



Economic Affairs Interim Committee

57th Montana Legislature

SENATE MEMBERS
DALE MAHLUM, Chairman
DOROTHY BERRY
JON ELLINGSON
GLENN A. ROUSH

HOUSE MEMBERS
KATHLEEN GALVIN-HALCRO, Vice-Chairman
GARY MATTHEWS
JOE MCKENNEY
JOHN SINRUD

COMMITTEE STAFF
DAVE BOHYER
RESEARCH ANALYST
BART CAMPBELL, STAFF ATTORNEY
EDDYE McCLURE, STAFF ATTORNEY
LOIS O'CONNOR, SECRETARY

MINUTES

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 documents.**

Seventh Meeting of Interim
Room 137, State Capitol
August 30, 2002

COMMITTEE MEMBERS PRESENT

Sen. Dale Mahlum, Chair
Sen. Jon Ellingson
Sen. Glenn A. Roush
Rep. Gary Matthews
Rep. Joe McKenney
Rep. John Sinrud

COMMITTEE MEMBERS EXCUSED

Rep. Kathleen Galvin-Halcro, Vice Chair
Sen. Dorothy Berry

STAFF PRESENT

Dave Bohyer, Research Analyst
Bart Campbell, Attorney
Lois O'Connor, Secretary

VISITORS

Visitors' list (ATTACHMENT #1)
Agenda (ATTACHMENT #2)

COMMITTEE ACTION

- Approved the minutes from the June 14, 2002, meeting as amended
- Approved a motion to authorize the drafting of proposed legislation requested by the Department of Commerce, the Governor's Office of Economic Opportunity, and the

State Auditor's Office with the understanding that it does not commit any legislator to supporting it

CALL TO ORDER AND ROLL CALL

The meeting was called to order by Sen. Mahlum, Chair, at 1:00 p.m. Attendance was noted; Sen. Berry and Rep. Galvin-Halcro were excused. (ATTACHMENT #3)

Sen. Roush **moved** that the minutes from the June 14, 2002, minutes be approved. Rep. Sinrud made a substitute motion to amend the minutes as follows: Page 9, middle of paragraph 4.

- Rep. Sinrud said that the cumbersome part of doing business. . . . He asked if there was any way to ~~elevate~~ evaluate the administrative burden on businesses.

PLEASE NOTE: This change has been made to the original draft minutes which are on file in the Offices of the Legislative Services Division.

The minutes were approved unanimously as amended.

PROPOSED RULE -- BOARD OF NURSING -- NURSE ANESTHETISTS

Kevin Braun, Legal Counsel, Department of Labor and Industry, said that there was a certain degree of controversy associated with the definition of " independent practice" related to nurse anesthetists because it gets to the technical aspects of nursing practice. The rule has not been adopted to date.

Kim A. Powell, Chairperson, Subcommittee on APRN Rule Review, provided an overview of the proposed Board of Nursing rule revision. (EXHIBITS #1, #2 and #3 respectively)

Jim Ahrens, President, MT Hospital Association (MHA), said that the rule demonstrates a turf war--whether or not CNRAs are going to practice independently or have them supervised by a physician or anesthesiologist. This issue will wind up in the Legislature. He said if CRNAs cannot practice independently, how will they practice. The issue that will be discussed is that they should be supervised by a physician who is the surgeon in the case. Many surgeries are preformed by independently practicing nurse anesthetists today. Only the larger cities have enough anesthesiologists to supervise surgery. The MHA would be in favor of the independent practice of CRNAs, but whatever is done, it will have an impact on hospitals' business and surgeries, many of which are done with anesthetics administered under the supervision of nurse anesthetists.

Margaret Morgan, MT Association of Nurse Anesthetists, provided written comments in support of the rule amendment. (EXHIBIT #4)

Sami Butler, MT Nurses Association, said that as the state contemplates more health care work force shortages, APRNs will continue to assist in alleviating the shortage and provide access to health care throughout the state. She said that APRN independent practice has been working and asked where are the poor outcomes in malpractice suits if these independent practitioners are not providing appropriate safe care to Montanans? She said what is the argument for supervision except to increase health care costs? The Association supports the Board's clarification of the rules.

