MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 29, 2001 at 10:05 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 176, SB 247, 1/23/2001
Executive Action: None

HEARING ON SB 176

Sponsor: **SEN. WALT McNUTT, SD 50, SIDNEY**

Proponents:
Kurt Alme, Director of Department of Revenue
Gordon Morris, Director of MACo
Gary Fjelstad, President of Montana Association of County Officials
Ron Alles, Chief Administrative Officer with Lewis & Clark Co.
Jim Regnier, Justice of the Montana Supreme Court
AnnMary Dussault, Missoula County Chief Administrative Officer
Joe Connell, representing self

Opponents:
Ed McLean, President of the Montana Judges Association
Gene Fenderson, MT District Council of Laborers
Dave O'Connell, representing self
Roberta Drew, Billings Public Defender

Opening Statement by Sponsor:

SEN. WALT McNUTT, SD 50, SIDNEY, opened on SB 176 saying it was the result of an interim committee. The committee was established by SB 184 during the 1999 Legislative session. He provided a report done by the committee, **EXHIBIT(jus23a01),** *Simplification in the 21st Century*. A bill synopsis also was provided for the committee to consider, **EXHIBIT(jus23a02).** He said it was not the first attempt at restructuring the District Court system to include a state assumption. He also noted that the constitution allowed for the restructuring. He said underlying, compelling reasons made the interim committee bring forward a bill this session: 1) the system was underfunded, compartmentalized, suffered from some of the same inequities that lead to the School Foundation Program's unconstitutional status by the Montana Supreme Court. Also, the District Court program was funded by 57 different sources of money; not all equal. 2) MACo adopted a resolution to adopt this program. The resolution could be found on page 3 of exhibit 1. He said the bill set forth a District Court plan to establish it as a state court system. He read the committee's recommendations found on page 1 of **exhibit (1).** He reported the committee made a good-faith effort during their two years and were able to reach consensus and develop a

program, something the other two attempts had failed to do. The Department of Revenue, the Supreme Court, and other agencies were able to come together this time.

Proponents' Testimony:

Kurt Alme, Director of Department of Revenue, reported the governor's office was still considering the bill, but supported the goals behind the proposal because of the adequate and relatively constant revenue and timely and uniform judicial services for individuals and businesses.

Gordon Morris, Director of MACo, emphasized page 3 of the report booklet, **exhibit (1),** explaining MACo's resolution. He believed the comments on pages 4 and 5 warranted review by the Judiciary. He thought the issues were straightforward. He provided a handout in reference to 3-5-404, **EXHIBIT(jus23a03),** so that the Judiciary could add that section to the repealers of the bill. He noted the bill asked for 3 or 4 repealers and he recommended 3-5-404 be added to those to get it off the books. The case notes attached to **exhibit (3)** pointed out some of the problems local governments encountered in terms of District Court in general. Also, he emphasized commissioners' discretion in providing supplemental funds to the District Court through a contract with the Supreme Court Administrator. The important point was the commissioner discretion that they MAY supplement the District Court budget operation. He suggested that section could be strengthened if it remained at their discretion and not court ordered.

Gary Fjelstad, President of Montana Association of County Officials, said the membership encouraged support of SB 176.

Ron Alles, Chief Administrative Officer with Lewis & Clark Co., said the county supported the bill and that the report was well crafted. By allowing commissioner's to supplement the District Court Funding, it allowed continuation of some youth programs that individual counties had established. Also, union employees currently fell under District Court funding and the committee recognized that those employees were allowed to do that.

Jim Regnier, Justice of the Montana Supreme Court, identified himself as an informational witness. The bill removed the state law librarian as an appointee of the court. According to the Supreme Court, the court administrator and the law librarian should remain as court appointed employees. He referred to page 16 of the bill, the amendment to section 22-1-504. The Court recommended striking the word "librarian" following the title and substituting "library". Then in subsection 2, striking "librarian and other", and adding, "except the librarian" It would read:

"The staff of the state law library, except the librarian, are. . ." Consistent with the changes, new section 1 of the bill, page 1, would then include the librarian along with the rest of the list of exempt employees. These amendments would then be consistent with other statutes, specifically, 22-1-503 sub2.

