



SJR 32 Subcommittee on Medical Liability Insurance

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58th Montana Legislature

SENATE MEMBERS

DUANE GRIMES--Vice Chair
JOHN COBB
BRENT CROMLEY
DEBBIE SHEA

HOUSE MEMBERS

GEORGE GOLIE--Chair
ROY BROWN
KATHLEEN GALVIN-HALCRO
DON ROBERTS

COMMITTEE STAFF

DAVE BOHYER, Research Analyst
JOHN MACMASTER, Staff Attorney
DAWN FIELD, Secretary

MINUTES

November 16, 2003

Billings Deaconess Clinic
Billings, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

COMMITTEE MEMBERS PRESENT

REP. GEORGE GOLIE, Chair
SEN. DUANE GRIMES, Vice Chair

SEN. BRENT CROMLEY
SEN. DEBBIE SHEA

REP. ROY BROWN
REP. KATHLEEN GALVIN-HALCRO

COMMITTEE MEMBERS EXCUSED

REP. DON ROBERTS

COMMITTEE MEMBERS ABSENT

SEN. JOHN COBB

STAFF PRESENT

DAVE BOHYER, Research Director
JOHN MACMASTER, Staff Attorney
DAWN FIELD, Secretary

AGENDA & VISITORS' LIST

Agenda, Attachment #1.
Visitors' list, Attachment #2.

COMMITTEE ACTION

The Committee approved the September 22, 2003, minutes, as written.

CALL TO ORDER AND ROLL CALL

Rep. Golie called the meeting to order at 6:35 p.m. Roll call was taken (Attachment #3); Sen. Cobb and Rep. Roberts were excused.

Introduction of Subcommittee Members and Staff, Overview of Today's Meeting

Rep. Golie introduced the Subcommittee members and staff and welcomed all visitors, both those attending on-site and those attending via teleconference.

Rep. Golie gave a brief overview of the SJR 32 Study of Medical Malpractice Liability Issues and an outline of the meeting. He asked those presenting testimony to limit their comments to a maximum of five minutes, in order to allow everyone an opportunity to address the Subcommittee.

PUBLIC TESTIMONY

Greg Rice, MD, St. John's Lutheran Hospital, Libby, testified that he has been a family physician in private practice for 26 years and has hospital privileges in St. John's Lutheran Hospital. He said his practice began experiencing a crisis approximately two years ago when the malpractice rates increased considerably. Dr. Rice said his rates have jumped from \$15,000 in 2001 to over \$40,000 in 2004.

Dr. Rice testified that one of the three physicians in the practice discontinued his obstetrics practice due to the high cost of malpractice premiums and he has been unable to recruit another doctor to provide obstetrical care.

Sen. Shea asked Dr. Rice if other family practitioners performing the same procedures were paying similar rates. Dr. Rice said if he wasn't offering obstetrical care, his rate would be approximately \$15,000. Sen. Shea said she has a concern that family practice physicians offering obstetrical care may only be paying half the malpractice rates that a licensed OB-GYN may pay for offering the same care and procedures.

Sen. Cromley asked Dr. Rice to describe his claims history for the last three years. Dr. Rice said his practice has not had any claims filed against it in the last three years.

Richard Palagi, CEO, St. John's Lutheran Hospital, Libby, testified that St. John's Hospital is a critical access hospital and local residents depend on it for care, especially in the winter months when both car and air travel are curtailed due to weather conditions. Mr. Palagi said costs increase every year while revenue remains flat, and solvency is a day-to-day battle. Mr. Palagi said:

- His facility's malpractice rates have skyrocketed over 400% in the last four years, increasing from \$28,000 in 2000 to over \$128,00 in 2003.
- Access to insurance carriers is very limited and a competitive market does not exist.
- His facility has had three carriers in the last four years.
- Coverage for emergency room physicians has increased from \$18,000 to almost \$89,000 per year.
- There is no claims history to cause these increases.
- The hospital cannot afford the increases.

