WYOMING HEALTHCARE COMMISSION
MONDAY, JULY 28, 2003
CHEYENNE, WYOMING
HITCHING POST INN

Attendance: Commission Chairman T. Chris Muirhead, Commissioners George B. Bryce, Ford T. Bussart, Dr. Stacy J. Childs, Carol V. Jenkins, Paul A. Lang, Dixie M. Roberts, John H. Vandel and Dr. Robert G. Volz, Commission ex-officio members Ken Vines, Wyoming Insurance Commissioner, and Dr. Deborah Fleming, Wyoming Health Department Director, and Commission staff, Director Diane Harrop and Assistant Emily Quarterman.

Chairman Chris Muirhead called the meeting to order at 9:30 a.m., introduced the Commission members, and summarized the purpose of the Commission and the meeting.

Rep. Tony Ross, Cheyenne attorney, original sponsor of Enrolled Act 90 (HB 261) *(http://legisweb.state.wy.us/2003/enroll/hb0261.pdf),* gave a history of the legislation and his Committee's intentions. Studies conducted as a result of Enrolled Act 90 will go to the House Corporations, Elections and Political Subdivisions Committee he chairs, and the Joint Labor, Health, and Social Services Committee. He said the Act directs completion of an analysis of tort reform alternatives and solutions to a pending crisis in insurance -- including the possibility of a joint underwriting association comprised of all property and casualty insurers, the feasibility of revising medical malpractice insurance laws that are probably now outdated, and the feasibility of establishing a provider owned mutual insurance company.

Rep. Colin Simpson, Cody attorney, House Judiciary Committee chair, sponsored failed legislation (HB 303, HB 305, ***Rep Colin Simpson.pdf***) to revise the medical malpractice liability fund statute and create a medical malpractice panel. He sees passage of similar legislation as being possible in the near future. He provided a summary of his efforts to address malpractice insurance issues in Wyoming, and a summary of testimony to the House Judiciary Committee on non-economic damage awards.

George Dikeou, Executive Vice President, Copic Insurance, reported on Colorado's ability to withstand medical liability crises (***Copic.pdf***). Copic was formed as a self-insurance trust in 1981. Colorado passed legislation authorizing physicians and hospitals to come together, self insure and spread the risk among themselves. Essentially a not-for-profit corporation, Copic was started by the Colorado Medical Society and 1,400 physicians who basically insured each other. Twelve of 15 Copic Board members are physicians. Dikeou said the focus should be access to health care limited by rising medical malpractice insurance costs. Copic insures about 80% (5,500) of Colorado's private physicians who buy insurance, more than 40 rural Colorado hospitals, and some of Nebraska's doctors. Copic has a full-time risk management staff and program designed to reduce the incidence and consequence of adversarial legal actions against member physicians. Before moving into other states, Copic requires passage of tort reform legislation, and must be able to establish a partnership between the company and the medical community to try to solve problems and prevent lawsuits. Copic is licensed, but is not operating, in Wyoming. Discussion followed regarding the relationship between insurance rates, tort reform, physician behavior and medical malpractice lawsuits that are tried and/or settled. Dikeou said five years ago his company studied Wyoming and found it to be too unpredictable to enter, and its population too small. Larger populations allow for spreading risk further. Physician Insurers Association of America is the trade organization of companies like Copic and can provide the Commission with information about similar corporations.

Robert C. Kidd, Wyoming Hospital Association President, said that in the 70s during a medical malpractice insurance crisis, his organization looked at self-insurance but did not find a way to make it economically feasible. As a solution, the WHA invited other states' health insurance groups and small companies into the state and some did, and/or continue to, operate in Wyoming. Hospitals' medical malpractice insurance is again threatened in the state. WHA recently met with Copic officials, hoping that organization would offer insurance to hospitals here. Kidd has talked to his counterparts in neighboring states about working together to self-insure and dubbed the effort the "Yellowstone Project." There are now roughly 53 hospitals in four states and more in two other states that are part of the project. Copic likes rural hospitals; the Yellowstone Project likes rural hospitals. Of the 17 potential Yellowstone Project member hospitals in

Wyoming, all are smaller hospitals -- with the exception of United Medical Center in Cheyenne. Actuarial data is being collected regarding what Wyoming's hospitals can contribute to their own company – Kidd anticipates 13 will eventually be allowed to join based on their fiscal and medical stability. He said WHA's biggest concern is access to care – particularly obstetrics -- for Wyoming citizens, so they will not have to travel out of state for primary care. There are some things Wyoming's Legislature could try to do to reduce malpractice premiums, such as a medical review panel with public findings, or a mediation or arbitration review panel whose decisions are binding. The physician base is too small in Wyoming to support a self-insurance pool, he said. Kidd provided the Commission with a report on Wyoming hospitals' 2002 activity in Wyoming (*handout*) and hospitals' fiscal challenges. Medicare and Medicaid reimbursement rates for care provided and uncompensated (bad debt) care are impacting the state's hospitals, but Kidd said that despite the odds, only two hospitals in Wyoming have closed in 20 years. Seven hospitals in the state operated in the black last year. But there may be limitations on services provided, loss of surgeons, and limited access to care, he said, or there may be joint ventures or mergers between hospitals. Kidd talked about the challenges of recruiting physicians to the state, and Wyoming Health Resources Network, Inc., an outgrowth of the Health Reform Commission that is a public-private partnership aimed at drawing more doctors and mid-levels to the state. Kidd said he could provide hospitals' malpractice insurance cost increase information to the Commission **(Wyoming Hospital Association.pdf, WHA1.pdf).**

<u>Sen. John Hanes</u>, Senate Judiciary Chair, talked about the difficulties attached to capping damage awards paid as a result of lawsuits – thought to help curb malpractice costs. He said Article 10, section four of the state's Constitution says the legislature cannot pass a law that will cap damages citizens can collect. To cap damages in the Wyoming, a joint resolution to amend the Constitution must be passed. The resolution not only has to pass two thirds of the House and two thirds of the Senate; the governor must sign off on the resolution once it's through the Legislature and then two-thirds of the voters in an election in which the Constitutional amendment is on the ballot must approve it. This session, a resolution to amend the Constitution introduced in the House went forward but didn't get through the Senate (*see Rep. Colin Simpson's proposed legislation*). Other tort reform measures also didn't get a hearing in the Senate. Sen. Hanes talked about how changes in the statutes and Constitution predicted to reduce the cost of medical malpractice insurance are most likely to get through the lawmaking process.