Sen. Eve Franklin, Senate District #21, Great Falls, said that she has followed the issue of the role of nurses in health care delivery and access for a decade and she concurred with Ms. Powell in that the inclusion of "independent" in rules is consistent with current practice. It is implied in law and it has been the hallmark of APRN practice since the role was developed in the late 1960s. However, in an attempt to streamline the rules, the Board has opened the flood gate for other issues that have been standing in the wings. The Board has provided an opportunity for anesthesiologists and their paid lobbyists to restrict nursing practice. Sen. Franklin added that if CRNAs cannot be used in rural areas in accordance with statute, it will shut down surgery in those communities resulting in the eventual closure of the hospitals.

Susan Good, Montana Society of Anesthesiologists, provided a copy of the Board of Nursing's Rules Subcommittee meeting schedules. (EXHIBIT #5) She said that no CNRA will be impacted or unable to practice if "independent" is inserted into the rule or not. After discussions with DPHHS, she found that there are no reimbursement issues involved and rural hospitals will receive no more or less reimbursement than they have before. Ms. Good added that this is not a turf war between anesthesiologist and CRNAs. Anesthesiologist have complete respect for the work that CRNAs do and they understand that they are critical to the provision of health services in the state. She said that nowhere in any rule that is promulgated either by the federal or state governments is it required that an anesthesiologist supervise CRNAs. In the past, the rule has stated, and what has been the practice in the state, that CRNAs practice under the supervision of the operating practitioner.

Ms. Good said that testimony refers to CRNAs providing lower cost services. This may be true. However, most reimbursements are straight across the board. It does not matter who provides the services, the pay is generally the same. The issue is whether CRNAs should be supervised by the person who is performing the operation. Referring to Exhibit #5, she said that the term used is "scope of practice". It was her contention that "scope of practice" issues are issues decided by the Legislature not the Board of Nursing. Based on a recent poll, APRNs in Montana see over 650,000 patients in unsupervised settings. CRNAs have been supervised for the last four years by the operating practitioner.

In conclusion, Ms. Good said that according to the presentation by Ms. Powell, the rule adoption occurred by the full Board following a review of the hearing examiner's report and opponents and proponents comments were reviewed. She attended the meeting and that did not happen which she believed to be an abrogation of the MAPA rules.

Mona Jamison, Attorney for Anesthesiologists, said that the issue is whether the definition of "scope of practice" is a legislative issue or is it within the jurisdiction, domain, and authority, of the Board of Nursing. According to the Board's response and in the notice of adoption of amendment to the rules, it states that "The Board has the authority to define "scope of practice" and licensure requirements for nurses in Montana". The issue is a "scope of practice" issue not a "level of nursing care" issue.

Ms. Jamison said that according to the Montana Administrative Procedure Act (MAPA), the Department responsible for the rules to which the Boards are attached must review the rules notice and determine whether or not the proposed rules are in compliance with 2-4-305 which states that to be effective, each rule has to be written and within the scope of authority confirmed and adopted in accordance with the standards prescribed by law. Not every Board can say "We

want to do this and we will do this administratively." This is what makes the public hate regulations. It is reflected by many Boards when they run amok in adopting rules where they do not have the legislative authority to do so. In fact, many of the rules end up usurping the authority of the Legislature to define "scope of practice". She added that if the Legislature wants CRNAs to practice without supervision, have it be a matter of public debate in a bill submitted to the Legislature. Define what "supervision" means for purposes of CNRA practice. For example, physical therapists assistants can practice with a certain degree of independence and supervision which is defined in Title 37. To approve it in a rule to make it consistent with prior rules, which may have been adopted illegally, is not adequate. Ms. Jamison provided an overview of two Attorney Generals' opinions in opposition to the rules related to the "scope of practice" regarding physical and occupational therapists. (EXHIBIT #6) Ms. Jamison repeated that "scope of practice" is within the Legislature's domain and she believed that the proposed rule is invalid, should not move forward, and that many of the rules in the notice of amendment are also invalid.

Dr. Michael Sterbis, Anesthesiologist, Missoula, said that current Medicare regulations require that nurse anesthetists be supervised by the operating physician if there is no anesthesiologist available which is the case in many rural hospitals in the state. The Anesthesiologist Association would like to keep that intact. He said that nurse anesthetists are not trained to deal with a variety of medical problems that may arise during a surgery. They cannot diagnose what is causing the patient to get worse and they cannot prescribe a treatment to fix the problem. This is what the proposed amendment tries to preserve, i.e. the supervision of CRNAs by medical doctors in rural areas.

