for this proposed legislation from the State Fire Convention and Investigation Bureau of the state Attorney General's Office and the Yellowstone County Attorney's office.

John Connor, Attorney General's Office and Department of Justice, appeared on behalf of this bill. He echoed the comments of the previous witnesses to the effect that the statute, as it is currently constructed, does not allow a proper charging of arson offenses under that statute. These incidents are now charged as a crime involving a fire by criminal mischief, which carries a lesser penalty than what the arson statute carries and also doesn't permit proper tracking of the actual crime as committed. He stated that the state now has a dog trained to detect arson-related fires which makes it easier to determine origin of these crimes.

Tim Bergstrom, Montana State Firemen's Association, stated that the organization would like to go on record as supporting HB 46.

Opponents' Testimony:

None.

Informational Testimony:

None

Questions From Committee Members and Responses:

REP. LOREN SOFT stated that this bill doesn't talk about treatment of juveniles or adolescents who would fall under this bill. He wanted to know if it is better covered under another bill. He questioned what happens to adolescents or juveniles charged with the crime of arson.

REP. SIMON deferred the question.

Mr. Connor answered that juveniles are charged as delinquent when they commit an offense that, if committed by an adult, constitutes a felony. So if the juvenile were to commit an act that would be by definition of this bill a crime of arson, that juvenile would be charged as a delinquent youth. The petition would say that the youth committed an act that, if committed by an adult, would be the crime of arson. In terms of punishment, the youth cannot be placed in an adult correctional facility, the most that could be done would be that the youth would either be put on probation or put into a youth treatment facility.

REP. DEB KOTTEL asked that since arson is a felony and a person can be convicted of a felony for the destruction of property of value less than $500, is it not inconsistent to charge someone with a felony for the destruction of property when if that person had stolen that property that was valued at less than $500, the person could only be charged with a misdemeanor. She clarified this statement about "or other property" as including property valued under $500.

Mr. Connor stated that it is true that a person can be charged with a felony for the crime of arson no matter the value of the property destroyed if that was done purposely or knowingly.

REP. KOTTEL said that if a person purposely and knowingly stole an item of less than $500, that person could only be charged with a misdemeanor. She wondered if it is appropriate to have a felony charge for the arson destruction of property that is valued less than $500.

Mr. Connor stated that there isn't any dollar value in the statute now, never has been, and suspects that the reason is the potential danger involved in the utilization of fire to commit a crime. It is likely that historically testimony could be found that the crime of arson is potentially dangerous and life-threatening, making the dollar value less significant as the means by which the crime is committed.

REP. WILLIAM BOHARSKI stated that having worked with county attorneys closely, he wanted to know what kind of addition to the work load could be expected.

Mr. Connor stated that he doesn't think it would mean a significant difference in the work load of county attorneys. He stated that they need to be made better aware of how to approach the prosecution of arson. Most of these crimes are now being charged as criminal mischief offenses anyhow.

REP. BRAD MOLNAR asked what the punishment is for criminal mischief.

Mr. Connor replied that it is 10 years and $50,000.

REP. MOLNAR stated that he understood that all this bill would do for the burning of a pasture, for instance, is change the punishment by increasing it by 10 years.

Mr. Connor replied that that would be one of the effects.

REP. JOAN HURDLE asked if there would be some problem getting a sentence for this kind of crime since "mandatory prison" is written into the law.

Mr. Connor stated that although the statute reads, "shall be imprisoned," in fact that isn't a mandatory sentence. The court has the discretion to sentence that person to up to 20 years or anything less than that including probation. This is not a statute which requires a mandatory minimum sentence.

REP. HURDLE stated that it does require prison.

Mr. Connor stated that it doesn't require prison, but gives the court the discretion to do that if the circumstances justify it as far as the judge is concerned.

Closing by Sponsor:

REP. SIMON said that sometimes we look at these things as simple fires, but a simple dumpster fire in downtown Billings turned into a million dollar loss of a furniture store. The crime of arson is serious and this bill is proposed to allow the change in the statute where probably many assumed it already was; i.e., when someone else's property is burned, that is the crime of arson or when personal property is burned for the purposes of gaining financially, that would be also the crime of arson.

CHAIRMAN CLARK closed the hearing on HB 46

HEARING ON HB 26

Opening Statement by Sponsor:

REP. DIANA E. WYATT, HD 43, Great Falls, said this bill came out of a joint study commission of the House and the Senate during the interim to discover and investigate insurance and medical malpractice claims and what is happening in Montana in reference to them. This was a unanimous proposal from that committee in terms of insurance issues. The act revises the Montana Medical-Legal Panel requiring that, upon request, the panel articulate reasoning and basis for their decision requiring mandatory non-binding mediation for an affirmative panel decision.