AnnMary Dussault, Missoula County Chief Administrative Officer, mentioned that while she was a representative in 1977, she carried the judicial branch section of HB 122 and the recommendation was to have state District Courts assumed by the state for administration of that system. As a member of the Missoula County Commission and now as the chief administrator, she understood increasing demands on counties. Added to that was the District Court's ability to use, "power of the order". She pointed out that 3-5-404, **exhibit (3)**, was passed in 1895, and not only called on the sheriff to provide space, but it also was all inclusive to provide the "stuff" needed for that space. She reiterated that it needed to be repealed. Two examples of how the "power" was used: 1) salary, as seen in **EXHIBIT(jus23a04)**, *cost of District Court orders*, 2) bills for space in the broader sense, **EXHIBIT(jus23a05)**. The salary requested was greater than the county matrix. The bill for parking was actually never implemented. The cover letter was never discussed with the County Commissioners, nor her, the Chief Administrative Officer. These examples emphasized why it would be good policy, good administration, and good accountability for the state to assume the District Court system under the authority of the Supreme Court.

Joe Connell, representing self, identified himself as a Chief Probation Officer in the 5th Judicial District. He was involved with the interim committee and believed this effort was more favorable than anything in the past. It provided relief to the counties and insured that those who worked in prevention, early intervention programs, and other pre-delinquent projects would be assured of the programs' continuation. He mentioned the probation officers who were not paid a fair and just salary, but had the same legal and administrative responsibilities as those in large urban districts.

Opponents' Testimony:

Ed McLean, President of the Montana Judges Association, felt SB 176 was a good start, but more work was needed. He wanted to work another two years on the project for unanimous support. One of the big problems between the judiciary branch and the county involved space needs. Some of these problems even had been addressed by the Montana Supreme Court.
{Tape : 1; Side : B}

Currently court reporters transcribed at home or in rented offices. SB 176 required counties to provide and pay for that space. Likewise, two counties, Yellowstone and Missoula Counties provided space for the public defender, SB 176 required all counties to provide that space. To illustrate, Flathead County had six public defenders providing their own space, but that cost would be absorbed by the county after SB 176. Many counties simply did not have the space to provide. Some judges in western Montana, as well as the Court Reporters Association, opposed the bill and asked him to carry that message and ask for a table motion to allow further study. He acknowledged it was a qualified opposition because with further study, it could have unanimous support.

Gene Fenderson, MT District Council of Laborers, said Local 254, juvenile probation officers and other employees of that operation, opposed at least new section 56 of SB 176 regarding collective bargaining agreements and those protections. They were concerned that they be allowed to unionize, and not put under a different bargaining agreement under authority of the Board of Personnel Appeals of the state. It was believed changes could ruin the relationships and protections established and negotiated over the years. He also mentioned the ability of the juvenile probation office to gain outside grants. It was feared that SB 176 could take away that avenue for funding.

Dave O'Connell, representing self, provided testimony in opposition, **EXHIBIT(jus23a06).**

Roberta Drew, Billings Public Defender, believed that the intent of the legislation was good, but they were specifically concerned with the commissions, duties, and rules of public defenders. They felt commissioned defense attorneys should be experienced criminal defense attorneys, but also be specifically experienced in indigent offense. They agreed with the minimum standards, but a commission that was voluntary in nature would not have the necessary time to develop standards, especially in light of the fact that currently Montana only had 5 established public defenders offices. Having a paid director for the Commissioner of the Public Defenders would be the only way to ensure efficiency, but it was not provided under the legislation. While judicial branch employees would have protected salaries, public defenders would not have those protections under the legislation.

Questions from Committee Members and Responses:

SEN. MIKE HALLIGAN asked for the numbers regarding the fiscal impact. **Gordon Morris, Director of MACo**, said the numbers could be found in the report, **exhibit (1).** The coordination

instructions were not included in the report because the funding for the proposal was contained in HB 124. The estimated amount, $20,800, 000, left the Clerk of Courts and all those staffs under county responsibility, all else would go to the state. The cost associated with the transfer was covered under the assumption that the amount would be netted out against the county entitlement calculation under HB 124.