Sen. Ellingson asked if the issue is whether the Board of Nursing has exceeded its authority in proposing the rule, and in order to evaluate that, nursing statutes would have to be reviewed. Ms. Jamison said absolutely. It is also her opinion that when the Supreme Court cases and Attorney Generals' opinions were applied to the Board's authority that the same law applies without any doubt whatsoever. Sen. Ellingson asked where in statute does it specifically deal with the Board's limitation of authority to promulgate rules. Ms. Jamison said that the rulemaking authority that the Board relies on and cites in its rule is 37-8-202(5)(a), MCA., which states that the Board has the power to make rules "to define the educational requirements and other qualifications applicable to recognition of advanced practice registered nurses". This is, perhaps, one of the weakest delegations of authority there is, and if the issue proceeds to court, it is also her opinion that the entire delegation is unconstitutional because it fails to address any boundaries that are required by law. Sen. Ellingson asked about the statutory authority for the proposition that the Legislature has to define the practice. Ms. Jamison said the Montana Administrative Procedure Act on rulemaking authority--2-4-305(5) states,"to be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law". This has been consistently interpreted by the Supreme Court and the Attorney Generals' opinion to mean the Legislature.

Rep. Matthews asked if the rule would pass the Legislature considering rural versus urban Montana. Ms. Jamison said that there may be a reasonable chance. However, she believed there would be a mechanism of responding to what some of the objections are so that probably the words "independent" and "level of supervision" would be more set forth in the legislation itself.

Bart Campbell, Staff Attorney, Legislative Services Division, said that when the issue arose, he reviewed it to see whether on the threshold level, the rule met MAPA requirements (i.e. the Board gave the right amount of notice, did it have a reasonable necessity statement, was it implementing a law, and did it have the authority.) In his opinion, the reasonable necessity statement could have been more direct on the use of the word "independent". The issue is a substantive one--what is the scope of practice for nurse anesthetists and does the scope of practice, as it currently exists, encompass the concept of "independent". When he reviewed the statutes, he found no help because there is no "scope of practice" definition in nursing law. If, in fact, "scope of practice" encompasses the concept of "independent", the rule would be a clarification. If what nurse anesthetist do now is not suppose to be independent but is subject to supervision, the rule becomes an expansion of scope. He said that if the Committee assumes that it is not within the scope of practice, without a specific grant from Legislature, Boards do not have the power to in increase or change "scope of practice" from what the Legislature intends.

Mr. Campbell said that if the Committee feels that a portion of the proposed rule is not right, it could send a letter to the Board of Nursing stating that the Committee does not go along with that portion of the rule. The Board does not have to agree and can adopt the rule anyway. At that point, the Committee has the right to have a statement in the published register of the rules that the Committee does not agree with a specific portion of the rule. The effect is that if someone were to bring a lawsuit challenging the rule, the burden of proof switches to the Board to show that the rule is valid.

Mr. Braun said that the Department made a request to the Board to not adopt the rule until such time that Committee members and the Legislative Branch had input on the issue. The Board is attached to the Department for administrative purposes only. If he were to object to the rule, the Board has its independent authority to push it through.

Sen. Ellingson asked if the American Association of Nurse Anesthetists guidelines would give the answer to the independent and non-independent question and that its incorporated by reference. Mr. Campbell said that although he has not reviewed the guidelines, it may be where "scope of practice" is defined. However, as a legislative drafter of laws, it creates another problem. It is unconstitutional for legislative drafters to allow an outside party to legislate for the state.

Sen. Mahlum asked how the Department was going to proceed. Mr. Braun said that if the Committee wanted to provide input regarding the rule and believes that it is a "scope of practice" and outside of legislative intent, he would bring it to the attention of the Board and ask if it wanted to deal with this by rule that would likely be subject to challenge or bring it into the legislative forum.

Rep. Sinrud said that if what Ms. Jamison has stated is the crux of the problem, it is between the Board of Nursing and the Legislature, and the Committee should find whether it is an increased "scope of practice" for CRNAs and does the Board have the authority to increase that scope. He asked if any other board had increased its "scope of practice". Mr. Campbell said that the Board of Barbers adopted by rule requirements for barber schools. A practitioner challenged it and the Board argued that there was nothing in statute that said they could not add the additional requirements of what a barber school needed to teach. The Court said "no", just because the Board was not prohibited from something does not mean that the Board could add on to what

the Legislature has told it. The question with this issue is what is the "scope of authority". If the Legislature could determine what the original intent was when nurse anesthetists were created and if it authorized that practice within this state, then the Legislature cannot allow the Board to increase the "scope of practice" even though there is no law stating they cannot. Rep. Sinrud said that in a decision of this magnitude and if the current standing of the CRNAs is not going to change, it is best to give guidance that the Board come in with a legislative change.