Proponents' Testimony:

Mike Craig, Planning and Research Director, Health Care Authority, stated that the enabling act, SB 285, that created the Health Care Authority had a similar directive to the Senate Joint Resolution that created the sub-committee to embark on this study. This is felt to be noncontroversial in the area of agreement and the sub-committee was commended for its hard work and their investigation into this.

Russell Hill, Montana Trial Lawyers Association, called attention to the written testimony which is attached. He stated that the bill represents a unique consensus as the Montana Medical-Legal Panel and the Montana Medical Association both support this bill. **EXHIBIT 1**

Brian Zins, Director of the Montana Medical-Legal Panel, stated that the panel does support this as good legislation and will help move the claims before the panel along much better.

Jerry Loendorf, Montana Medical Association (MMA), wanted to say that the MMA supports the bill. The function of the Medical-Legal Panel, when it was established in 1977, was to attempt to eliminate frivolous claims quickly and to dispose quickly of claims that were meritorious. It does this by gathering all the information immediately, particularly all the medical records, and to make those available to the parties and the experts who

meet with the parties in an informal hearing process to make a decision. They then give the parties their opinion as to whether they believe there is substantial evidence of negligence and whether that negligence could be construed to cause the damage complained of. The panel has traditionally given a decision in answer to these two questions; although by law it is currently allowed to give the reasons for the decisions, this bill requires the panel to give the reasons for decision to the participants. It should be helpful to know the decision as well as to also know the reason for the decision which hopefully will promote the settlement process. The second part of the bill, which requires mediation in the event a case is filed in court after a panel ruling, is favorable to the claimant. It doesn't require mediation where the panel has made a decision favorable to the defendant. In these cases, MMA thinks it reasonable to require mediation while acknowledging that the court probably has inherent authority to do that now.

Opponents' Testimony:

Mona Jamison, The Doctors' Company, stated that though they were not ardent opponents of the bill, they have a point to raise concerning section 2. It is their understanding that the courts already have inherent jurisdiction to require mediation and they wonder why it is necessary to impose this as a duty in the statutes. She noted that in Flathead County and also, she believes, in Gallatin County, mediation is already a mandatory practice. If it is already an inherent judicial discretion, they question the need for this bill.

Informational Testimony:

None.

Questions From Committee Members and Responses:

REP. DUANE GRIMES asked **Mr. Loendorf** to describe mediation as a practice and what this bill will mandate, who will be chosen to mediate and how that will that be supervised.

Mr. Loendorf said that this is not spelled out in the statute, but is left to the discretion of the district judge. How mediation takes place now generally, and there is no requirement that it take place in this manner, is that a mediator is agreed upon by the parties. The parties then meet with the mediator; usually the mediator requires a written statement from each party first so that he can study it prior to the meeting. The parties then meet with the mediator and the mediator encourages them to make a decision, usually by discussion with the parties, first jointly, and then with them individually regarding what the mediator sees as the merits of their case (perhaps including how the mediator views the result). What the mediator does varies by the individuals.

REP. GRIMES asked how much time this would add to the whole process and would it require legal counsel in the mediation.

Mr. Loendorf replied that once the case is filed in court, legal counsel would be necessary. He stated that probably a month would be added to the process because the discovery and all the proceedings would be held up by this bill pending mediation.

REP. DANIEL MC GEE pursued the logic of requiring mediation as opposed to leaving it optional.

Randy Dix, Trial Lawyers Association, answered that what happens now is that the mediation is not being applied uniformly but rather depending upon which court has jurisdiction. Some county courts are requiring mediation before a case can be tried; but in Lewis & Clark County where he practices, this is not the case. The reason for imposing the affirmative obligation upon the parties to sit down in mediation is that there is no mechanism now that really does it. With respect to **REP. GRIMES'** question regarding the additional time, he gave examples which indicated that it does not add much time--a few hours to a full day at the most. He cited that the mediation does short cut the process in the later phase of litigation.

{Tape: 1; Side: B; Approx. Counter: 5.5}

Closing by Sponsor:

REP. WYATT closed by stating that if things go to mediation, and thereby eliminate further litigation of other cases, time is also saved in the court and for the physician and for the person who may or may not be damaged in that incident. She said that in evaluating the cost savings one must look not just at that one trial through the process of the hearing with the medical malpractice panel, plus the mediation, plus the court costs and the time involved in that. But one must look as well at the ones that may be deterred and/or stopped at this level as important in terms of saving time and getting to justice. She cited a case where a physician wanted to settle much earlier but was not given that option and the injury to both the patient and the physician through the process added to the original injury. She stated that in that case and in others like it, the current process is not in the best interests of the parties involved. She felt that this bill is a reasonable approach to the law.