SEN. HALLIGAN wondered what would be retained by the county in terms of funding flexibility; would the 4 or 6 mills of the District Court be freed up for the county to use at its discretion. **Mr. Morris** said that was the intent. It would remain the authority of the county commissioners. The money could fund the Clerk of Courts function as well as the counties' half of the deputy county attorney's salary, and other District Court funding matters.

SEN. HALLIGAN clarified the motor vehicle half percent money source. **Mr. Morris** said the bill didn't touch that. It would remain a local option. That percent could be used with the commissioners discretion for any other county purpose. The motor vehicle money in HB 124 was requested to go to the state and the court would continue to get the 9 percent from the District Court grant program out of the motor vehicle money. That would continue to go into the program.

SEN. HALLIGAN noticed that page 12, line 9 removed space provisions. Who was assuming it? **Mr. Morris** said it was a troublesome area to cost it out and put it into a bill. MACo recommended that it would be worked out with the Supreme Court administrator over the interim. The counties would assume the responsibility of providing space as they did currently. Therefore, the court order notion had to be dealt with carefully.

SEN. HALLIGAN asked if the committee talked about 3-5-404, which wasn't discussed in the bill, but was brought up as a big issue. **Mr. Morris** felt the committee couldn't come up with an appropriate solution. It was entangled in the Constitutional issue. Therefore, repealing the section would be the best thing to do.

SEN. HALLIGAN questioned if the librarian issue was a big concern. **SEN. McNUTT** said it could have been an oversight. He also said that 3-5-404 was discussed, but language was not agreed upon. Therefore, they felt more public participation would be beneficial.

CHAIRMAN LORENTS GROSFIELD questioned the judge's opinion on repealing 3-5-404. **Ed McLean, President of the Montana Judges**

Association, felt this addressed the issue between the counties regarding space needs. He felt the space should remain a county obligation.

CHAIRMAN GROSFIELD wondered about the pay issue and the court ordering higher wages than other county staff. He felt it caused problems and asked for comment on it. **Mr. McLean** said it was an accurate comment and created ill-will within the county. The fault was two-fold: 1) judge issuing orders that brought their employees outside the parameter of other county employees. 2) Judges, at least in Missoula County, agreed to follow the county personnel plan; however, they implemented a pay raise for court employees for one year only. The following year, the court employees didn't receive it because a court order had not requested it. It established a practice that lacked communication between county commissioners, the human resource office, and the District Court Judges.

CHAIRMAN GROSFIELD mentioned that a few years ago, county assessors became state employees and maybe some of the issues were the same. He asked for another opinion on the matter. **Mr. Morris** said even under the bill, potential for ill-will could occur because employees would be moved off the county compensation schedule and placed on the state schedule. For the most part, the employees would then receive more. That was a friction point, but it needed to be addressed.

CHAIRMAN GROSFIELD asked how statewide commissioners would feel about inserting a statement regarding space issues. **Mr. Morris** said section 2 of the bill stated "each county or consolidated city/county should provide . . ." It could be tightened and language could require a way to mediate disputes that could arise over space needs. It would also be appropriate to include his issue of court orders within that section.

{Tape : 2; Side : A}

SEN. RIC HOLDEN said it appeared that public defenders would benefit and wondered about the opposition. **Roberta Drew, Billings Public Defender,** said she was mostly concerned with the commission and how it was being set-up. She had researched how some other states operated, and it looked like a paid director would be the best way to proceed to handle the diversity of Montana's cases. A full-time committed person would provide leadership and stability to the commission. The bill asked for a commission to establish statewide defense standards. Public defenders supported minimum standards for indigent defense, but it would take time to research and develop those standards. It took six months of debate to establish death penalty case

standards. In light of that, the bill was a good starting point, but it needed to be further studied.

SEN. HOLDEN clarified that smaller counties did not have full-time public defenders. **Ms. Drew** agreed. They were on a contract basis, however, the bill allowed the counties to establish full-time offices.

