



# 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 17, 2003

Mike Mansfield Center, St. Vincent Hospital  
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.

## **CALL TO ORDER AND ROLL CALL**

Rep. Golie called the meeting to order at 8:00 a.m. Roll call was taken ( Attachment #3).  
Rep. Roberts was excused and Sen. Cobb was absent.

## **INTRODUCTIONS AND OVERVIEW OF MEETING**

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

Rep. Golie reviewed the SJR 32 Study of Medical Malpractice Liability Issues and outlined the meeting agenda. Rep. Golie asked presenters to limit their testimony to a maximum of five minutes, in order to allow everyone an opportunity to address the Subcommittee.

## **PUBLIC TESTIMONY**

**Glenn Gunther, MD, St. John's Lutheran Hospital, Libby,** stated she is a Family Practitioner/Internist and has practiced medicine for 17 years. Dr. Gunther said she practiced obstetrics until one year ago and discontinued that part of her practice mainly due to the high cost of malpractice premiums.

**Keith Lara, MD, Chief of Staff, Kalispell Regional Medical Center, Kalispell,** testified he has been in practice for ten years and is the head of Emergency Medicine in addition to his duties as Chief of Staff. He stated his facility, particularly emergency medicine services, is most definitely experiencing a crisis in malpractice insurance rates which will soon have an effect on the availability of high risk procedures and services if relief is not provided. He noted that:

- the facility's helicopter service insurance rates have increased dramatically every year for the last several years and is in jeopardy of being discontinued;
- the hospital became self-insured to try to compensate for this increasing expense;
- if relief is not provided in the next year or two, Montana will begin to see limitations on emergency services, obstetrical, neurosurgery, and other high risk procedures; and
- the hospitals and physicians must be included in finding solutions to this problem.

Dr. Lara listed several possibilities for solutions:

- "loser" pays: this would stop the frivolous lawsuits and apply responsibility to attorneys to be more conscientious of the suits they bring forth;
- "no fault" decisions: the insurance company is sued, not the medical establishment.

Dr. Lara said in his opinion, physicians are very dedicated to providing quality service but eventually, economics must be a consideration too.

Sen. Grimes asked for specific numbers of the amount of the facility's medical malpractice insurance rate. Dr. Lara said:

- there had been a 100% rise from 2001 to 2002;
- in 2001, the premium paid was \$580,000;
- in 2002, the premium paid was \$1.1 million.

Rep. Galvin-Halcro asked Dr. Lara to further explain the hospital's self-insured status. Dr. Lara said the hospital joined a consortium of 13 other hospitals, which resulted in the hospital being able to reduce its malpractice insurance rate from \$1.1 million in 2002 to \$465,000 in 2003.

Rep. Galvin-Halcro asked Dr. Lara to provide more details on his two proposed solutions of "loser pays" and "no fault" decisions. Dr. Lara said the majority of the legal systems operating in the world, with the exception of the United States, already have the concept of "loser pays" in place and it is meant to deter attorneys from pursuing frivolous lawsuits. Dr. Lara suggested the Montana Medical Legal Panel be given the authority to make decisions on when to or not to use "loser pays".

Sen. Cromley asked Dr. Lara to further discuss the status of the helicopter service availability. Dr. Lara said the insurance rate just for the helicopter increased from \$110,000 to \$250,000 in one year. He said their safety record is one of the best in the nation, and the rates do not reflect performance or liability, but the litigious atmosphere of the state.

Rep. Golie asked Dr. Lara to confirm that there have been no claims filed against the helicopter service, yet the insurance rates have continued to increase. Dr. Lara said that was correct.

Rep. Golie asked Dr. Lara if he had any projections for what the captive insurance costs would be in the coming year. Dr. Lara said the captive insurance covered only the facility and not the physicians. He said the physicians are responsible for their own and they are looking at eliminating some higher risk services. Dr. Lara said if there is not some type of relief provided soon, some services will be eliminated.

Rep. Golie said he was unclear on who the carrier was for his personal medical malpractice liability. Dr. Lara said the physicians were covered by a variety of carriers such as The Doctor's Company and Utah Medical Insurance Association. He also said those premiums have gone up astronomically and do not reflect the risk in this state.

Rep. Brown asked Dr. Lara if the doctors he was referring to were considered employees of the Kalispell hospital or independent contractors. Dr. Lara said the physicians were considered independent contractors.

Rep. Brown asked if the claims history of the doctors had changed significantly in the last several years or if there had been any unusual circumstances that may have affected insurance rates. Dr. Lara said there had been no claims filed against the doctors in the last ten years.

**Jeff Golleher, Vice President of Finance, Holy Rosary Healthcare, Miles City,** said this issue is viewed as a very serious matter and it has had a financial impact on his facility. Mr. Golleher said Holy Rosary's professional and general liability insurance premiums increased significantly from approximately \$50,000 in 2002 to over \$500,000 in 2003.

Mr. Golleher said the hospital's claims history has been very good and has not changed over the last few years. The huge increase has been difficult for the hospital to absorb and unfortunately, some of the costs have been passed on to the patients through rate increases.

Mr. Golleher asked the Subcommittee to consider the many ramifications of these rate increases:

- If the rapidly rising costs of malpractice insurance and the declining availability of insurance carriers continue, rural Montana will lose existing physicians and it will become even more difficult to recruit new doctors.
- The loss of physicians in rural Montana would create a very serious access problem for its citizens.

Rep. Golie asked Mr. Golleher to identify the medical malpractice carrier insuring the hospital. Mr. Golleher said currently the hospital is self-insured with nine other affiliate hospitals across the country. He said some of the physicians employed by the hospital are covered under a conglomerate and others are covered through the two insurance carriers that are operating in Montana.

Mr. Golie asked Mr. Golleher to provide the name of the captive insuring the hospital. Mr. Golleher said the name was The Sisters of Charity.

**Randall Rauh, MD, Holy Rosary Healthcare, Miles City,** testified he is a board-certified OB/GYN specialist and has practiced for 28 years, 23 of them in the Miles City area. He is a Fellow of both the American College of OB/GYN and of the American College of Surgeons. He has co-authored five articles on the effects of malpractice litigation on rural medical health. He said he considers himself to be an "endangered species" for two reasons:

- women prefer a female physician for their healthcare; and
- he is in independent practice in a very rural and sparsely populated area, which forces him to acknowledge economic realities sooner rather than later.

