

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON HUMAN SERVICES

Call to Order: By **CHAIRMAN ARLENE BECKER**, on January 26, 2005 at 3:00 P.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Arlene Becker, Chairman (D)
Rep. Tom Facey, Vice Chairman (D)
Rep. Don Roberts, Vice Chairman (R)
Rep. Mary Caferro (D)
Rep. Emelie Eaton (D)
Rep. Gordon R. Hendrick (R)
Rep. Teresa K. Henry (D)
Rep. William J. Jones (R)
Rep. Dave McAlpin (D)
Rep. Tom McGillvray (R)
Rep. Mike Milburn (R)
Rep. Art Noonan (D)
Rep. Ron Stoker (R)
Rep. Pat Wagman (R)
Rep. Bill Warden (R)
Rep. Jonathan Windy Boy (D)

Members Excused: None.

Members Absent: None.

Staff Present: Susan Fox, Legislative Branch
Mary Gay Wells, Committee Secretary

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

Committee Business Summary:

Hearing & Date Posted: HB 24, 1/24/2005; HB 25, 1/24/2005;
HB 26, 1/24/2005; HB 59, 1/24/2005;
HB 64, 1/24/2005; HB 217, 1/24/2005

Executive Action:

CHAIRMAN ARLENE BECKER welcomed the audience and explained that HB 24, HB 217 and HB 59 would be heard together as they are similar bills. Each sponsor would present their bill and then proponents, opponents, informational testimony, and questions and answers would follow. **CHAIRMAN BECKER** invited Mike Foster to open the hearing with informational history.

Informational Testimony:

Mike Foster, representing four Sisters of Charity Hospitals: St. Vincent, Billings; St. James, Butte; Holy Rosary, Miles City; and Wheatland Memorial, Harlowton. He offered the following: The medical liability crises is a national problem but requires state-by-state action. In the 2003 Legislature, a bill was presented by REP. ROY BROWN regarding expert witnesses. It opened the door to the whole problem of medical liability in Montana. That bill did not make it through the legislative process, but what came out of that was a resolution that was easily adopted by the entire legislature. A study committee was created to look at this issue during the interim. That committee, chaired by REP. GEORGE GOLIE, met for about one and one-half years. They heard from many physicians, hospitals and others. The committee narrowed all the ideas to eight recommendations. Those recommendations were sent to the Legislative Council. This past fall, the Legislative Council made a decision to adopt five of those recommendations. Those recommendations turned into five bills. Of those five, four are here today. The other bill is in front of the Senate.

Mr. Foster told the committee that he had received a letter from James Kaiser, Administrator, St. James in Butte. The letter outlined the magnitude of the problem from a dollars and cents perspective. It translated into problems for providers as well as availability, access and choice for patients. He provided statics for 2002. The medical liability premiums for Holy Rosary in Miles City were at \$55,000 a year. Now they are at \$550,000. At St. James in Butte, premiums went from \$290,000 to \$842,000. At St. Vincent in Billings, premiums went from \$300,000 to \$3,000,000 a year. All these increases happened with no unusual claims. He then gave further statics. The impact of this affects the cost of health care in all respects. He pointed out that all parties have worked hard on bringing these bills together and he thanked them for their efforts. He handed out a brochure that addressed the key points about Montana's medical liability insurance crisis.

EXHIBIT(huh20a01)

{Tape: 1; Side: A; Approx. Time Counter: 0 - 9.8}

Pat Melby, Montana Medical Association (MMA), did not want to reiterate what Mr. Foster had said. He told the committee that each bill had been given a name. The first of the recommended bills was "the apology without admissibility" in HB 24, HB 59, and HB 217. The second was "captain of the ship" in HB 25. "Ostensible agency" was HB 26. "Expert witness qualification" was HB 64. "The loss of chance" was SB 21. He stated three things concerning these bills. First, they are not a panacea, either individually or collectively, for medical malpractice insurance, access and cost crises here in Montana. Each in its own way will help to mitigate the crises. Secondly, none of these measures would prevent an insured person from bringing a claim against a health care provider for a negligent act or omission. Finally, health care providers and Montana Trial Lawyers Association have had fruitful discussions on these bills and others and have been able to reach agreement on amendments that make the bills acceptable to Montana Trial Lawyers Association as well as accomplish the purposes the physicians had set out to do.