SEN. HOLDEN questioned the funding for the bill if HB 124 died. **SEN. McNUTT** replied that SB 176 could not pass without the house bill. He corrected the cost amount, $24,800,000, not $20,800,000.

SEN. DUANE GRIMES questioned why the bill was brought forward in 1977. **AnnMary Dussault, Missoula County Chief Administrative Officer,** said HB 122 was a product of the new Constitution passed in 1973 to implement the local government articles. However, that was never accomplished; local governments still operated under the old Constitution provisions. The funding mechanism in HB 122 was significantly different than SB 176. The state would have assumed the total burden for the costs of the District Court. SB 176 called for the funding to come from local resources with the current state resources continuing to go to District Court. The other major difference had the Clerk of the District Court included in HB 122, they're excluded in SB 176.

SEN. HALLIGAN questioned a court reporter about the various options regarding how the job was categorized. **Cerese Parker, Missoula County Court Reporter,** felt the judges had a broader view, so the Court Reporters Association backed their beliefs. They were concerned about having another entity other than just the District Court judges having power over their staff. The bill didn't state a salary range for the position.

SEN. HALLIGAN wondered if a staff person was present who had worked on the interim committee to explain how the transition would work. **Judy Paynter, Department of Revenue,** said two years of work time would be given to look at the transition provisions and how to reorganize. She indicated a person had been nominated to handle the labor transition issues to make sure it would work well. It provided the employees the state raise that the state employees would receive in 2002. It also gave the Judicial branch until July 1, 2002, to create their pay system and implement it. It would provide opportunity for those affected to participate in its creation. They envisioned people coming into the state would not take a cut in pay and there could be some who would receive a pay increase.

SEN. HALLIGAN questioned the start date of the money flow, July 1, 2001, saying it happened very quickly. Could there be a

delayed date to ease the system or make the transition not so scary. **Ms. Paynter** said they did consider that transition date and worked with the budget office. The office advised that with all the complex financial transactions, it was better to do them all at once. It was also better for the court system to have a base year before the next biennium's budget. It would ensure a foundation. The committee would give the Judicial Council, consisting of four District Court judges, and one Supreme Court judge two years for review and to make changes for the 2003 biennium. In the process, the committee put into place that although 2001 was close, they would keep whatever appropriation that came out, minus the variable court costs, so every court system stayed in that same proportion throughout the next two years to help remove some of the uncertainty of change.

SEN. GRIMES asked for a highlight of the amalgamation of the local MPEA and how the timeframes, decisions, and associated votes would happen. **John Andrew, Department of Labor and Industry,** also provided staff assistance to the board of appeals. He was not a part of the interim committee, but got involved when questions arose about the collective bargaining process. He didn't have answers to some of the questions. He understood that some employees after the transfer would fall under the Judicial branch. The open question that the Board of Personnel Appeals had regarded the role of the board in determining personnel related matters after the transfer. He didn't feel like he could answer the question relating to pay classification.

SEN. HALLIGAN clarified that the Board of Personnel Appeals did not currently handle Judicial branch issues. **Mr. Andrew** said that their role was not clear because they were part of the Executive branch, not the Judicial.

SEN. HALLIGAN questioned that the Judicial branch did not have a comparable board to the Board of Personnel Appeals. **Mr. Andrew** replied they didn't and the collective bargaining act did not specifically exclude the Judicial branch from its coverage, but it was not clear.

CHAIRMAN GROSFIELD understood that two District Court judges sat on the committee and wondered if they supported the bill and its findings. **SEN. McNUTT** replied they did agree and presented the findings and recommendations to an annual judges convention to get the bulk of the judges to agree.

CHAIRMAN GROSFIELD stated change was always hard, especially big change. However, the comments didn't seem to warrant another two years of study. Legitimate points needed to be addressed, but they didn't seem so great as to need more study outside of this

session. He questioned the judge about putting it off for another two years, or if the adjustments could be made within the next few months and some transition issues could be addressed next session. **Mr. McLean** said when the MT Judges Association met and voted on the issue, the vote in opposition was close. The consensus was to ask for a table motion on the bill to address some of the specific concerns. They felt something should be done, but it would take two more years of study.