Dr. Rauh cited examples of procedures for which Medicare/Medicaid reimbursements have decreased and listed several business expenses that have significantly increased. He said the combination of those factors, coupled with the enormous rate increases in malpractice insurance, result in increasingly difficult circumstances in which to practice medicine in Montana.

Dr. Rauh also provided data on his liability insurance history and rates:

- In 1985, he paid \$2,386 for malpractice coverage from Utah Medical Insurance Association.
- In 2002, he paid \$55,560 for malpractice coverage from the same carrier.
- In 2004, he will pay \$69,450 for malpractice coverage.
- There has not a claim filed against him in several years.
- These rates are standard rates for OB/GYN physicians.

Dr. Rauh said the purchasing power of corporate medicine is much stronger than that of independent physicians, having an insurance rate of approximately 25% less than independent physicians.

Dr. Rauh said recruiting is a major issue in a rural area such as his and becomes even more difficult when malpractice rates are so unpredictable. Eastern Montana is medically isolated, a physician is frequently required to be on call 24 hours a day, seven days a week, and because of the population base, there is not the capacity to raise the level of income to offset the liability fees.

Dr. Rauh said he had identified several solutions to remedy his situation:

- retire or move to an administrative position;
- join a larger practice;
- relocate his practice to a "more friendly" state;
- eliminate high risk services and procedures;
- reduce practice costs such as professional liability insurance, which can only be accomplished through legislative action and meaningful tort and court reform.

Dr. Rauh said he does not believe the rate increases are due to a poor investment market history but is due to insurers' losses on medical malpractice claims.

Sen. Grimes asked if his insurance provider had given him any reasons for the rate increases. Dr. Rauh said the reason given has been an increase in the number of claims and the dollar amount of the claims.

Rep. Golie asked Dr. Rauh to describe his claims history. Dr. Rauh said in the last seven years, there have been no obstetrical claims filed against Holy Rosary.

Rep. Golie asked Dr. Rauh what explanation Utah Medical Insurance Association had given him for the increase in his personal malpractice rates. Dr. Rauh said Utah Medical is a physician-owned insurance company and the explanation given him was "they were all in this together". Dr. Rauh said physicians are rated by specialty and there are times when physician rates may individually go up, based on the loss experience of that particular physician.

Sen. Cromley asked Dr. Rauh to clarify what he meant by "standard" rates: did that mean standard for the state or for the nation. Dr. Rauh said his rates are standard rates for OB/GYN physicians insured by Utah Medical in Montana. Sen. Cromley asked if Dr. Rauh knew how these rates compare to other states' rates. Dr. Rauh said it was well below some metropolitan areas but well above other areas such as Oklahoma.

Rep. Brown asked Dr. Rauh to define what he meant earlier when he mentioned relocating his practice to a "more friendly" state. Dr. Rauh said he retains his license in Oklahoma and would consider moving his practice there because even with the rates doubling there, they are still considerably less than the rates offered in Montana.

**Joseph Erpelding, MD, Orthopaedic Surgeon, St. Vincent Hospital & Healthcare, Billings,** distributed a synopsis of the medical malpractice problem in Montana that he had

prepared and discussed it with the Subcommittee members (Exhibit #1). He concluded his synopsis by stating that Montana ranks second in the nation in premium rates for orthopaedic surgeons and Montana currently has only two insurance carriers offering insurance coverage to orthopaedic surgeons for 2004. He added that Wyoming is experiencing even more difficulty than Montana in malpractice issues and currently has only one insurance carrier offering malpractice insurance to Wyoming physicians.

Sen. Grimes asked Dr. Erpelding to discuss how the issue of having to practice defensive medicine has affected the psyche of the orthopaedic community. Dr. Erpelding said he believes most physicians are still focused on providing high quality care, but there is the concern that if a case arises that has potential for litigation, the physician often refers that patient to a larger facility, usually out of state. Dr. Erpelding said this often creates a hardship for the patient and is unfortunate, because in most cases, the Montana physician has the capability, expertise, and knowledge to treat the patient.

Sen. Grimes asked Dr. Erpelding to speak for the orthopaedists of Montana and tell him if he thought there had been an increase in the number of frivolous claims in recent years. Dr. Erpelding said he could not speak to that but said the National Practitioners Data Bank (NPDB) could provide information. Dr. Erpelding explained that all claims filed are automatically submitted to the Bank. If a claim is settled before it is filed and the amount of the settlement is over \$30,000, it also is registered with the Data Bank.

Dr. Erpelding said doctors do not enjoy going to court and usually will settle before going to court. He said he personally has had two claims filed against him in 22 years and the national average for his specialty is one claim every 3.4 years.

Sen. Shea said the overlying theme of the meeting seems to be that the majority of physicians testifying have had few or no claims filed against them in the last few years, they are charging standard rates, and yet are experiencing a malpractice crisis. Sen. Shea asked Dr. Erpelding to share his opinion on the possible causes for this. Dr. Erpelding said the cause of the crisis is multi-faceted and said actual instances of medical malpractice, stock market history, and claims rates and amounts all are factors.

Rep. Golie asked Dr. Erpelding if the Montana orthopaedic surgeons have considered forming an insurance captive. Dr. Erpelding said he didn't think forming a captive was the solution and some doctors have even considered carrying no malpractice coverage at all and simply taking their chances.

Rep. Golie asked Dr. Erpelding if he thought claims and settlement activity in other states were affecting Montana rates. Dr. Erpelding said he did not think this was the case.

Rep. Brown asked Dr. Erpelding to provide more information on the malpractice situation in Wyoming. Dr. Erpelding said he would provide the information to the Subcommittee.

**Douglas Ezell, MD, OB/GYN, St. Vincent Hospital & Healthcare, Billings**, stated he has practiced obstetrics and gynecology in Montana for 22 years and discussed several points he wished to make to the Subcommittee. Dr. Ezell's presentation also included his recent liability insurance rate and several concepts he wished to have the Subcommittee consider (Exhibit #2).

Sen. Grimes asked Dr. Ezell to further discuss the plight of rural patients having to travel long distances to obtain obstetrical care. Dr. Ezell said as more and more doctors continue to discontinue high risk procedures and services, such as obstetrics, more and more Montana women will have to travel farther and farther distances to receive this care. He agreed with Dr. Rauh that it is getting more difficult to find physicians that are willing to start a practice in Montana. He added that nationally medical school admissions are down, as are applications to OB/GYN residency programs.

**Michelle Hood, President/CEO, St. Vincent Hospital & Healthcare, Billings,** submitted testimony and discussed the medical malpractice crisis as it relates to patients, patient care, and providers (Exhibit #3).