{Tape: 1; Side: A; Approx. Time Counter: 9.8 - 12.6}

HEARING ON HB 24

Sponsor: REP. GEORGE GOLIE, HD 20, GREAT FALLS

Opening Statement by Sponsor:

REP. GEORGE GOLIE presented **HB 24**. This bill is an act to provide an apology with that apology being inadmissible as evidence of liability for medical malpractice. This will allow more open communication between a health care provider and those receiving health care. It should also result in fewer lawsuits. He offered some amendments to the bill that further clarifies the intention of the legislation.

{Tape: 1; Side: A; Approx. Time Counter: 12.6 - 14}

HEARING ON HB 217

Sponsor: REP. DON ROBERTS, HD 56, BILLINGS

Opening Statement by Sponsor:

REP. DON ROBERTS presented **HB 217**. In the interim committee it became evident that many patients were concerned that their doctors seemed aloof and uncaring. They were surprised to find that doctors were told by their insurance companies that they could not express concern or sympathy without that being used

against them in a court of law as an admission of guilt. He concluded that these three bills could be blended together.

{Tape: 1; Side: A; Approx. Time Counter: 14 - 16}

HEARING ON HB 59

Sponsor: REP. CHRISTOPHER HARRIS, HD 66, BOZEMAN

Opening Statement by Sponsor:

REP. CHRISTOPHER HARRIS presented **HB 59**. He stated that any malpractice lawsuit that depends on evidence of an apology is, by definition, a frivolous lawsuit. A malpractice lawsuit must depend on other evidence. The apology itself, even if it is an apology related to fault, has no place in a lawsuit. An apology is the beginning of the healing process. If a mistake is made, an apology ought to be offered so that the doctor and the patient could communicate. He had introduced HB 59 without prior knowledge of the other bills being prepared. He offered to have his bill tabled so that one of the other bills could go forward.

{Tape: 1; Side: A; Approx. Time Counter: 16 - 19}

Proponents' Testimony:

Pat Melby, Montana Medical Association (MMA), believed that all these bills are good and he hoped that one of these bills will be passed through the legislative system. It would help to maintain relationships between physicians and patients that are sometimes destroyed simply because a physician can't make an expression of sympathy. They were also in agreement with the amendments.

{Tape: 1; Side: A; Approx. Time Counter: 19 - 21.3}

Michael Brown, Physician, Pathologist, Board Member of Rocky Mountain Health Network, spoke in favor of all three bills and handed in his testimony.

EXHIBIT(huh20a02)

{Tape: 1; Side: A; Approx. Time Counter: 21.3 - 23.4}

John Hanson, Diagnostic Radiologist, Billings, submitted his testimony and shared a personal story with the committee.

EXHIBIT(huh20a03)

{Tape: 1; Side: A; Approx. Time Counter: 24.6 - 26.3}

Paul Melvin, Orthopedist, Retired, Executive Director, Montana Orthopedic Society, concurred with the previous speakers. It is necessary as a physician and a human being to express your concern and sorrow to someone that has been badly injured or has

an incurable disease. He gave several examples. He urged the passage of one of these bills.

{Tape: 1; Side: A; Approx. Time Counter: 27.3 - 31}

Mark Rumans, M.D. Chief of Staff, Deaconess Billings Clinic, submitted his testimony and stated that medicine has been accused of lacking compassion and caring. He urged support of these bills because they bring back compassion and caring into the field of medicine.

EXHIBIT(huh20a04)

{Tape: 1; Side: B; Approx. Time Counter: 0 - 0.7}

Mark Taylor, Attorney, Montana Hospital Association (MHA), informed the committee that MHA was a key player in the process of bringing these three bills forward. He, personally, was concerned about the accessibility of doctors and understands the crisis of medical malpractice lawsuits. He urged passage of these bills.

{Tape: 1; Side: B; Approx. Time Counter: 0.7 - 2.1}

Mike Foster, representing four Sisters of Charity Hospitals, went on record as supporting all three bills.