Sen. Grimes asked Mr. Palagi if he was aware of any factor associated with smaller hospitals that could be a cause for the rate increases. Mr. Palagi said he was unaware of any circumstance that would indicate that to be the case.

Larry Putnam, CEO, Phillips County Hospital and Family Health Clinic, Malta, testified that:

- Phillips County Hospital is an isolated and small, critical access hospital.
- Medical malpractice rates are a problem for this facility.
- Malpractice rates have increased 334%, rising from \$21,000 in 2001 to \$70,083 for 2003-04.
- In 2003, the hospital had to spread the cost of its premiums over ten months, adding the additional expense of interest to the balance due.
- The increase in premiums limits the resources available for recruiting staff or purchasing equipment.
- There has been an increase in "nuisance" lawsuits over the last several years.
- The Subcommittee should consider the possibility of capping plaintiff's attorney fees for medical malpractice suits and put in place a mechanism for discouraging frivolous lawsuits against hospitals and physicians.

Rep. Brown asked Mr. Putnam if his facility has had any claims filed during the time period of the premium increases. Mr. Putnam said there had been one "nuisance" suit filed in that time period.

Rep. Golie asked Mr. Putnam who is insuring the facility. Mr. Putnam said the facility obtains its medical malpractice liability insurance through the Montana Health Network, which is a pool of 16 Montana hospitals. Rep. Golie asked if that meant his facility was self-insured. Mr. Putnam said the pool recently reconfigured itself into a captive insurance company, which is a self-insured program.

Sen. Grimes asked Mr. Putnam to elaborate on his suggestion of capping attorney fees and to explain why he made that recommendation. Mr. Putnam said he arrived at this opinion after reviewing the material available on the SJR 32 Medical Malpractice website and noticed that Montana has not enacted that particular part of tort reform.

John D. Alexander, Ugrin, Alexander, Zadick, and Higgins, P.C., Attorney for Benefis Healthcare and Great Falls Clinic, Great Falls, reported that the insurance premium rates for the Benefis Healthcare facility has increased from \$420,695 in 2000 to \$1,029,468 in 2003. Mr. Alexander said the company covering the facility for 2003 was not offering coverage to them in 2004 and the facility is searching for a new carrier. He said several insurance carriers are no longer offering medical malpractice policies in Montana, making it even more difficult for physicians and facilities to obtain coverage.

Rep. Golie asked Mr. Alexander to provide the facility's claims history in 2002 and 2003. Mr. Alexander said there had been no increase in the number of claims filed but the settlement amounts have increased drastically. Mr. Alexander said he has taken no cases to trial but the cost of settling these cases has risen two to three times.

Rep. Galvin-Halcro asked if there has been an increase in the number of physicians employed at Benefis Health Care since 2001. Dr. Addison answered that the number of physicians has increased by ten, from 250 to 260, since 2001. Rep. Galvin-Halcro asked if that increase was made in one field or in several. Dr. Addison said doctors had been added in several fields, not in any one particular specialty.

Rep. Golie asked Mr. Alexander if he could reveal the amounts of the settlements of the cases he has handled. Mr. Alexander replied he was not able to share that information with the Subcommittee.

Mr. Alexander also appeared before the Subcommittee on behalf of Montana physicians and hospitals he represents and discussed four issues his group plans to seek legislative action on:

- The issue of "ostensible agency": vicarious liability of a hospital should be limited to employees and actual agents. It is public perception that anyone providing care or services in a hospital is an employee of that hospital. Two recent Montana Supreme Court cases - Estates of Milliron and Butler v. Domin, 2000 - have impacted this issue.
- Consider enacting a statute that would require a plaintiff to submit an expert affidavit of "merit" of case. A number of states have such a law and require a licensed physician to file an affidavit stating there are reasonable grounds for a breach in the standard of care. There are a lot of claims being filed without expert testimony and analysis and this type of law would limit the cases filed to those with merit.
- Consider enacting a statute to encourage arbitration.
- Examine the issue of lack of informed consent, which is vaguely defined and is a component of almost every case. There is very little guidance in this area and the legal definition needs clarification or strengthening.