SEN. HALLIGAN asked about the forfeiture of fines and how they would be earmarked. **Ms. Paynter** said the moneys would be re-allocated to the state general fund except those from the Crime Victims program. The programs existing off those funds would be held harmless and would continue without disruption. She referred to a chart, **EXHIBIT(jus23a08)**, that illustrated the streamlining of the bill.

SEN. HALLIGAN asked if those programs that were held harmless would have to compete in the DPHHS budget to receive the funds that were currently earmarked for them. **Ms. Paynter** replied that an adoption program existed and those programs did not have to stand out as a statutory program.

Closing by Sponsor:

SEN. McNUTT closed on SB 176. He acknowledged this did ask for big change, but it was good public policy, it worked for the state, and was long overdue. He said it was an open process to gather all opinions. That allowed them to create something that would fit the statewide diversity, not just for one or two counties. He commented on 3-5-404 saying it might have been overlooked and asked the committee to look at that. He said the state librarian issue was also overlooked and needed to be evaluated. He noted the process was not finished, but it was time to act. He believed they set up a fair and equitable system, they tried to accommodate employees without reducing their pay, they provided for a transition period, included money for the wage adjustments, they might have a problem with who would negotiate union contracts, but that could be worked out. He strongly urged the committee not to wait another two years. He wanted to see a system enacted.

{Tape : 2; Side : B}

HEARING ON SB 247

Sponsor: **SEN. JOHN COBB, SD 25, AUGUSTA**

Proponents: **John Smith, Missoula Attorney**

Jerry Loendorf, Montana Medical Association
John Flink, Montana Hospital Association
Sami Butler, Montana Nurses Association

Opponents: **John Connor, Attorney General's office**
Barbara Harris, Department of Justice
Russ Cater, Chief Legal Council for DPHHS

Opening Statement by Sponsor:

SEN. JOHN COBB, SD 25, AUGUSTA, opened on SB 247, which clarified the fraud medicaid statute in some areas. He argued a criminal statute should be violated through a purposely or knowingly mental state. He said the violation should be against a statute, not a policy as was the current practice. The mental state for fraud violation should be purposely or knowingly, not based on knowing the person who supplied a claim. Lastly, a false and misleading claim was confusing because it was not stated clearly in all parts of the existing statute. He noted a Supreme Court case was pending regarding just the thing SB 247 was addressing.

Proponents' Testimony:

John Smith, Missoula Attorney, stated the current law had three problems: 1) the mental state of purposely or knowingly was confusing because within statute it says, "a person knows or has reason to know". By using those words, the statute did not rely solely on purposely or knowingly, but added another mental state, which caused confusion. He argued that people other than the doctor submitted the claims, but the doctor would be the one held liable because he/she had "reason to know" what was occurring. 2) It allowed for any Montana citizen to be prosecuted for any criminal action that violated a departmental policy or regulation. However, these policies and regulations did not have the force of law. He felt the potential for unjust prosecution was almost boundless. 3) Current law stated a person could prosecute any submission of a medicaid claim, it didn't have to be false or misleading. He felt in order to have a criminal statute, false and misleading had to be present. He provided a packet of the minutes from the 1995 Senate and House committee hearings on SB 293, **EXHIBIT(jus23a07)**. The bill from which SB 247 stemmed. He highlighted the discussion sections relating to the mental state. He also included a letter by **Nancy Ellery** regarding the differences in the two sections of SB 293. This letter stated the department never meant to prosecute people unless they knew what they were doing. He felt that the mental state from the civil sections statute were imported into the criminal statute, but it should not be there. He wanted the legislature to make the

statute right by making sure the correct mental state was used in the criminal statute.