Sen. Roush asked if the Montana Nurses' Association would be amenable to postponing action on the proposed rule and go before the Legislature with a bill. Ms. Butler said that the Association believes that if there was legislation, it would pass; that the issue is not an expansion of "scope of practice"; and the Association sees no reason why the Board should not go forward with the rule and adopt it.

Rep. Matthews asked **William Nicol, Nurse Anesthetist, Miles City**, if the rule change would hurt rural areas. Mr. Nicol said that he saw nurse anesthetists as performing their duties independently of being told how to perform their duties and they work in a collaborative effort with a total health care team--the captain of the ship being the physician in charge of the patient. Rep. Matthews asked if Mr. Nicol thought that the rule was a good rule. Mr. Nicol said that there were parts of the rule that nurse anesthetists were not agreeable to but they are going to accept it. It is not a bad rule because it defines nurse anesthetists' practice as it is now being practiced and it does not give them any more "scope of practice". Rep. Matthews felt that the rule did not expand the scope of practice that nurse anesthetists do, particularly in rural Montana. He said that the Committee should give the Department the okay to go ahead with the rule. If the rule gets challenged, it gets challenged.

Sen. Ellingson asked why the term "independent" was used without further explanation of what it meant. Ms. Powell said that the rule currently cites CRNA language as "independent", and the rule applies to licensure. The only requirement for supervision that exists for CRNAs is through the Center for Medicare and Medicaid Services (CMS) which requires supervision by a physician for Medicaid and Medicare patients only. The licensure of APRNs in Montana has been independent, and they are not required to be supervised in order to have a license to practice.

Ron Friend, CRNA, Butte, commented that CRNAs cannot hang out a shingle and start their own business. CRNAs never take it upon themselves to do anything to a patient unless it is discussed with the patient's physician.

Sen. Mahlum requested that the Department work with the Board of Nursing, Ms. Jamison, and Ms. Good to find a solution to the problem.

REVIEW OF AGENCY LEGISLATION

Department of Commerce

Mark Simonich, Director, Department of Commerce, provided an overview of the Department of Commerce's proposed legislation. (EXHIBITS #7 and #8 respectively)

Committee bills were not necessary for this legislation as the Department had sponsors.

Governor's Office of Economic Development

Dave Gibson, Office of Economic Development, provided an overview of the Office of Economic Development's proposed legislation and provided a copy of an Oregon initiative related to research and development. (EXHIBITS #9 and #10 respectively)

Sen. Roush was concerned about the consolidation approach to economic development and taking more away from rural Montana. Mr. Gibson said that he shared the same concern but that there are excellent models for how consolidation has been used in rural areas. It is not the Office of Economic Development's intention to move everything into the cities. Its intention is to establish policies and ask communities to work together.

State Auditor's Office/Insurance Commissioner

Ms. Clifford provided an overview of the State Auditor's Office proposed legislation. (EXHIBIT #10) She requested that the Committee authorize the drafting of the proposed legislation and the Auditor's Office will find its own sponsors.

Rep. Sinrud asked why the Auditor's Office was treating one group of individuals at a higher level of protection relative to the rest of the state when it comes to being victims of schemes and fraud. He believed in equal protection against fraud for all citizens. Ms. Clifford said that senior citizens have less time in their lives to recover financially from schemes and fraud. The Auditor's Office wants to elevate financial abuse to a felony status. In addition, there are many other financial protection bills that apply to all citizens.

Rep. Sinrud said that the Auditor's Office is establishing a health insurance pilot program that is based upon an unhealthy act--smoking. It is also expecting a certain amount of tax dollars coming from tobacco sales, yet, cities such as Helena (possibly Bozeman and Billings) have passed a no-smoking initiative banning smoking in public areas. He asked if research had been conducted on the impact of the no-smoking initiative on the sale of tobacco and what it could possibly do when a program is set up based upon those sales if tobacco sales decline. Ms. Clifford said that the Auditor's Office has very reliable projections on what the \$1-per-pack tobacco tax would raise--\$57 million. She was unsure whether new ordinances were taken into consideration. The Office could include a mechanism that addresses a shortfall in the collection of revenue. The tax credit proposal is for a pilot program that will be capped at a certain amount, in part, because of the difficulty to project take-up rates and the amount of people who will actually apply for the credits and use them.

