

1 *Senate* BILL NO. *402*
 2 INTRODUCED BY *Murray Turnage Reuter*
 3 *Blaylock* *Levent*

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A
 5 MANDATORY PRETRIAL REVIEW PANEL FOR MEDICAL MALPRACTICE
 6 CLAIMS."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9 Section 1. Short title. This act may be cited as the
 10 "Montana Medical Malpractice Panel Act".

11 Section 2. Purpose. The purpose of this act is to
 12 prevent where possible the filing in court of actions
 13 against health care providers and their employees for
 14 professional liability in situations where the facts do not
 15 permit at least a reasonable inference of malpractice and to
 16 make possible the fair and equitable disposition of such
 17 claims against health care providers as are or reasonably
 18 may be well founded.

19 Section 3. Definitions. As used in this act, the
 20 following definitions apply:

21 (1) "Health care provider" means a person, corporation,
 22 facility, or institution of a governmental unit of a state
 23 duly licensed by this state to provide health care or
 24 professional services as a doctor of medicine, hospital and
 25 out-patient health care facility, doctor of osteopathy,

1 chiropractor, podiatrist, or nurse anesthetist.

2 (2) "Malpractice claim" means any cause of action
 3 against a health care provider for medical treatment, lack
 4 of medical treatment, or other claimed departure from
 5 accepted standards of health care which proximately results
 6 in injury to the patient, whether the patient's claim or
 7 cause of action sounds in tort or contract, and includes but
 8 is not limited to actions based on battery or wrongful
 9 death.

10 Section 4. Montana medical malpractice panel. (1) The
 11 Montana medical malpractice panel is created. The function
 12 of the panel is to review all malpractice claims against
 13 health care providers covered by the act.

14 (2) Those eligible to sit on the panel are health care
 15 providers licensed pursuant to Montana law and residing in
 16 Montana and the members of the state bar of Montana.

17 (3) Cases which a panel will consider include all
 18 cases involving an alleged act of malpractice occurring in
 19 Montana by health care providers qualified under the act.

20 (4) Attorneys shall submit a case for the
 21 consideration of the panel prior to filing a complaint in
 22 any district court or other court sitting in Montana by
 23 addressing an application, in writing, signed by the patient
 24 or his attorney, to the director of the panel.

25 (5) The director of the panel shall be an attorney

1 appointed by and serving at the pleasure of the chief
2 justice of the Montana supreme court.

3 (6) The director's salary shall be set by the Montana
4 supreme court.

5 Section 5. Compensation of the panel and staff --
6 facilities for offices and hearings. (1) All members of the
7 panel shall be paid a salary in the amount of \$40 an hour,
8 under guidelines promulgated by the director.

9 (2) All members of the panel and its assistants are
10 entitled to receive their actual and necessary expenses
11 while traveling on the business of the panel, but such
12 expenses shall be approved by the director before payment is
13 made.

14 (3) The director may administer oaths, receive claims
15 filed, promulgate forms required hereunder, issue subpoenas
16 in connection with the administration of this act, and
17 perform all other acts required to fairly and effectively
18 administer this act.

19 (4) The director, subject to the approval of the chief
20 justice, may employ and fix the compensation for clerical
21 and other assistants as he considers necessary.

22 (5) The panel shall maintain adequate offices in the
23 city of Helena, in which the records are kept and its
24 official business transacted. Necessary office furniture,
25 stationery, and other supplies are authorized.

1 (6) Panel hearings shall be conducted in the county
2 where the medical injury or medical liability allegedly
3 occurred but may, within the sound discretion of the hearing
4 panel, be held in any other county if the panel considers it
5 necessary or advisable. It is the duty of the county
6 commissioners or other governing authority to provide, upon
7 request of the director of the panel, suitable facilities
8 for any such hearing.

9 Section 6. Proof of financial responsibility --
10 insurance, cash or surety bond. (1) Every health care
11 provider subject to the terms of this act shall, within 30
12 days after this act takes effect, file with the director, in
13 a manner prescribed thereby, proof of financial
14 responsibility.

15 (2) Every health care provider, subject to the
16 provisions of this act, shall either insure and keep insured
17 his liability hereunder in some corporation, association, or
18 organization authorized to write medical liability insurance
19 or furnish to the director a cash or surety bond as herein
20 provided. The submission of a cash or surety bond is subject
21 to the approval of the director and is valid only when
22 approved thereby.

23 (3) Such insurance or cash or surety bond shall be at
24 least \$300,000. Any health care provider who fails to so
25 act is subject to liability under the law without regard to

1 the provisions of this act.

2 (4) While such insurance or cash or surety bond
3 approved by the director remains in force, the health care
4 provider and those conducting their business, including
5 their insurance carrier, are liable to pay any claimant, his
6 personal representative, parent, spouse, dependents, or next
7 of kin, for personal injury or death, to the extent and in
8 the manner specified in this act.

9 Section 7. Funding of act. (1) The administration of
10 this act is funded from an annual surcharge on license fees
11 charged to each health care provider based upon the
12 experience rating of the various specialties and
13 institutions. These fees shall be collected by the director
14 annually at the time of the filing of evidence of financial
15 responsibility under this act.

16 (2) The fund created by the collection of these fees
17 shall be set aside for and is appropriated for the purpose
18 of financing the annual requirements of the administration
19 of this act. Funds, if any, over and above the amount
20 required for the annual administration of this act shall be
21 retained by the director and used to finance the
22 administration of this act in succeeding years and may not
23 revert to the general fund.