<u>Tom Jubin</u>, Cheyenne lawyer and a lobbyist for the Wyoming Trial Attorneys, provided historical context for the cyclical nature of medical malpractice cost increases **(Wyoming Trial Lawyers.pdf).** As noted by Sen. Hanes, one solution proposed is capping damages. But Jubin said caps discriminate against non-wage earners (children, the elderly) and prevent compensation of those who have been injured. Outrageous jury awards are blamed. In Wyoming, there were 31 cases that went to jury trial between 1989 and 2001, and in 26 of those cases, the verdict was zero. There were only five verdicts for people who were killed, injured or maimed. Not a single one was a million dollars. Wyoming Insurance Commissioner's office data was used to determine whether settlement costs and defense costs are to blame. Ken Vines said insurance companies report the number of claims and the amount paid out, but the data is provided in aggregate (not to whom or how much was received). Jubin said the average claim is $250,000 in Wyoming. The premiums collected exceed payouts. California enacted Proposition 103, an insurance industry reform, and premium rates decreased. The problem in Wyoming is that there are only a couple of medical malpractice insurance carriers, and they will be chased away by similar reform attempts. The concept of physicians establishing a risk retention group has been presented as another solution – that has been successful for other professionals.

> <u>Amy Minto</u>, Big Sky Captive Management, a subsidiary of ALPS, said ALPS is a risk retention group formed in the 1980s for rural attorneys in small communities when insurance availability for them was slim. Initially there were five states (Kansas, Montana, South Dakota, Wyoming and West Virginia) in which ALPS was registered to create a large enough pool for those attorneys (with some initial funding for start up). Right now, ALPS is registered in 25 states. After three years of operation, ALPS converted from a mutual risk retention group to a stock retention group. Big Sky provides alternative insurance resources to companies other than law firms. The joint underwriting association is a solution for a percentage of a classification of risk which is unable to find insurance. An example is drivers seeking car insurance. Those insureds who have bad experiences and can't get, or can't get affordable, insurance are put in an assigned risk pool. In a joint underwriting association, risks are pooled and doled out by percentage to admitted carriers.

Wyoming is looking at asking all casualty and property carriers to pool. If all insurers are required to pool, the risk is that some admitted carriers in multiple lines – not just medical malpractice – will leave the state. A risk retention group is a type of admitted carrier that shares a common interest owned by its insureds in one state that can practice in multiple states (all members must be covered, and only members may be covered), permitted by the federal government. Questions regarding what it would take to become an admitted mutual insurance company in Wyoming are referred to Ken Vines, Wyoming Insurance Department Director. Captive insurance carriers are a form of alternative carrier; 19 states permit them through legislation that allows for expedited coverage with parent companies covering losses. Captives have become the "en vogue" way to form risk retention groups. Finding start-up capital and whether Wyoming has a large enough pool are two concerns. The ALPS model could be used to pool similar physicians from other states to grow the numbers enough to allow for spreading the risk further. An actuarial analysis and feasibility study for a physicians' risk retention group in Wyoming would cost $50,000 to $100,000, Minto predicted. She said other state-based physician-serving risk retention groups are developing. Joint underwriting associations tend to be a last resort, Minto and Vines agreed, and are carried by the rest of the market.

Glen Smith, attorney, former deputy, Wyoming Insurance Department, and ALPS Board member, said the models Minto described – and specifically ALPS -- do work and they do work in Wyoming. In 1986, the lawyers in Wyoming were faced with the same crisis as doctors, he said. The lawyers couldn't find insurance at any price. What insurance companies were charging was so exorbitant, people couldn't afford the premiums. The lawyers grouped together with lawyers facing similar problems in other states and they sold surplus contribution certifications at $1,000 apiece to raise $3 million to get the company started. At first, ALPS was dependent on the reinsurance market and still is, to some extent. This particular model has been a tremendous success story, Smith said: it is now a $50 million company, transacting business with rural lawyers in 26 areas. He said his company believes in insuring the best possible risks and the best possible risks are in Wyoming and similar areas. ALPS' beauty is that it is owned by and directed by lawyers, serving lawyers, and has been successful as a result, according to Smith. One problem is, there has to be an appropriate base of insureds and have to have enough claims from which to develop a credible statistical base from which to assess premiums. There are not enough paid claims in Wyoming for the loss data to have substantial statistical meaning. It takes about 1,000 paid claims to have a completely credible base. Where are they getting the data to come up with the rate that's being charged in Wyoming? Nobody knows without understanding the ratemaking process and without knowing where the data came from to formulate this rate. There are about 800 doctors in Wyoming; subspecialties are charged a surcharge when they are higher risk.

Deanna Frey, of the Wyoming Children's Action Alliance, said the Governor's office asked that she share information about where children and families might be affected by health care reforms. She said 158,000 children under the age of 18 live in Wyoming; 26% of the population and 35% of households have children. Wyoming has a very high poverty level and children living in poverty are more likely to be without medical or dental care and to have serious health problems, she said. Finding physicians who will deliver babies and care for sick children is difficult for families in poverty. It's the Wyoming Children's Action Alliance's understanding that medical malpractice affects this, she said. Frey provided the commission with infant and child death rates, and changes in state-provided health care coverage limitations. She made available Kids Count 2002, a set of data showing the status of children in individual counties, statewide and in comparison with their peers nationally (*handout*).