Sen. Shea asked Ms. Hood if she could provided any more specific details on the malpractice measures being considered in Wyoming. Ms. Hood said she did not have more specific information. Sen. Shea suggested the Subcommittee research what Wyoming is doing.

Sen. Grimes asked Ms. Hood how risk management has affected the administrative decisions she makes and how these decisions, in turn, have affected the medical consumer. Ms. Hood said several years ago, Saint Vincent had no staff or resources allocated specifically for risk management but today its insurance captive employs a full-time attorney with a staff of four whose main function is dealing with risk management issues. Ms. Hood said risk management is a huge consideration when evaluating the potential of a new program and in determining what programs to offer.

Sen. Grimes asked if cost shifting to commercial insurers has been a factor in the St. Vincent facility. Ms. Hood said St. Vincent's has held its price increases down to 0-5 % over the last several years, even though costs have increased dramatically. She said St. Vincent's feels very strongly that it must play a major role in holding down the costs of healthcare so that small businesses can continue to offer insurance coverage. Ms. Hood said every attempt is made to find an internal avenue of dealing with these costs, rather than passing them onto the consumer. Sen. Grimes asked Ms. Hood to estimate how much costs would rise if she could pass along the costs to the consumer and not absorb them. Ms. Hood said the facility had experienced \$2 million in vacancy savings that would not have happened if the facility had passed rising costs on to the consumer.

Rep. Golie asked if the other hospitals in the insurance captive were Montana hospitals. Ms. Hood said there were two other Montana hospitals and the remaining hospitals were out-of-state facilities. Rep. Golie asked if the other states' rates had an effect on the Montana rates. Ms. Hood said there was little effect on Montana rates.

Rep. Brown asked if the "ostensible agency" or "independent contractor" laws presented problems for the facility. Ms. Hood said those laws have been a factor in just a few cases but overall, did not present many problems.

**John Oakley, MD, Neurological Surgeon, St. Vincent Hospital & Healthcare, Billings,** distributed a handout and discussed the medical malpractice insurance issue as it specifically relates to the practice of neurological surgeons (Exhibit #4).

Sen. Grimes referred to Page 4 of Exhibit #4, in which The Doctor's Company withdrew insurance coverage from 10 Washington neurosurgeons and asked if Montana was a friendlier state than Washington for neurosurgeons. Dr. Oakley said he thought so and said it was his understanding that The Doctor's Company has chosen not offer coverage to neurosurgeons in states that do not have a cap on pain and suffering settlements.

Sen. Grimes said because of Montana's previous tort reform, Montana was not in as severe a crisis as Washington and asked Dr. Oakley if additional tort reform would help lessen the degree of the crisis Montana is experiencing. Dr. Oakley said in his opinion, this would not solve the problem because while The Doctor's Company was not dropping neurosurgeon coverage, they were refusing to insure any new neurosurgeons.

Sen. Grimes said there was some sentiment in the legislature that the medical malpractice issue was a national problem and that Montana could not solve it. He asked Dr. Oakley if he thought Montana could impact the issue on a state level. Dr. Oakley said tort reform would be the best approach and recommended it be approached both from a national and state level.

**Scott DeMars, MD, Podiatrist, St. Vincent Hospital & Healthcare, Billings,** read a letter he recently received from the PICA Group insurance company that informed him it would no longer be offering medical malpractice liability insurance coverage to him or his practice (Exhibit #5).

Dr. DeMars said he has applied to three different insurance companies in five weeks and has not yet been able to retain coverage for his practice. He said he will have to make a decision soon, that it is very risky to practice without coverage, that he will lose hospital privileges without coverage, and that he does not want to leave Montana but may be forced to if insurance coverage can't be found.

Rep. Brown asked Dr. DeMars if he would be willing to contact the insurance company and ask it to define what it considers to be "meaningful legal reform". Dr. DeMars agreed to do this.

Sen. Grimes asked Dr. DeMars to illustrate what he will do if he can't find coverage, how this will affect the Montana consumer, will patients have to travel out-of-state, seek another specialist, etc.

Dr. DeMars gave as an example the importance of foot care that podiatrists provide to diabetics. Dr. DeMars said there would likely be a rise of hospitalizations, foot infections, and amputations in diabetics if access to podiatrists was limited or unavailable.

Sen. Cromley asked for a claims history of podiatrists in Montana. Dr. DeMars said it was relatively low and that he personally had not had a claim filed against him in over 10 years.

**John Cook, MD, General/Vascular/Thoracic Surgeon, St. Vincent Hospital & Healthcare, Billings,** distributed and discussed a bullet sheet of facts containing data and a graph illustrating the magnitude of the medical malpractice liability insurance crisis being experienced on a state and national level (Exhibit #6).

Sen. Shea asked Dr. Cook if he shared Dr. Oakley's opinion that Montana rates are being driven up by settlements in other states and if there is a need for additional tort reform, both on a state

and national level. Dr. Cook said he agreed with that assessment. Dr. Cook also commented that regional needs should be taken into consideration, if national reforms are enacted.

Sen. Shea asked Rep. Golie if the SJR 32 Subcommittee or the Montana Legislature could look into this approach.

**Evan Buchan, MD, Emergency Medicine, St. Vincent Hospital & Healthcare, Billings,**

discussed his views of the precarious position emergency medicine providers are in due to the insurance crisis (Exhibit #7). Dr. Buchan discussed limited access and how it has impacted an area in southern Pennsylvania:

- a town of about 40,000 with one hospital;
- had five orthopedists, now down to one;
- had six OB/GYN's, now down to three,
- no neurological surgical services available; and
- many patients must be referred to Pittsburgh; and West Virginia to receive specialty care.

Dr. Buchan said not having specialty medicine readily available creates a nightmare situation for emergency care physicians and cautioned this same situation could easily happen in Montana if action is not taken soon.

**Mitch Gallager, MD, Radiologist, St. Vincent Hospital & Healthcare, Billings,** submitted and discussed his past premium rates and The Doctor's Company historic rate information (Exhibit #8). Dr. Gallager noted that in over 20 years, he has had only one claim filed against him. He said it went to the Montana Medical Legal Panel and received a unanimous vote of support from the Panel, yet the claim remains open and it will remain open as long as the plaintiff's attorneys decide to keep it open. Mr. Gallager's insurance "free claims" discount was eliminated as a result of this action by the plaintiff's attorney and his premiums have increased significantly. He also said only two carriers were currently providing coverage to radiologists in Montana and there would be only one providing coverage in 2004.