CHAIRMAN CLARK then closed the hearing on HB 26.

HEARING ON HB 41

Opening Statement by Sponsor:

REP. LIZ SMITH, HD 56, DEER LODGE, opened the hearing on HB 41, which addresses the issue of treatment of the mentally ill. She represents the district where the Montana psychiatric hospital is

located as well as the Montana State Prison and stated that they feel that this particular bill would certainly streamline and benefit the mentally ill patient as well as the system. The purpose of HB 41 is to allow for the establishment of a treatment guardian, if necessary, at the time of involuntary commitment to the Montana State Hospital. Under current law, she stated, a person with mental illness who is a danger to self or others can be committed to Montana State Hospital, but the staff at Warm Springs cannot provide treatment unless the patient or the patient's guardian gives consent. Many patients who are admitted to Montana State Hospital do not have the capacity to give informed consent for treatment. She stated that in these cases, treatment must be delayed until a guardian can be appointed by a court. Establishing a guardianship after admission can delay treatment and can divert clinical staff time from treating patients to working on obtaining guardianship for patients, she said. HB 41 will allow a judge to determine the need for guardianship and appoint a guardian if necessary at the same time that a commitment is ordered. She stated that selecting a guardian from the community prior to admission, gives a much better opportunity to find a family member or friend to serve in that capacity. It also makes it possible for state hospital staff to consult the guardian for consent to treatment immediately upon admission. She further stated that patients are committed to Montana State Hospital because they are a danger to self or others and that we have an obligation to the patient, the community and the state hospital staff to provide effective treatment as soon as possible after admission. This bill will allow treatment to be started quickly while providing an appropriate court hearing on the mental capacity of the patient and the suitability of a potential guardian.

Proponents' Testimony:

Dan Anderson, Administrator of Mental Health Division at Department of Corrections and Human Services. The purpose of HB 41 is to enable treatment of the involuntarily committed patients to Montana State Hospital as soon as possible. He felt that it was important to keep in mind that involuntarily committed patients who have been found by a court to be dangerous to self or others cannot be treated at the hospital unless the patient gives consent or the patient's guardian gives that consent. Instead, the staff goes through the process of providing the documentation to the court to obtain guardianship. The department is not seeking to have the legislature authorize them to provide treatment on an involuntary basis; rather, they are asking for a process during the commitment hearing itself to take a look at the competency of the patient and if the patient is not capable of giving informed consent, then have the guardianship established at the commitment hearing. The treatment guardianship established under HB 41 is only for the purpose of giving consent for psychiatric and other medical services during the term of the commitment. It would not occur in every case. There would still be some people involuntarily committed who

would not have guardians, it would only be established by the judge based on the testimony of mental health professionals. He said that they feel this is a moderate approach and ensures due process protection for the patient needing a guardian and allows the appointment of guardians in a timely fashion. A written statement is attached as **EXHIBIT 2**.

Carl L. Keener, MD, Medical Director, Montana State Hospital, gave testimony for HB 41. He said that as they prepare for managed care and seek accreditation for the state hospital, it becomes important that they operate as efficiently as possible. This means reducing length of stay and treating as quickly as they can. Without authority to treat means "warehousing" the patient there at a cost of $250 per day. It also means that professional staff gets involved in legal proceedings at the cost of not being free to participate as fully as they would like in treatment proceedings at the hospital. He stated that his second point is the effect of this on the patient's condition. According to his testimony, it is well established that delaying treatment of a mentally ill patient means that patient is likely to become more resistant to treatment. Many of the patients suffer while awaiting treatment. He gave examples to support this view. His third point concerned the number of assaults that occur at the hospital. He stated that although the bill will not eliminate the assaults, they think that if they can medicate patients as soon as they get to the hospital, they will reduce the number of assaults. Medication is the greatest tool they have in treating the mentally ill at the hospital and they have, in most cases, little else to offer. This will allow them to mesh their treatment programs with managed care more effectively. He further stated that the patients also need to be safeguarded from being overly medicated and an objective decision by a guardian would offer this.