Wendy Curran, Wyoming Medical Society Executive Director, said as of July, Wyoming has been included among states declared by the American Medical Association to be experiencing a physician insurance crisis. The AMA uses a long list of criteria when analyzing whether a state is in crisis, including liability insurance cost increases, companies departing, declines in the market, whether doctors are leaving and ultimately whether the liability problem is impacting patient access to care. Curran cited specific areas in Wyoming where surgeons' and obstetricians' ability to access insurance is impacting patients' access to care. Physicians are looking at restricting the services they provide, relocating to other states because they can not afford liability premiums here, and some are retiring. It's hard to recruit physicians to Wyoming: work hours are long with frequent on-call duty leaving little time off for a weekend or spending time with

family, creating burnout. Wyoming has taken little legislative action to control physicians' medical malpractice insurance costs, compared with other states. The litigation system does little to efficiently compensate the injured expediently, she said. She works for a group of individuals whose training is based on looking at scientific evidence, research, data, that say this is proven over time to have the best results. They look to those reforms referred to as "micro reforms" – for example, the package of laws passed by California in 1975 including caps on non-economic damages, disclosure of collateral source payments, periodic payment of awards given in settlement or verdict, qualification of expert witnesses – that have been enacted in surrounding states and have increased stability in the insurance market. California has greater stability in its insurance market and premium costs increases have been significantly smaller. Wyoming has an extremely fragile health care system today. Hospitals are struggling, our physicians are struggling. The state's policymakers simply can't wait much longer to do something. The concept of a self-funded pool is not a new one – the state hired the Wyatt Consulting Group to come in and study the statute on the books now that has never been implemented. The Medical Society participated in some of those hearings; there were good, healthy discussions centering on whether this was the appropriate role for the state. The end result was the Legislature did not choose to move forward. The results of the Wyatt study showed they would not be able to lower rates. It is an advantage to have a doctor-operated, doctor-insuring company like ALPS is doing for lawyers, Curran said, but that concept has already been implemented and is in place via The Doctors Company, which is insuring Wyoming physicians. The Medical Society understood that a joint underwriting association (JUA) is a vehicle of last resort and the authority has been given to the Insurance Commissioner to determine the lack of a market and the need for a JUA **(Wyoming Medical Society.pdf, Reforming Medical Litigation.pdf).**

Devin O'Brien, of The Doctors' Company, said that his company has shown profits only two of the last eleven years **(The Doctors Company.pdf)**. The criticism that insurance companies' investment losses are the reason for the insurance crisis is inaccurate, he said, because the industry is regulated. If market return is subsidizing insurance rates and that "cushion" goes away, the rates will then be increased to cover the cost. But O'Brien maintains the insurance companies' investments are a small portion of their premium collections. Insurance Commissioner Ken Vines said filings with his Department show what insurance companies make or lose on investments, annually, as well as a five-year history on what they've made or lost on the underwriting. The Doctors' Company can come up with rates that are predictable on a consistent basis, O'Brien said. Wyoming may not have a rate that is either inadequate or excessive. The insurance commissioners in every state look at insurance company rate filings; in California, they have to detail the justification for the rate filings. With regard to California's Proposition 103 – the change in the insurance market was not because micro reforms were enacted. It takes a number of years for reforms to be tested in the judicial system. Once California's reforms were tested, a vibrant insurance market unfolded. Doctors are being pressured between declining income and increasing premium costs. The bottom line is, insurance companies can't have outgo exceed income indefinitely. The situation facing this state is a difficult one; Wyoming doesn't have enough doctors for any actuary to pick a rate. Other states' are not comparable. O'Brien said he's not an actuary but would venture if this state were to enact tort reform similar to those in California or Colorado, then insurance companies would come in because the market would be more predictable. Wyoming is particularly precarious because it has few physicians and the departure of one impacts health care access significantly. He said Wyoming's medical malpractice insurance rates are probably based on American Medical Association data. Insurance Commissioner Ken Vines said insurance companies file a packet of information on how they establish their rates with the Wyoming Insurance Department. The Doctors Company has risk management staff and programs for doctors with claims difficulties. He said he doesn't believe his company is a strong supporter of medical review panels as a means of reducing medical malpractice premium costs. Discussion followed regarding why physicians' medical malpractice premiums are increasing if claims costs are decreasing. Wyoming numbers are not sufficient to create credible figures to do rate making, actuaries say, Ken Vines reported. He said his understanding is insurance companies are using other information than Wyoming's numbers – they have to be using some other information. He said he can look at the filings in the Department and attempt to figure out what they've used in the past. He said he didn't know whether Wyoming's severity of claims cost is decreasing. His office would not have specific information on specific cases, what was settled in a particular case, what was non-economic damages.

Commission Chairman Muirhead tabled further discussion of available Insurance Commission and Doctors Company data to allow progress on the agenda.

Melissa S. Denison from the Ohio Hospital Insurance Company (OHIC) said her company is a stock company with 100% of its stock owned by a physician-owned medical malpractice company. Exhibit A in her report (**OHIC.pdf**) shows a comparison between states with and without caps. Exhibit B is OHIC's most recent rates for different physician specialties for the states in the states OHIC serves. She said there is a correlation between tort reforms and insurance premium rates. Rate increases in the last couple of years for hospitals and physicians are significant, but there had been none for several years prior to that – the average is about 4% per year. If the insurance companies increased their rates annually, there would not be the dramatic increases there are today. Price is what you compete in. We've had corrective action we have taken as an insurance industry over the last two to three years. The rates are settling down now. Since 1994, there have been claims in excess of $250,000 and in excess of $1 million in Wyoming (*handout*), she said. She said this year, countrywide information rather than AMA data is being proposed as the basis for rate setting for Wyoming. The amount that the National Association of Insurance Commissioners allows insurance companies to invest is about 15%; OHIC typically invests around 12% - and losses do impact rates. Reserves offset losses in premiums, which were inadequate. OHIC's investment income has remained relatively flat in the last few years. Under a physician policy, the physician has the right to settle. The company and attorney work in partnership and there's no expert witness to defend the physician's position and the venue isn't favorable, the insurance company encourages the doctor to settle – but they are not penalized if they choose to go to trial. Tort reform will not reduce premium costs but it will bring in more predictability and competition, which will lower costs. OHIC has been in the state; rates are based on the state's environment. In its most recent rate filing in Ohio, the company was required to put in a factor for tort reform. But OHIC's rates still went up on average 17.5% for physicians in Ohio and they went through three prior years of double-digit rate increases. A last resort joint underwriting association is not an issue for OHIC because it is not competing for those doctors. If it's a mechanism to bring down rates, OHIC cannot compete with that and that would make an impact on how the company does business in Wyoming.