Mona Jamison, The Doctors' Company, informed the committee that this company is a physician-owned insurance company for physicians for medical malpractice insurance. They are in 26 states, which included Montana, and they are one of the two remaining insurance companies for medical malpractice insurance in Montana. They are supportive of the bills and the amendments.

Leo Berry, Utah Medical Insurance Association, stated that his group is also doctor-owned serving doctors and hospitals in Montana. The issues being looked at are access and affordability. The Utah Med thinks these bills will assist in both of these goals.

Steve Yeakel, Executive Director, Montana Council for Maternal and Child Health, encouraged passage of these bills. They have seen first hand the problems of access to care and the impact of costs on that access.

{Tape: 1; Side: B; Approx. Time Counter: 2.1 - 6}

Barbara Ranf, Montana Chamber of Commerce and Montana Motor Carriers, stood in support of the bills and amendments and expressed their appreciation to the SJR 32 subcommittee.

Marti Wangen, Executive Director, Montana Podiatric Medical Association, spoke and submitted her testimony.

EXHIBIT(huh20a05)

{Tape: 1; Side: B; Approx. Time Counter: 6 - 7.9}

Jacqueline Lenmark, American Insurance Association (AIA), stated that AIA supports the concepts of the three bills.

Rose Hughes, Executive Director, Montana Health Care Association, added her support to these pieces of legislation. Even the health care providers at the skilled nursing facilities and the assisted living facilities have trouble finding medical malpractice insurance and experience the increasing cost of this insurance.

Joe Masurek, Blue Cross/Blue Shield of Montana, said that high malpractice insurance rates affect the cost of care and the cost of insurance. They were in support of these bills.

{Tape: 1; Side: B; Approx. Time Counter: 7.9 - 9.7}

Al Smith, Montana Trial Lawyers' Association, supported the bill with the amendments. They believe that this one bill out of all the bills may actually have a positive affect on malpractice rates.

{Tape: 1; Side: B; Approx. Time Counter: 9.7 - 12.7}

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. JONATHAN WINDY BOY asked for the amendments that had been mentioned several times. **REP. GOLIE** offered the amendments for viewing.

EXHIBIT(huh20a06)

REP. RON STOKER questioned the difference between the three bills. **REP. ROBERTS** said there are basically no differences after the amendments are put on.

REP. MIKE MILBURN wondered if the results from the interim committee were available. **Mr. Melby** informed the committee that the report, "Diagnosing the Ailment, Prescribing a Cure," published by the Legislative Council on the SJR 32 Study had been

handed out to each member of the Human Services Committee. The reason for these bills has been the severity of settlements.

EXHIBIT (huh20a07)

{Tape: 1; Side: B; Approx. Time Counter: 12.7 - 17.7}

REP. DAVE MCALPIN asked if Mr. Melby could distinguish between the amounts of settlement and actual jury verdicts. **Mr. Melby** said that one of the problems the study committee struggled with was getting good information on jury verdicts, settlements, the number of claims, etc. Unfortunately, prior to 2001, there was a statute that required medical malpractice insurers to report all this information to the insurance commissioner. Apparently, someone decided that this statute was not of much use. In a housekeeping bill in 2001, it was repealed unbeknownst to anyone. There is a bill in the Senate that would re-enact this statute. Unfortunately, much of that information was not available at this time.

{Tape: 1; Side: B; Approx. Time Counter: 17.7 - 19.5}

REP. MCALPIN redirected his question to Ms. Jamison. **Ms. Jamison** offered to get this information for the committee. She did say that, in Montana, there have not been many cases where jury settlements have been above \$1 million. In Montana, there has been an increase of lawsuits as opposed to amounts going up. There are defense costs associated with more lawsuits. She informed the committee that The Doctors Company invests only in bonds, not equities.