Marty Onishuk, Vice President, Montana Alliance for Mentally Ill, presented testimony saying that they are very concerned about the need for treatment and support the idea of people being medicated while in the state hospital. In their point of view, mental illnesses are neuro-biological brain diseases and a malfunction of the neuro transmitters in the brain that cause people to be mentally ill. Because of these malfunctions in the brain, she stated, medication is needed. Talk therapy alone will not help one with mental illness in their view. In the past, medications were abused and used to sedate people, but there is a movement too far in the other direction, in her opinion. One thing that isn't in the bill that she thought is very important is a way of tracking medications used by people who come to the state hospital from out of state and from various parts of the state. Required tracking would help ensure proper treatment. Administration of medications is difficult. She stated that there is a portion of the bill which refers to not forcing medication. She said that was unclear to her, but she wondered if it meant a requiring injectable medications. She stated that not all medications are injectable. It would be helpful if

patients who are currently competent would sign a treatment plan in anticipation of a time when they would return to the facility and not be competent at the time of re-commitment. She said that the inclusion of a time limit in this bill is good. She asked if there are alternatives if someone goes to court and is declared incompetent and is told they should be admitted to the state hospital but the hospital is full. Another area of concern is that endangerment to self and others is self-evident, but they have seen people who are unable to care for themselves who live alone. They would like to see enforcement of that aspect of the bill which states, "unable to care for self." A final area of concern involved the fact that county commissioners must now pick up the cost for someone who is not covered by insurance while they are in one of the five psychiatric hospitals in the state.

Opponents' Testimony:

Paul Stahl, Deputy Lewis and Clark County Attorney, stated that he had committed more than 800 people to the state hospital at Warm Springs and has done over 150 guardianships. He stated that it is difficult to testify against a bill that has a good intent; but said that of the 800 people he has committed, 700 of them wouldn't have been committed had they been required to take medication. The Montana County Attorney's Association has a bill that is going to deal with the medication issue also. He stated that he was also speaking for the Montana County Attorney's Association here and that their concern is that written language in the bill does not do what is intended.

It is not discretionary to allege that someone needs to have a guardian, and he believes that it will require petitioning the court to declare incapacity in addition to mental illness. The process now is very costly to the county (at $400 a day) while looking for competent authority to testify. He told of the difficulty to get the professional testimony that is required. He said that the bill will require that, in addition to someone with a masters in social work, a second person must be found to determine incapacity. He said that upon the request of the state hospital to this county, they now make a finding in their orders that a person is incompetent to take medication. He would not argue about whether a guardian is needed to determine whether a patient would be given medication; but he stated that they make a judicial determination in all of the cases in Lewis & Clark County hearings that a person is not capable of rendering informed consent because they commit most of them in the first place because they refuse to take the medications they need to stay well. He stated his concern about the patients' rights to due process, but he felt that adding this requirement would lengthen the process by 1-2 days and increase the cost as well as get a more contentious issue in court. He did not feel this bill was very well thought out.

Kelly Moorse, Director of Mental Disabilities Board of Visitors, presented written testimony. **EXHIBIT 3**

{Tape: 1; Side: B; Approx. Counter: 34.5}

David Hemian, Public Policy Coordinator for Mental Health Association, rose not totally in opposition to the bill, but had some concerns about it along the same lines as the previous testimony. The Billings Chapter has a treatment guardianship program that is being developed. Some of the concerns regarding due process have to do with the patient terminating the guardianship relationship when the patient begins to respond to medication and regains capacity to self-determine treatment. He wants the appointment of a treatment guardian and the hearing for determination of mental illness to be separated into two different hearings. From the patient's perspective they may see the guardian in a hostile relationship because of the process. He stated that they would welcome the opportunity to work with the proponents to work out the concerns.

Patrick Pope, Executive Director, Meriweather Lewis Institute, stated that he, as well as all voting members, have a mental illness and he handles his illness through a combination of medications and therapeutic peer support. Meriweather Lewis Institute (MLI) is not opposed to the idea of guardianship. They are opposed to this bill because of its lack of concern for due process of mental health consumers. The result of the bill, in their view, is that mental health consumers are viewed as incompetent merely because they have a mental illness. The guardianship process already works, he said. The Board of Visitors does a good job in advocating for consumers while addressing the treatment concerns. He said that changing things would put additional burdens on an already strained commitment process. He cited personal experience to support this view. He believes that consumers would not benefit from the bill, but that the Department of Corrections and Human Services and state hospital employees would benefit instead. He said that often a guardian cannot be found and so the institution or the staff becomes the guardian and this presents a definite conflict of interest. He stated that the issue is not that patients do not want to take their medications, but that they are not listened to regarding side effects, etc. He urged the committee to not support this bill.

Gordon Morris, Director, Association of Counties, stated that he had studied the bill and could not find a compelling reason for the bill. He requested that this bill have a fiscal note attached as required by state law in regard to implications for court-ordered appointment of a guardian. It looks to be a county financial liability.

Informational Testimony:

None.

Questions From Committee Members and Responses:

REP. DEBBIE SHEA asked where the guardians come from in the community; how the judge determines who is a guardian.