Cheryl McVay of the American Association of Retired Persons (AARP) (**AARP.pdf**) said she represents people 50 and older, who use a lot of healthcare. The AARP's position on medical malpractice said it is not a priority, based on what the membership is reporting are key issues. Basically, AARP focuses on consumers and the quality of care. Real reform goes beyond doctors and lawyers. One of the things the AARP policy emphasis is the Institute of Medicine's emphasis on systemic failures – failure to diagnose early enough, diagnostic errors, treatment errors – and try to bring forward development and implementation of improvements. Compensation for medical mistakes should be fast and adequate. The AARP found the joint underwriting association question confusing but does support an actuarial study that will give Wyoming policymakers the information needed to move forward. When AARP staff in Wyoming were looking at the JUA legislation, questions that arose were: how many insurance companies would be interested in participating, would this be available only to hospitals and physicians or would optometrists and other health professionals be included, and what would the impact be to individual consumers? It wasn't clear what impact would be felt by a homeowner or general casualty policyholder. AARP encourages stabilizing premiums and an actuarial study; the organization recognizes there must be a balance between physician losses, insurance market potential and impact on consumers. AARP's members are interested in the availability, affordability and adequacy of insurance for people from the ages of 50 to 64. That has shown up on its membership surveys.

James M. Fasone, Senior Vice President of Gallagher Healthcare Insurance Services, Inc., said his company provides insurance and risk management solutions to the insurance industry. He discussed the insurance industry's status and Wyoming's position in it, relative to other states. Wyoming has an affordability issue. Joint underwriting associations are pretty onerous in terms of the requirements to get in. They have to underwrite their profit; the JUA in California is technically bankrupt. What Wyoming doesn't want to do as an organization, as a commission, as a state, is take risks when unsure of the severity of medical malpractice claims. If the right data isn't available, it's going to be tough to take a bet. There's a number of ways Wyoming can structure something to be viable. Wyoming is going to have to underwrite profit just like all these other carriers are trying to do and will have to invest the premiums in a safe and

sound portfolio. Is the crisis to the point that the state wants to make that investment now for the future? When looking back 10 years later, will the belief be that action taken was beneficial? ALPS is an example – its rates are a little higher but it's predictable and it's sustained. Is there enough credible data to make a decision on which alternative to go with? Yes. Is there actuarial data to 90% certainty? No. If the state can't predict that, then policymakers have got to look at exposure data in other states. Although it's not ideal and Wyoming does not have the claims experience that others have, why are the carriers here experiencing losses? They're not priced for risk. It's primarily an investment in the process, which isn't going to be that painful, but also it's an investment in the structure, which could be a little painful, but what's the long-term result? Stability? Sustainability? He said he thinks there's probably enough data for Wyoming. He'd recommend getting ahold of some of the carriers here and doing some kind of data dump. There's no insurance company out there that wants to drive physicians out of business – that's not going to help them.

Comments from the audience
Dan Lex, Executive Director of the Quality Health Care Foundation (nonprofit nursing homes and long-term care facilities) and the Wyoming Optometric Association, talked about insurance premium increases – which are right in line with those nationally for nursing homes. He said nursing homes are still able to find a carrier in the state. The Quality Health Care Foundation is not looking for a reduction in rates but for access to the coverage, to the product, in the state. Policymakers have to make Wyoming attractive to carriers and he thinks that has to do with tort reform. In Florida, all the carriers have pulled out because of all the litigation related to long-term care. But to operate and receive Medicare reimbursement, a long-term care facility has to have coverage. As far as optometry, providers do not complain about rates – they've been stable – but there are probably two carriers interested in carrying product for that profession in Wyoming. The optometrists and long-term care providers have concerns that an environment be created that keeps insurance companies interested in coming into Wyoming. South Dakota has lost two long-term care companies because of the insurance crisis.

Toni Decklever, with the Wyoming Commission of Nursing and Nursing Education, said it is projected Wyoming will have the worst nursing shortage by the year 2020 in the nation. The state workforce working group predicted if Wyoming doubled enrollment in all available college nursing programs, there still wouldn't be enough nurses available. The nursing education bill passed this year was two years in the making and it originally had a larger price tag than it emerged with. The Commission of Nursing wishes more money had been invested by the Legislature in the effort but is pleased with the passage of a bill. There are quite a few people looking to apply for those funds, and there's hope that legislation will help with nursing retention.

Commissioner Ford Bussart led a discussion regarding what data is available that details the Wyoming medical malpractice claim, settlement and verdict experience. Wyoming subspecialty information probably won't be credible, former Insurance Commissioner John McBride said, because there are so few claims in the state. Wendy Curran, Melissa Denison, Bob Kidd, Insurance Commissioner Ken Vines and Health Care Commission member George Bryce participated in the dialogue.

The meeting adjourned at 5 p.m.

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Attendance: Commission Chairman T. Chris Muirhead, Commissioners George B. Bryce, Ford T. Bussart, Dr. Stacy J. Childs, Carol V. Jenkins, Paul A. Lang, Dixie M. Roberts, John H. Vandel and Dr. Robert G. Volz, Commission ex-officio members Ken Vines, Wyoming Insurance Commissioner, and Dr. Deborah Fleming, Wyoming Health Department Director, and Commission staff, Director Diane Harrop and Emily Quarterman.

Chairman Chris Muirhead called the meeting to order at 8 a.m., introduced the Commission members, summarized the purpose of the Commission and the meeting, and introduced the Governor.