**Julie Hugelen, MD, Family Practice, St. Vincent Hospital & Healthcare, Billings,** distributed several documents relating to family care issues and the major problems being experienced by family physicians (Exhibit #9 - personal testimony, Exhibit #10 - FP Report: Medical Liability Insurance Turmoil Sparks Discussions in Several States, Exhibit #11 - FP Report: Medical Liability Crisis hits Family Practitioners Hard, and Exhibit #12 - Family Practice Management - October 2003: Understanding the Physician Liability Insurance Crisis).

Sen. Grimes asked Dr. Hugelen if the impact of no preventive care results in more significant medical problems later. Dr. Hugelen said preventive care is critical to all patients, but especially to prenatal patients. She said the number of prenatal patients not seeking a physician's care until delivery is rising, and that fact increases the risks substantially for the mother, the child, and the physician.

**Neal Sorensen, MD, Internal Medicine, St. Vincent Hospital & Healthcare, Billings,** submitted and discussed testimony on behalf of internists and said there is no question rising malpractice costs have affected him and many other internists (Exhibit #13).

**Mike Brown, MD, Pathologist, St. Vincent Hospital & Healthcare, Billings,** testified he has been in practice for over three years, is President of the Montana Society of Pathologists, is a member of the College of American Pathologists, and is considered to be in the moderate risk category. Dr. Brown:

- expressed grave concern about the instability of insurance rates and how this instability has affected and will continue to affect his practice;
- said the high costs of liability insurance will result in physicians ordering unneeded tests on patients due to the potential threat of liability, thus increasing the cost of medical care for both patients and society;
- said his main concern is for young physicians looking to establish a practice and not able to afford the high premiums or not be able to gain coverage at all; and
- said the quality of care issue for pathologists is more than an issue of patient access - that diagnostic accuracy is essential.

**Keith Schultz, MD, Anesthesiologist, St. Vincent Hospital & Healthcare, Billings,** read a prepared statement as a representative of the anesthesiologists and of the seriousness of the medical malpractice liability insurance issue (Exhibit #14).

**Mike Foster, St. Vincent Hospital & Healthcare, Billings,** submitted a letter he recently received from Dr. Lashman Soriya, MD, of the Northern Rockies Brain and Spine Center regarding its medical liability premiums and the concern of the Center's ability to continue paying its premiums (Exhibit #15).

**Richard Gould, MD, St. James Healthcare, Butte,** presented the following testimony to the Subcommittee:

- He is a graduate of the WWAMI program and has practiced in Montana since 1992 as a general surgeon.
- He was one of four doctors named in a malpractice suit in 2000 but was dismissed from the suit in 2003.
- Despite that, the plaintiff's attorney continued to attach him to the suit. Dr. Gould ultimately was dismissed from the suit, there was no judgment against him, and yet his insurance company was forced to spend \$68,000 to defend him.
- Dr. Gould said he recognized the need for patients to have an avenue for restitution from doctors who do commit malpractice, but in his opinion, "the pendulum has swung too far the other way" and said doctors are discouraged from practicing because of situations such as his.

Dr. Gould said he was also served with another suit that was filed in District Court. It was determined that the plaintiff named the wrong doctor and he was dismissed from the suit. Dr. Gould said in the meantime, his name had appeared in a local newspaper article, it cost his insurance company \$14,000 to clear him, he has received no apology from the plaintiff or the plaintiff's attorney, and has suffered damage to his professional reputation. Dr. Gould said clearly this was an example of a frivolous suit and said he would like the Subcommittee to consider allowing "countersuit" insurance companies to do business in Montana. He said it was available in other states and would be instrumental in reducing the number of frivolous lawsuits.

Dr. Gould listed three recommendations he wished to have the Subcommittee consider:

- placing a cap on non-economic damages and reinforcing the existing cap;

- provide countersuit insurance; and
- speed up the legal process to decrease costs, both emotional and financial, to the physicians and patients.

**Dennis Salsbury, MD, St. James Healthcare, Butte**, testified that he was speaking as a physician practicing in Butte, Montana. Many physicians are experiencing increasing costs and decreasing income, and are dealing with the growing population of uninsured patients. Dr. Salsbury discussed the crisis being experienced by both his own practice and Butte physicians in general:

- His practice, the Rocky Mountain Clinic, has an excellent record and yet received quotes from two prospective new carriers containing premium increases of 150% and 200%, respectively.
- Three of the four physicians in the Clinic perform high-risk obstetric care, the Clinic pays approximately \$100,000 for malpractice insurance, and it takes the fees from over 50% of their 200 yearly deliveries to break even on their care costs.
- One of the physicians left the practice due to the high cost of malpractice premiums.
- An OB/GYN practicing in Butte discontinued the obstetrical portion of his practice and offers gynecological services only.
- Another OB/GYN in Butte is contemplating closing his practice completely due to the increasing risks and associated costs.

Dr. Salsbury suggested the Subcommittee study the reforms recently adopted in California and Texas, encouraged state support of federal reform, encouraged consideration of joint and several liability reform, and said physicians and hospitals must also take responsibility in policing themselves to ensure quality care.

Sen. Shea asked Dr. Gould which other states offer "countersuit" insurance. Dr. Gould said he did not have a detailed list of states that offer this coverage but he estimated that 20 - 30 states offered this type of insurance.

Sen. Shea said the Subcommittee had heard testimony from many doctors that they have an excellent practicing record and yet Montana is listed as sixth in the nation in the number of claims. She asked Dr. Salsbury to tell her where these claims are coming from. Dr. Salsbury said he needed to clarify that while his clinic has not been free of claims, for the volume of patients treated and the specialties provided, the insurance carrier deemed them to have an excellent record. Dr. Salsbury explained that once a claim is filed, it usually goes to the Montana Medical Legal Panel, it is heard there and a decision is made whether there should be a vote for or against the plaintiff, or if there should be a dismissal of that case. Dr. Salsbury said the decision made by the Montana Medical Legal Panel is nonbinding and leaves doctors and insurance companies vulnerable and liable for large expenses needed to fight these charges.

**James Kiser, CEO, St. James Healthcare, Butte**, addressed the Subcommittee with the following points:

- Holy Rosary has seen its general professional liability insurance increase 1,000%, St. Vincent's has seen an increase of 1500%, and St. James has seen similar increases as well.
- Most providers have reported huge malpractice increases.
- Radiologists, pathologists, and OB/GYNs are particularly distressed.