{Tape: 1; Side: B; Approx. Time Counter: 19.5 - 21.7}

REP. BILL WARDEN asked why "fault" was taken out on Page 2, Line 16 of HB 24. **Mr. Melby** said that language originally came from Colorado. There are a number of states in the U.S. that have apology-type bills. Colorado and Massachusetts are the only states that have included "fault" in their description of what can be stated. If a physician said, "I'm sorry, I misread the X-ray," and with the word "fault" in statute, the above statement would not be admissible. By removing the word "fault," the "I'm sorry" part would not be admissible, but the admission that something was done wrong would be admissible as it is in all tort cases. In Mr. Melby's view, most physicians are going to be counseled, if they apologize, to say, "I'm really sorry that we had a bad outcome." They would not use the other part of the statement and say, "I did the wrong thing." Mr. Melby did not feel that with the amendment, they were giving up that much. They felt it was a good compromise with the trial lawyers.

{Tape: 1; Side: B; Approx. Time Counter: 21.7 - 24}

REP. TOM MCGILLVRAY inquired of Ms. Lenmark that if these bills were passed, would more malpractice insurance companies come into

Montana. **Ms. Lenmark** replied that anything that could be done to moderate the litigation climate in Montana would assist not only moderating the rates for insurance but would increase competition.

REP. MARY CAFERRO inquired about the group that Ms. Jamison represented. **Ms. Jamison** explained that the name of the company is The Doctors' Company, a medical malpractice insurance company, owned and operated by physicians out of Napa, California. They sell insurance to physicians in 23 to 26 states. At this time, they are only selling insurance in states that have caps on economic damages. Montana is one of those states.

REP. CAFERRO asked if the rates are set nationally or according to a state's laws. **Ms. Jamison** informed the committee that the rates are based on Montana; however, there are always exceptions such as the re-insurance market. That is a national market. September 11, even though that is property and casualty, went to the re-insurance market. That affected everyone, even medical malpractice insurance rates. Even though the rates are set here, other things go into the equation.

REP. CAFERRO continued with her concerns. One is: would providers see their rates come down. The other is: would patients be protected. With these bills, would Montana see decreases in malpractice rates. **Ms. Jamison** was hopeful and optimistic that would happen.

{Tape: 1; Side: B; Approx. Time Counter: 24 - 30}

Closing by Sponsors:

REP. ROBERTS closed with some statics. As an oral surgeon, he had talked with a practitioner-owned insurance company. In the last ten years, there have been 5,000 lawsuits filed nationally against oral surgeons. Out of those 5,000 lawsuits, 81% were dropped because there was no malpractice. Another 10% were settled with the feeling there was no malpractice, but couldn't be proven. The remaining 9% that went to court, 73% were won by the oral surgeons. The cost just to deal with these lawsuits is very high. Not everything that has an adverse outcome is malpractice. He urged a do pass.

{Tape: 2; Side: A; Approx. Time Counter: 0 - 2.7}

REP. GOLIE thanked the committee for a good hearing. HB 24 will cut down on litigation and fewer frivolous lawsuits. Premium rates will be stabilized. This will make it possible to keep more physicians in their practices and in the areas in which they practice. The amendments that have been proposed are the

consensus of the major stakeholders. HB 24 was at the request of the Legislative Council and he asked for their support of HB 24.

REP. HARRIS did not close.

{Tape: 2; Side: A; Approx. Time Counter: 2.7 - 5.8}

HEARING ON HB 26

Sponsor: **REP. GEORGE GOLIE, HD 20, GREAT FALLS**

Opening Statement by Sponsor:

REP. GEORGE GOLIE opened the hearing on **HB 26**. This bill clarifies the liability among health care providers. An ostensible agent is a person who has apparent authority to act for the hospital even if the authority has not been confirmed. HB 26 provides that for purposes of a medical malpractice claim, liability may not be imposed on a health care provider for an act or omission by a person or entity alleged to have been an ostensible agent of the health care provider at the time that the act or omission occurred. He offered an amendment to HB 26 and gave an explanation of the amendment.

EXHIBIT(huh20a08)

{Tape: 2; Side: A; Approx. Time Counter: 5.8 - 8.4}

Proponents' Testimony:

Mark Rumans, M.D. Chief of Staff, Deaconess Billings Clinic, submitted his testimony.