Mr. Alexander said, in his opinion, the burden on insurance companies writing policies in Montana would be eased if some or all of these suggestions were implemented.

Rep. Brown asked Mr. Alexander to identify the insurance carriers that are no longer offering medical malpractice coverage in Montana. Mr. Alexander said the specific insurance companies he knew of were: PHICO, Physicians's Insurance, Utah Medical Insurance Association, and St. Paul Insurance. Rep. Brown asked if these companies are refusing service to Montana or if they are getting out of the malpractice insurance nationwide. Mr. Alexander said he believed most were discontinuing all malpractice coverage, with the exception of Utah Medical, which, he said,

he thought was refusing to write policies in Montana but still offering malpractice coverage elsewhere.

Sen. Grimes asked Mr. Alexander if he would be available at a later date to discuss how settlement issues may be driving the costs or claims. Mr. Alexander said he would be available whenever the Subcommittee needed him.

Rep. Golie asked Mr. Alexander if he would be available for the January 15, 2004, meeting in Helena.

Rep. Golie asked Mr. Alexander to explain a hospital's policy regarding independent contracting physicians. Mr. Alexander explained that independent contracting physicians have their own insurance and are not insured by the hospital. The problem is that when a physician is alleged to have created a breach in the standard of care, the hospital is frequently brought in because the alleged breach occurred while providing care in the hospital. Rep. Golie asked if it would make sense for the hospital to consider insuring the independent contracting physicians. Mr. Alexander said the underwriters do consider the number of employees working at the hospital but do not factor in any independent contractor positions when writing the policies.

Mr. Golie asked Mr. Alexander if he thought the Montana Medical Legal Panel has been effective in preventing frivolous lawsuits from proceeding. Mr. Alexander said on the whole, he thought the Medical Legal Panel was beneficial but from a defense point of view, most plaintiffs' attorneys think it is a waste of time and do not treat it with the respect it should be treated with.

Rep. Galvin-Halcro asked Mr. Alexander if independent contracting physicians are required to pay a fee to use the hospitals. Mr. Alexander said he did not believe these physicians had to pay to use the facility where they provided services. He said the patient receives a bill from the hospital and from the physician that has privileges to provide services in that hospital, which can be confusing to the patient.

Sen. Grimes asked Mr. Alexander to clarify whether or not the Medical Legal Panel is required to have "expert" testimony when reviewing cases. Mr. Alexander said "expert" testimony or witnesses are not required in Montana, that the Medical Legal Panel simply screens cases, and a case may proceed regardless of the Medical Legal Panel recommendation.

T. Brice Addison, MD, Chief of Staff, Benefis Health Care and Great Falls Clinic, Great Falls, said the physicians he was speaking for feel they are experiencing a significant malpractice crisis and provided the following information:

- In 2001, the Great Falls Clinic malpractice fees were \$607,000.
- In 2002, the premium increased by 305% to \$1,850,000 despite no significant change in claims history.
- In 2003, the Clinic paid \$3,000,000 for malpractice insurance.

Dr. Addison said several obstetricians in the Clinic have discontinued their OB practices, due to the increasing malpractice fees.

Dr. Addison said, in his opinion, awards history has little to do with the increases and suggested

punitive damages are a more likely reason for the increases.

Dr. Addison gave several suggestions for relief of the situation:

- have inducements for carriers to provide malpractice coverage in Montana;
- more extensive tort reform;
- placing caps on awards;
- placing limitations on the use of punitive damages; and
- requiring attorneys and plaintiffs pursuing frivolous suits to pay the court costs.

Sen. Grimes asked Dr. Addison to discuss the emotional toll this is taking on the medical providers. Dr. Addison said it is difficult to assess the trauma experienced by the physicians who have been involved in a medical malpractice case but did say:

- Most court decisions are made in favor of the physician, yet the long process required to reach a court decision is emotionally draining and time-consuming.
- If an award is made, the stigma and implications left on the physician undermine his credibility among his peers and the local community.

Dr. Addison said another consideration must be what happens to availability of services when a physician discontinues his practice.