24 (3) The annual surcharge shall be levied on all health
25 care providers and is to be determined by the state

1 commissioner of insurance based upon the experience rating
2 of the various providers and may not exceed 15% of the cost
3 to each provider for malpractice insurance and, if not
4 insured, 15% of the average premium for providers in its own
5 field or discipline. The annual surcharge is due on the
6 same date as license fees payable to the state of Montana
7 are due. Failure to pay shall result in suspension of all
8 license privileges.

9 Section 8. Panel decision required -- application. (1)
10 No malpractice claim may be filed in any court against a
11 qualified health care provider before application is made to
12 the panel and its decision is rendered.

13 (2) The application shall contain the following:

14 (a) a statement in reasonable detail of the elements
15 of the health care provider's conduct which are believed to
16 constitute professional negligence and dates and the names
17 and addresses of all physicians and hospitals having contact
18 with the claimant. Additional elements of the malpractice
19 claim must be included in an amended application filed not
20 less than 14 days prior to the hearing date.

21 (b) a statement authorizing the panel to obtain access
22 to all medical and hospital records and information
23 pertaining to the incident and, for the purposes of its
24 consideration of this matter only, waiving any claim of
25 privilege as to the contents of those records. Nothing in

1 that statement may in any way be construed as waiving that
2 privilege for any other purpose or in any other context, in
3 or out of court.

4 Section 9. Application procedure. (1) Upon receipt of
5 an application for review, the director or his delegate
6 shall cause to be served a true copy of the application on
7 the health care providers involved. Service shall be
8 effected pursuant to Montana law. If a health care provider
9 involved chooses to retain legal counsel, his attorney shall
10 informally enter his appearance with the director.

11 (2) The health care provider shall answer the
12 application for review and in addition shall submit a
13 statement authorizing the panel to obtain access to all
14 medical and hospital records and information pertaining to
15 the matter giving rise to the application and, for the
16 purposes of its consideration of the matter only, waiving
17 any claim or privilege as to the contents of those records.
18 Nothing in the statement waives that privilege for any other
19 purpose or in any other context, in or out of court.

20 (3) In instances where applications are received
21 employing a theory of respondeat superior or some other
22 derivative theory of recovery, the director shall forward
23 the application to the state professional societies,
24 associations, or licensing boards of both the individual
25 health care provider who has alleged malpractice and caused

1 the application to be filed and the health provider named a
2 respondent as employer, master, or principal.

3 (4) The panel director shall cooperate fully with the
4 claimant in retaining a physician qualified in the field of
5 medicine involved, who will consult with the claimant and
6 assist in preparation of the claim upon his payment of a
7 reasonable fee by the claimant.

8 Section 10. Panel selection. (1) Application for
9 review shall be promptly transmitted by the director to the
10 directors of the health care provider's state professional
11 society or association and the state bar, who shall each
12 select three panelists within 30 days from the date of
13 transmittal of the application.

14 (2) If no state professional society or association
15 exists or if the health care provider does not belong to
16 such a society or association, the director shall transmit
17 the application to the health care provider's state
18 licensing board, which shall in turn select three persons
19 from the health care provider's profession, and where
20 applicable, to persons specializing in the same field or
21 discipline as the health care provider.

22 (3) In cases where there are multiple defendants, the
23 case against each health care provider may be reviewed by a
24 separate panel or a single combined panel may review the
25 claim against all parties defendant, at the discretion of

1 the director or by stipulation of the parties.

2 (4) Three panel members from the health care
3 provider's profession and three panel members from the state
4 bar shall sit in review of each case.

5 (5) In those cases where the theory of respondent
6 superior or some other derivative theory of recovery is
7 employed, two of the panel members shall be chosen from the
8 individual health care provider's profession and one panel
9 member shall be chosen from the profession of the health
10 care provider named as a respondent, employer, master, or
11 principal.

12 (6) The director of the panel or his delegate, who
13 must be an attorney, shall sit on each panel and serve as
14 chairman.

15 (7) Any member shall disqualify himself from
16 consideration of any case in which, by virtue of his
17 circumstances, he feels his presence on the panel would be
18 inappropriate, considering the purpose of the panel. The
19 director may excuse a proposed panelist from serving.

20 (8) Whenever a party makes and files an affidavit that
21 a panel member selected pursuant to this section cannot,
22 according to the belief of the party making the affidavit,
23 sit in review of the application with impartiality, that
24 panel member may proceed no further. Another panel member
25 must be selected by the health care provider's professional

1 association, state licensing board, or the state bar, as the
2 case may be. A party may not disqualify more than three
3 panel members in this manner in any single malpractice
4 claim, and the affidavit must be filed within 20 days prior
5 to the date of hearing or within 5 days of the discovery of
6 the alleged partiality.

7 Section 11. Time and place of hearing. A date, time,
8 and place for hearing shall be fixed by the director, and
9 prompt notice thereof shall be given to the parties
10 involved, the attorneys, and the members of the panel. In no
11 instance may the date set be more than 120 days after the
12 transmittal by the director of the application for review
13 unless good cause exists for extending the period. Hearings
14 may be held anywhere in the state of Montana, and the
15 director must give due regard to the convenience of the
16 parties in determining the place of hearing.

17 Section 12. Hearing procedures. (1) At the time set
18 for hearing, the attorney submitting the case for review
19 shall be present and shall make a brief introduction of his
20 case, including a resume of the facts constituting alleged
21 professional malpractice which he is prepared to prove. The
22 health care provider against whom the claim is brought and
23 his attorney may be present and may make an introductory
24 statement of his case.

25 (2) Both parties may call witnesses to testify before

1 the panel, which witnesses shall be sworn. Medical text,
 2 journals, studies, and other documentary evidence relied
 3 upon by either party may be offered and admitted if
 4 relevant. Written statements of facts by treating health
 5 care providers may be reviewed. The monetary damages in any
 6 case may not be a subject of inquiry or discussion.