Gov. Dave Freudenthal said while the Commission isn't the "tort reform commission," that issue is going to have to be addressed. He encouraged the group to become focused on a few things in order to avoid spreading itself too thin over too few issues. His intention is to extend the life of the Commission, and warned the commissioners to expect longer terms. One of his regrets about the last decade and a half in the state, he said, is that not enough was done with the prior Health Reform Commission's recommendations. Health care reform is an issue that's not going to go away and needs to be pursued. Everything that's done should be as data-based rather than policy by anecdote – not a particularly good way to run a government. But data doesn't answer every question and there will be an understanding developing of human responses to policy shifts. Sometimes the Health Care Commission is going to be right, sometimes it's going to be wrong, he said, but he urged the Commission to take stands rather than avoiding controversy. The commissioners were chosen based on the Governor's knowledge of them and because of reputation. If they look forward into the future of the state, they will see challenges for health care in rural sparsely populated areas are going to continue on and on and are going to require a degree of honesty and creativity. Policymakers need to be honest with people about what can be done and how it can be paid for. He asked the Commission to be creative. Even as the least populated state in the nation, each citizen is entitled to some form of health care, he said. He said though the Governor's Office will work closely with the Commission, it isn't the governor's commission, or the legislature's commission, it's a commission of citizens. The judicial and executive branches are hopeful the commission will work out solutions for health reform. He predicted citizens will be incredibly willing to share their views with commissioners.

Rep. Jerry Iekel, a mental health professional on the House Labor, Health and Social Services Committee, spoke about the Legislature's intention in creating the Commission **(Rep Jerry Iekel.pdf).** The Joint Interim Labor, Health and Social Services Committee met this morning, he said, to address the role the Legislature will play with the Health Care Commission. Other Interim Labor, Health and Social Service Committee members present are Sen. Charlie Scott, Natrona County, and Sen. Mike Massie, Albany County. Rep. Doug Osborn, Johnson County, Committee co-chair, extends his regrets that he couldn't be here. Legislators recognize the serious impacts of the health care crisis that the nation is experiencing, and Wyoming has its very special part – we are both a prototype of the whole and peculiar (rural/frontier, small population, economies of scale), he said. Wyoming is experiencing health care provider shortages, insurance, medical malpractice, cost shifting and so on. HB 46 creating the Health Care Commission is calling for a working body and a process to address the complexities of this health care system problem and for a public process that extends beyond what can happen beyond the Legislature. As commissioners are called upon to improve health care and reduce costs, a larger cadre of persons is needed. Persons capable of efficacious work join together to sort out and seek focused testimony and organize and prioritize information. And then the Legislature expects to keep in touch with the Commission's work and most importantly to receive recommendations for what lawmakers can carry forth in budgetary and statutory work. Budgetary constraints exist. Many legislators have fairly fixed positions on certain of these issues. To summarize, with regard to the intent of the Legislature of creating the Health Care Commission, it's recognition of the impact of the national health care crisis, the need for a comprehensive organized response, and in a thorough way using the mechanism in the past that has yielded good results. The expectation is that the Commission will produce legislative initiatives because a citizen legislature cannot

flesh out responses to issues the way the commission can. The Legislature continues to be a partner in this work. He talked about the fragility of Wyoming's health care system with regard to physicians leaving the state and retiring early and the potential positive impact of tort reform on recruiting health care professionals. Medical malpractice, insurance and pharmaceuticals bills that were introduced during the last session of the Legislature were reviewed, as well as the cigarette tax increase that went into effect in July. He said the primary purpose of the bill was not initially for the creation of revenue but to address health costs associated with tobacco use. He said liability protection for retired physicians working in free clinics was also passed, which will promote development of free clinics to help meet the needs of uninsured low-income health care consumers in the state. All bills proposed during the session and Acts enrolled can be found on the state Legislature's web site, http://legisweb.state.wy.us/.

Sen. Charlie Scott, Chairman of the Senate Labor, Health and Social Services Committee, said the Commission's proposals will be translated into actual legislation that can be presented to the full committee and through the drafting process, will be modified to help insure its passage. He pledged legislative support. He reported on the impacts of medical inflation, large group premium increases, and small group premium increases and their impact on Wyoming, the causes of medical inflation (pharmaceuticals, hospital costs, decline of managed care, physician reimbursement) (**Sen Charles Scott.pdf).** He talked about the cost to health care consumers of medical errors, the nursing shortage, defensive medicine, and the shifting of costs from people who can't pay their bills to those who are paying. He said the federal government is responsible for half of cost shifting. Sen. Grassley of Iowa is leading a charge to make Medicare payments more equitable, he said. But Wyoming government is also not paying enough for health care via Medicaid, resulting in cost shifting. He said adverse selection is a significant factor in the rising cost of insurance – people who need health insurance because they have a significant personal risk are making sure they get it, while younger and healthier people are going without, so the risk is not well spread. 20% of insureds cost 80% of costs because better risks are leaving the health insurance market while higher risk consumers are covered. Wyoming's demographics and its "bubble" of aging people who moved to the state during the energy boom in the 70s also were addressed. He talked about potential solutions to Wyoming's health care costs woes.

> Sen. Mike Massie was asked by Sen. Scott to talk about the work of the State Planning Group addressing the problems of the uninsured. Massie said interesting and comprehensive information has been gathered by the group, also known as the Uninsured Task Force, in the state. Estimates are that about 14% of Wyoming's population is uninsured. The Task Force is focusing on key areas for recommendations for the low-income workers and employees of small businesses who don't have insurance. The task force is looking at the Utah model – the state of Utah has received a waiver to its Medicaid program to decrease benefits for some individuals to cover low-income uninsured people. The focus is to provide more individuals with primary, preventive care **(The Utah Plan.pdf).** One option might be Medicaid buy-in for some low-income workers, as well. Expansion of community health centers and downtown clinics might be a way to provide primary care and preventive medicine in communities. The plan is to have a menu of options for those who are not getting primary care that they need and then communities can choose what best fits. Small employers' health insurance coverage needs are a "tough nut to crack," Massie said. One option might be the New Mexico model, forming the creation of small employer purchasing pools, or another might be for the state to act as an information and referral source for employers looking for affordable health insurance. A catastrophic health insurance policy for the state might be another option.
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> Sen. Scott said in the late 1980s, he got desperate phone calls from people who couldn't find a physician and were going to other states; the family residency program run by the University of Wyoming helped with the crisis and continues to. Now, Wyoming is trying to recruit docs to the state on "lifestyle issues" but all surrounding states have similar lifestyles available and higher pay, as well. He talked about the threat that the Legislature might have to be called into special session if a medical malpractice carrier left the state. Various constitutional amendment proposals allowing for tort reform that might make medical malpractice insurance more available should be looked at closely, he said. He called for examination of the impact of medical errors, although little data exists to quantify how many occur and liability fears are resulting in reduced examination of the causes of death (few autopsies are being done in Wyoming now, Scott said). Wyoming needs to be prepared to implement a working solution to a crisis by modifying existing