Rep. Golie asked Dr. Addison if any of the insurance carriers have told him why they were refusing to offer coverage to the physicians, and asked specifically if the reason was related to investment earnings. Dr. Addison said the reasons the carriers gave were:

- the unfavorable judgments awarded in Montana;
- the large dollar amount of malpractice awards;
- the cost of defending and/or settling malpractice cases; or
- they were withdrawing from the malpractice coverage market completely.

Rep. Golie said he believed Montana has a cap on non-economic damages and asked Mr. Alexander to confirm this. Mr. Alexander said Montana has a cap of \$250,000 on non-economic damages.

Bruce Swarny, MD, Family Practitioner, Chief of Staff, Glendive Medical Center,

Glendive, stated he is a rural family physician, he has experienced large increases in his malpractice premiums, it is more and more difficult to meet increasing costs, his practice is no longer profitable, and he will not operate his practice in this manner for much longer.

Dr. Swarny had the following suggestions for the Subcommittee to consider:

- identify "true" malpractice from simply a bad outcome;
- limiting claimant attorney fees; and
- gather information from the insurance companies to determine why they are choosing to leave Montana.

Dr. Swarny said he wanted the Subcommittee to clearly understand that the decisions made by the Medical Legal Panel are not binding and do not prevent a case from proceeding.

Sen. Grimes asked Dr. Swarny what he plans to do if he continues to experience lost earnings every year. Dr. Swarny said he would move his practice to another state.

Scott Duke, CEO, Glendive Medical Center, Glendive, said the Glendive facility is a 25-bed critical access hospital that brought in approximately \$25 million in revenue from patient services in 2002. Mr. Duke said there are two nursing homes and an assisted living facility also associated with the Center.

Mr. Duke provided the insurance and claims history over the last five years (1999-2003) for the Glendive Medical Center:

- malpractice insurance premiums have increased from \$30,638 in 1999 to \$227,849 in 2003, an increase of 744%;
- there have been twelve claims filed and a total of \$98,000 has been paid out for five of those claims;
- the Center has changed insurance carriers three times in the last five years;
- the Center is currently a member of the Montana Health Network captive insurance company;
- the Center has changed its deductible from \$100,000 to \$500,000 in an attempt to lower the cost of the premium and has dropped its umbrella policy as well;

Mr. Duke said the Center has not had to discontinue services yet but that it may soon become necessary.

Mr. Duke said limiting client attorney fees and nuisance lawsuits would provide relief for the situation.

Mr. Duke said the Eastern Montana Veterans' Home in Glendive has also experienced dramatic increases in its malpractice coverage in the same five-year period.

Audrey Stromberg, CEO, Roosevelt Medical Center, Culbertson, said the Roosevelt Medical Center:

- has an annual operating budget of approximately \$3.7 million;
- employs 70 people from the area;
- employs only one physician;
- malpractice rates for the physician have increased from \$2,920 in 2000 to \$15,270 in 2003;
- obstetrics and surgery are not available at the Center;
- the general professional liability policy for the Center has increased from \$32,056 in 2001 to \$58,917 in 2003, an increase of 200%;
- there have been no claims filed in the last ten years;
- the malpractice insurance premium has increased from 21% of the Center's expenses to 42% of its expenses; and
- malpractice insurance now accounts for 2% of the total operating costs, up from 1%.

She said federal Medicaid and Medicare reimbursements have been decreased, adding to the difficulty of operating in a cost-effective manner.

Rep. Golie asked Ms. Stromberg to confirm that the Center does not offer surgery, has had no claims filed against it, and has still experienced rising malpractice premiums. Ms. Stromberg confirmed this. Rep. Golie asked her who the Center is insured with. Ms. Stromberg said the facility joined the Montana Health Network insurance captive in 2002.

Orin Pete, Council, MD, Sidney Health Center, Sidney, said he wished to make two points:

- doctors will be put out of business by malpractice insurance rates and have no control over this expense; and
- malpractice attorneys and suits have the potential to destroy rural medicine.