7 (3) The hearing will be informal, and no official
 8 transcript may be made.

9 (4) At the conclusion of the hearing, the panel may
 10 take the case under advisement or may request that
 11 additional facts, records, witnesses, or other information
 12 be obtained and presented to it at a supplemental hearing,
 13 which shall be set for a date and time certain, not longer
 14 than 30 days from the date of the original hearing unless
 15 the attorney bringing the matter for review consents in
 16 writing to a longer period.

17 (5) Any supplemental hearing shall be held in the same
 18 manner as the original hearing, and the parties concerned
 19 and their attorneys may be present.

20 (6) No panel member may be called to testify in any
 21 proceeding concerning the deliberations, discussions,
 22 decisions, and internal proceedings of the panel.

23 (7) No statement made by any person during a hearing
 24 before the panel may be used as impeaching evidence in
 25 court.

1 (8) At least 10 days prior to the hearing, the
 2 director shall furnish to each panel member copies of all
 3 claims, briefs, medical records, and other documents the
 4 director considers necessary.

5 Section 13. Panel deliberations and decisions. (1) The
 6 deliberations of the panel are confidential. Upon
 7 consideration of all the relevant material, the panel shall
 8 decide only:

9 (a) whether there is substantial evidence that the
 10 acts complained of occurred and that they constitute
 11 malpractice; and

12 (b) whether there is a reasonable medical probability
 13 that the patient was injured thereby.

14 (2) All votes of the panel on the two questions for
 15 discussion shall be by secret ballot. The decision shall be
 16 by a majority vote of those voting members of the panel who
 17 sat on the entire case. The decision shall be communicated
 18 in writing to the parties and attorneys concerned, and a
 19 copy thereof shall be retained in the permanent files of the
 20 panel.

21 (3) The decision shall in every case be signed for the
 22 panel by the chairman, who may vote only in the event the
 23 other members of the panel are evenly divided, and shall
 24 contain only the conclusions reached by a majority of its
 25 members and shall list the number of members, if any,

1 dissenting therefrom. If the vote is not unanimous, the
2 majority may briefly explain the reasoning and the basis for
3 their decision, and the dissenters may likewise explain the
4 reason for disagreement.

5 (4) The report of the medical review panel is not
6 admissible as evidence in any action subsequently brought in
7 any court of law. The copy of the report shall be sent to
8 the health care provider's professional licensing board.

9 (5) Panelists and witnesses are absolutely immune from
10 civil liability for all communications, findings, opinions,
11 and conclusions made in the course and scope of the duties
12 prescribed by this act.

13 (6) The panel's decision is without administrative or
14 judicial authority and is not binding upon any party. The
15 panel may not try to settle or compromise any claim or
16 express any opinion on the monetary value of any claim.

17 Section 14. Director -- rules of procedure. The
18 director is authorized to adopt and publish rules of
19 procedure necessary to implement and carry out the duties of
20 the medical review panel. No rules may be adopted, however,
21 which require a party to make a monetary payment as a
22 condition to bringing a malpractice claim before the medical
23 review panel.

24 Section 15. Tolling of the statute of limitations. The
25 running of the applicable limitation period in a malpractice

1 claim shall be tolled upon submission of a case for the
2 consideration of the panel and may not begin again until 30
3 days after the panel's final decision is entered in the
4 permanent files of the panel and a copy is served upon the
5 complainant and his attorney by certified mail.

6 Section 16. Maintenance of records. The director shall
7 maintain records of all proceedings before the medical
8 review commission which must include the nature of the act
9 or omissions complained of, a brief summary of the evidence
10 expressed, the decision of the panel, and any majority or
11 dissenting opinions filed. These records may not be made
12 public and may not be subject to subpoena, but are to be
13 used solely for the purpose of compiling statistical data
14 and facilitating on-going studies of medical malpractice in
15 Montana.

16 Section 17. Report by district court clerks. Within 30
17 days of entry of judgment, the clerk of the district court
18 from which judgment issues shall forward the name of every
19 health care provider against whom a judgment is rendered
20 under the medical malpractice act to the appropriate board
21 of professional registration and examination for review of
22 the fitness of the health care provider to practice his
23 profession. In cases where judgments are entered against
24 hospitals or other institutional health care providers on
25 the basis of respondeat superior or some other derivative

1 theory of recovery, the clerk of the district court shall
2 forward the name of the individual health care provider,
3 whose negligence caused the injury, to that health care
4 provider's board of professional registration and
5 examination for such review. Review of the health care
6 provider's fitness to practice shall be conducted in
7 accordance with law.

8 Section 18. Saving clause. This act does not apply to
9 acts of malpractice occurring prior to its effective date.

10 Section 19. Severability. If a part of this act is
11 invalid, all valid parts that are severable from the invalid
12 part remain in effect. If a part of this act is invalid in
13 one or more of its applications, the part remains in effect
14 in all valid applications that are severable from the
15 invalid applications.

-End-

STATE OF MONTANA

REQUEST NO. 368-77

FISCAL NOTE

Form BD-15

In compliance with a written request received February 7, 19 77, there is hereby submitted a Fiscal Note for Senate Bill 402 pursuant to Chapter 53, Laws of Montana, 1965 - Thirty-Ninth Legislative Assembly. Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

An act to establish a mandatory pretrial review panel for medical malpractice claims.

ASSUMPTIONS:

1. The six member review panel will hear approximately twenty medical malpractice claims per year.
2. The hearing on each claim will take approximately four days on the average.
3. Panel members will spend approximately 640 hours per year hearing claims.
4. The full-time executive secretary would be classified at approximately Grade 17.
6. Two full-time legal secretaries would be required at approximately Grade 8 each.