statutes to offer a medical malpractice policy to physicians with funding set aside to pay claims, should insurers pull out **(Professional Review Panel.pdf).**
Dr. Deborah Fleming, Wyoming Health Department Director and ex-officio Commission member, said the underinsured are as great a problem as the un-insured – the people who have only catastrophic insurance and no preventive care coverage. She asked Sen. Scott how long it will be before Wyoming's health care delivery system collapses. Scott said with malpractice insurance coverage, there's no telling – it could happen tomorrow, but he predicted 50/50 odds of that occurring in the next two years. It would be much better to be prepared with Health Care Commission responses to an anticipated crisis. He guessed that if lawmakers don't get this thing under control with recognition that inflation is inevitable – the United States is probably looking at a collapse within three to five years where the national system of health care financing will have to be dealt with in Washington. It's getting to be a problem that will not wait. Sen. Massie said that Wyoming needs to bolster the parts of the system that do work, such as encouraging state employees' families to come back into the state employee health care plan and spread the risk as the workforce ages.

George Bryce, of The Insurance Agency in Casper, Health Care Commission member, and 1990s Health Reform Commission member, said it is strange to be in charge of historical perspective. A lot of the things health care industry professionals have discussed through the years have not changed a whole lot – it's going to be a matter of urgency. He said health care reform leadership is blessed to have Sen. Scott and his 25 years of legislative of experience, his last 10 or 12 specializing in health care. The first Commission came about after Mrs. Clinton attacked the national health care plan in the aggregate in the early 90s. It's amazing how that straightened up the system – nobody knew what was going on behind those years. Gov. Sullivan launched the Health Reform Commission in December of 1993. At that time, the state wanted to have quality care and coverage. Everything the Health Reform Commission did came back to accessible and affordable care and coverage. He talked about the influences putting pressure on the commission that made it difficult to come up with a simple plan – but 49 recommendations were made after 14 months. Personal responsibility was emphasized by that Commission, although it's difficult to legislate. Lifestyle adjustments, physical education for a lifetime, moderation, smoking, drugs, alcohol, driving with seatbelts and wearing helmets, sexual awareness and teen pregnancy are examples. With the help of the press and public releases of information, it may be possible for this Commission to emphasize the importance of taking care of ourselves – which result in 40% of health care expenses, Bryce said. He reviewed all 49 Health Reform Commission recommendations and progress which has been made in the state since those recommendations were made *(handout).* Bryce sat on the Health Reform Commission's insurance mechanism subcommittee. He talked about how subsidies of health insurance can occur. He said medical accounts are needed to mix consumer, provider and employer dollars and increase the number of people covered and the amount of preventive care funded. The affordability side – insurance, what types of care are provided – how can we pay for it, that's going to be our biggest problem **(Health Reform Commission.pdf).**

Dr. Deborah Fleming, Wyoming Department of Health Director, provided copies of the Department's thumbnail sketch, and the mission, vision and philosophy for its strategic plan (*handouts*) and introduced a number of her leadership staff. She said Wyoming's Department of Health is unique in comparison to other states' because public health, Medicaid, aging, the Office of Rural Health, developmental disabilities, substance abuse prevention, mental health, and other programs are all in one department. She talked about the number of people benefiting from or served directly by Health Department programs, guessing that the Department serves more people than any other in Wyoming (excepting the Transportation Department, which provides roads). Disaster preparedness has become part of the Department's role as a result of 9/11 and the availability of federal funding for bio-terrorism. The influx of new funds allows the state to rebuild its public health delivery system that responds to a broad spectrum of disasters, including fires and floods. She talked about other changes in the Health Department's landscape, including the advent of Kid Care -- the state Children's Health Insurance Program (SCHIP), incremental Medicaid reforms, allied health professional shortages (nurses, social workers, occupational and physical therapists, therapists), an increasing awareness of public health threats resulting from 9/11, increasing substance abuse rates and mental health needs, the state's aging population (about 77,000 people are now 65 and older, or 15% of the population), and a growing minority population in Wyoming and disparities in health care access and

delivery. Assessment, policy development, assurance of access to health care and performance measurement are focuses of the Department. Targets include health professional shortage areas, percentage of low birth-weights (more than 20% higher than the national rate), unintentional injuries (more than 60% higher than the national rate – and Wyoming is 5th highest in the nation for unintentional injury mortality), suicide (5th in the nation), and problems with lower respiratory disease, maternal smoking, and motor vehicle crashes. Wyoming has the fastest aging population in the country and the state's long-term care services must keep pace with that. Workforce development is a partnership effort, Fleming said, and she and her staff are working with other agencies, nonprofits and professional associations. The Office of Rural Health is being strengthened, she said, increasing staff, outreach, and health care providers. The Wyoming Department of Health partners with Wyoming Health Resources Network (a public/private partnership facilitating recruitment of health professionals to the state), and she's calling for mentoring by health professionals to build a pool of up-and-coming allied health professionals. She also talked about the Department's role, with respect to the work that the Commission is doing and how the two may dovetail. The Health Department will internally be putting a new emphasis on employee health and well-being and hopes that other agencies will join in. She said she learned at a conference recently that success depends on relationships. For example, research shows that patients who have a good relationship with their physicians are less likely to sue and will continue to see that provider, Fleming noted that a previous Commission speaker had said. She said the challenge is to build relationships, even with the opposition – go out and meet face to face and meet with people on the other side. She said she hopes that if the Commission can adopt that motto, it can lurch forward. Dr. Fleming made a PowerPoint presentation printout available specific to Mediaid **(Deborah Fleming.pdf).**