{Tape: 2; Side: A; Comments: Tape 2 begins midway in the following testimony.}

Mr. Anderson replied that the definition in the bill of a treatment guardian could be found on page 5 which generally discusses the term "guardian." The preference would be a family member, if available. There is a better chance of that option if the selection is in the community prior to admission to the hospital.

REP. SHEA asked if anybody can apply to be a guardian.

Mr. Anderson said it would be better to discuss it regarding a particular person. There would be an attempt to identify who would be an appropriate and logical guardian for that person. It would generally be a family member, perhaps a friend, perhaps an advocate for that person from that community. They do have, at the hospital, a small volunteer guardianship program where if there isn't somebody more appropriate, these volunteers have agreed to be guardians. They plan to expand that program.

REP. ELLEN BERGMAN asked why it is that the patient reaches the state hospital without a guardian and that is not taken care of on the county level.

Mr. Anderson replied that that is what they are trying to establish with this bill. Currently, the only finding that needs to occur in court at the local level is if the person meets the criteria for an involuntary commitment. The issue of competency is not required. This bill is intended to accomplish this.

REP. DEB KOTTEL asked about subsection 16 on page 5, defining treatment guardian as "competent person." Then "suitable institution" is named; could that be Warm Springs itself?

Mr. Anderson said that it could be, to the extent that if there is no other suitable relative-friend-advocate, then it might be that the judge would designate the volunteer guardianship program at the hospital.

REP. KOTTEL said that the bill does not say "an agent of a suitable institution," but rather cites the institution itself; so would that be an officer of the institution as it is defined here, because it later says, "or....." as referring to something different. She questioned how an artificial person could be named a suitable guardian.

Mr. Anderson replied that he believed this language was taken out of existing language in the guardianship statute itself.

REP. KOTTEL asked if an institution had been appointed as guardian of a person.

Mr. Anderson said he believed it had.

REP. KOTTEL asked if this was a conflict of interest.

Mr. Anderson replied that it is absolutely a conflict of interest and he cited an example of a current situation which fits this circumstance.

REP. KOTTEL said that this statue changes the requirement for a professional person and takes them out of it, defining only a medical doctor or a psychologist. In that regard, she wanted to know what problems there had been in the past that would warrant this type of change. Secondly, she asked how many licensed psychologists there are in the state.

Mr. Anderson said he did not have an exact number but there are probably dozens of licensed psychologists in the state. The reason for including that provision has to do with the training that psychologists and psychiatrists have as opposed to the training that some other professionals have is which is much more directed at making those kinds of assessments. He said that if the issue of competency is raised, the professional person should be someone in that profession. He said there does not have to be two professional persons, only that a professional person be one of the two. Another way of doing that, if that is a major problem with the county, is to not require it, but to make sure that professional persons who are certified have the necessary background to make that assessment.

REP. KOTTEL asked if that particular part of the bill is essential to Mr. Anderson.

Mr. Anderson replied that it is not essential.

REP. GRIMES stated that the proponents described aggressive and violent behavior as one of the rationales for this bill, but the opponents described an emergency provision that could be utilized. He wanted to know if that is being utilized currently and if it provides sufficient assistance to be able to medicate those individuals who are found to be aggressive within the first 24 hours.

Dr. Keener said that they use two emergency laws now to medicate patients. If the patient is assaultive and dangerous, they can use medication under the Emergency Medication Law. Secondly they can get an emergency guardianship very quickly, but they need to clearly demonstrate that they have an emergency. The patient has to be overtly assaultive or overtly out of control. Although Kelly Moorse said that permanent guardianship could be granted within two weeks, Dr. Paul Meyer, who operates Units 42 and 43 at the state hospital, has waited an average of 132 days on 35

patients. Sometimes the patient's attorney delays hoping the patient's condition will change and guardianship will not be necessary. Emergency procedures are used only when they can be justified.

REP. MC GEE asked first about a number of changes in dates, effective dates, etc.

Mr. Anderson replied that throughout the Mental Health Act there are two versions. There is the so-called "temporary version" and there is the version that is called "the sunset version" that will go into effect in 1997 unless some changes are made. It revolves around what is called the "community commitment law" which is where someone is found to be mentally ill, but not seriously mentally ill. That part of the law is sunsetted in 1997. He said he thought that is where those dates come from. It doesn't have anything to do with this particular bill.

REP. MC GEE asked that if none of these amendments were proposed, would he be coming back to the legislature to resubmit this bill because of the sunset consideration.

Mr. Anderson replied that the sunsetting part of it does not have any bearing on this bill. In developing the bill both the sunset version and the current version have to be amended.

REP. MC GEE stated that currently there are a number of guardianship considerations and issues. He asked if it is correct that we have guardianships exist now.

Mr. Anderson said that was true.