FISCAL IMPACT:

Revenue: Funding for the administration of this act is to be provided by an assessment to each health care provider.*

Expenditure:	<u>FY 78</u>	<u>FY 79</u>
Personal services	\$193,559	\$194,390
Operating expenses	43,400	45,050
Capital outlay	<u>11,000</u>	<u>2,500</u>
Additional cost of proposed legislation	<u>\$247,959</u>	<u>\$241,940</u>

*There is only one insurance actuary in Montana and the Insurance Commissioner would be unable to hire rate experts, therefore, the rating of these health care providers would require the contracted services of an actuarial firm or a Rating Bureau. In the time allotted, no cost estimate could be obtained.

Richard L. Drury for
 BUDGET DIRECTOR
 Office of Budget and Program Planning
 Date: 2-11-77

Approved by Committee
on Judiciary

SENATE BILL NO. 402

INTRODUCED BY MURRAY, FURNAGE, PETERSON, BLAYLOCK, LENSINK

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A
MANDATORY PRETRIAL REVIEW PANEL FOR MEDICAL MALPRACTICE
CLAIMS; PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. This act may be cited as the
"Montana Medical Malpractice Panel Act".

Section 2. Purpose. The purpose of this act is to
prevent where possible the filing in court of actions
against health care providers and their employees for
professional liability in situations where the facts do not
permit at least a reasonable inference of malpractice and to
make possible the fair and equitable disposition of such
claims against health care providers as are or reasonably
may be well founded.

Section 3. Definitions. As used in this act, the
following definitions apply:

(1) "Health care provider" means ~~a person, corporation,
facility, or institution of a governmental unit of a state
duty licensed by this state to provide health care or
professional services as a doctor of medicine, hospital, and
out-patient health care facility, doctor of osteopathy~~

~~chiropractor, podiatrist, or nurse-anesthetist. A PHYSICIAN
LICENSED TO PRACTICE MEDICINE IN MONTANA OR A HOSPITAL,
HOSPITAL-RELATED FACILITY, OR LONG-TERM CARE FACILITY.~~

(2) "Malpractice claim" means any ~~cause-of-action~~
CLAIM OR POTENTIAL CLAIM against a health care provider for
medical treatment, lack of medical treatment, or other
~~claimed~~ ALLEGED departure from accepted standards of health
care which proximately results in injury DAMAGE to the
patient, whether the patient's claim or ~~cause-of-action~~
POTENTIAL CLAIM sounds in tort or contract, and includes but
is not limited to ~~actions-based-on~~ ALLEGATIONS OF battery or
wrongful death.

(3) "PANEL" MEANS THE MONTANA MEDICAL MALPRACTICE
PANEL PROVIDED FOR IN SECTION 4.

Section 4. Montana medical malpractice panel. (1) The
Montana medical malpractice panel is created. THE PANEL IS
ATTACHED TO THE MONTANA SUPREME COURT FOR ADMINISTRATIVE
PURPOSES ONLY, EXCEPT THAT 82A-108(2) DOES NOT APPLY. The
function of the panel is to review all malpractice claims OR
POTENTIAL CLAIMS against health care providers covered by
the IdIS act.

(2) Those eligible to sit on the panel are health care
providers licensed pursuant to Montana law and residing in
Montana and the members of the state bar of Montana.

(3) Cases which a panel will consider include all

1 cases involving an alleged act of malpractice occurring in
 2 Montana by health care providers qualified under the THIS
 3 act.

4 (4) Attorneys CLAIMANTS shall submit a case for the
 5 consideration of the panel prior to filing a complaint in
 6 any district court or other court sitting in Montana by
 7 addressing an application, in writing, signed by the patient
 8 or his attorney, to the director of the panel.

9 (5) The director of the panel shall be ~~an attorney~~
 10 appointed by ~~and serving at the pleasure of~~ the chief
 11 justice of the Montana supreme court FROM A LIST OF THREE
 12 PEOPLE SUBMITTED BY THE HEALTH CARE PROVIDERS. THE DIRECTOR
 13 SHALL SERVE AT THE PLEASURE OF THE CHIEF JUSTICE.

14 (6) The director's salary ~~shall be set by the Montana~~
 15 ~~supreme court, AND TERM OF OFFICE SHALL BE FIXED AND HE MAY~~
 16 BE REMOVED IN THE SAME MANNER.

17 Section 5. Compensation of the panel and staff --
 18 facilities for offices and hearings. (1) All members of the
 19 panel shall be paid a salary in the amount of \$40 an hour,
 20 under guidelines promulgated by the director MONTANA SUPREME
 21 COURT.

22 (2) All members of the panel, ~~and its assistants~~ THE
 23 DIRECTOR, AND HIS STAFF are entitled to ~~receive their actual~~
 24 ~~and necessary~~ TRAVEL expenses INCURRED while ~~traveling~~ on
 25 the business of the panel, AS PROVIDED IN 59-538, 59-539,

1 ~~AND 59-801,~~ but such expenses shall be approved by the
 2 director before payment is made.

3 (3) The director ~~may administer~~ PANEL MAY PROVIDE FOR
 4 THE ADMINISTRATION OF oaths, ~~receive THE RECEIPT OF~~ claims
 5 filed, ~~promulgate THE PROMULGATION OF~~ forms required
 6 hereunder BY THIS ACT, issue THE ISSUANCE OF subpoenas in
 7 connection with the administration of this act, and ~~perform~~
 8 THE PERFORMANCE OF all other acts required to fairly and
 9 effectively administer this act.

10 (4) The director, subject to the approval of the chief
 11 justice, may employ and fix the compensation for clerical
 12 and other assistants as he considers necessary.