<u>Linda O'Grady</u> delivered a presentation of the State Planning Grant (SPG) she coordinates **(SPG.pdf).** The SPG is competitive funding of over $1 million awarded to only 10 states to study the problems of the uninsured. The original grant was for 12 months – but Wyoming had to ask for more time, as did all the other states. Twelve months is an ambitious time in which to complete a study of this magnitude. An extension of the grant was awarded. Supplemental funding has been sought to allow Wyoming to remain in the SPG arena, working with other states. The supplemental funding proposal was flexible enough to allow the WHC to obtain research from the SPG. U.S. Ambassador Tom Stroock, chairman of the Health Reform Commission of the 1990s, now chairs the Uninsured Task Force funded by the SPG, and recommendations will be made that will go to the federal government regarding ways policymakers in Washington can help states with the uninsured. The University of Wyoming is partnering with the Task Force on health policy research, conducting surveys across the state. She said there haven't been a lot of surprises; a third of young adults 19 to 24 are uninsured. 2% of the state's population has never had insurance. Themes that have come out are cost, availability of insurance through employers and the need for government intervention in the insurance arena. She said six committees are winnowing down 30 options from which to make six recommendations. A contractor, Human Capital Management Services, is studying the risk of providing insurance to certain groups of uninsured populations. Small employer purchasing pools, barebones Medicaid expansion, health insurance outreach and marketing to make the public aware of what is available, SCHIP expansion, and support for community health centers and free clinics. A final report should be out early in 2004, with work completed through fall 2003.

<u>Ken Vines</u>, Wyoming Insurance Commissioner, said the Department of Insurance is the mirror of the Health Department in that it's one of the smallest – with just 25 employees. Wyoming's is the smallest insurance department in the country. This state's department does a lot of work and deals with a lot of issues. There seems to be a perfect storm in the insurance industry – health, medical malpractice, homeowners, reclamation bonding insurance affordability are all subject of controversy. One of the things he sees the Insurance Department's role on the commission as being is to provide information that is valid that is filed with the Department and isn't biased. If the Commission needs information, a request should be made to the Department – which may need a little time to tap into national resources if local information is not available. The Insurance Department and its Commissioner are pledged to helping the WHC. He said there are four or five companies licensed but not active in Wyoming's medical malpractice insurance market. The surplus lines market that some of the hospitals and doctors have had to go to is an alternative market of non-admitted companies. The Legislature in the early to mid-80s made the determination that Wyoming is going to be a competitive state with regard to rates. Prior approval for rates is not required in Wyoming. The exception to that rule is if there a noncompetitive line, then those rates have to be filed with

the Insurance Department and reviewed before they can be used. Medical malpractice is the only line considered noncompetitive. Two companies are selling 80% of the market, meeting the state statute's definition of what a noncompetitive market it is. He said that generally because the country is in an insurance cycle, in the early to mid-90s, companies were not filing for rate increases or were filing for decreases. In the last two or three years, that's changed and they've filed for substantial rate increases. When an Insurance Commissioner is reviewing rates, they walk a tightrope. Some of the time, insurance companies will leave if they don't get the increases they requested. Rates are determined based on experience, severity, exposure, frequency, trending. It's difficult to jerk one thing out and look at that. That's where actuaries come in. He said he doesn't know how rates can be studied or decisions made about rates without an actuary to talk to about it. Commissioner Vines issued a memo (*handout*) regarding a study the WHC is required to do by House Bill 261/Enrolled Act 90 (*handout*). In the bill is a laundry list of tasks, he said, including studying:

- feasibility of creating a joint underwriting association (JUA) composed of all insurers authorized to write casualty insurance in the state of Wyoming (580 to 600 companies, Vines said – mostly writing property casualty – and 99% don't write medical malpractice insurance),
- the impact of a JUA on the current Wyoming market,
- what kind of rates and reserve funds are needed to operate this JUA,
- necessary policy holder participation,
- provider-owned mutual insurance companies and a mechanism for providing state assistance to start that kind of company,
- what is needed to respond to a crisis in the market.

He said participation in a JUA can be statutorily mandated, but a company could then opt to leave Wyoming's insurance market. Is a JUA subject to being sued at some point? All the companies use reinsurance to pass off some of the risk they have. He's not aware that JUAs typically interact with reinsurers. W.S. 26-33-101 has to be examined by this study, concerning whether could be revamped and used. Certainly it needs to be revamped, with regard to the dollar amounts attached to it. The other thing about that law is, it assesses a surcharge on the doctor. The Commission has to get some feel about whether the doctors are willing to pay that surcharge. The fact that it was never implemented, the Commission should wonder about that. Liability risk retention groups are already there – if the Medical Society or Hospital Association wanted to form a risk retention group – that ability is already there. The only thing about risk retention groups the Commission should be aware of is that risk retention groups not formed in Wyoming are outside of the Insurance Commissioners jurisdiction. That really happens under a federal law. They're domestic or home state is where they are formed, and only that Insurance Department has authority over them. There are a lot of them out there and a lot are authorized to do business in Wyoming, but they are not licensed by Wyoming. When Enrolled Act 90 talks about the insurer of last resort or insuring in the event of an emergency situation – that's an extremely important issue to look at in this situation. He said he's not too nervous about Wyoming's insurance companies right now. He doesn't think it's any secret that several of our companies have been downgraded in their ratings and that tends to generate some concern. It would only take the loss of one of these companies by withdrawal from the state or financial insolvency to create an immediate problem. Where would the doctors go for medical malpractice coverage? Maybe one of these other companies, but maybe they couldn't get coverage. He said he thinks that's a real important part of this study. He said he talked briefly about costs in his memo. It's real hard to determine costs until specific direction is given to people who will bid on this contract. The Commission may need to do some kind of surveys of the doctors and the hospitals in the state to get their reaction. The report needs some specific recommendations – this is the number one thing the Commission believes might help in the situation. The National Association of Insurance Commissioners may have staff the Commission could consult with. Other states have done the studies – Mississippi, Arizona, Missouri, West Virginia – on the malpractice issue. NAIC.org has a map of the states with individual states' reports linked to it. The report from Mississippi is over a hundred pages long – he said he doesn't know if Wyoming needs to go to that extent, but that report will help show what has been studied by other states. The Insurance Commission feels competition is best – the more competition you can get, the better, to impact rates. That was the first recommendation they gave the Missouri Commission, that a JUA be an insurer of last resort. Commissioner Vines will provide a copy of the Mississippi report to Chairman Muirhead. There just aren't that many companies offering medical malpractice in the country – having three companies offering it in Wyoming probably puts the state ahead. Having one company isn't that unusual. On the $150,000 limit for after-