REP. MC GEE then asked what the liability of a guardian is and what impact it has on a guardian's decision regarding a patient and medications.

Beta Lovett, Attorney, Department of Corrections and Human Services, stated that there is a provision under Title 72 which deals with the liability of guardians. She asked for time to find the exact location of that provision.

REP. LOREN SOFT addressed **Dr. Keenar** regarding his testimony that no treatment can take place barring the emergency treatment procedures that are already in place. He asked he was referring to no treatment with psychotropic medications only, or other treatment procedures as well, and would those other treatment procedures take place upon admission of the patient to the hospital.

Dr. Keener said he was referring to treatment with medication, which is their most valuable tool in treating patients though they do try to get patients to participate in other treatment, such as group therapy; however, without medication, many patients are unable to use those therapies.

REP. SOFT asked how many patients per year that are admitted to the state hospital fall into this category where you perceive that you are unable to provide psychotropic medication treatment without the guardianship.

Dr. Keener said he did not have hard figures on that but would estimate 150 patients out of 350 admissions.

REP. SOFT asked Mr. Anderson if there is another bill or law that deals with the involuntary commitment of adolescents under 18. This bill seems to leave out involuntary commitment of adolescents.

Mr. Anderson said that is right. The current commitments law as written applies both to children and adults although there is no children's facility and so there is other legislation which would eliminate children from the Mental Health Commitment Act.

CHAIRMAN CLARK asked Mr. Anderson who pays the guardian when appointed by the court.

Mr. Anderson stated that to his knowledge, guardianship is not a paid responsibility but is just assumed by somebody who wants to help the person. There is no requirement here to pay the guardian.

CHAIRMAN CLARK asked if a guardian could ask to be paid and if so, who would pay.

Mr. Anderson said he guessed that a guardian could request that but that a judge would not appoint that person unless there was somebody else there who would be able to pay.

REP. ANDERSON asked Mr. Anderson to address **Mr. Stahl's** concerns about putting additional burdens and costs on the county attorneys' offices.

Mr. Anderson said that certainly it was not the intent to add a burden by requiring that the professional person who evaluates the patient and testifies has to be a psychologist or psychiatrist. Maybe that is something the committee would not like to put on the county. He does not see this as an additional person, but rather the same person testifying on the issue of serious mental illness would also testify on capacity to give informed consent. He is not convinced that there is an additional burden except for the need as drafted to provide a psychologist or psychiatrist. He did not believe that it is necessarily the case that the time would be extended in the process.

REP. BERGMAN asked the assistant county attorney for clarification of the county's objection to having the mental health institution give medication without a guardian's consent.

Mr. Stahl said they do not object and that Warm Springs should give medication. He stated that their bill coming up later will enable people in the community to give medication without liability. He stated that they think that is absolutely necessary. His objection is that this bill passes the burden from the state hospital back to the local government. To have a guardianship, a doctor must testify and at a local level this is difficult. This puts the cost back to the local level and will cost $1,000 more per patient commitment. For his county alone, based on the numbers processed, that would add $54,000 more to the county's costs and it isn't available.

REP. BERGMAN stated that she was not clear on what the objection is.

Mr. Stahl does not object except that all the burden is back on the counties to do all the work and absorb all the cost. Warm Springs needs the ability to give medications and he and the County Attorneys Association supports that. However, they do not support adding the need for appointment of a guardian without the money to cover the additional cost.

REP. MC GEE asked **Mr. Stahl** to explain what a person with a Masters in Social Work (MSW) would have to do.

Mr. Stahl replied that under the statute now, either a medical doctor or someone who is certified by the Department of Institutions (educational requirements and practical experience as criteria), can make that determination. People with an MSW do the psychiatric evaluations though occasionally psychiatric nurses, clinical psychologists and sometimes a medical doctor are used for this. A professional person is often defined as someone with an MSW who can make the determination.

REP. SOFT talked about passing back the cost and asked **Mr. Stahl** who he feels is ultimately responsible for the care and treatment of chronically mentally ill people.

Mr. Stahl said it was a duty that falls upon the state because not everyone who is committed here is a resident of this county or a taxpayer or even a resident of this state.

Closing by Sponsor:

REP. SMITH said in her closing remarks that this bill definitely is a cost-shifting type of need that is putting a lot of stress on services as well as costs. Expediency and efficiency are important to the issue here. She said she felt that expanding guardianship to be more available would actually reduce the stress on county levels. People can be hospitalized at the local psychiatric hospitals while being evaluated and the cost would be picked up by that county. She thought that perhaps there could be some flexibility in regards to the crisis team make up in that the professional person need not be a psychiatrist/psychologist.