13 (5) The panel shall maintain adequate offices ~~in the~~
 14 ~~city of Helena,~~ in which the IIS records are SHALL BE kept
 15 and its official business transacted. ~~Necessary office~~
 16 ~~furniture, stationery, and other supplies are authorized.~~

17 (6) Panel hearings ~~shall be conducted in the county~~
 18 ~~where the medical injury or medical liability allegedly~~
 19 ~~occurred but may, within the sound discretion of the hearing~~
 20 ~~panel, MAY~~ be held in any other county if the panel
 21 considers it necessary or advisable. ~~it is the duty of the~~
 22 THE county commissioners or other governing authority to
 23 SHALL provide, upon request of the director of the panel,
 24 suitable facilities for any such hearing.

25 ~~Section 6. Proof of financial responsibility.~~

1 insurance; cash or surety bonds; (1) Every health care
2 provider subject to the terms of this act shall, within 30
3 days after this act takes effect, file with the director in
4 a manner prescribed thereby, proof of financial
5 responsibility.

6 (2) Every health care provider, subject to the
7 provisions of this act, shall either insure and keep insured
8 his liability hereunder in some corporation, association, or
9 organization authorized to write medical liability insurance
10 or furnish to the director a cash or surety bond as herein
11 provided. The submission of a cash or surety bond is subject
12 to the approval of the director and is valid only when
13 approved thereby.

14 (3) Such insurance or cash or surety bond shall be at
15 least \$300,000. Any health care provider who fails to so
16 act is subject to liability under the law without regard to
17 the provisions of this act.

18 (4) While such insurance or cash or surety bond
19 approved by the director remains in force, the health care
20 provider and those conducting their business, including
21 their insurance carriers, are liable to pay any claimant, his
22 personal representative, parent, spouse, dependent, or next
23 of kin, for personal injury or death, to the extent and in
24 the manner specified in this act.

25 Section 7. Funding of act. (1) The administration of

1 this act is funded from an annual surcharge on license fees
2 charged to each health care provider based upon the
3 experience rating of the various specialties and
4 institutions. These fees shall be collected by the director
5 annually at the time of the filing of evidence of financial
6 responsibility under this act.

7 (2) The fund created by the collection of these fees
8 shall be set aside for and is appropriated for the purpose
9 of financing the annual requirements of the administration
10 of this act. Funds, if any, over and above the amount
11 required for the annual administration of this act shall be
12 retained by the director and used to finance the
13 administration of this act in succeeding years and may not
14 revert to the general funds.

15 (3) The annual surcharge shall be levied on all health
16 care providers and is to be determined by the state
17 commissioner of insurance based upon the experience rating
18 of the various providers and may not exceed 15% of the cost
19 to each provider for malpractice insurance and, if not
20 insured, 15% of the average premium for providers in its own
21 field or discipline. The annual surcharge is due on the
22 same date as license fees payable to the state of Montana
23 are due. Failure to pay shall result in suspension of all
24 license privileges.

25 SECTION 6. THERE IS A NEW R.C.M. SECTION THAT READS AS

1 FULLTEXT:

2 Funding of act. (1) There is created a pretrial review
3 fund to be administered by the director exclusively for the
4 purposes stated in this act. The fund and any income from it
5 shall be held in trust, deposited in an account, and
6 invested and reinvested by the director with the prior
7 approval of the director of the Montana medical association.
8 The fund may not become a part of or revert to the general
9 fund of this state but shall be open to auditing by the
10 legislative auditor.

11 (2) To create the fund, an annual surcharge shall be
12 levied on all health care providers. The amount of the
13 assessment shall be set by the director, who shall allocate
14 a projected cost among health care providers on a per capita
15 basis. The director may provide a different allocation upon
16 approval by the supreme court. Surplus funds, if any, over
17 and above the amount required for the annual administration
18 of the act shall be retained by the director and used to
19 finance the administration of this act in succeeding years,
20 in which event the director shall reduce the annual
21 assessment in subsequent years, commensurate with the proper
22 administration of this act.

23 (3) The annual surcharge is due and payable on the
24 same date as license fees payable to the state of Montana
25 are due.

1 Section 7. Panel decision required -- application. (1)
2 No malpractice claim may be filed in any court against a
3 qualified health care provider before ~~AN~~ application is made
4 to the panel and its decision is rendered.

5 (2) The application shall contain the following:

6 (a) a statement in reasonable detail of the elements
7 of the health care provider's conduct which are believed to
8 constitute ~~professional-negligence-and~~ A MALPRACTICE CLAIM,
9 ~~THE~~ dates THE CONDUCT OCCURRED, and the names and addresses
10 of all physicians and hospitals having contact with the
11 claimant AND ALL WITNESSES. ~~Additional elements of the~~
12 ~~malpractice claim must be included in an amended application~~
13 ANY AMENDMENTS TO THE APPLICATION MUST BE filed not less
14 than 14 days prior to the hearing date.

15 (b) a statement authorizing the panel to obtain access
16 to all medical and hospital records and information
17 pertaining to the ~~incident CLAIM~~ and, for the purposes of
18 its consideration of this matter only, waiving any ~~claim-of~~
19 privilege as to the contents of those records. Nothing in
20 that statement may in any way be construed as waiving that
21 privilege for any other purpose or in any other context, in
22 or out of court.

23 Section 8. Application procedure. (1) Upon receipt of
24 an application for review, the director or his delegate
25 shall cause to be served a true copy of the application on

1 the health care providers involved. Service shall be
 2 effected pursuant to ~~Montana law~~ THE MONTANA RULES OF CIVIL
 3 PROCEDURE. If a health care provider involved chooses to
 4 retain legal counsel, his attorney shall informally enter
 5 his appearance with the director.