Rep. Sinrud asked if the \$2 million taken from the interest on the tobacco settlement funds to expand the CHIP program would fluctuate. Ms. Clifford said the interest from the tobacco settlement trust fund increases every year because the state has been depositing more money into it. The interest is projected to be \$3 million in this biennium and \$6 million for the next biennium. Rep. Sinrud commented that he did not want to dangle a carrot in front of the citizens who apply for the program if there is not funding from other sources other than the general fund.

Sen. Mahlum asked about the Land Board Exchange Program legislation. **Jill Gerdrum, Deputy State Auditor**, said that currently, the Land Board and DNRC each has the ability to exchange land. Montana has many isolated parcels of state land that are wholly surrounded by private land which does not allow for the competitive bidding process or public access to the land. The Auditor's Office has been exploring a plan with DNRC that would establish a mechanism to provide for land banking whereby DNRC can sell state land and put the money into a specified

special revenue account to be used for the purchase of more state land in other areas. There is an exchange aspect to the legislation that DNRC and the Auditor's Office have been working on with the Stockgrowers Association so that in the event that a land owner has an isolated parcel, the stockgrowers have the opportunity to exchange the land rather than have it go up for sale.

Tom Bilodeau, Research Director, MEA-MFT, said that the idea of MEA-MFT's proposal is to pool all public school employees into one statewide purchasing pool for health insurance, set one standard set of benefits, and effectively establish a health benefits program that functions much like the current state health plan. MEA-MFT views the proposal as having many advantages in terms of stabilization of future health care costs, premiums, equity between school districts and their ability to purchase and manage health care costs and insurance premiums. It will also be an effective way to allow the 16,000 Montana public school workforce currently insured to have a better, more unified method of negotiating price discounts with providers and claims administrators.

Sen. Ellingson **moved** to authorize the drafting of the proposed legislation requested by the Department of Commerce, the Governor's Office of Economic Opportunity, and the State Auditor's Office with the understanding that it does not commit any legislator to supporting it. Motion passed unanimously.

SJR 22 SUBCOMMITTEE UPDATE

Rep. McKenney said that the SJR 22 Subcommittee was tasked with studying the issues of the high rate of uninsured Montanans (18.5%), the rising cost of health insurance, and submitting a report to the Legislature on how to address them. It has narrowed its focus to three issues: (1) to enhance or maximize the CHIP program; (2) the feasibility of joining a multi-state prescription drug purchasing pool; and (3) and the availability of tax credits for health insurance for individuals and small businesses.

The Subcommittee held a conference call with Mr. Tom Susman the director of West Virginia's multi-state purchasing pool. Mr. Susman expressed that West Virginia would save \$25 million over 3 years on prescription drugs and projected an administrative cost savings of \$6 million. West Virginia's plan does not cover Medicaid eligibles but it does cover public employees. The Subcommittee also discussed whether the Legislature needed to adopt legislation to permit the state to negotiate with other state government entities. It was informed that Montana has the authority to negotiate but needs to provide direction to the Executive Branch on how to proceed. Rep. McKenney said that the Subcommittee's final report will include a strong statement that the state study the feasibility of entering into a multi-state purchasing pool and the Subcommittee wants to make it very clear that local pharmacists are not harmed.

Sen. Ellingson said that the SJR 22 Subcommittee directed staff to draft proposed legislation for a tax credit for health insurance pilot program for review at its September meeting.

Rep. McKenney said that unlike the tax credit proposal offered by the State Auditor's Office, the SJR Subcommittee's proposal does not contain the \$1-per-pack cigarette tax to fund the proposal. The Subcommittee decided to go forward with the legislation even though it will be a \$45 million hit to the general fund. He said it is the Legislature's job to set priorities on how to spend those funds.

Rep. McKenney said that the Subcommittee was unsure how to proceed with its CHIP enhancement concept and decided to set up a working group made up of Sen. Ellingson, a representative from the Governor's Office, a representative from the State Auditor's Office, and himself to come up with a recommendation. The Subcommittee heard testimony on the possibility of taking developmentally disabled children out of the general fund and placing them into the CHIP program. If it can be done, the federal government will pay 80% of the expense.

Committee staff will work with Sen. Mahlum and Rep. McKenney to ensure the two committees work is finished before the September 15, 2002, deadline.

There being no further business, the meeting adjourned at 4:45 p.m.

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