She felt there is some flexibility in the bill to allow for more efficiency to accomplish what they propose. The increase in assaultive behavior has put the employees at the state hospital at risk, which affects workers compensation rates, and a mentally ill person needs to receive consideration in becoming more in control of themselves. She felt that this is a critical need. There is a limitation on their length of stay in a psychiatric hospital and it seems to increase the number of days before treatment can begin. **Judge Mizner** is in support of this bill. There are concerns for the cost of a court-ordered evaluation; perhaps this is something the committee really needs to look at. She thanked the committee and those who testified for a good hearing.

CHAIRMAN CLARK asked **REP. SMITH** to look into a fiscal note for this bill.

CHAIRMAN CLARK closed the hearing on HB 41.

REP. BILL TASH MOVED TO ADJOURN.

{ Comments: These minutes are complete on two 90-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 10:00 AM.

{Tape: 2; Side: A; Approx. Counter: 33.8; Comments: This session is recorded on two 90-minute tapes..}

Bob Clark

REP. BOB CLARK, Chair

Joanne Gunderson

JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 1/3/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓ late	~~✓~~	
Rep. Ellen Bergman	✓ late	~~✓~~	
Rep. Bill Boharski	✓ late	~~✓~~	
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓ late	~~✓~~	
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 1/3/95
HB 26

Montana Trial Lawyers Association

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

January 3, 1995

Rep. Bob Clark, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 26

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's support for House Bill 26, revising the Montana Medical Legal Panel Act.

Background. MTLA recommended these changes, among others, to the Joint Interim Subcommittee on Insurance Issues chaired by Sen. Del Gage. In addition, the Montana Medical-Legal Panel and the Montana Medical Association both testified before the subcommittee in support of these proposals. At its August 26, 1994, hearing on these proposals, the subcommittee voted 6-2 to recommend that they be enacted into law.

Montana Medical-Legal Panel. Montanans injured by medical negligence must submit their complaints to the Montana Medical-Legal Panel before resorting to court. The Panel evaluates complaints to determine (1) whether there is "substantial evidence" of medical negligence and (2) whether there is "reasonable medical probability" that any medical negligence injured the claimant.

Significantly, *the Panel does not say "YES" to a claimant, only "NO" or "MAYBE."* Consequently, even when Montana claimants successfully demonstrate the merits of their claim before the Panel, and even when Montana providers could avoid long, difficult, even counterproductive litigation, their liability insurance companies often have little or no incentive to negotiate a reasonable settlement of the claim.

House Bill 26. House Bill 26 reinforces the original intent of the Montana Medical-

Legal Panel Act by encouraging all parties to settle legitimate medical-negligence claimsf without litigation:

- Section 1 allows any party to a dispute before the panel to obtain a brief explanation for the panel's decision. Currently, the panel's findings often consist of nothing more than a vote count, giving little objective guidance to the parties and increasing the likelihood of litigation.

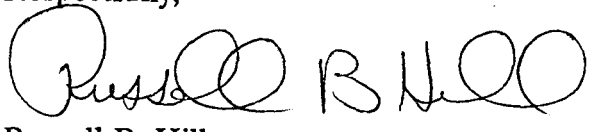
- Section 2 requires court-supervised, *non-binding* mediation whenever (1) the Panel finds substantial evidence of medical negligence and (2) the Panel finds reasonable medical probability that the claimant's injury resulted from that negligence. No party is bound by the recommendations of the mediator, but all parties must nevertheless negotiate in good faith.

- Section 3 merely extends the current guarantees of confidentiality for Panel deliberations and decisions to cover instances when the Panel explains its decision.

MTLA believes that the Montana Medical-Legal Panel and the Montana Medical Association continue to support the improvements contained in House Bill 26, and MTLA encourages this Committee to carefully consider their comments as well.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to express MTLA's support for House Bill 26.

Respectfully,



Russell B. Hill
Executive Director

EXHIBIT 2
DATE 1/3/95
HB 41

Testimony on HB 41 by Dan Anderson, Administrator of the Mental Health Division, Department of Corrections and Human Services. January 3, 1995

The purpose of HB 41 is to be able to initiate treatment of involuntarily committed patients at Montana State Hospital as soon as possible after admission. The State Hospital does not have the authority to treat even an involuntarily committed person without that person's consent or the consent of a guardian.

A committed patient who lacks the capacity to give consent must wait until State hospital staff can go through the process of getting a court to appoint a guardian. This presents a waste of time and resources that could be used to provide treatment and get the patient safely back to the community.

The Department is not seeking to have the Legislature give us the authority to treat the patient without consent. We are asking only that the issue of capacity to give consent be raised at the commitment hearing and, if appropriate, a guardianship be established so that our staff a the State Hospital can consult with the guardian and begin treatment immediately.