6 (2) The health care provider shall answer the
 7 application for review and ~~in--addition~~ shall submit a
 8 statement authorizing the panel to ~~obtain-access-to~~ INSPECT
 9 all medical and hospital records and information pertaining
 10 to ~~the-matter-giving-rise-to~~ the application and, for the
 11 purposes of ~~its-consideration-of-the-matter~~ SUCH INSPECTION
 12 only, waiving any ~~claim-or~~ privilege as to the contents of
 13 those records. Nothing in the statement waives that
 14 privilege for any other purpose ~~or-in-any-other-context--in~~
 15 ~~or-out-of-court~~.

16 (3) In instances where applications are received
 17 employing a theory of respondeat superior or some other
 18 derivative theory of recovery, the director shall forward
 19 the application to the state professional societies,
 20 associations, or licensing boards of both the individual
 21 health care provider ~~who-has~~ WHOSE alleged malpractice and
 22 caused the application to be filed and the health provider
 23 named a respondent as employer, master, or principal.

24 (4) The panel director shall cooperate fully with the
 25 claimant in retaining a physician qualified in the field of

1 medicine involved, who will consult with the claimant ~~and~~
 2 ~~assist--in--preparation--of--the-claim~~ upon his payment of a
 3 reasonable fee by the claimant.

4 Section 9. Panel selection. (1) Application for review
 5 shall be promptly transmitted by the director to the
 6 directors of the health care provider's state professional
 7 society or association and the state bar, ~~who~~ WHICH shall
 8 each select three panelists within 30 days from the date of
 9 transmittal of the application.

10 (2) If no state professional society or association
 11 exists or if the health care provider does not belong to
 12 such a society or association, the director shall transmit
 13 the application to the health care provider's state
 14 licensing board, which shall in turn select three persons
 15 from the health care provider's profession, and where
 16 applicable, to persons specializing in the same field or
 17 discipline as the health care provider.

18 (3) ~~in--cases--where~~ WHENEVER there are multiple
 19 defendants, the case against each health care provider may
 20 be reviewed by a separate panel, ~~or~~ AT THE DISCRETION OF THE
 21 PANEL INITIALLY APPOINTED OR BY STIPULATION OF THE PARTIES,
 22 a single combined panel may review ALL the ~~claim~~ CLAIMS
 23 against all parties defendant, ~~at--the-discretion-of-the~~
 24 ~~director-or-by-stipulation-of-the-parties~~.

25 (4) Three panel members from the health care

1 provider's profession and three panel members from the state
2 bar shall sit in review of each case.

3 (b) In those cases where the theory of respondeat
4 superior or some other derivative theory of recovery is
5 employed, two of the panel members shall be chosen from the
6 individual health care provider's profession and one panel
7 member shall be chosen from the profession of the health
8 care provider named as a respondent, AS employer, master, or
9 principal.

10 ~~(6) The director of the panel or his delegate, who~~
11 ~~must be an attorney, shall sit on each panel and serve as~~
12 ~~chairman.~~

13 ~~(7)(b)~~ Any member shall disqualify himself from
14 consideration of any case in which, by virtue of his
15 circumstances, he feels his presence on the panel would be
16 inappropriate, considering the purpose of the panel. The
17 director may excuse a proposed panelist from serving.

18 ~~(7)(7)~~ Whenever a party makes and files an affidavit
19 that a panel member selected pursuant to this section
20 cannot, according to the belief of the party making the
21 affidavit, sit in review of the application with
22 impartiality, that panel member may proceed no further.
23 Another panel member must be selected by the health care
24 provider's professional association, state licensing board,
25 or the state bar, as the case may be. A party may not

1 disqualify more than three panel members in this manner in
2 any single malpractice claim, and the affidavit must be
3 filed within AT LEAST 20 days prior to the date of hearing
4 ~~or within 5 days of the discovery of the alleged partiality.~~

5 Section 10. Time and place of hearing. A date, time,
6 and place for hearing shall be fixed by the director SUBJECT
7 TO [SECTION 5(6) OF THIS ACT], and prompt notice thereof
8 shall be given to the parties involved, the attorneys, and
9 the members of the panel. In no instance may the date set be
10 more than 120 days after the transmittal by the director of
11 the application for review unless THE PANEL FINDS good cause
12 exists for extending the period. ~~Hearings may be held~~
13 ~~anywhere in the state of Montana, and the director must give~~
14 ~~due regard to the convenience of the parties in determining~~
15 ~~the place of hearing.~~

16 Section 11. Hearing procedures. (1) At the time set
17 for hearing, the attorney CLAIMANT submitting the case for
18 review shall be present and shall make a brief introduction
19 of his case, including a resume of the facts constituting
20 THE alleged professional malpractice which he is prepared to
21 prove. The health care provider against whom the claim is
22 brought and his attorney may be present and may make an
23 introductory statement of his case.

24 (2) Both parties may call witnesses to testify before
25 the panel, which witnesses shall be sworn. Medical text

1 ~~LEXIS~~, journals, studies, and other documentary evidence
 2 relied upon by either party may be offered and admitted if
 3 relevant. Written statements of facts by treating health
 4 care providers may be reviewed. ~~The monetary damages in any~~
 5 ~~case may not be a subject of inquiry or discussion.~~

6 (3) The hearing will be informal, and no official
 7 transcript may be made.

8 (4) At the conclusion of the hearing, the panel may
 9 take the case under advisement or may request that
 10 additional facts, records, witnesses, or other information
 11 be obtained and presented to it at a supplemental hearing,
 12 which shall be set for a date and time certain, not longer
 13 than 30 days from the date of the original hearing unless
 14 the attorney bringing the matter for review consents in
 15 writing to a longer period.