EXHIBIT(huh20a09)

{Tape: 2; Side: A; Approx. Time Counter: 8.4 - 11.5}

Mark Taylor, Montana Hospital Association, asserted that HB 26 will have the greatest impact on hospitals. He did offer a conceptual amendment which would not change the bill as such. It would be amending only the preamble of the bill.

{Tape: 2; Side: A; Approx. Time Counter: 11.5 - 12.6}

Mike Foster, representing four Sisters of Charity Hospitals, concurred with the previous witnesses.

Al Smith, Montana Trial Lawyers Association, supported HB 26 with the amendments which they had proposed. They wanted to be sure that hospitals would continue their current practice of requiring any independent professional who practices at the hospital to carry malpractice insurance.

Mona Jamison, The Doctors' Company, stood in support of the bill and the amendments.

Leo Berry, Utah Medical Insurance Association, was supportive of the bill.

Pat Melby, Montana Medical Association, supported HB 26 and the amendments.

Steve Yeakel, Executive Director, Montana Council for Maternal and Child Health, stood in support of HB 26 and the amendments.

Barbara Ranf, Montana Chamber of Commerce, supported HB 26, the amendments and the next two bills as well.

Jacqueline Lenmark, American Insurance Association (AIA), stated that AIA supports the bill and the amendments.

Joe Mazurek, Blue Cross/Blue Shield of Montana stated that his group supports HB 26 and the next two bills as well.

{Tape: 2; Side: A; Approx. Time Counter: 12.6 - 16.4}

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. TOM MCGILLVRAY inquired as to how hospitals screen health care providers to make sure they are qualified. **Dr. Rumans** answered that all hospitals require physicians to go through a credentialing and privileging process where their background, licensing, training, etc. are thoroughly vetted and reviewed by members of the medical staff.

REP. MCGILLVRAY then asked, if the hospital made some error in their credentialing process, would they be liable. **Dr. Rumans** thought that in that situation, there could potentially be some liability on the part of the hospital. He could not comment specifically on the liability in that particular situation.

REP. MCGILLVRAY redirected his question to Mr. Smith. **Mr. Smith** said he did not feel that HB 26 covered this situation unless the hospital had not made sure a physician had purchased medical malpractice insurance.

{Tape: 2; Side: A; Approx. Time Counter: 16.4 - 19.9}

REP. BILL WARDEN asked who had crafted the amendments. **Mr. Smith** stated that the Montana Trial Lawyers Association had done so.

REP. WARDEN followed on and wanted to know the reason for the change on Line 6 of the Title. **Susan Fox, Legislative Staffer**, explained the change was added to the Title of the bill so it would reflect the intention of the amendments. If this would not be appropriate, she welcomed suggestions from Mr. Smith.

{Tape: 2; Side: A; Approx. Time Counter: 19.9 - 21.2}

Closing by Sponsor:

REP. GOLIE offered that in any lawsuit, the big question is, "Who is liable?" The main thrust of HB 26 is to clarify who is liable when many people have attended the patient. This would cut down litigation; and hopefully, this would reduce malpractice premiums and in turn, keep physicians in their current practices.

{Tape: 2; Side: A; Approx. Time Counter: 21.2 - 25.2; Comments: A break was taken and the tape was turned at this time to Side B.}

HEARING ON HB 25

Sponsor: **REP. DON ROBERTS, HD 56, BILLINGS**

Opening Statement by Sponsor:

REP. DON ROBERTS opened the hearing on **HB 25**. This bill would limit health care provider liability for another person's act or omission. This is the bill that is called the "captain of the ship." Currently, the surgeon in the operating room is liable for everyone in the room. HB 25 would change that and say the surgeon is in charge of what he is involved with along with his own staff; but the hospital has their staff and they would be liable for their own people.

{Tape: 2; Side: B; Approx. Time Counter: 0 - 1.1}

Proponents' Testimony:

Pat Melby, Montana Medical Association, told of a case where several errors were made by different providers. The Supreme Court held that the surgeon, even though he had no control over the nurse or the radiologist, was negligent per se, because he was "captain of the ship." HB 25 would give the surgeon the opportunity to explain that it was not his or his staffs' negligence but that it was someone else's negligence that caused the problem. He urged a do pass.