The guardianship established under HB 41 is only for the purpose giving consent to psychiatric and other medical treatment and it is only for the duration of the commitment. The appointment of a guardian would not occur in every case. It would only occur when a psychologist or psychiatrist finds that the committed person lacks the ability or capacity to make responsible and informed decisions regarding medical treatment.

HB 41 is a moderate response to the problem of delayed treatment at the State Hospital due to an absence of informed consent. It maintains the patients right to have a guardian appointed only through due process while allowing that due process to occur in a timely fashion.

EXHIBIT 3
DATE 1/3/95
HB 41

OFFICE OF THE GOVERNOR
MENTAL DISABILITIES BOARD OF VISITORS

MARC RACICOT, GOVERNOR

PO BOX 200804

STATE OF MONTANA

(406) 444-3955
TOLL FREE 1-(800) 332-2272

HELENA, MONTANA 59620-0804
FAX 406-444-3543

January 3, 1995

Representative Bob Clark, Chairman
House Judiciary Committee
State Capitol
Helena, MT 59620

Representative Clark and Members of the Committee:

For the record, my name is Kelly Moorse and I am the Executive Director of the Mental Disabilities Board of Visitors. The Board, serves as an advocate for persons who are mentally disabled, reviews patient care and treatment at state institutions and mental health centers and provides legal services for the mental health consumers who are at Montana State Hospital (MSH). For over the past ten years our legal staff has represented individuals both in commitment and guardianship hearings at MSH.

As indicated by our practice, we are not in principle opposed to the guardianship issue. We are however concerned with a number of sections of this proposed legislation which do not appear to safeguard due process rights of persons with mental disabilities.

Concerns:

1. We believe in order to protect a person's due process rights, the hearings for commitment and guardianship must be separate. We have serious concern that the finding of incapacity will automatically be made with each commitment. While we know that is not the intent of the Department of Corrections and Human Services, the language on page 7, lines 26-27 and page 9, lines 1-2 appears to request commitment and incapacity. We believe the determination of guardianship must be a separate hearing (as is currently the practice for guardianship hearings held at MSH).

2. The current guardianship codes (72-5-325 MCA) offers a provision for the removal/resignation of a guardian and restoration of capacity. We urge the committee to add a similar provision within the commitment statutes.

3. It is unclear if the treatment guardian continues during recommitment. Since re-commitment can be for up to six months and/or one year, clarification of this matter is necessary.

4. While we are encouraged by the language in Section 9 for the treatment guardian to consider "the person's expressed opinions", we are concerned if the decisions extend to treatment interventions which are in direct conflict with a mental health consumers religious/spiritual beliefs (i.e. blood, authorization of ECT etc.)
transfusions,

We urge your careful review of this proposed legislation. We hope you will give consideration to providing additional safeguards to insure and preserve the due process rights of persons with mental disabilities. Thank you.

Sincerely,

Kelly Moorse
Executive Director

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 01-03-95

BILL NO. 46 SPONSOR(S) REP. SIMON

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
John Connor	Dept of Justice	✓	
Tim Bergstrom	MT. State Firemen's Assoc	✓	
Lonnie Larson	Billings Fire	✓	
Jacqueline Lenmark	Am. Insurance Assoc	✓	
Paul Gerber	Billings Fire Dept.	✓	
Charles R. Brooks	Yellowcounty	✓	
Bruce Suenram	State Fire Marshal	✓	
Pat Clinch	MT State Council Firefighters	✓	

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

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HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 01-03-95

BILL NO. 26 SPONSOR(S) REP. DIANA WYATT

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
[illegible]	Mt. Med. Assn	✓	
~~Joyal Connor~~ ✓	~~Dept of Justice~~		
Ethan Zins	MT Med Assn	✓	
Jacqueline Lenmark	Am. Insurance Assoc	✓	
Charles R. Brooks	Yellowstone County		
Mike Craig	Health Care Auth	✓	
Russell B Hill	MT Trial Lawyers Assn	✓	
Kathy McGowan	MSPOA, MCMHC		

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HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 01-03-95

BILL NO. 41 SPONSOR(S) REP. L. SMITH

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Paul Stahl	Lewis & Clark County		X
Gordon Morris	MACo		
Charles R. Brooks	Yellowstone County		X
David Hemion	Mental Health Assoc.		✓
Pat Pope	Warm Springs Lewis Institute		✓
Carl L. Keener, M.D.	Montana State Hospital	✓	
Kemy Moorse	Board of Visitors		
Marty Onishuk	Mt. Alliance for MI	?	
Dan Anderson	Dept. Corrections & Human Services	✓	

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