16 (5) Any supplemental hearing shall be held in the same
 17 manner as the original hearing, and the parties concerned
 18 and their attorneys may be present.

19 (6) No panel member may be called to testify in any
 20 proceeding concerning the deliberations, discussions,
 21 decisions, and internal proceedings of the panel.

22 (7) No statement made by any person during a hearing
 23 before the panel may be used as impeaching evidence in
 24 court.

25 (8) At least 10 days prior to the hearing, the

1 director shall furnish to each panel member copies of all
 2 claims, briefs, medical records, and other documents the
 3 director considers necessary.

4 Section 12. Panel deliberations and decisions. (1) ~~AT~~
 5 ~~OR PRIOR TO THE TIME SET FOR THE HEARING, THE ATTORNEY~~
 6 ~~MEMBERS OF THE PANEL SHALL SELECT A CHAIRMAN WHO SHALL BE AN~~
 7 ~~ATTORNEY AND WHO SHALL PRESIDE OVER THE PANEL DELIBERATIONS.~~
 8 The deliberations of the panel are confidential. Upon
 9 consideration of all the relevant material, the panel shall
 10 decide only:

11 (a) whether there is substantial evidence that the
 12 acts complained of occurred and that they constitute
 13 malpractice; and

14 (b) whether there is a reasonable medical probability
 15 that the patient was injured thereby.

16 (2) All votes of the panel on the two questions for
 17 discussion shall be by secret ballot. The decision shall be
 18 by a majority vote of those voting members of the panel who
 19 sat on the entire case. The decision shall be communicated
 20 in writing to the parties and attorneys concerned, and a
 21 copy thereof shall be retained in the permanent files of the
 22 panel.

23 (3) The decision shall in every case be signed for the
 24 panel by the chairman, ~~who may vote only in the event the~~
 25 ~~other members of the panel are evenly divided~~, and shall

1 contain only the conclusions reached by a majority of its
 2 members and shall list the number of members, if any,
 3 dissenting therefrom. ~~if the vote is not unanimous, the~~ THE
 4 majority may briefly explain the reasoning and the basis for
 5 their decision, and the dissenters may likewise explain the
 6 reason for disagreement.

7 (4) The report of the medical review panel is not
 8 admissible as evidence in any action subsequently brought in
 9 any court of law. The copy of the report shall be sent to
 10 the health care provider's professional licensing board.

11 (5) Panelists and witnesses are absolutely immune from
 12 civil liability for all communications, findings, opinions,
 13 and conclusions made in the course and scope of the duties
 14 prescribed by this act.

15 (6) The panel's decision is without administrative or
 16 judicial authority and is not binding upon any party. ~~The~~
 17 ~~panel may not try to settle or compromise any claim or~~
 18 ~~express any opinion on the monetary value of any claim.~~ THE
 19 PANEL MAY RECOMMEND AN AWARD, APPROVE SETTLEMENT AGREEMENTS,
 20 AND DISCUSS THE SAME, ALL IN A MANNER NOT INCONSISTENT WITH
 21 THIS SECTION, AND ALL SUCH APPROVED SETTLEMENT AGREEMENTS
 22 ARE BINDING ON THE PARTIES.

23 Section 13. Director -- rules of procedure. The
 24 director, IN CONSULTATION WITH THE STATE BAR OF MONTANA AND
 25 SUBJECT TO APPROVAL OF THE SUPREME COURT, is authorized to

1 adopt and publish rules of procedure necessary to implement
 2 and carry out the duties of the medical review panel. No
 3 rules may be adopted, however, which require a party to make
 4 a monetary payment as a condition to bringing a malpractice
 5 claim before the medical review panel.

6 Section 14. Tolling of the statute of limitations. The
 7 running of the applicable limitation period in a malpractice
 8 claim ~~shall be~~ IS tolled upon submission of a case for the
 9 consideration of the panel and ~~may~~ DOES not begin again
 10 until 30 days after the panel's final decision is entered in
 11 the permanent files of the panel and a copy is served upon
 12 the complainant and his attorney by certified mail.

13 Section 15. Maintenance of records. The director shall
 14 maintain records of all proceedings before the ~~medical~~
 15 ~~review commission~~ PANEL which must include the nature of the
 16 act or omissions complained of, a brief summary of the
 17 evidence expressed, the decision of the panel, and any
 18 majority or dissenting opinions filed. ~~These records~~ ANY
 19 RECORDS WHICH MAY IDENTIFY ANY PARTY TO THE PROCEEDINGS may
 20 not be made public and ~~may~~ ARE not be subject to subpoena,
 21 but are to be used solely for the purpose of compiling
 22 statistical data and facilitating ~~on-going~~ ONGOING studies
 23 of medical malpractice in Montana.

24 ~~Section 17. Report by district court clerks. Within~~
 25 ~~30 days of entry of judgment, the clerk of the district~~

~~1 court from which judgment issues shall forward the name of~~
~~2 every health care provider against whom a judgment is~~
~~3 rendered under the medical malpractice act to the~~
~~4 appropriate board of professional registration and~~
~~5 examination for review of the fitness of the health care~~
~~6 provider to practice his profession in cases where~~
~~7 judgments are entered against hospitals or other~~
~~8 institutional health care providers on the basis of~~
~~9 respondeat superior or some other derivative theory of~~
~~10 recovery; the clerk of the district court shall forward the~~
~~11 name of the individual health care provider whose~~
~~12 negligence caused the injury to that health care provider's~~
~~13 board of professional registration and examination for such~~
~~14 review. Review of the health care provider's fitness to~~
~~15 practice shall be conducted in accordance with law.~~

-End-

16 Section 16. Savings clause. This act does not apply to
 17 acts of malpractice occurring prior to its effective date.

18 Section 17. Severability. If a part of this act is
 19 invalid, all valid parts that are severable from the invalid
 20 part remain in effect. If a part of this act is invalid in
 21 one or more of its applications, the part remains in effect
 22 in all valid applications that are severable from the
 23 invalid applications.