Rep. Golie asked Dr. Council how many doctors are employed by the Sidney hospital. Dr. Council said there are seven or eight doctors in the area and the majority of them are in private practice. Rep. Golie asked Dr. Council who his insurance provider is. Dr. Council said Utah Medical Insurance Association has been his provider in 2003.

Sen. Grimes asked Dr. Council to discuss the rate increases experienced by the Sidney hospital. Dr. Council said he did not have specific details but knew from conversations with the hospital administrator that there have been significant premium increases for the hospital as well.

Ray Gibbons, Administrator, Teton Medical Center CAH-SNF-NF, Choteau, said the Choteau facility:

- is a seven-bed critical access hospital with a 39-bed nursing home attached;
- does not offer surgery or obstetrical services and employs no physicians;
- has experienced extreme increases in its malpractice insurance rate, paying \$5,000 in 1999 to paying \$53,000 in 2003;
- last had a claim filed against it in 1997;
- has had three different carriers in the last three years and is covered through Utah Medical Insurance Association;
- is considering two different insurance captives for future coverage because Utah Medical Insurance Association may no longer be offering malpractice insurance.

David Henry, CEO, Northern Montana Healthcare, Havre, said one physician and three physician assistants service the area and hospital but if the facility cannot obtain malpractice coverage, the physician and the physician assistants will not continue to service the facility. He expressed grave concerns about the healthcare situation in Choteau, should that happen.

Sen. Grimes said the reports that Utah Medical Insurance Association is considering withdrawing medical malpractice insurance in Montana was a surprise to him. Mr. Gibbons said he would find out if a final decision has been made.

David Henry, CEO, Northern Montana Healthcare, Havre, testified that the Northern Montana Healthcare facility:

- is a 50-bed hospital and has a 150-bed nursing home attached;
- employs 25 physicians who practice in three clinics;
- operates a Home Health program; and
- has averaged \$85,000 per year for the last ten years for claims, settlements, and attorney fees.

Mr. Henry also provided graphs depicting malpractice premium rates for the Northern Montana Hospital physicians and hospital (Exhibit #1).

Mr. Henry discussed tail insurance that the facility recently had to purchase for a retiring

physician. Mr. Henry reported the facility had to pay 200% of his annual premium immediately, which amounted to \$55,000.

Mr. Henry said he was not convinced the Medical Legal Panel works and suggested creating a binding panel of "expert witness" physicians to review cases and set fair settlements.

Mr. Henry said the Subcommittee must be aware of the impact of a malpractice case on the psyche of a physician. He said malpractice issues may cause a doctor to question his capability or commitment to practice and may choose to retire or move their practice to another state. He added that Montana is already having difficulty recruiting physicians to some parts of the state and this type of situation will only increase the difficulty in maintaining the physician base.

Sen. Grimes asked Mr. Henry if his opinion of the Medical Legal Panel has always been skeptical or if he had ever been supportive of the idea. Mr. Henry said he originally thought the Panel was a good way to address the malpractice issue but over the last several years, it has become destructive and disruptive to the system.

Rep. Golie asked Mr. Henry who the insurance provider is for the Center. Mr. Henry said the facility is insured by an insurance captive based in Vermont called the Yellowstone Malpractice Group. The captive is made up of hospitals in Montana, Wyoming, and Idaho. He said the captive rates would increase in 2004 but hoped that the increase would only amount to a cost-of-living increase.

Mr. Henry said the premiums were increasing, the Medicaid/Medicare reimbursements have been decreased by \$1 million, and the revenue base has remained the same.

Sen. Cromley asked Mr. Henry for the name of someone in his captive who could provide specific information on the 2004 rate increase and whether it would be a cost-of-living or a more substantial increase. Mr. Henry said he would get that information to Sen. Cromley.

Randy Penton, Director of Risk Management, Billings Deaconess Clinic, Billings,

submitted two recommendations for tort reform that Billings Deaconess Clinic plans to pursue legislatively (Exhibit #2):

- changes in the punitive damages statute (MCA 27-1-221); and
- changes to the actual and ostensible agency statute (MCA 28-10-103).