{Tape: 2; Side: B; Approx. Time Counter: 1.1 - 4.3}

Dr. David Chavez, Yellowstone Urology, P.L.L.C., submitted his testimony.

EXHIBIT (huh20a10)

{Tape: 2; Side: B; Approx. Time Counter: 4.3 - 11.6}

Mark Taylor, Montana Hospital Association, stood in support of HB 25.

Mike Foster, representing four Sisters of Charity Hospitals, reiterated that this is an important bill in clarifying the lines of responsibility and authority.

Mark Rumans, M.D., Chief of Staff, Deaconess Billings Clinic, offered their support for this bill.

Mona Jamison, The Doctors' Company and The Montana Society of Orthopedic Surgeons, stood in support of HB 25.

{Tape: 2; Side: B; Approx. Time Counter: 11.6 - 14.2}

Leo Berry, Utah Medical Insurance Association, rose in support of HB 25.

Marti Wangen, Executive Director, Montana Podiatric Medical Association, urged the committee to support HB 25.

Jacqueline Lenmark, American Insurance Association, said that this bill should help with the availability and the affordability of medical malpractice insurance.

Al Smith, Montana Trial Lawyers Association, stated that they are in support of the bill even without amendments.

{Tape: 2; Side: B; Approx. Time Counter: 14.2 - 15.9}

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. TOM FACEY asked Mr. Berry or Mr. Smith if there were any problems in making the effective date "upon passage and approval." He saw no reason to wait till October. **Mr. Berry** concurred with this reasoning. **Mr. Smith** agreed and could not think of a reason to delay the effective date.

REP. MIKE MILBURN wanted the findings of the interim committee to clarify some questions he had concerning these bills. **REP. ROBERTS** explained the committee met many times over the year-and-

a-half period. Much of the information that Dr. Chavez spoke about was presented to the committee. There were testimonies from trial attorneys, practitioners, hospitals, nursing homes, etc. The committee, which was a group of eight, voted on the areas which were the most important. If the vote was not unanimous, or no less than 7-1, a proposed bill was not forwarded to the Legislative Council for their stamp of approval.

{Tape: 2; Side: B; Approx. Time Counter: 15.9 - 22.5}

REP. MILBURN inquired if other states had similar problems as Montana. **REP. ROBERTS** said that information had been given that Montana had a \$250,000 non-economic cap; but the truth is it is not in effect because no one wants to take it to the Montana Supreme Court. They are afraid it would be overturned. States that have an absolute cap of \$250,000 or \$350,000 seem to have a smaller rate of increase in malpractice premiums.

REP. MILBURN felt he was beginning to get the picture and the great need for tort reform. **REP. ROBERTS** informed the committee that the Montana Supreme Court overturned precedence 88 times during the past 10 years. The next state supreme court in the country was Vermont at 33 times. Most state supreme courts were far less than that. If one does not know how a supreme court is going to look at precedence, it is hard to set rates.

{Tape: 2; Side: B; Approx. Time Counter: 22.5 - 24.1}

REP. MARY CAFERRO asked Mr. Smith if he had insight as to why a doctor's malpractice insurance rates would go from \$12,000 in California to \$21,000 in Montana. **Mr. Smith** couldn't say why, but it does point to the fact that there is much that is not known about the setting of insurance rates. California has things other than MICRA in effect. They have an insurance reform that went through in the early 1980's. Part of that reform was if any insurance company asked for a rate increase, that increase could be challenged, by a citizen, before the insurance commissioner. Most of the increases have been challenged and denied or cut by 30% because they couldn't justify the increase.

REP. CAFERRO wanted to know why a doctor's malpractice insurance rates can go up so drastically when they have never been sued.

REP. ROBERTS could not really address the reason why. He related a story that he, himself, experienced. After Dr. Roberts had helped a patient in an emergency situation, the wife, on the way out of the office, said, "I sure hope I don't have to sue you nice people because you took such nice care of us. And, I hope he doesn't have any problems." With that in the back of your mind, one is less than eager to help someone who has no money and has an emergency situation.