- Physician recruiting and retention is increasingly difficult.
- The emergency room has experienced gaps in coverage by physicians due to physician burnout and malpractice insurance.
- Montana communities have an average commercial insurance rate of 34%, Butte's population of commercially insured citizens is only 20%.
- St. James was \$700,000 over budget in the first four months of its fiscal year and has provided \$1.2 million of charity care.
- The hospital cannot bear any additional costs burdens.

Mr. Kiser pointed out the economic impact that the health care industry brings to Montana:

- agriculture brings in \$1.9 billion in revenues,
- tourism brings in \$1.2 billion in revenues, and
- healthcare brings in \$3.3 billion in revenues.

Sen. Grimes stated he thinks he severely understated the medical malpractice liability insurance crisis in Montana, as presented in his 2003 bill that eventually became SJR 32. He asked Mr. Kiser if Montana was in imminent peril of being able to provide basic medical services to its citizens. Mr. Kiser said "imminent peril" was a very apt description of the situation and while he was appreciative of the Subcommittee hearing this issue, it should have been undertaken long ago. He said most hospitals are facing the issues of escalating costs and decreasing reimbursements.

## **REPORTS ON SURVEY RESULTS**

**Montana Hospital Association, Dick Brown**, presented an overview of the survey results of MHA members, as requested by the SJR 32 Subcommittee, (Exhibit #16) and then displayed and discussed the specific data and details of the survey in a Power Point presentation to the Subcommittee(Exhibit #17 - MHA Professional Liability Survey).

Rep. Galvin-Halcro referred to Page 13, Slide B, of Exhibit #17 (Policy Premium compared to Claims Awards), and asked Mr. Brown if the claims awards were negotiated between the parties involved, court ordered, or a combination of both. Mr. Brown said he could not provide that information because the survey did not ask for it.

Rep. Galvin-Halcro asked Mr. Brown if he had suggestions for reforming the Montana Medical Legal Panel. Mr. Brown said a specific comment received from the majority of the MHA members was that the Montana Medical Legal Panel should be given the authority to make binding decisions. He said the MHA members feel that if the Panel makes a unanimous or majority decision regarding a malpractice case, that ruling should be the final ruling on the validity of a malpractice case. Rep. Galvin-Halcro asked Mr. Brown to comment on the expertise of the Montana Medical Legal Panel and if that issue should be addressed legislatively. Mr. Brown replied that there is need for clarifying the process for identifying who should serve as an "expert witness" for each case.

Rep. Brown also referred to Page 13, Slide B, Exhibit #17 (Policy Premium compared to Claims Awards), and said the information could be deceiving if there was lag time, or because not all settlements are included, or if the facilities involved were reluctant to respond to the survey. He

asked Mr. Brown if any of those possibilities were factors in assessing the information presented in Slide B. Mr. Brown said there was always a chance that facilities either did not respond to a question or fully disclose information, so that there was a chance that numbers could be slightly skewed. Mr. Brown said also that as the situation matures, the numbers would likely go up on an annual basis. Rep. Brown said this was a concern because premiums are supposed to be based on experience and if Montana is sixth in the country for frequency of claims, yet the claims paid total is a fraction of what the premiums are, then something is askew. He said he was not sure how much validity could be put into that particular graph.

Sen. Cromley referred to Page 13, Slide A, Exhibit #17 (Payments on Claims), and asked Mr. Brown to clarify that some hospitals completed this portion of the survey and others chose not to. Mr. Brown confirmed that some of the facilities did not fill out that portion of the survey. Sen. Cromley asked if Mr. Brown could adjust the graph to show the amount of claims paid versus the premiums paid by the hospitals that completed this portion of the survey. Mr. Brown said he would do that and have the corrected graph within the week.

Sen. Shea said she would like to know, in regard to Page 13, Slide A, Exhibit #17 (Payments on Claims), why facilities chose not to respond to that particular question and asked if there was another venue available to access that information. Mr. Brown said the information would be available directly from the insurers. Sen. Shea commented that there was quite a discrepancy between data before 2000 and data after 2000. Mr. Brown said there could be several different factors, such as the fact that plaintiffs have three years to file a claim and that "real" numbers may not be available for several years yet.

Rep. Golie referred to Page 12, Slide B, Exhibit #17 (Total Claims Reported by Participating Facilities), and asked if that portion of the survey had been completed by all of the facilities. Mr. Brown said he would check to be certain and added that sometimes if there was no response, it simply meant that there were no reported claims. Rep. Golie said it appeared to him that there wasn't a clear connection between the number of claims made, premium amounts paid to insurers, and awards paid out for claims. Mr. Brown agreed with Rep. Golie's conclusion.

**Montana Medical Association, Pat Melby, Esquire, Brian Zins, Esquire, and Gerald Neely, Esquire,**

**Pat Melby, General Counsel for the Montana Medical Association (MMA)**, said he would like to address the question of "expert witnesses" serving on the Montana Medical Legal Panel. He said he personally had served on a number of panels as a representative of health care providers, and said he has observed that the physicians that serve as "expert witnesses" have always been from the specialty or field of practice of the physician in question. He said he did not think any judge would allow a physician from one specialty to act as an expert witness for another specialty.

Mr. Melby said, with the Subcommittee's permission, **Gerald Neely, Special Counsel, MMA**, would discuss the MHA survey results of medical providers.

Mr. Neely said his first reaction to the request of the Subcommittee to conduct this survey was that it might be a waste of time but as he compiled the data, there were a number of features

that provided new and startling information. Mr. Neely said there was a bit of a factual predicate that must be set before explaining the survey results and went on to say:

- He was surprised by the new information revealing the bulk of the physicians and hospitals, in essence, "own" their own insurance carriers. He said he didn't have exact percentages but he estimated more than 70% of Montana physicians are insured by their own carriers.
- This creates, in his opinion, a contradiction in the medical malpractice liability insurance issue and a question of why there has been no discussion on these self-insured programs.
- The focus and concern must be on these carriers who represent the bulk of the hospitals and physicians, and where are they in the percentages.
- Another crucial factor is the notion held by some that there has been a significant increase in the claims made in Montana. This has been totally contrasted by the testimony, witness after witness, that physicians and facilities have not experienced a rise in the number of claims. Mr. Neely stated, "The fact of the matter is that Montana has an absolute recent decline in the number of claims per physician."
- There is one source of data for this information, which is the Montana Medical Legal Panel. Mr. Neely said, to his knowledge, there was no contrary authority published anywhere in the United States that indicates that the rate of claims in Montana has increased.
- The National Practitioner Data Bank, as discussed earlier by Dr. Erpelding, doesn't collect information on the rate of claims, only the information on the rate of paid claims.
- Per 1000 physicians, in an absolute sense, the rate of claims and the rate of cases filed are both diminishing in Montana. In 2000, Montana had a total of 93 paid claims, as reported by the National Practitioner Data Bank. In 2001, Montana had 67 paid claims and in 2002, Montana had 69 paid claims. Mr. Neely said if the number of claims paid in Montana is divided by the number of people in Montana, and if that number is compared with the same number from other states, the rate of paid claims in Montana is high but not in absolute numbers; only in dollars paid out on those claims.