failure coverage, that's a state statute. The problem with raising that is that addresses life, health, property, casualty, not just medical malpractice. He said he didn't know if it would be workable to raise to a $1 million level, as suggested by one WHC member. Insurance companies can file for rate increases any time, Vines noted. The Insurance Commission currently has a rate filing from The Doctors Company. They can come to the Insurance Commissioner at any time and file a rate increase. When they file a rate filing, they will have an effective date on it. He noted the rate filings address base rate. Companies are still allowed to write on individual doctors and hospitals – they can add to the base rate through underwriting **(Ken Vines.pdf).**

Business meeting

Chairman Chris Muirhead outlined the 11 areas within statute the Commission is charged with addressing which he and Director Diane Harrop grouped into categories as a basis for discussion.

Sen. Charlie Scott was asked to explain "the implications of any reforms for non-health care activities." He said that issue was raised in part by the Governor, who was concerned that if the Commission and Legislature does things in the tort area, there could be implications on non-health care activities. For example, remove prohibition on non-economic damages and that has implications across the whole spectrum of potential liabilities. You see it also in joint underwriting associations, you do this you may raise property and casualty rates generally and some insurance companies may leave the state.

Chairman Muirhead then asked the Commissioners to individually analyze and prioritize groupings they see occurring. Each offered their comments. The Chairman proposed two initial subcommittees – one to work on tort reform and a second to work on access to health care - in cooperation with the SPG Underinsured Task Force, with a goal of a progress check in December. He said numerous non-commission members may be recruited for subcommittees.

Subcommittee 1 (operating with a 10/15/03 deadline) (Paul Lang, Ford Bussart, Ken Vines, John Vandel (Chairman), Stacy Childs):

- Health care tort and liability insurance and reform;
- A system to investigate and reduce health care errors with the provision of compensation for errors due to negligence on a schedule as an exclusive remedy;
- Implications of any reforms for non-health care activities that will impact health care (i.e. auto insurance that doesn't have enough of a payout to cover hospital costs).

Subcommittee 2 (Bob Volz, George Bryce, Carol Jenkins (Chair), Deb Fleming, Dixie Roberts):

- Access to an affordable, effective and quality health care system for Wyoming, including rural areas of the state (including prescription drug costs);
- Access to affordable insurance;
- Cost shifting by medical providers that occurs as result of reimbursement from public and other programs;
- The aging population in Wyoming and the long-term care services that will be needed by that population;
- Issues of wellness and individual responsibility for personal health;
- Disease prevention and management;
- Workforce shortages among medical provider professionals.

Not grouped:

- Other issues as deemed appropriate by the governor and the commission.

Chairman Muirhead did not assign himself to a subcommittee, but will participate in the work of both committees.

Suggestions were made from the audience that partnerships with the federal government be capitalized upon to further the committees' work, that a timeline should be developed, and existing programs and processes taken into consideration.

The Chairman asked if there are any groups that need to be invited to participate in the Tort Subcommittee. Suggestions were made by Commissioners and members of the audience including: Wyoming Medical Society, Wyoming Trial Lawyers, Wyoming Hospital Association, the insurers, consumer groups, AARP, nursing homes, small business community (Small Business Federation), nonprofit organizations' group representing special populations, (i.e. Brain Injury Association, etc.).

The Chairman asked for suggestions for candidates to participate on the Access Committee: Wyoming Primary Care Association, Wyoming Health Resources Network, Dr. Hugh Sloan, Bernadette Quevedo-Mendoza from CMS (Medicare), Wyoming Medical Society, tribal health councils/Indian Health Service, Wyoming Hospital Association, labor, Wyoming Nursing Association, Dan Lex (optometrists and long-term care), University of Wyoming College of Health Sciences, Nurse Practitioners Association and other allied health professionals' groups, Blue Cross Blue Shield, Health Insurance Association of America, Wyoming Retail Merchants Association, Restaurant Association, chambers of commerce, pharmacy association, WinHealth Partners, Wyoming Press Association, faith-based initiatives.

The Chairman asked the subcommittees to form lists of participants who can be appointed – particularly regarding tort reform since that committee is on a tight deadline.

Wyoming Hospital Association CEO Bob Kidd said U.S. Sen. Craig Thomas is planning a rural health conference in Casper the last week of August.

Sharon Breitweiser, who assisted with development of a bill working toward contraceptive equity (coverage of birth control by insurance companies) that failed this session, asked that the reproductive equity issue be included on the Commission's agenda.

Pennie Hunt, Wyoming Health Resources Network, reported on her organization's contribution to health care practitioner recruiting and retention efforts in the state and volunteered to assist the Commission.

Dr. John Harper, a Wyoming physician, a cardiovascular health volunteer, and consultant to the Department of Health substance abuse prevention division, said individuals need to participate in paying for preventive medicine via a federal tax credit incenting consumers to seek wellness information.

Cheralynn Kaiser of Wyoming Medical Center introduced herself and stated that the Casper hospital would be available to help if needed.

The Commission meeting was adjourned at 2:39 p.m. The next meeting is Aug. 25 in Casper.

Subcommittee meetings were held following the full Commission meeting.

All handouts are available upon request from the Health Care Commission staff, equart@state.wy.us, (307) 235-3227.