{Tape: 2; Side: B; Approx. Time Counter: 24.1 - 28.5}

REP. PAT WAGMAN, in a follow up on **REP. MILBURN'S** question, said that in a legislative newsletter, **SENATOR TESTER**, in a meeting on worker comp rates, asked why he was getting so many questions about why the rates were going up so dramatically. The staffer responded that was due, in part, to decisions handed down by the State Supreme Court. **REP. ROBERTS** reiterated that the Court had not followed precedence, but had interpreted the law differently 88 times. This makes rate setting difficult for insurance companies when they can not predict what a court will do.

{Tape: 2; Side: B; Approx. Time Counter: 28.5 - 30.5}

Closing by Sponsor:

REP. ROBERTS offered that HB 25 was just one more of the building blocks that need to be put in place concerning medical malpractice. The climate on this subject has to be changed.

{Tape: 2; Side: B; Approx. Time Counter: 30.5 - 32}

HEARING ON HB 64

Sponsor: **REP. ROY BROWN, HD 49, BILLINGS**

Opening Statement by Sponsor:

REP. ROY BROWN, opened the hearing on **HB 64** which is an expert witness qualification bill for medical malpractice cases. He gave a short background of the bill and listed the qualifications of an expert witness: Must be licensed in at least one state. Must ordinarily treat the diagnosis or condition. Must provide the type of treatment which is the subject matter of the claim. Can be an instructor at an accredited health professional school. Must have a competency level as a result of education, training and experience in the diagnosis. He offered some amendments to the bill and explained those to the committee.

EXHIBIT (huh20a11)

{Tape: 3; Side: A; Approx. Time Counter: 0 - 7.7}

Proponents' Testimony:

Pat Melby, Montana Medical Association, stood in support of HB 64 and the amendments as well. He explained amendment number five in more detail. The bill, as drafted, would provide that a physician who has a particular specialty or sub-specialty could not testify as an expert witness in a malpractice claim unless they had the same specialty and sub-specialty as the defendant in the lawsuit. The amendment states that a physician cannot testify as an expert witness unless they are in the same specialty and sub-specialty as the defendant UNLESS the subject

matter of that lawsuit has nothing to do with that specialty or sub-specialty.

{Tape: 3; Side: A; Approx. Time Counter: 7.7 - 10.5}

Tom Ebzery, representing the four Sisters of Charity Hospitals: St. Vincent, Billings; St. James, Butte; Holy Rosary, Miles City; and Wheatland Memorial, Harlowton, gave his explanation of the amendments and stood in support of the bill and the amendments.

{Tape: 3; Side: A; Approx. Time Counter: 10.5 - 11.8}

Dr. John Oakley, Neurological Surgeon, St. Vincent Hospital, Billings, submitted his testimony and urged a do pass.

[EXHIBIT](#) (huh20a12)

{Tape: 3; Side: A; Approx. Time Counter: 11.8 - 17.1}

Mark Taylor, Montana Hospital Association, urged a do pass.

Mark Rumans, MD, Chief of Staff, Deaconess Billings Clinic, stood in support of HB 64 and submitted his testimony.

[EXHIBIT](#) (huh20a13)

{Tape: 3; Side: A; Approx. Time Counter: 17.1 - 18.8}

John Hanson, M.D., Eastern Radiological Associates, rose in support of HB 64. He submitted his testimony and made a few comments.

[EXHIBIT](#) (huh20a14)

{Tape: 3; Side: A; Approx. Time Counter: 18.8 - 22}

Al Smith, Montana Trial Lawyers Association, supported the bill and the amendments.

{Tape: 3; Side: A; Approx. Time Counter: 22 - 23.7}

Marti Wangen, Executive Director, Montana Podiatric Medical Association, stood in support of the bill and urged a do pass.

Mona Jamison, The Montana Society of Orthopedic Surgeons and The Doctors' Company, stated that the bill is very important and urged a do pass.

{Tape: 3; Side: A; Approx. Time Counter: 23.7 - 24.8}

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. WILLIAM JONES inquired why the terms "health care provider" and "physician" are both used in the language of the bill. **REP.**

BROWN explained they are similar but there are some health care providers that are not physicians.