Mr. Neely said he thought an awareness of those basic facts from a few documented sources would resolve some of the concerns expressed by both the people testifying and the Subcommittee members themselves.

Mr. Neely said in Montana, there is a lower number of absolute claims, a lower rate of claims and rate of paid claims, and there have only been three claims paid out in excess of \$1 million from 1995 through the current year.

Mr. Neely said in examining the data of the Utah Medical Insurance Association and the data from The Doctor's Company, a large loss problem is not indicated. Mr. Neely said he knew for a fact that, according to the UMIA rate card, premium rates were only increased 25% last year and that The Doctor's Company had actually reduced premiums in some specialties. He said he found it puzzling that doctors had reported such huge increases in insurance premiums, in light of this information, and said the testimony heard last night and today did not "square" with the insurance company information.

Mr. Neely then explained and discussed the detailed MHA survey results as reported in Exhibit #18 (Specialty Survey - Medical Liability Insurance - Neurosurgeons, Orthopaedic Surgeons, and Obstetrics-Gynecology).

Committee discussion of Mr. Neely's information centered on:

- the reasons why carriers are leaving the Montana market and the impact this has had in Montana;
- that some doctors are voluntarily changing carriers while others are forced to change and the potential impact this may have on insurance rates;
- the high ranking Montana has received for total number of claims contradicting the data showing that the number of claims in Montana is dropping;
- clarification that the National Practitioner Data Base collects information only on paid claims, not claims filed, and how, due to lag time, this missing data may affect the final numbers; and
- if there is a need for physicians and facilities to increase their malpractice coverage.

Sen. Grimes asked Mr. Neely if the reason that carriers are leaving is because other carriers have pulled out. Mr. Neely responded that some doctors are forced to change carriers because the carrier is no longer doing business in Montana - that is not voluntary on the doctor's part. But if St. Paul was under crisis in the market and, as a result, showing negative underwriting profit, then it was a good decision for them to withdraw from the market. The consequence is the doctor is forced to make a change. Physicians face two types of access limits to carriers: those that voluntarily change carriers and those that are forced to change carriers involuntarily. The group that is on the cover of the report of Exhibit #18 went from Zurich Switzerland to St. Paul to UMIA, so they intentionally changed to St. Paul, and involuntarily changed to UMIA. Mr. Neely said, historically, carriers come and go, as the market dictates. UMIA may have a situation where they undercharged compared to other carriers and now have to catch up. That offers no solace for those who have to pay these premiums.

Sen. Grimes asked Mr. Neely to explain how Montana can be ranked fourth in the nation for total number of claims and yet the number of claims filed in Montana is dropping. Mr. Neely explained:

- The National Data Bank tracks paid claims only, not the number of claims filed. The information provided earlier by the Billings physician was incorrect in stating it tracked both categories.
- When the NPDB data states that Montana has a high rate of claims per 100,000 population, it is referring to paid claims only.
- That was how he reconciled the differences. He gave a comparison of the states of Louisiana and Montana: Louisiana has the same number of claims as Montana does, but Montana has fewer people so the rate of paid claims is higher per capita in Montana.
- The vast majority of claims paid in Montana are small claims.
- Insurance carriers are the only source of information Montana has for determining the actual numbers claims made.
- This information is not tracked on a national level so there is not a national source available.
- The Montana Medical Legal Panel data show how many claims occur and the drop in absolute numbers of claims: the number of claims per 1,000 physicians has actually has been declining.

Rep. Golie said Montana has not had any claims over \$2 million, yet many physicians and facilities are taking on that kind of coverage, and asked Mr. Neely why they would do that. Mr. Neely said he did not know why they would do that, but speculated that someone had told them they might need it. Mr. Neely referred to a very recent Montana malpractice case which involved multiple carriers and large dollar amounts. Mr. Neely said that he didn't have details but if it was a multi-million dollar claim, perhaps that is why doctors are increasing their coverage. Data show that 25% of Montana doctors have coverage in excess of \$2 - \$4 million and 30% have \$1 - \$3 million. They are overpaying because there is not the claims history to support the need for this level of coverage.

Sen. Grimes asked if the MHA data included the out-of-court settlement numbers. Mr. Neely said the National Practitioner Data Bank captures all the settlements and this information is included in the MHA survey, but that it is only current through 2001. Sen. Grimes asked if there was a lag time on gathering that data. Mr. Neely said on the NPDB website, the last annual report posted was for 2001, The only other source we have is interviews of carriers. We are missing pay outs for the remainder of the time.

Sen. Grimes said those missing numbers could be significant. Mr. Neely agreed they could be significant and said it was possible just a few claims could alter the numbers considerably.

Sen. Shea asked if Mr. Neely would make himself available to the Subcommittee in the near future, in the event the Subcommittee had questions or needed clarification of survey results. Mr. Neely said he would be available to the Subcommittee.

## **OVERVIEW OF THE MONTANA MEDICAL LEGAL PANEL (MMLP)**

**Brian Zins, Executive Director**, read a memo from the MMLP thanking the Subcommittee for the opportunity to testify and also gave a brief explanation of the MMLP features (Exhibit #19).

Rep. Brown asked Mr. Zins to explain how the MMLP is funded. Mr. Zins said the cost of operation is divided proportionally among the users of the MMLP.

Rep. Brown asked Mr. Zins to respond to the criticism that the MMLP is sometimes used as a "fishing expedition" and that in spite of a unanimous ruling against the plaintiff by the Panel, the ruling is frequently ignored and the case is still taken to court. Mr. Zins said the Panel is meant to be an avenue to fully explore all of the information in an informal but confidential setting. He said the Panel doesn't find if there is actual malpractice, but makes a determination of if there is reasonable doubt of the standard of care provided to the patient. Mr. Zins said the majority of claimants abide by the Panel's ruling.