Jerry Loendorf, Montana Medical Association, said they weren't testifying because of the pending court case, they were supporting the merit of the bill. He felt the purpose of the American justice system was to avoid convicting the innocent, even at the expense that some of the guilty might go free. He said the medicaid fraud law had the opposite approach. It would grab the guilty along with a few innocent people. He felt it was out of sync with the entire criminal code because it didn't clearly state the purposely and knowingly mental state standard. He didn't think a person should be found guilty unless intent and action were proven. In the current statute, he thought that wasn't clear. He also thought that the violation should go against a rule or regulation, not simply a policy.

John Flink, Montana Hospital Association, supported the bill for reasons already stated.

Sami Butler, Montana Nurses Association, supported the bill.

Opponents' Testimony:

John Connor, Attorney General's office, said in all his time before the committee he could never recall a situation where a bill was debated on a basis of conviction on a case pending appeal before the Supreme Court. He found that very distressing. He noted that the bill was first introduced in 1995, the arguments given by the proponents were considered at that time, and it was passed into law. He felt the only reason for SB 247 was because the client of the requester and proponent of the bill, **Mr. Smith,** was being convicted under this statute and it was now in the appeal process. Without waiting for the decision, the legislature was being asked to consider the merits of the issues that were raised and debated in that week-long trial. He noted that since 1986, only 9 cases had been prosecuted under this statute. Of those cases, he said none were dismissed or juries acquitted because of the statutory language. No one had gone to prison or jail. He understood the argument about the mental state, but 45-6-313 (1) had a mental state that applied to all the subsections that followed. The "knows or has reason to know" was in addition to the purposely or knowingly mental state. He felt there was opposition to the current law because it made it difficult for a criminal defense lawyer to get his/her client off. He believed the jury system needed to be trusted to make the right decision. Prosecutors did not round up the innocent in order to convict the guilty, they were elements of a system of those who refused to accept responsibility for their actions.

Prosecutors made no judgements about the morality of an issue. He felt the people of his bureau followed that ethical standard to the maximum. He was defending their appropriate discretion in a situation that was difficult. He felt doctors had ample opportunity to know what was going on and they couldn't blame their staff for not knowing the rules.

Barbara Harris, Department of Justice, introduced herself as one of the two prosecutors in the Medicaid fraud control unit. In the case that **Mr. Smith** defended and the other cases tried under this statute, during jury instruction, they were told that "purposely or knowingly" applied to every element. There was no confusion.

{Tape : 3; A}

She said the Medicaid program gave medical services and items to low income people. She said it was a large program administered by DPHHS and their fiscal agent, Counciltech. Like many other medical insurance systems, providers voluntarily signed-up for participation. She argued there was communication between the provider and the fiscal agent of the program as to the rules and where to get more information. When a provider signed-up, they were told they needed to know ALL the rules of the program. She pointed out that the bill called for changing the system, which was used universally in many insurance programs, to administrative rules. She said that was not workable because during mail correspondence with providers it was not feasible to put in all the administrative rules. She argued it wouldn't be read, and currently if a provider had questions, numbers were provided for them to call for assistance. Currently Medicaid required the providers to know the rules and she argued that there was nothing wrong with holding them responsible for knowing the rules of the program they voluntarily signed-up for. She said the Medicaid fraud statute required their responsibility. She said the proposed amendments were not warranted. Striking the words, "regulations" and "policies" would be unworkable. A program could not operate properly when every time things were changed to make it better for the provider, a standardized rule process had to be followed. She argued it would not clarify notice problems either. Striking the words, "knows or has reason to know" also would not work. There was no confusion. This language was an additional mental state reference. It didn't mean the prosecutor didn't have to prove "purposely or knowingly". The language "knows or has reason to know" was a fact of life. A voluntary provider sometimes chose not to know the rules, but they were required to know the full procedure for the program. She argued they did not prosecute mistakes or accidents, but looked at the circumstances to see if a system had been established to pass blame onto employees who were not

responsible for knowing the rules. She said that language needed to remain.