REP. JONES commented that dentists are covered under this medical-legal panel. His concern was that the term "health care provider" should be on Lines 24 and 26. **REP. BROWN** encouraged the committee to discuss this in Executive Action and see if it needed to be corrected. He did not think it made a lot of difference.

{Tape: 3; Side: A; Approx. Time Counter: 24.8 - 28.1}

REP. RON STOKER said there were two types of possible expert witnesses that came to his mind. In many medical schools, PhD's are instructors. Would they fit the criteria of an expert witness. **REP. BROWN** concurred that they would as long as they were an instructor of students in an accredited health professional school, residency, or clinical research program related to the diagnosis.

REP. STOKER further stated that in the field of anesthesiology, he believed there are a number of non-medical people that administer anesthesia. Would they be covered in this bill. **REP. BROWN** felt they would have to be a physician. **Mr. Melby** stated that in the practice of medicine, it is carved up. There are Certified Registered Nurse Anesthetists (CRNA) who administer anesthesia. There are podiatrists who can perform surgery. There are physician's assistants, nurse practitioners, etc. who do practice some types of medicine. The intent of the bill made it is appropriate to refer them as health care providers. If it is a CRNA who is the subject of a claim, the expert witness would have to be a CRNA.

{Tape: 3; Side: A; Approx. Time Counter: 28.1 - 31}

REP. JONES inquired if retired health care providers, who worked part time, would pay the same high fees that full-time providers pay. **Ms. Jamison** couldn't provide information for all classes of providers, but she did not believe that a rate would be adjusted whether part time or full time. She offered to get further information for the committee.

{Tape: 3; Side: B; Approx. Time Counter: 0 - 2.3}

REP. JONES pointed out that this drives home the point that a health care provider cannot work part time or even be a consultant because of the high cost of malpractice insurance.

{Tape: 3; Side: B; Approx. Time Counter: 2.3 - 3}

CHAIRMAN ARLENE BECKER invited **SEN. GREG LIND, SD 50, MISSOULA** to speak. **SEN. LIND** clarified the position that a part-time physician would find himself in. There are those who can

practice part time and there is a discounted rate. As the dollar value of the malpractice insurance premium climbs, it becomes a growing portion of one's overhead. It is not practical to work part time. With the loss of insurance carriers, many have had to move from one carrier to another. Those, who are nearing retirement, must completely give up their practice because if they simply assisted in surgery, they would have to buy a "tail" or an extended endorsement on their policy and then purchase new insurance. This forces them out of practice by the loss of carriers in the State of Montana.

{Tape: 3; Side: B; Approx. Time Counter: 3 - 4.7}

REP. DAVE MCALPIN inquired if this bill would apply to both defense and plaintiff expert witnesses. **REP. BROWN** said that it applies to both side.

REP. EMELIE EATON asked if it is difficult to find expert witnesses that would meet these new qualifications in Montana. **Mr. Smith** responded that it might be difficult to find experts in medical malpractice as well as legal malpractice because in a state with such a small population, they don't like to testify against their brethren. It is not that difficult to find a qualified expert out of the state.

REP. EATON further questioned if HB 64 would also be a cost-saving bill. **Mr. Smith** replied that not necessarily, but it might weed out some beginning lawyers who might try to fly by with someone who is not an expert witness.

{Tape: 3; Side: B; Approx. Time Counter: 4.7 - 6.5}

REP. FACEY reiterated his suggestion of amending all these bills to have an effective date upon passage and approval. **REP. BROWN** did not have a problem with that suggestion.

Closing by Sponsor:

The sponsor closed.

A letter from Mike Schweitzer, MD, Laurel, Montana, was sent to CHAIRMAN BECKER and was distributed to the members of the committee. The letter pertained to HB 24, HB 59 and HB 217. It was not mentioned in the hearings. Dr. Schweitzer was in favor of these bills.

EXHIBIT (huh20a15)

ADJOURNMENT

Adjournment: 5:50 P.M.

REP. ARLENE BECKER, Chairman

MARY GAY WELLS, Secretary

AB/mw

Additional Exhibits:

EXHIBIT ([huh20aad0.PDF](#))