Sen. Grimes asked Mr. Zins to explain where in the process the settlement negotiations will begin to occur between the parties involved. Mr. Zins said negotiations can occur at any point in the process, whether or not the case has appeared before the MMLP.

Rep. Golie asked Mr. Zins to comment on testimony that the MMLP costs defendants a lot of money in defending themselves and that it takes a very long time to get the cases before the

Panel. Mr. Zins said Montana statute requires the Panel to give its opinion within 120 days of hearing the case.

Rep. Golie asked if it was necessary for a plaintiff to go through the MMLP to file a lawsuit. Mr. Zins said a claim had to go through the Panel before it could proceed to court and that the average turnover from the time the application is received until a ruling is issued is about 91 days.

Rep. Golie asked if there could be a claim filed and settled without involving the MMLP. Mr. Zins said a "claim" is not legally considered a claim until it is filed with the MMLP or a court and it would be considered an "incident" until then.

### **INTERSTATE COMPARISONS OF MEDICAL LIABILITY LAW, LIABILITY REFORMS, AND LIABILITY INSURANCE OPTIONS**

**Dave Bohyer, Research Director, Legislative Services Division (LSD)**, distributed and discussed his report: *AN OVERVIEW OF INTERSTATE COMPARISONS OF MEDICAL LIABILITY LAW, LIABILITY REFORMS, AND LIABILITY INSURANCE OPTIONS* (Exhibit #20). Mr. Bohyer said the report is also available on the SJR 32 website. Mr. Bohyer's report discussed the background of the malpractice issue, identified issues and objectives, and outlined policy alternatives.

Mr. Bohyer said the greatest obstacle in studying this issue will be identifying the specific causes of skyrocketing premiums.

Sen. Cromley asked Mr. Bohyer if he had any information on whether or not other types of liability insurance were experiencing the same severe rate increases as the medical profession, either in Montana or nationally. Mr. Bohyer said he had anecdotal indications that other states were experiencing some degree of crisis in medical malpractice liability insurance, and other types of liability insurance rates have increased nationally as well.

Rep. Brown asked Mr. Bohyer if he knew of any situation in which a judge has deemed an expert witness to be unqualified to testify. Mr. Bohyer said he was not aware of that happening. Rep. Brown asked how many states have statutes in place defining the qualifications of an expert witness. Mr. Bohyer said he did not have a specific number but knew more than half of the states have legislatively adopted expert witness criteria.

Rep. Brown asked Mr. Bohyer to elaborate on the issue of joint and several liability, as discussed on Page 6 of Mr. Bohyer's report (Exhibit #18). Mr. Bohyer said the current statute tries to allocate the responsibility to compensate an injured party in proportion to the amount of damage that was caused by any one entity responsible for the injury. He said the former statute often resulted in the individual or entity with the best insurance or "deepest pockets" paying a disproportionate amount of the compensation to the injured party. Mr. Bohyer said Staff Attorney John MacMaster was available to answer questions if he wished to have more detailed information.

Rep. Golie asked Mr. MacMaster to comment on joint and several liability. Mr. MacMaster said it was his understanding that if an individual or entity is less than 50% at fault for the injury, the individual or entity cannot have all of the claimants damages assessed against them. If the individual or entity is 51% or more at fault for the injury, then it is possible to have all of the claimants damages assessed against them. Mr. MacMaster also discussed "right of contribution", in which an individual or entity found to be more than 51% at fault may in turn seek compensation from another individual or entity named in the same claim and found to be at fault but to a lesser degree. The individual or entity with the larger amount of damages assessed against them may sue the individual or entity with the smaller degree of fault and, if successful, make them pay back a portion of the damages assessed against the individual or entity with the larger amount of damages.

Sen. Grimes discussed the no fault issue, as enacted by Wisconsin and several other states and asked Mr. Bohyer if he was familiar with this concept and if the Subcommittee should find out more about it. Mr. Bohyer said he was aware that several states have or are considering enacting no fault programs and they will be somewhat similar to Montana's worker's compensation system.

Sen. Grimes said he would like an assessment of the medical malpractice liability issue in those states to see what kind of an impact the no fault approach has had. Mr. Bohyer said he had seen information on Florida and would continue to look for this type of information.

Sen. Shea complimented Mr. Bohyer on the completeness and thoroughness of his report. She referred to Page 28 of Exhibit #18 and asked Mr. Bohyer to further discuss the institution of experience ratings as a potential reform. Mr. Bohyer said he was not sure how an insurance company actually calculated an individual physician's premiums. He said he would either do more research on this himself or invite an insurance industry expert to report to the Subcommittee on exactly how premiums are calculated.

#### **OTHER STAKEHOLDERS IN MEDICAL MALPRACTICE LIABILITY INSURANCE**

**Larry Riley, Esquire, Utah Medical Insurance Association (UMIA)**, presented and discussed a report (Exhibit #21) prepared for the Subcommittee that explained the history of the Utah Medical Insurance Association, the features of UMIA's operations, and detailed data and information on UMIA's operating history in Montana which included loss ratio information, a summary of rate changes, a detailed claims history, a profit/loss statement, policy holder counts, rate comparisons between Utah and Montana, and more.

Sen. Grimes asked Mr. Riley if he or other representatives of UMIA would be available at future meetings to further discuss this issue from the carriers' perspective. Mr. Riley encouraged the Subcommittee to invite Martin Osowski, President and CEO of UMIA, to the January 2004 meeting. Mr. Riley also suggested inviting The Doctor's Company to attend the same meeting.

Rep. Golie asked Mr. Riley if, during the years there were no rate increases by UMIA, the company was drawing down its reserves. Mr. Riley said that was not the case, that while UMIA kept pace with the claims it received, it also tried very hard to keep increases at a minimum since it is a physician-owned company.

Rep. Golie asked Mr. Riley if he made recommendations to physicians on the amount of malpractice insurance coverage they should carry. Mr. Riley said doctors are encouraged to carry as much coverage as they can afford.

Rep. Golie asked Mr. Riley to provide information on how an economic damage award to a plaintiff is determined. Mr. Riley said economic damages are based on the persons' age, the amount of medical expenses, lost wages, and other factors.

Sen. Grimes asked if the increase in severity of claims and the pursuit of claims were the same thing. Mr. Riley said the word "severity" means an increase in the amount of money paid out to settle a claim and that amount has definitely increased in the last several years. Sen. Grimes asked Mr. Riley if this increase was the result of a litigious environment in Montana. Mr. Riley said there were many reasons for the amounts increasing, such as the fact that doctors are able to keep more patients alive with modern medical procedures.