24 SECTION 16. EFFECTIVE DATE. THIS ACT IS EFFECTIVE
 25 UPON ITS PASSAGE AND APPROVAL.

SENATE BILL NO. 402

INTRODUCED BY MURRAY, TURNAGE, PETERSON, BLAYLOCK, LENSINK

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A MANDATORY PRETRIAL REVIEW PANEL FOR MEDICAL MALPRACTICE CLAIMS; PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. This act may be cited as the "Montana Medical Malpractice Panel Act".

Section 2. Purpose. The purpose of this act is to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

Section 3. Definitions. As used in this act, the following definitions apply:

(1) "Health care provider" means ~~a person, corporation, facility, or institution of a governmental unit of a state duly licensed by this state to provide health care or professional services as a doctor of medicine, hospital, and out-patient health care facility, doctor of osteopathy,~~

There are no changes in SB402 and due to length will not be rerun. Please refer to yellow copy for complete text.

THIRD READING

~~chiropractor, podiatrist, or nurse-anesthetist, a physician licensed to practice medicine in Montana or a hospital, hospital-related facility, or long-term care facility.~~

(2) "Malpractice claim" means any ~~cause-of-action~~ CLAIM OR POTENTIAL CLAIM against a health care provider for medical treatment, lack of medical treatment, or other ~~claimed~~ ALLEGED departure from accepted standards of health care which proximately results in injury DAMAGE to the patient, whether the patient's claim or ~~cause-of-action~~ POTENTIAL CLAIM sounds in tort or contract, and includes but is not limited to ~~actions-based-on~~ ALLEGATIONS OF battery or wrongful death.

~~(3) "PANEL" MEANS THE MONTANA MEDICAL MALPRACTICE PANEL PROVIDED FOR IN [SECTION 4].~~

Section 4. Montana medical malpractice panel. (1) The Montana medical malpractice panel is created. ~~THE PANEL IS ATTACHED TO THE MONTANA SUPREME COURT FOR ADMINISTRATIVE PURPOSES ONLY, EXCEPT THAT 82A-108(2) DOES NOT APPLY.~~ The function of the panel is to review all malpractice claims OR POTENTIAL CLAIMS against health care providers covered by the IdIS act.

(2) Those eligible to sit on the panel are health care providers licensed pursuant to Montana law and residing in Montana and the members of the state bar of Montana.

(3) Cases which a panel will consider include all

1 cases involving an alleged act of malpractice occurring in
2 Montana by health care providers qualified under the IHS
3 act.

4 (4) Attorneys CLAIMANTS shall submit a case for the
5 consideration of the panel prior to filing a complaint in
6 any district court or other court sitting in Montana by
7 addressing an application, in writing, signed by the patient
8 or his attorney, to the director of the panel.

9 (5) The director of the panel shall be ~~an attorney~~
10 appointed by ~~and serving at the pleasure of~~ the chief
11 justice of the Montana supreme court ~~FROM A LIST OF THREE~~
12 PEOPLE SUBMITTED BY THE HEALTH CARE PROVIDERS. THE DIRECTOR
13 SHALL SERVE AT THE PLEASURE OF THE CHIEF JUSTICE.

14 (6) The director's salary ~~shall be set by the Montana~~
15 supreme court, AND TERM OF OFFICE SHALL BE FIXED AND HE MAY
16 BE REMOVED IN THE SAME MANNER.

17 Section 5. Compensation of the panel and staff --
18 facilities for offices and hearings. (1) All members of the
19 panel shall be paid a salary in the amount of \$40 an hour,
20 under guidelines promulgated by the director MONTANA SUPREME
21 COURT.

22 (2) All members of the panel, ~~and its assistants~~ IHE
23 DIRECTOR, AND HIS STAFF are entitled to receive ~~their actual~~
24 ~~and necessary~~ TRAVEL expenses INCURRED while ~~traveling~~
25 the business of the panel, AS PROVIDED IN 59-538, 59-539.

1 ~~AND 59-801,~~ but such expenses shall be approved by the
2 director before payment is made.

3 (3) The ~~director may administer~~ PANEL MAY PROVIDE FOR
4 THE ADMINISTRATION OF oaths, receive THE RECEIPT OF claims
5 filed, promulgate THE PROMULGATION OF forms required
6 hereunder BY THIS ACT, issue THE ISSUANCE OF subpoenas in
7 connection with the administration of this act, and perform
8 THE PERFORMANCE OF all other acts required to fairly and
9 effectively administer this act.

10 (4) The director, subject to the approval of the chief
11 justice, may employ and fix the compensation for clerical
12 and other assistants as he considers necessary.

13 (5) The panel shall maintain adequate offices ~~in the~~
14 ~~city of Helena,~~ in which the IIS records are SHALL BE kept
15 and its official business transacted. ~~necessary office~~
16 ~~furniture, stationery, and other supplies are authorized.~~

17 (6) Panel hearings ~~shall be conducted in the county~~
18 ~~where the medical injury or medical liability allegedly~~
19 ~~occurred but may, within the sound discretion of the hearing~~
20 ~~panel, MAY be held in any other county if the panel~~
21 ~~considers it necessary or advisable. It is the duty of the~~
22 IHE county commissioners or other governing authority to
23 SHALL provide, upon request of the director of the panel,
24 suitable facilities for any such hearing.

25 ~~Section 6. Proof of financial responsibility.~~