Russ Cater, Chief Legal Council for DPHHS, said the department opposed the bill. He said the department was primarily concerned with the imposed obligation on them that everything be done through the administrative rule-making process. He said he was not aware of any other statute that required such a burden. He argued that the policies are written in manual format and not oral, so they were accessible and could easily be known. He also said these manuals were more clear than a statute. The manuals provided a broader explanation of the rules and could even provide examples. In addition to providing manuals, the department provided training to all providers throughout Montana. Also a toll-free number was provided for providers to call with questions. He felt the bill created a legal loophole by requiring administrative rules, and it negated any letters or attempts to inform the provider of new policies. He felt the law worked well and did not need to be changed.

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL stated that the statute said if a person purposely or knowingly did something wrong, it would be a crime. However, most other criminal statutes used the word "and" instead of "or". Why was the statute written with "and"? **John Connor, Attorney General's Office**, said the opposite was true that most statutes said "or". He said very few used "and" because "purposely" was the more severe mental state and more difficult to prove. Therefore, if "purposely" was proven, it in effect proved "knowingly".

SEN. MIKE HALLIGAN asked the attorney's intent of wanting to use MAPA. He felt like it would be a tremendous burden that wasn't used in other cases. **John Smith, Missoula Attorney**, asked for clarification on the question.

SEN. HALLIGAN asked why MAPA would be part of the rules and regulations. **Mr. Smith** said he didn't know if the amendment required MAPA, but the amendment wouldn't allow a criminal prosecution for the violation of a policy. He felt that because it was a criminal statute, care needed to be taken in what the provider could be criminally prosecuted for. He said that MAPA was the guarantee in the political system for public participation and public sounding off about what agencies wanted to do. If a provider could prosecute without going through MAPA, it was a problem. He commented that he was appearing as a concerned citizen and attorney, not as the attorney in the pending Supreme Court case.

SEN. HALLIGAN said that he thought the bill asked for the use of MAPA to handle all the specifics of the program. He felt policies played a big role in trying to make sure the rules were as defined as possible to ensure criminal violations were based only on specific conduct as outlined in the policies. He asked if that was the wrong conclusion. **Mr. Smith** said that conclusion was not wrong, but all the rules published were rules, but policies were imparted via letters, phone calls, and other informal ways that could give rise to misguided criminal prosecution.

SEN. DUANE GRIMES questioned the intent of highlighting and providing the hearing minutes. **Mr. Smith** said because of the discussion and the response of the department's lawyer and administrator to the concerns that were being shown in the conversations involving the knowing mental state. He felt it was evidence of the department's and legislature's intent of the statute that had been watered down by the "knows and has reason to know" standard that was in there now.

SEN. GRIMES asked if the 1995 committee, which had good legal advice, intended this codified law under the criminal statute. **Mr. Connor** replied the statute was criminal because it provided for criminal acts, a mental state, and provided a penalty. He understood the minutes to show that these elements were considered by both the House and Senate committees. He didn't understand the suggestion that there was not an adequate mental state that must be proven. He said the jury learned of the mental states of "purposely or knowingly" and "knows or has reason to know" and how those applied in the jury instruction phase. He felt it was dangerous to argue a bill on a case that was pending appeal because the jury had given their opinion and it was too early to determine if they had been misguided.

CHAIRMAN LORENTS GROSFIELD questioned if the policy booklet was sent out to all providers. **Barbara Harris, Department of Justice,** said yes.

CHAIRMAN GROSFIELD asked when policies changed, how was notification given. **Ms. Harris** said the notification was given through mail.

CHAIRMAN GROSFIELD clarified that every provider received a policy change. **Ms. Harris** replied that a provider received a change notice if the change affected them.

CHAIRMAN GROSFIELD assumed that no provider was called on violation if the notice had not been sent. **Ms. Harris** said yes.

Closing by Sponsor:

SEN. COBB closed on SB 247 by responding to the fact that it dealt with a pending Supreme Court case. He said the bill was not retroactive. Therefore, the client could not use it for his benefit. He said policies should be clarified and at least referenced in the rules and updated yearly. He said there was not a lot of fraud, so criminal statute was not the way to go, it should be civilly prosecuted.

ADJOURNMENT

Adjournment: 12:25 P.M.

_____
SEN. LORENTS GROSFIELD, Chairman

_____
ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT(jus23aad)