Sen. Grimes asked, if from the UMIA perspective, state-level reforms were the proper avenue for the Subcommittee to pursue in trying to resolve this issue. Mr. Riley said he thought the problem would best be solved by Montanans and agreed that state reform was the best approach to take.

Rep. Golie asked Mr. Riley if he thought the Montana Medical Legal Panel was effective. Mr. Riley said he had 100% faith in its effectiveness.

**Al Smith, Esquire, Montana Trial Lawyers Association**, spoke to the Subcommittee from a plaintiff attorney's point of view and submitted a report from Americans for Insurance Reform titled: *MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES 2003* (Exhibit #22). This report examines what insurers have taken in and paid out, including all jury awards and settlements; and also directly tracks the rate of medical inflation. The report also contains newly-released 2002 insurance data which does not support the view that malpractice premium increases have been caused by increased payouts and costs.

Mr. Smith said the Subcommittee had heard from the physicians and the insurance industry but had not yet heard from anyone who has been harmed by medical malpractice. He asked Randy Dix, Esq. to address the members as a professional who has personally represented such an individual.

**Randy Dix, Esquire, Buxbam, Dix, Dave, and Harmon, Missoula**, stated the following:

- He agrees with Mr. Riley that the Montana Medical Legal Panel is functional and a very necessary element of the system.
- He thinks altering access to the court system will shift responsibility away from the responsible parties to the innocent victims.
- The value of human life and the integrity of human health must not be forgotten or ignored in this study process.

Mr. Dix introduced his client, Kristin Grimsrud, to testify to the Subcommittee of her personal experience as a plaintiff in a medical malpractice suit.

**Kristin Grimsrud, Plaintiff, Wolf Point,** testified to the Subcommittee of her personal experience as the surviving spouse of one who lost his life due to an incident of medical malpractice (Exhibit #23).

Sen. Shea asked if members could adjourn and digest the testimony before formulating a hypothesis on the cause of the medical malpractice issue. Sen. Grimes agreed with Sen. Shea's suggestion and asked to have one more meeting to allow more time for discovery and discussion.

Rep. Brown said he wanted to reassure Mrs. Grimsrud and any others who may be concerned that it is not the intention of the Subcommittee to limit citizen access to the courts or the legal system. Rep. Golie, responding to Rep. Brown, said the Subcommittee has the power to do exactly that and that is why concern is being expressed.

**Mona Jamison, Esquire, The Doctor's Company,** said she wished to make several points regarding medical malpractice liability insurance:

- It is a difficult balancing act in making sure the system is fair to true victims and their families, as well as protecting practitioners from unfair and frivolous malpractice claims.
- Every attempt will be made to have a representative from The Doctor's Company at the January 2004 meeting.
- HB 309, passed in 1995, did result in a significant reduction in the severity of claims.
- The Doctor's Company will continue to do business in Montana because of the stability provided by HB 309.
- Montana rates are determined by Montana experience, however there are some factors outside of Montana that may have an effect, such as stocks and bonds.
- The bond market is a national issue and cannot be controlled by Montana. The Doctor's Company only invests in the safest of bonds, and said she believed stock market investment in equities by insurance companies was statutorily prohibited by Montana or were at the very least, limited.
- The Doctor's Company believes there are a number of factors that contribute to the increases being experienced by Montana physicians and facilities, such as:
  - ▶ insurance losses are increasing,
  - ▶ investment income is down, and
  - ▶ underbidding by the insurance carriers operating in Montana.
- The Doctor's Company does not believe 9-11-01 had a direct effect on medical malpractice insurance premiums, but rather the " reinsurance" process that came after.
- California's MICRA legislation has been more responsible for the stabilization of insurance rates in that state than has Proposition 103.

Sen. Grimes asked Ms. Jamison if she was of the opinion that gap insurance and tail insurance have impacted the increasing cost of malpractice insurance. Ms. Jamison said they were probably factors but only a part of the overall picture. Sen. Grimes asked her to comment on the need for increasing malpractice insurance limits. Ms. Jamison said The Doctor's Company does not recommend limit increases to its clients.

**Claudia Clifford, State Auditor's Office, Helena,** said she wanted to respond to Ms. Jamison in regard to the state's regulatory authority over investment income of insurance companies. Ms. Clifford said Montana law allows domestic companies to invest funds however they like but none

of the medical malpractice liability insurance companies are Montana-based companies so they must comply to the investment statutes of the state in which they're domiciled. Ms. Clifford said if Montana has a concern about an insurance company's investment portfolio, the company can be questioned as it is being licensed to do business in Montana.

Ms. Clifford also referred to information she distributed at the September 22, 2003, SJR 32 Subcommittee meeting from the National Association of Insurance Commissioners and recapped investment income reported nationally by medical malpractice companies. Ms. Clifford said information contained in that document illustrated there has been a dramatic decrease in investment income reported by these companies.

**Jim Arens, Montana Hospital Association (MHA)**, distributed a resolution passed by the MHA encouraging the Subcommittee's serious consideration of state reforms (Exhibit #24). Mr. Arens also reminded the Subcommittee of the \$3.3 billion economic impact the health care industry has on the Montana economy.

### **DISCUSSION AND DIRECTION OF SJR 32 STUDY**

After discussion, it was agreed that the following items would be included on the January 15, 2004 meeting agenda:

- testimony from The Doctor's Company and the Utah Medical Insurance Association insurance companies and from an independent actuary to gain perspective of the malpractice issue from the industry's point of view, information on settlements, discussion of reform issues;
- discussion from insurance companies who have exited the Montana market as to why they left the state;
- a comparison of information on other states' rate increases and the level of tort reform taking place in these states; and
- other states' approaches to dealing with the malpractice issue.

Mr. Bohyer asked the Subcommittee members to submit their questions for the insurers and the actuary to him so he could prepare a uniform list to be distributed to them.

Rep. Golie said it was important the actuary asked to present to the Subcommittee be independent and not associated with an insurance company and that he or she also be very knowledgeable of the medical malpractice insurance issue.

Mike Foster asked if the Subcommittee intended to look at the Wisconsin system which is similar to the Montana worker's compensation system. Mr. Bohyer said he would be providing information on that issue to Subcommittee members before the next meeting.

### **ADJOURN**

Rep. Golie thanked Mike Foster, Jan Smith, and the staff of St. Vincent for their assistance with the meeting and also the many interested stakeholders for their testimony. With no further business before it, the Subcommittee adjourned at 4:35 p.m.

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