Mr. Penton distributed and discussed data on the Clinic's professional and general liability insurance premiums from 1999-2003 (Exhibit #3).

Mr. Penton also provided malpractice rate information for the Billings Deaconess Clinic;

- in 1999, the Clinic paid a malpractice premium of \$1.62 million;
- in 2002, the premium increased to \$9.5 million;
- in 2003, the Clinic formed a captive (BHA Mountain States Reciprocal Risk Retention Group) with eleven other hospitals and the cost of the malpractice insurance premium was decreased to \$6.4 million for primary coverage with a \$25,000 deductible.

Mr. Penton said he recently attended the annual conference of the American Society for Healthcare Risk Management and reported that more carriers would be entering the excess

market but at very high levels and the number of primary carriers would continue to decline. Mr. Penton said the only way to combat the decline of primary carriers was to decrease the number of claims and the severity of claims and to provide adequate tort reform.

Rep. Brown referred to Exhibit # 3 and asked Mr. Penton if the number of doctors changed significantly between 1999 and 2003. Mr. Penton said the number increased very slightly over that time period. He said there were physicians on staff that were not employed by the Clinic in addition to the Clinic physicians.

Dr. Mark Rumens, Chief of Staff, Billings Deaconess Clinic, said 200 physicians are employed by the Clinic and there are approximately 12 anesthesiologists and several open medical staff that could be considered independent contracting physicians.

Rep. Golie asked Mr. Penton if he had an indication of what the 2004 captive rate would be for the Clinic. Mr. Penton said the 2004 premium should be fairly stable with the possibility for a slight decrease. Rep. Golie asked Mr. Penton if the larger Montana hospitals have considered joining the same captive to spread the risk even further and if that was something Mr. Penton was pursuing. Mr. Penton said this has been discussed.

Sen. Grimes asked for explanation of how an umbrella policy fits into the Clinic's insurance plan. Mr. Penton said the Clinic's umbrella policy is its first layer of excess insurance and attaches at \$2.75 million per claim or \$8 million in aggregate. It also attaches over general, automobile, aviation, and employer liability.

Sen. Grimes asked if the excess and umbrella carriers were the same thing. Mr. Penton said this year they were but that is not always the case.

Mark Rumans, MD, Chief of Staff, Deaconess Clinic, Billings, discussed the quality of health care, specifically the difference between medical errors and medical malpractice and how the rising malpractice rates may have a detrimental effect on the quality of health care available to Montanans (Exhibit #4).

Rep. Golie acknowledged Yellowstone County Commissioner Bill Kennedy, Rep. Gary Branae, Rep. Kim Gillan, Rep. Carol Gibson, and Rep. Frank Smith, and thanked them for attending the meeting.

A LEGAL HISTORY OF MEDICAL LIABILITY IN MONTANA, JOHN MACMASTER, STAFF ATTORNEY, LEGISLATIVE SERVICES DIVISION (LSD), HELENA,

Mr. MacMaster distributed and presented *Montana Medical Malpractice Liability Law*, a report that discusses Montana statutes and court cases relating to medical malpractice (Exhibit #5). Mr. MacMaster explained the Montana statutes and discussed the history of medical malpractice laws in Montana.

Rep. Golie asked Mr. MacMaster to give his legal opinion concerning the Montana Rules of Evidence and if it would be constitutional to allow physicians to act as "expert witnesses" and not only decide the merit of a malpractice case but whether or not the case could proceed to the

courts. Mr. MacMaster said such a requirement could be challenged by both the Montana and United States Constitution under the right to a jury trial, as well as under the right to equal protection. Mr. MacMaster said a court challenge would be very likely if such a statute was enacted.

COMMITTEE ADMINISTRATION

Sen. Grimes **moved** to approve the September 22, 2003, meeting minutes as written. The motion passed unanimously on a voice vote.

ADJOURN

With no additional business to discuss, Rep. Golie adjourned the Subcommittee until 8 a.m., November 17, 2003.

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